IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***23rd February 2017*** Signature: _____

CASE NO: A270/2016

DPP REF NO: 10/2/5/1-(2016/0420)

DATE: 23rd February 2017

In the matter between:

FANAMEVA, LESEDI First Appellant

SITHEMBE, SIBUSISO Second Appellant

and

THE STATE Respondent

JUDGMENT

ADAMS J:

[1]. The appellants, who were legally represented, were charged in the Regional Court of Orlando, with 4 (four) counts, namely 1 (one) count of unlawful possession of a *9mm Vector* semi – automatic pistol firearm *('the Vector pistol')*, 1 (one) count of unlawful possession of 8 live rounds of ammunition, 1 (one) count of unlawful possession of a *Norinco 9mm* semi – automatic pistol firearm *('the Norinco pistol')* and 1 (one) count of unlawful possession of 8 live rounds of ammunition. The appellants pleaded not guilty to all of the charges and elected not to give any statements and / or plea explanations in terms of the provisions of section 115 of the Criminal Procedure Act 51 of 1977 *("the CPA").*

[2]. On the 20th July 2011 the first appellant was convicted on counts 1 and 2, and on the 23rd November 2011 he was sentenced as follows:

2.1 Count 1 (unlawful possession of the *Vector* pistol): 15 years' imprisonment; and

2.2 Count 2 (unlawful possession of ammunition): 2 years imprisonment;

The sentences on counts 1 and 2 were ordered to run concurrently, resulting in an effective sentence of 15 years direct imprisonment. In terms of section 276B(2) of the CPA the court *a quo* fixed a non – parole period of 8 (eight) years with respect to the effective period of incarceration.

[3]. On the 20th July 2011 the second appellant was convicted on counts 3 and 4, and on the 23rd November 2011 he was sentenced as follows:

3.1 Count 3 (unlawful possession of the *Norinco* pistol): 15 years' imprisonment; and

3.2 Count 4 (unlawful possession of ammunition: 2 years imprisonment;

The sentences on counts 3 and 4 were ordered to run concurrently, resulting in an effective sentence of 15 years direct imprisonment. In terms of section 276B(2) of the CPA, the court *a quo* fixed a non – parole period of 8 (eight) years with respect to the effective period of incarceration.

[4]. This is an appeal by the appellants against the convictions and sentences in relation to counts 2 and 4, and is with the leave of this court after a petition by the appellants. The appellants had also petitioned this court for Leave to Appeal against their convictions and sentences on counts 1 and 3, but such leave was refused.

[5]. I interpose here to mention that at the commencement of the hearing of the appeal, Ms Brits, who appeared on behalf of the appellants, applied for a postponement of the hearing of the appeal. The application for a postponement was premised on the grounds that certain portions of the record were missing as they had seemingly not been transcribed. It was submitted by Ms Brits that the missing portions of the record are vital to the adjudication of the appeal.

[6]. In *S v Chabedi,* 2005 (1) SACR 415 (SCA) Brandt JA set out the applicable principles relating to incomplete appeal records as follows:

> *'[5] On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that was*

said at the trial. As has been pointed out in previous cases, records of proceedings are often still kept by hand, in which event a verbatim record is impossible (see eg S v Collier, *1976 (2) SA 378 (C) 379A-D and* S v S, *1995 (2) SACR 420 (T) 423b-f).*

[6] The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, inter alia*, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal.'*

[7]. The contention on behalf of appellants that the shortcomings in the record rendered a proper consideration of the appeal difficult, if possible at all, was based on the submission that the evidence of a State witness, one Ruth Sebolai, which was not transcribed at all, would play an important role in the outcome of this appeal. An assessment and an evaluation of her evidence, so it was submitted, would be of assistance to us in deciding the appeal. We do not agree with this submission for the simple reason that it is factually incorrect. It appears from a perusal of the transcript of the record that the evidence of the said witness was in fact transcribed in its totality, inclusive of her evidence in chief and her evidence under cross – examination.

[8]. As indicated and expounded on below the nature of the issues to be decided on appeal is fairly crisp and in the main based on facts which are not in dispute. These issues can, in our view, be determined on the record as it stands, and the defects in the record will have no effect on a proper adjudication of the disputes in this appeal. Furthermore, the matter in the court *a quo* was finalised during 2011, and it is unlikely that it would be possible to reconstruct and rectify the appeal record at this stage. The interest of justice would accordingly not have been served by a postponement of the appeal.

[9]. In these circumstances we held that the appellants' request for a postponement should be refused.

[10]. The appeal turns on the very limited issue relating to whether or not the state had proven beyond a reasonable doubt that the appellants were in possession of the ammunition. It was submitted on behalf of the appellants that if regard is had to a number of discrepancies in the evidence of the arresting metro police officers relating to the alleged possession of the ammunition, coupled with the fact that the said police officers were relatively inexperienced as far as firearms and ammunition go and no ballistics reports were produced to prove that the bullets were *'ammunition'* as defined, it cannot be said beyond a reasonable doubt that the appellants were guilty of unlawful possession of ammunition.

[11]. The discrepancies complained of on behalf of the appellants are the following: one of the metro police officers who confiscated the firearms from the appellants at some point during his evidence said that there were 9 rounds of ammunition in the gun he booked in, whilst at some stage he alleged that there were 8 rounds. The investigating officer found that the one gun had 8 rounds of ammunition and the other 7 rounds, when he booked the firearms out on the 24th February 2009. This accords with the testimony of the arresting metro police officers, except for the evidence in chief of the first officer, who said that there were 9 rounds of ammunition in the firearm he took from one of the appellants. This discrepancy, in my view, is not material and should not detract from the uncontested versions of the two metro police officers. In any event, the evidence of the one police officer clearly points to a *bona fide* mistake in his evidence, which in chief went as follows: *'There were like 9 rounds in the firearm, 7 rounds in the magazine and one in the chamber, which we counted out in front of the suspect'.* This, as I said, is clearly a slip of the tongue, and I do not read anything into it. This same officer explains under cross examination

that what he meant was that the 8 rounds he referred to was in fact that *'all and all'* there were 8 rounds, with one of those 8 in the chamber.

[12]. Ms Brits, Counsel for the appellants, also argued that the whole process by which the bullets were removed and checked at the police station was flawed in that the bag or bags were not properly sealed and marked. This resulted in a break in the link between the bullets produced at the police station on the night of the crime and subsequently when they were removed by the investigating officer. Her argument is strengthened, so it was submitted by her, by the evidence of Warrant Officer Mathebula, who was the investigating officer in the matter, to the effect that, when he booked the firearms out at the Diepkloof Police Station on the 24th February 2009, the crimes having been committed on the 29th December 2008, he found that the one pistol had 7 rounds and the other one 8. He then packaged, sealed and marked separately, as required by proper procedure, each of the two firearms, without its ammunition, in 2 separate exhibit bags, which were each allocated its own seal number. He confirmed that when he booked out the guns and the ammo it had not been sealed, and was supposed just lying loose in the *'SAP13'* store in Diepkloof.

[13]. His intention on the 24th February 2009 was to take the firearms to Pretoria for a ballistics investigation. The ammunition was not taken to Pretoria, as they (being the police) *'do not usually send ammunition'* for ballistic assessment. He was subsequently provided with a Ballistics Report in the form of an affidavit in terms of section 212 of the Criminal Procedure Act 51 of 1977. There was no Ballistics Report relating to the ammunition, and, so the argument goes, there cannot be certainty that the *'bullets'* found in the guns were in fact *'ammunition'* as defined in the Firearms Control Act 60 of 2000 *('the Act')*. Also, so it was submitted, the fact that the ammunition was not bagged and sealed separately on or

about the 29th December 2008, gives rise to doubt whether the ammunition found by him on the 24th February 2009 was the same as the bullets found in the possession of the appellants.

[14]. The uncontested and unchallenged evidence by the two Metro Police officers was that the first and the second appellants were each found in possession of a number (ranging between 7 and 9) of rounds of ammunition. At no stage was it suggested to them that what was found by them was not *'ammunition'* as defined in the Firearms Control Act. Their evidence is corroborated by the Investigating Officer, who confirmed that approximately 2 months later he uplifted from the SAP13 storeroom the firearms and the 15 rounds of ammunition. He too was not challenged on his testimony that the bullets were *'ammunition'* as defined. The ammunition was found in the two firearms, which, as per the section 212 affidavit, were in good and proper working condition. The affidavit read as follows:

> *'5.1 The pistols mentioned in 3.1 & 3.2 functions (sic) normally without any obvious defects'.*

[15]. In *S v Sehoole*, 2015 (2) SACR 196 (SCA), the SCA had this to say in relation to the proof of a charge of unlawful possession of ammunition:

> *'[19] The State adduced ballistics evidence in the form of an affidavit in terms of section 212 of the CPA concerning the firearm in question. It will be recalled that Kladie had testified about the ammunition he had found in the firearm. Whilst it is undoubtedly so that a ballistic report would provide proof that a specific object is indeed ammunition, there is no authority compelling the State to produce such evidence in every case. Where there is acceptable evidence disclosing that ammunition was found inside a properly working firearm, it can, in the absence of any countervailing evidence be deduced to be*

ammunition related to the firearm. Needless to say, each case must be judged on its own particular facts and circumstances.

[20] In the light of what I have stated above, it follows that the high court erred in finding that a ballistic report was the only manner of proving that the offence was committed'.

[16]. Applying these principles *in casu* I am satisfied that the State had proven beyond a reasonable doubt that the appellants were guilty of contravening the provisions of section 90 of the Firearms Control Act in that they were in unlawful possession of ammunition as defined in the Act. I regard the evidence of the two Metro Police Officers, together with the testimony of the Investigating Officer and the section 212 Affidavit, as *'acceptable evidence disclosing that ammunition was found inside a properly working firearm'.* Furthermore, there most certainly is no countervailing evidence. Therefore, it can safely be deduced that the bullets were ammunition which related to the two firearms.

[17]. What is important is the overall picture. The version of the State and the facts as testified to by its witnesses have been accepted. On that version, the State has proven, in my view, that the appellants were in possession of ammunition as defined. I am of the view that the Regional Magistrate, after considering all the probabilities and improbabilities and particularly the fact that there is no onus on the appellants to convince the court of the truth of their explanation, correctly held that the evidence of the appellants was inherently improbable and false beyond a reasonable doubt.

[18]. I am accordingly unable to find any reason for disturbing any of the factual findings made by the court *a quo*. The case against the appellants was overwhelming and they were accordingly correctly convicted. It follows that the appeal against the convictions must fail.

[19]. I now turn to deal with sentence. It is trite that an appeal court can interfere with sentence only where the sentence is affected by an irregularity or misdirection entitling this court to interfere.

[20]. The court below had regard to the personal circumstances of the appellants, who both had previous convictions of crimes of a violent nature. The first appellant had previously been convicted of two counts of robbery and attempted murder. The second appellant was previously convicted of robbery, possession of an unlicensed firearm and unlawful possession of ammunition.

[21]. The first appellant was 33 years old at the time when the sentence was imposed on him. He is married, but does not have any children. Two of siblings are alleged to be dependent on him. His highest level of education is grade 11. The second appellant was 33 years old when he was sentenced and he also does not have any children. His elderly father and his siblings are dependent on him.

[22]. The offences committed by the appellants are of a serious nature, and are regarded as prevalent in the area of jurisdiction of the court a quo. The appellants appear to have shown no remorse for their actions.

[23]. I am satisfied that the learned regional court magistrate properly considered the triad of factors relevant to sentencing, namely the nature of the offence, the personal circumstances of the appellants, including their moral blameworthiness and the interests of society. The appeal against sentence therefore stands to be dismissed.

[24]. There is one other aspect, although not before us, in respect of which we feel obligated to express our disquiet. That relates to the order which the Learned Magistrate made in terms of section 276B(2) of the CPA to the effect that a *'non – parole period'* of 8 (eight) years was fixed in relation to the effective period of incarceration. The 8 year non – parole period obviously related to the sentence of 15 years imprisonment imposed on each of the appellants in respect their convictions on the charges of unlawful possession of firearms. The difficulty we have with the order is that the fixing of a non-parole period was part of the criminal trial and the court *a quo,* in accordance with the dictates of a fair trial, ought to have given the appellants notice of the court's intention to invoke s 276B of the CPA. The appellants had to be heard before such non-parole period was fixed, and the failure on the part of the Magistrate to do so amounted to a misdirection by that court. In that regard, see *S v Gcwala,* 2014 (2) SACR 337 (SCA)*, S v Mthimkhulu,* 2013 (2) SACR 89 (SCA), S v *Stander,*2012 (1) SACR 537 (SCA). In *Jimmale and Another v S,* [2016] ZACC 27 (30 August 2016), the Constitutional Court held that a non – parole period should only be ordered in exceptional circumstances.

[25]. Furthermore, the failure by the Magistrates Court to give reasons for its judgment on sentence in respect of the invocation of s 276B was highly prejudicial to the accused. We are therefore of the view that the dictates of a fair trial require that order to be set aside and the matter remitted to the court *a quo* to afford the parties an opportunity to address it. Unfortunately, since the non – parole period relates to the sentences of 15 years imprisonment in respect of which Leave to Appeal was refused by this Court, we are not at liberty to intervene.

[26]. The aforegoing is of concern to us.

[27]. In the circumstances, I make the following order:

1. The first and second appellants' appeal against their convictions and sentences is dismissed.

L R ADAMS J
Judge of the High Court
Gauteng Local Division, Johannesburg

I agree,

T V RATSHIBVUMO AJ
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	21st February 2017
JUDGMENT DATE:	23rd February 2017
FOR THE APPELLANT:	Ms Y J Britz
INSTRUCTED BY:	Legal Aid South Africa, Johannesburg
FOR THE RESPONDENT:	Adv E N Makua
INSTRUCTED BY:	Office of the Director of Public Prosecutions