REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED.

[redacted]
SIGNATURE

.....17/02/2017.....
DATE

CASE NO.: A648/2015

SAMUEL MPHUTHI **APPELLANT**

17/2/2017

AND

THE STATE **RESPONDENT**

JUDGMENT

THOBANE AJ,

[1] The appellant was arraigned in the Regional Court sitting at Sebokeng on two counts;

Count 1. Unlawful possession of 3 firearms,

Count 2. Unlawful possession of ammunition.

[2] The appellant, who was legally represented throughout the trial proceedings, pleaded not guilty to both counts but was nevertheless found guilty as charged and sentenced as follows,

Count 1. 10 years imprisonment,

Count 2. 5 years imprisonment.

He was further declared unfit to possess a firearm.

[3] Leave to appeal against the sentenced was granted by the court *a quo*.

[4] The events giving rise to the appellant's conviction are briefly as follows: The police were responding to a business robbery. They were given names of possible perpetrators by their informer. Using the information given to them, they proceeded to the appellant's place of residence. They forcibly opened the door and entered. They were not in possession of a search warrant but were granted permission by the appellant to search the premises. It was during this search that three firearms were recovered, namely, a Victor rifle, a semi-automatic 9mm Baretta as well as a semi-automatic 9mm Norinco pistols. These firearms had the following rounds of ammunition respectively,

10, 8 and 6. The appellant did not have a license to possess any of these firearms nor the ammunition. The Victor rifle was found tucked under a bed whereas the Norinco and the Baretta pistols were found in a purple bag.

[4] The appellant is of the view that the sentence imposed induces a sense of shock and on that basis argues that this court is at liberty to intervene. It is particularly contended that the sentencing court overemphasized the seriousness of the offense as well as the interest of society at the expense and to the exclusion of the appellant's personal circumstances.

[5] The following personal circumstances of the appellant were presented to the sentencing court;

- that he is 32 years of age;
- has attended formal schooling up to grade 11;
- he is single;
- he has three minor children aged 9, 6 and 3 years, whom he was maintaining and that being this young, they need parental guidance;
- his 6 years old child suffers from epilepsy;
- his partner is unemployed and has a "heart problem";
- that he is a first offender and that there is no evidence to suggest he is incapable of rehabilitation;
- that he suffers from arthritis;

- he did not have formal source of income but relied on informally lending people money as well as selling goods;
- that he co-operated with the police;
- he has been in custody for a period of 16 months before sentence was imposed.

[6] The respondent's counsel submitted that the court *a quo* delivered a balanced sentence having considered the personal circumstances of the appellant, the nature and seriousness of the offences, and the interests of society. Counsel contends that the aggravating factors far outweigh the mitigating factors and that as a result, the manner in which the magistrate approached sentencing as well as the sentences imposed cannot be faulted when one considers *inter alia*, the fact that the offences are prevalent and also the fact that the appellant's name had been mentioned or linked with two robberies in the area.

[7] The basic approach in every appeal against sentence was set out in ***S v Rabie 1975 (4) SA 855 (A)*** at 857D-F to be the following:

"the court hearing the appeal –

"(a) should be guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial court', and

(b) *should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly' exercised."*

The test under (b) is whether the sentence is vitiated by any irregularity or misdirection or is disturbingly inappropriate", (see also ***S v Giannoulis 1975 (4) SA 869 (A), S v Barnard 2004 (1) SACR 191 (SCA)*** *at* ***194C-D, S v Mayisela 2013 (2) SACR 129 (GNP) at [13].***)

[8] The court in ***S v Malgas 2001 (1) SACR 469 (SCA)*** at 478E-H said the appeal court can only interfere with the sentence imposed by the trial court where it is vitiated by a material misdirection or where the disparity between the sentence of the trial court and the sentence that the appellate court would have imposed had it been the trial court, is so marked that it be described as '*shocking*', '*startling*' or '*disturbingly*' inappropriate (see also ***Madiba v S*** **[2015] JOL 33686 (SCA)**).

[9] Having studied the record, it was noted that the court *a quo* firstly failed to forewarn the appellant about the applicability of the minimum sentences legislative framework to the charges and secondly that the appellant was charged with one count of unlawful possession of firearms despite the fact that three firearms were found in his possession. The record reflects that at the commencement of proceedings just before the charges were put to the appellant, the magistrate, alive to the fact that the charge sheet was silent on

the invocation of the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997, by the State, said the following;

> *"**Court**: Before the plea I must indicate to them that the state has not invoked the provisions of Section 51(2) of Act 38 of 2007 (sic), which deals with prescribed sentences. Be that as it may I must warn them that both counts are punishable with 15 years' imprisonment unless they can show the existence of substantial and compelling circumstances, but if at the time of the commission of the offense they were less than 18 years of age then they do not qualify for 15 years' imprisonment. I must further indicate that although the state has not invoked that provision, the state itself, that is Firearms Control Act, also imposes 15 years' imprisonment for these offenses....."* (Record page 26 line 11 to 20).

[10] From the above it seems clear that there was a failure on the part of the State, bearing in mind that the state is *dominis litis,* to forewarn the appellant. It is trite that such a failure vitiates the proceedings. See ***S v Makatu 2006 (2) SACR 582 (SCA)*** where the following is stated:-

> *"[7] As a general rule, where the State charges an accused with an offence governed by s 51(1) of the Act, such as premeditated murder, it should state this in the indictment. This rule is clearly neither absolute nor inflexible. However, an accused faced with life*

imprisonment - the most serious sentence that can be imposed - must from the outset know what the implications and consequences of the charge are. Such knowledge inevitably dictates decisions made by an accused, such as whether to conduct his or her own defence; whether to apply for legal aid; whether to testify; what witnesses to call; and any other factor that may affect his or her right to a fair trial. If during the course of a trial the State wishes to amend the indictment it may apply to do so, subject to the usual rules in relation to prejudice."

See also: ***S v Legoa 2003 (1) SACR13 (SCA), Kgantsi v S (732/11) [2012] ZASCA 76 (25/5/12) PN v S (828/13) [2014] ZASCA (27/3/14)***

[11] In ***S v Machongo 2014 JDR 2472 (SCA)*** the following is stated:-

"[10] It is settled law that failure to forewarn or to mention the applicability of the minimum sentence is a fatal irregularity resulting in an unfair trial in respect of sentence. The question is, having come to the conclusion that a misdirection has been committed, what next should the appeal court do? The answer is and has always been that the appeal court must consider the sentence afresh. What then does considering the sentence afresh mean?".

[12] Furthermore, forewarning an accused person about the applicability of minimum sentences is grounded in the Constitution of this country. That much was said in ***S v Kolea 2013 (1) SACR 409 (SCA)***, where the Supreme Court

of Appeal located such forewarning in the Constitution when the following was said;

> *"The accused's right to be informed of the charge he is facing, and which must contain sufficient detail to enable him or her to answer it, is underpinned by s 35(3)(a) of the Constitution, which provides that every accused person has a right to a fair trial. The objective is not only to avoid a trial by ambush, but also to enable the accused to prepare adequately for trial and to decide, inter alia, whether or not to engage legal representation, how to plead to the charge and which witnesses to call. It follows that, if the State intends to rely on the minimum-sentencing regime created in the Act, this should be brought to the attention of the accused at the outset of the trial…".*

[13] Possession of a semi-automatic firearm, such as the ones the appellant possessed, is an offense contemplated in section 51(2)(a) of Act 105 of 1997, therefore it attracts the minimum sentence of 15 years. In ***Swartz v S [2014] ZAWCHC 113 (4 August 2014)*** Rogers J discusses in detail jurisprudence pertaining to minimum sentences as it applies to possession of semi-automatic firearms. He said the following;

> *"[39] ....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.

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[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 (i.e. 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."

See (***S v Madikane 2011 (2) SACR 11 (ECG), S v Dube 2012 (2) SACR 579 (ECG), S v Khoza and Others 2010 (2) SACR 207 (SCA)*** and ***S v Maseola 2010 (2) SACR 311 (SCA)***.)

In *casu* the appellant was charged with unlawful possession of firearms "as per annexure". In the annexure would have been listed all three firearms. The charge sheet however comprises one count of possession of three firearms.

[14] For purposes of this appeal I accepts that the sentencing court was hampered by the failure to forewarn the appellant. This meant that the provisions of section 51(2) would not find application. Further, that the failure to charge the appellant with three counts of possession of the three firearms, meant that the sentencing court could not properly deal with, *inter alia,* issues of the cumulative nature of the sentences as well as proportionality. This is a second issue that is of concern to this court. This court however accepts that it cannot take into account that which was not placed and argued before the court *a quo* and not part of the record of the sentencing court. This court can therefore do no better than to highlight issues, arising from the sentencing court, that are of concern to it.

[15] Mr. Matlapeng on behalf of the appellant argued that although a sentence of 15 years imprisonment is competent for possession of an unlicensed firearm and ammunition, it is rarely imposed and is reserved for serious offences. We debated with him whether the facts of this case do not make this matter a "serious offense", in light of the fact that instead of imposing the sentence of 15 years imprisonment in count one, the magistrate imposed only 10 years and in respect of count two, that of possession of

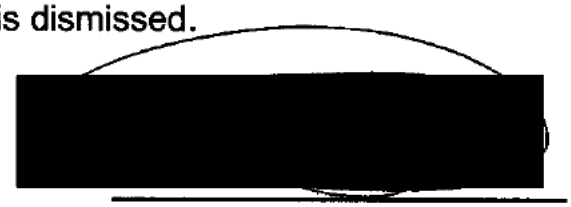
ammunition, 5 years imprisonment was imposed. He was constrained to concede that viewed from that angle, the contention that the effective sentence of 15 years is shockingly inappropriate, would not gain much traction as to be persuasive.

[16] Ms. van der Westhuizen argued on behalf of the respondent that when one considers the fact that the appellant was sought in connection with two aggravated robberies, and that the firearms discovered could have been used during the robbery, the offences of which the appellant had been found guilty were in fact very serious. She further argued that in any event, the minimum sentence for contraventions of section 3 and section 90 of the Firearms Control Act, No. 60 of 2000, is 15 years' imprisonment in each case, therefore that given the gravity of the offences, the sentences of 10 and 5 years' imprisonment respectively, do not induce a sense of shock, and are not disproportionate to the offences.

[17] I can find no misdirection in the court *a quo's* approach to sentencing. The record reflects that the magistrate had regard to ***S v Zinn 1969(2) SA 537 (A),*** and accounted for both mitigating and aggravating circumstances. He further dealt with the cumulative effect of the sentences and arrived at the conclusion, correctly in my view, that if the court were to impose the minimum prescribed in the Firearms Control Act, No. 60 of 2000, being 15 years per charge, it would be shockingly inappropriate.

[18] I therefore propose the following order;

1. The appeal against sentence is dismissed.



T THOBANE
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered

D MOLEFE
JUDGE OF THE HIGH COURT

APPEARANCES

Heard	:	29 January 2017
Delivered	:	17 February 2017
Counsel for Appellant	:	R.S Matlapeng
Counsel for Defendant	:	Adv. J.P. van der Westhuysen