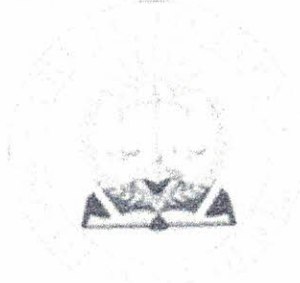



REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A24/18

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
31/01/19	
DATE	SIGNATURE

In the matter between:

SAMUEL ANDRIES MAHLANGU

Appellant

and

THE STATE

Respondent

J U D G M E N T

MALANGENI, AJ:

[1] The appellant was convicted in the Regional Court, Kwa-Thema on two counts of attempted murder and sentenced to 10 and 5 years imprisonment respectively. The sentence in count 2 was ordered to run concurrently with the sentence in count 1. Effectively he was sentenced to 10 years

imprisonment. He appeals against the sentence with leave having been granted by the court *a quo*.

[2] The appellant challenges the sentence on the basis that the trial court misdirected itself in sentencing him to 10 years imprisonment. It was argued on his behalf that the sentence imposed by the trial court is shockingly harsh and inappropriate having regard to comparable case laws. It was pointed out that the trial court over-emphasised the seriousness of the offence; the effect thereof on the complainants and the interest of the society. It failed to take into account the prospects of rehabilitation. It was further submitted that the trial court also erred in taking into account the aggravating factors which were not presented to the court through evidence by the state.

[3] Against the appeal, the respondent made the following submissions:

3.1 That the trial court took into account the main purposes of punishment being retribution, deterrence and rehabilitation.

3.2 It considered all the factors with regard to sentence and that the sentence imposed was appropriate under the circumstances. The offences the appellant was convicted of, were serious in that a firearm was used in the commission thereof and the offence is rife in the region. The appellant shot the complainant in count 1, Thabang, until he ran out of bullets. He shot Fanie

the complainant in count 2 between his legs and did not care where the bullet landed.

The evidence

[4] Four state witnesses, namely, Thabang Jonas Mokoni (Thabang), Fanie Mkau (Fanie), Duduzi Lemana (Mduduza), and Dr Lobo, testified in support of the state's case and the appellant also testified but he did not call any witnesses.

Thabang testified that on 2 September 2012 at 23:00 he went with Mduduza to a tavern in Kwa-Thema. On arrival at the tavern they found Fanie and the appellant arguing outside. Because he knew Fanie, he reprimanded him and invited him inside the tavern for a beer. He had known the appellant for four years at the time. He, Fanie and Mduduza went inside the tavern where they bought beers, sat down and drank them. A short while later, the appellant approached them, speaking the language that is spoken in jail. He told the appellant to move away and the appellant said they should go outside. He went out of the tavern with the appellant. While outside, the appellant said he should repeat what he had said while they were inside the tavern. He then slapped the appellant with an open hand and returned to the tavern. The appellant said he would cut his tail on that day. He, Fanie and Mduduza continued drinking inside the tavern. At approximately 01:00, they left the tavern. Fanie and one Cosas were walking in front and he walked behind them in the company of Mduduza. As they were walking, they heard three shots of a firearm. Immediately thereafter, the appellant emerged saying this

is the dog I have been looking for. He started shooting. He shot him on his collarbone, his left arm above the wrist and also on his right thigh. He realised that running away would be dangerous and decided to approach the appellant. As he approached him, the appellant continued shooting. The appellant was at the time in the company of one Chipa and an unknown male. Chipa and the unknown male kicked him and he fell. The appellant shot him on his ribcage. He also pointed him with a firearm on his forehead. He tried three times to shoot but the firearm did not shoot. He then left. Before the appellant left, he pulled him by his leg and told him that he was not going to die.

[5] Where the incident took place, there was an Apollo light on the street and he could see all that transpired.

[6] Under cross-examination he denied that he was an aggressor and that the appellant fired warning shots. He denied the appellant's version. He testified that he did not observe what happened between Fanie and the appellant as he was walking behind Fanie.

[7] Fanie testified that he was outside the tavern arguing with the appellant when Thabang came and asked him to join him for a drink inside the tavern. He went with him inside the tavern. He corroborated the evidence of Thabang that while they were inside the tavern, the appellant approached them and Thabang went out with the appellant.

Thabang returned into the tavern and he heard the appellant saying he will cut Thabang's tail. He corroborated Thabang's evidence regarding how they left the tavern at approximately 01:00 am, the way they were walking and what happened at Kuzoijo Street as they were walking, how the appellant appeared with one Chipa. He testified that the appellant cocked the firearm and asked what they had been saying. He then fired two shots to the ground in between his legs. He was walking with Cosas in front of Thabang and Mduduza. Cosas asked the appellant why he was firing the shots. The appellant fired one shot at Cosas's feet. He left them and said he was looking for another dog. He then heard other shots being fired. He had seen Thabang from a distance wrestling with the appellant and heard two further shots. The appellant was the only person who was seen having a firearm on the night in question. Cosas has since passed on. At the time of the incidents, he had been knowing the appellant for a long time. He looked upon him as a brother.

[8] Under cross-examination he testified that when the appellant fired the shots at him, he was a metre away from him. The firearm was not aimed at his upper body but on his feet. He denied the appellant's version that he attempted to kill him.

[9] Mduduza corroborated Thabang's evidence that he was with him when they went to the tavern where they found Fanie and the appellant arguing and that Fanie then joined them inside the tavern and they had some drinks together. While they were busy having drinks inside the tavern, the appellant called Thabang outside. Thabang went outside and later rejoined them. He

also corroborated both Fanie and Thabang's evidence regarding how they left the tavern, how they were walking and what happened at Kuzoijo Street and how it came about that he had to take Thabang to the hospital. He was seeing the appellant for the first time that night. When the shots were fired, he had gone to hid himself. He could see what was happening to Thabang as there was an Apollo light that illuminated the street. He did not count the shots that were fired. He denied the appellant's evidence that only one shot was fired. He was adamant that three shots were fired while he was standing with Thabang and another shot went off when the appellant and Thabang were wrestling over the firearm.

[10] Dr Lobo also testified. His qualifications were placed on record. He was working at Pholosong hospital at the time of the incident. He completed the J88 medical report form pertaining to Thabang. He saw him on 3 September 2012 at approximately 02:25. Thabang was brought to the hospital by the police and he had a history of having been shot. He was in pain on admission at the hospital. When he examined him, he found a soft wound on the back of his neck. He had an entrance wound with an exit wound on the abdomen which was painful. On the right thigh, he had a 3 cm laceration like a circle. On the left forearm he had another laceration. A catheter was put on his genitals draining blood. His urine was mixed with blood. According to him the injuries that Thabang sustained could have caused his death if he was not operated immediately. Under cross-examination he mentioned that 600 millimetres of blood was extracted from Thabang's abdomen.

[11] The appellant also testified. He was also at the tavern on 2 September 2012. He had a verbal argument with Thabang and his friends. He left the tavern at midnight and came across Thabang and his friends in Kuzoiyo Street. He was with Piet and Chipa. Thabang and his friends were making noise, saying yes, this person. He had already told Piet about them. Piet took out a firearm, cocked it and gave it to him, saying if they gave him problems, he should shoot upwards. Thabang and his friends surrounded them. He fired a warning shot. Thabang ran and grabbed his hand which was carrying a firearm. He later changed his version and said Thabang ran and grabbed the firearm and not his hand. They fought over the firearm, a shot went off and they both fell down. On further questioning by his legal representative, he changed his version and said they fought over the firearm, fell down and a shot went off. After the shot went off, he looked on the ground and saw there was blood. Chipa kicked Thabang several times. Thabang let go of the firearm. He then took the firearm, gave it to Piet and ran away. He denied shooting at Fanie and Thabang. According to him Dr Lobo lied when he said one of the shots that were fired at Thabang, was fired from far. He does not know what caused Thabang's injuries.

[12] Under cross-examination he testified that he left Thabang lying on the ground when he ran away. Further that he also saw Fanie on the night of the incident and he was busy talking.

[13] This court's power to interfere in sentencing is limited and the sentencing court has a discretion. In *S v Malgas* 2001 (1) SACR p 469 (SCA) at paragraph [12], it was held that:

"A court of appeal may not simply substitute a sentence because it prefers it and will be entitled to interfere only if the sentencing court materially misdirected itself or the disparity between its sentence and the one which this court would have imposed had it been the trial court is 'shocking', 'startling' or disturbingly inappropriate."

[14] Appellant has been convicted of serious offences that are prevalent in our country. People use dangerous weapons like firearms and knives to injure other people. In this case a firearm was used. What is worse is that the appellant shot at the complainants for no apparent reason. When offences are prevalent they become serious. Courts are encouraged to pass harsher sentences in respect of serious offences.

[15] The appellant fired numerous shots against the complainants thereby severely injuring Thabang. According to the doctor who treated him, had he not been operated in time, he would have died. These are violent offences directed on innocent and harmless victims. As a result of this violent conduct against Thabang, his health has changed in that he cannot carry heavy objects and when it is cold he experiences pain. In *S v Mhlakaza* 1997 (1) SACR p 515 (SCA) Harms JA stated that:

"The object of sentencing is not to satisfy public opinion but to serve the public interest. A sentencing policy that caters predominantly or exclusively for public opinion is inherently flawed. It remains the court's

duty to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public. 519a-e. Given the current levels of violence and serious crimes in the country, it seems proper that, in sentencing especially such crimes, the emphasis should be on retribution and deterrence. Retribution may even be decisive."

[16] The appellant is 52 years old, he is not married and he is a father of 3 children. His defence counsel submitted that the court should consider the time that appellant spent in custody. In *S v Mahlangu and Others* 2012 (2) SACR p 373 (GJS) it was held that the relevant period must be considered, with all other factors, on the basis that being a pre-trial incarcerated person is a great hardship. The factor seems not to have been placed before the trial court. I lean in favour of considering this factor, at least appellant being in custody for such a period has felt the taste of prison. Counsel for the state disagreed with the above submissions. It is important to mention that the appellant had a previous conviction of unlawful possession of a firearm. This previous conviction is not relevant to the current offences and a period of 9 years has lapsed between it and the current offences. However, it is aggravating that the appellant randomly fired shots on the night of the commission of the offences.

[17] It was submitted on the appellant's behalf that the appellant is a candidate of rehabilitation. According to the trial record, there is no indication that the appellant showed any remorse throughout the trial. The trial court correctly found that he is not a candidate for rehabilitation. Having considered the appellant's personal circumstances, the nature of the seriousness of the offences committed and the interests of society, I am of the view that the sentence imposed is shockingly disproportionate to the offences committed.

It cannot stand. The trial court has therefore misdirected itself and this court has to intervene and interfere with the sentence.

[18] In the result I propose the following order:

18.1 The appeal against the sentence of the appellant is upheld.

18.2 The sentence is set aside and replaced with the following sentence:


"In respect of count 1, the accused is sentenced to 7 (seven) years' imprisonment. In respect of count 2, the accused is sentenced to 5 (five) years' imprisonment. The sentence in count 2 shall run concurrently with sentence in count 1."

18.3 In terms of section 282 of Act 51 of 1977 the substituted sentence is antedated to 15 November 2017.



M. MALANGENI
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree:



M. J. TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

For the appellant:	M Botha
Instructed by	Legal Aid S.A
For the respondent:	E P Mnguni
Instructed by	The Director of Public Prosecutions
Heard on	30 August 2018
Handed down on	31 January 2019