Case nr 192/92

IN THE SUPREME COURT OF SOUTH AFRICA APPELLATE DIVISION

In the matter between :

MOSAWENKOSI SILENCE GWALA Appellant

and

THE STATE Respondent

CORAM : VAN DEN HEEVER JA

KANNEMEYER AJA

HEARD : 1993-09-16

DELIVERED : 1993-09-27

J U D G M E N T

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KANNEMEYER, AJA

The appellant was charged before a regional magistrate with three contraventions of the Arms and Ammunition Act, No 75 of 1969 ("the Act"). The first count

alleges that, on 5 November 1990 and at or near Nagle Dam Road, in the district of Camperdown, he unlawfully had in his possession two AK 47 machine rifles in contravention of section 32 (l)(a) of the Act. Count 2 alleges that on the same date and place as mentioned in count 1 he unlawfully possessed two F1 grenades and two RGD 5 grenades in contravention of section 32 (l)(b) of the Act, while count 4 (count 3 having been withdrawn) alleges that on the date and place mentioned in count 1 he possessed 117 rounds of AK 47 ammunition without being in lawful possession of an arm capable of firing such ammunition, in contravention of section 36 of the Act.

He pleaded guilty to all three counts, and handed in a statement in terms of section 112(2) of Act No 51 of

1977 which reads :

"I the undersigned Mosawenkosi Silence Gwala do hereby admit that

A) COUNT ONE

1. On or about the 5th day of November 1990 and at or near Nagel Dam Road, Camperdown Natal I had in my possession two AK 47 Madrine rifles.

2. Those two rifles were in my possession in the sense that I had physical control over them and that I intended to possess them.

B) COUNT TWO

3. On or about the 5th day of November 1990 and at or near Nagel Dam Road, District Camperdown I had in my possession two F. 1 grenades and two RGD 5 grenades together with four UZRGM detonators which are used to trigger the said grenades.

4. The articles referred to in paragraph 3 above were in my possession in the sense that I had physical control over them and that I intended to possess them.

C) COUNT FOUR

5. On or about the 5th day of November 1990 and at or near Nagel Dam Road, District of Camperdown I had in my possession the following live ammunition.

117 X A/C 47 rounds.

6. I possessed the said ammunition in the sense that I had physical control over them and I

intended to possess the said articles.

7. I did not at the time lawfully possess an arm capable of firing such ammunition.

D) ALL COUNTS

8. I admit that my possession of the said arms and ammunition was unlawful.

9. I knew at the time that my conduct in possessing the said arms and ammunition was unlawful and I accordingly admit that I had the requisite legal intention to contravene the relevant sections of the Arms and Ammunition Act under which I have been charged.

10. I accordingly plead guilty to counts one, two and four."

The prosecutor accepted the plea on the above basis and the appellant was found guilty on all three counts.

He gave no evidence in mitigation but the attorney representing him made a lengthy statement in this regard. His statement was, of course, neither made under oath nor was it subject to cross-examination. However, it appears that both the trial Court and counsel for the State accepted the facts contained in it as true and the magistrate sentenced the appellant on the basis thereof and of certain

evidence presented by the State. The facts mentioned by the appellant's attorney and the evidence elicited by the State will be mentioned presently.

The magistrate sentenced the appellant to five - years' imprisonment on both count 1 and count 2 and to one year's imprisonment on count 4. He then said that he had taken into account the cumulative effect of the sentence and ordered that :

> "two years' imprisonment on each of counts 1 and 2 run concurrently. The effective sentence is then one of a term of seven years' immediate summary imprisonment."

On appeal to the Court a quo the sentence was confirmed on the basis that the magistrate, while intending to impose a cumulative sentence of seven years' imprisonment had failed to achieve this object by the formula he had adopted. Accordingly the judgment of the Court a quo concluded as follows :

> "In order to give effect to the clear intention of the Magistrate I therefore propose that the appeal should be allowed only to the extent that four

> years of the term of imprisonment imposed in respect of count 2 should be ordered to run concurrently with the five years sentence imposed in respect of count 1, with the result that the appellant's effective term of imprisonment will be seven years."

It was ordered accordingly. It is against this sentence that the appellant now appeals.

I now turn to the facts placed before the trial court in mitigation of sentence. The appellant was thirty eight years old when the offence was committed and at the time of his trial he was unemployed. He was a first offender. He is a married man with five dependant children. He grew up in the Swaaiemani district in Natal, where he went to school and passed standard 8 in 1974. He then left school and obtained work with a company, South African Nylon Spinners, in which he rose to the position of supervisor. In 1982 he resigned in order to start his own business as a shopkeeper. In 1983 he became interested in civic matters and was made an organiser in the Swaaiemani civic Association

and, as such, was involved in community welfare projects and joined the United Democratic Front (UDF). This led to his becoming interested in politics. In 1989 there was civil disorder and violence in the Swaaiemani area between members of the UDF and those of the Inkatha Freedom Party (IFP) and the appellant's shop and home were destroyed by fire. He suspected that this was because of his membership of the UDF. This left him with no source of income and without a roof over his head. He decided to commit himself to the process of political change in South Africa and to this end he made contact with Umkonto Wesizwe (MK), the military wing of the ANC. He was accepted by this organisation and on 25 August 1989 he left for Lusaka in Zambia and from there he was sent to Moscow where he received military training for two months. He eventually returned to South Africa in March 1990.

Prior to his return to this country the ANC, which had been a banned organisation, was unbanned on 2 February 1990 and thus, when he returned, membership of the ANC was

legal, but it was still its intention to continue using its armed forces to achieve its object.

On his return home the appellant obtained temporary employment at a shop in Sinathingi in the Pietermaritzburg district. The weapons, which are the subject of the three counts to which he pleaded guilty, were brought to him at this shop on 13 July 1990 by a person who introduced himself as Mandla Nxumalo and referred to the appellant as Victor Vezi which was the latter's nom de guerre in MK. The appellant accordingly concluded that Mandlo Nxumalo was also a member of that organisation, using an assumed name. Nxumalo instructed him to keep the weapons in a safe place until he received further instructions. The appellant accordingly hid the weapons. On the following day, 14 July 1990, he was detained in terms of section 29 of the Internal Security Act, until 22 October 1990 when he was released. During the period of his detention he heard that the ANC had suspended the so called "armed struggle". This

notwithstanding, on his release, he did not hand over the weapons he had concealed before his detention to either the ANC or to the authorities. The explanation advanced on his behalf was first, that he had had no further instructions from Nxumalo and did not know how to contact him and secondly that, although he knew that discussions were taking place between the ANC and the Government about the disposal of weapons, no finality had been reached and he had received no instructions from MK officials to hand his cache to the authorities. It appears that when he received the weapons originally at Sinathingi he had intended or been instructed to conceal them in Swaaiemani, but had been detained before he could do this. After his release from detention he decided, in the absence of any other instructions, to take them to Swaaiemani as originally planned. He did this on 5 November 1990, but the vehicle in which he was travelling was stopped at a police road block en route and the weapons were discovered and he was arrested.

In aggravation of sentence the State called warrant officer Wilson Magadhla of the South African Police. He is second in command of a special investigation unit stationed at Wartburg. Swaaiemani is in his area. The purpose of the special investigation unit of which he is a member is to investigate cases arising out of unrest between the ANC and the UDF on the one hand and the IFP on the other. His unit took over these investigations in 1991 but he was aware that the unrest had commenced in 1988. He says there was an escalation of violence in the area in 1989 and 1990 but that during 1991 the incidents of violence had lessened. He investigated eighty-eight murder cases between 1988 to 1991 in the Swaaiemani area, in some of which AK 47's had been used.

The procedure adopted in the magistrate's court is far from satisfactory. One is left in doubt about many facts that could, and probably would, have been clarified had the appellant given evidence under oath and been subjected to

cross-examination. One has statements made by his attorney which are argument in mitigation and other statements which contain factual allegations. Then there was no agreement between counsel for the appellant and counsel for the State before us whether everything said by the appellant's attorney in the trial court was unconditionally accepted by the magistrate and counsel for the State or not.

After counsel for the State had concluded his argument, the appellant's attorney was invited, by the magistrate, to reply. He said :

> "Your Worship, the only point I wanted to make was that my learned friend has led evidence and made submissions about the unrest conditions in the Swaaiemani area and the fact that these conditions stem from conflict between Inkatha and the ANC. I would simply make the submission. Your Worship, that the reasons why the accused possessed these arms, given to the Court, they're not disputed and they are not associated with those aspects or that particular conflict".

It was argued that, since this statement was not challenged by the State, it must be assumed that the State

accepted it.

This led to a debate before us as to whether the strife between members of the ANC and the IFF in the Swaaiemani area was of relevance in determining an appropriate sentence. The appellant appears to have prospered until his house and shop were burnt down. He thought that members of the IFF were responsible and that he had been chosen as a victim because of his membership of an organisation to which they were opposed. An inference could be drawn from these facts that he joined MK in order to settle his score with the IFF, if it were not for his attorney's statement :

> "As a result of the mood in which he found himself after the destruction of his home and in the context of the changes which were taking place in his own mind, he decided to commit himself firmly to the process of political change in South Africa and he therefore made contact with Umkonto Wesizwe..."

and his disavowment that the appellant possessed the arms in connection with the conflict in the Swaaiemani area, quoted

above.

Another question that remains unresolved because of the procedure adopted is why the appellant attempted to remove the arms which were in his possession at sinathingi to Swaaiemani after his release from detention on 22 October 1990. He must have known that the Swaaiemani area was in a state of unrest. His attorney merely said that the weapons were brought to the appellant on 13 July 1990. It was only when, at the conclusion of his address, the magistrate asked him how the appellant came to be arrested in possession of the weapons that, after taking instructions, he said :

> "... he acquired possession of the arms, as indicated, on 13 July. He placed them in a temporary place of safekeeping. The following day he was detained in terms of section 29 before he had taken these arms to the place where they were supposed to have been kept near his family home at Swaaiemani and after his release he arranged to go and fetch them from the place where they had been left before his detention ..."

From this it is not clear if he had decided that they should be concealed at Swaaiemani or if Nxumalo

instructed him to take them there. Indeed nothing is known about the conversation between the appellant and Nxumalo. Had the appellant given evidence he doubtless would have been asked under cross-examination for details of the instructions he received.

It was argued before us that the State had accepted that there was no indication that the appellant intended to use the weapons unlawfully. The basis of the submission is the statement, in his address on sentence, by counsel for the State, that :

> "He was in possession of a formidable arsenal and although there's no evidence to show that he himself intended to use the weapons unlawfully, there's no evidence to show what guarantees or safeguards were undertaken to prevent others from so using the weapons."

In view of the above it must be accepted that the appellant held the weapons for storage purposes only and that while they were in his possession he did not intend to use them himself. However he must have appreciated that they may

still have been used by MK for military purposes. Indeed Mr Blomkamp for the appellant admitted that had he received instructions to use them in the furtherance of the struggle he probably would have done so.

Whether or not he personally intended to use the weapons, he must have appreciated the danger of them falling into the hands of one or other of the warring factions in Swaaiemani. Had this happened it would have added to the violence in this area.

Much was made in argument of the fact that the appellant did not enjoy the benefit of the indemnity provided by Government Notice 12834 of 7 November 1990 because it only applied to offences committed before 8 October 1990. He apparently applied for indemnity and was refused it but full details of this application are not before us. However, the fact that his crime was committed after 8 October 1990 with the result that he did not qualify for indemnification is not, in my view, a mitigating circumstance. The 8th October

1990 must have been chosen for a cogent reason and, so we were informed, the date has not been extended. Thus offences of a political nature, committed after that date should be punished on the normal basis.

We were referred to the decision of Foxcroft J, in the Cape Provincial Division in the unreported matter of S v Dlali Case no. SS 79/92 where, in somewhat similar circumstances, an accused, found guilty on a plea of guilty in respect of the possession of illegal arms and ammunition, had sentence postponed for one year and he was ordered to appear before the Court on 10 June 1993, but only if called upon to do so, in terms of section 297(1)(a) of the Criminal Procedure Act, No.51 of 1977. It is not necessary to consider whether the order made in Dlali's case was a proper one. Suffice it to say that there are differences between that case and this. Dlali also pleaded guilty, but his statement made in terms of section 112(2) of Act no.51 of 1977 was very detailed. It contained much more information

than does the section 112(2) statement made by the appellant, which discloses the bare essentials for a plea of guilty. Further Dlali gave evidence and called witnesses whose evidence must have been of great assistance to the Court. Also, while violence is rife in many areas of South Africa the appellant intended, and was in the process of, taking a quantity of weapons of war into an area where the situation was particularly sensitive. He was not going to hide them in his home in anticipation of receiving instructions to hand them over to a joint command of the Government and the ANC as Dlali was. He was taking them to a trouble spot some distance from where he was then working and intended to leave them there. How he intended to safeguard them we do not know. They certainly would not have been under his personal care as was the position in Dlali's case.

However sight must not be lost of the fact that it was accepted at the trial that the appellant did not possess the arms and ammunition in question in order to commit acts

of violence but rather as a custodian of them on behalf of MK.

The trial magistrate said that, taking all the factors into consideration, the appellant merited "robust sentences". He considered that the appellant should serve a sentence of seven years and, having sentenced the appellant to a total of eleven years' imprisonment, achieved his object by ordering certain portions of the various sentences to run concurrently.

On appeal, the Court a quo, having amended the order concerning the concurrent running of the sentences, as mentioned above, confirmed the sentence stating that :

> "... it cannot be said that the sentence, although it is a severe one, is startlingly inappropriate."

There is nothing to indicate that the magistrate gave any consideration to a suspension of a portion of the sentence he imposed. The appellant's attorney suggested that a totally suspended sentence would be appropriate and a

similar submission was made to the Court a quo and to us by his counsel. The magistrate does not mention this aspect in his judgment on sentence. Even if a totally suspended sentence would not be appropriate, one does not know why the magistrate did not consider a partial suspension. Nor does the Court a quo appear to have given this possibility any thought despite the fact that until his hard earned estate was destroyed by arson the appellant appears to have been a useful member of society.

True, he has committed a serious crime. He dealt with the arms he possessed as custodian in a manner verging on recklessness. But I do not consider that what he did deserves "a term of seven years immediate summary imprisonment". In my view, if he were sentenced to a total of seven years' imprisonment but was required to serve four years of this sentence, he would have expiated his wrong. A suspended sentence would have a saluatory effect upon him and will hopefully deter him from similar conduct in the future

while the period which he will serve in prison will be sufficient to deter those who contemplate committing similar offences and will satisfy the public interest.

The appeal is allowed to the following extent. The sentences imposed by the trial court are altered to : Count 1 - 3 years' imprisonment Count 2 - 3 years' imprisonment Count 3 - 1 years' imprisonment

It is ordered that eighteen months of the sentences on both count 1 and count 2 will be suspended for a period of 5 years on condition that the appellant is not convicted of a contravention of any of the provisions of the Arms and Ammunition Act, No 75 of 1969, committed during the period of suspension, in respect of which he is sentenced to direct imprisonment without the option of a fine.

KANNEMEYER

AJA VAN DEN HEEVER JA CONCURS

J U D G M E N T

SMALBERGER, JA:-

I have had the privilege of reading the judgment of my learned brother KANNEMEYER ("the judgment"). I agree that the appeal must succeed and that the appellant's sentence should be reduced. For reasons that follow, however, I am of the view that the

circumstances of the present matter merit a lesser sentence than that proposed by him.

As pointed out in the judgment, the case of s v Dlali is one of "somewhat similar circumstances". Without going into the matter in detail, the general approach of FOXCROFT, J in Dlali's case commends itself to me. I agree with him that "there is no magic formula which can be used to determine a proper sentence in all cases of unlawful possession of firearms". Each case must depend upon its own facts. The following passage from FOXCROFT, J's judgment is also apposite:

> "The crime clearly falls within the category of offences generally described as 'political'. The accused was obviously not intent on any personal benefit in possessing these weapons and was carrying out the orders of MK. From time immemorial, courts of law have recognised the distinction between ordinary and political crimes."

I appreciate the fact that, as pointed out in the judgment, there are certain differences between

Dlali's case and the present one. The most significant of these is the fact that at the time of his arrest the appellant was conveying the weapons in question into a particularly sensitive and volatile area.

It is clear that the appellant did not (subject to further orders) intend to use the weapons, but to safeguard them pending instructions as to their disposal. The appellant received military training while outside the country. He would appear to be a generally responsible person. In the circumstances one could reasonably expect him to exercise proper care and control with regard to the custody of the weapons. It is not without significance that the weapons remained safely hidden over the period of more than three months while he was in detention. Their proper safekeeping was therefore not necessarily dependent upon his being in physical control of them. No doubt he would have

attempted to hide them successfully again.

I accept that introducing the weapons into a volatile area involved some risk that they might fall into the wrong hands, and that the appellant acted unreasonably in attempting to take them to Swaaiemani. I do not agree, however, that his conduct in the circumstances can be said to verge on recklessness. In Dlali's case FOXCROFT, J concluded that the degree of careless conduct displayed by Dlali was "not the kind of carelessness which would commend itself to me as meriting a prison sentence". The same cannot be said for the appellant's negligence. It was of a sufficient degree to merit some imprisonment.

In my view an effective sentence of two years imprisonment coupled with a further period of imprisonment suspended on appropriate conditions would have been a proper one in the present matter. That would have ensured the appellant's immediate, or almost

immediate release, as he has been in custody since 3 October 1991. As this is a minority judgment it is not necesary to set out how I would have structured the sentence in relation to the three counts.

J W SMALBERGER JUDGE
OF APPEAL