THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case no: 20465/14

In the matter between:

YUSUF MOHAMED ASMAL **APPELLANT**

And

THE STATE **RESPONDENT**

Neutral citation: *Asmal v S* (20465/14) [2015] ZASCA 122 (17 September 2015)

Coram: Shongwe, Theron and Majiedt JJA

Heard: **19 August 2015**

Delivered: **17 September 2015**

Summary: Sentence – on a charge of unlawful possession of a fully automatic rifle (AK47) in terms of s 4 of the Firearms Control Act 60 of 2000 – whether the sentence imposed for unlawful possession of an AK47 rifle is shockingly harsh – and whether the court a quo ought to have considered ordering the sentence on the firearm conviction to run concurrently with the sentence on the two other counts – this court's interference justified.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Patel and Mokgohloa JJ and Skinner AJ sitting as court of appeal):

1 The appeal is upheld and the sentence imposed by the court a quo is set aside.

2 The following order is substituted:

'The appeal against sentence on count 3, unlawful possession of a fully automatic firearm, succeeds. The sentence of the trial court is set aside. The following sentence is substituted in its place:

Accused 2 is sentenced to 8 years' imprisonment which must run concurrently with the effective sentence imposed on counts 1 and 2.'

3 The sentence is antedated to 23 January 2009.

JUDGMENT

Shongwe JA (Theron and Majiedt JJA concurring)

[1] On 2 October 2008, the appellant, Mr Yusuf Mohamed Asmal, was convicted by the KwaZulu-Natal Division of the High Court, Pietermaritzburg (Murugasen J) on charges of kidnapping, murder and the unlawful possession of a fully automatic rifle (to wit an AK47 rifle) read with s 51 of the Criminal Law Amendment Act 105 of 1997. He was sentenced to 8 years' imprisonment on the kidnapping charge, life imprisonment on the murder charge and 15 years' imprisonment on the unlawful possession of a firearm charge. The court ordered the sentences imposed in respect of counts 1 and 2 to run concurrently with the sentence imposed on the murder charge, ie life imprisonment.

[2] The appellant's appeal partially succeeded to the full court, against his conviction and sentence. The full court confirmed the conviction on the kidnapping charge, but reduced the sentence to 4 years' imprisonment and also changed the murder conviction to culpable homicide and imposed a sentence of 8 years' imprisonment. The full court confirmed the conviction and sentence on the unlawful possession of the firearm charge. It ordered the sentence of 4 years' imprisonment for kidnapping to run concurrently with the 8 years' imprisonment on the culpable homicide charge only. This appeal is with the special leave of this court against sentence on the firearm charge only. It further limited the appeal in the following manner:

'(i) Whether the sentence imposed for conviction of the firearm charge is shockingly harsh.

(ii) Whether the court ought to have considered ordering the sentence on the firearm conviction to run concurrently with the sentences on the two other counts.'

[3] It is necessary to set out the facts that led to the conviction and sentence. The deceased, an 18 year old boy, was employed by the appellant as a herdsman and also resided on the appellant's property. Certain goods belonging to the appellant went missing and the deceased was suspected to have stolen them. The appellant sought the assistance of Mondli Wilson Majozi (accused 1 in the trial) and Tholinhlanhla Skhumbuzo Nyathikazi (accused 3 in the trial) to look for the deceased as he had disappeared from the property. The deceased was found and apprehended by accused 1 and others on the morning of 18 August 2006, who then summoned the appellant to the place where the deceased was kept. The deceased was assaulted by the group of people, including the appellant. The appellant denied that he assaulted the deceased. On the instructions of the appellant, the deceased was taken to a place where the appellant was employed as a junior manager. He was made to sit there for hours on end until the evening of the same day. On the instructions of the appellant the deceased was questioned by two employees regarding the alleged stolen goods

and was simultaneously assaulted to compel him to admit to the theft. The appellant is said to have struck the deceased with a shotgun on the head and he later died of head injuries. The deceased's body was dumped at La Mercy beach. On 30 August 2006 the police searched the appellant's house, after he had been arrested, and found an unlicensed fully automatic rifle (AK47) in the spare room. This search occurred in the presence of his wife.

[4] The court a quo did not find any material misdirections in respect of the sentence on the unlawful possession of the firearm. It, therefore found no reason to interfere with the conviction and sentence.

[5] The appellant attacked the sentence of the trial court on the basis that the firearm which, although potentially capable of firing on automatic, was unloaded and no ammunition was found. He contended further that the firearm had not been used in the commission of an offence, therefore, it was argued, substantial and compelling circumstances existed which justified a departure from the minimum sentence of 15 years' imprisonment.

[6] The State conceded that 15 years' imprisonment on this charge induced a sense of shock. It agreed with the appellant's contention that the combined effect of all his personal circumstances together with the surrounding factors amounted to substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence. I agree. This approach is fortified by numerous cases of a similar thread, for example *S v Madikane* 2011 (2) SACR 11 (ECG); *S v Dube* 2012 (2) SACR 579 (ECG); *S v Sukwazi* 2002 (1) SACR 619 (N); *S v Manana* 2007 (1) SACR 62 (T) at 68.

[7] It is settled law that each case must be adjudicated on its own facts and that no two cases are the same. In the present case the appellant was 42 years

old when he was sentenced by the trial court, married with four children and employed at a Hyperstore as a junior manager. His wife was also employed. Although the appellant had previous convictions, for purposes of sentence he was considered a first offender. The previous convictions did not concern firearms and occurred more than ten years before the commission of the offence under discussion.

[8] This court in *S v Barnard* 2004 (1) SACR 191 (SCA) para 9 correctly observed that:

'A court sitting on appeal on sentence should always guard against eroding the trial court's discretion … and should interfere only where the discretion was not exercised judicially and properly. A misdirection that would justify interference by an appeal Court should not be trivial but should be of such a nature, degree or seriousness that it shows that the court did not exercise its discretion at all or exercised it improperly or unreasonably.'

[9] The kidnapping and murder offences occurred on 18 August 2006, but the AK47 was only found on 30 August 2006. The finding of the rifle may appear to be unrelated to the other charges, however, it was as a result of his arrest on those charges that the police, through their intelligence, decided to search his house. In effect one would be justified to conclude that the AK47 charge emanates from the other charges. Had the appellant not been suspected of the kidnapping and murder charges, his house would, in all probability, not have been searched. This conclusion ought, justifiably, to result in the sentences running concurrently especially when this court considers the cumulative effect of the sentences.

[10] In answer to the questions raised by this court when granting special leave to appeal, the sentence imposed on the possession of the AK47 rifle was not only shockingly harsh, but also disproportionate considering the facts of this

case. When the rifle was found in the appellant's house he had been incarcerated already. The rifle was not loaded and no ammunition was found. It further had not been used in the commission of other offences for which he had been arrested. It is a fact that the appellant failed to proffer a reasonable explanation for the possession save for a bare denial. In my view, the court a quo ought to have found substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence.

[11] In view of the reasons above it warrants this court's interference with the sentence. It is in the interests of the administration of justice that an appropriate sentence be imposed where necessary. Therefore the appeal against sentence on the unlawful possession of a firearm charge stands to succeed.

[12] The following order is issued:

1 The appeal is upheld and the sentence imposed by the court a quo is set aside.

2 The following order is substituted:

'The appeal against sentence on count 3, unlawful possession of a fully automatic firearm, succeeds. The sentence of the trial court is set aside. The following sentence is substituted in its place:

Accused 2 is sentenced to 8 years' imprisonment which must run concurrently with the effective sentence imposed on counts 1 and 2.'

3 The sentence is antedated to 23 January 2009.

J B Z SHONGWE
JUDGE OF APPEAL

Appearances

For the Appellant:	A D Collingwood Instructed by: Carlos Miranda Attorneys, Pietermaritzburg; Matsepes Inc, Bloemfontein.
For the Respondent:	M V Mcanyana Instructed by: Director of Public Prosecutions, Johannesburg; Director of Public Prosecutions, Bloemfontein.