



**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

**AR No: 59/2020**

In the matter between:

**DELANI TANOZI NDLOVU**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

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**ORDER**

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On appeal from: The Regional Court, Estcourt (H.B. Visagie sitting as court of first instance)

1. The appeal against conviction on the charge of murder is upheld.
2. The conviction and sentence in the charge of murder are set aside.
3. The appeal against sentence on the charge of unlawful possession of firearm is upheld.

4. The sentence of fifteen (15) years imprisonment on the charge of unlawful possession of a firearm is set aside and it is substituted for a sentence of eight (8) years imprisonment.
5. The sentence imposed on count 3 is ordered to be served concurrently with the sentence of eight (8) years imprisonment. The effective sentence is eight (8) years imprisonment.
6. The sentence is ante-dated to 02 August 2017.
7. No otherwise determination is made in terms of section 103 (1) of Act 60 of 2000.

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## JUDGMENT

Delivered on:

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**Mngadi J (Mnguni J concurring):**

[1] The appellant with the leave of the trial court appeals against conviction on a charge of murder and against sentence on a charge of unlawful possession of a firearm.

[2] The appellant was charged before the regional court with three (3) counts, namely; one (1) count of murder (count 1), one count of unlawful possession of a firearm (count

2) and one (1) count of unlawful possession of ammunition, namely; six rounds of live ammunition (count 3).

[3] The appellant who legally represented, when the charges were put to him, pleaded not guilty. As basis of defence in terms of the provisions of s115 of the Criminal Procedure Act 51 of 1977 (CPA), the appellant denied committing the offences and, in particular, he denied that he was found in possession of the firearm.

[4] The learned regional magistrate after hearing evidence convicted the appellant on all the charges. He sentenced the appellant to fifteen (15) years imprisonment on the charge of murder; to fifteen (15) years imprisonment on the charge of unlawful possession of a firearm and to one (1) year imprisonment on the charge of unlawful possession of ammunition. In terms of s280 (2) of the CPA it was ordered that the sentence imposed on count 3 and ten (10) years of the sentence imposed on count 2 be served concurrently with the sentence on count 1. It resulted in a total effective sentence of twenty (20) years imprisonment.

[5] The charge of murder alleged that: 'The accused are guilty of the crime of murder (read with the provisions of Section 51(2) of the Criminal Law Amendment Act 105/1997.

In that upon or about 13 July 2013 and at or near Wembezi in the Regional Division of KZN the accused unlawfully and intentional kill Siyabonga Kheswa a male person.'

The charge of possession of a firearm stated: 'That the accused is guilty of the offence of contravening the provisions of Section 3 read with Sections 1, 103, 117, 120(1)(a), Section 121 read with Schedule 4 and Section 151 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.

In that on or about 30 December 2013 and at or near Estcourt in the Regional Division of KZN, the accused, did unlawfully have in his possession the following firearm, to wit 9mm pistol without holding a licence, permit authorisation issued in terms of the Act to possess that firearm'.

[6] The evidence against the appellant adduced by the State and accepted by the trial court was the evidence of the police witnesses. They testified that they searched the room of the appellant in the presence of the appellant and found the firearm under the



pillow of the bed the appellant had been sleeping on. It had a magazine in it with six (6) live rounds of ammunition.

[7] The State in relation to the murder charge relied on circumstantial evidence. It was common cause that the deceased was killed on 13 July 2013 when he was shot from the back of his neck. He was shot with 9mm pistol calibre firearm determined on ballistic examination of two spent cartridges recovered from the scene. It was established ballistically that the firearm found in possession of the appellant on 30 December 2013 was the firearm used in the murder of the deceased. The appellant resided approximately 50 metres from the tavern in which the deceased was shot and killed.

[8] The appellant testified. He denied that the firearm was found in his possession. He admitted that the police searched his room but he stated that they did not find any firearm. He stated that on the same date he was arrested with was one Mlambo, his neighbour and that the firearm was found in possession of Mlambo. The rebuttal evidence accepted by the trial court showed that the police arrested Mlambo for a different firearm.

[9] The trial court in assessing the circumstantial evidence stated that evidence must be considered in its totality. Further, that it must apply the two rules found in *R v Blom* 1939 AD 188 namely; that the inference sought to be drawn must be consistent with all the proved facts. Secondly, the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. The learned regional magistrate reasoned that the proved facts taken together with the fact that the appellant belatedly raised an *alibi* he rejected and the appellant's false claim that Mlambo was arrested for the firearm are to the effect that there is no other reasonable inference that can be drawn but that the appellant was the shooter.

[10] In my view, the facts that the appellant denied being found in possession of the firearm and contended that the firearm was found in possession of Mlambo, and the fact that he belatedly raised an *alibi* which the trial court rejected are not part of the proved facts envisaged in *R v Blom* from which to draw an adverse inference. The said factors

are confined to be considered in rejecting the appellants defence to the charge of unlawful possession of a firearm and to the charge of murder. They add nothing to State case against the appellant. In *S v Mtsweni* 1985 (1) SA 590 (A) at 595E-F the following is stated : 'Voordat 'n skuldigbevinding aan moord kan geskied moet daar bewese feite wees wat by wyse van afleiding die appellant aan did dood van die oorledene koppel. By ontstentenis daarvan bestaan daar nie 'n *prima facie* saak teen die appellant nie, en kan sy leuenagtige getuiniis, net soos in die geval waar hy nie getuig nie, nie leemtes in die Staat se saak aanvul en 'n gevolgtrekking van skuld regverdig nie...' It is common cause that an unlawfully possessed handgun may change hands easily. It circulates with ease amongst criminals. It may change hands within days. There was no evidence that in this case it could not have changed hands in a period of six (6) months. In the absence of any other implicating evidence, it merely constituted a suspicion against the appellant. Therefore, the conviction of the appellant on the charge of murder is unsustainable.

[11] The learned regional magistrate, acting in terms of the provisions of the s51 of the Criminal Law Amendment Act 105 of 1997, sentenced the appellant to 15 years' imprisonment for the unlawful possession of a firearm. Section 51 (2) Part II Schedule 2 of the CLAA provides that if no substantial and compelling circumstances exist, the court shall impose a sentence of imprisonment for a period not less than 15 years for an offence relating to the possession of an automatic or semi-automatic firearm.

[12] The regional magistrate took into consideration that the appellant was a first offender, he had three minor children aged 12, eight and six years respectively, he had grade 10 level of education, he was doing casual jobs. Further, he took into consideration the purposes of punishment, namely; deterrence, prevention, retribution and rehabilitation. The regional magistrate found in respect of both the Murder charge and the charge of unlawful possession of a firearm that there were no substantial and compelling circumstances for the court to impose a sentence less than the prescribed minimum sentence in respect of each crime.



[13] It is contended on behalf of the appellant in relation to the appeal against sentence for the unlawful possession of a firearm as follows, namely; that he personal circumstances of the appellant were not taken into account; that the trial court over-emphasised the seriousness and prevalence of the offence, lastly, that the court imposed a harsh sentence in view of the sentences imposed in previous cases ranging from the sentence of five (5) years imprisonment.

[14] It is trite that imposition of sentence is primarily in the discretion of the trial court. The appeal court can only interfere with sentence in limited circumstances, namely; where the imposition of the sentence is vitiated by a material misdirection or the sentence imposed is disturbingly inappropriate or it is so severe that it induces a sense of shock. In *S v Malgas* 2001(1) SACR 469(SCA) at 478d-e it was held : 'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were a trial court and then substitute the sentence arrived at by it simple because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh.'

[15] The first issue for determination is whether the sentencing on the conviction for unlawful possession of a firearm ought to have been within the purview of the provisions of the CLAA. It would fall within the purview of the provisions of the CLAA if the nature of the offence falls within the said provisions and the provisions are invoked at the commencement of the trial.

[16] In the course of the trial the State introduced an affidavit in terms of section 212 of the Criminal Procedure Act 51 of 1977 by Warrant Officer Thulebona Moses Ncwane(Ncwane). Ncwane was employed by the South African Police Service and attached to the Ballistic Unit of the Forensic Science Laboratory as a Forensic Analyst. Ncwane stated that he examined the firearm in question. He found it to be self-loading, but not capable of discharging more than one shot with a single depression of the trigger. The effect of Ncwane's evidence is that the firearm was a semi-automatic firearm.

[17] In the judgment on sentence the regional magistrate stated as follows: 'Mr Ndlovu , you will recall that at the onset of this case, I informed you and explained to you that should you be convicted on a charge of murder and unlawful possession of a prohibited firearm that it will attract prescribed minimum sentences of 15 years. The sentences are prescribed by an Act of Parliament and may not be deviated from, unless there substantial and compelling circumstances, which justify a deviation from the prescribed sentence.' The legal representative of the appellant when addressing the trial court on sentence he stated that it was the count of murder which attracted the minimum sentence and he sought to persuade the court that there were substantial and compelling circumstances for the court to impose a sentence less than the prescribed minimum sentence of fifteen (15) years imprisonment. The learned regional magistrate did not invite the legal representative of the appellant to address him whether there were substantial and compelling circumstances in relation to the charge of unlawful possession of a firearm.

[18] The charge for unlawful possession of the firearm as quoted above did not refer to the provisions of the CLAA. Further, it did not allege that the firearm was a semi-automatic firearm. The charge sheet on 22 August 2016 before another magistrate records the following: 'minimum sentence of fifteen (15) years imprisonment explained'. It is not known what explanation was given and in relation to which charge. The trial commenced on 10 November 2016. The record does not show that any explanation relating to applicable prescribed minimum sentence was given. The regional magistrate stated in the judgment on sentence that the explanation was given at the onset of the case. It was not possible at that stage for the appellant to indicate whether there was such explanation given or not. If the explanation was given, it should be reflected on the record. In the circumstances, it must be accepted that no explanation either in the charge or at the commencement of the trial was given that the charge of unlawful possession of the firearm attracted a prescribed minimum sentence of fifteen (15) years imprisonment.

[19] In *S v Ndlovu* 2017 (2) SACR 305 (CC) the court held that a court could not sentence an accused in terms of a sentencing jurisdiction the court is not clothed with. Section 35(3) of the Constitution provides that every accused person has a right to a fair trial which, *inter alia*, includes the right to be informed of the charge with sufficient detail



to answer it. It infringes the accused's right to a fair trial to sentence an accused in terms of the provisions of the law not invoked against him, even if the proved charge falls within the ambit of the law in terms of which he has been sentenced. See *S v Makatu* 2006(2) SACR 582 (SCA) para 3 and 7. It follows that the learned regional magistrate misdirected himself to sentence the appellant in terms of the provisions of the CLAA. The sentencing of the appellant on the conviction on the charge of unlawful possession of the firearm is vitiated by a material misdirection and it falls to be set aside.

[20] The personal circumstances of the appellant are stated above as well as the purposes of punishment and the nature of the offence for which the appellant was convicted. Unlawful possession of a firearm is a serious offence. The issue of licenses for possession of firearms is strictly regulated. It is important that firearms be possessed by responsible individuals. A person possessing a firearm unlawfully is not accepting accountability for the use of such a firearm. Persons commit most crimes by unlawfully possessed firearms. One firearm may be used to commit many crimes over a period of time. The element of deterrence must be a factor in determining an appropriate sentence for the crime of unlawful possession of a firearm. In my view, the appropriate sentence, taking into account the personal circumstances of the appellant and the circumstances of the crime for which he was convicted, is eight (8) years imprisonment.

[21] I propose the following order.

1. The appeal against conviction on the charge of murder is upheld.
2. The conviction and sentence in the charge of murder are set aside.
3. The appeal against sentence on the charge of unlawful possession of firearm is upheld.



4. The sentence of fifteen (15) years imprisonment on the charge of unlawful possession of a firearm is set aside and it is substituted for a sentence of eight (8) years imprisonment.
5. The sentence imposed on count 3 is ordered to be served concurrently with the sentence of eight (8) years imprisonment. The effective sentence is eight (8) years imprisonment.
6. The sentence is ante-dated to 02 August 2017.
7. No otherwise determination is made in terms of section 103 (1) of Act 60 of 2000.

  
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**Mngadi, J**

I agree, it is so ordered.

  
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**Mnguni, J**

## APPEARANCES

Case Number AR : 59/20

For the Appellant : Mr. X. Sindane

Instructed by : Pietermaritzburg Justice Centre  
PIETERMARITZBURG

For the respondent : Mr R. Xaba

Instructed by : Deputy Director of Public Prosecutions  
PIETERMARITZBURG

Matter enrolled for hearing : 21 July 2021

With the consent of the parties, the matter disposed of without oral arguments.

Judgment delivered on : 30 JULY 2021