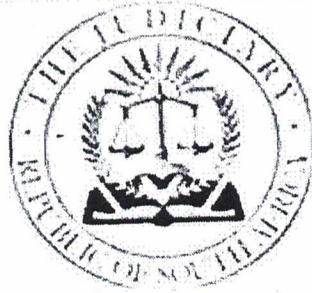


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A583/17

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

17/06/21
DATE


SIGNATURE

In the matter between:

RETSHIDISITSE LEBAJOA

Appellant

and

THE STATE

Respondent

J U D G M E N T

The judgment and order are accordingly published and distributed electronically. The date and time of hand down is deemed to be 10:00 on 17 June 2021.

TEFFO, J:

[1] The appellant was arraigned in the Oberholzer Regional Court where he faced charges of robbery with aggravating circumstances, unlawful possession of a firearm and ammunition, pointing of a firearm, two counts of assault with intent to do grievous bodily harm and possession of a dangerous

weapon. The charges of robbery with aggravating circumstances and unlawful possession of a firearm (semi-automatic) were read with the provisions of section 51(2) of Act 105 of 1997, the Criminal Law Amendment Act ("the CLAA") and Part II of Schedule 2. The section provides that a first offender who is convicted of the said offences is liable to be sentenced to a minimum period of 15 years' imprisonment unless, in terms of section 51(3) thereof, the court is satisfied that "*substantial and compelling circumstances*" exist which justify the imposition of a lesser sentence.

[2] He pleaded not guilty but was ultimately convicted on all counts save for the count of robbery with aggravating circumstances. However, he was convicted of theft on that count. He was sentenced to twelve years' imprisonment on the charge of unlawful possession of a firearm and two years' imprisonment on each of the other charges. The sentences imposed in all other counts were ordered to run concurrently with the sentence imposed in the count of the unlawful possession of a firearm.

[3] He appeals against his conviction and sentence with the leave of the *court a quo*.

The facts

[4] On 15 September 2015 at approximately 05:00 the complainants, Messrs Antonia Sekwela (Antonia), Sergio Mayite (Serge), Thabo Ngwenya (Thabo) and one Zito were at the Western Deep Mine to mine illegally. As they were walking, they spotted the appellant behind them who was bending at the time. He approached them and pointed them with a firearm. They ran away. Thabo and Serge had buckets in their possession at the time. The

bucket that Thabo was carrying was empty while the small one carried by Serge had gold bearing material. The appellant followed Thabo and caught him. After noticing that the bucket he was carrying was empty, he left him and pursued Serge. He could not catch Serge.

[5] The group met again at a spot where they changed clothes. The appellant emerged and pointed them with a firearm again as he was looking for the small bucket that Serge was carrying earlier when they first met him. They ran away again to another spot. Serge and one gentleman who was with the group left them. The appellant emerged again and asked them why they were running away and the whereabouts of Serge. After he was informed that Serge had already left, he demanded Serge's contact numbers and also told them to inform him to come back with his work referring to the soil that Serge was carrying.

[6] Serge, Thabo and the appellant met again at the hiking spot. They boarded the same taxi. The appellant threatened them with a firearm. A struggle broke out and the firearm fell. The appellant took out a knife and stabbed Serge and Thabo. He still followed them after they had alighted from the taxi. Police were called and the appellant was arrested.

[7] The State also called two police officers, Constables Mosiyaleng and Gharejane who gave evidence about the arrest of the appellant and where the firearm and the knife which were used in the commission of the offences were found.

The appeal against conviction

[8] The conviction of the appellant was criticised on the basis that the evidence of the state witnesses did not prove beyond a reasonable doubt that the appellant committed the offences. In his heads of argument, Mr M Botha on behalf of the appellant submitted that the Magistrate misdirected himself by convicting the appellant of theft when he found that the appellant had the intention to deprive Antonia of his clothes permanently.

[9] With regard to the unlawful possession of a firearm, the unlawful possession of ammunition and possession of a dangerous weapon, Mr Botha submitted that the State relied on circumstantial evidence. Relying on the case of *R v Blom*¹ and *S v Cooper*², he submitted that circumstantial evidence alone does not prove the guilt of the appellant and his involvement is not the only reasonable inference that can be drawn from all the proven facts. Further, that it does not exclude all other reasonable inferences and specifically the appellant's version. He further submitted that the magistrate erred in convicting the appellant on count of possession of a dangerous weapon.

Applicable legal principles

[10] A court of appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record of the evidence reveals that those findings are patently wrong. The trial court's findings of fact and credibility are presumed

¹ 1939 AD 288

² 1996 (2) SA 875 (T)

to be correct, because the trial court, and not the court of appeal, has had the advantage of seeing and hearing the witnesses, and is in the best position to determine where the truth lies³.

Count 1 - Theft

[11] Further submissions on this count were that the evidence of the complainant, Antonia was that he did not see the appellant taking the bag that was carrying his clothes. He subsequently asked the appellant about the whereabouts of his clothes and the appellant mentioned that he had placed them nearby, indicating a particular spot. Mr Botha argued that the moving of the complainant's bag does not constitute theft of the items.

[12] This argument is not of assistance to the appellant's case if one takes into account the following evidence: Antonia testified that the appellant robbed him of his clothes, a brown trouser valued at R180,00 which was inside a purple bag. He never recovered it. He left the trouser inside the bag at the spot where he and the others changed their clothes on the day of the incident. When he went to get it, he did not find it. He took someone else's clothes. He asked the appellant about his clothes and the appellant said he threw them somewhere.

[13] Although the complainant did not see the appellant taking or removing his clothes where he had left them, the appellant admitted that he threw the clothes somewhere else. It does not appear from the evidence that the complainant was shown where the clothes were thrown and that he was able to recover them. It can, therefore, not be correct to say that there was no

³ *Supra*

intention to deprive him of his clothes permanently. In my view the court below correctly convicted the appellant of theft.

Counts 2, 3 and 7 – Unlawful possession of a firearm, ammunition and possession of a dangerous weapon

[14] Mr Botha for the appellant further submitted that the only evidence linking the appellant to the firearm, the ammunition and the knife, was the allegation by the state witnesses that the items were found near a spot where the appellant had passed when he was chased. He argued that the items were found by the complainants as per the evidence and they pointed the items to the police officers. He submitted that no DNA of the appellant was found on the firearm, and the police officers testified that they did not see the appellant carrying any of the items when they were chasing him. Furthermore, that the appellant testified that it was in fact the members of the complainant's group who were in possession of the firearm and the knife.

[15] It is not correct that the only evidence linking the appellant to the firearm, the ammunition and the knife, was the allegation by the state witnesses that the items were found near the spot where the appellant passed when he was being chased after. Antonia testified that during their first encounter with the appellant, he pointed them with a firearm and they ran away. Their second encounter with him was when they were at a spot where they changed their clothes. The appellant again pointed them with a firearm and they all ran away. Serge and Thabo further testified that the appellant who later boarded the same taxi with them, threatened them with the firearm inside the taxi, a struggle broke out and the firearm fell. The appellant took out

the knife and stabbed the two complainants. He followed them even after they had alighted from the taxi.

[16] The two police officers, who were not with the complainants and the appellant at the time of the incidents, testified that they overheard from the radio about a robbery that had just taken place where a firearm was involved. They immediately rushed to the scene. As they were driving in P111 Road, they saw a group of people in an open veld towards the bush chasing after a certain man. When the man saw them, he changed the direction and stopped at a tree as if he was looking for a place to hide himself. He continued running until they managed to catch him after they alighted from the vehicle. They looked around and at the tree where the man stopped earlier, they found a black jacket with green stripes. Inside the jacket, they found a firearm and a knife. The undisputed evidence was that no one else went past that tree.

[17] The information that was given to them about the suspect in the robbery was that he was in possession of a firearm and was wearing a black jacket with stripes. Some people in the group who were there identified the appellant as the person who had robbed them with a firearm.

[18] Constable Gharejane testified that the appellant was running in an open veld. They never lost sight of him. They saw him dropping something where he was running. The group confirmed that the appellant was wearing the same lumber jacket wherein the firearm and the knife were found wrapped, earlier.

[19] The appellant also admitted that the jacket was his. This was also confirmed by DNA evidence.

[20] The fact that Thabo testified that he was the person who pointed the firearm and the knife to the police is of no consequence taking into account that the items were found in the presence of the police. Constable Mosiyaleng never mentioned that the items were pointed to him by any member of the group. This fact does not assist the appellant's case in that the appellant testified that when he fought with Serge, Thabo was not there. The lumber jacket remained with Serge when he got loose from him when they were fighting. There is no evidence that Serge or Thabo also went past the tree where the jacket was found prior to it being found. The only person who went past that tree was the appellant. It can only have been the appellant who had left the jacket under the tree as he was the only person who was seen running and stopping past that tree prior to the jacket being found there.

[21] The *court a quo* correctly found that it was not probable that the complainants would have called the police if they were the robbers as the appellant had testified. Further that it was strange that if the knife belonged to the complainants, only them were stabbed and injured and the appellant was not. It also was strange that if the complainants and the appellant were fighting over the golden concentrate as the appellant had testified, the complainants, Serge and Thabo would have continued to pursue him to a point where Serge would fire a shot in the air and also stab him with a knife when golden concentrate was in their possession.

[22] The appellant could not explain why the firearm and the knife were found wrapped in his lumber jacket. The firearm had ammunition and was functional. It could not have been a coincidence that it was the appellant who

had been pointing the complainants with a firearm, stabbed them with a knife, and then the firearm and knife were later found wrapped in a jacket that belonged to him and which he was wearing on the day in question.

[23] Having regard to the totality of the evidence presented in the court *a quo*, I am of the view that the court *a quo* correctly rejected the appellant's evidence as not reasonably possibly true. It correctly found corroboration and logic in the evidence of the state witnesses. It was not only circumstantial evidence that led to the conviction of the appellant on those counts. There was also direct evidence that I referred to above. The convictions thereof cannot be faulted.

[24] Mr Botha also submitted that the State did not lead evidence that the firearm in question was a semi-automatic firearm, and the intention of the appellant to possess that firearm. He argued that by so doing, the State had failed to prove all the requirements for the minimum sentence to be applied. Reliance thereof was placed on the case of *S v Mokwevho*⁴.

[25] Ms Scheepers for the State submitted that the issue was not raised as a ground of appeal.

[26] The issue raised is very important and the court cannot be precluded from dealing with it merely because it was not included as a ground of appeal.

[27] In the *Mokwevho* matter⁵, Willis J as he then was said the following:

"In s 1 of the Firearms Control Act 60 of 2000, 'semi-automatic' is defined as meaning 'self-loading but not capable of discharging more

⁴ *S v Mokwevho* 2010 (1) SACR 349 par 5

⁵ *Supra*

than one shot with a single depression of the trigger'. No evidence was led in this regard. The appellant was at risk of receiving a minimum sentence if convicted as charged. In *S v Nziyane*⁶ Botha J, with Du Plessis concurring, held, when referring to the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997, in so far as they relate to the minimum sentence for possession of an unlicensed semi-automatic firearm, that:

'Die woorde dra na my mening die betekenis oor die feite wat aanwesig moet wees om die minimum vonnis verpligtend te maak by skuldigbevinding moet vasstaan in die sin dat dit inbegrepe moet wees in die feite waarop die skuldigbevinding gegrond is.'

In other words, in order to attract the prescribed minimum sentence, all the necessary elements must be proven at the stage of conviction, including the fact that the weapon in question was a semi-automatic one. In this case, questions arise not only whether the appellant was in unlicensed possession of a firearm and ammunition, but also whether the firearm was the one described in the charge and whether it was a semi-automatic one. There is also the question of mens rea to which I shall refer separately at a later stage."

[28] At paragraph 10 of the *Mokwevho* judgment⁷, the judge proceeded to say the following:

⁶ 2000 (1) SACR 605 (T) at 609c-d

⁷ *Supra*

“Although Botha and Du Plessis JJ were not, in the Nziyane case, dealing pertinently with the question of mens rea, it seems to me that the fact that the firearm in question was a ‘semi-automatic’ one (and, by definition, ‘self-loading but not capable of discharging more than one shot with a single depression of the trigger’) is not merely part of the narrative or description of the facts in the charge-sheet: it constitutes an essential element of the alleged offence. Guided by the Nziyane case, by which I am in any event bound, I come to this conclusion that the semi-automatic offence, precisely by reason of the fact that it is the possession of this very type of firearm that brings a severe minimum sentence into operation. Moreover, it is not good enough to prove that an accused person possessed a firearm which so happens to be a semi-automatic one. With the Tshwape and De Blom cases as my guide, it seems to me that it must 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 attached thereto. Ordinarily, when it comes to possession of a firearm, it will be a matter of ready inference that a person found in actual physical possession thereof must have known or ought to have known that it was a firearm. When it comes to possession of a semi-automatic firearm, that inference is not quite so easily drawn. Nevertheless, the issue of whether such an inference may be drawn, should not generally, be unduly problematic for the prosecution. Ordinarily, the inference can readily be drawn that a person proven to

have discharged a semi-automatic firearm either knew or ought to have known that it was 'self-loading but not capable of discharging more than one shot with a single depression of the trigger'.

Furthermore, cross-examination of an accused person should assist in determining how credible the denial by the accused person of the absence of either dolus or culpa in regard to its semi-automatic quality may be. In the present case before us, even if it was accepted that it has been proven that he was in possession of the firearm, there is nothing to justify the necessary inference that the appellant must have been aware or ought to have been aware of the fact that it was a semi-automatic firearm."

[29] The case of *Mokwevho*⁸ is distinguishable from the case before us. In the case before us the charge-sheet explains that the fire arm was a semi-automatic fire arm. The ballistic report was handed in by consent. The appellant consented that the fire arm was a semi-automatic fire arm. Mr Botha did not go through the record. Had he gone through the record, he would have realised that there was sufficient evidence to prove that the fire arm was a semi-automatic fire arm. Under the circumstances I am not persuaded that the *court a quo* misdirected itself by finding the appellant guilty of unlawful possession of a semi-automatic firearm.

[30] Mr Botha further submitted that the evidence tendered by the State does not support a conviction of contravening section 3(1) of the Dangerous

⁸ *Supra*

Weapons Act⁹. He argued after referring to the section that the evidence by the State does not prove a further intention to use the knife as provided for in the section of the Act. Instead it proves that he had abandoned the knife.

[31] I do not find any merit in this argument. Serge and Thabo testified that the appellant stabbed them with a knife inside the taxi after the firearm fell. They never knew that he was in possession of a knife until he produced it and stabbed them with it. The fact that the firearm and the knife were found wrapped inside the jacket the appellant was wearing earlier under a tree, is an indication that when he was being chased by the group and the police he still had the weapons in his possession and only left them where they were found upon realising that he was going to be caught and the police were involved. I am therefore satisfied that the appellant was correctly convicted on this count.

The assault charges

[32] Mr Botha argued that the injuries sustained by the complainants were not supported by the J88 medical reports. Serge testified that the appellant stabbed him on his back with a knife once. The J88 medical report which was completed a week later states that he had a superficial laceration of ± 2 cm on his forehead and that the laceration could have been caused by a sharp object. No other injuries were noted on the J88 medical report. He could not explain why the injury at the back was not noted on the J88 medical report. However, his further evidence under re-examination was to the effect that he still had a 5 cm scar that was visible on his back.

⁹ *S v Francis* 1991 (1) SACR 198 (A) at 198J-199A, *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645E-F

[33] Thabo testified that he was stabbed with a knife on his shoulder and the different parts of his body. The J88 medical report which was completed two days after the incident, stated that his right eye was swollen and he had an abrasion and laceration above the right eye and the suturing was done.

[34] It is my view that the conviction of the appellant on the two counts of assault with intent to do grievous bodily harm cannot be faulted. I am not persuaded that the trial court misdirected itself.

The appeal against sentence

[35] The following personal circumstances of the appellant were placed on record in mitigation of sentence: He was 36 years old at the time of sentence. He is married and had 2 children aged 15 and 2 years. He was unemployed however, he survived on odd jobs whenever they were available. He also did part-time building work. He also worked at the dumping site at the mine. He passed standard 4 (grade 6) at school. He spent 22 months in prison while awaiting trial.

[36] In his heads of argument, Mr Botha for the appellant submitted that the charge-sheet in the Regional Court did not make reference to the provisions of section 51(2) of the CLAA and the provisions were not referred to when the charges were put to the appellant. Further that the record does not show that the appellant was made aware of the minimum sentence of 15 years' imprisonment before the commencement of the trial and that reference thereof was only made during argument and sentence.

[37] Mr Botha further argued that the judgment on sentence was too short and curt. It does not demonstrate any proper reflection of the factors relevant to sentencing.

[38] Furthermore, it was submitted that the trial court erred in not properly applying its mind to inquiring into the proportionality between the offence and the period of imprisonment.

[39] Further submissions were that the sentence was too long. The magistrate did not take into account the period that the appellant spent in custody while awaiting trial. He did not call for more information in the form of a pre-sentence report before passing sentence and he misdirected himself in not taking sufficient cognisance of, or overlooking the appellant's personal circumstances and not giving more weight to the mitigating factors.

[40] In aggravation of sentence, the State made the following submissions: That the offences that the appellant was convicted of were serious. They were prevalent and the appellant did not show any remorse. Weapons were used in the commission of the offences and the appellant had previous convictions.

[41] The appellant has the following previous convictions: On 12 June 2009, he was convicted of contravening section 1(A) of the Immigration Act¹⁰ and sentenced to R600 or 90 days imprisonment. On 22 July 2010, he was convicted of stock theft and sentenced to a fine of R3 600 or 6 months' imprisonment plus two and half years' imprisonment suspended for a period of three years conditionally. On 15 August 2011, he was convicted of

¹⁰ Act 13 of 2002

contravening section 3(A) of the Precious Metals Act¹¹ and sentenced to a fine of R3 000 or 6 months' imprisonment wholly suspended for 5 years conditionally. He was also declared unfit to possess a firearm. On 2 May 2015, he was convicted of contravening the Immigration Act and sentenced to a fine of R1 800 or 3 months' imprisonment.

[42] The State did not agree with the submissions made on behalf of the appellant. It submitted that the sentence was fair and appropriate to the offences committed.

[43] The basic approach in every appeal against sentence was set out in *S v Rabie*¹² 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 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*¹³, *S v Barnard*¹⁴, *S v Mayisela*¹⁵).

¹¹ Act 37 of 2005

¹² 1975 SA 855 (A) at 857 D-F

¹³ 1975 (4) SA 869 (A)

¹⁴ 2004 (1) SACR 191 (SCA) at 194C-D

¹⁵ 2013 (2) SACR 129 (GNP) at [13]

[44] The court in *Malgas*¹⁶ held that 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 that the appellate court would have imposed had it been the trial court, is so marked that it can be described as “*shocking*”, “*startling*”, or “*disturbingly inappropriate*” (see also *Madiba v S*¹⁷).

[45] The purpose of referring to the provisions of the CLAA is to warn the accused of the CLAA and the consequences thereof. Although the charge-sheet did not refer to the provisions of s 51(2) of the CLAA in respect of the count of unlawful possession of a firearm, the charge clearly describes the firearm as a semi-automatic pistol. The record shows that after the charges were put to the appellant and before he could plead, the magistrate explained the provisions of the CLAA and the prescribed minimum sentence. This is what the Magistrate said:

*“Let us explain the prescribed sentences for the robbery and possession of the semi-automatic firearm. They fall under Part II of Schedule 2 of Act 105 of 1997. In other words, the prescribed sentence may be between 15 and 20 years’ imprisonment.”*¹⁸

In this instance, the appellant knew before he pleaded that upon conviction, the provisions of the CLAA would be applicable and that he was facing a minimum sentence of 15 years’ imprisonment. The argument on behalf of the

¹⁶ 2001 (1) SACR 469 (SCA) at 478E-H

¹⁷ 2015 [JOL] 33686 (SCA)

¹⁸ Record page 4 line 20

appellant that the provisions of the CLAA were only referred to during argument and sentence is therefore without merit.

[46] I agree that the judgment on sentence is too short. However, it cannot be argued that there was no sufficient information placed before the magistrate to enable him to properly apply his mind on sentence. For the reasons that will be advanced later in the judgment, the sentence cannot be faulted.

[47] In *S v Malgas*¹⁹ endorsed in *S v Dodo*²⁰ it was held that it is incumbent upon a court in every case before it imposes a prescribed sentence to assess upon a consideration of all the circumstances of a particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The Constitutional Court made it clear that what was meant by the offence in that context consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender. If the court is satisfied that a lesser sentence is called for in a particular case, thus justifying a departure from the prescribed sentence, then the court is bound to impose that lesser sentence.

[48] After considering all the mitigating and aggravating factors, the *court a quo* correctly regarded the period spent by the appellant in custody while awaiting trial as a substantial and compelling circumstance. It then deviated from imposing the prescribed minimum sentence of 15 years' imprisonment in respect of the count of unlawful possession of the semi-automatic firearm and

¹⁹ 2001 (1) SACR 469 (SCA)

²⁰ 2001 (3) SA 382 (CC)

imposed a sentence of 12 years' imprisonment. Furthermore, the court ordered that the sentence in all the other counts run concurrently with the sentence of 12 years' imprisonment.

[49] It is my view that sentence imposed is proportionate to the offences committed. There was therefore no misdirection by the *court a quo*. Accordingly, the appeal against conviction falls to fail.

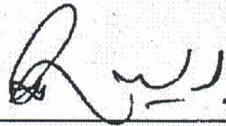
[50] In the result I make the following order:

52.1 The appeal against conviction and sentence is dismissed.



M J TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree:



A K RAMLAL
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

For the appellant	M Botha
Instructed by	Pretoria Justice Centre
For the respondent	S Scheepers
Instructed by	The Director of Public Prosecutions
Date heard	10 February 2021
Date handed down	17 June 2021