

SOUTH AFRICA / JUDGMENT

Mlambo v S (A144/2019) [2021] ZAGPPHC 644 (4 October 2021) [2021] ZAGPPHC 644

COURT

North Gauteng High Court, Pretoria

BEFORE

N Davis, V Noncembu

CASE / FILE NUMBER

A144/2019

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HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

- (1) REPORTABLE: NO.
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED.

DATE 04 OCTOBER 2021

CASE NO: A144/2019

In the matter between:

TEBOGO MLAMBO

Appellant

and

THE STATE

Respondent

J U D G M E N T

This matter has been heard by way of a virtual hearing and disposed of in the terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1]

Introduction

This appeal against conviction and sentence, came before us on 25 June 2021 after a successful petition to this court. The matter has been enrolled previously, on 2 June 2020 and 2 November 2020. On neither of these dates, nor in respect of the

present enrollment, has the appellant delivered any heads of argument. His attorneys have also withdrawn on 3 December 2020. There was also no appearance by or on behalf of the appellant at the hearing. Nevertheless, and as the State has filed heads of argument and was ready to proceed, in the interests of certainty and finality, we resolved not to remove or simply strike the matter from the roll, thereby terminating the appeal process, but to consider the appellant's case and give

judgment.

[2] The basic facts

2.1 The appellant was convicted on 4 September 2021⁷ in the Regional Court, Pretoria of having been in unlawful possession of a prohibited semi-automatic fire-arm and ammunition.

2.2 The appellant was sentenced to 15 years imprisonment on count 1 and three years on count 2, which sentences were to run concurrently. Five years of the 15 years sentence were conditionally suspended for 5 years.

2.3 The arrest of the appellant took place in suspicious circumstances: the arresting officer, a member of the police's Flying Squad, and his partner received coordinates from their radio control room regarding a hi-jacked vehicle in Atteridgeville, being a grey Mercedes Benz C200 Kompressor. When the police officers arrived at the scene, they noticed a red Toyota Etios vehicle behind the suspected hi-jacked car. The appellant was the only occupant, sitting in the driver's seat. He was ordered to alight but leave all his possessions he had on him on the seat. He was subsequently handcuffed and a semi-automatic firearm was retrieved from the seat, which the arresting officer made safe and in which he found a magazine with 11 rounds. The serial number of the fire-arm had been filed off and the appellant refused to answer questions as to the ownership of the fire-arm. He however, said that the vehicle belonged to a friend of his. Inside the vehicle the police officers found a jersey and in the pocket thereof found gloves and a hand-made balaclava. Due to the fact that the appellant did not respond to questions about the ownership of the fire-arm, he was arrested and the fire-arm and the live rounds of ammunition were sealed in an evidence bag in his presence.

2.4 The appellant's version was that he has been a passenger in the vehicle, having been driven by his friend Mousa. He had, however fallen asleep while Mousa had been driving and, when he woke up, the car was parked and Mousa was nowhere to be seen. He had climbed out of the vehicle when the police arrived at high speed. He consented to the vehicle being searched where

upon the fire-arm was found by the arresting officer under the driver's seat. The appellant further alleged that, after his arrest, he pointed out Mousa from the crowd of onlookers, who was in the company of Mousa's mother. The police apparently spoke to this Mousa and his mother, but declined to arrest Mousa. The appellant also conceded that the jersey, gloves and balaclava were found in the vehicle.

2.5 The arresting officer's partner corroborated his version on all material aspects and, after perusing the record, we are of the view that the learned magistrate had correctly rejected the appellant's exculpatory version and accepted the evidence of the police officers. No misdirection can be gleaned from the record on this score and, in our view the appeal against conviction must fail.

[3] Ad: sentence

3.1 The provisions of section 51(2)(a) of Act 105 of 1997 were correctly found to being applicable, resulting in a prescribed minimum sentence of 15 years in respect of count 1.

3.2 However, the magistrate took the relative youth of the appellant into account as well as the fact that he was a first offender. Accordingly, a third of the sentence was suspended.

3.3 The function of a court of appeal is to determine whether or not the trial court, in imposing sentence, has exercised its discretion judicially and properly. The determination is not whether the sentence was "right or wrong", but whether the court imposing it, exercised its discretion properly and reasonably. See *S v Pillay* 1977 (4) SA 531 (A) at 535E-G.

3.4 The learned magistrate had correctly applied the principles of the well-known Zinn-triad, took into account the appellant's personal circumstances and had regard to the pre-sentencing report. Accordingly, we find that the judicial discretion had correctly and properly been exercised. We do not find the sentences imposed shocking or disproportionate. The appeal against sentence can therefore also not succeed.

[4] Order

The appeal against the convictions and sentences is dismissed.

N DAVIS

Judge of the High Court

Gauteng Division, Pretoria

I agree

V NONCEMBU

Acting Judge of the High Court

Date of Hearing: 25 August 2021

Judgment

delivered: 04 October 2021

APPEARANCES:

For the Appellant:

In person

For the Respondent:

Adv S. D Ngobeni

Attorney for the Respondent: Director of Public Prosecution, Pretoria

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