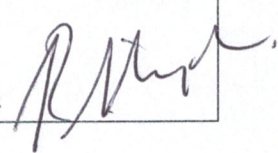


IN THE HIGH COURT OF SOUTH AFRICAGAUTENG LOCAL DIVISION, JOHANNESBURGCASE NO: SS093/2019DATE: 2020.02.21

10

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED. ✓	
DATE 28/02/2020	SIGNATURE 

In the matter between

THE STATE

and

CYPRIEN SCELO MKHIZE

Accused

S E N T E N C E

20

STRYDOM, J: The accused, Mr Cyprien Scelo Mkhize (hereinafter referred to as "the accused"), has been convicted on:

- 2 counts of attempt murder.
- 1 count of unlawful possession of firearms in contravention of section 3, read with sections 1, 103, 117, 120(1)(a) and 121, further read with

schedule 4 of the Firearms Control Act 60 of 2000 and section 250 of the Criminal Procedure Act 51 of 1977.

- 1 count of being in unlawful possession of ammunition in contravention of section 90, read with sections 1, 103, 117, 120(1)(a) and 121, further read with schedule 4 of the Firearms Control Act 60 of 2000 and section 250 of the Criminal Procedure Act 51 of 1977.

- 10 The indictment made no reference to section 51(2) of Act 105 of 1997 (the Minimum Sentence Act) as far as the attempt murder counts are concerned. The same applies to the count for being in unlawful possession of semi-automatic firearms.

Attempt murder where a person was assaulted and a dangerous wound was inflicted with a firearm, falls within Part (IV) of Schedule 2, as referred to in section 51(2) of the Minimum Sentences Act. A minimum sentence of 5 years is prescribed for a first offender.

- 20 A conviction on a count of being in possession of a semi-automatic firearm also carries a 15 year minimum sentence as contemplated in section 51(2)(a), which refers to Part (II) of Schedule 2 to this Act.

Accused was also charged with a count of murder, read with the provisions of section 51(2) of the Minimum

Sentences Act. After the accused had pleaded, the Court warned him about the applicability of a minimum sentence, but this was done in relation to the murder count.

Fact is no reference has been made of the minimum sentence regime prescribed in the Minimum Sentence Act with reference to the two attempted murder counts accused has been convicted of. The same applies to the count for being in unlawful possession of a semi-automatic firearm.

10 In this instance the minimum prescribed sentence, as stated here above, is 15 years' imprisonment. The question now arises if this Court can sentence the accused in terms of the Minimum Sentences Act.

This question was considered in the matter of *State v Sehlabelo* 2013 JDR 0787 (GNP). The learned Judge noted in paragraph 10 of this judgment as follows:

20 "On perusal of the charge sheet and the record, I noted that the appellant was charged with unlawful possession of a firearm "read with the provisions of section 51 Act 105 of 1997". This particular section makes provision on various mandatory minimum sentences to be imposed in cases of conviction depending on the subsection the State chooses. It could be life imprisonment if accused is charged

under section 51(1) or less if he is charged under section 51(2). The underlying principle enshrined in *S v Makatu* 2006 (2) SACR 582 (SCA) is to the effect that the section under which the accused is charged should be clear in the charge sheet. Failure to make a clear reference to the relevant provisions of Act 105 of 1997 makes it inapplicable. That would leave the court with no option but to sentence the accused in accordance with the provisions of Act 60 of 2000 where 15 years' imprisonment is the maximum as opposed to the minimum – see *S v Nkosi* 2006 [JOL] 1799 (W)."

10

The Count in *Sehlabelo supra* referred to the case of *State v Makatu* where the accused was charged under section 51(2) but was sentenced in accordance with section 51(1), which provides for life imprisonment. This was found to be a misdirection on the part of the trial court. The

20 Constitutional Court in:

- *MT v S; ASB v S; September v S* 2018 (2) SACR 592 (CC) has however stated that: "*It would not create a hard and fast rule that each case where an accused has not been explicitly informed of the applicability of the minimum*

sentence regime, that it will automatically render a trial unfair."

The Court there held:

"It is indeed desirable that the charge sheet refers to relevant penal provisions of the Minimum Sentences Act. This should not, however, be understood as an absolute rule. Each case must be judged on its particular facts. Where there is no mention of the applicability of the Minimum Sentences Act in the charge sheet or in the record of the proceedings, a diligent examination of the circumstances of the case must be undertaken, in order to determine whether that omission amounts to unfairness in the trial.

This is so because even though there may be no mention, examination of the individual circumstances of a matter may very well reveal sufficient indications that accused's section 35(3) rights to a fair trial has not in fact been infringed." (At paragraph 40)."

As stated, the Court did not refer the accused to the minimum sentence regime pertaining to the counts of attempted murder and the unlawful possession of semi-automatic firearm, as this was not mentioned in the

indictment.

The Court informed the accused about the minimum sentence regime pertaining to the murder count on which the accused was acquitted. Accused was legally represented and during argument it was clear that Mr Mavatha, appearing for the accused, was well aware of the minimum sentence applicable as far as these other counts were concerned.

Despite this, this Court has formed the view to
10 sentence the accused without applying the prescribed minimum sentences. The reason for this being to take out of the equation any possible prejudice the accused might have suffered. The Court will now turn to the consideration of an appropriate sentence.

The structure of a sentence should be determined by a requirement for the balancing of the nature and circumstances of the offence, the characteristics and circumstances of the offender and the impact of the crime on the community, its welfare and concern.

20 A Court should strive and accomplish and arrive at a judicial counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. See *State v Zinn* 1969 (2) SA 537 (A) 540G.

The Court will start its inquiry by considering the

nature of the offences the accused was convicted of. On 15 October 2018, during the early morning hours, the accused went to a house situated in Malvern, Johannesburg.

He was armed with an unlicensed firearm. The house was occupied by various people, including the two complainants in the attempted murder counts. There was evidence that the accused wanted to buy this property and that the owner experienced difficulty to evict the people
10 occupying the house.

The first complainant was in her room when she heard gunshots outside. She looked through the window, when accused fired shots at her. She was hit twice in her elbow and suffered injuries. She was taken to hospital by ambulance and was admitted for about 2 weeks. She still experiences difficulty lifting her arm.

The complainant in count 2 was leaving his room when accused for no apparent reason fired shots at him. He was hit twice, on his hand and on his forearm. He was
20 also admitted to hospital and treated there for 3 to 4 days. These shots fired at the complainants could have killed them. They were fortunate that they were not hit on other parts of their bodies.

About a month after this incident, accused was found to be in possession of two unlicensed firearms. In

the judgment on the conviction reference was made to these firearms as a Taurus pistol and a Beretta pistol. These are semi-automatic firearms according to the admitted ballistic report, EXHIBIT O.

The ballistic evidence revealed that the Taurus was used to fire the spent cartridges found on the crime scene pertaining to count 1 and 2. Further it was shown that the cartridge cases found on two other crime scenes were fired from the Beretta pistol. Accused was not
10 convicted on the charges relating to the other crime scenes.

The evidence indicated that the accused randomly fired shots without any provocation or for any other discernible reason. No motive was established and accused as part of his case in mitigation of sentence persisted in his innocence. He elected to place no evidence before Court to explain his actions.

Attempted murder and the possession of unlawful firearms and ammunition are serious offences. In this
20 country people live in fear of their lives. It happens too often that innocent people are shot for no reason whatsoever.

The accused possess two unlicensed firearms. In this instance the Court does not have to speculate why accused kept these firearms. Clearly it was to commit

criminal activities. He used the Taurus to shoot the complainants in the attempted murder counts. In relation to the Baretta pistol the Court can reasonable infer that this firearm was also possessed to commit crime.

The Court further takes into account that accused must have planned his action to shoot at people at this specific house. He went to this particular house armed and started to shoot randomly.

Against these circumstances and nature of the
10 crimes, the Court should also consider the personal circumstances of the accused. The personal circumstances of accused, which was placed before Court, were, undisputed.

He is a man of 40 years old. Married with 4 children aged between 18 and 4 years. His children currently stays with their grandmother in KwaZulu Natal. Accused is married and he was employed as a driver for approximately 7 years and earned R7 000 per month. He maintained his family.

20 The Court will also bring into the equation that the accused has been in custody awaiting trial for approximately 1 year and 5 months. He testified that he passed Grade 12. In my mind the one circumstance which stands out in favour of the accused is the fact that the is a first offender.

The society at large expect of the Courts to deal with criminals who commit serious crimes harshly. People want to feel safe and move around freely. Why should it be allowed that criminals shoot at people and severely injure them?

The victims, if they are lucky to survive, are left with the painful consequences which in some instances may permanently change their lives. Both victims in these incidents testified that they still suffer consequences after
10 being shot.

Weighing up the personal circumstances of the accused as set out herein above and particularly that he is a first offender, against the seriousness of the offences and the fact that people were seriously injured, I am of the view that the aggravating circumstances outweighs the personal circumstances of the accused.

The same applies to the unlawful possession of the firearms, as these firearms were used to commit serious crime. The accused did not at any stage show
20 remorse.

It was argued on behalf of the accused that the Court must consider a sentence of correctional supervision in terms of section 276(1)(i) of the Criminal Procedure Act. In terms of this sentencing option, a sentenced person will have to serve a short period of the sentence in custody.

The Court is of the view that this is not an appropriate sentence. Direct imprisonment for a relatively long period is the only appropriate sentence. The facts and evidence before this Court are squarely incongruous with a non-custodial sentence. See *State v Matyityi* 2011 (1) SACR 40 (SCA) 14.

The Court will keep in mind that the main purposes of punishment are deterrent, preventative, reformatory and retributive. Further that punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances. See *State v Rabie* 1975 (4) SA 855 (A) 862A to B.

The Court will also keep in mind that the two attempted murder convictions stemmed from the same incident where accused fired shots at two complainants in close proximity at the same premises.

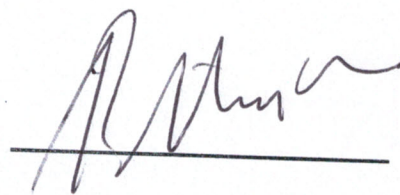
Further the Court will also keep in mind that accused possessed not only one, but two firearms unlawfully. The Court is also well aware that the cumulative effect of various sentences should not lead to an extraordinary long sentence.

ORDER

The accused can now stand. Accused is

sentenced as follow:

- Count 1
Attempted murder
7 years' imprisonment
 - Count 2
Attempted murder
7 years' imprisonment
 - Count 14
Unlawful possession of firearms
8 years' imprisonment
 - Count 15
Unlawful possession of ammunition
2 years' imprisonment
 - It is ordered that the sentences on counts 1 and 2 should run concurrently.
 - It is further ordered that the sentence on count 15 should run concurrently with the sentence in count 14.
 -
- 20 Effectively accused is sentenced to 15 years' imprisonment.
- The accused is also declared unfit to possess a firearm in terms of section 103 of the Firearms Control Act 60 of 2000.

A handwritten signature in black ink, appearing to read 'J. Strydom', is written over a horizontal line.**STRYDOM, J****JUDGE OF THE HIGH COURT**

Date of Judgment on Sentence: 21 February 2020
10 **Counsel for the State:** Adv. M. Rampyapedi
Counsel for the accused: Adv. A. Mavatha

