REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

In the matter between: **Case No: CA & R 76/2010**

LOVEMORE DUBE **Appellant**

And

THE STATE **Respondent**

Coram: **Chetty and Pillay JJ**

Date Heard: **11 May 2011**

Date Delivered: **27 May 2011**

Summary: Sentence – Appeal against – Appellant sentenced to minimum sentence of fifteen years imprisonment for possession of semi-automatic firearm – Appellate interference not warranted – Cumulative effect of sentences however excessive – Sentence reduced

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JUDGMENT

Chetty, J

[1] The dream of instant wealth, to an appreciable extent, sustains the gambling industry, casinos, in particular, the lure attracting hordes of

prospective millionaires. There is of course, a *quid pro quo*. To make money, one must perforce be obliged first to spend one's own. Mindful, no doubt, of the old adage that a fool and his money are soon parted, the appellant sought to enrich himself in a manner not generally resorted to by patrons of the casino industry. He, together with his cohorts, decided to rob the Boardwalk Casino in Port Elizabeth. Having suitably armed himself with a 9mm short calibre Pietro Beretta semi-automatic pistol, the intrepid prospective millionaire, entered the casino on 27 June 2009. In common with many other patrons in search of instant richness, this quest however proved somewhat elusive. Unlike others whom lady luck forsook and who lost their money and forlornly left the premises of their own accord, the appellant was rather ignominiously, escorted from the casino by a posse of policemen. His cohorts however, fortuitously made good their escape.

[2] The appellant was duly arraigned for trial before the regional court on charges of robbery with aggravating circumstances as intended in section 1 of the **Criminal Procedure Act**[1] (the Act) (count 1); possession of a semi-automatic firearm in contravention of section 3 read with sections 1, 103, 117, 120(1)(a) and section 121 read with Schedule 4 of the **Firearms Control Act**[2] and further read with section 250 of the Act (count 2); possession of 6 live rounds of 9mm ammunition in contravention of section 90 read with other related sections of the **Firearms Control Act** and section 250 of the Act (count 3); pointing a firearm in contravention of section 120 (6)(a) read with

[1]Act No 51 of 1977
[2]Act No 60 of 2000

sections 1, 103, 120(() read with section 4 and section 151 of the **Firearms Control Act** (count 4) and kidnapping (count 5).

[3] The appellant, who was legally represented at the trial, tendered a plea of guilty to the charges and in his written plea explanation admitted the essential elements of the charges preferred against him and provided the following brief synopsis of his doomed escapade:-

> "On the day in question myself, Mbata, Jacques and Small went to the Casino at the Boardwalk in order to rob it. We watched the door where the money of the Casino was kept. At that stage I pretended to be paying a game on one of the machines opposite the cashiering department. I then noticed that one of the security guards was on his way out of the cashiering department and one of the cashiers went into the cash department. I then followed the person and pointed him with a firearm. I then ordered the person to take me to the place where the money was kept. We then entered the safe and I ordered that the money be put into the bag. After the money was placed in the bag I then walked to the door of the safe and it was closed. I then tried to open the door, but it could not. I then fired shots into the roof. I then asked the cashier for the till to the safe in order to open the door, however the cashier did not give it to me. Minutes later the police arrived in the safe and I was arrested. I know that my actions were wrongful and that I have no right to act in the manner I did. I am sorry for my actions and I ask the Court to forgive me."

[4] During the sentencing stage the appellant admitted a previous conviction for the unlawful possession of a firearm and ammunition committed on 6 September 2006 and for which he received a composite sentence of 18

months imprisonment which was however suspended in its entirety for 5 years under certain conditions. Although the appellant elected not to testify in mitigation of sentence or call witnesses, his attorney placed on record that the appellant was an unmarried 28 year old with a dependent child aged 7; that although he lacked permanent employment, he was self employed as a fruit and vegetable vendor and earned approximately R380, 00 per day, a portion of which he applied to the upkeep of the minor child's welfare. He furthermore submitted that the appellant's plea of guilty demonstrated his remorsefulness, and stressed that not only was no-one injured in the incident but that the appellant's ill-gotten gains never left the casino. This rather spartan address constituted the submissions on sentence.

[5] The trial magistrate delivered a well reasoned, albeit brief judgment on sentence. He correctly categorised the offence as serious and properly concluded that the appellant's previous conviction constituted an aggravating circumstance. It is apparent from the terms of the judgment that the magistrate considered that the only appropriate sentence was a lengthy custodial one. That finding is, in my view, unassailable. Although the appellant unsuccessfully sought leave to appeal against the sentences imposed on him, this court however, on petition, granted the appellant limited leave only in respect of the sentences imposed on counts 2 and 3 and the cumulative effect of the sentences imposed, i.e. against the effective sentence of 23 years imprisonment.

[6] In granting the appellant leave as aforesaid the judges considering the petition must perforce have considered that there were reasonable prospects of success. With due deference to that decision, I turn to consider whether appellate interference with the sentence imposed is warranted.

[7] A conviction on a charge of possession of an automatic or semi-automatic firearm attracts a mandatory sentence of 15 years imprisonment absent a finding that substantial and compelling circumstances exist which justify the imposition of a lesser sentence. It is implicit from the magistrate's judgment that no such circumstances were shown to have been established. Although it would appear from the evidence adduced before him that the magistrate's conclusion that no substantial and compelling circumstances existed was correct, that is not the end of the enquiry. Where it is shown that the sentence is disproportionate to the crime, the criminal and the legitimate interests of society, that in itself constitutes substantial and compelling circumstances. Such an approach was first articulated by Marais JA, in **S v Malgas**[3] more than a decade ago and has been consistently followed ever since. The learned judge stated as follows:-

> "In summary –
> A. . . .
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> B. . . .
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> C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.
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> D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first

[3] 2001 (2) SA 1222 (SCA) at para [25]

> offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.
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> E. The Legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.
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> F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.
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> G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.
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> H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.
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> I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.
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> J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided."

[8] More recently[4], this court was called upon to determine, with particular reference to the prescribed minimum sentence for the unlawful possession of a semi-automatic firearm, the circumstances under which departure from the ordained sentence was warranted. After an exhaustive analysis of a plethora of judgments on the point, Plasket J, (Pickering J concurring), made the

[4]Bantu Vuyani Madikane, unreported, CA & R 145/2010

following trenchant remarks apropos the aforegoing. The learned judge stated as follows:

> "I am mindful of the fact that at least in some of the cases the sentence imposed resulted from the erroneous interpretation of the relevant item of Part II of Schedule 2 of the Criminal Law Amendment Act that was adopted in *Sikwazi* and was applied in a number of other cases: as a result, a maximum sentence of three years' imprisonment was held in these cases to apply. It seems to me that this incorrect interpretation was, however, resorted to because of a sense of disquiet as to the proportionality of a sentence of 15 years' imprisonment for the unlawful possession of a pistol, albeit one that was a semi-automatic (as most pistols are). In any event, as the cases that I have listed above show, in most cases, the sentences imposed tended to be in the region of two years' imprisonment. Even if allowance is made for the imposition of more severe sentences for the offence of unlawful possession of a firearm that is automatic or semi-automatic as a result of the application of the Criminal Law Amendment Act, it seems to me that a sentence of 15 years' imprisonment is unlikely to be proportional to the crime, the criminal and the legitimate needs of society in all but the most serious of cases."

[9] Although the learned judge was constrained not to interfere with the trial court's finding that no substantial and compelling circumstances had been shown to exist, the proven facts rendered the ordained sentence unjust. The facts in **Madikane** are however entirely distinguishable. It is apparent from the appellant's plea explanation that the robbery was well planned. It was moreover contemptuous of authority and its method of execution demonstrates a callous disregard for the rights not only of the security personnel at the casino but moreover the hordes of patrons who frequent the establishment. It is implicit from the terms of the appellant's plea explanation

that that was not the appellant's first visit to the casino. The inference may thus legitimately be drawn that he must have known that casino's are equipped with security cameras to facilitate the identification of the criminal element. With a bravado bordering on arrogance, the appellant nonchalantly walked into the casino, cognisant that he could easily be identified. This arrogance of attitude is symptomatic of a complete disdain for law and order.

[10] The appellant's conduct throughout, culminating in the firing of the shots in the safe shows that he would brook no dissent. Fate had however dealt him a cruel blow – the safe itself held him prisoner. These facts belie any suggestion that the ordained sentence is disproportionate to the crime, the criminal and the legitimate needs of society. In any event the sentence imposed on counts 1, 2 and 3 was ameliorated by the order that 10 years run concurrently with the sentence imposed on count 1. Consequently there is no proper basis to interfere with the sentence imposed on counts 2 and 3.

[11] `Does the cumulative effect of the sentence imposed warrant interference? The test is trite – where the cumulative effect of a number of sentences strikes one as excessive, appellate interference is warranted. The effective sentence imposed in respect of counts 1, 2 3, 4 and 6 was 20 years imprisonment. Given the gravity of these offences the magistrate's arithmetical assessment cannot be faulted and the cumulative effect of the sentence can hardly be construed as excessive. Should the sentence on count 5, *viz* the discharge of the firearm, however, not similarly have been ordered to run concurrently with the other offences. It is common cause that

the shots were fired only after the appellant discovered that the safe had entrapped himself and the cashier. No attempt was made to hold the cashier hostage in order facilitate his escape. Rather, the firing of the shots could only have been triggered by a sense of utter frustration that the object of his entire criminal endeavour now held him captive. The kidnapping itself and the pointing of the firearm merited a separate composite sentence which the magistrate however ordered to run concurrently with the robbery conviction. Given the fluidity of the events, there seems to be no logical reason for not having ordered the sentence on count 5 similarly to run concurrently.

[12] In the result the appeal against the sentences imposed in respect of counts 2 and 3 is dismissed. The appeal against the cumulative effect of the sentence imposed is however allowed to the extent that the sentence imposed in respect of the appellant's conviction on count 5 is ordered to run concurrently with the sentence imposed on count 1, the effective sentence thus being 20 years imprisonment.

[13] The following orders will issue:

1. **The appeal against the sentences imposed in respect of the appellant's conviction on counts 2 and 3 is dismissed.**
2. **The sentence imposed in respect of the appellant's conviction on count 5, *viz* 3 years imprisonment, is ordered to run concurrently with the sentence**

imposed on count 1, the effective sentence thus being 20 years imprisonment.

3. **The sentence is antedated to the date of sentence i.e. 30 September 2009.**

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D. CHETTY
JUDGE OF THE HIGH COURT

Pillay, J

I agree.

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R. PILLAY
JUDGE OF THE HIGH COURT

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