THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Appeal Case No: A430/13

DPP Ref: 9/2/5/1 – 260/13

Lower Court ref: SHD 29/13

In the matter between:

BERNARD SWARTZ **APPELLANT**

And

THE STATE **RESPONDENT**

Coram: DESAI, BAARTMAN & ROGERS JJ

Heard: **28 JULY 2014**

Delivered: **4 AUGUST 2014**

JUDGMENT

ROGERS J:

Introduction

[1] This is an appeal against sentence with the leave of the court *a quo*. The appellant was convicted on two counts of unlicensed possession of a semi-automatic firearm (counts 1 and 3) and on two counts of unlicensed possession of ammunition (counts 2 and 4). On each of counts 1 and 3 he was sentenced to 15 years' imprisonment and on each of counts 2 and 4 he was sentenced to three years' imprisonment. The magistrate ordered that 10 years of the imprisonment imposed on count 3 and two years of the imprisonment imposed on count 4 should run concurrently with the sentence on count 1. This meant an effective 24 years' imprisonment.

[2] The appellant, who was legally represented throughout the proceedings in the court *a quo*, pleaded not guilty to counts 1 and 2 and guilty to counts 3 and 4. The State accepted the guilty plea in respect of counts 3 and 4 and the appellant's accompanying s 112(2)(b) statement, and he was duly convicted on those two counts. In respect of counts 1 and 2, the State led the evidence of W/O G Arendse and the accused testified in his own defence. The magistrate accepted the evidence of the former and rejected the accused's version, resulting in his conviction on counts 1 and 2. There is no appeal against any of the convictions.

[3] The facts in respect of counts 1 and 2 are that on the evening of 28 April 2012 Arendse was patrolling in Phumlani in the Lotus River area together with a member of the neighbourhood watch. They came across the appellant who was in the company of another man. As Arendse got out of the patrol vehicle to question them, he saw the appellant take something from his pocket and throw it over the nearby fence. Arendse searched the appellant and the other man but found nothing on them. While the member of the neighbourhood watch guarded the appellant, Arendse inspected behind the fence and found a cocked semi-automatic pistol with eight rounds of ammunition. The appellant's version, which the magistrate rejected, was that he had been in the company of four other people, that he had not been in

possession of a firearm or thrown anything over the fence, and that he had not seen anyone else do so.

[4] In regard to counts 3 and 4 the appellant said in his s 112(2)(b) statement that on 21 October 2009 and near Lotus River he was pushing a trolley of garbage to a rubbish heap. Two young men ran past him. One of them threw something onto the rubbish heap. On closer inspection, the appellant saw that it was a semi-automatic firearm. He wrapped it up and placed it in his trolley, thereby appropriating it to himself. On his way home he was stopped by the police and they found the firearm and six live cartridges. Since the State did not contest this explanation, the appellant's version must be accepted.

[5] The appellant was convicted on 12 April 2013. The State proved a number of prior convictions. After hearing submissions, the magistrate imposed the sentences previously mentioned. On 27 August 2013 the magistrate heard and granted an application for condonation and for leave to appeal against sentence. On 29 November 2013 a direction was made that the appeal be heard by a full bench.

[6] Ms Adams, who represented the appellant in the appeal, advanced two main points. The first was that the magistrate erred in treating the case as covered by the minimum sentencing regime contained in the Criminal Law Amendment Act 105 of 1997. The second was that, if the latter legislation was applicable, the magistrate misdirected himself in failing to find that there were substantial and compelling circumstances to depart from the minimum sentence of 15 years on counts 1 and 3.

Applicability of minimum sentencing legislation

[7] Ms Adams submitted that the sentencing regime applicable to the appellant's conviction on counts 1 and 3 was that contained in s 121 of the Firearms Control Act 60 of 2000 read with Column 1 of Schedule 4 and not the sentencing regime contained in s 51(2)(a) read with Part 2 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997. Insofar as unlicensed possession of semi-automatic firearms is concerned, the former sentencing regime would allow the trial court to impose a discretionary sentence not exceeding 15 years' imprisonment while the

latter sentencing regime would require that a first offender be sentenced to not less than 15 years' imprisonment unless there were substantial and compelling circumstances to impose a lesser sentence.

[8] There are some decisions of the High Court in support of Ms Adams' contention but they were overruled by the Supreme Court of Appeal in *S v Thembalethu* 2009 (1) SACR 50 (SCA). In the latter case it was held that the opening words in s 51(2), namely 'notwithstanding any other law', meant that the sentencing regime in Act 105 of 1997 took precedence over that laid down in the Arms and Ammunition Act 75 of 1969.

[9] The Arms and Ammunition Act did not define the terms 'semi-automatic firearm' and 'automatic firearm' found in Part II of Schedule 2 of the Criminal Law Amendment Act. Section 2 of the Arms and Ammunition Act contained a general prohibition against the unlicensed possession of an 'arm', a term defined in such a way that it would have included a semi-automatic or automatic firearm. Section 39(2) of the Arms and Ammunition Act set out the maximum sentences to which a convicted person could be sentenced. In general, unlicensed possession of a semi-automatic or automatic firearm was subject to a maximum sentence of three or five years' imprisonment, depending on whether it was a first or subsequent conviction.

[10] Like the Arms and Ammunition Control Act, the Firearms Control Act 60 of 2000, which came into force on 1 July 2004, does not create a specific offence for unlicensed possession of a semi-automatic firearm. That offence is covered by the more general language of s 3 of the Firearms Control Act relating to the unlicensed possession of firearms. Unlicensed possession of a fully automatic firearm is now the subject of a separate offence created by s 4(1)(a) of the Firearms Control Act.

[11] The penalties provision of the Firearms Control Act is s 121. It states that any person convicted of a contravention of or 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 the corresponding item in Column 2. The maximum sentence in the case of unlicensed possession of a fully automatic firearm in violation of s 4(a) is 25 years' imprisonment. The maximum

sentence for a violation of s 3 (unlicensed possession of a semi-automatic firearm would fall under this section) is 15 years' imprisonment.

[12] In *S v Baartman* 2011 (2) SACR 79 (WCC) this court (*per* Donen AJ, Davis J conc) considered that *Thembalethu* did not compel the conclusion that the Criminal Law Amendment Act overrides the sentencing regime introduced by the Firearms Control Act. Donen AJ's reasoning was broadly as follows. He said (in para 16) that in *Thembalethu* the court found that the Criminal Law Amendment Act created an 'enhanced jurisdiction' in comparison with the penalties created in terms of the Arms and Ammunition Act. The position had changed, he considered, with the introduction of the Firearms Control Act because the latter Act laid down a maximum sentence of 15 years' imprisonment for unlawful possession of a semi-automatic firearm and 25 years' imprisonment for unlawful possession of an automatic firearm: 'This differentiation, in my view, suggests that the legislature could never have intended to retain the uniform penalty regime, employed by the State in section 51(2) of the Amendment Act, in order to coerce possessors to submit these firearms to licensed regulation' (para 17).

[13] He observed, further, that, while the mandatory penalties imposed for unlawful possession of a fully automatic weapon could be 'accommodated within the sanctioning regime' of the Firearms Control Act, the same was not true in relation to semi-automatic weapons, because the minimum sentence of 15 years' imprisonment under the Criminal Law Amendment Act was also the maximum sentence under the Firearms Control Act (para 18). With reference to the use of the word 'may' in s 121 of the Firearms Control Act (the penalty provision), he considered that the lawmaker's intention had been to introduce and achieve a discretionary sentencing regime which was not subject to the minimum sentencing legislation (para 23).

[14] He concluded that the phrase 'notwithstanding any other law' in s 51(2) of the Criminal Law Amendment Act could not have been intended to override a future law which introduced its own comprehensive regulatory and sentencing regime (para 33).

[15] *Baartman* was followed in an unreported decision of this court, *S v Mentoor* Case A395/2013 (*per* Nyman AJ, with Ndita J concurring). Particular emphasis was placed in *Mentoor* on the view that the opening words in s 51(2)(a), 'notwithstanding any other law', meant any other law existing at the time of promulgation. In terms of this interpretation, the Arms and Ammunition Act was such a law but the Firearms Control Act was not.

[16] I respectfully disagree with the reasoning in *Baartman* and *Mentoor*. In terms of *Thembalethu* the minimum sentences apply when the specific circumstances of an offence bring it within the scope of one of the schedules to the Criminal Law Amendment Act. The words 'notwithstanding any other law' in s 51(2) appear to me to be clear and unambiguous and do not permit of a distinction between law existing when the Criminal Law Amendment Act came into force and law which comes into existence thereafter.

[17] Even if such a distinction were valid, it would not lead to a different result in respect of cases governed by the law as it has existed since 31 December 2007. I say so because, although the Criminal Law Amendment Act 105 of 1997 in its original form came into force on 13 November 1998, s 51 was substituted with the current provision with effect from 31 December 2007 by way of s 1 of the Criminal Law (Sentencing) Amendment Act 38 of 2007. Although the previous s 51 also contained the words 'notwithstanding any other law', and although the new s 51 could perhaps have been brought into its current form by way of amendment rather than substitution, as a fact the lawmaker substituted a new section. In doing so, the lawmaker again used the words 'notwithstanding any other law'.

[18] The current s 51 is thus a later law than the relevant provisions of the Firearms Control Act. I repeat, however, that in my view the words 'notwithstanding any other law' are not limited to laws which existed at any particular date. In what follows, I shall assume in favour of the appellant that the Firearms Control Act is a later law.

[19] A later Act might, on a proper interpretation thereof, *pro tanto* repeal an earlier Act but that is a different matter. Where the earlier Act is stated to apply

'notwithstanding any other law', there would only be a *pro tanto* repeal or exclusion by a later Act if the later Act disclosed an intention to override the express 'notwithstanding' provision in the earlier Act. In order for there to be an implied repeal there must be an irreconcilable conflict between the two enactments, the presumption being against implied repeal (*Khumalo v Director-General of Cooperation and Development & Others* 1991 (1) SA 158 (A) at 164C-165E). An implied intention to repeal might be inferred, for example, from the circumstance that the later Act could find no meaningful scope of operation unless it overrode the earlier Act. That is not the case here.

[20] The Firearms Control Act does not disclose an intention to effect a *pro tanto* repeal of the Criminal Law Amendment Act. The penalties provision, s 129, does not say that it applies 'notwithstanding any other law'. Section 129 is a maximum-penalty provision, not a minimum-sentence provision. This is an important distinction.

[21] In certain circumstances the Firearms Control Act authorises a heavier sentence than the Criminal Law Amendment Act. As noted, unlicensed possession of an automatic firearm is punishable with imprisonment of up to 25 years. In terms of the Criminal Law Amendment Act, the minimum sentence for the same offence is 15, 20 or 25 years, depending on whether the accused is a first, second or multiple offender. This does not, however, give rise to any conflict between the Firearms Control Act and the Criminal Law Amendment Act. The combined effect of the legislation in such circumstances is that the trial court [i] may only impose a lesser sentence than the one prescribed under the Criminal Law Amendment Act (15, 20 or 25 years' imprisonment as the case may be) if there are substantial and compelling circumstances; [ii] and may impose a sentence of up to 25 years. The power to impose (in the case of a first offender) a sentence of more than 15 years (up to a maximum of 25 years) would naturally only arise for consideration if the court concluded that there were no substantial and compelling circumstances to impose a sentence of less than 15 years.

[22] A court imposing sentence under the Criminal Law Amendment Act is always entitled, in the absence of other legislation, to impose a heavier sentence than the

prescribed minimum. But in relation (for example) to the unlicensed possession of an automatic firearm, the Firearms Control Act places a cap on the higher sentence which may be imposed (a maximum of 25 years' imprisonment), at the same time indicating the lawmaker's view of the gravity of the offence.

[23] The concurrent operation of minimum and maximum sentencing regimes is not confined to offences relating to firearms, explosives and armaments:

(i) For example, various offences created in terms of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 ('the PCD Act') attract the minimum sentences specified in s 51(1) or s 51(2)(a) of the Criminal Law Amendment Act, depending on the precise circumstances of the crime. Section 18 of the PCD Act sets out the maximum penalties which may be imposed for the same crimes, including (where the sentencing court is the High Court) life imprisonment.

(ii) Various offences created in terms of the Prevention and Combating of Corrupt Activities Act 12 of 2004 ('the PCC Act') attract the minimum sentences set out in s 51(2)(a) of the Criminal Law Amendment Act if the amount involved or the character of the crime falls within the qualifications specified in Part II of Schedule 2. Section 26 of the PCC Act sets out the maximum penalties which may be imposed for the same crimes, including (where the sentencing court is the High Court) life imprisonment.

(iii) Offences relating to exchange control attract the minimum sentences set out in s 51(2)(a) of the Criminal Law Amendment Act if the amount involved or the character of the crime falls within the qualifications specified in Part II of Schedule 2. Section 34 of the South African Reserve Bank Act 90 of 1989 has its own detailed provisions as to maximum penalties for exchange control offences.

(iv) The offence referred to in s 13(f) of the Drugs and Drug Trafficking Act 140 of 1992 attracts the minimum sentences set out in s 51(2)(a) of the Criminal Law Amendment Act if the amount involved or the character of the crime falls within the qualifications specified in Part II of Schedule 2. Section 17(e) of the Drugs and Drug Trafficking Act sets out the maximum penalty which may be imposed for the same crime (imprisonment not exceeding 25 years).

[24] It is clear that the lawmaker, when it enacted and from time to time thereafter amended the Criminal Law Amendment Act, foresaw and intended that the minimum sentencing regime would apply to various statutory crimes for which maximum penalties were laid down in other legislation. This is particularly clear in the case of the PCD Act and the PCC Act, because those very Acts at the same time amended Part II of Schedule 2 of the Criminal Law Amendment Act so as to include in the minimum sentencing regime various offences created under the PCD Act and the PCC Act.

[25] Where the maximum penalty specified in a particular law is the same as or greater than the minimum penalty specified in the Criminal Law Amendment Act, there is in truth no need to rely on the 'notwithstanding' phrase in s 51 of the latter Act because there is no conflict between the concurrent applicability of the maximum and minimum sentencing regimes and therefore no need to determine which law is, in the particular circumstances of the case, paramount.

[26] There are, however, cases where the Criminal Law Amendment Act requires a heavier penalty than the maximum stated in the Firearms Control Act. In relation to a first offender in respect of the unlawful possession of a semi-automatic firearm (which is what we are dealing with in this appeal), the minimum and maximum are the same – 15 years' imprisonment. There is thus no 'conflict' in this situation. However, if the accused person is a second or multiple offender, the Criminal Law Amendment Act lays down a minimum sentence of 20 or 25 years' imprisonment as the case may be, whereas the Firearms Control Act contains no such differentiation. To this extent there is a potential 'conflict' between the two enactments.

[27] It is in this latter situation that one needs to determine whether the Criminal Law Amendment Act takes precedence. Even in this situation, I cannot discern an intention on the part of the lawmaker in the Firearms Control Act to effect a *pro tanto* repeal of the relevant provisions of the Criminal Law Amendment Act insofar as they relate to unlawful possession of a semi-automatic firearm. The Firearms Control Act does not deal with the specific instance of second or multiple offending in relation to semi-automatic and automatic weapons, whereas the Criminal Law Amendment Act clearly intended to create particularly heavy penalties in such cases, notwithstanding

any other law. This conclusion could be justified on the basis that, in the case of multiple offending in relation to certain firearms, the Criminal Law Amendment Act is specific legislation whereas the Firearms Control Act is a general law relating to firearms. The maxim which applies here is *generalia specialibus non derogant*, which is closely related to the presumption against implied repeal (*Sasol Synthetic Fuels Pty Ltd & Others v Lambert & Others* 2002 (2) SA 21 (SCA) para 17).

[28] One also cannot infer, from the fact that the Firearms Control Act creates different maximum penalties for unlawful possession of semi-automatic firearms and automatic firearms whereas s 51(2)(a) of the Criminal Law Amendment Act subjects those offences to the same minimum sentences, that the lawmaker intended, when enacting the Firearms Control Act, to render inapplicable the provisions of the Criminal Law Amendment Act in regard to firearms. There is nothing inherently irrational about subjecting two different crimes to the same minimum sentence but different maximum penalties.

[29] As a final observation, I find it most unlikely, if the intention with the enactment of the Firearms Control Act had been to repeal (or render inoperative) the provisions of the Criminal Law Amendment Act in relation to semi-automatic and automatic firearms, the lawmaker would not expressly have dealt with this important question rather than leaving it to inference from a general pattern of regulation.

[30] In my view, the *ratio* in *Thembalethu* is applicable to the Firearms Control Act and is binding on us. There are a number of cases where this view of the legal position has been adopted (in this court, see *S v Rossouw* 2014 (1) SACR 390 (WCC) paras 3-9; see also *S v Madikane* 2011 (2) SACR 11 (ECG) paras 18-22; *S v Lekhelebane* [2009] ZAFSHC 78 paras 12-13; *S v Khoza* [2011] ZAGPJHC 218 para 2; *S v Sehlabelo* [2013] ZAGPPHC paras 5-9).

[31] Ms Adams did not contend that, if this were the correct legal position, the appellant was not sufficiently forewarned of the applicability of the minimum sentencing legislation. The charge sheet was framed with reference to the Firearms Control Act and without reference to the Criminal Law Amendment Act. However, a trial court is obliged to apply the Criminal Law Amendment Act unless to do so

would violate an accused person's right to a fair trial. Although it is highly desirable that the potential applicability of the minimum sentencing legislation should be mentioned in the charge sheet, this is not an indispensable requirement.

[32] In the present case the appellant was legally represented at his trial. Immediately after the appellant pleaded the magistrate asked his attorney whether the accused had been informed of the potential applicability of minimum sentences in relation to semi-automatic weapons. The attorney confirmed this. This could only have been a reference to the Criminal Law Amendment Act, because the Firearms Control Act does not lay down minimum (as opposed to maximum) sentences and because that Act in any event does not authorise a separate penalty specifically for semi-automatic weapons.

[33] In his judgment on conviction, the magistrate stated that the firearms in counts 1 and 3 were semi-automatic firearms for purposes of s 51(2) of the Criminal Law Amendment Act. This attracted no objection from the appellant's attorney. The submissions on sentence were made on the premise that the Criminal Law Amendment Act was applicable and that the magistrate needed to decide whether or not there were substantial and compelling circumstances to depart from the prescribed minimum sentences.

[34] No point was taken in the application for leave to appeal that the appellant had been insufficiently warned of the potential applicability of the minimum sentencing legislation.

Substantial and compelling circumstances

[35] It is unnecessary to rehearse the well-known principles relating to the assessment of whether substantial and compelling circumstances exist which warrant a departure from a prescribed minimum sentence. I do not think that the magistrate approached the matter in a legally incorrect fashion. He recognised that, even where there are no specific mitigating features, a sentence might be sufficiently disproportionate to the crime to convince the trial court that the imposition of the prescribed sentence would give rise to an injustice. The more

difficult question is whether the magistrate's application of the legal principles to the facts of the case was justified.

[36] The appellant was 39 when he perpetrated the crimes to which counts 1 and 2 related and 40 when he perpetrated the other two crimes. His attorney stated that the appellant had reached standard 4; that he lived with his mother; that he had four children, of whom the youngest two stayed with him and his mother; that he was a bricklayer who earned R200 per day when he had work; and that he was the family's sole breadwinner.

[37] These personal circumstances do not indicate anything of substance insofar as mitigation is concerned. Once it is clear (as it was here) that an appropriate sentence would on any reckoning involve a substantial period of imprisonment, family circumstances of the kind mentioned by the appellant's attorney diminish in significance.

[38] The appellant's prior convictions constituted an aggravating consideration. Given the combination of the character of the convictions, their frequency and the presence of sentences of imprisonment without the option of a fine, none of the previous convictions were required to be disregarded pursuant to s 271A or s 271B of the Criminal Procedure Act 51 of 1977. The appellant had three prior convictions (1989, 1991 and 1992) for possession of a dangerous weapon in contravention of s 2(a) of the Possession of Dangerous Weapons Act 71 of 1968. (A 'dangerous weapon' is defined in that Act as meaning any object other than a firearm which is likely to cause serious bodily injury if it were used to commit an assault. The maximum sentence is two years' imprisonment.) On the third occasion (1992) the appellant was sentenced to six months' imprisonment. In 2001 he was convicted of possession of an unlicensed firearm in violation of s 2 of the Arms and Ammunition Act 75 of 1969 and sentenced to two years' imprisonment. During 1995 he was convicted on two counts of theft and one count of assault. During 2007 he was again convicted of theft for which he received a suspended sentence of R900 or 90 days' imprisonment. Later in 2007 he acknowledged guilt on a charge of assault and paid a fine of R150.

[39] Although the aggravating effect of the appellant's poor record is to some extent lessened by the fact that his last conviction of any kind was in 2007 and that his last conviction for an offence relating to the possession of weapons was in 2001, his past brushes with the law cannot be disregarded. Even for a first offender, s 51(2)(a) requires a sentence of 15 years' imprisonment for unlawful possession of a semi-automatic firearm. The inclusion of this offence in Part II of Schedule 2 reflects the lawmaker's determination to tackle, by way of severe sentences, a particular scourge in our society (gun crime). The magistrate treated the appellant as a first offender for purposes of s 51(2)(a), presumably in the absence of any evidence that his 2001 conviction involved possession of a semi-automatic weapon. Nevertheless, the appellant was not, when it came to the assessment of substantial and compelling circumstances, entitled to be treated as a man without relevant prior convictions.

[40] In *Madikane supra* Plasket J reviewed the sentences imposed for possession of automatic firearms (paras 25-28) and of semi-automatic pistols (para 29-30). He observed that, in relation to the latter class of case, he had not found decisions, apart from *Thembalethu*, in which sentences exceeding three years' imprisonment had been imposed. He acknowledged that the guidance afforded by some of the cited cases was undermined by the fact that they were decided on the view, later found in *Thembalethu* to be incorrect, that the minimum sentencing legislation did not apply and that the maximum penalty under the relevant part of the Arms and Ammunition Act was three years' imprisonment. As against this, the Supreme Court of Appeal in *Thembalethu* upheld a sentence of 15 years' imprisonment imposed on a first offender. A sentence of 15 years' imprisonment was also upheld in *Khoza supra*.

[41] Unlicensed possession of semi-automatic firearms is a very serious matter. Violent crime involving the use of such weapons has not diminished since *Thembalethu* was decided. I have no doubt that the lawmaker, in requiring a minimum sentence of 15 years' imprisonment to be imposed in the absence of substantial and compelling circumstances, had in mind that generally an unlicensed weapon of that kind is possessed for use (whether by the possessor himself or by one to whom he passes the weapon) in other serious crimes such as murder,

robbery with aggravating circumstances, hijacking and the like. Very often the perpetrators of violent crime are not apprehended.

[42] Crimes such as rape and robbery with aggravating circumstances cover a wide range of criminal conduct. In such cases, the criminal conduct itself (ie quite apart from the personal circumstances of the accused) can be regarded as lying on a continuum from the less serious to the truly heinous. It is more difficult to view unlawful possession of an automatic or semi-automatic firearm in this way. The lawmaker has said that, in the absence of substantial and compelling circumstances, a first offender should be sentenced to 15 years' imprisonment for unlawfully possessing a semi-automatic firearm. If the accused person is also convicted of a crime relating to the use of the firearm (eg murder), he would be separately sentenced for that crime. In the absence of special circumstances explaining how the unlawful possession came about or in the absence of compelling personal circumstances relating to the accused, how can the unlawful possession of a semi-automatic firearm *per se* be regarded as not justifying the prescribed 15-year sentence except on the premise that the lawmaker was wrong to lay down 15 years as the minimum sentence? That is not a premise on which a court is entitled to act.

[43] All things considered, I do not believe that the magistrate erred in finding, in relation to count 1, that there were no substantial and compelling circumstances to depart from the minimum sentence of 15 years' imprisonment. The appellant offered a denial which was found to be false. No mitigating circumstances in relation to his possession could be inferred. There was nothing to place his unlawful possession of the firearm in a less heinous light than the one which motivated the lawmaker to lay down a minimum 15-year sentence.

[44] On the other hand, I think the magistrate erred in finding no substantial and compelling circumstances in relation to count 3. Whether one regards the appellant's explanation as plausible or not, the State accepted it. One must thus assess the matter on the basis that the appellant fortuitously came across the firearm at a rubbish dump and was apprehended the same day. Naturally members of society are expected not to succumb to temptation. The proper course would have been for the appellant to notify the police. Nevertheless, his decision to take

the firearm into his possession could be regarded as having been on the spur of the moment when the two youths discarded it. The appellant did not have the firearm in his possession for very long before he was apprehended. He pleaded guilty on these two counts, which counts in his favour. The circumstances of the crime are such as to make a sentence of 15 years' imprisonment disproportionate.

[45] We are thus at large to reassess the sentence in relation to count 3 and the related count 4. In my opinion, a just sentence would be seven years' imprisonment in respect of count 3 and one year's imprisonment in respect of count 4.

[46] In regard to count 2, the sentence of five years' imprisonment for possession of the ammunition found in the firearm to which count 1 related appears to me to be very harsh, taking into account that (as mentioned below) the appellant's possession of the ammunition was tied up in his possession of the firearm itself. I would have thought a sentence of two years' imprisonment appropriate. This differs sufficiently from the sentence imposed by the magistrate to warrant interference.

Cumulative effect

[47] This leaves the question of the cumulative effect of the sentences. We will be imposing sentences totalling 25 years' imprisonment as against the magistrate's 36 years. Because we are interfering with the sentence on count 3 and 4, we are also at large to reassess the appropriateness of the combined effect of all the sentences. I should nevertheless mention that the trial magistrate misdirected himself by apparently considering that the effective sentence he was imposing was 21 years' imprisonment. If the magistrate had a total effective period of 21 years' imprisonment in mind, he should have ordered an additional three years from counts 3 and/or 4 to run concurrently with count 1.

[48] The two sets of charges are not related in point of time. The first two related offences were committed in April 2012 and the second two related offences in October 2012. To exacerbate matters, the appellant was out on bail when he committed the second two related offences. The explanation he gave in respect of

counts 3 and 4 has already been reflected in a significantly reduced sentence on those counts.

[49] Nevertheless, sentences in the aggregate of 25 years' imprisonment strike me as excessive. The charges relating to possession of ammunition were in each case closely related to the possession of the firearm. There was no evidence that the ammunition was held separately. In relation to counts 1 and 2, Arendse said that when he picked up the firearm that had been thrown over the fence he removed its magazine and found seven live cartridges, the eighth being in the barrel. In relation to counts 3 and 4, the appellant's s 112(2)(b) statement is not explicit on the point, though his version as to how he came into possession of the firearm suggests that the six cartridges were likely to have been in the weapon's magazine.

[50] If we were to order that the sentence on count 2 run concurrently with the sentence on count 1 and that the sentence on count 4 run concurrently with the sentence on count 3, the overall effective sentence would be 22 years' imprisonment. That still appears to me to be excessive, given that the appellant has not been shown to have been previously convicted of unlawful possession of a semi-automatic or automatic firearm. I regard a total effective period of 18 years' imprisonment as appropriate. This combined sentence gives effect to the severe sanctions contemplated in the legislation and sends out the appropriate warning to the community while at the same time recognising that, because the required sentences are high, the appellant might be crushed under their cumulative weight unless some mercy were shown.

[51] I would thus allow the appeal to the extent set out below:

(a) There is substituted for the sentences imposed by the court *a quo* the following sentences, antedated to 12 April 2013 (the date of sentencing in the court *a quo*):

(i) on count 1, 15 years' imprisonment;

(ii) on count 2, two years' imprisonment;

(iii) on count 3, seven years' imprisonment;

(iv) on count 4, one year's imprisonment.

(b) The imprisonment in respect of counts 2 and 4 and four years of the imprisonment in respect of count 3 shall run concurrently with the sentence on count 1, with the result that the accused is sentenced to a total effective period of 18 years' imprisonment.

DESAI J:

[52] I concur. An order is made in the terms proposed by Rogers J.

BAARTMAN J:

[53] I concur.

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DESAI J

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BAARTMAN J

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ROGERS J

APPEARANCES

For Appellant:	Ms L Adams
	Cape Town Justice Centre
	3rd Floor, SA Reserve Bank Building
	60 St George's Mall

	Cape Town
For Respondent:	Mr K Pillay
	Office of the DPP
	Cape Town