



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number (lower court): RCA 125/18

Case number (High Court): A52/2025

In the matter between:

THANDIKHAYA MNTONINTSHI

Appellant

And

THE STATE

Respondent

Coram: Pangarker J and Greig AJ

Hearing date: 28 November 2025

Judgment delivered: 27 February 2026

JUDGMENT

Greig AJ (Pangarker J concurring)

INTRODUCTION

[1] In this appeal the appellant appeals against both his conviction and sentence on charges of possession of an unlicensed firearm and ammunition.

[2] On 20 February 2019, pursuant to his plea of not guilty and a trial, the appellant was convicted in the Mitchells Plain Regional Court ('the trial court') as follows:

- (a) Count 1: being in possession of a prohibited firearm of which the serial number was removed in terms of section 4 (1) (f) (iv) read with sections 1, 103, 117, 119, 120 (1) (a), 121 and schedule 4 of the Firearms Control Act¹ ('the FCA') and further read with sections 250 and 270 of the Criminal Procedure Act² ('the CPA'), and section 51 (2) of the Criminal Law Amendment Act³ ('the CLAA').⁴
- (b) Count 2: being in possession of ammunition in terms of section 90 read with sections 1, 103, 117, 119, 120 (1) (a), Schedule 4 of the FCA read with section 250 of the CPA.

[3] The trial court sentenced the appellant to 15 years' direct imprisonment on count 1, and 8 years' direct imprisonment on count 2 and ordered that, in terms of section 280 (2) of the CPA, the sentences should run concurrently.

[4] Following a petition granted by Salie-Hlophe J (as she then was), the appellant was granted leave to appeal to this Court.

¹ 60 of 2000

² 51 of 1977

³ 105 of 1997

⁴ In terms of Part 2, Column 4 of the FCA a maximum sentence of 25 years is prescribed.

[5] In essence the appellant contends:

- (a) As to conviction, that the versions presented by the State and the appellant are at least equally probable, and this is insufficient to support the appellant's conviction;
- (b) As to sentence, that the trial court misdirected itself by not taking due cognisance of the fact that the appellant was a young first offender.

EVIDENCE FOR THE STATE

Const. Virgil Rossouw

[6] Const. Virgil Rossouw testified that on 6 February 2015 at about 13h00 he and his patrol partner, Const. Daniels, were on patrol in the Mandalay area when they noticed a blue VW Golf with four occupants that they regarded as suspicious. They followed it to Kipling Street, Mandalay, pulled in front of it, and instructed the occupants twice to get out. The appellant got out on the left back side of the vehicle, in front of him, carrying a red-and-grey 'cooler box' type carry bag in his right hand.

[7] Const. Rossouw requested and obtained the appellant's consent to search the bag. In it he found a black Z88 pistol with its serial number filed off. He also found ammunition, more specifically, a magazine containing 16 live 9mm rounds, as well as a loose .45 calibre live round.

[8] In response to a question as to why he was in possession of a firearm where the serial number had been filed off, the appellant told him that *'they broke into a policeman's house in Cape Gate to steal the firearm.'*⁵

[9] Const. Rossouw said that the firearm, magazine and rounds were sealed on the scene in the appellant's presence. The appellant was arrested, his constitutional rights were explained, and he was handcuffed and placed in the police vehicle.

[10] The police officers then searched the vehicle and found a bolt cutter and a crowbar inside it.⁶ None of the remaining three occupants of the vehicle could provide a clear answer as to whose items these were, or why they were in the vehicle, and Const. Rossouw arrested the other occupants for possession of housebreaking implements.

[11] Under cross-examination Const. Rossouw accepted that his written statement (exhibit 'A') failed to mention the alleged admission by the appellant on the scene that the firearm was stolen from a policeman's house in Cape Gate. He could give no reason for this omission, beyond saying he had 'just mentioned it'⁷ to the court. He disputed the appellant's version that there were other police vehicles present when he was apprehended, that the appellant was ordered to lie on the ground, and that the appellant was only shown the contents of the bag at

⁵ Evidence in chief of Const. Rossouw, transcript p 7 lines 3-4.

⁶ The evidence of Const. Daniels was that these items were found on the back seat of the vehicle.

⁷ Evidence under cross-examination of Const. Rossouw, transcript page 18, line 22.

the police station. However, Const. Rossouw conceded that, had the appellant not exited with the bag in hand, he would not have known who had been in possession of the bag.

Const. Enrico Daniels

[12] Const. Enrico Daniels testified that on 6 February 2015 at about 13h00 he and, Const. Rossouw, stopped a blue VW Golf with four passengers. After the vehicle was stopped, Const. Rossouw instructed the occupants to get out; the appellant, seated on the left rear seat, was the first to alight holding a red-and-grey carry bag.

[13] Const. Daniels's evidence was that Const. Rossouw obtained the accused's permission to search him, opened the carry bag, and found that it contained a black Z88 9mm pistol inside with the serial number scratched off, and 16 x 9mm live rounds and an additional live .45 calibre round of ammunition. Const. Daniels confirmed that Const. Rossouw immediately arrested the appellant, handcuffed him, and read him his constitutional rights. Const. Daniels testified that he could not remember any conversation between Const. Rossouw and the appellant about the firearm, because he was focused on dealing with the remaining three occupants.

[14] As to the further search, Const. Daniels testified that the other occupants also consented to the vehicle being searched. A crowbar and bolt cutter were found on the back seat for which the occupants could give no satisfactory explanation. All four occupants were then arrested: the accused for possession of

the firearm and ammunition, and the others for possession of housebreaking implements.

[15] Const. Daniels maintained it was only he and Const. Rossouw at the scene, and there were no other police backup vehicles. He denied the defence version that the appellant was ordered to lie on the ground, or that the bag and ammunition were only shown to him at the police station.

[16] Under cross-examination Const. Daniels accepted that he did not see the appellant holding the bag while seated inside the vehicle, and only saw the bag when he alighted. He correctly conceded that if the appellant had not exited with the bag, he would not have known who had been in possession of it.

[17] Const. Daniels was unable to give a clear estimate of the size of the bolt cutter and crowbar, and could not recall the alleged admission attributed to the appellant about the firearm having been stolen from a policeman's house in Cape Gate.

Further formal evidence

[18] Before closing its case, the State by agreement handed in documentary exhibits in relation to the chain of custody: an extract from the SAPS 13 register, a statement by the SAPS 13 clerk, Mr Pumlani Galo, and a statement by Detective Francois Jordaan, who transported the exhibits.

[19] In addition, the State handed in an affidavit deposed to in terms of section 212 of the CPA by W/O Nkosi Pendule Njotovo, a ballistics examiner at the SA Police Services Forensic Science Laboratory, confirming that the serial number had been removed from the firearm and could not be restored despite an etching processes.

THE APPELLANT'S EVIDENCE

[20] The appellant testified (through an isiXhosa interpreter) that on 6 February 2015 he was travelling with three friends in a vehicle on the way to Monwabisi Beach when they noticed a police vehicle following them, and were instructed to pull over. He claimed that other police vehicles were ahead blocking the road, and that after they stopped the police ordered all four occupants to get out and lie on the ground where they were searched. Other officers searched the vehicle, finding a bolt cutter and crowbar which they claimed to have found in the boot. He testified that the owner/driver accepted responsibility and said he used the tools at home.

[21] The police then told them that they would be arrested and taken for an identification parade. On arrival at the police station they were placed in cells and nothing was said about any firearm at that stage.

[22] The appellant denied alighting from the vehicle with a bag containing a firearm or ammunition, and said he first heard about the firearm after being taken to the charge office, where he was shown a gun already inside a 'police bag'.

[23] He further testified that at the charge office he was told he was being arrested for the firearm because it was allegedly used in robberies. He was instructed to count the ammunition as police cocked the firearm and rounds were removed. He said there were 16 rounds in total but denied there was an additional loose round. He also denied that he told Const. Rossouw anything about the firearm having been stolen from a policeman's house in Cape Gate.

[24] The appellant further alleged that police later took him to his home to search it and assaulted him there. He also confirmed he had no prior relationship or problems with the two arresting officers, but persisted that he was being falsely implicated.

[25] Near the end of his evidence the appellant said that after their arrest he and his three fellow passengers were taken to their respective home addresses for searches. Once back at the police station they were placed in the same cell, and later appeared in court where the matter was postponed for seven days for the conduct of an identity parade which, on his version, never materialised. He testified that the matter was later withdrawn in 2015. He asserted that initially all four occupants of the vehicle had been charged 'with the same charges', but he was later 'singled out' on the firearm and ammunition counts.

[26] In cross-examination the prosecutor put to the appellant that he was the sole accused because he was the one who had alighted with the bag containing the firearm and ammunition. The appellant responded:

*'if that is the case, why was the matter initially withdrawn if they knew that I was the one who exercised control over this firearm, ammunition, etcetera, etcetera? If they knew that from the get-go, why was the matter withdrawn and later I was recharged?'*⁸

[27] Arising from the above the appellant's legal representative sought a postponement to check the previous charge sheet, and the reasons for the withdrawal. The learned Magistrate declined to grant this request, and queried its relevance, pointing out that, even if there was a withdrawal, this could not have finalised the matter. Thereafter the defence case was closed.

JUDGMENT OF THE TRIAL COURT

Conviction

[28] The trial court's judgment was delivered ex tempore on 25 October 2018.

[29] The trial court found that the evidence of the two State witnesses corroborated each other in all material respects and was consistent, clear, and credible.

[30] The trial court noted its impression that the appellant was evasive and 'uncomfortable' under cross-examination. He 'created other versions' which were not relevant, and failed to displace the State's evidence where it differed from his own version.

⁸ Evidence under cross-examination of appellant, transcript p 71 line 24 to page 72 line 3.

[31] The appellant's version that he did not have possession of the bag was characterised by the trial court as a 'bare denial'. The trial court noted that the appellant admitted that the two state witnesses were unknown to him and implied that on this basis it was implausible that he was 'singled out'.

[32] The trial court thus accepted that it was proved beyond reasonable doubt that the appellant was the first occupant to alight from the vehicle carrying a bag inside which the police found the Z88 semi-automatic pistol with its serial number filed off, a magazine containing 16 rounds of 9mm ammunition, and a loose .45 round.

[33] The appellant further did not dispute the State's statements supporting the chain of evidence and the trial court thus found that on the evidence as a whole the State had established beyond reasonable doubt that the appellant was in unlawful possession of a bag containing the firearm and ammunition. The appellant was accordingly convicted on both counts.

Sentence

[34] In addressing sentence, the trial court identified section 51(2) of the CLAA as applicable to count 1, on the basis that the offence fell within Part II of Schedule 2, being the unlawful possession of a semi-automatic firearm. This prescribed a minimum sentence of 15 years' direct imprisonment for a first offender, unless substantial and compelling circumstances were found to justify a lesser sentence. Section 121 read with Schedule 4 of the FCA provided for a

sentence of imprisonment up to 25 years for a section 4 contravention (count 1) and up to 15 years for a section 90 contravention (count 2).

[35] The trial court referred to the decision of the Full Bench in *S v Swartz*⁹ which held that, in the case of a first offender convicted of unlawful possession of a semi-automatic firearm, there was no conflict between the two statutes, as both contemplated a sentence of 15 years' imprisonment. The court thus found that it was bound to impose the prescribed minimum sentence unless substantial and compelling circumstances were present.

[36] The trial court then considered the appellant's personal circumstances. He was 22 years old at the time, with a 3-year-old child. He was single, and the child stayed with the mother. At the time that he committed the offence he was 18 years old. The appellant left school in grade 9. At the time his sentence was handed down, the appellant was serving a sentence of 15 years for robbery with aggravating circumstances, and rape. The court noted that for purposes of sentencing it would treat the appellant as a first offender.

[37] The trial court again referred to *Swartz* where it was held that unlicensed possession of a semiautomatic firearm is a very serious matter, given the violent crime with which such weapons are associated, and the legislature's undoubted awareness that possession of that kind was almost always related to serious crimes such as murder, robbery, hijacking and the like. The court further remarked that there was no explanation from the appellant as to how he came to

⁹ 2016 (2) SACR 268 (WCC), upheld in *S v Motloung* 2016 2 SACR 243 (SCA).

be in possession of a firearm and ammunition, and concluded that *'in all probability it must have been stolen from a police officer.'*¹⁰

[38] The trial court accordingly sentenced the appellant to 15 years' direct imprisonment on count 1, and 8 years direct imprisonment on count 2, with such sentences to run concurrently.

APPELLANT'S SUBMISSIONS

Conviction

[39] The appellant argues that his version is more probable, or at least equally probable. In particular, the appellant relies on the fact that the evidence of the police officers, viz. that he exited the vehicle knowing that the bag he carried contained an illegal weapon and ammunition, was unlikely.

[40] The appellant also submits there are further improbabilities in the State's version, such as that the two police officers would not alone have apprehended four suspects in a vehicle.

[41] Similarly, the appellant contends that circumspection is required in relation to the evidence of Const. Rossouw because his statement fails to mention

¹⁰ Judgment, transcript page 122, lines 24-5.

the evidence which he presented later, namely that the appellant told him that the firearm was stolen from a policeman's house.

[42] The appellant points out that the court does not have to be convinced that every detail of his version is true. If the accused's version is reasonably possible true, the court must decide the matter on that version. The accused's version can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.¹¹

Sentence

[43] The appellant submits that the trial court misdirected itself in finding that no substantial and compelling circumstances exist to deviate from the prescribed minimum sentence. These factors, cumulatively considered, ought to have resulted in a lower sentence.

[44] Firstly, the appellant points to the fact that he was 18 when he committed the offence and, even though another court found him guilty of robbery and rape, at the time he committed the crime in question, he was a first offender.

[45] Secondly, the appellant contends that there is no proof that the firearm previously belonged to a law enforcement officer, nor that it was used in the commission of any offence.

¹¹ *S v Shackell* 2001 All SA 279 (SCA) at 288E-F.

[46] Thirdly, the trial court misdirected itself in finding that the appellant was out on bail when the offences were committed. The offences were committed on 6 February 2015, whilst the offence for rape and robbery of which the appellant was found guilty was committed on 22 June 2016, the guilty finding ensuing on 9 June 2017. In relation to the present offences the appellant was rearrested on 30 May 2018.

[47] Fourthly, the appellant contends that the trial court misdirected itself by giving insufficient consideration to the element of mercy, and overemphasising retribution.

RESPONDENT'S SUBMISSIONS

Conviction

[48] The State contends that the appellant's conviction should stand. The trial court correctly found the existence of the required physical and mental elements of the appellant's possession of the firearm and ammunition was proved beyond reasonable doubt.

Sentence

[49] As to sentence, the State submits that the trial court correctly weighed the required factors in the balance are coming to the sentence imposed.

[50] The State further submits that the sentence imposed was not so shocking, startling or disturbingly inappropriate as would warrant interference by this Court.

DISCUSSION AND FINDINGS

Incomplete record

[51] At the outset of the appeal hearing the court raised with the parties the fact that the first page of the statement of Const. Rossouw (at page 153 of the record) is missing. Counsel for the appellant was agreed that this omission was not material and that the appeal could proceed.

Conviction

[52] There is very little criticism which may be levelled at the trial court's assessment that the evidence of the two State witnesses corroborated each other in all material respects.

[53] The trial court further expressed reservations as to the credibility of the appellant who it said was evasive and uncomfortable whilst testifying.

[54] In this regard due weight must be given to the trial court's assessment of the credibility of the witnesses, especially given the fact that the trial court was steeped in the atmosphere of the trial.¹²

[55] As to the appellant's submission that the evidence of the State witnesses is *'not probable because, should the appellant have known that the bag contained an illegal weapon, he would not have gotten out of the vehicle holding the bag*

¹² *Rex v Dhlumayo and Another* 1948 (2) SA 677 (A), albeit that demeanour may be a 'tricky horse to ride' – see *S v Kelly* 1980 (3) SA 301 (A) at 308B – D.

containing the firearm',¹³ this ignores the fact that there are many other entirely plausible reasons why the appellant may have alighted from the vehicle with the weapon, including an intention to flee or use the weapon.

[56] The submission that 'the version of the two police officers that they alone apprehended the suspect vehicle with four occupants inside is improbable', is likewise tenuous. Certainly, there was no evidence to suggest that such an action would have been against police protocols.

[57] Weighed in the scales, these submissions therefore do not have sufficient cogency to warrant setting aside the conviction in the absence of material contradictions between the versions presented by the State's witnesses.

[58] In this regard it stands to reason that the only basis upon which the appellant's version can be true is if the State's witnesses concocted their version that the appellant was the one in possession of a firearm and ammunition when in fact they were not able to establish which of the occupants of the vehicle was thus in possession. One would expect, in such circumstances, material contradictions on salient aspects of the evidence of the two State witnesses, even if they had the opportunity, prior to testifying, to fabricate such a version. Such contradictions, as the trial court correctly found, are largely absent.

¹³ Appellant's heads of argument, paragraph 6.1.1, pages 3-4.

[59] The only troubling aspect is the appellant's assertion under cross-examination that all four occupants of the vehicle were initially charged with these offences; that these charges were subsequently withdrawn in 2015; and that he was later singled out and re-charged alone on the firearm and ammunition counts. However, this point was not pertinently raised on appeal and, beyond the appellant's assertion in the evidence before the trial court, no objective material was placed before this court by the appellant or his counsel to substantiate such contentions.

[60] In the absence of this evidence there is no sufficient basis to impugn the credibility of the State witnesses, nor to suggest that they chose to concoct a version to pin the firearm and ammunition counts on the appellant. The absence of any evidence as to such an ulterior motive, and the fact that such a scheme would have needed to have been in the works for many years - an unlikely scenario - only emphasises the point. This aspect thus remains at the level of speculation and does not, without more, cast doubt on the correctness of the conviction.

Sentence

[61] There is little if anything in the circumstances of the offence, or the personal circumstances of the appellant, which could warrant a deviation from the prescribed minimum sentence of 15 years' imprisonment for a first offender.

[62] The appellant's heads of argument mention only two such factors, namely:

- (a) 'For the purpose of sentencing the appellant is considered a first offender'; and
- (b) 'He was very young when he committed the offence and abusing drugs during the time'.

[63] As to the appellant's submission that he ought to have been treated as a first offender, it is apparent from the judgment of the trial court that he indeed was treated as a first offender. Moreover, though the appellant was a young 18-year-old first offender with a 3-year-old child and substance abuse problems, these circumstances are insufficiently weighty, even taken together, to indicate that the sentence imposed by the trial court was disturbingly or shockingly inappropriate, or that there are substantial and compelling circumstances warranting a deviation from the minimum sentencing regime.¹⁴

[64] It is also noteworthy that, in holding that the sentences for unlicensed possession of the firearm, and for unlicensed possession of ammunition, are to run concurrently, the overall sentence imposed by the trial court does show a degree of leniency and that the regional magistrate was mindful of the cumulative effect of the sentences.

¹⁴ Whilst 'substantial and compelling' does not mean circumstances which are 'exceptional' in the sense that they are rare, and a cumulation of substantial mitigating circumstances may qualify, speculative hypotheses favourable to an offender, maudlin sympathy, aversion to imprisoning first offenders, doubts as to the efficacy of the minimum sentencing regime, and marginal differences in personal circumstances, do not qualify - *S v Malgas* (117/2000) [2001] ZASCA 30; [2001] 3 All SA 220 (A) at paras 9 and 10.

[65] As to misdirections by the trial court, it is so that its conclusion in its judgment on sentence that *'in all probability it [the firearm] must have been stolen from a police officer'*¹⁵ is not supported by any objective evidence that the firearm was indeed a police weapon.¹⁶

[66] However, this misdirection, if misdirection it was, does not seem to have weighed much with the trial court in making the decision to impose the prescribed minimum sentence. Certainly, even if one ignores this factor, the sentence imposed does not strike one as inappropriate or shocking.¹⁷

[67] Similarly, the trial court, in arriving at the sentence which it did, did not rely on the appellant being out on bail when the offences were committed.

[68] Accordingly this court is not able to come to the conclusion that there is a proper basis to interfere with the sentence imposed by the trial court.

CONCLUSION

[69] For the reasons set out above, this Court is satisfied that the trial court committed no material misdirection in its evaluation of the evidence relating to

¹⁵ Judgment, transcript page 122, lines 24-5

¹⁶ The police forensic laboratory was not able to establish the initial serial number of the weapon as it had been conclusively filed off.

¹⁷ It is trite that this court may only interfere with the sentence if it is shockingly inappropriate or has been vitiated by a material misdirection; see for instance *S v Singh* 2016 (2) SACR 443 (SCA) at para [23].

conviction or sentence. On a conspectus of the evidence, the State proved beyond reasonable doubt that the appellant was in unlawful possession of the firearm and ammunition, and the conviction on both counts must accordingly stand.

[70] In relation to sentence, the trial court correctly applied the applicable minimum sentencing regime. When regard is had to the seriousness of the offence, the prevalence of violent crime, and the absence of substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence, the sentence imposed cannot be said to be shockingly inappropriate.

ORDER

[71] In the result, I would grant the following order:

- a. The appeal against conviction and sentence is dismissed.
- b. The conviction and sentence imposed by the Regional Court, Mitchells Plain, are hereby confirmed.



M GREIG
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered



M PANGARKER
JUDGE OF THE HIGH COURT

APPEARANCES:

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For respondent: Adv T Kwetane
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