



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

HIGH COURT CASE NO. DR72/2025

REVIEW NO: 2/2024

MAGISTRATES' COURT CASE NO: B 207/2023

In the matter between:

CELIMPILO DLOMO

ACCUSED

and

THE STATE

ORDER

In the premises the following order is made:

1. The order of the court a quo on conviction is confirmed.
2. The sentence imposed by the court a quo on 21 February 2024 is set aside and replaced with the following sentence:
 - 2.1 The accused is sentenced to three years' imprisonment on count 1, half of which is suspended for a period of five years on condition that the accused is not convicted of unlawful possession of a firearm or ammunition during the period of suspension.
 - 2.2 The accused is sentenced to one year imprisonment on count 2.

- 2.3 The sentence in count 1 is to run concurrently with the sentence in count 2.
- 2.4 The sentences are antedated to 21 February 2024.

SPECIAL REVIEW JUDGMENT

Mathenjwa J (Sibiya AJ concurring)

[1] The matter initially came before Tucker AJ who raised several queries to which the learned magistrate has responded. The matter now comes before me on special review under s 304(4) of the Criminal Procedure Act 51 of 1977 ('the CPA').

[2] The accused was charged with two counts at Nongoma Magistrate Court; count 1 is a contravention of s 3 of the Firearms Control Act 60 of 2000 ('the FCA') read with s 51(2) of the Criminal Law Amendment Act 105 of 1977 ('the Act') in that the accused was found in possession of a 303 hunting rifle without a licence, permit or authorisation; count 2 is a contravention of s 90 of the FCA in that the accused was found in possession of 21 live rounds of ammunition without being a holder of a licence in respect of a firearm capable of discharging that ammunition nor a permit to possess the ammunition.

[3] The accused was represented by a legal practitioner appointed by legal aid. When the prosecutor put the charges to the accused at the commencement of the proceedings, the learned magistrate informed the prosecutor that she had to read the provisions of s 51(2) of the Act, since the Act was applicable to the charge relating to the possession of a firearm. Subsequently, the prosecutor read into the record that if the accused was convicted of the offence of possession of a firearm his sentence may attract the minimum penalty provisions contained in s 51(2)(a) of the Act. Subsequently, the magistrate asked the accused whether he understood the charges levelled against him, to which the accused answered in the affirmative.

[4] The magistrate then warned the accused in terms of s 1(1) of the Criminal Law Amendment Act 1 of 1988, which states that:

‘Any person who consumes or uses any substance which impairs his or her faculties to appreciate the wrongfulness of his or her acts or to act in accordance with that appreciation, while knowing that such substance has that effect, and who while such faculties are thus impaired commits any act prohibited by law under any penalty, but is not criminally liable because his or her faculties were impaired as aforesaid, shall be guilty of an offence and shall be liable on conviction to the penalty which may be imposed in respect of the commission of that act.’

[5] The accused pleaded guilty to both counts. In his plea explanation in terms of s 112(2) of the CPA the accused admitted that he was found in possession of a 303 rifle and 21 live rounds of ammunition without holding a licence to possess the firearm and ammunition. He confirmed that he knew it was unlawful to keep the firearm without a licence. The firearm was left behind by his father when he passed away on 22 January 2017. His late father had a licence to possess that firearm. The accused was aware that he should have handed in the firearm to the police after the death of his father which he had failed to do.

[6] The magistrate found the accused guilty of both counts and thereafter asked the accused’s legal representative whether she understood the implications of s 51 of the Act and whether in light of the prescribed minimum sentence the submission that the accused should be considered for non-custodial sentence was relevant. The magistrate then asked the legal representative to address her specifically on s 51 of the Act. The magistrate then adjourned the matter and directed the accused’s legal representative to read the judgments of *S v Malgas*¹ and *S v Matyityi*² and to address the court accordingly when it resumed.

[7] Subsequently when the court resumed the accused’s representative addressed the court on the issue of substantial and compelling circumstances. She referred to *S v Malgas* as authority for the principle that ordinarily the prescribed minimum sentence should be imposed unless the sentence would be unjust or

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

² *S v Matyityi* [2010] ZASCA 127; 2011 (1) SACR 40 (SCA).

disproportionate to the offence. Ultimately the legal representative submitted that the circumstances of the offence constituted compelling and substantial circumstances that warranted deviation from the prescribed minimum sentence. After hearing both the prosecutor and the accused's representative on sentence, the court further adjourned the matter for sentencing. When the court resumed for sentencing the magistrate alluded to the fact that the court gave the legal representatives a chance to address the court on substantial and compelling circumstances because the State in its indictment had invoked s 51 of the Act, however the magistrate observed from the ballistic report handed in by the State that the minimum sentence provisions were not applicable to possession of a 303 firearm. The court subsequently sentenced the accused to seven years' imprisonment for count 1; unlawful possession of a firearm and seven years' imprisonment for count 2; unlawful possession of ammunition, which sentences were ordered to run concurrently.

[8] The issues for determination in this case are whether there were any irregularities in the proceedings in the magistrates' court and if so whether the irregularities were material and therefore led to a failure of justice.

[9] The function of an appeal court when considering fairness in a criminal appeal was spelt out in *S v Rudman and Another; S v Mthwana*³ where it was stated that the function of a criminal appeal court was to enquire:

'Whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted'.

Thus, the starting point is to determine whether there were any irregularities in the proceedings. The record shows that the accused was charged with unlawful possession of a 303-firearm rifle read with the provisions of s 51(2) of the Act which makes provision for mandatory minimum sentences. The prescribed minimum sentence in respect of unlawful possession of a firearm is regulated by s 51(2) read with Part II of the Act which provides that:

'(2) 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, in the case of-

³ *S v Rudman and Another; S v Mthwana* 1992 (1) SACR 70 (A) at 100F-G.

- (i) a first offender, to imprisonment for a period not less than 15 years.
- (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
- (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years.

[10] It is instructive that the 303 rifle is neither an automatic rifle nor a semi-automatic rifle. Therefore, unlawful possession of a 303 rifle does not fall under the list of offences in Part II of Schedule 2 of the Act. Consequently, the minimum sentence prescribed by s 51(2) is not applicable to a conviction for possession of a 303 rifle. For that reason, it was irregular to add the provisions of prescribed minimum sentence to the charges faced by the accused in the court a quo. Even if the provisions of s 51(2) were applicable, which was not, the district magistrates' court would not have had the jurisdiction to hear the matter. Section 51(2) of the Act authorises the regional court and high court, to the exclusion of the District Court, to impose a sentence on a charge read with s 51(2). For that reason, it was irregular for the magistrate to preside over a matter in respect of which the accused was facing a charge which attracted a minimum sentence.

[11] This matter is distinguishable from matters in which the magistrate would have discovered after conviction that the offence merited punishment in excess of the jurisdiction of the magistrate's court.⁴ In the later instance the court would commence the proceedings on the basis that it has jurisdiction. It would be only after a conviction following on a plea of guilty that the magistrate will form the opinion that the conviction would merit punishment in excess of its jurisdiction. If a magistrate commences with the proceedings involving a charge read with the provisions of the prescribed minimum sentence, he/she would be committing an irregularity and contravene the principle of the rule of law which requires that a power may be exercised only if the person exercising such power has the authority to do so. For

⁴ Section 114(1) of the CPA provides that:

'If a magistrate's court, after conviction following on a plea of guilty but before sentence, is of the opinion-

(a) that the offence in respect of which the accused has been convicted is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate's court.

...

the court shall stop the proceedings and commit the accused for sentence by a regional court having jurisdiction.'

that reason, the magistrate erred in presiding over a matter in respect of which the accused was facing a charge read with s 51(2) of the Act.

[12] It should be pointed out that the mandatory minimum sentence provisions are distinguishable from the provisions that provides for a maximum sentence. In the latter category the district court has jurisdiction to hear a matter and impose a sentence above its three years jurisdictional limit. In the present matter, the accused was charged with contravening s 3 of the FCA which makes it an offence for any person to possess a firearm without a licence, permit or authorisation granted in terms of the Act. Schedule 4 of the FCA prescribes that a maximum sentence of 15 years' imprisonment may be imposed on any person found guilty of contravening the provisions of s 3. Section 151 provides that 'Despite any law to the contrary, any magistrate's court has jurisdiction to impose any penalty provided for in terms of the Act'. In *Tau v S*⁵ Loubser AJ confirmed an eight-year sentence imposed by a magistrate's court for contravention of s 3 of the FCA on the basis that the Act vests the court with the jurisdiction to impose a sentence that exceeds its normal jurisdictional limit.

[13] Regarding the sentence, it is instructive that before the magistrate imposed the sentence, she alluded to the fact that the charges against the accused did not fall under s 51(2) of the Act, without further elaboration. The record reflects that when the accused's legal representative submitted to the court that it should consider a non-custodial sentence, the magistrate opined that a non-custodial sentence might not be relevant in the light of the prescribed minimum sentence. It remains uncertain if the magistrate had recognised the relevance of the non-custodial sentence at the time she imposed the sentence on the accused.

[14] It is appropriate to distinguish the circumstances of this case from most cases involving unlawful possession of firearms, in that the accused's late father was the licenced owner of the firearm; the firearm was found in the accused's house in the homestead where it was left by his father. The firearm was not stolen or acquired

⁵ *Tau v S* [2017] ZAFSHC 42 para 12.

illegally; it was legally acquired by the accused's late father; it was not used for the commission of any offence; the accused was a first offender; at the time of his arrest he was employed at Okhukho mine earning a salary of R6 000 per month; and he had two children whom he was supporting.

[15] The magistrate failed to pay proper attention to the personal circumstances of the accused, the unique circumstances of the case and to consider the proportionality of the sentence to the offence when imposing the sentence. It is no doubt that given the proliferation of unlawful possession of firearms and the prevalence of violent crimes involving the use of firearms, courts are required to impose appropriate sentences that would have the effect of preventing further proliferation of unlawful firearms. However, the magistrate misdirected herself in failing to consider the peculiar circumstances of this case. Each case should be treated on its own merits. In the present case, the magistrate failed to consider mitigating factors when imposing a seven-year sentence in respect of possession of a firearm and ammunition, respectively.

[16] It is trite that not all irregularities contravene the right to a fair trial, however an irregularity which leads to a failure of justice would contravene the right to a fair trial which is central to any civilised criminal justice system.⁶ 'In principle, the system aims to punish only those persons whose guilt has been established in a fair trial.'⁷ Our courts have recognised the principle that justice must not only be done but also be seen to be done as at the heart of a fair criminal trial.⁸ For these reasons a presiding officer is required to conduct a trial in accordance with general open-ended notions of justice and fairness and ensure that the right to a fair trial is adhered to.⁹

[17] In relation to the conviction, it is important to note that the interpretation of section 51(2) of the Act concerning the charge is relevant solely to sentencing and does not affect the fundamental nature of the accused's conviction.

⁶ *S v Jaipal* 2005 (1) SACR 215 (CC) para 26.

⁷ *Sanderson v Attorney-General Eastern Cape* 1998 (2) SA 38 (CC) para 23.

⁸ *S v Dzukuda and Others; S v Tshilo* 2000 (4) SA 1078 (CC) para 11.

⁹ *Sanderson* para 22.

It is clear from the record that all the elements of the offence were present, and the accused was correctly found guilty. For that reason, I have no reason to interfere with the conviction since the irregularities were not material to the conviction. However, the misdirection by the magistrate on sentence requires intervention by this court. Considering the circumstances of this case as alluded to above a lesser sentence would be proportionate to the nature of the offence and the circumstances of the accused.

Order

[18] In the premises the following order is made:

1. The order of the court a quo on conviction is confirmed.
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Mathenjwa J

I agree.

Sibiya AJ

