REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL CASE NO: A197/2018

DPP REF NUMBER: 10/2/5/1-(2018/177)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

8/4/2019 .....
DATE

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SIGNATURE

In the matter between:

NDEBELE, LODRICK APPELLANT

And

THE STATE RESPONDENT

JUDGEMENT

WESSELS AJ:

[1] The Appellant was charged in the Regional Court, Regional Division of Gauteng, with one count of contravention of section 4(1)(f)(iv) of the Firearms Control Act, no 60 of 2000 ("the Act") - possession of a prohibited firearm: to wit a 9 mm short caliber Norinco Pistol, with serial number/identifying mark altered without permission of the Registrar, and with one count of contravention of section 90 of the Act - possession of

ammunition, to wit two 7.65 mm cartridges without being the holder of a license in respect of a firearm capable of discharging that ammunition, or a permit to possess ammunition, or is otherwise authorized to do so.

[2] The Appellant was legally represented and pleaded not guilty to both charges. The explanation of plea was a bald denial of both charges.

[3] On the 9th November 2017 the Appellant was convicted as charged and on 16 November 2017 sentenced as follows:

Count 1: 8 years imprisonment

Count 2: 18 months imprisonment, to run concurrently with the 8 years imprisonment.

In terms of section 103(2) of the Act the Appellant was declared unfit to possess a firearm.

[4] On 29 January 2018, the Appellant applied for and was granted leave to appeal against both conviction and sentence.

[5] In considering the Appellant's appeal, the trial court's findings of fact are, in the absence of a demonstrable and material misdirection by the trial court, presumed to be correct, unless the recorded evidence shows these findings to be clearly wrong.[1]

[6] The State relied on the evidence of the following witnesses:

CONSTABLE MARREN EMMANUEL SIPHEDI

[7] He testified that he was a Police Constable stationed at Yeoville Police Station. On 18 February 2017 he was working at the Client Service Centre

[1] *Hadebe 1997 (2) SACR 641 (SCA) at 645e-f; Seedat 2015 (2) SACR 612 (GP) at [23].*

when a member from the public reported to him that an unknown black man who was wearing black jeans and a black leather jacket was in possession of a firearm. This person was seen at a pub called DRC in Yeoville and he was seated next to the entrance at the pub.

[8] Pursuant to him receiving the report, he and a colleague attended to the complaint. They walked to the DRC pub, which was not 250m away from the Police Station. Whilst approaching the pub, they saw a person standing by the door at the pub entrance, leaning against the wallwho fitted the description. They were in plain clothes and approached the pub in a normal manner so as to not arise his suspicion. However, when they were close, the person (later confirmed to be the Appellant) saw them, and tried to run into the pub, but was then apprehended by his colleague, Sergeant Phosa. Sergeant Phosa explained to the person that they were police officers and wanted to search him. The person resisted the search and was wrestled to the ground by Sergeant Phosa. This person was searched by Cst Sephedi and a firearm was found on the righthand side of his waist, tucked into his trousers.

[9] The person was asked for the license of the firearm he was carrying, but there was no response. They then realized that he was in illegal possession of the firearm. He was then told he was being arrested for illegal possession of a firearm, handcuffed and taken to their police station. At the time the Appellant was being handcuffed, the witness took the firearm, made it safe and found the two cartridges. The Appellant did not have a license to possess such a firearm. The Appellant was found standing on his own, not in the company of other persons, although other persons were also standing outside the pub. The witness personally searched, seized and

booked the firearm, two cartridges and a magazine into the SAP 13.

[10] He does not know the name of the firearm because the name of the firearm and the serial number was filed off. He was adamant that the firearm was found on the Appellant's waist and not between the chairs in the pub, as put to him during cross-examination. The Appellant was the only person who tried to run away when they approached the pub.

[11] In cross-examination it was put to the witness that he was apprehended by the policemen when he was on his way out of the pub, who apprehended him, found nothing on him, pushed him back into the pub and inside the pub they found the firearm between chairs. He also claimed to have been assaulted by them, with "claps" in the face and also kicked, but not really injured. The Appellant further claimed to have seen a glimpse of the firearm when it was recovered inside the pub, but later on, at the police station, had an opportunity to look at it when it was placed on the table.

SERGEANT MAROBA ADAM PHOSA

[12] He testified that he was a sergeant in the South African Police Service and also stationed at Yeoville. On 18 February 2017, he went out with Cst Siphedi to effect an arrest at the DRC pub, also known as Papa Mujanga tavern or pub. When they approached the pub, Appellant tried to flee. He apprehended the Appellant, wrestled him to the ground while Cst Sephedi searched him and the firearm was found on the Appellant. It was a silver type of a firearm with a magazine and two live rounds.

[13] In cross-examination the Appellant's version of events was put to the witness as well. The Appellant again claimed to have seen a glimpse of the

firearm when it was recovered inside the pub, but later on, at the police station, had an opportunity to look at it when it was placed on the table.

[14] Both state witnesses corroborated each other on all material respects and stood firm under cross-examination.

WARRANT OFFICER MASHUDU RASHITENGA

[15] To prove the charges and that the weapon was a firearm and the two cartridges were ammunition as defined in terms of the Act, the State handed in an affidavit in terms of Section 212 (4)(a) of the Criminal Procedure Act 51 of 1977, deposed to by a member of the South African Police Service, warrant officer Mashudu Rashitenga of the Ballistic Unit, setting out his expertise as an examiner of forensic Ballistics related cases, the nature of his forensic examination, his findings and conclusions.

[16] This affidavit complied in all respects with the requirements of the said section 212(4)(a) and such, upon its mere production at such proceedings constituted prima facie proof of such fact. Warrant officer Mashudu Rashitenga stated that the conclusions arrived at were based on facts, established by means of an examination and process which require a knowledge and skill in Forensic Ballistics.

[17] The salient conclusions were as follows:

> "5. *I visually inspected the cartridges mentioned in 3.2 and found they consist of a primer, cartridge case, bullet and propellant and were designed and manufactured to be fired by a centre-fire firearm.*

6. I examined the pistol mentioned in 3.1 and found:

6.1 The firing pin and safety selector of the pistol mentioned in 3.1 are missing and because of this it was not able to discharge ammunition.

7. I examined the mechanism of the pistol mentioned in 3.1 and found it to be self-loading, but not capable of discharging more than one shot with a single depression of the trigger. I also found that:

7.1 The device was manufactured or designed to discharge centre-fire ammunition.

8. After application of the electro-acid etching process and electro-magnetic process, I could not determine serial number of the pistol mentioned in 3.1."

[18] In terms of section 212(12) of the Criminal Procedure Act the court before which an affidavit or certificate is under any of the preceding provisions of this section produced as prima facie proof of the relevant contents thereof, may in its discretion cause the person who made the affidavit or issued the certificate to be subpoenaed to give oral evidence in the proceedings in question, or may cause written interrogatories to be submitted to such person for reply, and such interrogatories and any reply thereto purporting to be a reply from such person, shall likewise be admissible in evidence at such proceedings.

[19] In due course the trial court, in the exercise of its discretion, caused W/O Mashudu Rashitenga to be subpoenaed to give oral evidence. W/O Rashitenga's evidence reaffirmed what he stated in his section 212(4)(a)

affidavit. As was already apparent from the affidavit, W/O Rashitenga could not test fire the pistol, because the firing pin and safety selector of the pistol were missing and because of that, it was not able to discharge ammunition. During W/O Rashitenga's oral evidence and cross-examination it was made clear that, although the firing pin and safety selector of the pistol were missing and that because of this it was not able to discharge ammunition at that stage, the pistol could be taken to a dealer in firearms and be repaired.

[20] W/O Rashitenga confirmed that the pistol was a popular one and that he tested similar ones in the past. He stood firm that the pistol was a device which was manufactured or designed to discharge centre-fire ammunition and as such a firearm as defined as such in the Act.

[21] This was also the case in respect of the two cartridges, which, as was stated in his section 212(4)(a) affidavit, he visually inspected and found they consist of a primer, cartridge case, bullet and propellant and were designed and manufactured to be fired by a centre-fire firearm. Nothing turns on the fact that these two cartridges were of a different calibre and could not actually be fired by that firearm, in view of the provisions of section 90 of the Act, in respect of count two.

THE APPELANT LODRICK NDEBELE

[22] The Appellant testified in his defense. He confirmed that he was dressed in black clothes as was described by the two policemen. He confirmed that the two state witnesses apprehended him. He added that they were in the company of a female officer who was clad in uniform, but she had nothing

to do with his apprehension.

[23] He testified that he was apprehended by them, ostensibly for no reason, as he was in the process of leaving and was already outside the pub, at the gate outside that leads to the street. He claims he was then taken back into the pub by them, whereupon they searched him, found nothing, and then picked up something from the floor that, he was told by them, was his firearm. He then responded that he knew nothing about it.

[24] He testified further that there were many people inside the pub and there were chairs and crates as well. When asked in evidence-in-chief about the object found on the floor, and whether it was "open to see", he explained it was just on the floor and there were many people inside. He stated he did not see it clearly at that stage, because he was immediately taken outside and handcuffed. He was only able to look at it properly subsequently at the police station, when he saw it when it was placed on a table. Notably the Appellant made no mention of any assault perpetrated on him by the two policemen during all this time, and it was only at the end of his evidence-in-chief, in response to a leading question, that he then contended that he was slapped and kicked by them with "booted feet", although he sustained no injuries.

[25] He denied that he was ever in possession of the firearm or the ammunition. In response to a direct question by his attorney, as to why, he thinks, the witnesses singled him out as the person who had the firearm, he speculated that the two policemen singled him out as the person in possession of the firearm, because "maybe they were looking for someone who was wearing similar clothes" as his.

[26] In cross-examination the Appellant's version, compared with the version put

to the two state witnesses, and his own evidence-in-chief, changed a number of times, and in material respects: He claimed he passed the two policemen before he walked out of the pub, and it was at that point that he noticed them. They were about to enter the pub and he was about to leave the pub. He was inside the pub and they met at the door. They then made him go back into the pub and then told him they wanted to search himand proceeded to do so. He now claims that there wasn't a police woman at that time, only the two policemen. He claims he did not see what the object was that was picked up from the floor, and that he was not paying attention to what it was, that this object was never shown to him before he was taken to the police station. He claims the two policemen told him they are searching him because they were looking for someone who was wearing the same clothes than his and that that person was having a firearm.

[27] The Appellant's case was closed without him calling any other witnesses.

[28] In assessing and weighing up the versions of the various witnesses, it is trite that it is not enough or proper to reject an accused's version on the basis that it is improbable only. An accused's version can only be rejected once the court has found, on credible evidence, that it is false beyond reasonable doubt.

[29] In assessing and weighing up the versions in this matter, it was immediately apparent that the Appellant's version was contradictory in many respects and fanciful regarding the version that the policemen would have, by chance, after the Appellant was apprehended, then taken back into the pub, and searched, found a firearm on the floor, in a pub full of people, chairs and crates, and then falsely accuse the Appellant in the manner he claimed they did. The Appellant's version, weighed against the evidence of the two

policemen, was utterly unconvincing to say the least, and highly improbable.

[30] After due consideration of the judgment on the merits by the trial court, the evidence presented as summarized above, the grounds of appeal and the submissions made by counsel for the respective parties, the court of appeal could not find any demonstrable and material misdirection by the trial court, neither did the recorded evidence show these findings to be clearly wrong. This court of appeal concurs with the trial court that the Appellant's version can be rejected, on credible evidence, and that it was false beyond reasonable doubt.

[31] The conviction therefore on count two, is uncontentious. The only remaining issue is whether the State proved count one beyond a reasonable doubt, on the facts of this case.

[32] In this regard, no expert evidence was led in rebuttal of the section 212(4)(a) affidavit of W/O Mashudu Rashitenga, and his expertise not challenged in any manner, nor was the *prima facie* proof of his conclusions unsettled in any manner whatsoever during his oral evidence.

[33] Against this *prima facie* proof, it was submitted in argument on appeal by counsel for the Appellant that, because the pistol was not test-fired due to the missing firing pin, it was not proven that the firearm was indeed designed or manufactured to propel a bullet or projectile through a barrel or a cylinder by means of burning propellant at a muzzle energy exceeding 8 joules, and therefore that it was not proven that this weapon could discharge a projectile with any force for it to be used for offensive purpose within the ambit of the definition of a firearm.

[34] Appellant's counsel referred the court of appeal to **S v Filani 2012 (1)**

SACR 508 (ECG) where the accused had been convicted of the unlawful possession of a firearm and unlawful possession of ammunition. The evidence led by the State in this regard was that, in the course of the robbery, the accused had been seen to fire a shot with a firearm and that a bullet struck the wall behind the complainant, leaving a small hole. The complainant later pointed out to a police officer the cartridge, the 'bullet point' and the hole in the wall caused by the projectile. No forensic analysis was conducted on any of the items, nor were any photographs handed in to court; The state contended that, because the weapon in possession of the Appellant had discharged a projectile with enough force for it to be used for offensive purposes, it therefore fell within the ambit of the definition of a firearm in section 1 of the Firearms Control Act. The Court, on appeal, held that given the increased technical nature of the various definitions of a firearm contained in the Firearms Control Act, such a finding could not be made in the absence of expert evidence to that effect. The appeal against conviction and sentence accordingly succeeded.

[35] The facts pertaining to the aforementioned judgment, however, are clearly distinguishable from the facts of this case, and in any event, in this case expert evidence was tendered, which evidence was neither seriously challenged nor was the prima proof of the conclusions based on the facts found, rebutted in the slightest. The submission by counsel for the Appellant that this firearm did not have a firing pin, the centre-pin was missing and the expert witness did not test whether the firearm could be readily altered, fixed or manipulated so it can discharge ammunition and that the requirements (a) and (b) as per the definition of a firearm were not met, holds no water, in the light of the uncontested evidence by the expert

witness, that the device was manufactured or designed to discharge centre-fire ammunition.

[36] The court of appeal was also referred by Appellant's counsel to the case of **Thulani Madlala v S, Case No AR1407/**03; the accused in that case was found in possession of a firearm where a firing pin was missing or had a defect. It had to be decided whether this firearm in the absence of the firing pin still qualifies as a firearm. The Court referred to a case of **Ntsamai 1945 (1) Prentice Hall H95 (T)** where the accused was found in possession of a firearm of which the hammer spring and the magazine were missing. The court there had to decide as to whether this now still qualifies as a firearm and the Court found that the replacing or refitting of a part or two of the missing or defective part(s) does not deprive the article from being described as a firearm, but when the alterations and repairs required are extensive in order to put the article a condition of being capable of discharging a shot, the article might be derelict matter and therefore not a firearm.

[37] In the Appellant's matter, however, the uncontested expert evidence of W/O Rashitenga, when he gave oral evidence, was that, although the firing pin and safety selector of the pistol were missing and that because of this it was not able to discharge ammunition at that stage, the pistol could be taken to a dealer in firearms and be repaired. The pistol clearly did not require such extensive repairs that it was rendered derelict and/or for all intents and purposes, irreparable.

[38] Accordingly the State proved beyond reasonable doubt that the Appellant was found in possession of a prohibited firearm as charged, and the conviction on count one is upheld. The conviction on count two is

uncontentious and is similarly upheld.

[39] It is trite law that sentence is the sole discretion of a trial court. The appeal court can only interfere with a sentence where the court a quo has not reasonably exercised its discretion when imposing a sentence.[2]

[40] Such discretion is properly and reasonably exercised if it was not based on a substantial misdirection, if it was not substantially inappropriate and if it was not substantially different from the sentence appeal tribunal itself would have imposed.[3]

[41] In considering an appropriate sentence the trial court noted the following mitigating factors:

[41.1] At the time of sentencing, Appellant was 22 years old;

[41.2] Appellant was single and a father of a minor child;

[41.3] He had been in custody for 10 months awaiting finalisation of his trial;

[41.4] His highest education is Grade 7;

[41.5] Before his arrest, he was gainfully employed and earned R1500,00 per month;

[41.6] Previous convictions were not proved.

[42] In view thereof that the Appellant was convicted on count one, and the evidence had also established that the firearm was semi-automatic, the offence is regulated by the provisions of the Criminal Law Amendment Act and it fetches a minimum sentence of 15 years imprisonment. Section 51(3) of the said Act states that a court may deviate from passing the minimum

[2] *S v Nchenche* 2005 (2) SACR 386 (W)

[3] *S v Obisi* 2005 (2) SACR 350 (W).

sentence if it is persuaded that substantial and compelling circumstances exists.

[43] During sentencing the trial court had duly considered the personal circumstances of the Appellant, the interest of society and the seriousness of the crime and found that there are indeed substantial and compelling circumstances that merited deviation from the minimum sentence of 15 years imprisonment on count one under the circumstances of the case.

[44] The Appellant was sentenced to 8 years imprisonment in relation to count 1 and 18 months imprisonment in relation to count 2.

[45] This court of appeal finds that such discretion has been properly and reasonably exercised, and was neither based on a substantial misdirection, nor was it substantially inappropriate, nor was it substantially different from the sentence this court of appeal itself would have imposed.

[46] In the result the following order is made: -

The appeal is dismissed.

Edmund Wessels
Acting Judge of the High Court, Gauteng Local Division, Johannesburg

I AGREE

Roland SUTHERLAND
Judge of the High Court, Gauteng Local Division, Johannesburg

DATE OF HEARING:	7 FEBRUARY 2019
DATE OF JUDGEMENT:	9 April 2019

APPEARANCES:

COUNSEL FOR APPELLANT:	ADV M. LEOTO
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COUNSEL FOR RESPONDENT:	ADV. MAPHIRI