THE STATE

Versus

MPUMELELO MOYO

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 27 JANUARY 2011

Review Judgment

MATHONSI J: The accused was charged with a total of 13 counts the first 12 of which related to offences under the Firearms Act, Chapter 10:09 while the 13th count related to escaping from lawful custody in contravention of section 185(1)(a) of the Criminal Law Code, Chapter 9:23.

He pleaded guilty to all the charges and was duly convicted by the trial magistrate at Beitbridge Magistrates Court. In count 1 he was convicted of unlawful possession of a firearm in breach of section 4(4)(b) of the Firearms Act, and sentenced to 24 months imprisonment.

In counts 2 to 11 he was convicted of pointing a firearm in contravention of section 27 (b) of the Firearms Act and the court *a quo* took the 10 counts as one for purposes of sentence and sentenced him to 24 months imprisonment.

In count 12 he was convicted of discharging a firearm in a public place in contravention of section 27(d) of the Firearms Act and sentenced to 24 months imprisonment. In respect of count 13, that is escaping from lawful custody in breach of section 185(1)(a) of the Criminal Law Code, he was sentenced to 5 years imprisonment. This gave the accused an aggregate sentence of 11 years none of which was suspended and none of which was ordered to run concurrently with the other.

Having taken issue with the sentence in count 1, the apparent splitting of charges in counts 2 to 11 and the fact that none of the sentences were ordered to run con-currently, I gave the Attorney General the opportunity to address me on those issues. The Attorney General has taken the view that there was nothing wrong with the sentence in count 1 because the penalty clause is to be found in section 4(2) of the Firearms Act which allows the trial magistrate to impose a fine not exceeding level 10 or imprisonment not exceeding 5 years or both.

Mr Mabhaudi for the state while conceding that there was an unlawful splitting of charges in counts 2 to 11, submitted that the sentence in count 1 was proper. I do not agree. I shall return to that issue later in this judgment.

The facts of the matter are that on the 3rd April 2010, the police received a tip off that the 21 year old accused was in possession of an unlicensed firearm at Baobab Spar in Beitbridge. They duly attended at the scene and took the accused and his 3 brothers, who were driving a VW Golf Citi vehicle, to the police station. At the police station they started searching the bags of the suspects and when they were about to rummage through the accused's bag, he suddenly grabbed the bag from where he pulled out a 9mm Short Unique Pistol.

The accused pointed the firearm at all those present including his 3 brothers, cocked the weapon and ordered them to lie down. Apparently there were 10 people present which then gave rise to the 10 charges of pointing a firearm.

The accused then took to his heels and before disappearing into the nearby bush he fired a shot from the firearm. The state had an option to charge the accused under section 4(1) of the Firearms Act which provides:

> '' (1) Subject to this Act, no person shall purchase, acquire or have in his possession any firearm or ammunition unless he holds a firearm certificate in respect thereof in force at the time.
>
> (2) Any person who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding level 10 or to imprisonment for a period not exceeding 5 years or to both such fine and such imprisonment.''

However, the accused was not charged under that section. Instead, in count 1 he was charged under section 4(4)(b) of the Firearms Act. That section provides:

> ''If any person has in his possession any firearm or ammunition otherwise than as authorised by a firearm certificate in respect thereof, in force at the time, he shall, subject to this Act, be guilty of an offence and liable to a fine not exceeding level 6 or to imprisonment for a period not exceeding 1 year or to both such fine and such imprisonment.''

The accused was charged under section 4(4) (b) and the penalty for contravening that section is a level 6 fine or imprisonment of not more than a year. The trial magistrate therefore erred in opting for a sentence of 2 years imprisonment. That sentence will be altered to 1 year imprisonment.

The next issue which arises is whether it was proper to charge the accused with 10 counts of pointing a firearm merely because there were 10 people present at the police station. The accused pointed a firearm to induce fear in order to make good his escape. The process of pointing the firearm constituted one criminal transaction. *R v Peter* 1965 (3) SA19 (SR) at 20A; *S v Mutawarira & Another* 1973(3) SA 902 (RAD) at 904 A-B and *S v Rayiti* 1984(1) ZLR 269 (H) at 272 A-E.

The rule of practice against the duplication of convictions is designed to prevent the multiplicity of convictions of an accused person where the whole of the criminal conduct imputed to him in substance constitutes only one offence which could be contained in a single but all embracing charge. This is meant to avoid prejudice to the accused person.

In *S v Mutawarira & Another* (*supra*) at 905 Beadle CJ stated:

> ''I consider therefore, that this is a case where there has been a duplicity of convictions and there has been prejudice to the appellants because, by the adoption of this procedure, the magistrate was able to do what was criticised in one of the earliest cases on this subject, *R v Marinus* (1887) 5 SC349, that is to give himself a greater jurisdiction than he would have had if the offence had been treated as one count.''

In casu, the accused should have been charged with one count of pointing a firearm. SMITH J, was faced with a similar situation in *S v Rayiti (supra)*. At 272 D he stated:

> ''If the accused is convicted of only one count the question arises as to the proper sentence to be imposed. The magistrate had imposed a total of 15 months imprisonment with labour, six months for count 1 and nine months for count 3. In my view, the reduction in the number of counts must be reflected in a reduction in sentence, and I am of the opinion that nine months imprisonment with labour is a proper sentence for the offence committed.''

Although the magistrate treated the 10 counts as one for sentence he came up with a total of 24 months for the 10 counts. In my view those 10 counts should be amended to one count and the accused should benefit from the reduction. I am of the view that an appropriate sentence for the single count considering the 24 months for the 10 of them, should be 3 months imprisonment.

Accordingly I make the following order:

1. The conviction on count 1 is confirmed but the sentence is altered to 12 months imprisonment.

2. Count 2 is amended by the inclusion of all the individuals contained in courts 3 to 11.

3. The sentence of 24 months imposed on counts 2 to 11 is set aside and a sentence of 3 months imprisonment is substituted there for.

4. The conviction and sentence on count 12 are confirmed.

5. The conviction and sentence on count 13 are confirmed.

6. The sentences of 3 months (count 2) and 24 months (count 12) are ordered to run concurrently with the sentence of 5 years imprisonment (count 13) leaving a total effective sentence in respect of all counts of 6 years imprisonment.

Ndou J ..... I agree.