

SOUTH AFRICA / JUDGMENT

Myeni v S (A102/2024) [2025] ZAGPJHC 368 (1 April 2025)

[2025] ZAGPJHC 368

COURT

South Gauteng High Court, Johannesburg

BEFORE

MMP Mdalana-Mayisela, G Malindi

CASE / FILE NUMBER

A102/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

CASE

NO: A102/2024

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

1

April 2025

In

the matter between:

MYENI

SPHAMANDLA

Appellant

And

THE

STATE

Respondent

JUDGMENT

Mdalana-Mayisela J

- [1] This is an appeal against the effective sentence of 15 years imprisonment imposed upon the appellant by the Regional Magistrate

court, Johannesburg. The appeal is pursuant to the petition for leave to appeal against sentence only having been granted by this court. The appeal is opposed by the respondent. This court granted an unopposed condonation application for the late filing of the appellant's heads of argument.

- [2] The transcribed record of appeal is incomplete. The evidence of the appellant and address by legal representatives during the pre-sentencing proceedings is not transcribed. It is clear from the merits judgment that the appellant testified in his defence. The parties on appeal agreed that the transcribed record is sufficient to determine the appeal against sentence. We also found it to be sufficient to determine the issues before us. Therefore, we decided to proceed with the hearing of the appeal.

- [3] The appellant was charged on count 1 with the contravention of section 4(1)(f)(iv) read with sections 1,17,19,20,103,117,120(1)(a),

section 121 read with Schedule 4, and section 151 of the Firearms Control Act 60, of 2000 and further read with section 250 of the Criminal Procedure Act 51, of 1977 ("the CPA") – possession of a prohibited firearm: serial number / identifying mark altered without written permission of the Registrar; and on count 2 with the offence of contravening the provisions of section 90 read with sections 1,103,117,120(1)(a), section 121 read with Schedule 4, and section 151 of the Firearms Control Act, 60 of 2000 and further read with section 250 of the CPA – possession of ammunition.

- [4] It was alleged that on 2 September 2019 and at Kerk street, Johannesburg the appellant unlawfully had in his possession a 9mm Parabellum Calibre Norinco, semi-automatic pistol, the serial number or any other identifying mark of which has been changed or removed without written permission of the Registrar, being a prohibited firearm. On the same date and at the same street he unlawfully had in his possession ammunition, one 9mm Parabellum Calibre Cartridge without being the holder of a licence in respect of a firearm capable of discharging that ammunition, a permit to possess ammunition, a dealer's licence, manufacturer's licence, gunsmith licence, import, export or in-transit permit or transporters permit issued in terms of the Firearms Control Act, or is otherwise authorized to do so.

- [5] Briefly, the facts leading to conviction are as follows. On 2 September 2019, Constables Risenga Nkosinathi Myambo and Walter Matlole Bopape were patrolling in Kerk and End streets in Johannesburg CBD. They saw the appellant in the group of five men. The appellant was hiding something on his waist and thereafter, he buttoned his jacket. He ran away when

he saw the constables. They pursued him through Kerk street and constable Bopape caught him. Constable Bopape searched him with his permission in the presence of constable Myambo. He found from his waist the prohibited firearm and ammunition. He asked the appellant to produce a licence for the possession of the firearm and ammunition. The appellant informed him that he does not have a licence. Constable Bopape informed the appellant of his constitutional rights and arrested him. He was taken to Johannesburg central police station and detained. The prohibited firearm and ammunition were booked in SAP13.

- [6] During his trial he pleaded not guilty. He denied possession of the prohibited firearm and ammunition. He disputed that he was chased and arrested by Constables Myambo and Bopape. He stated that he was arrested by other policemen while he was walking in Kerk street. He was legally represented throughout the proceedings in the lower court.
- [7] The lower court rejected his version and convicted him on both counts. He was sentenced to 15- years imprisonment on count 1 and 3- years imprisonment on count 2. It ordered the sentence imposed on count 2 to run concurrently with the sentence of 15 years imprisonment imposed on count 1. He was declared unfit to possess a firearm in terms of section 103 of Act 60 of 2000.
- [8] The grounds of appeal against sentence are as follows.
 - [8.1] An effective sentence of 15 years imprisonment is shockingly inappropriate.
 - [8.2] The lower court did not attach sufficient weight to the personal circumstances of the appellant.
 - [8.3] It did not consider the element of rehabilitation.
 - [8.4] It overemphasized the seriousness and prevalence of the offences, interests of society, deterrence and retribution elements.
- [9] During the plea proceedings the lower court explained to the appellant the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997 (“the CLAA”). The finding of guilt on count 1 attracts the prescribed minimum sentence of 15 years imprisonment for the first offender, unless the court finds that there are substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence.
- [10] In determining whether there are substantial and compelling circumstances, a court must be conscious that the legislature has ordained a sentence that should ordinarily be imposed for the crime specified, and that there should be truly convincing reasons for a particular circumstance to call for the imposition of a lesser sentence.[1] Such circumstances may include those factors traditionally taken into account in sentencing – mitigating factors - that lessen an accused’s moral guilt[2]. The specified sentences are not to be departed from lightly and for flimsy reasons.[3]

- [11] The personal circumstances of the appellant are as follows. He was 28 years old when the offences were committed. He is the first offender. He was employed as a security guard and earning R3000.00 per month. He is unmarried. He has three minor children. He was a breadwinner to his children. He was not a primary caregiver. He spent two years in prison awaiting trial.
- [12] In the sentence judgment the lower court found that the appellant's personal circumstances do not amount to substantial and compelling circumstances. The main contention by the appellant in this appeal is that the lower court committed a material misdirection by failing to consider whether his personal circumstances cumulatively taken amount to substantial and compelling circumstances warranting a deviation from the imposition of the minimum sentences.
- [13] It is trite that sentencing is pre-eminently a matter for the discretion of the trial court. The test for interference with the sentence imposed by the trial court is not whether or not the appeal court would have imposed another form of punishment, but rather whether the trial court exercised its discretion properly and reasonably when it imposed the sentence. The appeal court will interfere where the imposed sentence is vitiated by an irregularity, misdirection or where there is a striking disparity between the sentence and that which the appeal court would have imposed had it been the trial court or it induces a sense of shock.[4]
- [14] In *S v PB*[5], Bosiello JA formulated the approach to an appeal against the sentence imposed in terms of the CLAA as follows:
- "What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court's exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not."*
- [15] The respondent argued that the appellant did not show remorse for the commission of the offences. The lower court also overemphasized this point. That was a material misdirection because lack of remorse is not a decisive factor in sentencing. All the factors relevant to sentencing must be considered and sufficient weight attached to them. The trial court also has a discretion in sentencing.
- [16] It is clear from the sentence judgment that the lower court overemphasized the seriousness and prevalence of the offences, and interest of society. The sentence exercise was not balanced. The lower court used the personal circumstances of the appellant against him. It stated that the fact that he has children, and he was gainfully employed should have deterred him from committing the offences. The lower court failed to appreciate the nature

of the offences the appellant was convicted of. There was no victim during the commission of offences. There was no evidence that the prohibited firearm was used in the commission of other offences or that other offences were also committed by the appellant. There was also no evidence on whether the appellant possessed the prohibited firearm and one cartridge with the intention to commit violent crime or for his protection as a security guard. The lower court was wrong to use the appellant's personal circumstances against him.

[17] In *Nyathi v The State*[6] an instructive survey of sentencing patterns in respect of unlawful possession of firearms was conducted. Deviations from the minimum

sentence of 15 years imprisonment are recorded even where aggravating circumstances existed where firearms were used in robberies. In some cases, the sentences were either reduced by 5 years or 5 years thereof suspended. The proportionality rule enunciated in *S v Matjeke*[7] was applied as the sentences imposed by the lower courts were too disparate to the crime of unlawful possession.

[18] This court considers the following to be grounds for deviation from the minimum sentence imposed by the lower court. The appellant was 28 years old at the time of the commission of the offences, and he is a first offender. He was not convicted of violent crimes. The lower court failed to consider the prospects of rehabilitation in determining sentence. That also was a material misdirection warranting interference by the appeal court.

[19] The appellant spent two years in prison awaiting trial. It is submitted on behalf of the appellant that the lower court referred to this factor in its sentence judgment but did not attach sufficient weight to it. The Supreme Court of Appeal has held in numerous cases that the period spent in prison awaiting trial does not per se constitute a substantial and compelling factor[8]. Each case has to be judged on its merits. A long delay not attributable to the accused may be one such circumstance.

[20] The lower court ordered an effective sentence of 15 years imprisonment which effectively meant that the appellant would spend 17 years in prison. That makes the imposed effective sentence to be excessive and unjust. The lower court had a duty to consider whether the prescribed sentence is proportionate to the offence committed, taking into account traditional factors as well as the period spent in custody awaiting trial.[9] The respondent has submitted that the imposed effective sentence of 15 years is unjust and that this court should impose a lesser

sentence. It was a material misdirection for the lower court not to consider the aforementioned traditional mitigating factors as substantial and compelling, warranting deviation from the prescribed minimum sentences.

[21] In conclusion, I find that the appellant's personal circumstances cumulatively taken amount to substantial and compelling circumstances. The sentence imposed by the lower court is disproportionate to the crime, the criminal and the legitimate needs of society, and less severe sentence should be imposed by this court.

[22] In considering an appropriate sentence, I take into account the interests of society, that there is no victim, no commission of a

violent crime, no use of a prohibited firearm in any form, the seriousness and prevalence of the offences, appellant's personal circumstances, mercy, and the purposes of punishment, which are aimed at rehabilitation, deterrence and retribution, and the sentences imposed in similar cases that we were referred to by counsel. In considering the cumulative effect of the sentences, I am of the view that the sentence imposed on count 2 should be ordered to run concurrently with a sentence imposed on count 1.

[21] In my view the appropriate sentence which fits the appellant as well as the crime is the one that follows.

ORDER

[22] The following order is made.

1. The appeal against sentence is upheld.
2. The sentence of 15 years' imprisonment imposed for unlawful possession of a firearm is set aside and substituted with the

following sentence:

"The accused is sentenced to 8 years direct imprisonment for count 1 – unlawful possession of a firearm."

3. The sentence imposed for count 2 – unlawful possession of ammunition is set aside and substituted with the following sentence:

"The accused is sentenced to 2 years direct imprisonment for count 2 – unlawful possession of ammunition."

4. The sentence imposed for count 2 is ordered to be served concurrently with the sentence of 8 years imposed for count 1. The effective

sentence is 8 years direct imprisonment.

5. The order made by the lower court declaring the appellant unfit to possess a firearm in terms of section 103 of Act 60 of 2000 is confirmed.

6. The sentence set out in paragraphs 2, 3 and 4 of this order is antedated to 12 October 2021.

MMP Mdalana-Mayisela

Judge of the High Court

Gauteng Division,

Johannesburg

I agree

G Malindi

Judge of the High Court

Gauteng Division,

Date of delivery: 1 April 2025

Appearances:

On behalf of the appellant: Mr LF Musekwa

Instructed by: Legal Aid SA

On behalf of the respondent: Adv SJ Khumalo

Instructed by: National Prosecuting Authority

[1] S v Malgas 2001 (1) SACR 469 (SCA)

[2] S v Nkomo 2007 (2) SACR 198 (SCA) at para [11]; S v Vilakazi 2009(1) SACR 552 (SCA) at para [20]-[21]

[3] Malgas at para 25.

[4] S v Nkosi and Another 2011(2) SACR 482 (SCA); S v Kgosimore 1999 (2) SACR 238 SCA; S v Obisi 2005(2) SACR 350 (WLD); S v De Jager 1965 (2) SA 616 (A) at 628; S v Sadler 2000 (1) SACR 331 (SCA).

[5] S v PB 2013 (2) SACR 533 (SCA) para 20

[6] Nyathi and Another v S (A133/2020) ZAGPPHC

[7] S v Dodo 2001(3) SA 382 (CC) at para [37]-[39]; [2016] ZAGP 129 (7 June 2016)

[8] Ludidi and Others v S (Case No. 056/2022) [2024] ZASCA 162 (29 November 2024) at para [15]; Ncgobo v S 2018 (1) SACR 479 at para [7]

[9] S v Radebe and Another 2013 (2) SACR 165 (SCA).

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