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

CASE NO: AR294/2024

In the matter between:

SIBUSISO DLAMINI	**FIRST APPELLANT**
SPHAMANDLA MADONDO	**SECOND APPELLANT**

and

THE STATE	**RESPONDENT**

Coram: **Pitman J (Chetty J concurring)**
Heard: **23 October 2026**
Delivered: **06 November 2026**

ORDER

On appeal from: The Regional Division of KwaZulu-Natal, Umbumbulu.

1. The appeals by both appellants in respect of both their convictions and sentences are dismissed.

APPEAL JUDGMENT

Pitman J (Chetty J concurring):

[1] On 18 May 2024 the appellants were, in the Regional Court Umbumbulu, each convicted of one count of the unlawful possession of a prohibited semi-automatic firearm and one count of the unlawful possession of ammunition. They were each sentenced to the minimum 15 years' imprisonment on the firearm count and three years' imprisonment on the ammunition count. The sentence on the ammunition count was ordered to run concurrently with the sentence on the firearm count.

[2] The appeal ought to have been heard on 6 August 2025 but was adjourned because the record was incomplete. The record is now remedied, and the appeal was argued on 23 October 2026. Both appellants appeal their convictions and sentences with the leave of the trial court. Each of the appellants is represented by counsel.

The convictions

[3] The State evidence was that members of the South African Police Service received crime-prevention information that a Hyundai i20 vehicle with registration number NB655920 was being used to transport illegal firearms at the KwaMakhutha taxi rank. Upon attending the rank, they found the vehicle with the first appellant in the driver's seat and the second appellant in the front passenger seat. After each appellant alighted, they were searched and in the possession of each was found a semi-automatic pistol with the serial number obliterated. Each of the pistols contained ammunition. In the boot of the vehicle another firearm (a rifle) was recovered together with other ammunition. The appellants failed to produce licences for the possession of the firearms and ammunition and did not give a clear account thereof and were accordingly arrested and charged. The firearms were sealed and entered into the SAP 13 register under number 530/2018, as was the vehicle. After establishing ownership of the vehicle by a third party, the investigation produced other parties, two of whom testified at the trial in relation to the hiring of that vehicle by four men, one of whom was the first appellant. For purposes of this judgment, it is not necessary to deal with that aspect any further.

[4] The appellants denied that any firearms were found in their physical possession and denied knowledge of any firearms and ammunition found in the boot of the vehicle at the time of their arrest.

[5] Each appellant testified and the first appellant called a witness. The first appellant testified that on the relevant day he had needed to repair his cell phone and visited a friend to help him. That friend put him onto the second appellant. In order to get to the second appellant another friend arrived in the i20 vehicle fortuitously and assisted with transport. The second appellant got into the vehicle when they arrived, and they were driven to where the phone was to be fixed. Whilst with the person who was fixing the phone it was noticed that the battery was low and the appellants returned to the vehicle to charge it. While that was being done the first appellant was sitting in the driver's seat and the second appellant in the front passenger seat to help. At that point the police arrived, knocking on the vehicle window and demanding that they get out. They did so, were asked to lift their shirts, were handcuffed and asked where the firearms were. The vehicle was searched, the boot opened and a bag was found with firearms. They told the police these were not their firearms and pointed out the person who had provided the vehicle. He denied that any firearms were found in his physical possession. The second appellant confirmed the version of the first appellant, stating that he had not known the first appellant prior to the date of the arrest. He also denied the physical possession of any firearms.

[6] The witness for the defence testified that he knew both of the appellants. He claimed to be present with the first appellant when the i20 had been driving past while the first appellant had been trying to fix his cell phone. He testified that that vehicle stopped and at the request of the first appellant agreed to provide transport to the place where the phone would be fixed. He denied that the first appellant was in possession of any luggage when he left in the vehicle.

[7] In a lengthy and comprehensive judgment, the trial magistrate accepted the evidence of the police witnesses and rejected the evidence of the appellants and the first appellant's witness. In the result she found that each of the appellants had been found in possession of the relevant semi-automatic pistols and ammunition, with the serial numbers removed. She also accepted the evidence that the rifle had been found

in the boot of the vehicle. She was not satisfied that the evidence did not establish beyond a reasonable doubt the possession by the appellants of the rifle in the boot but convicted them in respect of the pistols and ammunition found in their possession.

Submissions on Appeal

[8] The first appellant submits that the trial court erred: -

(a) in accepting the evidence of police witnesses regarding the physical possession of the firearms by the appellants. It is argued that she should have found that there was a reasonable possibility that the pistols were found in the boot with the rifle and that in the circumstances she ought to have acquitted them both in that regard;

(b) in not finding that the placing of all firearms into a single bag after their recovery was irregular and had the result that doubt was created as to "in whose possession each firearm was found"; and

(c) in not finding that in the absence of "formal admissions pertaining to the chain of evidence" the State had not proved beyond a reasonable doubt that the firearm referred to in count one and the ammunition referred to in count four were indeed the items which, on the State's case, were found in the first appellant's possession on the day in question.

[9] The second appellant submits that the trial court erred: -

(a) in accepting the State evidence that the firearm and ammunition were found in his physical possession;

(b) in rejecting the appellant's version as being false beyond reasonable doubt;

(c) in trivialising "contradictions between police officers";

(d) in not specifically detailing every contradiction, improbability and inconsistency after finding that the defence evidence was "riddled" with such;

(e) in not calling the driver of the i20 vehicle; and

(f) in failing to "closely examine the quality of presentation by the State in failing to prove a factual link between exhibits alleged to have been collected at the scene and tested at a ballistic laboratory".

[10] The respondent submits that the police witnesses were good witnesses and any inconsistencies were not material to their credibility. There was no indication that they had contrived together a case against the appellants, and it was inherently improbable on the evidence that they would have done so. As regards the recovered firearms, the evidence was that they had been sealed in the exhibit bag with reference PAR 000160057, marked with the relevant KwaMakhutha CAS number 74/07/2018 and entered into the SAP 13 register. The section 212 statement of the firearm analyst admitted as evidence established that the same exhibit bag bearing the same references with an unbroken seal was received by her and that she thereafter examined the firearms and the ammunition and came to the conclusions that she did.

[11] The respondent submits also that the appellants' evidence was correctly rejected as false as they were "very poor and not credible or reliable witnesses".

Analysis

[12] In my view the submissions on behalf of both appellants in respect of the convictions lack any substance or merit. The magistrate's judgment constitutes a comprehensive, rational and careful consideration of the credibility of all witnesses who appeared before her.

[13] As regards her analysis of the evidence of the appellants, the magistrate prefaced it with the words "Let us closely examine the version of the accused" and then did precisely that as is evidenced by the transcribed judgment. Her conclusions that the appellants gave contradictory and inconsistent evidence are, in my view, unimpeachable. I am satisfied that the evidence of the two appellants, as apparent from the record, is unimpressive and that the trial court's findings that the versions contained material inconsistencies were justified.

[14] Her conclusion that the two police witnesses should be believed is also, in my view, unimpeachable. An appeal court must be reminded that the trial court was able to view and hear the witnesses first-hand and is accordingly in a better position to assess the credibility of the witnesses than an appeal court with only the transcribed record before it. That is not to say that an appeal court should not, in respect of

credibility arguments, consider the *viva voce* evidence insofar as it has been transcribed. I have done exactly that.

[15] Whilst there may be some inconsistencies in their version (of which the trial magistrate was well aware), I agree with the magistrate that on all material issues they were consistent. There is nothing inherently improbable about the police version either. In fact, if the version of the appellants is to be believed, the two police witnesses have lied about finding a pistol and ammunition in the physical possession of each of the appellants but then been honest about the rifle and other ammunition in the boot. In my view, if the police witnesses had as their motive the creation of false evidence to implicate the appellants in a possession of firearms case, that they would not have done so also in relation to the rifle and its ammunition is inherently improbable.

[16] As regards the appellants' "chain of evidence" arguments: -

(a) That issue was not challenged by the appellants during the trial. No State witnesses were tackled in that regard and that argument was not raised then.

(b) An affidavit in terms of s 212 of the Criminal Procedure Act 51 of 1977 was admitted by consent in relation to the ballistic forensic report about the firearms.

(c) That affidavit records that the analyst received a sealed evidence bag marked "PAR 00633348" and "KwaMakhutha CAS 74/07/2018". Inside that was another sealed evidence bag labelled "PAR 00010057" and "KwaMakhutha CAS 74/07/2018".

(d) The evidence of the firearms having been sealed initially, as testified to by W/O Ntuli, is consistent with the sealed bag inside the further sealed bag later dispatched to forensics.

[17] The Appellate Division (as it then was) in *S v Du Plessis* 1972 (4) SA 31 (A), dealing with a blood-alcohol concentration test and an affidavit similar to one in terms of s 212 of the CPA at the time, held that where all of the relevant reference numbers corresponded, "Dit was vir die Staat nie nodig om te bewys hoe die bloedmonster vanaf Dr. Louw by Maurice Freiman uitgekom het nie. Die respondent het geen getuienis aangebied om die prima facie bewys wat die Staat in hierdie verband voorgelê het, te weerlê nie." This has been followed in decisions such as *S v Boyce* 1990 (1) SACR 13 (T).

[18] In my view that principle is of equal application in regard to the firearms in this matter and the subsequent report by the forensic expert in her s 212 affidavit. The fact that the two pistols analysed by the expert had no visible serial numbers (one she established through a specialised electro-magnetic process only) is further confirmation that these were the ones the police had seized in this matter.

[19] Therefore, the trial court was correct, in my view, in its conclusion that the firearms and ammunition analysed as functional and semi-automatic were those recovered at the time of the arrest of the appellants. The trial court committed no material irregularities or misdirection in respect of the convictions of the appellants. I would therefore dismiss the appeals in respect of the convictions of the appellants on the possession of illegal firearm and ammunition charges.

The sentences

In respect of the first appellant, it is submitted on appeal that the effect of the sentence of 15 years' imprisonment is unjustifiably heavy because, *inter alia*, the first appellant co-operated with the police during his arrest, the firearm was not used in a crime, and it was never shown that the firearms had links with any other unlawful activities. Mr Barnard argued that given the fact that the first appellant was a first offender at 46 years of age, together with his other personal circumstances, and those features mentioned above, the minimum sentence of 15 years imprisonment was disproportionate and that the appeal court ought to interfere and impose a sentence of six years' imprisonment. The magistrate, so he argued, ought to have considered "mercy" when assessing the circumstances of the first appellant cumulatively, that her judgment on sentence suggests that she did not, and that as a result the sentence induces a sense of shock and is disproportionately heavy.

[20] In respect of the second appellant, Mr Mvune associated himself with the arguments of Mr Barnard but added that the trial court failed to take into account the personal circumstances and age of the second appellant and as a result incorrectly concluded that there were no substantial and compelling circumstances justifying a departure from the minimum sentence prescribed by statute. He further submitted that

the trial court committed “a glaring irregularity” in sentencing the second appellant on “Count 1” when he had not been convicted of that count.

Ms Xulu, for the State, argued that the personal circumstances of the first appellant, being that he was 46 years old and a first offender, unmarried with two minor children and a sickly mother and a niece who are all dependent on him financially, and self-employed and that the second appellant was 23 years old, also a first offender, had two minor children and was doing part-time jobs as a gardener earning R350 per day when he got work did not constitute substantial and compelling circumstances warranting a sentence below the prescribed minimum in respect of either of them.

She argued that it was correctly found by the trial court that the offences were very prevalent and very serious. Because of the serious nature thereof a minimum sentence of 15 years’ imprisonment had been prescribed by the legislature. She argued that the trial court correctly emphasised society’s interest in deterring offenders from this type of offence and submitted further that there was a danger that society would lose confidence in the justice system if these offences were trivialised. She emphasised that the maximum sentence could have been 25 years’ imprisonment and submitted that in his view the court had been lenient in only imposing 15 years’ imprisonment.

[21] The law is settled on when an appellate court may interfere with a sentence imposed by a lower court. It can only do so, and this is the traditional test, when there is a material misdirection or irregularity by the sentencing court or the sentence induces a sense of shock in the sense that it is extraordinarily heavy. However, our Courts have now also constitutionalised “proportionality” in sentencing, deriving it from sections 12 and 35(3) of the Constitution.[1]

[22] In one of the early pre-constitution judgments on this issue, *S v Rabie* 1975 (4) SA 855 (A). The Appellate Division (as it then was) set out the following on this issue: -

[1] S v Dodo 2001 (3) SA 382 (CC)

> ‘1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal –
>
> (a) Should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial Court; and
>
> (b) Should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been “judicially and properly exercised”.
>
> 2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.’

[23] More recently in *S v Malgas* 2001 (1) SACR 469 (SCA), Marais JA, dealing with the minimum sentence legislation, stated that when considering sentence, the emphasis must shift to the objective seriousness of the type of crime and the public's need for effective sanction against it. At para [12] the Court laid out the guidelines when an interference would be permissible:

> ‘A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court.' But an appellate court may interfere with the exercise by the sentencing court of its discretion, even in the absence of a material misdirection, when the disparity between the sentence imposed by 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'.

[24] At paragraph [25] of the same judgment, the Court said:

> 'If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence'

[24] This effectively then means that this court can only interfere if the sentence is vitiated by an irregularity, misdirection or is disturbingly inappropriate in the sense that it induces a sense of shock or is disproportionate. See also *S v Bogaards* 2013 (1)

SACR 1 (CC); *S v Ngcobo* 2018 (1) SACR 479 (SCA), para 11; *S v Romer* 2011 (2) SACR 153 (SCA), para 22.

[25] As a result of Mr Barnards argument, I want to deal with the position of the courts on the element of mercy in sentencing. Because the magistrate may not have mentioned the principle does not mean she did not consider it.[2] Whatever the case may be however, Holmes JA in S v Rabie *supra* set out the following regarding mercy in sentencing at page 866: -

> "A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case.

[26] In this matter the trial magistrate carefully, and in an extensive well-reasoned in my view, judgment, considered all relevant factors. I do not discern any irregularities or misdirections, nor have Counsel been able to point any out. The magistrate was aware of the principles to apply in deciding on an appropriate sentence and did not, in my view, over exaggerate or underemphasise any of them.

[27] It is well to note that the legislature has imposed a maximum penalty of 25 years for the possession of a prohibited firearm (as defined in s 4 of the Act) under Schedule 4 (now replaced by s 53 of the Firearms Control Amendment Act 28 of 2006). In comparison, the legislature imposed a lesser sentence of 15 years for possession

[2] For example: *R v Dhlumayo* 1948 (2) SA 677 at 702; *S v Mokela* 2012 (1) SACR 431 SCA

of an unlicensed pistol or semi-automatic firearm. In *S v Thembalethu* 2009 (1) SACR 50 (SCA) where the Court at para 7 noted that: -

> 'In my view once it is proved in a trial that an accused is guilty of an offence in terms of which he or she unlawfully possessed a firearm, in this case in contravention of s 2 read with ss 1, 39 and 40 of the now repealed Arms and Ammunition Act 75 of 1969, and it is proved or admitted that the firearm was 'semi-automatic' the application of its provisions relating to sentencing is triggered.'

[28] The minimum sentence is prescribed unless substantial and compelling circumstances exist justifying a departure. The appellants argued that a significantly mitigatory fact, ignored by the magistrate, was that the recovered firearms were not used in the commission of any offences. That argument, however, ignores the proven facts that the appellants dishonestly attempted to distance themselves from the possession of the firearms, and accordingly never gave a mitigating version relating to their possession, together with the facts that each firearm had its serial number ground off and/or obliterated. In my view the inference is unavoidable that those facts together with the circumstances of the arrest of the appellants, established that the firearms were in all probability possessed by the appellants for unlawful and criminal use and that being apprehended before unlawfully using them was simply fortuitous. That being said, I accept that it is a fact to take into account, as the magistrate did, that the firearms had not yet been used with any calamitous results.

[29] In my view, given the test for interference as set out above, no grounds exist for it to be found that the sentences imposed were consequent upon any misdirections or irregularities. Whilst heavy, the sentences are not so heavy in all circumstances as to induce a sense of shock in respect of jurists or the public in my view. I do not consider them disproportionate in respect of all the facts of this case either.

[30] When sentencing the second appellant the magistrate did refer, in her oral judgment, that he was being sentenced in respect of count 1. He was in fact convicted of the possession of the firearm found in his possession as count 2. In her judgment

granting leave to appeal the magistrate explained that this was an oversight on her part.

[31] She correctly manually recorded, at the time of conviction and on the charge sheet, the second appellant's conviction on the firearm charge as a conviction on count 2. That this is so, is evident from the manuscript charge sheet. The manuscript charge sheet also reveals that the sentence imposed on the second appellant was in respect of count 2. In my view that oversight in her oral judgment is of no material significance. The manuscript charge sheet is correct.

[33] While counsel for the appellants' describe the sentences imposed by the court a quo as harsh, I do not consider, in the totality of the circumstances of the appellant, the interests of society to be protected from the use of prohibited firearms and the seriousness of the offence, that the sentence of 15 years' imprisonment *per se* justifies interference by this Court. In my view no grounds justifying interference by this Court have been established.

[34] I propose the following Orders:

1. The appeals by both appellants in respect of both their convictions and sentences are dismissed.

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PITMAN J

I agree:

_____

CHETTY J

APPEARANCES

For the First Appellant: Advocate L Bernard

Instructed by: S.D & Associates
30 Dorothy Nyembe Street
8th Floor Royal Towers
Durban
Cell: 065 839 0942
Email: sibusisodlamini0@gmail.com

For the Second Appellant: Advocate M Mvune

Instructed by: 197 Andrew Zondo Road
Ovolli Building
Amazimtoti
Cell: 072 521 1267
Email: advmduduzimvune@gmail.com

For the Respondent: Advocate GE Xulu

Instructed by: Director of Public Prosecution Office
20th Floor
88 Joe Slovo Street
Durban
Cell: 074 927 3661
Email: CXulu@npa.gov.za

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 06 November 2026 at 09h30.