THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 692/12

In the matter between

JUSTICE KHAKHATHI NEVHUTALU **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Nevhutalu v S* (692/12) [2013] ZASCA 44 (28 March 2013)

Coram: PONNAN, TSHIQI, MAJIEDT, PILLAY and PETSE JJA

Heard: **15 MARCH 2013**

Delivered: **28 MARCH 2013**

Summary: Sentence – pointing of firearm – contravention of s 39(1)(i) read with ss 1 and 12 of Act 75 of 1969 as amended – sentence of 6 months imprisonment, warranting interference on appeal.

ORDER

On appeal from: North Gauteng High Court, Pretoria (van der Merwe J and Vilakazi J sitting as court of appeal):

1. The appeal against sentence is upheld.

2. The order of the court below is set aside and is substituted by the following:
   ‘(a) The appeal against conviction is dismissed.
   (b) The appeal against sentence succeeds.
   (c) The sentence of 6 months’ imprisonment imposed on the appellant is set aside and substituted with the following:

‘The accused is sentenced to 6 months’ imprisonment, wholly suspended for a period of 5 years, on condition that the accused is not convicted of a contravention of sections 120(3), (4), (5), (6), (7) or (8) of the Firearms Control Act 60 of 2000, committed during the period of suspension.’

3. The order declaring the appellant unfit to possess a firearm pursuant to the provisions of s (12)(1) of the Arms and Ammunition Act, 75 of 1969 is set aside.

JUDGMENT

MAJIEDT JA:

[1] This is an appeal against a sentence of 6 months’ imprisonment, imposed by the Regional Court for Limpopo, sitting at Polokwane, confirmed on appeal by the

North Gauteng High Court, Pretoria (van der Merwe J, Vilakazi AJ concurring) imposed in consequence of a contravention of the provisions of s 39 (1) (i) of the Arms and Ammunition Act, 75 of 1969 (the Act). The appeal is with the leave of the court below. The appellant was charged under the Act, since the offence was committed when that Act was still in operation.

[2] The factual matrix underlying the appellant's conviction and sentence is briefly as follows:

(a) The appellant, a member of the Military Police at the time of the incident, was a passenger in a motor vehicle ('the appellant's vehicle') when an altercation ensued between him and the complainant, Mr Thomas Rilefe who, in turn, was a passenger in another motor vehicle, driven by his brother, Mr Alfeus Rilefe ('the complainant's vehicle'). The quarrel emanated from what appears to have been the inconsiderate driving of one or both of the motor vehicles.

(b) The trial court accepted the State's version of events and rejected that of the appellant. On the proven facts the appellant's vehicle overtook the complainant's vehicle twice on the N1 national road between Louis Trichardt and Polokwane. On the second occasion the appellant uttered an obscenity at the Rilefe brothers relating to their mode of driving and pointed a small black object at them that, according to them, resembled a firearm. The appellant's vehicle drove in a haphazard fashion in front of the complainant's vehicle, after having overtaken it for the second time.

(c) Their vehicles stopped at road works. The appellant alighted from his vehicle to urinate some distance away. Upon his return he approached the complainant's vehicle and again swore and pointed a firearm at them. Both vehicles drove off, with the appellant's vehicle continuing to zigzag across the road. The Rilefe brothers' employer, Mr Nico Venter, who had been driving ahead of them and behind the appellant's vehicle, called the police to report the driving and the appellant's pointing of a firearm. The appellant was arrested shortly thereafter. The police recovered the magazine from the appellant's pistol and confiscated both the magazine and the pistol. The appellant was off duty at the time and dressed in civilian clothing.

[3] The appellant's personal circumstances can be succinctly summarized as follows: he was 30 years' old at the time of sentencing, a first offender, with 4 minor children. As stated, he was employed at the South African National Defence Force (SANDF) as a military policeman.

[4] In its judgment on sentence, the trial court alluded to the following aggravating circumstances: the appellant's lack of remorse and the fact that the appellant had intimidated the Rilefe brothers by 'wielding' his firearm and thereafter by pointing it at them, causing them to be petrified. In addition to the sentence of 6 months' imprisonment, the appellant's firearm was declared forfeited to the State in terms of s 39(3)*(a)* of the Act and he was declared unfit to possess a firearm in terms of s 12(1) thereof.

[5] On appeal, the court below rejected the contentions advanced on behalf of the appellant, namely that the appellant's aforementioned mitigating personal circumstances were largely underemphasized, resulting in a shockingly inappropriate sentence. Appellant argued further that the trial court had erred in not suspending a portion of the period of imprisonment or, alternatively, by not imposing a fine. The court below concluded that the trial court had properly exercised its sentencing discretion and that the sentence did not warrant interference on any of the well-established grounds.

[6] The maximum competent sentence for this particular offence, in terms of s 39(1)*(i)*, read with s 39(2)*(d)* of the Act, at that time was a fine not exceeding R4 000.00 or 1 year imprisonment or both such fine and imprisonment.

[7] The magistrate misdirected himself on sentence in the following material respects:

(a) Firstly, made reference to the Criminal Law Amendment Act, 105 of 1997 (the Criminal Law Amendment Act). Whilst he did not specifically invoke its provisions he appears to have been influenced by it in his approach during the sentencing process. This is manifested by his consideration of a custodial sentence as the only suitable sentence, without considering alternative sentencing options.

(b) Secondly, the magistrate took the appellant's lack of remorse into account as an aggravating circumstance. But the record does not bear this out. It is trite that the fact that an accused person pleads not guilty and contests his or her guilt at a trial is not, without more, indicative of a lack of remorse.

(c) Lastly, the magistrate also took into account the fact that the appellant had 'intimidated the witnesses by driving next to them and wielding this firearm as an aggravating feature.' As indicated in para 3*(a)* above, the appellant was in fact not the driver, but a passenger in his vehicle.

[8] In view of these material misdirections, this court is at large to consider the sentence afresh. Mention must be made at the outset of an important consideration, namely that the penal provisions in the present Firearms Control Act, 60 of 2000 (the Firearms Control Act) have been increased substantially in respect of this particular offence, compared to those in the Act. Section 121 of the present Act, read with s 120 and Schedule 4 thereof, provides for a maximum sentence of 10 years' imprisonment.

[9] The appellant's personal circumstances, set out above, are strongly mitigating. He is a first offender, gainfully employed and a useful member of society. He also had to care for his 4 minor children. The aggravating factors are the fact that he is a member of the SANDF, which is tasked with the protection of the people of this country. His conduct on the day in question does not behove his occupation as a military policeman. Furthermore, the Rilefe brothers were justifiably petrified by the appellant's conduct, to the extent that they locked their vehicle's doors.

[10] In a relatively brief judgment of some two pages the magistrate, as stated, appears to have started from the premise that a custodial sentence is the only suitable sentence. He gave no consideration whatsoever to alternative non-custodial sentencing options. I fail to understand what useful purpose a short term of imprisonment will serve in this case. On the contrary, it will only cause the appellant grave jeopardy in his work and family situation. Imprisonment should generally be imposed in instances where there is a need to remove the offender from society. Nienaber JA pointed out in *S v Lister* 1993 (2) SACR 228(A) at 232g that 'a prison is primarily an institution of punishment, not cure'. And it is trite that punishment must fit the crime, the criminal and the needs of society.

[11] The question which arises next is what the benchmark sentences have been for similar offences in the past. An analysis of sentences passed under the Act shows that non-custodial sentences are usually imposed for this particular offence, although each case must of course be decided on its own merits. Thus in *S v van Heerden*, 1990 (2) SACR 579 (E) at 585c-d, a sentence of a fine of R800.00 or 200 days' imprisonment was imposed on appeal. In that matter a taxi driver was charged in the magistrates' court with pointing a firearm in contravention of s 39(1)*(i)* of the Act. He had forced the complainant, a rival taxi driver, to bring his taxi to a halt and had gone to the complainant's vehicle and had pointed an object, which to the state witnesses appeared to be a firearm, at the passengers. The magistrate was not satisfied that the state had proved that what had been pointed was indeed a firearm, and accordingly convicted the accused of common assault and imposed a fine of R800.00 or 400 days' imprisonment. On appeal the court found that the magistrate had erred and that the appellant should have been convicted as originally charged. The court, per Kannemeyer J P (Kroon J concurring) made the following observation: 'In all the circumstances. . . whether the appellant is to be punished in this case for pointing a firearm or for common assault, his moral blameworthiness is of a similar degree. The sentence that the magistrate considers appropriate for assault is, in my view, also one which would be appropriate for the offence originally charged'.

The court altered the sentence to a fine of R800.00 or 200 days' imprisonment, since the magistrate had exceeded his sentencing jurisdiction in imposing 400 days as an alternative.

[12] In *S v* Sam 1980 (4) SA 289 (T), a 67 year old café owner was convicted of a similar offence and sentenced to a fine of R100.00 or 25 days' imprisonment. The appeal unsurprisingly did not concern the sentence, but the conviction, more particularly the question of *dolus* in the context of *error iuris* and *error facti*.
In *S v Hodgkinson* 2010 (2) SACR 511 (GNP), the appellant was convicted in the Magistrates' Court of the unlawful pointing of a firearm in terms of s 120 (6)(*b*) of the Firearms Control Act and he was sentenced to payment of a fine of R2000.00 or 90 days' imprisonment, wholly suspended on certain conditions. I must point out that the incident concerned a toy water pistol, hence the nature of the sentence imposed.
In *Van Heerden* the incident emanated from taxi rivalry and not road rage as is the case in the instant matter, but the facts and circumstances as set out in para 12 above are fairly analogous to that in the present matter.

[13] There is to my knowledge only one reported judgment where a custodial sentence had been imposed for an offence such as the present one. In *Modungwe v S,* [2003] 1 All SA 235(T), the appellant had been convicted of the unlawful possession of a firearm and ammunition, as well as the unlawful pointing of a firearm. He was sentenced to 5 years' imprisonment on each of counts 1 and 3, and 3 years' imprisonment on count 2. The appeal concerned the Magistrate's imposition of the minimum sentences prescribed in the Criminal Law Amendment Act. The court held that these offences do not fall within the ambit of the section of that Act which attracts the prescribed minimum sentence. In respect of count 3, the unlawful pointing of a firearm, the court imposed a sentence of one year imprisonment. The problem is that no facts concerning the commission of the offence can be gleaned from the judgment and no reasons are furnished for the imposition of the maximum permissible sentence in terms of s 39(2)*(d)*. The case is therefore of no assistance in the present matter and it does not detract at all from my views, enunciated above, that a custodial sentence is not justified in the present matter.

[14] In my view a custodial sentence is grossly disproportionate to the facts and circumstances relating to the offence. But a severe non-custodial sentence should nonetheless be imposed to convey clearly the message that conduct such as this, particularly from a member of the armed forces, will not be tolerated. A sentence of 6 months, wholly suspended on appropriate conditions, would in my view meet the well-established sentencing objectives.
That, as I see it, will better achieve the traditional aims of sentencing such as retribution and deterrence - and also be blended with a measure of mercy. It seems to me that, with a suspended sentence hanging over his head the appellant is hardly likely to resort to his firearm as readily as he did in this instance. Had the magistrate properly applied his mind to the task which confronted him I have little doubt that he ought to have concluded – as I have done – that on the facts here present a custodial sentence was unjustified.

[15] As stated in para 5 above, an order was also issued to the effect that the appellant be declared unfit to possess a firearm in terms of s 12(1) of the Act. No enquiry whatsoever was, however, held prior to the issuing of that order. On the contrary, immediately following upon the prosecutor's argument on sentence (the appellant's legal representative having by then concluded his address), the magistrate made the startling remark that '(t)he defence also did not convince me in terms of s 12 (of the Act) why if not I declared him unfit to possess a firearm'. The appellant's legal representative was thereupon asked to make submissions on this aspect, to which the magistrate replied '(r)ather late', but nonetheless permitted further submissions to be advanced. Those submissions related primarily to the fact that the appellant was employed as a military policeman and to the adverse effect such an order would have on his employment. The magistrate then simply made the declaratory order of unfitness, without furnishing any reasons. This is a further misdirection. I can think of no good reason why such an order should have been made, which would be gravely prejudicial to the appellant in the discharge of his work related duties. It therefore ought to be set aside.

[16] The following order is made:

1. The appeal against the sentence is upheld.

2. The order of the court below is set aside and is substituted by the following:
   ‘(a) The appeal against conviction is dismissed.
   (b) The appeal against sentence succeeds.
   (c) The sentence of 6 months’ imprisonment imposed on the appellant is set aside and substituted with the following:

‘The accused is sentenced to 6 months’ imprisonment, wholly suspended for a period of 5 years, on condition that the accused is not convicted of a contravention of sections 120(3), (4), (5), (6), (7) or (8) of the Firearms Control Act, 60 of 2000, committed during the period of suspension.’

3. The order declaring the appellant unfit to possess a firearm pursuant to the provisions of s (12)(1) of the Arms and Ammunition Act, 75 of 1969 is set aside.

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S A MAJIEDT
JUDGE OF APPEAL

PONNAN JA (TSHIQI, PILLAY and PETSE JJA CONCURRING):

[17] I have read the judgment of Majiedt JA and, whilst I concur in the order, I deem it necessary to pass certain observations with respect to the matter.

[18] The ready resort to a firearm that one encounters in this case, which has become all too pervasive in our country, is to be deprecated. What is worse is that here we are dealing with a member of this country’s armed forces whose conduct was the very antithesis of that to be expected of someone who is sworn to protect. No doubt public outrage would be warranted at conduct of this kind and it follows that

the public interest would have to be properly served in the determination of an appropriate sentence. But we need to remind ourselves that:

'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.'

(*State v Samuels* 2011 (1) SACR 9 (SCA) para 9.)

[19] It is not clear to me why it was thought that direct imprisonment was the only appropriate punishment in this case. Sentencing courts would be well advised to differentiate between those offenders who ought to be removed from society and those who, although deserving of punishment, should not be removed. In my view the appellant falls into the latter of the two categories. I cannot imagine that he is ever likely to repeat what he did. Personal deterrence thus hardly comes into the reckoning. In any event to the extent that it may be thought necessary that personal deterrence be addressed, the sword of a suspended sentence hanging over his head for a period of five years adequately does so. To uphold the sentence imposed on the appellant would, in my view, be to overemphasise the interests of society and conversely under-emphasise the interests of the appellant. After all he was a useful member of society with an unblemished record and his first foray into criminal conduct of any kind was at the relatively advanced age of 30. In those circumstances it can hardly be concluded that direct imprisonment was imperatively called for.

[20] Where I part company with my colleague Majiedt is the invocation by him of various authorities to identify what he describes as the benchmark for an offence of this kind. To trawl through the cases as an aid to the determination of an appropriate

sentence may well be ‘an idle exercise’ (*S v Fraser 1987 (2) SA 859 (A) at 863)*. For as Centlivres JA put it in *R v Wells* 1949 (3) SA 83 (A) at 87 – 88:

'Decided cases are... of value not for the facts but for the principles of law which they lay down. In this connection I cannot do better than quote the remarks of Lord Finlay in *Thomson v Inland Revenue* (1919 SC (HL) 10): "No enquiry is more idle than one which is devoted to seeing how nearly the facts of two cases come together: the use of cases is for the propositions of law they contain, and it is no use to compare the special facts of one case with the special facts of another for the purpose of endeavouring to ascertain what conclusion you ought to arrive at in the second case."'

That is not to suggest that courts should not strive for consistency (*S v Xaba* 2005 (1) SACR 435 (SCA)). But as it was put by this court in *Jimenez v S* [2003] 1 All SA 535 (SCA) para 6:

‘. . . [W]hile it may be useful to have regard to sentences imposed in other similar cases, each offender is different, and the circumstances of each crime vary. Other sentences imposed can never be regarded as anything more than guides taken into account together with other factors in the exercise of the judicial discretion in sentencing.’

However, the desire to achieve uniformity cannot be allowed to interfere with the free exercise of a judicial officer’s discretion in determining an appropriate sentence in a particular case in the light of the relevant facts in that case and the circumstances of the person charged (*S v Moloi* [1987] 1 All SA 249 (A)).

[21] Both *S v van Heerden* and *S v Sam* were decided over two decades ago. Those two cases thus hardly prove fertile ground as a comparator for the present. *Hodgkinson*, although of more recent vintage, involved a toy water pistol and is therefore clearly distinguishable from the present. That leaves *Modungwe* - which my learned colleague asserts is of no assistance. It follows, in my view, that no discernible trend can be said to emerge - certainly not one that can culminate in the conclusion that ‘non-custodial sentences are usually imposed for this particular offence’. For, as *R v Karg* 1961 (1) SA 231 (A) at 236H made plain: ‘. . . no countenance should be given to any suggestion that a rule may be built up out of a series of sentences which it would be irregular for a Court to depart from’.

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V M PONNAN
JUDGE OF APPEAL

APPEARANCES

For Appellant:	H L Alberts Instructed by: Pretoria Justice Centre Bloemfontein Justice Centre
For Respondent:	A G van Rensburg Instructed by: Director of Public Prosecutions, Pretoria Director of Public Prosecutions, Bloemfontein