

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case number: AR344/2022

In the matter between:

SIBUSISO SIBONGISENI MABASO

APPELLANT

and

THE STATE

RESPONDENT

ORDER

On appeal from: Regional Court, Ingwavuma (Mr MA Khumalo sitting as court of first instance) it is ordered:

1. The appeal against the conviction and sentence on count 1 is dismissed.
2. The conviction and sentence on count 1 is confirmed.
3. The appeal against the conviction and sentence on count 3 is upheld. The following conviction is substituted in its stead:

'The accused is found guilty of contravening s 3(1) read with s 120(1)(a) of the Firearms Control Act 60 of 2000, being the unlawful possession of a firearm, a 9mm calibre, the exact make unknown, on 11 February 2013.'

4. The appeal against the conviction and sentence on count 4 is upheld. The following conviction is substituted in its stead:

'The accused is found guilty of contravening s 90 read with s 120(1)(a) of the Firearms Control Act 60 of 2000, being the unlawful possession of two rounds of ammunition, being one 9x19mm and one unidentified calibre.'

5. The sentences imposed in respect of counts 3 and 4 are set aside and replaced with:

'The sentences on counts 3 and 4 are taken as one for purpose of sentence and the accused is sentenced to four years' imprisonment.'

6. The sentences imposed on counts 3 and 4 are antedated to 19 April 2016.

7. The sentences imposed on counts 3 and 4 will by operation of law be served simultaneously with that imposed on count 1.

JUDGMENT

Hadebe AJ and Henriques J (separate concurring):

Introduction

[1] This is an appeal against the convictions and sentences imposed upon the appellant by the Regional Court, Ingwavuma. The appellant was charged as follows:

- (a) Count 1: Murder (read with the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the CLM)) it being alleged the murder was planned and/or premeditated;
- (b) Count 2: Conspiracy to commit murder;
- (c) Count 3: Unlawful possession of a semi-automatic firearm; and
- (d) Count 4: Unlawful possession of ammunition.

[2] He was convicted on counts 1 and 4 as charged. On count 3, he was convicted for contravening s 3 of the Firearms Control Act 60 of 2000. He was acquitted on count 2. On count 1, he was sentenced to undergo life imprisonment; on count 3, he was sentenced to undergo seven years' imprisonment and on count 4, he was sentenced to undergo three years' imprisonment. The sentences on counts 3 and 4 were ordered to run concurrently with the sentence imposed on count 1.

[3] The appellant brought an application for leave to appeal his convictions on counts 3 and 4, which was granted by Mr B Milner, who had not presided at the trial in the court *a quo*. In relation to count 1, the appellant has an automatic right of

appeal in terms of the provisions of s 309(1)(a) of the Criminal Procedure Act 51 of 1977 (the CPA).

[4] In preparation for the appeal, the parties' legal representatives filed their respective heads of argument. The main focus of these heads of argument related to the conviction and sentence on count 1. In light of this, at the hearing of the appeal, the parties' legal representatives were directed to file supplementary heads of argument, specifically addressing the convictions and sentences on counts 3 and 4, which they subsequently did.

The convictions

The grounds of appeal on conviction

[5] The appellant raised *inter alia* the following in the heads of argument as his grounds of appeal:

- (a) The court *a quo* misdirected itself in finding that although he knew of the statement that was taken by Captain Nyawo, he had provided the contents of the statement and had signed the statement.
- (b) The court *a quo* failed to properly consider the conclusions of the evidence of Mr Clayton.
- (c) The court *a quo* misdirected itself by focusing exclusively on the evidence of Mr Clayton in its judgment, which favoured the respondent and which demonstrated bias towards the appellant.
- (d) The court *a quo* misdirected itself in finding that cellphone number 0[...] belonged to the appellant.
- (e) The court *a quo* misdirected itself in finding that the appellant was the person who shot and killed the deceased.
- (f) The court *a quo* misdirected itself in finding that the appellant was in the unlawful possession of a firearm and ammunition.

[6] A consideration of the evidence presented in the court *a quo* is necessary at this juncture before dealing with the respective grounds of appeal.

The evidence in the court a quo

[7] During the trial of the appellant in the court *a quo*, the respondent led the evidence of several witnesses, among them being Ms Ellen Phumzile Gumede (Ms Gumede), who was married to the deceased, and Mr Cocks Mthembu (Mr Mthembu), a neighbour of the deceased, who travelled with the deceased to his workplace at the Umhlathuze Municipality. The appellant and Ms Gumede had a relationship before the offences were committed. The marriage relationship between the deceased and Ms Gumede was estranged.

[8] Ms Gumede was arrested after the death of the deceased and testified as a witness in terms of s 204 of the CPA. She testified that she had informed the appellant shortly before the deceased was murdered that she wished to terminate her relationship with him. This was after she realised her daughter had become aware of her relationship with the appellant. Ms Gumede informed the appellant about her intention to terminate their relationship. The appellant did not want her to end the relationship and informed her that the deceased already knew about their relationship and many people were talking about it. He indicated that he would shoot her and the deceased to end the talking. Ms Gumede's response was that the appellant should rather shoot her instead of the deceased, as the deceased had done nothing wrong.

[9] On 10 February 2013, a day before the deceased was killed, the appellant and Ms Gumede met at her home which she shared with the deceased. The appellant informed Ms Gumede that he would call her around 20h00 on the same day and around 03h00 to 04h00 the following morning to find out if the deceased was at home. Ms Gumede testified that on that night, she left her cellphone in another room, and did not receive or answer any calls from the appellant. On the following day, 11 February 2013, whilst she was inside the house which she shared with her husband, she heard a gunshot after her husband had gone outside their home, preparing to go to work. She was called by Mr Mthembu to come outside. When she went outside, she saw her husband lying on the ground. The police attended the scene and removed his body. She had never spoken to the appellant

after the death of her husband. At the end of the trial, the court a quo discharged her from prosecution in terms of s 204 of the CPA.

[10] Mr Mthembu, whose evidence was not disputed, testified that he had called the deceased before the shooting, as they were to travel together that morning to work. The deceased had told him to enter the deceased's yard. Upon doing so, he witnessed the shooting of the deceased but could not identify the shooter.

[11] The post-mortem was prepared by Dr Francois Alwyn van Niekerk (Dr van Niekerk), a district surgeon on 12 February 2013, after examining the body of the deceased. The cause of death of the deceased was recorded as being a gunshot wound, the entry wound being at the back of the head and the exit wound to the deceased's face below the right eye. In addition, it was also noted that the deceased had sustained a gunshot wound through the right hand. The post-mortem report, as well as an affidavit in terms of s 212(4) of the CPA, were admitted into evidence without leading the evidence of Dr van Niekerk.

[12] The respondent, in addition, relied on a confession made by the appellant to Captain Nyawo on 1 October 2013. In the confession, the appellant recorded that he was defending himself when he killed the deceased, as the deceased had tried several times to kill him. He narrated how he had planned to kill the deceased. In the confession, the appellant placed himself at the scene of the crime and confirmed that he shot the deceased twice on the day in question. A trial-within-a-trial was not held, despite the appellant disputing the admissibility of the statement. What was pertinently disputed by the appellant was the content of the statement and that his signatures appeared on the respective pages of the statement.

[13] The respondent called Mr Elwyn Roland Clayton (Mr Clayton) from the Forensic Science Laboratory, who is employed *inter alia* as an examiner at the Questioned Document Unit, to testify about the report he compiled, given the appellant's challenge to the signatures on the confession. He testified that he was requested to conduct a comparative analysis of the signatures on three sets of documents. The first being the original statement dated 1 October 2013, marked S1(1) to S1(9), a written statement consisting of three pages, marked Q1(1) to Q1(3)

(which were the questioned documents), and specimen signatures of the appellant, marked S2 and S3. He was requested to only do a comparison of the signatures between Q1(1) to Q1(3) with the acknowledged signatures of the accused S1(1) to S1(9) and S2 and S3.

[14] He testified that it is not uncommon for signatures to be generally inconsistent with each other in respect of design, considering the seriousness of the document, which may have been caused by nervousness, fatigue or stress. He testified that it is not common for an individual to have more than one signature. He further testified that the signatures in the second document that was signed by the appellant appear to have been written at a relatively fast speed. Based on his comparison he concluded that

'... the fundamental differences between the acknowledged signatures marked S1.1 to S1.9 and the requested specimen signatures marked S2 and S3 provide strong support for the proposition that the latter signatures are in all likelihood deliberately disguised rather than the product of a different writer.'

[15] What is of relevance is that, interestingly, the requested specimen signatures S2 and S3 were completely different to S1(1) to S1(9), which were the acknowledged signatures.

[16] The respondent also called Ms Lynette van Zyl (Ms van Zyl), who was employed by Vodacom. She was called to testify about the cellphone records that were requested by the investigating officer in terms of s 205 of the CPA. The application was for cellphone numbers 0[...]2, 0[...]3 and 0[...], and IMEI number 3[...]. She testified that according to the cellphone records for cellphone numbers 0[...]2 and 0[...], there were several communications during the night on 10 February 2013. Also, on 11 February 2013, there was a call made to 0[...]2 from 0[...]. The communication between the aforesaid numbers continued until 05h59, even after the death of the deceased.

[17] The witness was also requested to plot the distances of certain towers to the appellant's homestead. The Nibela Telkom tower and the appellant's homestead were 1.3 kilometres apart and from the appellant's homestead to the deceased's

home was 930 metres. At crucial times, the 082 number pinged off the Nibela Telkom tower and the 072 number pinged off the Khuleni Beacon tower. The evidence of this witness was not challenged by the appellant.

[18] The respondent called Sergeant Ntshangase, the investigating officer who obtained the cellphone numbers of the deceased's wife and the appellant to forward them to the expert, Ms van Zyl. He obtained the cellphone numbers from the deceased's wife. He further testified that the cellphone numbers 0[...]2 and 0[...] belonged to the deceased's wife and the appellant, respectively. When asked how he knew this, he stated that firstly, he was informed by the deceased's wife; and secondly, the identity number of the appellant corresponded with the identity number that was used to RICA cellphone number 0[...]. His evidence was corroborated by the deceased's wife when she was recalled to confirm that she gave her cellphone numbers and that of the appellant to Sergeant Ntshangase. Ms van Zyl, when she testified, confirmed that, according to Vodacom's records, these were the appellant's and the deceased's wife cellphone numbers.

[19] The appellant elected to exercise his right to remain silent, closed his case and called no witnesses in his defence.

Submissions by the appellant on the convictions

[20] Mr *Tengwa*, who appeared for the appellant, argued that the learned magistrate was wrong in finding that the respondent had proved the guilt of the appellant beyond a reasonable doubt. He further argued that the court *a quo* erred in accepting the evidence of Mr Clayton, which was inconclusive. I find it difficult to accept this argument, as Mr Clayton came to the conclusion that there was a likelihood that the specimen signatures were deliberately disguised. There is no evidence to gainsay Mr Clayton's evidence.

[21] It was submitted for the appellant in the supplementary heads of argument, that the court *a quo* should have considered the fact that no firearm and ammunition were recovered from the appellant's possession and although the appellant was the shooter, this was insufficient to sustain the convictions on counts 3 and 4.

[22] It was further submitted that the court *a quo* had found that the respondent did not prove that the firearm used was a semi-automatic firearm. It was argued that despite the shortcomings, the court *a quo* misdirected itself in finding the appellant guilty on counts 3 and 4.

Submissions by the respondent on the convictions

[23] Ms *Mlondo*, who appeared for the respondent, argued that its witnesses corroborated each other in material respects. The statement of the appellant amounted to a confession which confirmed the version of the deceased's wife, Ms Gumedede. Relying on *S v Boesak*,¹ it was submitted that although the appellant has a right to remain silent and is under no obligation to testify, it did not mean that there were no consequences attached to his decision. It was lastly submitted that the evidence, when considered holistically, was sufficient to prove the guilt of the appellant beyond reasonable doubt.

[24] In its supplementary heads, the respondent submitted that there was no evidence by the appellant suggesting that he had a licence, permit or any form of authority, authorising him to possess a firearm of any calibre. It was also submitted that it was undisputed that the deceased died as a result of a gunshot wound to the head and that the only inference that can be drawn is that the appellant was in possession of a firearm which he used when he shot and killed the deceased as well as ammunition² as envisaged in the Firearms Control Act 60 of 2000 (the Firearms Act). It is for these reasons submitted that the court *a quo* was accordingly correct in convicting the appellant on counts 3 and 4.

Analysis

[25] In *Mnyandu v Padayachi*,³ the court stated that:

¹ *S v Boesak* [2000] ZACC 25; 2001 (1) SACR 1 (CC).

² The respondent referred to 15 cartridges. This appears to be an error as count 4 refers to two live rounds of ammunition.

³ *Mnyandu v Padayachi* 2017 (1) SA 151 (KZP) para 28.

'It is trite that a court of appeal will not interfere with the findings of fact and credibility of the trial court unless it is apparent from the record that the court *a quo* either materially misdirected itself or erred to the extent that its findings are vitiated and fall to be set aside.'

[26] The court *a quo* found that the respondent had proved its case beyond reasonable doubt and convicted the appellant on the counts that are the subject of this appeal. The court *a quo* found that the evidence of the respondent through its witnesses was given in a straightforward manner. The witnesses impressed the court as being honest. It was satisfied that the truth had been told when one considered the evidence holistically.

[27] The court *a quo* was satisfied that the confession by the appellant was freely and voluntarily made, and without any undue influence. It found that the respondent succeeded in proving beyond reasonable doubt that the confession was made in terms of the requirements of s 217(1) of the CPA and was therefore admissible. Relying on the confession, the court *a quo* found that the appellant had the motive to kill the deceased, as recorded in his confession.

[28] As discussed above, Mr *Tengwa* conceded that the statement of the appellant constituted a confession, in compliance with s 217 of the CPA. The statement was made to Captain Nyawo, who had no interest in the matter. He could not have made up what is contained in the statement. The content of the confession is consistent with the evidence of the deceased's wife, Ms Gumede. It is worth noting that the appellant did admit in the confession that he was the person who killed the deceased. The court *a quo* considered the evidence led by the respondent holistically, including the findings in the report of Mr Clayton that there was a likelihood that the specimen signatures were deliberately disguised. Having considered the concession by the appellant's counsel and the content of the confession, I am not able to discern any misdirection by the magistrate on count 1. In my view, there is no merit in the grounds of appeal for the conviction on count 1 - the magistrate correctly found that the confession was made freely and voluntarily. Consequently, he correctly convicted the appellant of murder read with s 51(1) of the CLAA.

[29] In relation to counts 3 and 4, no firearm was recovered. The main difficulty with the respondent's case, in particular count 3, was the fact that the appellant was charged with the possession of a semi-automatic firearm, despite the firearm not having been recovered nor tested.

[30] A firearm is defined in the Firearms Act as follows:

"firearm" means any-

- (a) device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of burning propellant, at a muzzle energy exceeding 8 joules (6 ft-lbs);
- (b) device manufactured or designed to discharge rim-fire, centre-fire or pin-fire ammunition;
- (c) device which is not at the time capable of discharging any bullet or projectile, but which can be readily altered to be a firearm within the meaning of paragraph (a) or (b);
- (d) device manufactured to discharge a bullet or any other projectile of a calibre of 5.6 mm (.22 calibre) or higher at a muzzle energy of more than 8 joules (6 ft-lbs), by means of compressed gas and not by means of burning propellant; or
- (e) barrel, frame or receiver of a device referred to in paragraphs (a), (b), (c) or (d), but does not include a muzzle loading firearm or any device contemplated in section 5.'

[31] The respondent submitted in the supplementary heads that there is no evidence by the appellant to suggest that he had a licence, permit or any form of authority, authorising him to possess a firearm of any calibre, as required in s 250 of the CPA. It was further submitted that the only reasonable inference, which can be drawn from the proven facts, is that the appellant used a firearm to shoot the deceased. The respondent submitted further that it is an undisputed fact that the deceased died as a result of a gunshot wound to the head. In its supplementary heads, the respondent referred to 15 spent cartridges which represent ammunition, as envisaged in the Firearms Act. This appears to be a typographical error, as there is no evidence suggesting that there were 15 spent cartridges. In fact, the appellant

stated in his statement that he shot the deceased twice. His version is supported by the findings in the post-mortem report.

[32] The learned magistrate reasoned that the instrument used was indeed a firearm and the possession thereof by the appellant of such instrument was in contravention of the Firearms Act. The court *a quo* found that the inference of guilt based on the strong evidence is the only reasonable inference to be drawn from the facts of this case. In my view, the magistrate, in his judgment, did adhere to the well-established test as set out in *R v Blom*⁴ as follows:

'(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'

[33] Having regard to the evidence of Mr Mthembu, who saw the shooting, albeit that he could not identify the shooter; the appellant who confirmed in his confession that he shot the deceased twice; and that the post-mortem report which confirmed that the deceased was killed as a result of a gunshot, I am of the view that the respondent has discharged the onus to prove that the appellant was in possession of an unlicensed firearm and ammunition and not a semi-automatic firearm as alleged in the charge sheet. However, as will become apparent in the concurring judgment, there are issues with the way in which the convictions on counts 3 and 4 were worded. I agree with what has been stated in the concurring judgment and the correct convictions will have to be stipulated.

The sentences

The grounds of appeal on sentence

⁴ *R v Blom* 1939 AD 188 at 202-203.

[34] The grounds of appeal on sentence, as recorded in the application for leave to appeal, are as follows:

- 'a. The sentence imposed upon the accused is manifestly excessive;
- b. The sentence is so far outside the range of appropriate sentence;
- c. The court erred in overemphasizing the interest of the community at the expense of the interest of the accused;
- d. The sentence given to the accused was harsh and disproportionate to the crime committed and also to the personal circumstances of the accused;
- e. The court erred in stating that there were less substantial and compelling circumstances to deviate from the prescribed minimum sentences in terms of the Criminal Law Amendment Act 105 of 1997;
- f. The court never even took time to know or to investigate the personal circumstances of the accused person before sentencing.'

Proceedings in the court a quo

[35] During sentencing, the appellant did not testify in mitigation of sentence and elected to make submissions through his legal representative from the bar. It was submitted on his behalf that he was 30 years of age with no pending charges and had no previous convictions. He survived on odd jobs and had five children who were financially dependent on him.

[36] It was submitted before the court *a quo* that it must consider the appellant's personal circumstances as a whole as constituting substantial and compelling circumstances justifying a deviation from the mandatory minimum sentence on count 1. In addition, the court *a quo* must consider the duration spent by the appellant in custody from the time of his arrest until the finalisation of the case, being from 1 October 2013 to 19 April 2016.

[37] The court *a quo* took into account that the appellant did not show remorse. It found that there were many aggravating factors which far outweighed the mitigating factors. Some of the aggravating factors included the fact that the deceased was killed in his backyard at his home, and that the children and relatives must have seen

the deceased lying in a pool of blood. The court found that there were no substantial and compelling circumstances to deviate from the prescribed minimum sentence on count 1.

Analysis

[38] It is trite that the imposition of sentence is pre-eminently a matter that falls within the discretion of the trial court, and that a court of appeal will only interfere in certain distinct circumstances. Such circumstances may present themselves if the sentencing court did not exercise its discretion appropriately, or if it exercised it unreasonably. Also, in circumstances where the sentence imposed is adversely disproportionate to the offender, the crime committed and the legitimate needs of society. Reiterating this principle, Khampepe J stated the following in *S v Bogaards*:⁵

'An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.'
(Footnotes omitted.)

[39] Notwithstanding that there may not be an obvious material misdirection, an appellate court may be entitled to interfere with a sentence imposed by a trial court if 'the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"'.⁶

[40] Regarding the period spent in custody whilst awaiting trial, the Supreme Court of Appeal held in *S v Radebe and another*⁷ that the period spent awaiting trial cannot,

⁵ *S v Bogaards* [2012] ZACC 23; 2013 (1) SACR 1 (CC) para 41.

⁶ *S v Malgas* 2001 (1) SACR 469 (SCA) para 12.

⁷ *S v Radebe and Another* [2013] ZASCA 31; 2013 (2) SACR 165 (SCA) para 14.

on its own, constitute substantial and compelling circumstances justifying a departure from the prescribed minimum sentence. Lewis JA observed that:⁸

'... the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed.'

[41] Consequently, the submission advanced for the appellant that the period spent in custody on its own amounts to substantial and compelling circumstances warranting a departure from the prescribed minimum sentence falls to be rejected. The crime of which the appellant was rightly convicted has become a pandemic in our society. In my view, there are no substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence of life imprisonment on count 1.

[42] In relation to count 3, there is no doubt that the appellant was in possession of an unlicensed firearm and ammunition. In terms of s 121, read with schedule 4 of the Firearms Act, the maximum sentence for the unlawful possession of a firearm is 15 years. In this matter, the magistrate imposed a sentence of seven years in count 3. In relation to count 4, he imposed a sentence of three years imprisonment.

[43] Having read the separate concurring judgement I am in agreement that the appeal against the sentences on counts 3 and 4 will have to be upheld and agree with the reasons contained therein and the new sentences imposed.

Henriques J (separate concurring judgment)

[44] I have read the main judgment and concur in the findings, save to add the following in relation to counts 3 and 4. The court a quo convicted the appellant of the

⁸ Ibid.

possession of an unlicensed firearm as opposed to a semi automatic firearm and the unlawful possession of ammunition. He was sentenced to a sentence of seven years imprisonment on count 3 and in relation to count 4, the court a quo imposed a sentence of three years imprisonment.

[45] Counts 3 and 4, as set out in the charge sheet, read as follows:

'Count 3:

2.1 That the accused is guilty of the offence of contravening the provisions of Section 3 read with Section 1, 103, 117, 120(1)(a), Section 121 read with Schedule 4 and Section 151 of the Firearms Control Act, 60 of 2000, and further read with Section 250 of the Criminal Procedure Act 51 of 1977 and Section 51(2) of the Criminal Law Amendment Act 105 of 1997 - Possession of a Semi-Automatic Fire-Arm.

In that 11 February 2013 and at or near Kwa-Nibela, in the Regional Division of KwaZulu- Natal the accused did unlawfully have in his possession the following firearm, to wit 9x19mm calibre pistol without holding a licence, permit or authorisation issued in terms of the Act to possess that firearm(s).

Count 4:

2.2 That the accused is guilty of the offence of contravening the provisions of Section 90 read with Sections 1, 103, 117, 120(1)(a), Sections 121 read with Schedule 4 and Section 151 of the Firearms Control Act, 60 of 2000 and further read with Section 250 of the Criminal Procedure Act 51 of 1977 - Possession of ammunition

In that on or 11 February 2013 and at or near Kwa-Nibela Area in the regional division of KwaZulu-Natal the accused did unlawfully have in his possession ammunition to wit 2 x live rounds without being the holder of:

- (a) a licence in respect of a firearm capable of discharging that ammunition;
- (b) a permit to possess ammunition;
- (c) a dealer's licence manufacturer's licence, gunsmith's licence, import, export or in- transit permit or transporter's permit issued in terms of this Act;
- (d) or is otherwise authorised to do so.'

[46] In the supplementary heads of argument, the appellant submitted that:

(a) Despite finding that the appellant was the shooter, the court *a quo* ought to have acquitted the appellant as no firearm and ammunition were recovered from the appellant.

(b) The ballistic evidence that the fired bullet was a 9mm calibre was insufficient to establish the type of 9mm pistol used.

(c) The respondent had charged the appellant with possession of a semi-automatic firearm and the court *a quo*, having found the respondent had not proved the firearm to be a semi-automatic firearm, misdirected itself in finding him guilty of the possession of a firearm in contravention of s 3 of the Firearms Act.

[47] The respondent, correctly in my view, submitted that it had discharged the onus of proving the appellant was in possession of a firearm in contravention of s 3 of the Firearms Act and two rounds of ammunition. What it did not do was establish that the firearm was a semi-automatic one, the make thereof, as well as the calibre of one of the rounds of ammunition.

[48] The respondent elected not to lead any evidence in relation to the calibre and type of firearm, as it is common cause that it was not recovered. The only evidence presented was the handing in of exhibit 'O', which is an affidavit in terms of s 212 of the CPA by Warrant Officer Nolwazi Mzimela, a forensic analyst employed at the Ballistics Unit of the Forensic Science Laboratory. Warrant Officer Mzimela took into custody an evidence bag containing one fired bullet on 11 March 2013 and on examination thereof, found that the bullet was a 9mm calibre.

[49] In convicting the appellant, the court *a quo* relied on circumstantial evidence in finding that the appellant was in possession of a firearm, namely, the results of the post-mortem completed by Dr van Niekerk, which reflected a gunshot wound to the deceased's right hand and a gunshot wound to the head of the deceased, with the bullet found below the right eye. Based on inferential reasoning, coupled with the appellant's confession that he had shot the deceased, the court *a quo* concluded that the appellant was in possession of a firearm.

[50] In its judgment on conviction, the court *a quo* was mindful of the fact that no firearm was recovered from the appellant and concluded that

'The State must have chosen to proceed with the contravention of Section 3 and 90 of the Firearms Control Act 60 of 2000 on the basis of the argument that if the Court finds that the accused was the shooter in respect of count 1, he must have been in possession of a firearm which had ammunition which he possessed illegally.'

[51] In rejecting the respondent's contentions that the appellant was in possession of a semi-automatic firearm, the court *a quo* found that such inference was not easily drawn as

'evidence has to be led that such firearm was indeed a semi-automatic firearm. If no evidence is led, the State ought to have filed a ballistics report to say that the fired cartridge was fired from the firearm which was self-loading but not capable of discharging more than one shot with a single depression of the trigger and this would have triggered the operation of Section 51(2) of the Criminal Law Amendment Act 105 1997.'

[52] The court *a quo*, relying on unreported judgments of the Northern Cape Division of the High Court, as well as *S v Filani*⁹ and *S v Matinisi*,¹⁰ was of the view that it would be more appropriate to convict the accused of possession of a firearm in contravention of s 3 of the Firearms Act, as 'it was satisfied that the instrument used was indeed a firearm'.

[53] In relation to count 4, the court *a quo* was of the view that as the appellant had confessed to Captain Nyawo that he had shot the deceased twice with a firearm, consequently, by virtue of inferential reasoning, he must have been in possession of two live rounds of ammunition.

⁹ *S v Filani* 2012 (1) SACR 508 (ECG) (*Filani*).

¹⁰ *S v Matinisi* 2010 JDR 1334 (ECG) (*Matinisi*).

[54] The evidence presented in the court *a quo* established the following proven facts namely:

- (a) That the deceased in this matter died as a result of a gunshot wound to the head.¹¹
- (b) That it was the appellant who shot and killed the deceased.
- (c) That the fired cartridge found at the crime scene was fired from a firearm, namely, a 9mm calibre pistol.¹²
- (d) That the fired bullet was designed to be fired from a centrefire firearm.¹³

[55] It is trite that the duty of the respondent is to prove beyond reasonable doubt that the instrument used by the appellant in the commission of the offence in this matter was a firearm as defined in s 1 of the Firearms Act.

[56] The definition of a firearm has been extensively quoted in the main judgment. Section 1 of the Firearms Act defines 'ammunition' as the 'primer or complete cartridge' and 'cartridge' in turn is defined as 'a complete object consisting of a cartridge case, primer, propellant and bullet'.

[57] The Firearms Act has its own penalty provisions. Section 90, read with s 121 and schedule 4, prescribes the maximum periods of imprisonment which a court can impose. In respect of a contravention of s 3, the maximum period of imprisonment is that of 15 years. The Firearms Act contains certain presumptions in chapter 15, which operate in relation to the possession of a firearm and/or ammunition.

[58] The relevant provision for purpose of this matter is s 117(3)(c), which reads as follows:

'In any criminal proceedings against a person where it is alleged that such person has injured or killed another person or has damaged property

¹¹ The record, exhibit 'Z2' at page 432.

¹² The record, exhibit 'G' at page 326.

¹³ The record, exhibit 'O' at page 312.

belonging to another person, the following circumstances will, in the absence of evidence to the contrary which raises a reasonable doubt, be sufficient evidence that such person participated in the injury, killing or damage, where it is proved that-

...

(c) as a result of such discharge, a person was injured or killed, or property was damaged.'

[59] In my view, having regard to the various decisions, the court *a quo* correctly concluded that the provisions of the CLAA would only apply in circumstances where the respondent proved that the firearm was a semi-automatic firearm. As already mentioned, the Firearms Act has its own penalty provisions.

[60] In *Matinisi*, although no firearm was found, the full bench relied on the evidence of two witnesses who testified that the appellant had approached them after the shooting with a request to 'hide a firearm'.

[61] *Filani* dealt with the definition of a firearm, as envisaged in the predecessor to the Firearms Act, being the Arms and Ammunition Act 75 of 1969. The facts in *Filani* were distinguishable - there was no forensic report on the cartridge recovered from the scene, no photographs were handed in of the 'hole in the wall' where it had been 'struck by a projectile'. The court found that¹⁴

'Had the bullet point and cartridge been subjected to forensic analysis, then, depending on the results of such analysis, the state may well have been able to establish that the projectile had been fired from a device falling within the ambit of the definition of "firearm".'

[62] The State in *Filani* had submitted that in the absence of forensic evidence, the weapon discharged or propelled a missile with enough force or velocity for it to be

¹⁴ *Filani* at 515D-E.

used for offensive purposes and it fell within the definition of a firearm. The court held that:¹⁵

'In my view, however, given the increased technical nature of the various definitions of 'firearm' contained in the later and current Act, such a finding cannot be made in the absence of expert evidence to that effect. Certainly, it is not a matter of which this court may take judicial notice. The state failed to lead any such expert evidence and accordingly failed, in my view, to discharge the onus upon it.'

[63] I agree with the sentiments of Binns-Ward J in *S v Jordaan and Others*,¹⁶ that while the reasoning in *Filani* is difficult to fault on its given facts, it would 'give rise to uncomfortably anomalous results if applied as a general doctrine'. The SCA in *S v Sehoole*¹⁷ has held

'Whilst it is undoubtedly so that a ballistics report would provide proof that a specific object is indeed ammunition, there is no authority compelling the State to produce such evidence in every case. Where there is acceptable evidence disclosing that ammunition was found inside a properly working firearm, it can, in the absence of any countervailing evidence, be deduced to be ammunition related to the firearm. Needless to say, each case must be judged on its own particular facts and circumstances.'

[64] The court *a quo* correctly did not utilise the CLAA sentencing provisions. As already mentioned, the Firearms Act has maximum sentences set out in the penalty provisions for a contravention of either s 3 or s 4. The CLAA provides for various minimum sentences. I align myself with the sentiments expressed by the SCA in *S v Motloun*,¹⁸ which read as follows:

'The two statutes must also be read in the context of Parliament's wish to increase sentences. The words "(n)otwithstanding any other law" have remained in place, despite the amendment to the Criminal Law Amendment

¹⁵ *Filani* at 515F-G.

¹⁶ *S v Jordaan and Others* 2018 (1) SACR 522 (WCC) para 101.

¹⁷ *S v Sehoole* [2014] ZASCA 155; 2015 (2) SACR 196 (SCA) para 19.

¹⁸ *S v Motloun* [2016] ZASCA 16; 2016 (2) SACR 243 (SCA) para 21.

Act on 13 November 2008. The Firearms Control Act, which came into effect on 1 July 2004, introduced a distinction between fully automatic and semi-automatic firearms and the contraventions relating to these weapons. It is apparent that, in passing this legislation, Parliament considered any offence relating to the possession of an automatic or semi-automatic firearm, explosives or armament as being a serious offence. In providing for enhanced penal jurisdiction for particular forms of an already existing offence, the legislature does not create a new type of offence. See *S v Legoa* 2003 (1) SACR 13 (SCA) ([2002] 4 All SA 373; [2002] ZASCA 122) para 18.'

[65] Having regard to the post-mortem report, the court *a quo* was correct in finding that the appellant was in possession of a firearm in contravention of s 3 in the absence of an explanation or in the absence of the appellant disputing this in the court *a quo* and also correctly concluded that at the time, given the number of gunshot wounds and the recovery of a bullet, the appellant was in possession of two rounds of ammunition.

[66] In discharging its onus, the respondent only required that the bullet point as well as the cartridge be subjected to forensic analysis and depending on the results of such analysis, the respondent may well have been able to establish that the projectile had been fired from a device falling within the ambit of the definition of 'firearm'.¹⁹

[67] When considering the totality of the evidence, there is no evidence by the appellant to suggest that he had a license, permit or any form of authority, authorising him to possess a firearm of any calibre. Further to that, it remains an undisputed fact that the deceased died of a gunshot wound to the head, which seemed to be common cause, as the post-mortem report, exhibit 'Z2', was admitted by consent.

¹⁹ See *Filani* at 5150.

[68] It is submitted that the only reasonable inference that can be drawn from the proven facts in this matter, is that the appellant, at the time that he shot and killed the deceased, used a firearm, proven to be a 9mm pistol, as per exhibits 'G' and 'O'.

[69] Given the specific wording of the offences in the charge sheet, the court *a quo* ought to have, when convicting the appellant, specified the exact charges on which he had been convicted to align with the proven facts. Count 3 in the charge sheet reflects that the appellant was in possession of a 9x19mm calibre pistol and count 4 reflects that he was in possession of two live rounds. Given that no firearm was found, save for the calibre being known from the one 9mm bullet recovered, the convictions on counts 3 and 4 would have to be substituted to correctly reflect what he was found in possession of in relation to these two counts.

[70] When sentencing the appellant in respect of counts 3 and 4, the court *a quo* held the following:

'Taking into account that the Court has decided in respect of count 3, the minimum sentences are not applicable in respect of count 3. The normal sentence prescribed in terms of the Firearms Control Act is applicable in respect of count 3.'

[71] It then proceeded to impose a sentence of seven years' imprisonment on count 3 and three years' imprisonment on count 4 and directed those sentences to run concurrently with the sentence on count 1. The judgment on sentence is silent on the reasoning which the court *a quo* embarked upon to impose such sentences and one is not able to glean from the judgment on sentence why the court *a quo* refrained from imposing the maximum sentences, which are prescribed in terms of Firearms Act and what factors it considered and what it took into account in imposing the sentences it did in respect of the convictions on counts 3 and 4. As a consequence, given the applicable legal principles referred to hereinbefore in the main judgment, we are entitled to interfere.²⁰

²⁰ *S v Malgas* 2001 (1) SACR 469 (SCA) para 12; *S v Sadler* 2000 (1) SACR 331 (SCA) para 10.

[72] That then brings me to the appropriate sentence. It is common cause that the offences in counts 3 and 4 arise from one incident, the murder, and are closely related in time and space to such offence. Although the court *a quo* ordered the sentences to run concurrently with that imposed on count 1, and the outcome does not alter the sentence which the appellant is to serve, it is in the interests of justice that this court properly considers the sentences, given the failure by the court *a quo* to provide any reasons for the imposition of the sentences it did.

[73] It would appear that the court *a quo* failed to have proper regard to the fact that the convictions on counts 3 and 4 arise from the same incident and are closely related in time and space to that. As a consequence, on appeal the convictions and sentences on counts 3 and 4 warrant interference in relation to the proper wording of the convictions and the substitution of the sentences on counts 3 and 4.

Order

[74] In the result the following orders will issue:

1. The appeal against the conviction and sentence on count 1 is dismissed.
2. The conviction and sentence on count 1 is confirmed.
3. The appeal against the conviction and sentence on count 3 is upheld.

The following conviction is substituted in its stead:

'The accused is found guilty of contravening s 3(1) read with s 120(1)(a) of the Firearms Control Act 60 of 2000, being the unlawful possession of a firearm, a 9mm calibre, the exact make unknown, on 11 February 2013.'

4. The appeal against the conviction and sentence on count 4 is upheld.

The following conviction is substituted in its stead:

'The accused is found guilty of contravening s 90 read with s 120(1)(a) of the Firearms Control Act 60 of 2000, being the unlawful possession of two rounds of ammunition, being one 9x19mm and one unidentified calibre.'

5. The sentences imposed in respect of counts 3 and 4 are set aside and replaced with:

'The sentences on counts 3 and 4 are taken as one for purpose of sentence and the accused is sentenced to four years' imprisonment.'

6. The sentences imposed on counts 3 and 4 are antedated to 19 April 2016.

7. The sentences imposed on counts 3 and 4 will by operation of law be served simultaneously with that imposed on count 1.

HENRIQUES J

CASE INFORMATION

Date of Hearing: 8 November 2024

Date Judgment Reserved: 9 December 2024

Date of Judgment: 07 October 2025

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This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand down is deemed to be 9h30 on 7 October 2025.