

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Review Number. : 246/2010

In review between:-

THE STATE

and

XOLILE GIFT DUKU

CORAM: MOLOI, J

JUDGMENT BY: MOCUMIE, J et MOLOI, J

DELIVERED ON: 10 JUNE 2010

JUDGMENT

MOLOI, J

[1] This matter came before me on automatic review from the Magistrate, Botshabelo.

[2] The accused had been convicted of contravening the provisions of section 90 read with sections 1, 103, 117, 120(1)(a) and 121 read with Schedule 4 of the Fire Arms Control (*“Act No. 60 of 2000”*) and together read with section 250 of the Criminal

Procedure Act No. 51 of 1977 (*“the CPA”*). It was alleged that on April 2010 and at L Section in the district of Botshabelo, the accused was unlawfully found in possession of ammunition, namely 64 x R4 rounds without being in possession of a licence of a fire-arm from which such ammunition could be fired (Unlawful Possession of Ammunition). He pleaded guilty to the charge and was sentenced to thirty (30) months imprisonment in terms of section 276 (1) (b) of the CPA.

- [3] When questioned in terms of section 112(1) (b) of the CPA it appeared that the police found the accused at his grandmother’s house in L Section Botshabelo. The police searched the place and could not find anything. He, out of his own accord, took a box from the top of the wardrobe and gave it to them. It contained the 64 x R4 rounds. He told them he took the box from a scrap truck parked on the church premises as he feared the rounds could cause harm to the many children playing in and on that truck. In the truck there were also computer parts. He was aware of the call on national television urging people to hand in the fire-arms and ammunition to the police. He did not have time to do so by the time he was arrested.

- [4] The accused was a 20 year old, unmarried male and a first offender. He left school in 2008 when he was in grade 11 for financial reasons. He had worked as a construction worker and also as a distributor of advertising material for periods of five and three months respectively. Both his parents were still alive and his father was maintaining him. He was aware that the R4 rounds were exclusively used by the police and/or the military. He asked for a fine to be imposed.
- [5] After perusal of the record, I sent a query to the magistrate and asked:

“Is die vonnis soos opgelë nie kras an onvanpas in die omstandighede van die geval nie.”

The magistrate responded as follows:

“Ek kan die saak nie verder voer as in my ex tempore uitspraak nie. In ander distrikte is die besit van ammunisie seker nie ‘n euwel nie maar in die 18 jaar wat ek aan hierdie hof verbonde is was daar geweldige toename in die besit van ammunisie en vuurwapens in hierdie distrik. Die

vonnis kom met die eerste oogopslag swaar voor, maar openbaar dit nie in gevoel van skok nie en is ek steeds van mening dat dit gepas is. (my emphasis).

- [6] In its *ex tempore* judgment the trial court referred to the prevalence of the offence in Botshabelo. It also referred to the seriousness of the offence and decided the seriousness of the offence and the interest of the community should weigh heavier than the personal circumstances of the accused. It stated that the accused was not in a position to pay a fine as he was unemployed and ruled payment of a fine as inadequate punishment for the offence. He held the view that a suspended sentence would equally be inadequate in the light of the seriousness of the offence and the interests of the public. The magistrate was of opinion that 30 months imprisonment was an appropriate sentence. The accused was deemed unfit to possess a fire-arm in terms of section 103(1) of Act 60 of 2000.
- [7] From the reasoning of the magistrate it is clear that he did not balance the triad of sentencing against each other nor considered the objectives of passing sentence as set out in **S v Khumalo and others,** 1984 (3) SA 327 (AD) at 330 D-I. The under-tone

one gets from his reasoning is that he had retribution and possibly deterrence in mind but certainly not rehabilitation and prevention. If he did, he would have prioritised rehabilitation and prevention over the other objectives since he was dealing with a first offender of only 20 years of age who had the ammunition from 18 or 19 December 2009 without committing any unlawful act with it. The accused was a youth open to indiscretion in his conduct. It was also not correct to say that the imposition of a suspended sentence would not serve any purpose as such sentence can serve as a deterrence for the individual concerned because the sentence would hang over his head and deter him from committing such an offence in the future which would result in fulfilling the prevention and deterrence of the accused.

- [8] It is trite that the court of appeal can only interfere with the sentencing discretion of the trial court if such discretion was exercised improperly or when the sentence is harsh and if the trial court misdirected itself on a material aspect **S v Jaminez** 2003 (1) SACR 507 (SCA) at 517 g-h and **S v Malgas**, 2001(1) SACR 469 (SCA) at 478 f-g.
- [9] In the result the sentence of 30 months imprisonment imposed by the magistrate, Botshabelo, on 23rd April 2010 is inappropriate in

the circumstances of the case and is set aside. I am of the view that the following sentence is appropriate in substitution.

- (a) Twelve (12) months imprisonment of which ten (10) months imprisonment is suspended for a period of four (4) years on condition that the accused is not convicted of the offence of contravening section 90 of the Fire-Arms Control Act No. 60 of 2000 committed during the period of suspension.
- (b) In terms of section 103 (1) of the Fire-Arms Control Act No. 60 of 2000 the accused is deemed to be unfit to possess a fire-arm.
- (c) The above sentence is, in terms of section 282 of the Criminal Procedure Act 51 of 1977, ante-dated to 23rd April 2010.
- (d) This order must be brought to the attention of the accused and be transmitted to the correctional facility where the accused serves the sentence forthwith.

MOLOI, J

I concur.

MOCUMIE, J