IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A104/2018

1. Reportable: No
2. Of interst to other judges: No
Date:
4. Signature

In the matter between:

PULE MOKGAKA Appellant

and

THE STATE Respondent

JUDGMENT

MAKHUVELE J

Introduction

[1] This appeal, with leave of this court on petition is against the sentence imposed on the appellant by Regional Magistrate Mr Steyn ('the Magistrate') in the Regional Division of Oberholzer where he was arraigned and convicted of two

counts relating to contraventions of the Firearms Control Act, Act 60 of 2000 ("the Act").

[2] In Count 1, he was found guilty of possession of a 9mm Parabellum calibre vector model 288 semi automatic pistol in contravention of the provisions of Section 3 of the Act as he was not a holder of a licence, permit or authorisation issued in terms of the Act. In Count 2, he was found guilty of contravention of the provisions of section 90 of the Act in that he was found in possession of 9mm live rounds of ammunition without being the holder of a licence in respect of a firearm capable of discharging that ammunition, a permit to possess ammunition , a dealers' licence, manufacturer's licence, import, export or in-transit or transporter's permit issued in terms of the Act or otherwise authorized to do so.

[3] The appellant had pleaded not guilty to both charges and chose not to tender any explanation. The State led the evidence of the police officer that arrested him and also submitted a ballistic report affidavit in terms of section 212 of the Criminal Procedure Act 51 of 1977, as amended. The appellant testified in his own defence and did not call witnesses. He was found guilty as charged as I have indicated above.

[4] On 21 June 2017 the Magistrate sentenced him to 5 and 3 years imprisonment on counts 1 and 2 respectively. After indicating the sentences on both counts, the Magistrate went on to state that *" So the total is 8 years imprisonment"*.

[5] The appellant was refused leave to appeal. He petitioned the Judge President in terms of Section 309(a) of the Criminal Procedure Act, 51 of 1977. The petition to appeal the conviction was refused. He was granted leave to appeal the sentence only.

[6] It appears from the transcript of the record of proceedings that the appellant was legally represented throughout the trial. It is also evident that he had a fair trial in that at the request of the Public Prosecutor and after charges were put to him, the Magistrate explained the effect of the various statutory provisions in the charge sheet, specifically the prescribed minimum sentencing regime with regard to count 1.

Relevant background facts leading to the conviction and sentence

[7] On 28 August 2016 at about 20:00, three police officers were on patrol duties and driving in a marked police vehicle around Khutsong in an area called Majimbos, Tshwane Section.

[8] Constable Labethe, who was the driver, testified that he saw three males and that two of them were wearing 'Sotho clothes' and one had a 'big lumber jaclet'. They changed direction when they saw the police and entered 'an indian shop'.

[9] He drove faster as he had formed a suspicion about their conduct. He stopped next to them. Two started running, but he managed to apprehend one, the appellant. He searched him and found a 9 mm firearm on his waist belt and one magazine with ten 'bullets'. The firearm was not in a holster. The appellant also had a black backpack referred to as 'a school bag'. He searched the contents and found a balaclava, a small torch used in mines, a knife and a big 'cello tape'.

[10] The other two men were also apprehended by his colleagues. They found a 'revolver' in the possession of one and nothing was found on the third suspect.

[11] The appellant's version that he was already inside the 'tuckshop ' and awaiting for his purchases when the police came in and called the two men who were also there and unknown to him was rejected.

[13] The ballistic report confirmed that the pistol was *'self-loading, but not capable of discharging more than one shot with a single depression of the trigger'* and that it

'was manufactured or designed to discharge centre-fire ammunition'. The serial number of the pistol could not be determined.

Issues for decision and submissions

[14] The issues that this court is required to decide are;

[14.1] whether the individual sentences as well as the cumulative sentence of eight (8) years imprisonment are harsh and startingly inappropriate and whether, taking into account the fact that the two offences were committed under the same circumstances and thus inextricably intertwined, the Magistrate misdirected himself by not ordering that the two sentences should run concurrently.

[15] In response to the issue of harshness of the individual sentences, counsel for the State argued that count 1 (possession of a semi-automatic firearm) attracts a minimum sentence of 15 years and that the Magistrate has already exercised his discretion and deviated form imposing the prescribed sentence. It was also submitted that the sentence of 3 years for unlawful possession of ammunition was not shockingly inappropriate and harsh because the Magistrate took into account all relevant factors and cannot be said to have misdirected himself.

Factors taken into account during sentencing

[16] The Magistrate took into account the fact that the appellant had no previous convictions , that he was 39 years old , unmarried with two children aged 2 and 4 , that he had no 'school training' and was healthy.

[17] With regard to count 1, he took into account that the appellant had been in custody for a period of 10 months.

[18] He also took into account the total effect of the two sentences and in this

regard, decided to *'reduce each sentence to reduce the total effect of the two sentences'.*

[19] He also considered the interest of society and specifically mentioned the prejudice on the legal owners of firearms who must apply for licences and undergo expensive training.

The law

[20] It is trite that the appeal court can only interfere with the discretion of the lower courts to impose sentences only if :

[20.1] There was an irregularity during the trial or sentencing of an accused person.

[20.2] The lower court misdirected itself in respect of the imposition of the sentence.

[20.3] The sentence imposed by the trial court could be described as disturbingly or shockingly inappropriate.[1]

[21] The question is not whether the sentence is right or wrong, but rather whether the lower court exercised its discretion properly and judicially[1].

[22] The proper approach to sentencing under circumstances where the provisions that created a mandatory minimum sentencing regime , Section 51(3)(a) of Act 105 of 1997 are applicable was formulated by Marais JA in the leading case of S v Malgas (117/2000) [2001] ZASCA 30; [2001] 3 All SA 220 (A) (19 March 2001)[2].

[23] In Paragraph 25, Marais JA summarized the proper approach by examining the provisions that created the minimum sentencing regime as well as the specific offences referred to in Part 1 of Schedule 2. With regard to the latter, the learned Judge stated that the court's discretion in imposing sentence has been limited, and

---

[1] S v Pillav 1977 (4) SA 531 (A) at p 535 E-G
[2] reported in the South African Criminal Law Reports as S V Malgas 2001 (1) SACR 469 (SCA)

not eliminated. The usual factors that a trial court would take into account when sentencing are still applicable, such as proportionality of the sentence to the crime, balancing the various competing interests, and the nature of the offence.

Discussion

Ad sentence in count 1

[24] The Magistrate took into account various factors indicated above and imposed a sentence of 5 years instead of the prescribed minimum 15 years sentence in respect of count 1. He imposed 5 years instead.

[25] In the matter of Asmal v The State (20465/140)]2015] ZASCA 122 (17 September 2015) the appellant was found in possession of an automatic rifle, an AK 47 and was sentenced to the prescribed 15 years imprisonment. This was reduced to eight years on appeal to the SCA and mainly on the basis that it induced a sense of shock. The appellant was charged with murder of a herdsboy and during the investigations, his home was raided by the police who found this firearm. It was not linked to the commission of the crime. It was not loaded. The appeal court held that the combined effect of all his personal circumstances together with his personal circumstances amounted to substantial and compelling circumstances justifying a deviation from the minimum sentence.

[26] Comparatively, the 5 years imposed on the appellant before us, who remained unremorseful is quite lenient . Even looking at the cases cited by the counsel for the appellant, where sentences of 4 and 3 years were imposed, 5 years does not appear to be off the mark. In any event, there is no formula with regard to the sentence that may be imposed after a trial court has decided to deviate from the minimum sentencing regime. All that the appeal court is enjoined to do is to enquire

as to whether such a sentence is appropriate and not harsh or induces a sense of shock.

Ad sentence in count 2

[27] The Magistrate did not specifically address count 2 but only stated that he needed to *'reduce each sentence to reduce the total effect of the two sentences'*. There is no prescribed minimum sentence in count 2, as such, it is not clear what he meant by wanting to reduce this sentence.

[28] In my view, the 3 years sentence imposed in count 2 on its own is neither shockingly inappropriate nor harsh when one takes into account the circumstances under which the ammunition was found. The ammunition was loaded in a semi-automatic firearm which was in the appellant's waist belt. He also had a backpack that was loaded with a knife, torch and masking tape (cello tape).The appellant and the two other men attaracted the police's attention and ran away when confronted. These circumstances, correctly considered are different form a situation where a firearm or ammunition would be found by chance, for instance in a house when police conduct a raid.

The cumulative effect or concurrent running of the sentences

[29] It is clear from the sentencing record that the Magistrate was alive to the cumulative effect of the sentences that he intended to impose. However, he did not give an order as to how they should run, whether the second one on expiration of the first or concurrently. Instead, the Magistrate chose to *'reduce'* the sentences to counter the cumulative effect. The problem with 'reducing' the sentences as I have already indicated is that there is no prescribed minimum sentence in count 2.

[30] Other than the obvious fact that count 2 has no prescribed minimum sentence, this method of reducing sentences is clearly not in accordance with the provisions of Section 280(2) of the Criminal Procedure Act 51 of 1977, as amended.

The relevant parts read as follows;

" 280 Cumulative or concurrent sentences

(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.

(2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.

[31] The Magistrate clearly did not apply his mind to the provisions of this section because if he had, he should have considered and specifically made a ruling about whether or not the sentences should run one after the other or concurrently and not purport to reduce the individual sentences under circumstances where count 2 has no prescribed minimum sentence. Even if count 2 had a prescribed minimum sentence, and taking into account the fact that the offences occurred under one act and similar circumstances, it would have been desirable to make a specific order as provided for in Section 280(2) of the Criminal Procedure Act.

[32] During argument counsel for the appellant referred us to the matter of S V Motshathupa 2012 (1) SACR 259 (SCA) where it was held[3] that a court must not lose sight of the fact that the aggregate penalty must not be unduly severe when dealing with multiple offences.

[33] I do not think that the aggregate penalty is unduly severe, however, and in view of the failure to consider Section 280(2), I am of the view that the Magistrate misdirected himself and this entitles this court to intervene.

[34] Though the circumstances under which the offences were committed are repulsive, the possession of the ammunition is as correctly submitted by the counsel for the appellant intertwined to the facts that gave rise to the conviction and sentence in count 1.

[35] Consequently, the cumulative effect of the sentence imposed in both counts must be altered by making an order in terms of Section 280(2) of the Criminal Procedure Act to make the sentences imposed to run concurrently.

Order;

[36] The appeal on the individual sentences imposed in count 1 and 2 is dismissed.

[37] The appeal succeds in as far as the cumulative effect of 8 years is concerned.

[38] The order of the Magistrate is varied to read as follows;

" *Count 1: 5 years imprisonment;*

Count 2: 3 years imprisonment.

---

[3] Para.8

In terms of Section 280(2) of the Criminal Procedure Act, 51 of 1977 , the sentence imposed in respect of count 2 is ordered to run concurrently with the sentence imposed in respect of count 1"

TAN MAKHUVELE J

Judge of the High Court

I agree, and it is so ordered,

NN BAM AJ

Acting Judge of the High Court

APPEARANCES:

Appellant: Advocate JL Kgokane

Instructed by Legal Aid South Africa

The State: Advocate R Molokoane

On behalf of the Office of the Director of Public Prosecututions, Pretoria.

Date heard: 20 May 2019

Judgment delivered on: ~~27 June 2019~~ 18 July 2019.