REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number: 75/2002

In the matter between:

SAM NDLOVU Appellant

and

THE STATE Respondent

CORAM: **SCHUTZ, MPATI and NUGENT JJA**

HEARD: **5 NOVEMBER 2002**

REASONS HANDED IN ON: **27 NOVEMBER 2002**

Criminal Law – unlawful possession of firearm – imposition of sentence – effect of failure of prosecution to ask for minimum sentence – effect of failure by presiding officer to inform accused of possible application of minimum sentencing provisions of Act 105 of 1997 – need for State to prove firearm automatic or semi-automatic.

REASONS

MPATI JA:

[1] Three important issues arise in this case. The first is whether it is incumbent upon the State to allege in the charge sheet, or otherwise pertinently bring it to the attention of the accused, that it is relying on the firearm with whose possession he is charged being an automatic or semi-automatic one, and is consequently seeking the imposition of the minimum sentence of 15 years. The second is the extent of the obligation resting on the presiding judicial officer to satisfy himself that the accused fully understands that he/she stands to be sentenced to the minimum period of imprisonment, unless substantial and compelling circumstances are found to exist, such as justify the imposition of a lesser sentence. The third is the extent of the onus resting on the State to prove that the firearm in question is automatic or semi-automatic.

[2] The appellant stood trial in the regional court, Germiston, on two charges, viz unlawful possession of a firearm in contravention of s 2 of Act 75 of 1969 (count 1)

and unlawful possession of eight rounds of ammunition in contravention of s 36 of the same Act (count 2). He was convicted on both charges. In the course of his judgment the magistrate made a finding that the weapon, a 9 mm Star pistol, was a semi-automatic firearm. This finding brought the appellant within the ambit of the minimum sentencing provisions of the Criminal Law Amendment Act 105 of 1997 (the Act), the offences having been committed on 28 November 1998. The minimum sentencing provisions came into force on 1 May 1998.

[3] In terms of s 51(2)(a)(i) of the Act the minimum sentence to be imposed on a first offender following a conviction of unlawful possession of an automatic or semi-automatic firearm is 15 years' imprisonment unless substantial and compelling circumstances exist, which justify the imposition of a lesser sentence (s 51(3)(a)). Having found that no substantial and compelling circumstances were present the magistrate thereupon sentenced the appellant to 15 years' imprisonment on the first

charge and on the second to imprisonment for one year, the two sentences to run concurrently.

[4] The appellant's appeal to the Witwatersrand Local Division against his convictions and sentences failed, but that Court granted him leave to appeal to this Court.

[5] After it had heard argument this Court issued the following order (on 5 November 2002):

> '1. The appeal against conviction is dismissed.
> 2. The appeal against sentence is upheld. The sentences of 15 years and one year are set aside and are replaced with a sentence of three years on charge one and one year on charge two, such sentences to run concurrently.
> 3. The appellant is ordered to be released forthwith, the sentence above already having been served.'

The reasons for this order were to be given later. They now follow.

[6] The appellant pleaded not guilty to both charges before the magistrate and

denied that he was found in possession of the firearm loaded with eight cartridges. In this Court, however, his counsel conceded that the appellant's denial was correctly rejected by the magistrate as not being reasonably possibly true. But he persisted with the argument that the magistrate's finding that the firearm was a semi-automatic weapon was erroneous. The facts are these. Three members of the South African Police Service, Sergeants Phineas Maja and Makoba and Constable Sepo Lawrence Motsamai, were patrolling in a street in Katlehong, Germiston, in a police vehicle. Sergeant Makoba was the driver. Constable Motsamai, on seeing the appellant who was walking along the street with his shirt hanging over his trousers on one side, suspected that the appellant was carrying a firearm. He asked Sergeant Makoba to stop the vehicle and he and sergeant Maja approached the appellant. He searched the appellant and found the 9 mm Star pistol tucked in the appellant's trousers. On examining the firearm, he and Maja found 8 rounds of ammunition in the magazine.

The appellant could not produce a licence entitling him to possess the firearm.

[7] The prosecutor did not lead any evidence on the issue of whether the firearm was semi-automatic. It was only during the following exchange between the magistrate and the appellant at the end of the examination-in-chief of Motsomai that mention was made of it:

> 'Meneer, watse tipe wapen is die 9 mm pistool? --- Dit is `n pistool, handwapen, Edelagbare.
> Meneer, is dit outomaties of semi-outomaties of nie een van die twee nie? --- Dit is `n semi-outomatiese pistool.'

Apart from Motsamai's other testimony that he tested the firearm to ascertain that it was in working condition, there was no evidence on which to base his conclusion that the firearm was semi-automatic. It is on this evidence that counsel for the appellant argued that it had not been proved that what was found in the appellant's possession was a semi-automatic firearm and that therefore the sentence imposed in respect of the first charge was not competent.

[8] An allied submission made by counsel was that at no stage was the appellant pertinently alerted to the fact that he stood in peril of the sentencing regime of the Act being applied if he was convicted. In response to this latter submission counsel for the State contended that apart from the fact that reference was made in the charge sheet to s 50 of the Act the appellant was legally represented and that 'everyone knew what it was all about'.

[9] The difficulty with this argument of course is that there is no indication whatsoever in the record that the appellant or his legal representative had the slightest idea, prior to sentence, that the appellant was facing the prospects of imprisonment of 15 years in terms of the minimum sentencing provisions of the Act. Apart from mentioning, in the course of his judgment and while summarising the facts, that '[d]ie wapen is `n semi-outomatiese vuurwapen', the magistrate does not appear to have advised the appellant at any stage of the consequences of this finding, if made. At the

end of his judgment he convicted the appellant 'op BEIDE DIE AANKLAGTE … SOOS AANGEKLA'.

[10] The first charge (which is really the one in issue in this appeal) reads:

> 'That the accused is guilty of the offence of contravening Section 2 read with Sections 1, 39(1)(h), 39(2) of Act 75 of 1969 as amended. Read with Section 50 Act 105/97.
>
> In that upon or about the 28 day NOVEMBER 1998 and at or near KATLEHONG in the Regional Division of Southern Transvaal the accused did unlawfully have an arm/arms to wit 9 mm PISTOL in his possession without being the holder of a licence issued in terms of Act 74 of 1969 to possess the said arm/arms.'

Section 39(2) of the Arms and Ammunition Act 75 of 1969, to which the accused was directed in the charge sheet, stipulates the penalties for contravening that Act (the penalty for contravening s 2 is a fine of R12 000 or imprisonment of 3 years or both). The very reference to that section was calculated to convey the impression that the State would seek the penalty provided for in that Act. It was pointed out on behalf of

the State that the charge sheet also referred the appellant to the Act. The section of that Act to which the appellant was referred (s 50) does not relate to the sentencing regime but instead reads as follows:

> 'The laws mentioned in the second column of Schedule 1 are hereby amended to the extent set out in the third column of that Schedule.'

It was submitted on behalf of the State that the reference to s 50 was clearly an error and that the charge sheet must have been intended to refer rather to s 51. If that is so the charge sheet was at the very least ambiguous as to whether the State would seek the sentence provided for in the Arms and Ammunition Act or whether it would seek the sentence provided for in the Act. Nothing in the remainder of the charge provided any further enlightenment. Indeed, it seems that the State had no intention of seeking the sentence provided for in the Act because it led no evidence at all to bring the matter within its terms. It was only after the State had completed leading the evidence of the witness concerned that the magistrate's questions elicited the relevant facts.

[11] Whilst it is desirable that the charge sheet should set out the facts the State intends to prove in order to bring an accused within an enhanced sentencing jurisdiction, to do so is not essential. *R v Zonele and Others* 1959 (3) SA 319 (A) at 323 A-H; *S v Moloi* 1969 (4) SA 421 (A) at 424 A-C. But in a recent judgment of this Court Cameron JA reminds us that an accused person has a constitutionally guaranteed right to a fair trial that embraces a concept of substantive fairness. He said the following:

> 'The Constitutional Court has emphasised that under the new constitutional dispensation, the criterion for a just criminal trial is "a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force". (*S v Zuma and Others* 1995 (2) SA 642 (CC) para 16, drawing a contrast with *S v Rudman and Another, S v Mthwana* 1992 (1) SA 343 (A) 377; and see *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) para 22, per Kriegler J.) The Bill of Rights specifies that every accused has a right to a fair trial. This right, the Constitutional Court has said (in *S v Zuma*, *supra*, para 16), is broader than the specific rights set out in the subsections of the Bill of Rights' criminal trial provision (s 35(3)(a)-(o) of the Constitution). One of those

> specific rights is "to be informed of the charge with sufficient detail to answer it" (s 35(3)(a)). What the ability to "answer" a charge encompasses this case does not require us to determine. But under the constitutional dispensation it can certainly be no less desirable than under the common law that the facts the State intends to prove to increase sentencing jurisdiction under [the Act] should be clearly set out in the charge sheet.'

(*Michael Legoa v The State*, case no 33/2002, judgement delivered on 26 September 2002, para 20.) Cameron JA declined, however, to lay down a general rule that the charge sheet must in every case recite either the specific form of the scheduled offence (in that case dealing in dagga with a value of more than R50 000) with which an accused is charged, or the facts the State intends to prove to establish it. He held, in the end, that 'Whether the accused's substantive fair trial right, including his ability to answer the charge, has been impaired, will … depend on a vigilant examination of the relevant circumstances' (para 21).

[12] The following extract from the judgment of the Full Court in *S v Seleke en*

Andere 1976 (1) SA 675 (T) at 682H was quoted with approval by Cameron JA (his translation from Afrikaans):

> 'To ensure a fair trial it is advisable and desirable, highly desirable in the case of an undefended accused, that the charge sheet should refer to the penalty provision. In this way it is ensured that the accused is informed at the outset of the trial, not only of the charge against him, but also of the State's intention at conviction and after compliance with specified requirements to ask that the minimum sentence in question at least be imposed.'

The enquiry, therefore, is whether, on a vigilant examination of the relevant circumstances, it can be said that an accused had had a fair trial. And I think it is implicit in these observations that where the State intends to rely upon the sentencing regime created by the Act a fair trial will generally demand that its intention be pertinently brought to the attention of the accused at the outset of the trial, if not in the charge sheet then in some other form, so that the accused is placed in a position to properly appreciate in good time the charge that he faces as well as its possible

consequences. Whether, or in what circumstances, it might suffice if it is brought to the attention of the accused only during the course of the trial is not necessary to decide in the present case. It is sufficient to say that what will at least be required is that the accused be given sufficient notice of the State's intention to enable him to properly conduct his defence.

[13] Upon conviction in the present matter the appellant became liable to a minimum sentence of 15 years' imprisonment in view of the magistrate's finding that he had been found in possession of a semi-automatic firearm, unless substantial and compelling circumstances were present justifying a departure from the prescribed sentence. Were it not for the magistrate's finding the sentence which would have been imposed would not have exceeded R12 000 or 3 years' imprisonment or both (s 39(2)(b)(i) of Act 75 of 1969). The difference is huge and, in my view, where the minimum sentencing provisions apply an accused must not be subjected to the risk of

being visited with them without having been made fully aware that such will be the case unless substantial and compelling circumstances are present which would justify a lesser sentence. And in this regard the presiding officer bears the responsibility of satisfying himself and should not simply conclude, without more, as appears to have been the position in the present matter, that no substantial and compelling circumstances exist. Cf *S v Dlamini* 2000 (2) SACR 266 (T) at 268 d-g; *Rammoko v Director of Public Prosecutions* (case no 85/2001, unreported judgment of this Court, delivered 15 November 2002, paras 13 and 14).

[14] In the circumstances of this case it cannot be said that the appellant suffered no prejudice from the magistrate's failure to warn him of the consequences of his finding, should he make such a finding, that the weapon found on him was a semi-automatic farearm. In invoking the provisions of the Act without it having been pertinently brought to the appellant's attention that this would be done rendered the trial in that

respect substantially unfair. That, in my view, constituted a substantial and compelling reason why the prescribed sentence ought not to have been imposed. Hence the order that we have already made.

[15] In view of this conclusion it is unnecessary to consider the question whether the State proved that the firearm concerned was a semi-automatic weapon. It is, however, well to repeat the *caveat* in *S v Metu* 1995 (2) SACR 681 (A), a case in which this Court took judicial cognisance that an AK47 can be operated as a machine gun, that this does not mean that 'the State may with impunity be careless about proving the qualities of possibly less well-known weapons' (at 684 e-f).

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L MPATI
JUDGE OF APPEAL

CONCUR:
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SCHUTZ JA

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NUGENT JA