153/55

G.P.-S.384-1952-3-10,000. U.D.J. 445.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellate DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN KRIMINELE SAAK.

JOHN BOESIGO

Appellant.

versus

THE QUEEN

Respondent.

Appellant's Attorney / Prokureur van Appellant Mandela & Tambo (J'burg) *Respondent's Attorney / Prokureur van Respondent*

Appellant's Advocate / Advokaat van Appelant Dison *Respondent's Advocate / Advokaat van Respondent* Rf. de Wet

Set down for hearing on:— / Op die rol geplaas vir verhoor op:— Tuesday, 18th Oct, 1955.

(TPD.2) 9.45 – 10.55.

I: 1, 5, 7, 8, 10

CAY.

Judgment
Appeal allowed, ... sentence altered to read ... pay a fine of £[illegible], and to undergo [illegible] ... "the imprisonment ... suspended for 3 years on condition that appellant is not again convicted of contravening the provisions of Act 25/1927".

Centlivres, C.J., Fagan, de Beer, Reynolds, & Brink, JJ.A.

[illegible] Registrar 24/10/55.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :-

JOHN BOESIGO Appellant

&

R E G I N A Respondent

CORAM :- Centlivres C.J., Fagan, de Beer, Reynolds et Brink JJ.A.

Heard :- 18th October 1955. Delivered :- 24·10·55

J U D G M E N T

CENTLIVRES C.J. :- The appellant pleaded guilty before a magistrate's court to a charge of having contravened Sec. 4(1) read with Sec. 30(ii) of Act 28 of 1937 in that on April 15th, 1955, he wrongfully and unlawfully possessed a revolver without having been licensed to possess it under the Act. Evidence was given by a detective sergeant to the effect that he found the revolver on a shelf in the appellant's shop and that it was loaded with six bullets.

The appellant admitted in the evidence he gave that the revolver was in his possession. Continuing he said :-

" During 1952 six native males entered my shop and pointed a revolver at me and took £50 cash, cigarettes and covered me up with a blanket. I reported to the Police. My shop was broken into last year - it was also broken

" into for a second time. I reported these incidents at the Police Station.
A native came into my shop with this revolver and asked me whether I wanted to buy it and I bought it for £4. I keep it on a shelf in the shop. "

In cross-examination the appellant said :-

" I know that I have to be in possession of a firearm licence. I took no steps to obtain a licence. I do not deny that the value of this revolver is about £12. I do not know the person from whom I bought the revolver. I do not know how it came about that he came to me with the revolver. I did not ask where he got it from. I did not ask him where he got it from as he may then have refused to sell it to me. I did care whether it was stolen or not but I wanted to protect myself.
I did not ask where he got it from nor did I ask him for his licence because I knew that natives are not allowed to possess a revolver. I know I must have a licence. I did not apply for one because it might be refused. I do not know that this revolver has been stolen. "

After the appellant was found guilty the detective sergeant was re-called and stated that the revolver in question had been reported as stolen in 1940. He also said that the position in regard to the unlawful possession of firearms was then so bad in the district subject to the jurisdiction of the magistrate trying this case that his department had instituted a special division to deal with the matter.

The appellant had no previous record. The magistrate imposed a sentence of four months imprisonment with compulsory labour. In his reasons for sentence the magistrate said :-

" The facts of the case are not in dispute and as the appeal is not directed towards the conviction, they will only be dealt with in relation to the sentence and in so far as the latter is affected thereby.

Apart from the formal evidence given by Sgt. Breytenbach it appeared that accused's shop was broken into some time ago and that previously he was held up by a person armed with a revolver and relieved of £50 in cash as well as a quantity of cigarettes. On these grounds the accused felt justified in purchasing the firearm in question and the facts surrounding the purchase are as follows :-

(a) The revolver was purchased from a person <u>who was not nor could be</u> in possession of a licence because it was a <u>stolen</u> firearm.

(b) The purchase price was only £4, which is altogether out of proportion to the present day value of £12, which is not denied.

(c) Accused did not know the native who sold him the revolver nor did he make any enquiries whatsoever: in fact, he did not even care '<u>whether it was stolen or not</u>.' As such he was a ready purchaser of stolen firearms.

(d) On his own admission, accused knew he was doing wrong. Whatever the case may be, he had in mind that <u>natives are not allowed</u> to possess firearms. He knew that <u>he</u> himself had to obtain a licence but failed to take the necessary steps.

" These then are the facts as revealed by the accused himself and they are not to be denied.

After the verdict the Prosecutor led evidence for the purpose of sentence and this evidence certainly reveals a deplorable state of affairs ; in fact, so deplorable that a special section of the C.I.D. had to be called into being to counteract the illegal traffic in firearms.

It was suggested that the accused is a man of some standing because he is a storekeeper and as such should be differently treated from the ordinary offender for the purpose of sentence, but there is no substance in this argument nor is there any justification for its acceptance more especially so in view of the utter disregard of the law with which the accused, on his own statement, is fully acquainted. "

The appellant appealed unsuccessfully to the Transvaal Provincial Division against the severity of the sentence and now appeals, after leave granted, to this Court.

In terms of Sec. 30(ii) of Act 28 of 1937 the maximum punishment prescribed is a fine of fifty pounds and imprisonment for six months. The sentence imposed by the magistrate was therefore a competent sentence and well below the prescribed maximum. Before this Court will order a reduction of a sentence imposed by a trial court it must be shown that the trial court exercised its discretion improperly (Rex v Ramanka 1949 (1) S.A. 417). Such a discretion is improperly exercised when the trial court in passing sentence misdirects itself on

the facts and in such circumstances this Court will itself impose an appropriate sentence (Rex v Moteken 1949 (2) 547 at p. 551). An appropriate sentence may, of course, be the same as that actually imposed by the trial court (Ebrahim and Two Others v Rex, 1950 (1) P.H.H. 67 at p. 128) or it may be a less severe sentence. The question, therefore, in the present case is whether the magistrate misdirected himself on the facts in sentencing the appellant.

It seems to me that the magistrate misdirected himself when he stated in paragraph (a) of his reasons that the revolver in question was a stolen firearm. For this statement he apparently relied on the evidence given by the detective sergeant after conviction. That evidence was purely hearsay and was inadmissible. I have not overlooked the fact that the magistrate added that "these then are the facts as revealed by the accused himself." I can find nothing in the appellant's evidence to show that he admitted that he received the revolver well knowing it to have been stolen. His evidence no doubt raises a suspicion to that effect but suspicion is not enough. Moreover the appellant was not charged with receiving stolen property well knowing it to have been stolen and in my opinion it was not competent for the magistrate in this case by the device of imposing a very severe penalty, to punish the appellant both for a

offence of which the accused has been convicted. But the
into account the prevalence in the locality of the type of
" It is permissible for a Court, in passing sentence, to take
(1950 (2) S.A. 351 at p. 352) :-
remarks of Tredgold J. (as he then was) in Rex v Morosi & Another
Counsel for the appellant drew our attention to the following
sentence (Rex v Kapumulo and Others, 1920 A.D. 56 at p. 57).
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Sec. 186(2) of Act 56 of 1955) and the Court is therefore en-
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The magistrate in paragraph (c) of his reasons misquoted the appellant as saying that he did not care whether the revolver was stolen or not. What the appellant said was "I did care "whether it was stolen or not. "

As the magistrate misdirected himself as to the facts in passing sentence which, to use his own language, was "affected thereby" this Court is at large as regards the sentence and must decide what in its opinion would in all the circumstances of the case be an appropriate sentence. The evidence of the detective sergeant as to the prevalence of the crime was in my opinion admissible under Sec. 337(2) of Act 31 of 1917 (now Sec. 186(2) of Act 56 of 1955) and the Court is therefore entitled to take this fact into consideration in assessing the sentence (Rex v Mapumulo and Others, 1920 A.D. 56 at p. 57). Counsel for the appellant drew our attention to the following remarks of Tredgold J. (as he then was) in Rex v Morosi & Another (1950 (2) S.A. 351 at p. 352) :-

" It is permissible for a Court, in passing sentence, to take into account the prevalence in the locality of the type of offence of which the accused has been convicted. But the

" Court's opinion on this point is ordinarily formed upon its own judicial experience. I doubt very much whether it is permissible for the Crown to lead evidence of such prevalence. Such a course is open to obvious objection. It would open up a vast field of enquiry upon a nebulous and inconclusive subject on which the accused would be entitled to be heard. "

With great respect, I am unable to share the learned judge's doubt. If a judicial officer, through inexperience in dealing with criminal matters, has no knowledge whether the crime of which he has convicted an accused is or is not prevalent in his area of jurisdiction, I can see no reason in principle why evidence should not be given after conviction of the prevalence of the crime, provided that such evidence is subject to cross-examination. In the present case the detective sergeant was cross-examined on the point. In these circumstances it seems to me that, as one of the objects of punishment is to deter others (Rex v Swanepoel, 1945 A.D. 444 at pp. 453-455), we must in deciding upon the appropriate sentence take into account as one of the relevant factors the fact that the crime of which the appellant was convicted is prevalent in his area. Another factor to be taken into account is the fact that the appellant on his own admission knew that he was breaking the law. These two factors justify a severe sentence.

On the other side of the picture is the important fact that the appellant had a clean record. Another factor which tells in the appellant's favour is that his shop had been broken into ; that he had also been held up in his shop at the point of a revolver and robbed of £50 and a quantity of cigarettes and that for these reasons he purchased a revolver which he kept on a shelf in his shop for self defence.

Taking into account the factors both against and in favour of the appellant I am of opinion that the sentence imposed by the magistrate was too severe. In all the circumstances an appropriate sentence would be a fine of £20 and four months imprisonment with compulsory labour, the imprisonment to be suspended for a period of three years on condition that the appellant is not convicted again ~~convicted~~ of contravening any provision of Act 28 of 1937.

The appeal against the sentence is therefore allowed and the sentence altered to read as above.

Jansen JA)
de Beer JA)
Fannin JA) concur.
Brink JA)