CRIM. APPEAL 443/02

LUKE MANGENA
versus
THE STATE

HIGH COURT OF ZIMBABWE
KAMOCHA and GOWORA JJ
HARARE, 29 May 2003

Criminal Appeal

S. Karuwa, for the appellant
V. Shava, for the respondent

GOWORA J: The appellant was convicted by the Regional Magistrate's Court of one court each of contravening section 4(1) and section 27(b) of the Firearms Act [*Chapter 10:09*]. The magistrate, having found that there were no special reasons sentenced him to the mandatory term of 5 years imprisonment. He has noted an appeal against sentence.

In his grounds of appeal the appellant has averred that:

1) The sentence imposed is manifestly excessive in the circumstances and induces a sense of shock, regard being had to the nature of the offence, the circumstances surrounding the commission of the offence and the appellant's personal circumstances.
2) The learned magistrate erred in holding that no special circumstances existed.
3) It is submitted that the following are some of the facts of record constituting special circumstances warranting the imposition of a sentence less than the sentence imposed:
    1) The appellant found the firearm;
    2) The firearm was recovered;
    3) No injury was caused to any person through the use of the firearm;
    4) Appellant is a youthful first offender;
    5) At the date of sentence the appellant had already spent 11 months in custody

6) Appellant is married and has one infant.

The appellant was charged with one count of housebreaking with intent to steal and theft, one count of contravening section 4(1) of the Firearm Act [*Chapter 10:09*] and one count of attempted murder. He pleaded guilty to count two, and not guilty to count one. In relation to the charge of attempted murder the appellant pleaded not guilty but tendered a plea to the lesser charge of discharging a firearm in a public place.

The allegations against the appellant are that on the 20th March 2000, he unlawfully and with intent to steal broke and entered into 18 Walling Road, Mabelreign, the house of Marcius Leiman and stole one Thompson VCR, one Phillips 14 inch colour television set, one F.N. branett pistol, one dryer, one hair cutter, and one portable radio.
In respect of the second count, it was alleged that that on 16 April 2000 and at the Harare Street and Market Square bus terminus the appellant not being the holder of a valid firearm certificate had unlawfully purchased, acquired or had in his possession a firearm namely an F.N. Branett.
Lastly it was alleged that on 16 April 2000, and at Harare Street, Market Square terminus, the appellant had unlawfully and with intent to kill assaulted Constable Alexander Jachi, a policeman on duty by firing at him with a pistol.
No evidence was led in relation to the first count. Evidence was led on the third count, but at the close of the State case, after an application for his discharge, he was acquitted on the charges of housebreaking with intent to steal and theft and attempted murder. He was found guilty on the charges of possessing a firearm without a licence and discharging a firearm in a public place.
On the second count he was sentenced to 5 years imprisonment, and on the third count he was ordered to pay a fine of $1 000/in default of payment he was sentenced to 50 days imprisonment. The present appeal is in respect of the sentence on the second count.
It was submitted in the heads of argument filed on behalf of the appellant that the sentence imposed upon him following his conviction is manifestly excessive and induces a sense of shock taking into account the circumstances of the case and the personal circumstances of the appellant. It was contended that the learned magistrate in the court *a quo* did not give due weight and consideration to the following mitigatory features:

1) That the appellant is a young first offender aged only 21, who pleaded guilty.
2) That the appellant is a married man with one child, and he is the

sole breadwinner for the family.
3) That the appellant had already spent eleven months in custody as a result of pre-trial incarceration.
4) That the cumulative effect of these factors is to place the appellant in a special category of offenders warranting a non-custodial sentence or at most a short and sharp imprisonment term, which is the norm in our Courts.

At the hearing before us however, Mr *Karuwa,* counsel for the appellant did not address on this point. The State has not addressed itself specifically to this contention by the appellant.

In his reasons for sentence the learned magistrate took into account the fact that the appellant was a first offender who had pleaded guilty to the charge. He also took into account that the appellant had not used the firearm to commit any offences and had only discharged the firearm when he was being chased by what he believed were members of the public and he was afraid of being harmed. The learned magistrate in the court *a quo* then went on to consider whether or not there were special reasons in not imposing the mandatory sentence.
In taking this approach, the learned magistrate could not be faulted. The appellant had been convicted of a statutory offence which called for a mandatory term of imprisonment in the absence of a finding of special reasons. Thus the discretion that normally is reposed in a judicial officer is removed where a mandatory term is prescribed. It is only in the event that a finding of special reasons is made that the judicial officer would then consider the mitigatory features and pass an appropriate sentence.
It was contended further on behalf of the appellant that the learned magistrate in the court *a quo* erred in holding that there were no special reasons or circumstances warranting the imposition of a less severe form of punishment. It was further submitted that the appellant not only pleaded guilty to the charge but told the court that he had found the firearm near a river in Mabelreign and picked it up, and that this fact was not disputed by the State. It was also submitted that the appellant had not gone on a spree of committing offences after he picked up the firearm and that he had used it only on the day of his arrest, when being pursed by police officers whom he did not know were such, and that importantly there was no injury or loss to human life from the use of the firearm.
Additionally, it was contended that the appellant initially thought that the firearm was a toy, and given that *bona fide* ignorance of some statutory provision has been held to constitute special circumstances, his belief should be so found. It was contended further that the appellant had intended to hand in the firearm to the police, albeit seven days after he had picked it up. Finally, it was contended that the appellant had spent 11 months in custody prior to being tried.
The State has, in heads of argument filed on its behalf, submitted that it is faced with some difficulty to make a meaningful response because a proper and thorough inquiry was not made to establish what the appellant intended to do with the firearm and why he retained it. Before us however

counsel for the State has submitted that the record did not reveal a lack of a proper inquiry there was no need for this Honourable Court to interfere with the sentence **as the finding that there no reasons could not be faulted**.

The appellant was legally represented at the trial. After the conviction the learned magistrate requested that he be provided with details on the following:

1) When had the appellant picked up the firearm in relation to the arrest.
2) Why he did not surrender it to the police.
3) Why he had the firearm on him in town.
4) How did he know how to discharge a firearm.

Counsel for the appellant indicated that, the appellant had picked up the firearm a week before his arrest and that he did not know that it was a firearm but thought it was a toy. He indicated further that he had placed it in his satchel where it remained until the day of his arrest. He said that when he was running away he fired it thinking it was a toy and intending to scare members of the public. He submitted that even the police thought it was a toy. He also submitted that the appellant was remorseful and had pleaded guilty. He referred the court to two authorities on special circumstances,. According to the record, the prosecutor made submissions to the court in rebuttal.

In my view, the approach of the learned magistrate cannot be faulted. He did not dispense with an inquiry into special circumstances. He requested for details on certain pertinent issues. He was not furnished with answers. The appellant's counsel at the time would surely have been aware of the need to furnish the court with all such information as would assist the court in finding special reasons. He chose not to advance special reasons to the court. That is not the fault of the magistrate.

In considering special circumstances, in this matter the learned magistrate took into account the following factors: (a) that he picked up the weapon; (b) that he did not use it to commit any other offence and only discharged it when he was in danger of being attacked by members of the public. The court also took into account that the appellant had said he had kept the firearm in his satchel for a week and had taken it to town in the satchel because he thought it was a toy. The learned magistrate was not persuaded that he thought the firearm was a toy. The court found that the appellant had cocked the firearm before discharging it and it also considered that the week he kept it, before surrendering it to the police was too long. The court found that there were no special reasons and therefore imposed a mandatory sentence of 5 years.

As to what constitutes special reasons SQUARES J in *S v Chisiwa* 1981 ZLR 667 stated at page 671:

> "It is most import, however, not to overlook the word 'special' in the section. The clear intention of the Legislature in using this word is that the reasons have to be out of the ordinary, either in their extent

> or their nature, and by definition, therefore, not all mitigatory factors may be special reasons. On the other hand if they are "special reasons" they will always be mitigatory whether they arise from the commission of the offence, or the facts and conditions affecting the offender. It should be clear from this that the court may have regard to factors arising either out of the commission of the offence or peculiar to the offender, as long as they are out of the ordinary. This will involve the making of a value judgment, since the question whether such reasons exist will often be a matter of degree. And, furthermore, by use of the plural 'reasons' it should be borne in mind that the Legislature clearly allowed for the cumulative effect of a number of reasons to be taken into account by the court in arriving at its decision."

In *S v Rawstron* 1982 (2) ZLR 221 DUMBUTSHENA J as then was, stated at 234 as follows:

> "[A] clear distinction must be drawn between special circumstances and mitigating features which go to the determination of quantum of sentence."

In the *S v Mbewe & Ors* 1988 (1) ZLR 7, the court went further to give a pointer as what could constitute special circumstances. At page 13 EBRAHIM J, as he then was, stated:

> "It is apparent that mitigating factors such as "good character" or "particular hardship", which are of general application, cannot be taken as "special circumstances". Neither, it would seem, would contrition as evidenced by a plea of guilty to the offence or co-operation on the part of the accused person constitute special reasons. However, where for example the accused was out of necessity compelled by circumstances to commit an offence, e.g. forced to drive whilst drunk because of urgent medical necessity, or was *bona fide* ignorant of some statutory provision of the law, such factors could constitute not only mitigating factors but "special circumstances" in the case. The above are offered merely as illustrations and are not intended as a closed list."

In *Nkosana v S* SC 143/95, the court found special reasons where the accused an unemployed villager had inherited a 303 rifle. The rifle had been abandoned for a lengthy period resulting in most of its metallic parts being corroded extensively and its original parts being replaced with homemade ones. His explanation for possessing it was that having inherited it from his father as a communal farmer he had used it to scare

away elephants and other animals from his fields. He had only realised in 1992 that the law required him to obtain a certificate. He also stated that it was his intention to apply for a certificate but that he had delayed in doing so.

> In *S v Mutowo* HH 458/88, the High Court on review found special reasons where the explanation of the accused, aged sixteen, was to the effect that he had wanted to play with the weapon and shoot birds.
> In *S v Mhiripiri* HH 163/88, the court on review, accepted that the accused an unsophisticated urban dweller who had acquired a **.**22 Browing Rifle in September 1984 for the purpose of protecting his crops from wild animals like baboons and wild pigs had established special reasons.
> In the court *a quo* it was submitted on behalf of the appellant that there were special reasons in the following respect:
> a) that the firearm was picked up a week before his arrest;
> b) that he kept it because he thought it was a toy – he did not actually know it was a firearm;
> c) that he had placed it in his satchel with the CDs which is why he had taken it to town;
> d) that he had only discharged the firearm in a bid to frighten what he thought were members of the public intent on harming him.

The appellant did not advise the court why he did not hand it over to the police, presumably because it would not have accorded with his belief that the firearm was in fact a toy.

> The learned magistrate did not accept that the appellant believed that it was a toy. The appellant cocked the rifle before firing. The magistrate was further not persuaded to believe the appellant, due to the fact that he did not state why he thought the firearm was a toy.
> The appellant is young, but not a juvenile. He is an urban dweller who would have an easy familiarity with toys. The firearm on the date of his arrest was loaded and apparently stashed somewhere on his person not his satchel. He cocked it before firing. I am not convinced that he believed the firearm to be a toy. The reasoning of the learned magistrate in failing to find special reasons cannot be faulted.
> The other factors such as his age, his marital status, the fact that he was in custody for 11 months prior to being tried are all factors of mitigation not special circumstances.

In the result, the appeal is without merit and is dismissed.

Kamocha J, I agree.