

SOUTH AFRICA / JUDGMENT

Desaleigh and Another v S (A111 /2019) [2021] ZAFSHC 93 (1 April 2021) [2021] ZAFSHC 93

COURT

Free State High Court, Bloemfontein

BEFORE

Mbhele, Daffue, O'Brien

CASE / FILE NUMBER

A111 /2019

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

Number: A111 /2019

BINAM

DESALEIGH

Appellant 1

MALEFETSANE

SETLABA

Appellant

2

and

THE

STATE

Respondent

CORAM:

MBHELE, ADJP, et DAFFUE, J et O'BRIEN, AJ

JUDGEMENT

BY: MBHELE, ADJP

HEARD ON:

22 FEBRUARY 2021

DELIVERED ON: 01 APRIL 2021

- [1] The appellants were convicted by the Regional Magistrate, Welkom, of contravening the provisions of Section 3 read with Section 1, 103, 117, 120 (1) (a), Section 121 read with Schedule 4 and Section 151 of the Firearms Control Act, 60 of 2000 (Possession of a firearm without a licence, to wit a semi-automatic, 6.35mm pistol). They were each sentenced to 6 years' imprisonment. They appeal against conviction and sentence.
- [2] The offence is alleged to have been committed on 10 April 2015 at Meloding in the District of Virginia. The background facts are as follows. The first appellant is a foreign national, speaking Amharic and running a tuckshop in Meloding Township. The first and second appellants were accused number 1 and 3 respectively in the court a quo. The police had information that accused 2 in the court a quo had knowledge of a firearm that was used in a certain robbery incident where someone was shot at.
- [3] Constable Motswika testified that he followed information that led him to accused 2 in Meloding, Virginia. Upon interrogating accused 2 he provided them with information that led them to the second appellant. The second appellant confirmed to the witness that a firearm was brought to him and that he took it to the first appellant. The second appellant took them to the first appellant's place. The first appellant went to his bedroom where he took out the firearm, wrapped in a plastic bag, from underneath his bed.
- [4] Constable Mojela confirmed that he was with Motswika when accused 2 took them to the second appellant's place. From the second appellant's place they drove to the first appellant's shop. On their arrival at the first appellant's shop the second appellant told him to give the police what he received from him. The first appellant went into his bedroom and took out a firearm from underneath his bed. The firearm was wrapped in a plastic bag.
- [5] The first appellant admitted that the firearm was found in his possession, but denied that he knew that the item in his possession was a firearm. His version is that he received some parcel from the second appellant two days before the police arrived at his shop with the second appellant and accused 2. The parcel was wrapped in a plastic bag and he did not know what was contained in the bag. He did not ask the second appellant what was wrapped in the plastic bag that he received from him. When the second appellant arrived with the Police on the date of their arrest he told him to bring a 'sethunya' (Sesotho word for a firearm). He went into his bedroom and took out the parcel which he had placed on the shelf next to his bed. It is his testimony that he has been staying in Meloding for a while, he

understands Sesotho and communicates well with his customers around Meloding.

- [6] The second appellant denied ever telling the police that the firearm was with the first appellant and that he was at the first appellant's place two days earlier to deliver the parcel in question. His evidence is that the police arrived at his home, conducted a search and when nothing was found, they told him to get into their bakkie and drove with him to the first appellant's place.
- [7] In their notice of appeal, the appellants contended that the court a quo erred in finding that the state proved its case beyond reasonable doubt despite material contradictions in the state's case and rejecting the evidence of the appellants. They further contended that the Magistrate erred in finding that all elements of the offence were satisfied when the guilty verdict was returned.
- [8] The trial court evaluated the evidence and came to the conclusion that the state witnesses were truthful and rejected the versions of the appellants as improbable. It is trite that factual and credibility findings of the trial court are presumed to be correct unless they are shown to be wrong with reference to recorded evidence. The acceptance by the trial court of oral evidence and conclusions thereon are presumed to be correct, absent misdirection. (See *S v Francis* 1991 (1) SACR 198 (SCA) at 204 e-d.) A court of appeal may only interfere where it is satisfied that the trial court misdirected itself or where it is convinced that the trial court was wrong. (See *R v Dhlumayo & another* 1948
- (2) SA 677 (A) at 705-706).
- [9] It is well established that, where a trial judge makes findings on credibility of a witness, the court of appeal will take into account that the judge had the advantage of seeing the witnesses whilst testifying, which benefit is not available to the court of appeal. The powers to evaluate and appraise evidence belong to a trial court and its conclusions cannot be interfered with simply because a court of appeal would have come to a different finding or conclusion. The trial court's advantage of seeing and hearing witnesses places it in a better position to assess the evidence than a court of appeal, and such assessment must take precedence unless there is a clear and demonstrable misdirection. The Supreme Court of Appeal held as follows in *S v Pistorius* 2014 (2) SACR 315 (SCA) par 30:
- 'It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong. *R v Dhlumayo and Another* 1948
- (2) SA 677 (A) at 706; *S v Kebana* 2010 (1) All SA 310 (SCA) para 12.... As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, this court is not at liberty to interfere with his findings.'
- [10] It is trite that the state must prove its case beyond reasonable doubt. Ms. Abrahams, on behalf of the appellant abandoned the constitutional point that was raised in her supplementary heads. She submitted that the contradictions between the two state

witnesses on whether the firearm was wrapped in a plastic bag or not warranted a total rejection of the state's case against the first appellant. She conceded that there are no merits in respect of the appeal against second appellant's conviction and the sentences imposed in respect of both the appellants.

- [11] Contradictions must be material to warrant rejection of a witness' evidence. In dealing with contradictions the following was said in *S v Mkohle* 1990 (1) SACR 95 (A) at 98f:

"Contradictions per se do not lead to the rejection of a witness' evidence,...they may simply be indicative of an error".

- [12] In *S v Oosthuizen* 1982 (3) SA 571 (T) at 576 G it was held:

"Plainly it is not every error made by a witness which affects his credibility. In each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness's evidence".

- [13] The contradictions between Motswika and Mojela are immaterial if one looks at the evidence holistically. It is worth noting that the two state witnesses would not have retrieved the firearm had the appellants not cooperated with them and led them to where the firearm was kept. What is of importance is that the second appellant led them to the first appellant who handed over the firearm to Motswika and Mojela. Although the first appellant speaks Amharic, his limited understanding of Sesotho enabled him to go straight to his bedroom to take out the firearm that was hidden under the bed when the second appellant called for it in Sesotho. It is improbable that the first appellant would receive an item wrapped in a plastic bag and keep it obscured in his bedroom, if he did not know that the parcel contained a firearm. Both State witnesses corroborated each other on where the

firearm was found. The only inference to be drawn from the first appellant's conduct is that he knew that the parcel he received

from the second appellant contained a firearm.

- [14] The state witnesses' version is supported by the manner in which the events of the day unfolded. I am unable to find any demonstrable or clear error on the part of the trial court to justify interference with its credibility findings. The trial court was correct in its assessment of evidence and credibility findings. I cannot find that the trial court erred in finding that the appellants' versions are inherently improbable and fell to be rejected.

- [15] The sentencing powers are pre-eminently within the judicial discretion of the trial court; the court of appeal should be careful not to erode such discretion. The court sitting on appeal will interfere if the sentencing court exercised its discretion unreasonably or in circumstances where the sentence is adversely disproportionate. See *S v Rabie* 1975 (4) SA 855 (A) at 857 D-E; also *S v De Jager and Another* 1965 (2) SA 616 (A).

[16] When sentencing, the court must consider the main objectives of punishment, being the prevention of crime, retribution, the deterrence of criminals, and the reformation of the offender. Simultaneously, the court must strike a balance between the crime, the offender and the interest of society.

[17] In *S v Mudau* 2013 JDR 0938 (SCA) Majiedt JA, as he then was, remarked as follows at par 13:

“I hasten to add that it is trite that each case must be decided on its own merits. It is also self-evident that sentence must always be individualized, for punishment must always fit the crime, the criminal and the circumstances of the case. It is equally important

to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration

of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that is involved at arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society. Sentencing involves a very high degree of responsibility which should be carried out with equanimity. . .”

[18] The offence committed by the appellants is undoubtedly a serious one. The offence falls within the purview of section 51(2) of Act 105 of 1997 which prescribes minimum sentences for offences of a particular nature. The minimum sentence applicable in the circumstances of this matter is 15 years. The trial court found the age of the appellants, the fact that they are first offenders and that the second appellant spent 27 months in prison awaiting trial, as substantial and compelling circumstances warranting deviation from the prescribed minimum sentence of 15 years.

[19] The first appellant was 27 years of age at the time of sentencing, single with no dependents, a shopkeeper and a first offender. The second appellant was 37 years of age, married with one child who is 5 years old. His wife is unemployed and he was the sole breadwinner employed at Harmony Mine. He is a first offender who spent 27 months in prison awaiting trial.

[20] Sentence must be tailored to suit the offender, the crime and the circumstances surrounding the case. As stated supra, punishment must be proportionate to the offence. Although the appellants were first offenders, the impact of the offence they were convicted of on the wellbeing and safety of society cannot be underestimated. Although details of the robbery alleged to have been committed with the said firearm were not placed before the trial court, it has to be considered that violent crimes involving the use of unlicensed firearms are escalating daily and have reached alarming proportions. Perpetrators of many crimes committed with these firearms are never brought to book. Holders of these unlicensed firearms terrorise communities with confidence that their actions would not be easily detectable.

[21] When weighing up the mitigating factors against the aggravating circumstances in this matter, as well as the interest of the community, I am not persuaded that there is a just cause to interfere with the sentences imposed. The appeal ought to fail.

ORDER

[22] The following order is made:

1. The appeals of both appellants against their convictions and sentences are dismissed;
2. The convictions and sentences are confirmed.

N.M. MBHELE, ADJP

I concur.

DAFFUE, J

I concur.

O'BRIEN, AJ

On behalf of the appellant: Ms. V.C. Abrahams

Instructed by:

Justice Centre

BLOEMFONTEIN

On behalf of the respondent: Adv. S. Giorgi

Director: Public Prosecution

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