



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
27/11/2025	
DATE	SIGNATURE

APPEAL NO. A17/2022

DPP REF NO: 10/2/5/1-(2022/008)

In the matter between:

NCUBE, MQONDISI MONGEZI

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

KARAM AJ:

INTRODUCTION

1. The appellant was convicted in the Randburg Regional Court of:

1.1 count 3 – unlawful possession of a firearm, a semi-automatic pistol,
read with the provisions of the Section 51(2) of the
Criminal Law Amendment Act 105 of 1997
("the minimum sentence legislation"); and

1.2 count 4 – unlawful possession of four rounds of ammunition.

2. He was sentenced as follows:

2.1 count 3 – 17 years imprisonment; and

2.2 count 4 – 5 years imprisonment.

No order was made as to concurrency, resulting in an effective term of
22 years imprisonment.

3. Leave to appeal both the conviction and sentence was granted.

THE EVIDENCE

4. Constable Phiri testified that on the evening in question he was together with Constable Sekula and they were patrolling in their motor vehicle. They encountered two suspicious looking males and decided to stop and search them. They exited their vehicle and introduced themselves to the two males, displaying their appointment cards.

The two males ran in opposite directions to one another and the officers gave chase on foot. The one male managed to outrun Sekula, and the latter joined the witness in pursuing the other male, the appellant. The witness was shouting at the appellant to stop, which the appellant ultimately did. Whilst the witness searched the appellant, Sekula was giving the witness backup.

A firearm was discovered on the appellant's right waist, with four live rounds of ammunition therein. The appellant did not have a license to possess the firearm. Upon being asked what he was doing therewith, the appellant responded that he was trying to make a living, and that the people back home were suffering and he was trying to provide for them. He was thereafter arrested on the scene.

5. During cross examination, the witness disputed the version put that the appellant was together with one Mduduzi, and that the latter was in possession of a plastic bag which he threw to the ground upon noticing the police vehicle approaching and ran away. Further, that the appellant did not run away, and was guarded by the witness whilst his colleague retrieved the plastic bag wherein a firearm was discovered. Further that the appellant had no knowledge that there was a firearm therein.
6. Constable Sekula testified. He repeated the evidence of Phiri and was consistent therein. He disputed the appellant's version aforesaid, as put to him.
7. The appellant testified. He reiterated the version as put to the officers aforesaid.

ISSUES ON APPEAL

8. The issues to be determined on conviction are whether the trial court erred in finding that the State had proved its case beyond reasonable doubt and in not finding the appellant's version to be reasonably possibly true.

9. The issues to be determined on sentence are whether the trial court erred in imposing more than the minimum sentence on count 3 and in making no order as to the concurrency of the sentences imposed.

LAW AND ANALYSIS

10. It is trite that in a criminal trial, the onus of proof is on the State to prove its case beyond reasonable doubt. This is indeed a stringent test but is applied in order to ensure that only the **proven** guilty are convicted. It is further trite that the Court is required to adopt a holistic approach in respect of the evidence and its assessment thereof, and use a common-sense approach. It is not sufficient if the guilt of the accused appears possible or even probable – his guilt must be proven beyond reasonable doubt.

S v Hadebe & Others 1998 (1) SACR 422 (SCA)

S v Van Der Meyden 1999 (1) SACR 447 (SCA)

S v Phallo & Others 1999 (2) SACR 558 (SCA)

S v Van Aswegen 2001 (2) SACR 97 (SCA)

S v Shackel 2001 (2) SACR 185 (SCA)

S v Chabalala 2003 (1) SACR 134 (SCA)

AD CONVICTION

11. The State witnesses were impressive witnesses. They corroborated each other in material respects. They were cross examined extensively and nothing material emanated therefrom. It is clear that they were honest and reliable witnesses.
12. It is noteworthy to mention that the appellant's counsel conceded at the hearing Of the appeal that she could not point out any inconsistencies in the evidence of the police officers.
13. On the contrary, the appellant was an unimpressive witness to say the least. He contradicted himself in his evidence and same was riddled with improbabilities.

He initially stated that whilst seated with Mduduzi, the latter had made a telephone call to his girlfriend and Mduduzi had requested the appellant to accompany him to his girlfriend.

He subsequently stated that Mududuzi had received a call from some person and after ending the call, had requested the appellant to accompany him to meet that person at the terminal.

It is highly improbable that Mduduzi would have kept the firearm under the table in a plastic bag at the tavern where they were drinking; that only Mdudzi had run away; that neither of the officers had pursued Mduduzi; and that he saw the firearm for the first time at the police station.

14. The ballistic report in respect of the firearm was handed in by consent.
15. Having regard to all of the aforesaid, I am of the view that the learned Magistrate correctly convicted the Appellant, finding that his version was not reasonably possibly true, and that there is no merit in the appeal on conviction.

AD SENTENCE

16. Having been charged in terms of the minimum sentence provisions, the appellant faced a minimum sentence of 15 years imprisonment on count 3.
17. I am satisfied that the learned Magistrate correctly found that, in the circumstances of this matter, there are no substantial and compelling circumstances that warrant a deviation from the imposition of the prescribed minimum sentence.

18. It is trite that a lower court has a discretion to impose up to an additional 5 years imprisonment to the minimum sentence. Further, that the presiding officer is required to give reasons for the imposition of more than the minimum sentence.

In this matter, the reason furnished was the prevalence of the offence.

I am not satisfied that this is a proper reason for justifying the imposition of more than the minimum sentence, for the following reasons:

18.1 the lack of evidence that the firearm was utilised in the commission of any other offence;

18.2 the evidence that the appellant was incarcerated at the time the firearm was robbed from its lawful owner, hence the acquittal of the appellant on count 1;

18.3 it is for the very reason of the prevalence of the offence, that the increased penalties were introduced by the minimum sentence legislation.

18.4 there are, in my view, no facts or circumstances warranting the imposition of more than the minimum sentence.

19. Regarding the sentence of 5 years imprisonment imposed on count 4, I am of the view that this sentence is startlingly inappropriate in the circumstances of this matter, entitling this Court to interfere therewith.

The 4 rounds of ammunition were contained in the firearm. It may have been a different issue were the ammunition to have been of a different calibre to the firearm.

I am of the view that an appropriate sentence therefore would be 3 years years imprisonment.

20. It is further trite that in imposing sentence, a court is required to take into account the cumulative effect of the sentences imposed.

S v Moswathupa 2012 (1) SACR 259 (SCA)

S v Kruger 2012 (1) SACR 369 (SCA)

S v Mokela 2012 (1) SACR 431 (SCA)

It is apparent from the record that this was not considered by the court a quo in the imposition of sentence, constituting an irregularity and enabling this Court to interfere therewith.

There are further no reasons in my view, having regard to the facts and circumstances of this matter, why the sentence imposed on count 4 should not be ordered to run concurrently with that imposed on count 3.

21. In the circumstances I propose the following Order:

21.1 The appeal against conviction is dismissed.

21.2 The appeal against sentence is upheld:

21.2.1 The sentence of 17 years imprisonment imposed on count 3 is set aside and replaced with a sentence of 15 years imprisonment;

21.2.2 The sentence of 5 years imprisonment imposed on count 4 is set aside and replaced with a sentence of 3 years imprisonment.

21.2.3 The sentence imposed on count 4 is ordered to run concurrently with the sentence imposed on count 3.

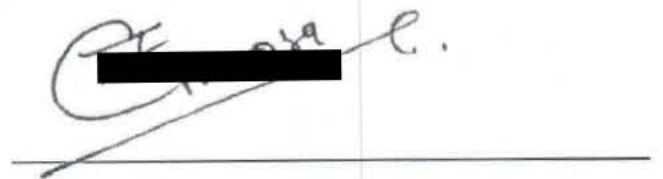
The effective sentence, accordingly, is 15 years imprisonment,
and is antedated to 30 September 2020.

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W A KARAM

ACTING JUDGE OF THE HIGH COURT

I AGREE AND IT IS SO ORDERED

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C I MOOSA

JUDGE OF THE HIGH COURT

Appearances:

Appellant: Ms S Bovu

Legal Aid SA

Johannesburg Office

Respondent: Adv C Mack

Director of Public Prosecutions

Gauteng Local Division