REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No. A 120/2011

In the matter between:

TONY KHOZA Appellant

versus

THE STATE Respondent

JUDGMENT

MEYER, J

[1] The regional court sitting in Boksburg convicted the appellant of unlawfully possessing a semi-automatic firearm (count 1) and of attempted murder (count 2), and he was sentenced to fifteen years' imprisonment on count 1 and to seven years' imprisonment on count 2. He now appeals against the sentences imposed upon him, having been granted leave by two judges of this division on petition.

[2] The provisions of s 51(2)(a) read with Part II of Schedule 2 to the Criminal Law Amendment Act 105 of 1997 (the Act) obliged the court below to impose a sentence of

15 years' imprisonment upon the appellant pursuant to his conviction of unlawfully possessing a semi-automatic firearm, unless the court below found that substantial and compelling circumstances existed that justified the imposition of a lesser sentence than the one prescribed. The charge sheet in this instance makes no reference to the provisions of the Act insofar as the charge of attempted murder is concerned and it also does not appear from the record that the appellant or his legal representative was aware of its provisions that are applicable to attempted murder. The court below accordingly, in my view correctly, did not apply the provisions of the Act in sentencing the appellant pursuant to his conviction of attempted murder. See: *S v Legoa* 2003 (1) SACR 13 (SCA), paras 18 – 21.

[3] A review of the applicable case law is not necessary. By now it is trite that the starting point for a court in considering an appropriate sentence for an accused person who has been convicted of an offence for which a minimum sentence is prescribed in terms of the Act, such as the appellant's conviction of unlawfully possessing a semi-automatic firearm, is the prescribed minimum sentence. In considering whether or not substantial and compelling circumstances exist, which would justify the imposition of a lesser sentence than the prescribed one, a court is enjoined to apply the traditional objectives of punishment - prevention, retribution, deterrence, and rehabilitation - and to weigh the personal circumstances of an accused person against the crime committed by him or her and the legitimate interests of society.

[4] The appellant was 25 years old at the time of sentencing. He was single and employed as a taxi-driver by his stepfather. He was a first offender. A reading of the record of the proceedings in the court below shows that these are the only

circumstances and factors that favoured the appellant. In my view the court below correctly did not take the time that he had spent in custody pending the finalisation of his criminal trial into account in sentencing him since his incarceration was of his own making. His initial release on bail was withdrawn, because he had failed to appear in court.

[5] The offences of which the appellant have been convicted are serious. Armed with a semi-automatic firearm with an obliterated serial number, the appellant and his companions made their way into the sanctity of a private residential estate. The appellant did not hesitate to fire three shots at or in the direction of a security guard. The firearm was in the ready position for immediate shooting when it was seized from his possession.

[6] Our country suffers an unacceptable and distressing incidence of violence and the commission of violent crimes, such as the one of attempted murder of which the appellant was convicted.

[7] In *S v Makwanyane and Another* 1995 (2) SACR 1 (CC), para 117, Chaskalson P said the following about the level of violent crime that existed in our country at the time of that judgment in 1995:

> 'The level of violent crime in our country has reached alarming proportions. It poses a threat to the transition of democracy, and the creation of development opportunities for all, which are primary goals of the Constitution. The high level of violent crime is a matter of common knowledge and is amply borne out by the statistics provided by the Commissioner Police in his amicus brief. The power of the State to impose sanctions on those who break the law cannot be doubted. It is of fundamental importance to the future of the country that respect for the law should be restored, and that dangerous criminals should be apprehended and dealt with firmly.'

[8] Fifteen years later, Ponnan JA described the present day crime situation as follows in *S v Matyityi* 2011 (1) SACR 40 (SCA), para 23:

> 'Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow the words from Malgas, it still is 'no longer business as usual'.'

[9] In *S v Thembalethu* 2009 (1) SACR 50 (SCA), para [11], Kgomo AJA said the following about the legislature's intervention in prescribing the minimum sentence of fifteen years' imprisonment for the unlawful possession of a semi-automatic firearm:

> 'It may well be so that one of the consequences of the Criminal Law Amendment Act is that the unlawful possession of, for example, a pump-action shotgun may entail a more lenient sentence than the unlawful possession of a semi-automatic firearm this does not result in an absurdity. The singling-out of semi-automatic firearms may well have been the result of the frequency with which these firearms have been used in violent crimes.'

[10] I am in all the circumstances satisfied that the court below was justified in its conclusion that no substantial and compelling circumstances justifying the imposition of a lesser sentence than the prescribed one for the appellant's conviction of unlawfully possessing a firearm were present. A departure from the prescribed minimum sentence was, in my view, not justified in this case. I am also satisfied that the sentence of 7 years' imprisonment for the appellant's conviction of attempted murder is an appropriate one in all the circumstances.

[11] I am, however, of the view that there is one respect in which the court below misdirected itself. Insufficient weight was given to the cumulative effect of the sentences of 15 years' and of 7 years' imprisonment. An effective sentence of 22 years' imprisonment is not proportionate to the appellant's personal circumstances, the crimes that he has committed, and the legitimate interests of society. The court below should in

all the circumstances have ordered that 4 years of the 7-year sentence imposed in respect of the count of attempted murder should run concurrently with the sentence of 15 years' imprisonment on the count of unlawfully possessing a semi-automatic firearm, thereby tempering the effective term of imprisonment, which would otherwise have been too harsh a sentence.

[12] I am accordingly of the view that the appeal should partially succeed, and that the following order should be made:

1. The appeal against the sentence imposed upon the appellant pursuant to his conviction of unlawfully possessing a semi-automatic fire-arm is dismissed.
2. The appeal against the sentence imposed upon the appellant pursuant to his conviction of attempted murder is dismissed.
3. It is ordered that 4 years of the sentence imposed upon the appellant pursuant to his conviction of attempted murder is to run concurrently with the sentence of 15 years' imposed upon him pursuant to his conviction of unlawfully possessing a semi-automatic fire-arm.
4. The appellant is accordingly sentenced to an effective term of imprisonment for eighteen years pursuant to his conviction of unlawfully possessing a semi-automatic fire-arm and pursuant to his conviction of attempted murder.

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P.A. MEYER

JUDGE OF THE HIGH COURT

MAKHANYA, J

I agree with my brother Meyer J. It is so ordered.

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G.M. MAKHANYA
JUDGE OF THE HIGH COURT

21 November 2011