



**IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)**

- (1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED

18/04/2013

DATE

SIGNATURE

CASE NUMBER: A111/12

In the matter between:

XOLANI COLLIN SEHLABELO

APPELLANT

V

THE STATE

RESPONDENT

JUDGMENT

RATSHIBVUMO (AJ):

[1] Mr. Sehlabelo, hereinafter referred to as the appellant, was convicted of unlawful possession of a firearm in contravention of section 3 of the Firearms Control Act 60 of 2000 and unlawful possession of ammunition in

contravention of section 90 of the same Act, following a guilty plea at Benoni Regional Court. He was sentenced to 15 years imprisonment on the first count and 5 years imprisonment on the second count. The sentence on the second count was ordered to run concurrently with that on count 1. The effective sentence was as such 15 years imprisonment. He appeals against the said sentence.

[2] Court of appeal would be disinclined to interfere with the sentence because sentencing falls within the exclusive discretion of the trial court. It is only when there is a serious misdirection on the part of the trial court, failure to exercise the discretion properly or when the sentence imposed is startlingly inappropriate that a court of appeal would interfere.¹ We are called upon to determine if that discretion was properly exercised.

[3] The appellant was legally represented during trial. A statement was handed in by his attorney in terms of section 112 (2) of Criminal Procedure Act, Act 51 of 1977 (CPA). Among the issues admitted in that statement was a fact that the firearm in question was a semi-automatic.² That meant the minimum sentence of 15 years as prescribed by Criminal Law Amendment Act, Act 105 of 1997 would be applicable.

[4] The trial court remarked that “the court has got to abide by what the legislature says and it must be only under stringent circumstances where the court has to deviate from the prescribed sentences.” It may be inferred that that by stringent circumstances he meant “substantial and compelling circumstances” as worded in section 51 (3) Act 105 of 1997. The court found

¹ *S v Michele and Another* 2010 (1) SACR 131 (SCA) at 135a-b

² *S v Mukwevho* 2010 (1) SACR 349 (GSJ)

no such circumstances and as a result, the appellant was sentenced to 15 years imprisonment.

[5] It is trite that sentencing falls within the exclusive discretion of the trial court. Act 105 of 1997 obligates a 15 years minimum sentence for the offence of unlawful possession of a semi-automatic firearm on the one hand and Act 60 of 2000 a 15 years maximum sentence on the other.³

[6] Questions have been raised as to whether the Legislature could have intended to keep the approaches envisaged by the two legislations (Act 105 of 1997 and Act 60 of 2000) as they are.⁴ The reason for the conflict is that the 1997 Act provides for the uniform sentence in respect of both the unlawful possession of an automatic firearm and also the unlawful possession of a semi-automatic firearm whereas in a later Act (of 2000), the Legislature enacted uneven sentences for these offences. The maximum penalty in respect of semi-automatic is 15 years imprisonment whereas 25 years imprisonment is the maximum for the automatic.

[7] Act 105 of 1997 has been criticized as being poorly drafted and absurd for various reasons.⁵ In *S v Baartman*,⁶ the court went as far as to suggest that it could not have been the intention of the Legislature to retain the uniform penalty regime employed by the State under Act 105 of 1997. The judge reached these conclusions considering that while the mandatory penalties imposed for unlawful possession of fully automatic weapon may be accommodated within the sanctioning regime under Act 60 of 2000, the penalty

³ See section 51 (2) of Act 105 of 1997 and section Schedule 4 of Act 60 of 2000.

⁴ *S v Baartman* 2011 (2) SACR 79 (WCC).

⁵ See *S v Sukwazi* 2002 (1) SACR 619 (N) where it was criticized for providing for penalties for “semi-automatic” and “automatic” firearms whereas such firearms were not defined in the Arms and Ammunition Act 75 of 1969.

⁶ *Supra*.

relating to semi-automatic weapons cannot since the maximum penalty turns out to be the minimum too.

[8] It is beyond question that the Legislature in enacting Act 60 of 2000 opted not to repeal Act 105 of 1997 or portions thereof. If it so intended, it could have done so. Refusing to follow Act 105 of 1997 because it is irreconcilable with Act 60 of 2000, and for the reason that the Legislature could not have intended to keep the two different sentencing regimes borders along the lines of being too prescriptive to the Legislature in my respectful view, something the courts are reluctant to do, in respect of the separation of powers.⁷

[9] The Supreme Court of Appeal dealt with the two legislations in *S v Thembaletu*.⁸ After making a thorough comparison between the two legislations and a number of decided cases, the Supreme Court of Appeal concluded that earlier decisions to the effect that the minimum sentences were not applicable to unlawful possession of semi-automatic pistols were wrongly decided. It is my respectful view that unless there are new development in terms of the legislation, that position is still binding until it is revisited in accordance with judicial precedent.

[10] On perusal of the charge sheet and the record, I noted that the appellant was charged with unlawful possession of a firearm “read with the provisions of section 51 Act 105 of 1997.” This particular section makes provision on various mandatory minimum sentences to be imposed in cases of conviction depending on the subsection the State chooses. It could be life imprisonment if accused is charged under section 51 (1) or less if he is charged under section 51 (2). The

⁷ See *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC).

⁸ 2009 (1) SACR 50 (SCA).

underlying principle enshrined in *S v Makatu*⁹ is to the effect that the section under which the accused is charged should be clear in the charge sheet. Failure to make a clear reference to the relevant provisions of Act 105 of 1997 makes it inapplicable. That would leave the court with no option but to sentence the accused in accordance with the provisions of Act 60 of 2000 where 15 years imprisonment is the maximum as opposed to the minimum – see *S v Nkosi*.¹⁰

[11] I am however satisfied that in the current case, the provisions of section 51 (2) Act 105 of 1997 remain applicable since no other provision under section 51 deals with the semi-automatic firearm except 51 (2). Further thereto, I noted on record when the charge was put to the appellant that the State apprised the appellant of the applicability of section 51(2) of Act 105 of 1997¹¹. There cannot as such be any confusion as to which provision is relevant for which the appellant was charged with.

[12] Section 51 (3) (a) of Criminal Law Amendment Act 105 of 1997 provides that ‘[i]f any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence...’

[13] Section 51 (3) empowers this court to exercise its own discretion to determine if there exist any substantial and compelling circumstances, that may justify the imposition of a lesser sentence than the sentence prescribed in terms of subsection (2)

⁹ 2006 (2) SACR 582 (SCA) where the accused was charged under section 51 (2) but was sentenced in accordance with section 51 (1) which provides for life imprisonment. This was found to be misdirection on the part of the trial court. See also *S v Legoa* 2003 (1) 13 (SCA).

¹⁰ [2006] JOL 1799 (W).

¹¹ Record of proceedings, page 1 at line 20-25

[14] The appellant in the current case is 24 years old first offender who in the words of the trial court, demonstrated remorse. The trial court however could not find that demonstration on its own sufficient to deviate from the prescribed sentence. In *S v Malgas*,¹² the Supreme Court of Appeal held that all factors traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process. It held further that if the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

[15] Reported cases reflecting the pattern of sentences imposed by the courts have been analysed on numerous occasions. In *S v Madikane*,¹³ Plasket J went on record to say he has not found a reported case where an accused was sentenced to more than 3 years imprisonment for unlawful possession of a semi-automatic firearm, except *S v Thembaletu*.¹⁴ He proceeded to set aside the sentence of 15 years imprisonment replacing it with 7 years' imprisonment for the unlawful possession of a semi-automatic weapon and for unlawful possession of ammunition. The appellant in the matter was aged 32, had three previous convictions and did not demonstrate any remorse. Other cases considered in sentence for similar offences would be *S v Mathebula*¹⁵, *S v*

¹² 2001 (1) SACR 469 (SCA).

¹³ 2011(2) SACR 11 (ECG)

¹⁴ *Supra*.

¹⁵ 2012 (1) SACR 374 (SCA).

Sukwazi,¹⁶ *S v Nkosi*¹⁷ and *S v Kololo*¹⁸ where sentences imposed ranged between 2 and 3 years imprisonment.

[16] Looking at the personal circumstances of the appellant in this case, that he was aged 24, a first offender who demonstrated remorse by pleading guilty and has spent seven(7) months¹⁹ in prison awaiting trial. It is, in my view, a misdirection for the court not to consider these traditional mitigating factors as substantial and compelling, warranting deviation from the prescribed minimum sentence. I am thus of the view that the court a quo ought to have recorded these circumstances, as I hereby do, as substantial compelling deviation. It is for this reason that I find justification of interfering with the sentence of the court a quo.

[17] I would thus, make the following order:

- a) Conviction is confirmed.
- b) Appeal against sentence succeeds
- c) The sentence imposed by the court a quo is set aside and replaced with the following:

‘Count 1: The accused is sentenced to 5 years imprisonment.

Count 2: The accused is sentenced to 3 years imprisonment.

It is ordered that the sentence in count 2 runs concurrently with the sentence on count 1’.

- d) The sentence is antedated to 29 September 2011.

¹⁶ [2002] JOL 10180 (N).

¹⁷ *Supra*

¹⁸ [2005] JOL 13992 (E).

¹⁹ Appellant has since his arrest on the 28th February 2011 been in custody.

T.V. RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

A.M.L PHATUDI
JUDGE OF THE HIGH COURT

DATE HEARD: 15 APRIL 2013

JUDGMENT DELIVERED: 17 APRIL 2013

FOR THE APPELLANT: PRETORIA JUSTICE CENTRE
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MR. R.S MATLAPENG

FOR THE RESPONDENT: DIRECTOR OF PUBLIC
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ADV S.R. SIBARA