



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

High Court Review Number: 383/24

Magistrate's Court Serial Number: 02/2024

Case Number: 501/2023

In the matter between:

THE STATE

And

JACQUES NUWEGELD

ACCUSED

REVIEW JUDGMENT IN TERMS OF S 304(4) OF ACT 51 OF 1977

LEKHULENI J et NZIWENI J

[1] This matter came before us in chambers as a special review in terms of s 304(4) of the Criminal Procedure Act No 51 of 1977 (*the CPA*). The accused, who appeared in person, was charged in the Beaufort West magistrate's court on four counts of housebreaking with intent to steal and theft. The accused pleaded not guilty to the charges, and after evidence was led, the accused was subsequently convicted on three counts. The court found the accused not guilty on count four as

there was no evidence led against him on this count. After considering the submissions in mitigation and aggravation of sentence, the trial court sentenced the accused to three (3) years imprisonment in respect of each count. The accused was cumulatively sentenced to nine years imprisonment in respect of the three counts.

[2] On perusing the record, we were satisfied that the conviction of the accused on the three counts was underpinned by sound reasoning and that the conviction on these counts was in accordance with justice. However, we were startled by the sentence of nine years direct imprisonment that the trial court imposed on the accused. We also noted from the record that the trial court did not consider the provisions of section 103 of the Firearms Control Act 60 of 2000 (*'Firearms Control Act'*). Subsequent thereto, we queried the severity of the sentence and requested the trial magistrate to give reasons for the sentence imposed and why section 103 of the Firearms Control Act was not considered when the sentence was imposed.

[3] In response, the magistrate indicated that after considering all relevant factors, specifically the relevant previous convictions and the sentences which were handed down for those matters, and the clear indication that it did not have the desired effect of deterrence, he was of the opinion that the sentence he imposed was appropriate under the circumstances. According to the magistrate, not even the suspended sentence, which was still in place, had any effect of deterring the accused from committing further crimes. The magistrate stated that the accused showed no remorse at any stage for his actions. The magistrate also acknowledged that he indeed neglected to consider the provisions of section 103 of the Firearms Control Act during the sentencing proceedings.

[4] From the outset, it must be stressed that the sentence imposed by the magistrate raises questions relating to its appropriateness. We note from the magistrate's response to our query, that the accused's previous convictions had a substantial effect on the severity of the sentence. In addition, the sentence imposed by the magistrate easily lends itself to the conclusion that the accused was sentenced for his present crime and more for his previous convictions. This statement holds true not only due to the magistrate's response to our query, which readily supports this interpretation, but also because of the significant severity of the

sentence in question.

[5] An accused person's previous convictions are relevant in determining his character and whether there is a need for deterrence to protect society. In pursuit of this goal, section 271(4) of the CPA stipulates that 'if the accused admits such previous conviction or such previous conviction is proved against the accused, the court shall take such conviction into account when imposing any sentence in respect of the offence of which the accused has been convicted'. Consequently, previous convictions are relevant in the context of sentencing, as they illustrate a discernible pattern of behaviour.

[6] However, it is significant to note that the sentencing court, when sentencing, should consider the present offence/s, not the previous convictions. The accused's previous convictions should not heavily influence the sentence. Accordingly, an accused person should not be penalised for his past sins or wrongdoings. The sentence must be proportionate to both the offence/s and the offender.

[7] In the present case, it is strikingly evident that the sentence imposed by the magistrate is manifestly excessive and evokes a sense of shock. This disproportionate punishment starkly contradicts the nature of the offence committed, leaving no doubt that a grave injustice has occurred. Indeed, the accused has rather an unenviable list of previous convictions. The accused has about six relevant previous convictions of housebreaking with the intent to steal and theft. As foreshadowed above, the accused should be sentenced for the offence charged and not for his previous convictions. (See *S v Baartman* 1997 (1) SACR 304 (E) at 305D).

[8] It is, however, incontestable that a significant term of direct imprisonment was warranted in this matter. However, we are of the firm view that the magistrate misdirected himself in that he overemphasised the impact of the list of previous convictions of the accused at the expense of the other factors. The previous convictions did not warrant the magistrate to increase the sentence beyond what would otherwise be a fitting sentence. As we have previously observed, it is wrong to punish a person again for his past crimes. An accused person should not get

subjected to a particular sentence because of his record unless the sentence is imposed in terms of the provisions of the Criminal Law Amendment Act 105 of 1997, or any other statutory provisions. Ordinarily, an accused person should not be punished more than the crime deserves.

[9] In the present matter, the sentence was increased beyond what is proportionate to the gravity of the crimes committed. Ostensibly, the cumulative effect of the sentence imposed by the magistrate does not relate to the gravity of the crimes but to the accused's previous convictions. In the circumstances, there are several reasons why the sentence imposed by the magistrate is untenable. In the first place, as we have observed previously, a person should not be subjected to double punishment. In *S v Beja* 2003 (1) SACR 168 (SE) at 170d, the court dealt as follows with facts comparable to the present, particularly on previous convictions:

'It is trite law that the sentence must always fit the crime and the fact that the person to be punished has a long list of previous convictions of a similar nature, while it may be an important factor, could never serve to extend the period of sentence so that it is disproportionate to the seriousness of the crime for which such a person must be punished. A period of imprisonment must always be reasonable in relation to the seriousness of the offence.'

[10] In *S v Dodo* 2001 (3) SA 382 (CC) paras 37 to 38, Ackermann J, stated as follows in respect of proportionality:

'The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading, particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue.... Section 12(1)(a) [of the Constitution of the Republic of South Africa] guarantees, amongst others, the right "not to be deprived of freedom... without just cause". The "cause" justifying penal incarceration and thus the deprivation of the offender's freedom is the offence committed. "Offence", as used throughout in the present context, consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a

bearing on the seriousness of the offence and the culpability of the offender. In order to justify the deprivation of an offender's freedom it must be shown that it is reasonably necessary to curb the offence and punish the offender. Thus, the length of punishment must be proportionate to the offence. To attempt to justify any period of penal incarceration... without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity ... Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence ..., the offender is being used essentially as a means to another end and the offender's dignity assailed. So too where the reformatory effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity.'

[11] Indeed, it is in this vein that we stress again that the gravity or otherwise of the offence is always a material consideration in the imposition of a sentence. Certainly, previous convictions are relevant to sentence, but only in so far as they reflect upon the accused's character. (See *State v Smith* [2000] JOL 7026 (E)). A sentence must always fit the crime and the fact that the person to be punished has a long list of previous convictions of a similar nature, while it may be an important factor, could never serve to extend the period of sentence so that it is disproportionate to the seriousness of the crime for which such a person must be punished. *S v Salman* [2008] JOL 21701 (E). We acknowledge that a person with a record such as that of the accused is obviously less deserving of mercy than is a first offender. However, the punishment must be within the confines and bounds of the offence committed.

[12] Consequently, in so far as the proceedings on the merits are concerned, we are satisfied that the accused was properly convicted. The sentence of nine years direct imprisonment imposed by the trial court is not a just sentence and must be set

aside.

[13] As mentioned earlier, the trial court did not conduct an inquiry in terms of section 103 of the Firearms Control Act. The accused was convicted of housebreaking with intent to steal and theft and was sentenced to direct imprisonment without the option of a fine. Housebreaking with intent to steal and theft involves an element of dishonesty. A conviction on housebreaking with intent to steal and theft brings the matter within the ambit of s 103(1)(g) of the Firearm's Control Act.

[14] Section 103(1)(g) of the Firearms Control Act provides that 'unless the court determines otherwise, a person becomes unfit to possess a firearm if convicted of any offence involving violence, sexual abuse or dishonesty, for which the accused is sentenced to a period of imprisonment without the option of a fine.' Where a matter is governed by section 103(1) of the Firearms Control Act, the accused is automatically deemed to be unfit to possess a firearm unless the court determines otherwise. (See *S v Lukwe* 2005 (2) SACR 578 (WLD) at 580f). The court may determine that the statutory unfitness to possess a firearm, in terms of section 103(1), shall not take effect or shall not apply.

[15] We share the views expressed in *State v Mkhonza* 2010 (1) SACR 602 (KZP) para 22, where the court stated that when the legislature vested in the courts of this country the jurisdiction to determine that the statutory unfitness to possess a firearm imposed under s103(1) of the Act should not apply, it did not intend the courts to adopt a supine approach to these matters, dependent entirely upon whether the accused had the knowledge, means and resources to place a proper case before it, that the disqualification should not apply to them, and in all other cases for the disqualification to apply as a matter of rote. At the very least, it was the intention of the legislature that the court should have regard to all relevant factors concerning the offence, however feeble and limited the case advanced by the accused, and to consider the issue of whether it should determine otherwise in the light of all the facts.

[16] There is an obligation on the trial court to consider correctly all the relevant

factors, whether the case is one where the statutory disqualification from possessing a firearm should remain in place or whether it should be determined otherwise. In approaching that task, the court should have regard to any factor that bears on the issue and, if there is reason to believe that all material facts bearing on that decision are not before it, to cause those facts to be discovered and placed before it.

[17] In summary, when the matter falls within the ambit of section 103(1), and the accused person is unrepresented, the court should draw the accused's attention to the provisions of section 103(1) and invite him or her to place facts before the court to enable it to determine that he or she is indeed fit to possess a firearm. The court must adopt an active role to ensure that all the relevant facts are placed before it to make a proper determination. The automatic deprivation of the right to possess a firearm may have serious consequences for an accused if the provisions of section 103(1) are simply ignored and not brought to his or her attention. *S v Maake* 2007 (1) SACR 403 (T) at para 19.

[18] Some of the important factors that should be considered in terms of section 103(1) of the Firearms Control Act were underscored by the full court in *S v Phuroe en Agt Ander Soortgelyke Sake* 1991 (2) SACR 384 (NC) under the s 12(1)(a) of the now repealed Arms and Ammunition Act 75 of 1969 which section was in substance similar to section 103(1) of the Firearms Control Act. The court highlighted such factors as –

- (a) The accused's age and personal circumstances;
- (b) the nature of any previous convictions or the absence thereof;
- (c) the nature and seriousness of the crime of which he has been found guilty and the connection that the crime has with the use of a firearm;
- (d) whether there is any background which suggests that the accused may make use of his or her licensed firearm for the purpose of committing offences, and
- (e) whether it is in the interest of the community that the accused be declared unfit to possess a firearm because of the fact that he or she poses a potential danger to the community.'

[19] Evidently, the trial court adopted a supine approach in dealing with this

matter. The accused was automatically deemed unfit to possess a firearm upon conviction on housebreaking with intent to steal and theft and sentenced to direct imprisonment without a fine. The trial court did not allow him to place facts to enable it to determine whether the statutory unfitness to possess a firearm in terms of section 103(1) should take effect or not. The court below misdirected itself in this regard. Accordingly, the matter should be referred to the magistrate to properly consider the necessary facts to enable him to determine whether the statutory unfitness to possess a firearm should take effect.

[20] In the result, the conviction in respect of the three counts is confirmed, but the sentence is set aside and replaced with a sentence of 1 year and six months imprisonment in respect of each count, which is antedated to the date upon which the presiding magistrate imposed the sentence. The effective term of imprisonment is thus 4 years and 6 months.

[21] The determination in terms of section 103(1) of the Firearms Control Act is referred to the magistrate for consideration in light of the guidance set out in paragraphs 13 to 18 of this judgment.

LEKHULENI JD
JUDGE OF THE HIGH COURT

NZIWENI CN
JUDGE OF THE HIGH COURT