

SOUTH AFRICA / JUDGMENT

Mthunzi v S (A164/2023) [2024] ZAGPPHC 90 (31 January 2024)

[2024] ZAGPPHC 90

COURT

North Gauteng High Court, Pretoria

BEFORE

Francis-Subbiah, N. Khumalo

CASE / FILE NUMBER

A164/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

No A164/2023

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED. NO

DATE:

31/1/2024

SIGNATURE:

In

the matter between:

MTHUNZI,
ABEL VELLY
APPELLANT
and
THE
STATE
RESPONDENT
APPEAL

JUDGMENT

FRANCIS-SUBBIAH, J:

- [1] The appellant, Mr Mthunzi, was charged and convicted in the Regional Court, Sebokeng for contravening Section 3 of the Firearms Control Act 60 of 2000, being in possession of a semi-automatic firearm. He was duly sentenced to 15 years' imprisonment as the provisions of section 51 (2) and Part 2 of schedule 2 of the General Law Amendment Act 105 of 1997 are applicable. Whether this sentence is strikingly inappropriate and induces a sense of shock is now before the appellant court to decide. The appellant with leave of the trial court appeals against the sentence only.
- [2] The appellant was at a tavern on 7 April 2014. Two policemen were parked outside the tavern at 2am when it was closing. They were informed that the appellant was in possession of a firearm. They confronted the appellant who attempted to run away, but he was apprehended. Upon being searched the firearm was found against his waist. The firearm had no magazine or ammunition. It was confirmed at the trial that the firearm is self-loading (semi-automatic) by design and that a magazine forms an integral part in the firearm mechanism. Furthermore, its absence inhibits the normal operation of the firearm. The appellant denied his possession of the firearm and gave no explanation for his possession thereof.
- [3] Conviction of the possession of an illegal firearm attracts the minimum term of imprisonment. The appellant was treated as a first-time offender and 15 years' imprisonment is mandated in the absence of substantial and compelling circumstances warranting a lesser sentence. Both Counsel for the Appellant and the State at the hearing submitted that in matters of illegal possession of a firearm only, a sentence between 5 to 8 years has been handed down by courts when it is not accompanied by the commission of other offences.
- [4] On behalf of the State it is advanced that there are no substantial and compelling circumstances to justify a lesser sentence of 15 years as prescribed by the minimum sentence legislation. Further the appellant failed to provide an explanation for his possession of the illegal semi-automatic firearm, instead he preferred a false explanation and attacked the credibility of the police officers. The serial number of the firearm was erased or obliterated and therefore could not be traced to its original owner. Accordingly, this is an aggregating factor as such a possession can only have been for reprehensible purposes. The appellant was arrested while carrying the illegal firearm on his person and at a public place where alcohol is consumed. The appellant did not give an explanation why he took the illegal firearm with him to a public place. He further showed no remorse and did not take any responsibility for these actions. The ballistic expert's affidavit concluded that even without a magazine the firearm it is still able to discharge ammunition.

- [5] In determining an appropriate sentence after conviction the court must consider the offence, the offender and the interests of society as entrenched in *S v Zinn* 1969 (2) SA 537 A. The ideal outcome is to achieve a proper balance between the triad of the nature of the crime, the personal circumstances of the appellant and the interests of society. In *S v Rabie* 1975 (4) SA 855 (A) the court held that:

"Punishment should fit the criminal as well the crime, be fair to society, and be blended with a measure of mercy according to the circumstances."

- [6] In an evaluation of judicial discretion an appeal court may not interfere with a sentence merely because it would have imposed a different sentence than the one imposed by the trial court - *S v Skenjana* 1985 (3) SA 51 (A). Nevertheless, a striking disparity between the sentence and that which the appeal court would have imposed had it been the trial court, remains an element for interfering with the trial court's sentencing discretion. - *Director of Public Prosecution KZN v P* 2006 (1) SACR 243 SCA. Additionally, the power of the appeal court to interfere with a sentence extends to a finding of irregularity or misdirection of sentencing powers or is disturbingly inappropriate. - *S v Rabie* 1975 (4) SA 855 (A).

- [7] Further in *S v Mthembu* 2012 (1) SACR 517 (SCA) the court held that:

"...mere misdirection is not by itself sufficient to entitle a court of appeal to interfere with the sentence, it must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably."

- [8] The aggravating circumstances in this case are the high prevalence of the offence, the seriousness of the offence, no remorse was shown by the appellant, and he gave no explanation for the possession of the firearm in a public place. The trial court dealt with the appellant as a first offender, as his previous conviction was disregarded being

older than 10 years at the time of sentencing. The mitigating factor is that this possession can be distinguishable from other possessions of firearms where victims have been injured or threatened.

- [9] In balancing the mitigating and aggravating factors to consider the appropriateness of the sentence. I have had regard to the case of *S v Sukwazi* 2002 (1) SACR 619 (N), where Combrinck, J considered the differences between pistols, semi- automatic guns, full-automatic guns, pump-action shotguns and revolvers. There the court concluded that it could not have been the intention of the Legislature that the possession of a pistol, solely because it has a semi-automatic firing mechanism, should attract a minimum sentence of 15 years' imprisonment in terms of the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997.

- [10] The court considered the fact that a .375 Magnum revolver or a pump-action shotgun which are not considered semi-automatic firearms, yet are far more powerful weapons than a pistol, will not attract a minimum sentence of 15 years' imprisonment. Therefore, it would

be absurd to impose a sentence of 15 years' imprisonment for possession of a .22 pistol whereas a person in possession of a .375 Magnum revolver or a pump action shotgun will receive a maximum of three years' imprisonment. The court having considered the factors in that case, reduced the sentence from 15 years to 3 years. Moreover, the court held that it is not competent for Courts to apply the provisions of the Criminal Law Amendment Act where an accused has been convicted of the unlawful possession of a semi-automatic pistol.

- [11] The above reasoning is commensurate with the view taken by Plasket, J in *Madikane v S* [2011] JOL 26693 (ECG), where he concluded for similar reasons that the sentence was disproportionate to the crime, the criminal and the legitimate interests of society. Therefore, the disproportionality on its own constituted a substantial and compelling circumstance justifying and requiring the court to refrain from imposing the prescribed sentence of 15 years. A sentence of 8 years was imposed.
- [12] In this division in *Ramaqele v S* (A98/2018) [2019] ZAGPJHC 35 (21 February 2019) the court for the possession of a semi-automatic fire-arm, a Norinco Pistol with six (6) rounds of ammunition reduced the minimum sentence of 15 years to 6 years as being appropriate in those circumstances.
- [13] I am similarly persuaded that the proportionality of the sentence to the crime, the appellant and the legitimate interests of society constitutes compelling and substantial circumstances on its own to warrant a deviation from the passing of the minimum sentence on possession of the firearm in the present matter. It would serve the interests of justice to mitigate the length of the sentence. The sentence is out of proportion to the gravity and magnitude of the offence, and for this reason the sentence imposed by the trial court is unjust and requires it to be set aside.

[14] I therefore find that an appropriate sentence in this regard is eight (8) years' imprisonment.

[15] In the result:

15.1 The appeal is upheld.

15.2. The sentence imposed by the court a quo is set aside.

15.4 The sentence is replaced with a sentence of eight (8) years imprisonment.

14.5 The sentence is antedated to 8 November 2022.

FRANCIS-SUBBIAH, J

JUDGE OF THE HIGH COURT

PRETORIA DIVISION

I agree.

N. KHUMALO, J

APPEARANCE:

Counsel for the Appellant: Adv. H L Alberts Legal Aid South Africa, Pretoria Counsel for the Respondent: Adv. A P Wilsenach The Director of Public Prosecution. Date of Hearing: 25 January 2024 Date of Judgment: 31 January 2024

This judgment has been delivered by uploading it to the court online digital data base of the Gauteng Division, Pretoria and by e-mail to the attorneys of record of the parties. The deemed date for the delivery is 31 January 2024.

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