THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 262 / 03

ROSCHEN SAMUELS Appellant

and

THE STATE Respondent

Neutral citation: ***Samuels v The State*** **(262/03) [2010] ZASCA 113 (22 September 2010)**

BENCH: **NAVSA and PONNAN JJA and K PILLAY AJA**

HEARD: **14 SEPTEMBER 2010**

DELIVERED: **22 SEPTEMBER 2010**

SUMMARY: **Sentence – possession of unlicensed firearm – over emphasis of general deterrence and public safety – on appeal 11 years after conviction and sentence – sentence of imprisonment set aside and replaced with a fine.**

ORDER

On appeal from: The South Gauteng High Court (Johannesburg) (Epstein AJ and Roux AJ sitting as court of appeal).

1 The appeal against sentence is allowed.

2 The sentence imposed by the magistrate is set aside and there is substituted therefor the following sentence:

'A fine of R6 000, payment whereof is deferred until 31 March 2011, or six months' imprisonment'.

JUDGMENT

PONNAN JA (JA and JA concurring):

[1] The appellant, Roschen Samuels, was convicted pursuant to a guilty plea in the Johannesburg Regional Court of contravening s 2 read with s 39(2) of the Arms and Ammunitions Act 75 of 1969 (the Act) and sentenced to a term of imprisonment of two years.

[2] In amplification of his plea the appellant adduced a statement in terms of s 112 of the Criminal Procedure Act 1997, which read:

'1 I am the accused in this matter.

2 I admit that I am guilty of contravening section 2 read with sections 39(2) and 40 of Act 75 1969.

3 I admit that on the 22nd day of March 1999 and at or near Hamilton Street, Newclare, Johannesburg I did wrongfully and unlawfully have in my possession an arm to with a 9mm pistol.

4 I admit that I was having the aforesaid pistol in my possession without being the holder of a valid licence for this arm.

5 I admit that I was aware that it was illegal to carry or possess a firearm and/or pistol without the necessary licence for same and that my actions were punishable in law.

6 I further wish to state that I have made this statement out of my own free will and was not forced or unduly influenced to make same.'

[3] As is evident from his statement it was limited to an admission of the essential elements of the offence charged. Aside from the following two questions by the magistrate, the record which spanned all of three pages is ominously silent:

'**Questions from the court to the public prosecutor:**

Did the fire-arm have any serial no on it?

No.

Question from the court to the defence:

How did the accused come in possession of the fire-arm?

The accused picked the fire-arm up. He wanted to keep it. When he saw the SAP on the day of his arrest he threw it away.'

[4] Moreover there is no judgment on sentence to speak of. What motivated the magistrate is to be discerned from the statement that she filed in terms of Rule 67 of the Magistrates' Court Rules. That too was brief. The relevant portion, without emendation, reads:

'The court reads every day of people being murdered or robbed and the fire-arms were used, and that suspects are usually in the age group of the accused.

The defence mentioned that the court did not take into consideration that this fire-arm had no cartridge or ammunition. But the accused decided to keep this fire-arm. And you will only keep it for one purpose and that is to use it, even if it is to protect yourself, then it seems the he will have no problem to get a cartridge or communication. If the accused were in possession of a cartridge and ammunition then that would have been a second count and would the court have dealt with it further on that count.'

[5] Aggrieved by what he considered to be an excessive sentence, the appellant appealed to the Johannesburg High Court. Epstein AJ (Roux AJ concurring) held:

'Section 39(2)(*a*) of the Act provides for a maximum of ten years imprisonment for the possession of more than one firearm and it is submitted that this section cannot be applicable to the appellant. The maximum sentence applicable to the appellant is that contained in section 39(2)(*b*) of the Act which provides for a maximum of a fine of R12 000.00 or imprisonment of three years or both'.

The court accordingly concluded:

'A sentence of direct imprisonment is appropriate in this case. I have taken into account the accused's age and the fact that he was a first offender as mitigating factors. In view of the misdirection I am entitled to interfere with the sentence. In my view, taking into account the aforementioned mitigating factors, the sentence imposed by the magistrate should be reduced. The sentence imposed by the magistrate is set aside and substituted with the following:

"The accused is sentenced to a period of imprisonment of 18 months of which 6 months are suspended for a period of three years on condition that the accused is not convicted within the aforementioned period of the same crime or any arising from the Arms and Ammunitions Act, 75 of 1969." '

[6] It is against the effective sentence of 12 months' imprisonment that the further appeal to this court is directed. The appeal is before us with the leave of the court below. At the time of the commission of the offence the appellant was a 21-year old first offender, who was earning approximately R2 000 per month as a casual employee. For reasons that are not entirely clear and in any event not necessary to traverse, it has taken all of 11 years for the matter to be heard by this court. We were informed from the bar that the appellant is now in permanent employment earning R5 000 and that he has since fathered a child.

[7] One would have thought that such facts as served before the magistrate were insufficient to have enabled her to exercise a proper sentencing discretion. As to both the crime and the appellant there are significant gaps that one needs for responsible sentencing. We know very little about the crime, for example, how or where exactly did the appellant come to acquire possession of the firearm? How long did he have possession of it? Why did he decide to keep it? And of the appellant himself we know as little. What are his scholastic achievements? What type of work does he do? What is his work record? Most importantly is he the type of young man who should go to gaol?

[8] Despite the fact that the appellant was represented before the magistrate there nonetheless remained a duty on her to call for such evidence as was necessary to

enable her to exercise a proper judicial sentencing discretion. For, as *S v Siebert*[1] made plain:

'Sentencing is a judicial function *sui generis*. It should not be governed by considerations based on notions akin to onus of proof. In this field of law, public interest requires the court to play a more active, inquisitorial role. The accused should not be sentenced unless and until all the facts and circumstances necessary for the responsible exercise of such discretion have been placed before the court.'

The judgment added: '[A]n accused should not be sentenced on the basis of his or her legal representative's diligence or ignorance'. Whilst I am alive to the very trying conditions under which magistrates work in this country and their justifiable need to eradicate the enormous case backlogs that confront them, this nonetheless may well have been the kind of matter where, given the paucity of information, the magistrate should have called for a pre-sentence report. Absent such a report the magistrate was unable to explore all of the available sentencing options and to choose one that best served the interests of this particular case.

[9] An enlightened and just penal policy requires consideration of a broad range of sentencing options from which an appropriate option can be selected that best fits the unique circumstances of the case before the court. It is trite that the determination of an appropriate sentence requires that proper regard be had to the well known triad of the crime, the offender and the interests of society. After all any sentence must be individualised and each matter must be dealt with on its own peculiar facts. It must also in fitting cases be tempered with mercy. Circumstances vary and punishment must ultimately fit the true seriousness of the crime. The interests of society are never well served by too harsh or too lenient a sentence. A balance has to be struck.

[10] It was urged upon us that correctional supervision would have been an appropriate sentence for the appellant. Sentencing courts must differentiate between those offenders who ought to be removed from society and those who although deserving of punishment should not be removed. With appropriate conditions correctional supervision can be made a suitably severe punishment even for persons

[1] 1998 (1) SACR 554 (SCA) at 558j-559a.

convicted of serious offences.[2] Correctional supervision, as a possibility, did not even merit any mention in either the judgment of the magistrate or that of the court below. I venture to suggest that that sentence may well have commended itself as one that was fair and just in this case. But the extraordinary passage of time encountered here renders it inappropriate. It seems to me that it would hardly serve the interests of justice for the matter to be remitted to the trial court 11 years after the appellant's conviction for him to be sentenced afresh. That, on the view that I take of the matter, excludes correctional supervision as a sentencing option.

[11] It is not entirely clear to me why it was thought that direct imprisonment was the only appropriate sentence. What seemed to weigh with both courts was the prevalence of violent crimes executed with unlicensed firearms. Epstein J put it thus:

'The prevalence of violent crime with the use of firearms and the terrible consequences that are associated therewith cannot be overemphasised. The people of the city of Johannesburg and its surrounds are terrorised on a daily basis by unscrupulous criminals who perform the most horrific and heinous crimes using firearms.'

That consideration was deserving of and warranted appropriate recognition in the determination of an appropriate sentence. Regrettably, it ignored crucial evidence that the firearm had no cartridge or ammunition. Moreover, as I shall hope to show, the prevalence of violent crime was a factor hardly to be taken into account against the appellant personally.

[12] The appellant was a young - evidently immature - man, who, when he saw the police became so afraid that he threw the firearm away. Hardly the reaction of someone intent on using the firearm for some nefarious purpose. More likely, one suspects, is the inference that he picked up the firearm out of idle curiosity. If that is so, as it certainly seems to be on such evidence as is available, then the link sought to have been made between him and violent crime is devoid of any foundation. That speculative hypothesis should have been displaced by one more charitable to the appellant, namely that he acted with immaturity and a lack of sophistication when he picked up the firearm. And,

[2] *S v Ingram* 1995 (1) SACR 1 (A).

when he decided to retain possession of it, he was not motivated by a desire to use it for any nefarious purpose thereafter.

[13] Epstein AJ stated: 'in considering an appropriate sentence it is necessary to take into account the deterrent factor, not only in respect of the appellant but also in respect of other persons who are in possession of unlicensed firearms'. I cannot imagine that the appellant is ever likely to repeat what he did. Deterrence is therefore only relevant in respect of other would-be offenders. There as well the appellant is being punished with imprisonment to deter others who stand on a very different footing to him, namely those who make themselves guilty of violent crimes and utilise unlicensed firearms to achieve that end. It is hard to resist the conclusion that the appellant is being rendered a sacrificial lamb on the altar of general deterrence.

[14] It follows on the view that I take of the matter that the requisite balance was not struck as the offence and the interests of society were over emphasised and conversely the interests of the accused under emphasised. Moreover, the only two factors relied upon for the conclusion that imprisonment was warranted, namely general deterrence and the prevalence of violent crime are, as I have demonstrated, less apposite to the appellant than appears to have been thought by either of the courts below.

[15] What one sees here is excessive devotion to the furtherance of the cause of deterrence and the protection of the public interest but insufficient weight to other factors that may lessen the gravity of the offence in the circumstances of this particular case.[3] Thus no or insufficient consideration was given to the following factors: that he was a first offender; that the firearm given its state when found could not have been put to any immediate unlawful use; that he became so frightened upon seeing the police that he immediately attempted to dispose of the firearm; that following upon his arrest he made a full confession to the police; that he fully co-operated and demonstrated his remorse by pleading guilty at the first available opportunity; and most importantly as I

[3] *S v Maseko* 1982 (1) SA 99 (A).

have stated, that he did not retain the firearm for any other nefarious purpose. All of those were weighty factors and undoubtedly served to lessen the gravity of the offence in regard to the appellant on the facts of this case. And yet none of them either individually or cumulatively received due recognition in the determination of an appropriate sentence. The result was the imposition of punishment that was grossly disproportionate to what could be considered fair in the circumstances of this case.

[16] Moreover, in the last 11 years whilst his appeal to this court has been pending the appellant has managed to avoid any further brush with the law. And as his counsel points out in all of that time he also has had to endure the mental anguish that is conjured up by the threat of imprisonment. The legislature has provided for a sentence of imprisonment for a period not exceeding three years or a fine not exceeding R12 000 or both. Both the public interest and the need to do justice to the appellant would be well served by the imposition of a fine. I may add that no consideration was given to the payment of a fine as a sentencing option. That may have been on account of the fact that the appellant was then in casual employment and perhaps it was thought that such a sentence would not have served any meaningful purpose. But as *S v Mosia*[4] made clear the court can direct that the fine be paid in instalments, if necessary over a period for as long as five years. That makes it possible in appropriate circumstances for even a humble wage earner, to escape imprisonment. In that way an accused person is offered a real alternative to imprisonment and by having to prune his income over a fairly protracted period the long term deterrent effect of punishment is enhanced.

[17] I have in mind a fine sufficiently severe as to represent real punishment. Ordinarily it may have been more appropriate for it to have been coupled with a wholly suspended sentence of imprisonment to enhance its deterrent value. But on account of the passage of time and his maintaining a clean slate during that period a suspended sentence has been rendered largely superfluous. A suspended sentence as well therefore falls to be excluded as a sentencing option. We were informed from the bar that were we inclined to impose a fine in the region of half of that prescribed by the

[4] 1988 (2) SA 730.

legislature, which seems to me just and fitting, the appellant should be allowed in terms of s 297(5)(a) of the Criminal Procedure Act something in the order of six months to effect payment.

[18] In the result:

1 The appeal against sentence is allowed.

2 The sentence imposed by the magistrate is set aside and there is substituted therefor the following sentence:

'A fine of R6 000, payment whereof is deferred until 31 March 2011, or six months' imprisonment'.

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V M PONNAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	J P Myburgh
	Instructed by: Sarlie & Ismail Inc Johannesburg Mthembu & Van Vuuren Inc Bloemfontein
For Respondent:	M P D Mothibe
	Instructed by: The Director of Public Prosecutions Witwatersrand Local Division The Director of Public Prosecutions Provincial Division Free State