Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

[REPORTABLE]

Case Number: **A404/2004**

Coram: HENNEY J ET DOLAMO J ET MANTAME J

In the matter between:

RUDOLPH COTENBERG Appellant

And

THE STATE Respondent

JUDGMENT DELIVERED 30 MAY 2014

DOLAMO, J:

(A) BACKGROUND

[1] The appellant in this matter appeared in the Regional Court facing 4 counts relating to the contraventions of the provisions of the now repealed Arms and Ammunition Act 75 of 1969. These counts were, possession of a fire-arm[1] and

[1] In contravention of section 2 read with sections 1; 39 and 40 of Act 75 of 1969

ammunition[2] without being the holder of a valid licence, pointing a fire-arm[3], and committing a nuisance by unlawfully discharging the said fire-arm.

[2] At some stage the counts were withdrawn against the appellant. These counts were, however, later re-instated. The Appellant having been brought to Court with a summons issued in terms of the provision of section 54 of the Criminal Procedure Act 51 of 1977 (the "CPA"). On 1 November 2002, the 4 charges were put to Appellant. He pleaded guilty to the possession of the fire-arm and ammunition counts, but not guilty to pointing the said fire-arm or causing a nuisance by discharging it.

[3] In his plea explanation in terms of section 112 (2) of the CPA, the Appellant admitted that on 17 December 2000, he was found in unlawful possession of the fire-arm and ammunition, and that he did not have a valid licence, or authorisation to be in of such fire-arm possession. He is alleged to have purchased the fire-arm from a policeman who had promised to apply for a licence on his behalf, and who by then, had not yet obtained such licence for him. On the counts of pointing a fire-arm and discharging it in a public place, Appellant's plea explanation was, that he was on his way home when he was attacked by a person or persons, and in self-defence, fired shots to ward off the unlawful attack.

[2] In contravention of section 36 read with sections 1; 39 and 40 of Act 75 of 1969
[3] In contravention of section 39(1)(i) read with sections 1 and 39(2)(d)

[4] At the end of a trial in which two state witnesses testified and Appellant also testified in his defence, he was also found guilty of the counts to which he had pleaded not guilty. He was sentenced on counts 1, 2 and 3, to imprisonment for 3 years. All these counts were taken together for purposes of sentencing. Appellant was also cautioned and discharged on count 4. I shall return in due course to analyse the evidence led in the trial, the Magistrate's reasoning in rejecting the Appellant's version and convicting him as charged, as well as the reasons for imposing a sentence of direct imprisonment. I deal first with the circumstances that followed his conviction and which had led to the constitution of this Full Court to hear the appeal.

[5] Upon his conviction and sentence, the appellant gave notice of his intention to appeal against his conviction and sentence. He also applied for, and was released on bail of R1000.00 pending appeal. On 29 October 2004, the appeal came before a Court of appeal constituted by a Judge of this Court and an Acting Judge. After hearing argument the appeal Court postponed the matter *sine die,* and ordered that a correctional supervision report on the circumstances of the appellant be obtained. After a lengthy delay, allegedly due to the changes in the department of correctional services, a report was finally made available in 2005.[4] The matter, however, was never re-enrolled to have it finalise. This Court was advised by Counsel for the State, Ms *Riley*, that the failure to place the matter on the roll again, was due to an administrative oversight in the office of the Director of Public Prosecutions. In the meantime, the permanent Judge retired, and the Acting Judge according to available records never returned to act. It is also not clear whether he was appointed a

[4] No specific date was mentioned nor was the report part of the record before this court.

permanent Judge of this Court, or any other division. As a result the Judge President of this Division, relying on his powers in terms of the now repealed Supreme Court Act[5] constituted the present full court/bench to deal with the unusual circumstances of the case, and if appropriate, to dispose of the matter.

(B) POINTS RAISED BY THE COURT

[6] The peculiar circumstances of the matter raised the following questions, and consequently, this Court requested the parties to address it as follows:

6.1 whether the previous court was seized with the matter when it postponed it *sine die* for a correctional supervision report, and if so,

6.2 whether this Court was lawfully constituted, and competent to deal *de novo* with, and finalise the appeal in the light of the unavailability of the previous court.

6.3 whether a Court in a criminal appeal can postpone a matter *sine die.*

[7] This Court received useful heads of argument from Ms *De Jongh* and Ms *Riley* for the Appellant and the respondent respectively. We are indebted to them. Both Counsel submitted that, though the previous Court was seized of the matter, this Court was empowered to deal with it *de novo,* in the light of the previous Court being unavailable. Ms *De Jongh*, for the Appellant, pointed out that section 14 of the Superior Courts Act[6] does not have any provision specifically dealing with a situation

[5] Act 59 of 1959
[6] Act 10 of 2013

where all the Judges of a previous Court were not available, but nevertheless, submitted that the matter must start *de novo* before this Court. Counsel was also of the view that a criminal appeal Court can postpone a matter *sine die* in terms of its inherent powers, but only if the reason for such a postponement cannot be resolved within a specific time, and it is indeterminate to the Court how long a time would be required.

[8] Ms *Riley* submitted that though it was not clear in terms of which provision a Court can postpone *sine die* a criminal appeal, such practice has nevertheless developed. As authority for the proposition that a Court may postpone a matter *sine die,* Counsel for the respondent cited the Supreme Court of Appeal Judgment per Van Heerden and Pillay JJA (Mthiyane DP and Malan JA concurring) in *Brossy v Brossy*[7], an Eastern Cape Division judgment in *Toba and Mendu v The State*[8]*,* and the judgment of the Full Court in this Division in *S v Mazongolo*[9]. It was Respondents submission that this practice of postponing *sine die* a criminal appeal, if not closely monitored, may lead to the kind of effect it had produced in this matter. On whether this Court can deal with the matter *de novo,* Ms *Riley* referred us to a North Gauteng High Court (Pretoria) judgment in the matter of *Thabo McPherson Tshabalala v The State*[10]*,* where, after hearing an appeal the Court postponed the matter *sine die*. When it was re-enrolled, it came before another differently constituted court. The Court, per Oosthuizen AJ, held that *"we see no reason why it should be postponed for a third time and why we cannot entertain the appeal".* Counsel submitted that it would be in the interest of justice that this Court, as constituted, and based on its inherent powers, deal with and dispose of the matter.

---

[7] (Case no 602/2011 [2012] *ZASCA 151)*
[8] (Case no CA and R962/2002)
[9] *S v Mazangolo* 2013 (1) SACR 564 (WCC)
[10] (A74/2011)

[9] I proceed to deal first with the procedural issues raised in this matter. Corollary questions to the question as to whether the previous Court, which heard the appeal, and postponed it s*ine die,* was seized with the matter, are whether this Court is lawfully constituted, and if so, whether it should hear the matter *de novo.* It is trite law that a Court must be lawfully constituted to give a valid judgment.[11] The previous court which originally heard the matter on 29 October 2004, (for the sake of convenience I shall henceforth refer to it as the "previous Court") was constituted in terms of section 13 (2) (a) (i) of the Supreme Court Act[12], which provided that the Court of a provincial or local division shall, except when it is in terms of any law required, or permitted to be otherwise constituted for the hearing of any appeal against a judgment, or order of an inferior court, be constituted before not less than two Judges. In terms of section 22 (a) and (b) of the Supreme Court Act that Court had the power on the hearing of an appeal, to receive further evidence, either orally, or by deposition before a person appointed by such division, or to remit the case to the Court of first instance, or the Court whose judgment was the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence, or otherwise, as it deems necessary. It also had the power to confirm, or amend, or set aside the judgment or order, which was the subject of the appeal, and to give any judgment, or make any order, which the circumstances may require. Such powers of hearing further evidence, however, must be used sparingly.

[11] See *S v Gqeba and Others* 1989 (3) SA 712 (A)
[12] Act 59 of 1959

[10] Pursuant to its powers as set out *supra* the previous Court heard the appeal but, instead of confirming, amending or setting aside the judgment which was the subject of the appeal, ordered that a correctional supervision report be obtained and, for this purpose, postponed the matter *sine die.* It was fully entitled to do so by virtue of its powers derived from the provisions of section 22 and in terms of its inherent powers. After the correctional supervision report was secured, the previous court ought to have reconvened to dispose of the matter by confirming, amending, or setting aside the judgment appealed against, or give any order which the circumstances may have required. This however did not happen, as pointed out *supra.* The problem in my view was that the matter was not postponed to a particular date, but *sine die*, with the result that there was no judicial supervision of the progress made in the procurement of the requested supervision report. The result was that the matter fell through the cracks resulting in this inordinate delay for a period of (10) ten years.

[11] In the light of the delays brought about by the postponement of the matter *sine die,* and exacerbated by the unavailability of the previous Court, can this Court step in its place, and finalise the matter, or hear the matter *de novo?* In the repealed Supreme Court Act and its replacement, the new Superior Courts Act, which came into operation on the 23 August 2013, there is no section which deals specifically with a situation where both Judges who constituted a Court, and did not finalise a matter by giving a judgment or order were no longer available. No provision was made in any of the two acts for this eventuality nor, as far as I could determine, is there any case law dealing with a situation similar to the present. The closest provision of the Supreme Court Act which dealt with a situation where a Court was

depleted by death, retirement, incapacity, or absence of one or more of the judges, but not all the Judges who constituted a previous Court, was section 17 (2), which provides as follows:

> *"(a) if at any stage during the hearing of any matter by a full court, any judge of such court dies or retires or is otherwise incapable of acting or is absent, the hearing shall, if the remaining judges constitute a majority of the judges before whom it was commenced, proceed before such remaining judges, and if such remaining judges do not constitute such a majority, or if only one judge remains, the hearing shall be commenced de novo, unless all the parties to the proceedings agree unconditionally in writing to accept the decision of the majority of such remaining judges or of such remaining judge as the decision of the court".*

[12] An equivalent provision which deals with a depleted Court in the Superior Court Act is section 14 (5) which provides as follows:

> *"If at any stage during hearing of any matter by a full court, any judge of such court is absent or unable to perform his or her functions, or if a vacancy among the members of the Court arises, that hearing must –*
>
> *(a) if the remaining judges constitute a majority of the judges before whom it was commenced, proceed before such remaining judges; or*
>
> *(b) if the remaining judges do not constitute such a majority, or if only one judge remains, be commenced de novo, unless all the parties to the proceedings agree unconditionally in writing to accept the decision of*

the majority of the remaining judges or of the one remaining judge as the decision of the Court".

[13] Can these provisions be interpreted, or by analogy, extended to cover a situation such as the present, where the previous Court was depleted to the extent that none of its Judges were available? A purposive interpretation of the section is called for. The purpose of the sections 17 (2) of the repealed Supreme Court Act and 14 (5) was, and of the current Superior Court Act, is in my view to cater for three possible situations: where the majority of a full Court, as it was constituted, were still available, where the majority was no longer available, and where only one Judge remained. If the remaining Judges constituted a majority, the matter will proceed to finality in the normal way. Where the remaining Judges do not constitute a majority, and the parties do not agree unconditionally in writing to accept the decision of the majority of the remaining Judges as the decision of the Court, or where only one Judge remained, the inevitable was that the matter must commence *de novo.* I cannot see why when all the Judges who constituted the Court were no longer available, would the matter not start *de novo.* A narrow interpretation of these sections could mean, that a matter could start *de novo* where the remaining Judges did not constitute a majority, but not where all the Judges were no longer available. Such an interpretation could lead to absurdities. To avoid an absurdity, the relevant section in my view, must be interpreted in such a way that a matter will start *de novo* where all the judges were no longer available. In the circumstances, I am satisfied that this Court is properly constituted and therefore seized with this matter. Also, it would be undesirable to send it back to the court *a quo*. The interest of justice dictates that this Court deals with, and dispose of this matter.

[14] The next question is whether the previous Court was correct to postpone the matter *sine die* while waiting for the correctional supervision report. As Ms *Riley* pointed out there are instances in our case law where the Courts have postponed a criminal appeal *sine die.* For example in *Brossy v Brossy (supra)* Van Heerden and Pillay JJA postponed *sine die* an appeal involving a maintenance matter, which strictly speaking was not a criminal appeal, to enable the appellant to complete and reconstruct the record of the proceedings in the maintenance court. *In S v Mazongolo (supra)* a Full Court of this Division, after hearing an appeal against sentence (where leave to appeal against conviction was refused) formed the view that the appellant's conviction was not justified on the evidence before the Magistrate postponed the appeal *sine die* to afford the appellant an opportunity to apply to the President of the Supreme Court of Appeal for leave to appeal against conviction.

[15] It is evident that though there is no prohibition against postponing a criminal appeal *sine die,* the process must be properly managed and monitored to ensure that the matter is not lost in the system. Even where, as in this case, it was not clear when a particular step which necessitated the postponement would be taken, it would be proper to postpone the matter to a specific date so as to enable the Court to have judicial oversight on progress made, or the lack thereof, and to take appropriate steps where there is any undue delay. Postponing an appeal *sine die*, where the circumstances do not justify it may in certain instances lead to a failure in the administration of justice and may infringe on an appellant's right to a speedy trial. It is for this reason that section 168 of the CPA enjoins a Court, before which criminal

proceedings are pending to adjourn the proceedings to any date on the terms which to the Court may seem proper, and which are not inconsistent with any provision of that Act. A criminal appeal which is an extension of the trial cannot be dealt with differently unless the circumstances of a particular case call for a different approach. To postpone *sine die* may lead to the kind of delay experienced in this matter.

(C) MERITS

[16] I turn to deal with the merits of the appeal. Leslie October, a member of the South African Police Service ("SAPS") stationed at Grassy Park, testified that on 17 October 2000, he was on duty together with his colleagues, Khan and Smit, patrolling in the Grassy Park area, when they received a complaint of gangs with fire-arms in Oribi Street. While proceeding to the area they received another report that a shooting had taken place. On arrival they parked their patrol vehicle in 5th Avenue and went to take different positions next to a prefabricated wall. This was at the corner of 5th Avenue next to an open field. Constable Khan, went with Smit to another corner at the opposite end of 5th Avenue, and monitored the situation.

[17] While so positioned, October heard the sound of gunshots. Simultaneously he saw the Appellant emerging from the veld and walking towards Oribi Avenue, towards the direction where Constable Khan, had taken his position. Appellant started firing shots towards the veld while still walking in the direction of Constable Khan. As he got closer to Constable Khan the latter came out and fired a warning shot. This brought appellant to a stop. October then rushed to where Khan and the

appellant were to give support to Constable Khan. Altogether he heard two shots being fired. The first was before they took their respective positions. These came from the direction of the open veld. October was not certain whether Appellant fired at Smit or not because his attention was focused on Khan as, according to him, was a sitting target. But October later changed his version, that he saw appellant turning and firing a shot, to say that he actually did not see him firing, but only heard the sound of a gunshot. October also could not see how the appellant held the firearm as he was walking. He confirmed that the area was a dangerous gangster area, but could not tell what had happened prior to their arrival, which had triggered the shooting. October was, however, of the view that it was unnecessary for appellant to fire shots. October said that when confronted by Khan, appellant went to lie on the ground. October went to where appellant was lying and saw that he was injured. He could not determine where on his body the injury was because he was busy controlling the crowd which had gathered on the scene.

[18] In cross-examination, October admitted that the first gun shots did not come from the Appellant, or any of the policemen on the scene. He also conceded that appellant could have been shot by unknown people. He thereafter said that when appellant fired, Inspector Smit (apparently October intended to mean Khan) came out and identified himself. October was not certain whether appellant's shot were aimed at Smit, or at the people who were firing at him, but concluded that he could have been firing at the other people. Appellant's version, which was put to October, was that Khan shot him thrice which he denied and re-iterated that Khan only fired one warning shot. October admitted that he could not see whether appellant was hit

by the shot fired by Khan because he was behind Appellant and Khan was in front of him.

[19] Khan was also called as a witness. He testified that he was a Constable in the SAPS and was stationed at Grassy Park in the crime prevention unit. He confirmed that he was on duty on 17 November 2000, and busy with crime prevention duties. He and his colleagues (October and Smit) received a call in connection with a shooting complaint at approximately 24h30 and went to attend the scene, which was an open veld between Oribi and 5th Avenue, Lotus River. On arrival at the scene he and his colleague took different tactical positions. He took his position at a corner which was closest to Strandfontein Road. He had a clear view of the open veld. He saw a man (later identified as the appellant) coming towards him from the opposite side of the open veld. As he was approaching he heard gunshots and could see that these were fired by the Appellant from the muzzle flash of his fire-arm. He took cover behind a precast wall as he was not sure of the direction in which appellant was firing. He heard more gunshots while still behind cover. After a while Khan stepped out to see what had happened to the person who was approaching from the open veld. He saw appellant coming towards him with his fire-arm pointed at him.

[20] Khan testified further that it was at this point that he came out and shouted that he was a policeman and that appellant must stand still. Appellant did not heed this order, but continued to approach him with his fire-arm still pointing in Khan's direction. Khan then fired a warning shot in the direction of the veld. The appellant

dropped the fire-arm and went down. While on the ground appellant told him that he had been shot. Khan summoned his colleagues for support and Smit came to his aid. Khan took possession of appellant's fire-arm, which was a Norinco pistol with three rounds of ammunition, and found that its hammer had been pulled back. Thereafter the Appellant was taken to hospital. The fire-arm, was later tested, and proved to belong to someone else, and not the appellant. It was however, not reported stolen. Khan admitted that he did not know at whom appellant was firing nor, was he sure who else was firing. He was however, certain that appellant was the only person in the veld at the time. In cross-examination Khan conceded that it was possible that appellant was firing shots because somebody was firing at him, but denied that the appellant did not point the fire-arm at him.

[21] After the close of the state's case appellant testified in his own defence. As he had already pleaded guilty to the unlawful possession of the fire-arm and ammunition, he confirmed that he was walking in the veld carrying this fire-arm when he heard voices screaming obscenities at him and ordering him to stop. He ignored the insults and continued walking. The next thing he heard shots being fired at him. He alleged that about eight to fifteen shots were fired at him. He started running, pulled out his own fire-arm, and shot back in an attempt to scare off his attackers. He alleged that it was necessary to fire back to defend himself. According to him he fired two shots, and these brought the shooting which was directed at him to a stop. As he turned a corner he came across Khan who identified himself as a policeman. At that time he was running and his fire-arm was pointed to the ground. He denied pointing the fire-arm at Khan or at any other person.

[22] Under cross-examination, Appellant stated that the people who fired at him were about 40 metres away, and near a street light where he could only see their silhouettes; that he could not have just walked faster to avoid these people, but had to fire back because they were firing at him; that by shooting back, people stopped firing at him. He also testified that Khan fired three shots at him, and that these were in close proximity of his lower limbs. On being shot at by Khan, Appellant dropped his fire-arm and went to the ground. The last shot was fired while he was already lying on the ground.

(D) MAGISTRATE'S FINDINGS AND ANALYSIS OF EVIDENCE

[23] The Magistrate, correctly in my view, held that there was little which was in dispute between the state and the defence. After analysing the evidence of the two state witnesses, and that of the appellant, in particular, the evidence of Khan that appellant continued to point the fire-arm at him even after Khan told him that he was a policeman, and that he must stop, and came to the conclusion that Appellant's version, that he was not certain that Khan was a policeman since he was not in uniform nor showed him a badge, did not make sense. The magistrate held further that Appellant's version that notwithstanding the fact that he was not certain that Khan was a policeman had yet put up his hands, also did not make sense. Consequently he rejected the whole of appellant's version and convicted him.

[24] It is a trite principle in our law that in criminal proceedings the prosecution has to prove its case beyond reasonable doubt; that mere preponderance of probabilities is not enough; that in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true; that it is permissible to test the accused's version against the inherent probabilities but it cannot be rejected merely because it is improbable. Accused's version can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.[13]

[25] The appellant's version that he was fired at while walking in the veld is to a large extent corroborated by that of the state's witnesses. October testified that on arrival at the scene of the shooting, and while he had taken cover behind a prefabricated wall he heard the sound of gun shots, and simultaneously saw appellant walking in the veld in the direction of Oribi Avenue. At that point, appellant turned and fired two shots in the direction of the veld. The shots he heard before appellant fired came from the side of Oribi Avenue. He was not sure at whom the shots were aimed. October could not see how appellant held his fire-arm as he walked towards where Khan was stationed. He also could not say what had happened prior to the shooting which resulted in the appellant firing shots in return. He was, however of the opinion, that it was not necessary for appellant to have fired these shots since he was already close to Fifth Avenue, and could have simply increase his pace, and turned around the corner to relative safety. He said so even though he acknowledged that this was an area with a high incident of criminal activities. He conceded under cross-examination that the first shots he heard were

[13] Per Brand AJA (as he then was) in *S v Shackell* 2001 (4) SA 1 (SCA) at para 30

not coming from the appellant but from the other side, and it is in that direction that appellant directed his shots.

[26] Khan, on the other hand, did not see the direction in which the appellant fired his shots. He averred that he was not sure who else was firing the other shots that he heard while he had taken cover, when he came out behind the precast wall, behind which he had taken cover. He said that he had seen the Appellant approaching with his fire-arm pointing at him, and that it was at that point that he shouted "*police*" and ordered Appellant to drop his fire-arm. The Appellant did not immediately drop his fire-arm, which caused him to fire a warning shot, where after the Appellant dropped his fire-arm, went down and told him that he had been shot. He too conceded that appellant could have been fired at by other people.

[27] It is immediately apparent from the evidence of October and Khan that there were other people who were also firing shots. The possibility that these people were firing at Appellant therefore cannot be excluded. The possibility that appellant fired in response to such fire cannot also be excluded. In the circumstances, it cannot be said that Appellant's version, that he fired in self-defence was so improbable as to be rejected as not being reasonably possibly true. Self-defence in this circumstance excluded the element of unlawfulness from the charge of unlawfully discharging the fire-arm. Appellant's version, that he fired in self-defence and that he used means appropriate to the danger that confronted him is reasonably possibly true. It cannot be held against him that he elected to fire back and not run faster, as October had suggested, to what he regarded as safety. His version that he fired in self-defence

cannot therefore be false. He accordingly should have been acquitted on this charge.

[28] On the count of pointing a fire-arm the Magistrate rejected the appellant's version that his fire-arm was pointing downwards as he was approaching where he came across Khan. In rejecting his version, the Magistrate held that Appellant had contradicted himself, in that there was no clarity as to why Khan fired a second and third shot when he was co-operating. In this respect, the Magistrate held that Appellant is alleged to have been hit by the second shot fired by Khan while he had dropped his firearm, and at the same time said that he was not sure whether Khan was a policeman. This according to the Magistrate corroborated Khan's evidence that Appellant did not really want to co-operate when he was told the first time to "*staan vas*"; that since appellant was close to see that Khan was not in police uniform, he was close enough for Khan to see the pointed fire-arm. The only reasonable inference to be drawn was that he did not heed Khan's instructions to stop and that appellant's version that, although he did not think that Khan was a policeman, he nevertheless put up his hands, but still three shots were fired at him, did not make sense.

[29] I do not agree with the Magistrate's interpretation of the evidence on this aspect. Appellant testified that he was running and firing back at the people who were shooting at him. When he came around the corner, with his fire-arm facing downwards, Khan screamed at him '*SAP, staan vas, jou wapen (sic)*": and that though Khan was not in police uniform, did not produce a badge and appellant did

not know that he was a policeman, he still obeyed his instructions. Appellant did not deviate from this version under cross-examination. In this respect he responded to questions by the Magistrate as follows:

> "*'n Hoek? Ja, en hy het toe voor my ingespring terwyl ek hardloop met die vuurwapen wat na die grond gerig is en hy sê my, "SAP, staan vas, laat val jou vuurwapen!'. Ek skreeu vir hom dit is 'n wettige vuurwapen, maar ek gooi my hande in die lug in en sê toe weer, 'staan, laat val jou vuurwapen!' en hy skiet toe 'n skoot deur my bene, wat net mis is, en toe laat val ek my vuurwapen, toe skiet hy my weer nog 'n skoot en toe ek lê op die grond, toe gaan daar nog 'n skoot af en dit is deur my thighs".*

[30] In addition Appellant disputed Khan's version that he refused to drop his fire-arm, and maintained that he had obeyed Khan's instructions. The rest of Appellant's cross-examination related to his version that he was shot in his leg by Khan which version was said to have never been put to Khan, and why would Khan shoot him while he was lying on the ground, or with his hands up. In the midst of this cross-examination about the number of shots fired at him appellant stuck to his version that he did not point his fire-arm at Khan, and that Khan would have killed him if he had continued to do so.

[31] It is not correct, as the Magistrate found, that the area where Khan stood was illuminated by a street light which enabled appellant to see that he was not wearing police uniform. The evidence of the street light came when appellant described how

he noticed the people who were firing at him. Appellant's version, that he did not point the fire-arm at Khan cannot be rejected as so improbable as to be false and is, in the circumstances, reasonably possibly true. He ought to have been acquitted on the charge of pointing a fire-arm as well.

[32] That leaves the question of the appropriate sentence to be imposed on the appellant for the unlawful possession of the fire-arm and ammunition without a valid licence to which he pleaded guilty. Appellant was sentenced to 3 years' direct imprisonment on counts 1, 2 and 3 and to a warning and discharge on count four.

[33] In his judgment on sentence the Magistrate regarded as aggravating the fact that not only was he found in possession of the fire-arm, but also the manner in which he acquired it, namely, that he bought it from a policeman: and that he fired "*willy nilly*" in an area where innocent people could have been killed: The Magistrate also stated that people in the area in question were used to just random shooting and killing of innocent people, and that a policeman could have been shot and killed. The community in the area was sick and tired of the gangsters and expect the courts to impose sentences on people like the Appellant that would serve as deterrent.

[34] Against sentence it was argued on behalf of the appellant that the trial court misdirected itself in over-emphasizing the interest of the community at the expense of the Appellant's personal circumstances. Ms *De Jongh* argued that the appellant's circumstances which were presented to the court at the time of sentencing have since changed for the better, and that in the exceptional circumstances of the case,

this court should take into consideration his current circumstances in meting out an appropriate sentence. Ms *De Jongh* found support for her submission in the judgment of Leach AJA in *S v Michele and Another*[14] and that of Lewis JA in *S v Jaftha*[15] where the learned Judges held, respectively, that while an appeal court would generally only consider the facts and circumstances known when sentence was initially imposed, the courts have recognised, that in exceptional circumstances factors later coming to light may be taken into consideration on appeal where it is in the interest of justice to do so, and where there was a delay of ten years the state accepted that the sentence should be revisited.

[35] As a general rule, an appeal court may not interfere with a sentence, unless there is a material misdirection by the trial court, or unless the sentence is startlingly inappropriate, with there being a striking disparity between it and the sentence the appeal court would have imposed. Only if the appeal court is convinced that the trial court exercised its sentencing discretion improperly, or unreasonably, would an appeal court interfere. The question in this matter therefore is, whether in imposing the sentence of three years imprisonment the Magistrate exercised his discretion properly. If not then this court is at liberty to interfere.

[36] The Magistrate considered the circumstances under which the Appellant fired the shots as aggravating, in particular, in that innocent people could have been killed. His view, that the Appellant was firing indiscriminately, was based on questions which the Magistrate himself asked, the Appellant namely, that Appellant

[14] 2010 (1) SACR 131 (SCA)
[15] 2010 (1) SACR 136 (SCA)

could not see the people at whom he was firing, and that he blindly fired in the air, with the result that anybody could have been struck. This ignored the Appellant's answers to his questions, which was that he had fired in the direction of the people who were firing at him.

[37] The Magistrate furthermore, and without any evidence being led, assumed that the appellant was engaged in unlawful gangster activities. The circumstances under which the Appellant fired the shots, as indicated *supra*, were lawful in the sense that appellant was acting in self-defence. The unlawful possession of the fire-arm is a separate matter and does not detract from the fact that he was acting in self-defence. In misconstruing the evidence on the merits, the Magistrate misdirected himself when it came to the imposition of an appropriate sentence. I accordingly conclude that the Magistrate did not exercise his sentencing discretion properly, and that this Court is entitled to interfere, and impose what would be an appropriate sentence in the circumstances.

[38] The submission by Ms *De Jongh* that this court should look at the Appellant's personal circumstances and other factors which came to light after sentencing was supported by the state. In this respect Ms *Riley*, submitted that it would serve no purpose to send the appellant to prison and that it appeared that the appellant had in the interim been rehabilitated and became a useful member of society. This submission was based on the undisputed updated version of appellant's personal circumstances. He was older, and hopefully wiser, at age 34. He was still married and three of his children were still minors. He was employed as a cleaner by the

Department of Health and had completed Grade 12 through part-time studies. He was actively involved in community affairs, running a soccer team and providing religious counselling to prisoners. Most significantly appellant has not re-offended.

[39] I agree that sending Appellant to prison will not serve any purpose. In considering what sentence will be appropriate his current personal circumstances will be taken into consideration. The inordinate delay in finalising the matter is a significant factor to take into consideration. Appellant had to anguishly wait for ten years for the matter to be finalised. He was however not totally without blame. He was, or ought to have been aware that his appeal was not finalised, yet he took no steps whatsoever to expedite its conclusion. And this was, while out on bail, and not hampered otherwise by the restrictions of imprisonment. No reason where advanced why he did nothing after the correctional supervision was prepared to see to the finalisation of the appeal. In the circumstances I am, however, of the view that a sentence of a fine coupled with a wholly suspended sentence of imprisonment will be an appropriate sentence.

(E) <u>ORDER</u>

[40] The order I propose therefore is the following:

1. the appeal succeeds;

2. the convictions of the appellant on count 3 and 4, i.e. pointing of a fire-arm in contravention of section (1) (i) read with sections 1 and 39 (2) (d) of the Arms and Ammunition Act, and causing a nuisance by unlawfully discharging a fire-arm in contravention of Regulation 2 read

with Regulation 1, 4; and 5 of Provincial Notice 134/1974m, are set aside;

3. the sentence of 3 years' imprisonment imposed by the Magistrate is set aside and replaced with the following:

> "*R3000-00 or 12 months imprisonment. A further 12 months imprisonment wholly suspended for 3 years on condition the accused is not found guilty of a contravention sections 90; 91; 92; 93 and 94 of the Fire Arms Control Act 62 of 2000".*

_____

DOLAMO, J

I agree. It is so ordered.

_____

HENNEY, J

I agree.

_____

MANTAME, J