

SOUTH AFRICA / JUDGMENT

Maphalala v S (A93/2016) [2017] ZAGPPHC 590 (11 September 2017) [2017] ZAGPPHC 590

COURT

North Gauteng High Court, Pretoria

BEFORE

M Sello, M J Teffo

CASE / FILE NUMBER

A93/2016

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: A93/2016

DATE:

11 SEPTEMBER 2017

In

the matter between:

SIFISO

RICHARD

MAPHALALA

Appellant

and

THE

STATE

Respondent

JUDGMENT

SELLO, AJ:

- [1] The appellant was arraigned in the Regional Court, Piet Retief, with a co accused where they faced one count of housebreaking with intent to steal and theft (count one) and one count of contravention of s 3 of the Firearms Control Act 60 of 2000 (count two).
- [2] The appellant entered a plea of guilty to both charges and submitted a statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977. His coaccused pleaded not guilty. The State accepted the appellant's plea of guilty as tendered and the trial of his coaccused was separated from his trial.
- [3] The appellant was convicted and sentenced to 5 years' imprisonment in respect of count one and 15 years' imprisonment in respect of count two.
- [4] The salient facts that arise from the appellant's s 112(2) statement are the following: On or about 30 November 2011 he was at Witkop, Piet Retief. He together with his coaccused entered the house of one Zakhele Gelvin Ngubane through a broken window where they stole a laptop and keyboard, some perishable goods (meat and alcohol) and a firearm 9mm norinco pistol. The appellant admitted that the firearm was a semi automatic pistol. The said firearm was found in the appellants' possession on 27 January 2012.
- [5] The appellant applied for leave to appeal against sentence only which was dismissed by the Magistrate. He petitioned the Gauteng High Court for leave to appeal against sentence which was granted on 24 November 2015. His appeal is therefore confined to sentence only.
- [6] The basic approach in every appeal against sentence was set out in *S v Rabie* 1975 (4) SA 455 (A) at 857DE to be the following: the court hearing the appeal "(a) should be guided by the principle that punishment is 'pre eminently a matter for the discretion of the trial court', and (b) should be careful not to erode such discretion hence the further principle that the sentence should only be altered if the discretion has not been Judicially and properly exercised."
- [7] The test under (b) is whether the sentence is vitiated by any irregularity or misdirection or is disturbingly inappropriate (see also *S v Giannoulis* 1975 (4) SA 469 (A); *S v Barnard* 2004 (1) SACR 191 (SCA) at 194CD; *S v Mayisela* 2013 (2) SACR 129 GNP at [13]).

[8] The court in *S v Ma/gas* 2001 (1) SACR 469 (SCA) at 478EH said the appeal court can only interfere with the sentence imposed by the trial court where it is vitiated by a material misdirection or where the disparity between the sentence of the trial court and the sentence the appellate court would have imposed had it been the trial court, is so marked that it can be described as "shocking" , "startling" , or "disturbingly inappropriate".

[9] The appellant advances the following contentions in regard to the sentence imposed in respect of count two firstly, That the

magistrate erred in finding that there were no substantial and compelling circumstances to deviate from the minimum sentence of 15 years imprisonment as prescribed by s 51(2) of the Criminal Law Amendment Act 105 of 1997. It was argued that the sentence was shockingly inappropriate, that insufficient factors had been placed before the magistrate in aggravation of sentence and that the personal circumstances of the appellant, cumulatively taken, constituted substantial and compelling circumstances justifying a departure from imposing the prescribed minimum sentence. It was also argued that the sentence of 15 years imprisonment is a maximum sentence in terms of s 121 of the Firearms Control Act 60 of 2000 and that the magistrate thus had a discretion to impose a lesser sentence.

[10] Counsel for the State raised an issue that was not raised on behalf of the appellant which we find pertinent in this appeal, that the chargesheet did not refer to the relevant provisions of Act 105 of

1997. There is no indication in the record that the provisions of Act 105 of 1997 were brought to the attention of the appellant at any stage of the proceedings

[11] Section 51(2) of Act 105 of 1997 provides as follows:

"Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in

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

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

[12] Subsection (3) referred to provides that a sentencing court may impose a lesser sentence than the sentence prescribed if it finds that substantial and compelling circumstances exist which justify the imposition of such lesser sentence.

[13] Part II of Schedule 2 in turn provides:

"Any offence relating to

(a) the dealing in or smuggling of ammunition, firearms, explosives or armament; or

(b) the possession of an automatic or semiautomatic firearm, explosives or armament."

- [14] In terms of the provisions of s 51(3) read with Part II of Schedule 2 a court convicting an accused person of any offence referred to in the Schedule therein is obliged to impose a sentence of 15 years' imprisonment unless such court finds that substantial and compelling circumstances justifying the imposition of a lesser sentence than the prescribed one, are present.
- [15] Section 3 of the Firearms Control Act 121 makes it an offence for anyone to possess a firearm unless he or she holds for such firearm a licence, permit or authorisation issued in terms of the Act. Schedule 4, read with s 121 of the Act, prescribes a maximum 15year imprisonment sentence on conviction for contravention of s 3.
- [16] The contention advanced in argument on behalf of the appellant is that the two Acts, Act 105 of 1997 and the Firearms Control Act, introduce two conflicting sentencing regimes for the same offence, and the latter of the two is the applicable legislation. A similar contention was considered and rejected by a full court in *S v Swartz* 2016(2) SACR 268 (YVCC). The court rejected this argument on two bases, firstly that the words 'notwithstanding any other law' in s51(2) of Act 105 of 1997 meant that this sentencing regime took precedence over that laid out in any other Act, including the Firearms Control Act, whether or not such Act existed at the time of promulgation of s 51(2); and secondly, that s 51 was substituted with the current provision with effect from 31 December 2007 by way of s 1 of the Criminal Law (Sentencing) Amendment Act 38 of 2007, thus it is a later law than the relevant provisions of the Firearms Control Act.

"The words '(n)otwithstanding any other law' preserve other existing laws and include other laws that may be promulgated in the future, provided there is no clear conflict or express repeal. It follows that 'any other law' must be given its plain meaning, which in this case must include the Firearms Control Act";

[18] The SCA further held that:

"[T]he two statutes must also be read in the context of Parliament's wish to increase sentences. The words '(n)otwithstanding any other law' have remained in place, despite the amendment to the Criminal Law Amendment Act on 13 November 2008. The Firearms Control Act, which came into effect on 1 July 2004, introduced a distinction between fully automatic and semiautomatic firearms and the contraventions relating to these weapons. It is apparent

that, in passing this legislation, Parliament considered any offence relating to the possession of an automatic or semiautomatic firearm, explosives or armament as being a serious offence. In providing for enhanced penal jurisdiction for particular forms of an already existing offence, the legislature does not create a new type of offence. See *S v Legoa* 2003 (1) SACR 13 (SCA) ([2002] 4 All SA 373; [2002] ZASCA

- 122) para 18 Upon a proper construction of the two statutes there is no conflict between the two sentencing regimes and they therefore do not fall into the exceptions where a later statute repeals an earlier one".

[19] In the premises, it is my view that the magistrate correctly invoked the provisions of Act 105 of 1997 in sentencing the appellant. In *S v Thembaletu* 2009 (1) SACR 50 (SCA) Kgomo AJA pointed out that:

"once it is proved in a trial that an accused is guilty of an offence in terms of which he or she unlawfully possessed a firearm, in this case in contravention of s 2 read with ss 1, 39 and 40 of the now repealed Arms and Ammunition Act 75 of 1969, and it is proved or admitted that the firearm was 'semiautomatic' the application of its provisions relating to sentencing is triggered".

[20] Counsel for the State correctly submitted that the fact that no reference was made to the provisions of s 51 of Act 105 of 1997 at any stage of the proceedings meant that the trial court could not rely on such provisions in sentencing the appellant. He conceded that in the circumstances this court is entitled to interfere with the sentence imposed by the court a quo.

[21] In fact the provisions have been referred to in the charge sheet, but I agree that the appellant was not made aware of such provisions in relation to sentencing.

[22] In *S v Legoa* 2003 (1) SACR 13 (SCA) Cameron JA pointed out that:

"The Constitutional Court has emphasised that under the new constitutional dispensation, the criterion for a just criminal trial is "a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal court before the Constitution of the Republic of South Africa Act 108 of 1996 came into force". The Bill of Rights specifies that every accused has a right to a fair trial. This right, the Constitutional Court has said, is broader than the specific rights set out in the subsections of the Bill of Rights" criminal trial provision. One of those specific rights is "to be informed of the charge with sufficient detail to answer it". What the ability to "answer" a charge encompasses this case does not require us to determine. But under the constitutional dispensation it can certainly be no less desirable than under the common law that the facts the State intends to prove to increase sentencing jurisdiction under the 1997 statute should be clearly set out in the chargesheet".

[23] The rationale behind the passage from the Legoa case was set out by the SCA in *S v Tlhako* (129/15) [2015] ZASCA 140 thus:

"The accused person has a constitutionally protected right to a fair trial, which includes the sentencing process. When he or she is confronted with a charge(s,) he or she must be placed in a position to understand exactly the case he/she has to meet so that the defence, if any, can be conducted properly. Implicit herein is also the option of pleading guilty. The failure to alert the accused of the sentencing regime intended to be relied upon, precludes the use of the Act".

[24] The appellant was 29 years old when he perpetrated the crimes for which he was convicted. He was single with three

children ranging from 12 months and 6 years in age. The appellant had been employed before his arrest at Forestry peeling earning R750.00 per month. He pleaded guilty and has shown remorse for his conduct.

[25] The appellant was arrested within two months of committing the crimes.

[26] The appellant did take the court fully into his confidence and provided a complete account of his conduct. The record shows that the appellant indicated that he was willing to testify against his coaccused.

[27] In aggravation of sentence it was submitted on behalf of the state that the offence of possession of a firearm is prevalent. The appellant was found in possession of a firearm which he kept to himself until he was arrested and the goods stolen were recovered.

[28] The appellant has a previous conviction of robbery. He was convicted in 2002 and was given a 2 year

suspended sentence. He however is considered in law as a first offender in the light of the fact that his previous conviction was more than 10 years old at the time.

[29] Possession of unlicensed semiautomatic weapons is a serious offence. Crimes committed with the use of such firearms are an increasing scourge in this country.

[30] The appellant, in my view, is a candidate for rehabilitation.

[31] In my view the mitigating factors mentioned above cumulatively taken, constitute substantial and compelling circumstances entitling the court to deviate from imposing the prescribed minimum sentence of 15 years.

[32] Consequently, there is reason to interfere with the sentence of the court a quo.

[33] In the result the following order is made:

1. The appeal against sentence is upheld.
2. The sentence of the court a quo is set aside and replaced with the following sentence:

"On count one the accused is sentenced to five years imprisonment.

On count 2 the accused is sentenced to 10 years imprisonment.

The sentence in count one is ordered to run concurrently with the sentence in count two. Effectively the accused will serve a period of ten years imprisonment"

3. In terms of s 282 of Act 51 of 1997 the substituted sentence is antedated to 28 May 2012, being the date on which the appellant was sentenced.

M SELLO

ACTING JUDGE OF THE HIGH COURT

I agree:

M J TEFFO

JUDGE OF THE HIGH COURT

APPEARANCES

FOR THE APPELLANT MS. M B BALOYI

INSTRUCTEDBY

PRETORIA JUSTICE CENTRE

FOR THE RESPONDENT P W COETZER

INSTRUCTED BY

THE DIRECTOR OF PUBLIC PROSECUTIONS

DATE OF JUDGMENT 11 SEPTEMBER 2017

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