

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

Case No.: A40/2004

In the case between:

ANDRIES MOTLATSI MOTSOARI

Appellant

and

THE STATE

Respondent

CORAM:

EBRAHIM, J *et* MATSEPE, AJ

JUDGMENT:

EBRAHIM, J

HEARD ON:

17 OCTOBER 2005

DELIVERED ON:

27 OCTOBER 2005

- [1] The appellant was charged in the Regional Court sitting at Bloemfontein with 2 counts of robbery with aggravating circumstances. He was convicted accordingly and sentenced on each count to 15 years imprisonment. In addition he was charged and convicted of a third offence

namely contravening Section 2 read with Section 39(1)(h) and 39(2)(a) and 39(2)(b) of the Arms and Ammunition Act 75 of 1969 as amended, that of being in possession of a semi-automatic firearm without having a valid licence to possess it. On this count he was also sentenced to undergo 15 years imprisonment. In terms of the provisions of Sections 208(2) of the Criminal Procedure Act 51 of 1977 the learned trial magistrate ordered that the sentences on all 3 three counts run concurrently, with the caveat that the appellant serve an effective sentence of 28 years imprisonment.

- [2] The appellant originally noted an appeal against his conviction and sentence on all three counts. He has however elected to prosecute the appeal against the sentence on count 3 only. At the hearing before us, Mr. Reynecke on the appellant's behalf abandoned the appeal on the merits on all three counts, and the appeal in respect of the sentences imposed on counts 1 and 2.

[3] I have carefully analysed the learned magistrate's judgment on sentence and it is apparent that careful consideration was given by him to the case law defining the purposes of punishment and the guidelines to be followed in the sentencing process. He has also quite clearly applied his mind to the provisions of the minimum sentence legislation (the Criminal Law Amendment Act, Act 105 of 1997) and his imposition of the minimum sentence in respect of the 2 counts of robbery with aggravating circumstances cannot be faulted.

[4] Where however, the learned magistrate has erred is in imposing a sentence of 15 years imprisonment in respect of the conviction for the unlawful possession of the firearm in accordance with the provisions of Section 51(2)(a) of the Criminal Law Amendment Act, 1997. Section 51(2)(a)(i) reads as follows:

51(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court, including a High

Court to which a matter has been referred under section 52

(1) for sentence, shall in respect of a person who has been convicted of an offence referred to in-

(a) Part II of Schedule 2, sentence the person, in the case of-

(i) a first offender, to imprisonment for a period not less than 15 years;"

The offences referred to in part II, schedule II include robbery with aggravating circumstances as well as

"any offence relating to –

- a. the dealing in or smuggling of ammunition firearms explosives or armament; or
- b. the possession of a automatic or semi-automatic firearm, explosives of armament."

[5] In the present case the appellant was convicted of being in possession of a 9mm pistol (a semi-automatic firearm) without having a licence to possess it. He was sentenced in terms of Section 51(2)(a)(i) to the minimum sentence of 15 years imprisonment, he being a first offender. The

magistrate gave no consideration to whether or not the sentence of 15 years imprisonment for such an offence was an appropriate one. His approach was clearly incorrect for the following reasons –

5.1 The offence created in part II of Schedule II of the Criminal Law Amendment Act of 1997, that of possession of a semi-automatic firearm, is a non-existent offence and is nowhere to be found in the Arms and Ammunition Act 75 of 1969. Section 32(1) of the Arms and Ammunition Act of 1969 makes it an offence to be in possession of an automatic firearm, explosives and an armament without simultaneously being in possession of a valid licence to possess such an arm.

5.2 The legislature could not have intended that possession of a 9mm pistol without a licence attract a minimum sentence of 15 years imprisonment solely because the firearm happens to be a semi-automatic one whilst possession of any other handgun for

example a revolver be excluded from the ambit of Section 51(2)(a)(i).

See **STATE v SUKWAZI** 2002 (1) SACR 619 NPD.

The legislature could not have intended such disparity when it came to the imposition of sentence in respect of different types of hand guns. The sentence stipulated in Part II of schedule II in relation to the possess of a semi-automatic firearm therefore cannot be adhered to as it leads to absurdity in sentencing.

- [6] In my view a sentence of 2 years imprisonment would have been appropriate for the conviction of possession of a 9mm pistol without a licence. In the result I would uphold the appeal against the sentence on count 3 and set aside the sentence of 15 years imprisonment.

Accordingly I make the following order:

1. The convictions in respect of count 1, 2 and 3 and the sentence of 15 (fifteen) years imprisonment each in

respect of counts 1 and 2 are confirmed.

2. The appeal against the sentence on count 3 succeeds to the extent that the sentence of 15 (fifteen) years imprisonment is set aside and substituted with a sentence of 2 (two) years imprisonment.

I order that the sentence on count 3 is to run concurrently with the sentence on counts 1 and 2 so that in effect the appellant serves a sentence of 28 (twenty eight) years imprisonment.

In view of the fact that the appellant in the court *a quo* was charged and convicted with one other namely Benjamin Salamane, I direct that a copy of this judgment be made available to the said Salamane.

S EBRAHIM, J

I concur.

V. MATSEPE, AJ

On behalf of appellant: Attorney J.D. Reyneke
Instructed by:
Legal Aid Board
BLOEMFONTEIN

On behalf of respondent: Adv. B.G. Claassens
Instructed by:
Director Public Prosecutions
BLOEMFONTEIN

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