

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appeal No.: A116/2023

DPP Ref No: 10/2/5/1-(2023/62)

Date of Appeal: 18 March 2024

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
05/04/24	[REDACTED]
DATE	SIGNATURE

In the matter between:

NTOMBELA, S

FIRST APPELLANT

ZULU, S

SECOND APPELLANT

MDLADLA, Z

THIRD APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

Karam AJ:

INTRODUCTION

1. The appellants were convicted in the Johannesburg Regional Court as follows:

1.1 First appellant – count 1 – unlawful possession of a semi-automatic firearm;

1.2 Second appellant – count 2 – unlawful possession of a semi-automatic firearm
which serial number had been obliterated;

1.3 Third appellant – count 3 – unlawful possession of a semi-automatic firearm
which serial number had been obliterated;

count 4 – unlawful possession of ammunition.

2. The firearm counts were read with the provisions of the Criminal Law Amendment Act 105 of 1997 (“the minimum sentence provisions”).

All counts were read with the provisions of Schedule 4 of the Firearms Control Act 60 of 2000 (Schedule 4”).

3. The appellants were sentenced as follows:

3.1 First appellant – 15 years imprisonment in terms of the minimum sentence
provisions;

3.2 Second appellant – 15 years imprisonment in terms of the minimum sentence provisions;

3.3 Third appellant – count 3 – 15 years imprisonment in terms of the minimum sentence provisions;

count 4 – 3 years imprisonment.

The sentence on count 4 was ordered to run concurrently with that on count 3.

Accordingly, they were each sentenced to an effective term of 15 years imprisonment.

4. Leave to appeal was sought by all appellants in respect of both conviction and Sentence. Same was refused by the court a quo.

On petition for leave to appeal their convictions and sentences, leave was granted only in respect of sentence.

ISSUES ON APPEAL

5. The issues to be determined are whether the trial court erred in failing to find substantial and compelling circumstances, warranting a departure from the imposition of the

prescribed minimum sentences on counts 1, 2 and 3 and whether the sentence imposed is startlingly inappropriate in the circumstances.

LAW AND ANALYSIS

6. It is trite that punishment is pre-eminently a matter for the discretion of the trial court. A court of appeal can only interfere with the sentence imposed where that discretion has not been judicially, properly or reasonably exercised, resulting in irregularity or misdirection, or where the sentence imposed is shockingly inappropriate in that it is substantially different from that sentence which the appeal court would have imposed.

S v Pieters 1987 (3) SA 717 (A)

S v Malgas 2001 (1) SACR 469 (SCA)

DPP v Mngoma 2010 (1) SACR 427 (SCA)

S v Le Roux & Others 2010 (2) SACR 11 (SCA)

S v Grobler 2015 (2) SACR 210 (SCA)

AD SENTENCE

7. The thrust of the argument by the appellants' counsel relates to the submission that the learned Magistrate failed to consider their period of incarceration awaiting finalisation of the matter, being a period of 2 years and 6 months, as submitted.

It appears from the trial record that this factor was neither raised in address on

sentence, in the judgment on sentence, nor in the application for leave to appeal in the court a quo.

It appears probable that this factor led to the granting of the petition for leave to appeal the sentences imposed.

8. This Court is mindful of the various decisions of the superior courts as to importance of such factor being considered by a presiding officer in the consideration of sentence. Two and a half years is a considerable period of time and having regard to the nature of the matter, this Court may well have interfered in the sentence were this in fact the true position.
9. There is, however, no merit in this submission.

It is apparent from the pre-trial proceedings that the appellants were arrested on 26 May 2016. On 20 June 2016 their bail application was finalised and they were all granted bail in the sum of R3000,00. The subsequent appearances reflect that they all paid same and their bail was extended after each appearance. Hence, the lack of any reference to this factor in the court a quo, as aforesaid.

On this being drawn to the attention of both counsel at the hearing of this appeal, counsel confirmed same and this ground of appeal was withdrawn.

10. The aggravating factors far outweigh the mitigating factors, including the following factors:

- 10.1 the lack of any remorse;

10.2 the fact that a shot gun with 5 live rounds was found in the wall of the shack that the appellants were arrested in;

10.3 the prevalence of persons unlawfully possessing firearms, which has become an epidemic in our crime ridden country;

10.4 the fact that the firearms found in possession of appellants 2 and 3 were prohibited firearms, the serial numbers thereof having been obliterated;

10.5 the fact that appellants 1 and 3 were employed as security guards at the time they were arrested in unlawful possession of the respective firearms.

11. I am of the view that the learned Magistrate correctly found that there is nothing substantial and compelling in the appellants' personal circumstances.

12. In **S v Malgas** supra it was stated that the minimum sentence legislation aimed at ensuring a severe standardized and consistent response from the courts and is to be applied unless there are and can be seen to be truly convincing reasons for a different response.

Further, that the specified sentences are not to be departed from lightly or for flimsy reasons which cannot withstand scrutiny.

This has been reiterated by the superior courts on numerous occasions.

13. I am of the view that the learned Magistrate properly considered all the mitigating factors, correctly found that same, neither individually nor cumulatively considered, constitute substantial and compelling factors.
14. I am further of the view that the imposition of the minimum sentences is not disproportionate, considering the facts and circumstances as a whole, and does not result in an injustice.
15. I am further of the view that the learned Magistrate imposed a proper sentence in the circumstances.

It must be borne in mind that appellants 2 and 3 faced a sentence of up to 25 years imprisonment in terms of the provisions of Schedule 4.

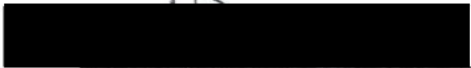
The learned Magistrate further correctly considered the cumulative effect in ordering The sentence on count 4 to run concurrently with that on count 3.

16. Accordingly, I am of the view that there is no merit in the appeal.
17. In the circumstances, I propose the following Order:

17.1 The appeal against sentence is dismissed in respect of all of the appellants.


W A KARAM
ACTING JUDGE OF THE HIGH COURT

I AGREE


F J VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT

Appearances:

APPELLANTS: Adv I B Mthembu
Legal Aid SA
Johannesburg Office

RESPONDENT: Adv S H Rubin
Director of Public Prosecutions
Gauteng Local Division