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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no: A268/2023
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. YES
DATE: **18 July 2024**
SIGNATURE

IN THE MATTER BETWEEN:

PELANI ENOCK MTSHALI APPELLANT

and

THE STATE RESPONDENT

Coram: Collis J and Matthys AJ

Summary: Sentence -Prescribed Minimum -Jurisdictional facts for application- Imposition of in terms of section 51(2) Act 105/97 -Offence- unlawful possession of a semi-automatic firearm- Onus rest on the State to prove upon conviction, the jurisdictional fact - fault on the part of the accused i.r.o the semi-automatic nature of the firearm, for the minimum sentence regime to apply-Guilty plea- jurisdictional facts of the

offence described in Schedule 2 of Act 105/97, to be canvased in the section 112 (2) statement and or questioning by the presiding officer.

ORDER

On appeal from: The Regional Court Nigel

1. The appeal against sentence on count 1 is upheld.

2. In terms of section 309 (3) of the Criminal Procedure Act 51/77, the conviction on count 1 is set aside and altered to read as follows- Guilty on contravening section 3 read with sections 120 (1) (a) and section 121 of the Firearms Control Act 60/2000.

3. The sentence of 15 years imprisonment on count 1, is set aside and replaced with 7 years imprisonment.

4. The sentence of 1 year imprisonment on count 2 is confirmed.

5. In terms of section 280(2) of the Criminal Procedure Act 51/1977, it is ordered for the 7 years imprisonment imposed on count 1, to run concurrently with the imprisonment imposed on count 2.

6. The effective term of 7 years imprisonment is antedated from 27 July 2022 (date of conviction).

JUDGMENT

Matthys AJ and Collis J concurring

Introduction

[1] This is an appeal against sentence from the Regional Court sitting at Nigel[1]. The appellant is aggrieved by the sentence of 15 years imprisonment imposed on a charge of the unlawful possession of a semi-automatic firearm in contravention of section 3 read with section 120(1) (a) and section 121 of the Firearms Control Act 60/2000, further read with section 51(2) of Act 105/1997. He was also sentenced to a term of 1 year imprisonment on a charge of the unlawful possession of ammunition[2]. It was ordered for the imprisonment imposed on the two counts to run concurrently.

[2] Leave to appeal the sentence was refused by the trial court, however granted on petition in terms of section 309C of Criminal Procedure Act 51 of 1977 (CPA)[3].

BACKGROUND

[3] The appellant pleaded guilty to the charges and his legal representative placed on record his statement in terms of section 112(2) of the CPA. The contents of the statement read as follows: -

[3] "I admit that on the 12th of February 2021, at about 12:00 and near Devon in the Regional Division of Gauteng, I did unlawfully have in my possession a firearm to wit a 9 mm Norinco pistol with serial number 2[...] and ammunition to wit 8 (eight) 9 mm parabellum calibre live rounds in a magazine, without holding a license, permit or authorization issued in terms of the Firearms Control Act to possess the firearm and ammunition.

[4] I was retrenched during the Covid pandemic and I used the money to buy a motor vehicle. I did not have a driver's license and I requested family members from Kwa-Zulu Natal to come to Gauteng to help me and drive the vehicle to KZN, because I did not have a license. Before they arrived in Gauteng, I bought the abovementioned firearm and ammunition to protect myself and my vehicle when travelling to KZN. While we

[1] Regional Magistrate J Du P Voogt presiding.
[2] contravention of section 90 read with section 120 (1) (a) and section 121 of Act 60/2000.
[3] An order by Makhoba J and Le Grange AJ

were on our way to KZN, our vehicle was stopped by Police and searched and the Police found the said firearm and ammunition underneath the left front passenger seat where I was seated. I placed the firearm under the seat and my two co-accused who was in the vehicle, was not aware of the fact that I placed a firearm underneath my seat.

[5] I admit the contents of the section 212 statement of W/O Z I Sikosana that the firearm is a semi- automatic firearm in terms of the Firearms Control Act and the ammunition found in my possession is ammunition in terms of the same Act.

[6]I admit that at all relevant times I knew that it was unlawful to possess a firearm and ammunition without being lawfully licensed or authorized to possess such firearm or ammunition.

[7] I admit that my action was unlawful and a punishable offence.**"** [My emphasis]

[4] The admitted facts as set out in the statement, were accepted by the prosecution and the Regional Court Magistrate, convicted the appellant as charged on each of the two counts. The parties and the Regional Magistrate, were all *ad idem* that the conviction on the unlawful possession of the semi-automatic firearm, warranted for sentencing to be considered under the "Minimum Sentence regime"[4].

[5] On appeal, the parties agreed that the sentence of 15 years imprisonment imposed on the unlawful possession of the semi-automatic firearm, is inappropriate and should be set aside by this court. However, having heard the arguments made by the parties, the court invited heads of argument to be filed on the issue - Whether on the particular facts admitted by the appellant, the conviction resorts within the purview of section 51(2) (a) of Act 105/97. Differently phrased, did the appellant admit in his guilty plea, that he at the time of the commission of the offence, had knowledge of the semi-automatic functioning of the firearm as referred to in Schedule 2 Part II of Act 105/97,

[4] Act 105/97

even though he admitted the contents of the ballistic report[5] in which the firearm is described as of semi-automatic mechanism[6].

[6] In the context of the issue raised by the court, the parties were referred to the decision by Willis J in **S v Mukwevho**[7] in which the court held the following: -

"… the semi-automatic feature of the firearm was an essential element of the alleged offence precisely by reason of the fact that it was the possession of this very type of firearm that brought a severe minimum sentence into operation. Moreover, it was not good enough to prove that an accused person possessed a firearm which so happened to be a semi-automatic one: it had to be proven, at least by necessary inference, that the accused person must have known (dolus) or ought to have been aware of the relevant facts (culpa) which give rise to that prescribed minimum sentence for such possession and assumed the risks that attached thereto[8]" [My emphasis]

The Appellant's Argument

[7] On behalf of the appellant, it is submitted that he only admitted the elements of the offence contained in section 3 read with section 120 of Act 60 of 2000 and the correctness of the contents of the ballistic report. He however, did not admit that he knew (from his own independent knowledge) that the firearm in his possession, was of semi-automatic mechanism.

[8] It is contended that if the Mukwevho decision is to be followed on the facts of this case (where in the appellant did not specifically admit that he knew at the time of the possession of the firearm that it was a semi-automatic) the conviction as well as the sentence ordered by the trial court, cannot be sustained. The argument goes, that the prosecution would not have proven all of the essential elements of the offence charged, as was held in Mukwevho.

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[5] Affidavit deposed to by the ballistic analyst in term of section 212(4)(a) of Act 51/1977 (CPA)
[6] Self-loading, but not capable of discharging more than one shot with a single depression of the trigger.
[7] 2010 (1) SACR 349 (GSJ)
[8] Footnote 7 para 11 at 357e–h

[9] In the premises, counsel contended that this court ought to review the conviction in terms of its inherent review powers. It is further argued on behalf of the appellant, that in following the decision in Mukwevho, there is no other charge on which the appellant can be convicted as a competent verdict and that section 270 of the CPA, do not find application. In the alternative, counsel argued that this Court should follow the approach in **S v Mathekga and Another**[9].

[10] It is submitted that the approach in Mathekga, leaves the conviction on the unlawful possession of a firearm intact and that the penalty provisions in section 121 of the Firearms Control Act 60 of 2000 be applied for sentence purposes.

The Respondent's Argument

[11] In heads of argument counsel for the prosecution, maintains that it could not have been the Legislature's intention with section 51(2) of Act 105/97, to expand the elements of the offence charged and for the State to be required to prove, that the appellant had independent personal knowledge that the firearm was a semi-automatic firearm. It is contended that the provision in section 51 (2) of Act 105/1997 should find automatic application, based on the admissions made by the appellant in his guilty plea.

[12] It is further argued for the State, that because the facts in Mukwevho are distinguishable from the facts in this case, that decision should not be followed by this court. The State placed reliance on the decision of **S v Thembalethu**[10] in support of its argument.

DISCUSSION

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[9] 2020(2) SACR 559 (SCA) para 22 in which it was held to the extent that the trial court wrongly convicted and sentenced the appellants on the basis of section 51(1) as the provision requires that the law-enforcement officer must be performing his functions as such. Where the offender was not aware that the person was a law-enforcement officer the offender cannot reasonably be expected to know that the victim was a law-enforcement officer and the provisions of section 51(1) do not apply. The murder therefore automatically fell within the ambit of section 51(2) in terms whereof the prescribed minimum sentence is 15years'mprisonment.

[10] 2009 (1) SACR 50 (SCA)

[13] The argument advanced on behalf of the respondent, is unfortunate and not legally sound. Moreover, counsel for the respondent's selective reading of the decision in Thembalethu, misinformed her argument made. The Thembalethu decision, is not authority for the contention, that the State is not required to prove, that an accused had knowledge of the semi-automatic nature of the firearm, at the time of the commission of the offence and before the minimum sentence regime can find application.

[14] In Thembalethu, the appellant relied on **S v Sukwazi**[11] and a long line of similar decisions of the High Courts. The challenge related to the inclusion of the possession of semi-automatic firearms in schedule 2 of Act 105/97. At the time, possession of semi-automatic firearms was considered to be less serious than the other types of arms listed in the schedule. Then, the penalty clause in the repealed Arms and Ammunition Act[12] allowed a maximum sentence of three years imprisonment for possession of a firearm. In Sukwazi, it was held to the effect that it was an absurdity for Act 105/97 to require a minimum of 15 years imprisonment and that the legislature could not have intended same.

[15] With the Thembalethu decision, the Supreme Court of Appeal set aside the decision in Sukwazi, as it was in conflict with the decision in **S v Legoa**[13]**.** In Legoa, it was held that Act 105/97 does not create new offences, but refers to specific forms of existing offences, for which harsher punishment is decreed[14]. It was held that there is no absurdity in the inclusion of a semi-automatic firearm in the schedule, in that the possession of such firearms may have been singled out by the legislature, due to its prevalence in the commission of violent crime. It was held of no consequence, that the penalty clauses in the Arms and Ammunition Act was lower than the prescribed minimum in Act 105/97.

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[11] 2002 (1) SACR 619 (N)
[12] 75/1969
[13] 2003 (1) SACR 13 SCA
[14] Footnote 13 at para 9

[16] What is of significance for purposes of this appeal in the Thembalethu decision, is that in that decision the appellant testified that the mechanism of the semi-automatic firearm, was demonstrated to him and it was proved that he fired it in the commission of a robbery.

[17] It was on that basis, that the Supreme Court of Appeal held, that there was no question that the appellant was aware that he was in possession of a semi-automatic firearm. It was therefore (unlike in this case) not necessary for that court to decide, whether the appellant had knowledge of the semi-automatic nature of the firearm, the possession of which, forms the basis of the charge and for the enhanced sentencing jurisdiction to apply[15].

[18] The argument made for the appellant is also misguided in some respects. The Mukwevho decision does not hold forth, that a new offence is created by the fact that the provisions in section 51(2) of Act 105/97 are read with section 3 of the Firearms Control Act 60/2000.[16] As will be illustrated below, Act 105/97 does not create new offences, but provides for existing offences in a specified form, which brings it within the ambit of the enhanced sentencing regime.

[19] Section 3 of the Firearms Control Act 60/2000 provides that no person may possess a firearm unless he holds a licence, permit or authorization issued in terms of the Act, for a firearm. Section 120(1)(a) makes it an offence if section 3 is contravened and section 121 read with Schedule 4 sets out the punishment for this offence.

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[15] Footnote 10 para 13

[16] Footnote 13 (S v Legoa) at para18 the following is held-

[18] It is correct that, in specifying an enhanced penal jurisdiction for particular forms of an existing offence, the Legislature does not create a new type of offence. Thus, 'robbery with aggravating circumstances' is not a new offence. The offences scheduled in the minimum sentencing legislation are likewise not new offences. They are but specific forms of existing offences, and when their commission is proved in the form specified in the Schedule, the sentencing court acquires an enhanced penalty jurisdiction. It acquires that jurisdiction, however, only if the evidence regarding all the elements of the form of the scheduled offence is led before verdict on guilt or innocence, and the trial court finds that all the elements specified in the Schedule are present.

[20] In this case, the prosecution preferred for the provisions of the Firearms Control Act, to be read with section 51(2) of Act 105/97 in order to trigger, the application of the minimum sentencing regime. The prosecution is consequently required to prove upon conviction, the jurisdictional fact i.e. fault on the part of the accused i.r.o the semi-automatic nature of the firearm, before the minimum sentence will apply. The semi-automatic nature of the firearm, forms part of the definitional elements of the offence in its specified form, which must be proved by the State upon conviction, if it is preferred for the minimum sentence to find application[17]. This is so, as it is provided in section 51 (2)(a) of Act 105/97 that: -

"Notwithstanding any other law but subject to subsections (3) and (6), a Regional court or a High Court shall sentence a person who has been **convicted** of an offence referred to in (a) Part II of Schedule 2.."
[My emphasis]

[21] As mentioned, the issue whether the State proved that the appellant had knowledge of the semi-automatic mechanism of the firearm, when he committed the offence, speaks to the element of fault (mens rea) which is basic to criminal liability. It is an established principle of criminal liability, that there can be no liability without fault. This principle is expressed in the maxim "the act is not wrongful unless the mind is guilty"[18]. Further to that, the requirement of fault as an element of liability means that fault (dolus or culpa) must exist, in respect of each and every element of the crime with which the accused is charged.

[22] As was held in Mukwevho, for the minimum sentence regime to be applied, it had to be proved by the State or the appellant had to admit thereto, that he not only had intention to unlawfully possess a firearm, but that his intention encompassed knowledge when he possessed the firearm, that it was of semi-automatic functioning.

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[17] This principle was established in S v Legoa at para 14-18 See footnote 13
[18] Latin - actus non facit reum nisi mens sit rea

[23] I considered that the appellant was convicted exclusively, based on the admissions he made in his section 112(2) statement. The offence he was convicted of with reference to section 51(2) of Act 105/97, had to be determined solely on the contents of that statement. There is no admission that he at the time of his possession of the firearm, subjectively knew or ought to have known, the semi-automatic nature of the firearm. Such knowledge could not have been inferred, albeit that the appellant admitted the contents of the ballistic report during the trial.

[24] Although the facts in Mukwevho are distinguishable from that in the present case, the legal principles related to the element of fault, required to be held criminally liable, remains fixed. The principle explained in Mukwevho, is not a novel one, it aligns with earlier decisions of our courts, also referred to in Thembalethu[19]**.** To illustrate, in **S v Petersen**[20] the court held the following:

"The importance of the State having to prove that the intention of the accused was not merely to possess a firearm but a semi-automatic one is illustrated in S v Adams 1986 (4) SA 882 (A) where the accused was charged in terms of s 2 (1) of the Dangerous Weapons Act 71 of 1968 as being in possession of 'any dangerous weapon'. In dealing with the concept possession in this case Corbett JA said:

'Under s 2 (1) the onus is clearly on the State to prove that the accused person was in possession of a dangerous weapon, and this onus would include the burden of establishing beyond a reasonable doubt the existence at the relevant time of this mental element'. (At 891 H) See also Nicholas AJA at 897 B-D.

In my view, this approach is of equal application to the present case. Given the consequences which follows from a conviction of an offence relating to possession of a semi-automatic firearm, the state is obliged to **prove the existence of the necessary mental element** of the crime of such possession" [My emphasis]

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[19] Footnote 10 para 12
[20] 2006 (1) SACR 23 (C) at 27 para a-f

[25] Regard being had, to the quoted authority, it is necessary to stress, that a clear distinction must be made between an accused admitting the description of the firearm (as of semi-automatic nature) because he is informed by the contents of the ballistic report, during the trial and an accused's actual knowledge of the semi-automatic mechanism of the firearm, at the time of the unlawful possession thereof. The latter mentioned scenario, is what is required to be proved by the State.

[26] It is therefore imperative for the exact extent of the admission to be ascertained, where an accused tender a plea of guilty on a charge, where the minimum sentence regime is relied upon by the State. It is obligatory for the jurisdictional facts of the offence described in Schedule 2 of Act 105/97, to be canvased in the section 112 (2) statement and or questioning by the presiding officer.[21]

[27] In convicting the appellant as charged, the court *a quo* did not question him nor satisfy itself, as to proof of the fault element (i.e. dolus or culpa to possess a firearm of semi-automatic working) of the specified offence listed in Schedule 2 Part II of Act 105/97, which element constitute the jurisdictional requirement, necessary to invoke the minimum sentencing regime.

[28] In the first instance, I find that the trial court wrongly convicted the appellant as charged.[22] It is therefore required for this court to in terms of section 309 (3) of the CPA, alter the conviction in accordance with what is proved by the admissions made by the appellant [23].

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[21] Eg. In S v Gagu 2006 1 SACR 547 SCA the appellants were convicted of rape, their guilty plea statements did not address common purpose or conspiracy to commit rape their sentencing could not be covered by part 1 of Act 105/97.

[22] The charge incorporates section 51(2) of Act 105/97

[23] **309 Appeal from lower court by person convicted**

(3) The provincial or local division concerned shall thereupon have the powers referred to in section 304 (2), and, unless the appeal is based solely upon a question of law, the provincial or local division shall, in addition to such powers, have the power to increase any sentence imposed upon the appellant or to impose any other form of

sentence in lieu of or in addition to such sentence: Provided that, notwithstanding that the provincial or local division is of the opinion that any point raised might be decided in favour of the appellant, no

[29] There can be no doubt, that the elements of the offence contained in section 3 read with sections 120(1) (a) and section 121 of the Firearms Control Act 60/2000, (admitted by the appellant) is included in the original charge framed. I also considered that the appellant who was legally represented, have been advised in the charge sheet of the penalty provision in section 121 of the Firearms Control Act.

[30] I therefore find that there is no prejudice to the appellant, if the erroneous verdict made by the trial court, is altered by this court, in terms of section 270 of the CPA, to one of guilty on contravening section 3 read with sections 120(1) (a) and section 121 of the Firearms Control Act 60/2000[24] *viz*, without reference to section 51(2) of Act 105/97.

[31] Secondly, the trial court for the reasons herein stated, misdirected itself in material respects, by consideration of the sentence under the minimum sentence regime. The trial court exercised its sentencing discretion wrongly, in that no finding on substantial and compelling circumstances was required.[25] This court is therefore at large, to consider the sentence afresh.[26]

[32] To arrive at a fitting sentence, consideration is afforded to the blameworthiness of the offender in relation to the crime, the personal circumstances of the offender, as well as the interests of society in the effective sanctioning of offenders.[27] It is further, in the interests of society for sentence to be of a deterrent; preventative; rehabilitative and retributive nature, obviously with reference to the peculiar facts of the case[28].

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conviction or sentence shall be reversed or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to such division that a failure of justice has in fact resulted from such irregularity or defect. [My emphasis]

[24] Section 270 of the CPA provides- If the evidence on a charge for any offence not referred to in the preceding sections of this Chapter does not prove the commission of the offence so charged but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved.

[25] 51(3) of Act 105/97

[26] The law on the approach to an appeal on sentence is stated in S v Malgas 2001(2) SA 1222 (SCA)

[27] See S v Zinn 1969 (2) SA 537 (A); S v Rabie 1975 (4) SA 855 (A)

[28] See S v RO & another 2010 (2) SACR 248 (SCA) at [30]

[33] The following personal circumstances of the appellant are underlined. He was 40 years old at the time of his arrest. He has two wives and eight children. Four of his children are still minors. As stated in his guilty plea, he was unemployed at the time of his arrest, in that he was retrenched where he was employed as a general worker. He was the breadwinner of his family. The Appellant has a grade 8 level of education. The State proved that he has three previous convictions for assault.

[34] In terms of section 121 of the Firearms Control Act 60 of 2000, the maximum sentence that can be imposed for the unlawful possession of a firearm and or ammunition is 15 years imprisonment. This penalty illustrates the serious light in which the type of offence is viewed, not only by the legislature but also by law abiding citizens of our country.

[35] It is common knowledge that in current times, the unlawful possession of firearms and ammunition are prevalent, that is despite robust sentences imposed by the courts. It is therefore necessary for our courts to take cognisance of the prevalence of these offences for sentencing purposes. Serious and prevalent crimes such as the one's committed by the appellant, brings to the fore the retributive and deterrent objectives of sentencing.

[36] Hence it is permissible in this type of matter, for the personal circumstances of the offender to ebb into the background[29]. Let others of like mind, receive the stern message, that our courts do not take the unlawful possession of firearms lightly.

[37] I considered that the appellant showed a readiness to take the consequences of his criminal conduct, by pleading guilty. There is also no countervailing evidence, that his professed remorse is genuine. He acquired the possession of the firearm and ammunition to protect himself and his property, however, this motive for committing the offences, do not detract from his moral blameworthiness. The unlawful manner in which he acquired the firearm is aggravating in itself.

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[29] S v Vilakazi 2009(1) SACR 552(SCA) at para 16

[38] Appellant is not qualified to utilize (know the working) a firearm, which is a dangerous weapon. He therefore placed himself and others at risk. It was fortunate that the police stopped his vehicle and found the weapon before harm could be done.

[39] In essence the arguments for the State and the appellant are in harmony, that direct imprisonment is the most realistic type of sentence to be imposed on the facts of this case. I agree, it is due to the rifeness of the type of crime, that direct imprisonment has become the norm, as illustrated in the abundance of decided cases referred to by the parties. Sentencing trends, however holds limited value and the imposition of sentence remains a matter for judicial discretion, informed by the unique facts of the case.

[40] Considered all the facts, I find a term of 7 years imprisonment on count 1 (unlawful possession of the firearm) equitable. It is further prudent to order in terms of section 280(2) of the CPA for the imprisonment imposed on count 2 (unlawful possession of ammunition) to run concurrently with the imprisonment imposed on count 1 and for the effective term of imprisonment to be antedated from the date of conviction, 27 July 2022.

[41] The following order is made:

1. The appeal against sentence on count 1 is upheld.

2. In terms of section 309 (3) of the Criminal Procedure Act 51/77, the conviction on count 1 is set aside and altered to read as follows- Guilty on contravening section 3 read with sections 120(1) (a) and section 121 of the Firearms Control Act 60/2000.

3. The sentence of 15 years imprisonment on count 1, is set aside and replaced with 7 years imprisonment.

4. The sentence of 1-year imprisonment on count 2 is confirmed.

5. In terms of section 280(2) of the Criminal Procedure Act 51/1977, it is ordered for the 7 years imprisonment imposed on count 1, to run concurrently with the imprisonment imposed on count 2.

6. The effective term of 7 years imprisonment is antedated from 27 July 2022 (date of conviction).

MATTHYS AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I concur and it is so ordered
COLLIS J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

Counsel for the Appellant:	Adv LA Van Wyk (Legal Aid South Africa)
Counsel for the State/Respondent:	Adv I Erwee (NPA Pretoria)
Date of Hearing:	14 May 2024
Date of Judgment:	18 July 2024