REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL CASE NO: A301/2017
COURT A QUO CASE NO: 463/2017

DELETE WHICHEVER IS NOT APPLICABLE
1. REPORTABLE: YES/NO
2. OF INTEREST TO OTHER JUDGES: YES/NO
3. REVISED

DATE: 25/3/19 SIGNATURE:

In the matter between:

LESTITSA TLADI Appellant

and

THE STATE Respondent

JUDGMENT

WEINER, J

Introduction

[1] The appellant in this matter has brought an appeal against the sentence imposed on him by the Magistrate's Court, Soweto.

[2] On 14 May 2013, the appellant was convicted of the following offences by the court a quo:

2.1. Count 1: attempted murder – for which he was sentenced to 8 years' imprisonment.

2.2. Count 2: the unlawful possession of an unlicensed firearm – for which he received 20 years' imprisonment.

2.3. Count 3: the unlawful possession of ammunition – for which he received a 3 year sentence of imprisonment.

[3] The court a quo ordered that the sentence for count 3 run concurrently with the sentence imposed for count 2. The appellant was effectively sentenced to 28 years of imprisonment.

[4] The appellant argues for a reduction of sentence and submits that the following sentence would be appropriate in the circumstances of the case:

4.1. Six years' imprisonment for the attempted murder;

4.2. Fifteen years' imprisonment for the unlawful possession of an unlicensed firearm; and

4.3. Three years' imprisonment for the unlawful possession of ammunition, with all the sentences to run concurrently with each other. The effective sentence would amount to 15 years' imprisonment.

[5] The State opposed the appeal against the sentence.

Factual background

[6] On 5 June 2011, the appellant had attended a gathering at the home of a certain Mr Mtimkhulu, together with the complainant.

[7] The appellant borrowed the car of the complainant to go purchase liquor, but only returned approximately 3 hours later.

[8] The complainant decided to leave but could not find his vehicle. The complainant and appellant confronted one another and argued. The complainant contacted a friend of his in order to make arrangements for the appellant's vehicle to be removed from his parents' home. The appellant left and returned with a firearm.

[9] According the complainant's version, which was accepted by the court a quo, the appellant wanted to find out where his vehicle was located. The complainant refused to tell the appellant and the appellant shot the complainant in the lower leg. He continued to point his firearm at the complainant, threatening to 'finish him off' if he did not reveal where the appellant's car was. The complainant told the appellant where the car was. The appellant left to retrieve his car and returned. The appellant then agreed to take the complainant to hospital and asked him to say that he had been shot during the course of a robbery.

Sentence of the court a quo

[10] The court a quo considered the following factors in respect of sentencing the appellant:

10.1. That the appellant was not a first offender. He had previous convictions for attempted murder and the unlawful possession of an unlicensed firearm, for which he served a sentence of imprisonment.

10.2. That the appellant had been declared unfit to possess a firearm.

10.3. That the appellant had spent 23 months in custody prior to conviction.

10.4. That the appellant was provoked by the complainant.

10.5. That the intoxication of the appellant could not be taken into account as a mitigating factor, given that there was insufficient evidence to determine the degree to which it influenced the appellant.

Arguments of the appellant on appeal

[11] The appellant argues that the severity of the cumulative sentence induces a sense of shock and must be set aside. The appellant contended that it is necessary to view the circumstances of the incident and the sentences holistically, and reduce the sentence accordingly. The Court should take account of the fact that the consumption of liquor by the parties played a major role in the incident, and the fact that the appellant had been unnecessarily provoked by the complainant.

[12] The appellant further states that the Magistrate merely paid lip service to the concept of mercy in sentencing. The appellant also argues that the Magistrate over-emphasised the seriousness of the offence and the interests of the community in determining the appropriate sentence for count 2.

[13] With regard to the appellant's previous convictions, it was argued that the Court must take account of the fact that a number of the previous convictions are outdated, as they are from 15 years ago.

[14] At the hearing, the appellant argued that the minimum sentencing legislation – i.e. the applicable provisions of the Criminal Law Amendment Act 105 of 1997 (the CLA) – was not explained to the appellant in respect of count 2. No reference was made in the charge sheet to the minimum sentencing legislation and this constitutes an irregularity in the proceedings.

[15] Further, the appellant argued that in order for the State to be able to rely on the minimum sentencing legislation in respect of count 2, it had to prove that the firearm was a semi-automatic weapon. The appellant submitted that the State failed to do so.

[16] The appellant did not seek to overturn the sentence imposed in respect of count 3, the unlawful possession of ammunition.

Arguments of the State on appeal

[17] The State asserted that the appeal must be partially upheld. It conceded that the trial court had erred in sentencing the appellant to more than 15 years' imprisonment for the unlawful possession of an unlicensed firearm. It submitted that the maximum prescribed sentence for the offence is 15 years' imprisonment.

[18] The trial court imposed 20 years' imprisonment in respect of count 2, and the State called attention to the fact that the Magistrate had invoked the incorrect legislation in doing so. The Magistrate relied on section 25(1)(a) of the CLA, which applies to mental patients, and not to the appellant's case.

[19] The State disagreed with the submission made by the appellant that it had not proved that the weapon was a semi-automatic firearm. It relied on the ballistics report, in which it is clear, *ex facie*, that the weapon was a semi-automatic firearm. However, it stated that this was only relevant insofar as it sought to rely on the minimum sentencing provisions contained in the CLA – which it did not. In this regard, the State conceded that the minimum sentencing legislation had not been explained to the appellant, and therefore the State would not seek such sentence in terms of the CLA.

[20] Therefore, the State submitted that the applicable legislation in respect of count 2 – i.e. the contravention of section 3 of the Firearms Control Act 60 of 2000 (the FCA) – is section 121 of the FCA read with Schedule 4 thereof, which provides for a maximum of 15 years' imprisonment.

[21] The FCA is silent in respect of what sentence applies to first and second offenders. The State submitted that ordinarily, the maximum sentence is not imposed in respect of first offenders. However, in the present circumstances the maximum sentence should apply, as the appellant has a previous conviction for the unlawful possession of an unlicensed firearm, and had been declared unfit to possess a firearm.

[22] In respect of count 1 – attempted murder – the State argued that the *minimum* sentence to be imposed in respect of a second offender is 7 years' imprisonment. In this regard it relies on section 51 read with Part IV of Schedule 2 of the CLA together with Schedule 1 of the Criminal Procedure Act 51 of 1977 (the CPA).

22.1. Schedule 1 of the CPA includes murder and '*any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.*' The State submits that this encompasses the offence of attempted murder.

22.2. Section 51 of the CLA provides as follows:

Discretionary minimum sentences for certain serious offences.-

(1) ...

(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-

(a) ...

(b) ...

(c) Part IV of Schedule 2, in the case of-

(i) a first offender, to imprisonment for a period not less than 5 years;

(ii) a second offender of any such offence, to imprisonment for a period of not less than 7 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years;...

(d) ...

Provided that the maximum term of imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of

imprisonment that it must impose in terms of this subsection by more than five years. [Emphasis added.]

[23] Part IV of Schedule 2 lists the following offences:

Any of the following offences, if the accused had with him or her at the time a firearm, which was intended for use as such, in the commission of such offence

...

An offence involving assault, when a dangerous wound is inflicted with a firearm, other than an offence referred to in Part I, II or III of this Schedule...

[24] The State rejected the appellant's submission that the commission of the offences be treated as one incident. It argued that they were distinct offences. In this regard, it stated that the offence of the unlawful possession of an unlicensed firearm cannot be limited to the incident in question. The appellant could have been in possession of the firearm for longer. However, the State did not prove this.

[25] The State further rejected the appellant's argument that the previous convictions are outdated and should not be taken into account. It stated that although s 271A of the CPA provides that certain convictions fall away after the expiration of 10 years, the section did not apply to certain of the previous convictions of the appellant. The offences in question fall outside the ambit of the provision and must be taken into account for purposes of sentencing.

[26] The State submitted that the Court must take account of the following factors in respect of sentencing:

26.1. The appellant's previous convictions;

26.2. That the appellant shot the complainant at close range; and

26.3. That the appellant attempted to flee from the police when they effected the arrest.

[27] Initially, in its heads of argument, the State submitted that the appropriate sentence would be an effective sentence of 25 years' imprisonment. At the hearing, the State submitted that the following sentence would be appropriate in the circumstances:

27.1. Count 1 – 7 years' imprisonment;

27.2. Count 2 – 15 years' imprisonment;

27.3. Count 3 – 3 years' imprisonment.

[28] It stated that the sentences for counts 2 and 3 should run concurrently, with the effective sentence amounting to 21 years' imprisonment. In the alternative, it argued that the Court order that the sentence for counts 2 and 3 run concurrently with half the sentence imposed for count 1 – an effective sentence of 18 years' imprisonment.

Considerations for the Court:

[29] The Court is called upon to determine whether to uphold the sentence imposed by the court a quo. In particular, it is necessary for the Court to determine the following:

29.1. Whether the sentence for count 1, attempted murder, should be upheld. In this regard the following considerations are applicable: the personal circumstances of the appellant; whether the intoxication of the appellant at the time of the incident should be taken into account as a mitigating factor; that the appellant was provoked by the complainant; and the fact that the appellant has a previous conviction of attempted murder. The Court must also determine whether the sentence, or part of the sentence, should run concurrently with counts 2 and/or 3.

29.2. The legislation applicable to count 2, and the sentence to be imposed in terms thereof. The sentence of the Magistrate must be set aside, as the incorrect sentencing legislation was relied upon. In order to determine an appropriate sentence, the following must be considered: the fact that the minimum sentencing legislation was not explained to the appellant (even though he had legal representation); whether the State proved that the weapon was a semi-

automatic firearm, and the relevance of such a finding on sentencing; the fact that the appellant has a previous conviction for the unlawful possession of a firearm without a licence; and the fact that the appellant was previously declared unfit to possess a firearm.

Sentence in respect of count 2 – the unlawful possession of an unlicensed firearm

[30] The Magistrate imposed the 20 year sentence of imprisonment based on section 25(1)(a) of the CLA. Section 25(1)(a) '*Amends section 30 of the Mental Health Act, No. 18 of 1973, as follows:- paragraph (a) substitutes subsections (1) and (2); and paragraph (b) deletes subsection (7).*'

[31] The Magistrate erred in respect of the sentence imposed for count 2 and the sentence must be set aside.

[32] The State concedes that the Minimum Sentences Legislation is not applicable and that s 3 and s 121 of the FCA are applicable. It thus relies on s 121, read with Schedule 4, which provides for a maximum sentence of 15 years' imprisonment for the contravention of s 3.

32.1. Section 3 provides as follows:

> ***3. General prohibition in respect of firearms and muzzle loading firearms.—***
>
> *(1) No person may possess a firearm unless he or she holds for that firearm—*
>
> > *(a) a licence, permit or authorisation issued in terms of this Act; or*
> >
> > *(b) a licence, permit, authorisation or registration certificate contemplated in item 1, 2, 3, 4, 4A or 5 of Schedule 1.*
>
> *(2) ....*

32.2. Section 121, titled 'Penalties' provides that—

Any person convicted of a contravention of or a failure to comply with any section mentioned in Column 1 of Schedule 4, may be sentenced to a fine or imprisonment for a period not exceeding the period mentioned in Column 2 of that Schedule opposite the number of that section.

32.3. Schedule 4 provides for a maximum period of imprisonment of 15 years for a contravention of section 3 of the FCA.[1]

[33] In *S v Thembalethu*,[2] the SCA provided clarity on the sentencing provisions for the unlawful possession of an unlicensed semi-automatic firearm. The appellant in that matter had challenged the sentence of 15 years' imprisonment imposed for the possession of the unlicensed semi-automatic firearm.[3] The sentence had been imposed in accordance with section 51(2)(a) read with Part II of Schedule 2 of the CLA. The appellant contended that these sentencing provisions were not applicable to his case.

[34] The SCA stated that once it is proven or admitted that a firearm is a 'semi-automatic', the sentencing provisions of the CLA are triggered.[4] In considering s 51(2) of the CLA, it found that the use of the phrase '*[N]otwithstanding any other law*' is a clear indication that the provisions supersede all other laws on sentence in respect of offences listed in Part II of Schedule 2 of the Act (which includes offences relating to the possession of a semi-automatic firearm).[5] It stated that wording of the section is peremptory and unambiguous, and that the minimum sentence must be applied – although a court may justify a departure from the minimum sentence where there are 'substantial and compelling circumstances'.[6]

[35] In *Thembalethu*, the charge sheet did not refer to the provisions of the CLA. However, the SCA found that it was evident from the record that the appellant's legal representative was aware of its provisions.

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[1] Schedule 4 has been substituted by section 53 of the Firearms Control Amendment Act 28 of 2006, but the provision is not operational as it has not yet been proclaimed.
[2] *S v Thembalethu* (343/07) [2008] ZASCA 9 (20 March 2008).
[3] The accused had been convicted in terms of section 2, read with sections 1, 39 and 40 if the Arms and Ammunition Act 75of 1969, which has been repealed.
[4] *S v Thembalethu* (note 2 above) para 7.
[5] Ibid para 6.
[6] Ibid paras 6 and 17.

[36] The SCA further determined that it was common cause that the firearm was a semi-automatic weapon, and it was clear that the appellant was aware of the type of firearm he was in possession of. Given the facts of the case, the SCA was not called upon to decide the question of whether the appellant must have knowledge of the 'semi-automatic' nature of the firearm. It sentenced the appellant in accordance with the provisions of the CLA.

[37] Thus the SCA distinguished the matter from the case of *S v Peterson*,[7] a decision by the full court of the Cape Provincial Division. In that matter, the State had failed to draw the attention of the accused to the fact that a conviction of an offence relating to the possession of a semi-automatic firearm has a prescribed minimum sentence of 15 years' imprisonment in terms of the CLA. The High Court stated that the accused must be made aware the implications of the offence prior to conviction. In this regard it quoted *S v Ndlovu*[8] with approval, wherein it was stated:

'"*To ensure a fair trial it is advisable and desirable, highly desirable in the case of an undefended accused, that the charge sheet should refer to the penalty provision. In this way it is ensured that the accused is informed at the outset of the trial, not only of the charge against him, but also of the State's intention at conviction and after compliance with specified requirements to ask that the minimum sentence in question at least be imposed.*"[9]

The enquiry...is whether, on a vigilant examination of the relevant circumstances, it can be said that an accused had a fair trial. And I think that it is implicit in these observations that where the State intends to rely upon the sentencing regime created by the Act a fair trial will generally demand that its intention pertinently be brought to the attention of the accused at the outset of the trial, if not in the charge-sheet then in some other form, so

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[7] *S v Peterson* 2006 (1) SACR 23 (C).
[8] *S v Ndlovu* (75/2002) [2002] ZASCA 144 (27 November 2002)
[9] As stated in *S v Seleke en Andere* 1976 (1) SA 675 (T) at 682H and quoted with approval by Cameron JA in *S v Legoa* 2003 (1) SACR 13 (SCA).

that the accused is placed in the position to appreciate properly in good time the charge that he faces as well as its possible consequences.'[10]

[38] In *Peterson*,[11] the Court made the following finding:

'*In the present case there is a marked absence of any attempt on behalf of the State to draw the attention of the accused to the importance of being convicted of an "offence relating to . . . the possession of an automatic or semi-automatic firearm". In terms of Part II of Schedule 2 of Act 105 of 1997 the conviction of any such offence renders an accused liable to the imposition of a minimum sentence prescribed in s 51(2)(a) of that Act. The implications of such a sentence were neither brought to the attention of the accused in the charge-sheet, nor at the outset of the trial when the accused was asked to plead nor at the time when the accused's representative made certain admissions, including that the firearm found in the possession of the accused was a semi-automatic firearm. Furthermore, other than an inference to be drawn from an admission that the Bersin Model 83 pistol was a semi-automatic pistol, no evidence was tendered which proved that the accused was aware that he was in possession of a semi-automatic weapon.*'[12]

[39] Further, the Court also found that the State must provide evidence that the appellant was aware that he was in possession of a 'semi-automatic' weapon. It stated that –

'*...Given the consequences which follow from a conviction of an offence relating to possession of a semi-automatic firearm, the State is obliged to prove the existence of the necessary mental element of the crime of such possession.*'[13]

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[10] *S v Ndlovu* (note 8 above) para 12. See also *Ndlovu v The State* (204/2014) [2014] ZASCA 149 (26 September 2014) for a discussion on the applicability of a prescribed minimum sentence where it is not set out in the charge sheet. The SCA held that the overarching consideration is whether or not the accused's right to a fair trial was infringed on by the omission.

[11] S v Peterson (note 7 above).

[12] Ibid at 27H-C.

[13] Ibid at 27E-F. It referred to *S v Adams* 1986 (4) SA 882 (A) at 891H in which Corbett JA stated '...the *onus* is clearly on the State to prove that the accused person was in possession of a dangerous weapon, and this *onus* would include the burden of establishing beyond a reasonable doubt the existence at the relevant time of this mental element.'

[40] The High Court concluded as follows:

'*... the State failed both in its formulation of the charge-sheet and at any other time during the presentation of its case prior to conviction to alert the accused to the implications of a conviction of the unlawful possession of a firearm where such conviction would bring the provisions of s 51(2)(a) into play.*

To that extent I am satisfied that it would not be fair to subject the accused to the provisions of s 51(2)(a). It does not follow, however, that the proceedings against the accused should be vitiated. He was charged with being in possession of a firearm and correctly found guilty on that charge.

This conviction means that the sentencing process falls outside of the scope of the provisions of s 51(2)(a)(i) of the Act read together with Schedule 2, Part II thereof.

For these reasons, the entire process of sentencing of the accused must begin afresh. In my view, the new process of sentencing must take account of what is an appropriate sentence...'[14]

[41] The Court in *Peterson* set the sentence aside and remitted the case to the trial magistrate for a reconsideration of sentence.

[42] In the present case, the court a quo did not refer to the applicability of the CLA in respect of count 2.

[43] However, the appellant was found to be in possession of a 9mm Norinco Pistol. In his section 212 affidavit (the 'Ballistics Report'), Warrant Office A.Z. Nthaudi states that he received a '*9mm PARABELLUM CALIBRE NORINCO MODEL NZ 75 SEMI-AUTOMATIC PISTOL, SERIAL NUMBER OBLITERATED AND MARKED IT 107075/11 WITHOUT A MAGAZINE.*' The pistol was found to be '*self-loading, but not capable of discharging more than one shot with a single depression of the finger.*'

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[14] *S v Peterson* (note 7 above) at 28G-29J.

[44] Given the explicit reference to the firearm being 'semi-automatic' and the fact that the description accords with the definition of 'semi-automatic' in terms of the FCA, it is clear that the appellant was in possession of a semi-automatic firearm. The State did not show that the appellant had knowledge that he was in possession of a semi-automatic firearm, and thus the minimum sentencing legislation in terms of the CLA is not applicable.

[45] As the appellant pointed out, the charge sheet made no reference to a semi-automatic firearm or to the minimum sentencing provisions in terms of the CLA. The charge sheet reads as follows:

'*POSSESSION OF A FIREARM*

THAT the accused is guilty of the offence of contravening the provisions of Section 3 read with Section 1, 103, 117, 120 (1) and Section 121 read with Schedule 4 of the Firearms Control Act, 60 of 2000 and further read with Section 250 of the Criminal Procedure Act, 51 of 1977- possession of firearm

...

PENALTY- SCHEDULE 4 (SECTION 121) :- FINE OR 15 YEARS'

[46] The State acknowledged this omission in the charge sheet, and even though the appellant had legal representation throughout the trial, accepted that the minimum sentencing provisions in terms of the CLA cannot be invoked in the circumstances of the case. In any event, the record does not show that the State proved that the appellant had knowledge of the fact that the weapon was a semi-automatic firearm.

[47] Therefore, section 121 read with schedule 4 of the Firearms Control Act are applicable in this case, and the appellant must be sentenced in accordance with these provisions.

The appellant's previous convictions

[48] In respect of the question of whether the appellant's previous convictions should be taken into account, it is necessary to consider section 271A of the Criminal Procedure Act. Section 271A provides that certain convictions fall away after the expiration of 10 years. It states as follows:

Where a court has convicted a person of—

(a) any offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, may be imposed but—

(i) has postponed the passing of sentence in terms of section 297 (1) (a) and has discharged that person in terms of section 297 (2) without passing sentence or has not called upon him or her to appear before the court in terms of section 297 (3); or

(ii) has discharged that person with a caution or reprimand in terms of section 297 (1) (c); or

(b) any offence in respect of which a sentence of imprisonment for a period not exceeding six months without the option of a fine, may be imposed,

that conviction shall fall away as a previous conviction if a period of 10 years has elapsed after the date of conviction of the said offence, unless during that period the person has been convicted of an offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, may be imposed.

[49] The appellant's previous convictions are as follows:

49.1. The possession of stolen property without providing a reasonable explanation, a conviction dating from 22 September 1993.

49.2. On 25 May 1998, the appellant was sentenced to 5 years' imprisonment for attempted murder, robbery and the possession of a weapon without a licence.

49.3. The appellant was convicted of assault on 27 March 2004. The sentence imposed was a R600 fine or two months' imprisonment suspended for 3 years on the condition that the accused did not commit common assault or assault GBH during the period of suspension.

49.4. On 17 June 2009 the appellant was found guilty on 2 counts of possession of suspected stolen property in accordance with Act 62 of 1995 read with section 36 of the General Law Amendment Act. He was sentenced to 3 years' imprisonment in respect of each count and was declared unfit to possess a firearm.

[50] As the State has indicated, the convictions do not fall within the ambit of s 271A of the CPA and consequently do not fall away after a period of 10 years has lapsed. The convictions remain relevant for the purposes of sentence.

[51] The Court must take cognisance of a number of the appellant's previous convictions. In particular, the appellant's previous offences from 1998 of attempted murder and possession of a weapon without a licence are relevant in that the appellant will be deemed to be a second offender in respect of these offences for the purposes of sentencing.

[52] The Court must also take the conviction of assault into account. In regard to the two convictions for the contravention of section 36 of the General Law Amendment Act, a period of 10 years had not yet passed when the appellant was convicted by the court a quo. But the nature of such offences is not relevant to the present charges. The 1998 conviction for robbery falls outside the ambit of section 271A. The 1993 conviction for the possession of presumably stolen property is similarly irrelevant for the purpose of determining the sentence.

Having regard to the aforesaid factors, the following order is made:

1. The appeal against the sentence is partially upheld.

2. The sentence in respect of count 2 is set aside.

3. In relation to count 1, the appellant is sentenced to 7 years' imprisonment;

4. In relation to count 2, the appellant is sentenced to 15 years' imprisonment;

5. In relation to count 3, the appellant is sentenced 3 years' imprisonment.

6. The sentences for counts 2 and 3 are to run concurrently, with half the sentence imposed for count 1 – an effective sentence of 18 years' imprisonment.

S E WEINER
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNEBURG

I agree

L NKOSI-THOMAS
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNEBURG

Date of hearing: 14 March 2019

Date of judgment: 25 March 2019

Appearances:

Counsel for the Appellant: Adv. C Meiring

Instructing Attorneys: Van Deventer & Deventer Incorporated

Counsel for the State: Adv. Serepo