SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 605/2018

In the matter between:

ELIJAH PERCY SEHLANO LEDWABA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Ledwaba* v *The State,* (605/2018) [2018] ZASCA 64 (27 May 2019)

Coram: Ponnan JA, Leach JA, Mokgohloa AJA

Heard: 07 May 2019

Delivered: 27 May 2019

Summary: Criminal appeal against sentence – appellant convicted of culpable homicide and sentenced to five years' imprisonment - whether such sentence appropriate in the circumstances

Criminal Procedure – declaration of unfitness to possess firearm in terms of s 103(2) of the Firearms Control Act 60 of 2000 – duty on the court to hold an enquiry and make determination whether accused is unfit to possess firearm – court failed to hold enquiry.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Msimeki and Nkosi JJ sitting as court of appeal):

1 The appeal is upheld.

2 The order of the court below is amended by the deletion of paragraphs 3, 4 and 7 and the substitution therefor of the following:

'(3) The appeal against sentence in respect of count 1 is upheld.

(4) The sentence of 5 years' imprisonment imposed by the court a quo in respect of count 1 is set aside and in its stead is substituted:

"(4.1) The accused is sentenced to seven months' imprisonment.

(4.2) The sentence is antedated to 6 February 2013 in terms of s 282 of the Criminal Procedure Act 51 of 1977."'

JUDGMENT

Mokgohloa AJA (Ponnan, Leach JJA Concurring):

[1] The appellant was charged in the regional court, Evander, Mpumalanga (the trial court) with murder, read with the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997 (count 1) and pointing of a firearm in contravention of s 120(6)*(a)* of the Firearms Control Act 60 of 2000 (the Act) (count 2). He was convicted as charged on count 2 and of culpable homicide in respect of count 1. He was sentenced to five years' imprisonment on the latter count and to two years' imprisonment in respect of the former. The sentences were ordered to run concurrently. The appellant was further declared unfit to possess a firearm.

[2] Aggrieved by the convictions and the sentence imposed on him, the appellant appealed to the Gauteng Division of the High Court, Pretoria. His appeal was only successful in respect of count 2, his conviction and sentence on that count being set aside. The high court issued the following order:

‘1 The appeal against conviction in respect of Count 1 is dismissed.
2 The conviction is confirmed.
3 The appeal against sentence in respect of Count 1 is dismissed.
4 The sentence of 5 years’ imprisonment in respect of Count 1 is confirmed.
5 The appeal against conviction in respect of Count 2 is upheld.
6 The conviction and sentence in respect of Count 2 are set aside.
7 The order declaring the appellant unfit to possess a firearm is confirmed.’

The appellant thereafter applied to this court and was granted special leave to appeal solely in respect of the sentence on count 1 i.e the sentence of five years’ imprisonment.

[3] The matter emanates from an incident that occurred on 13 March 2011 at Salonica Street, Evander, Mpumalanga, when the deceased, Hendrick Jansen van Rensburg, was shot by the appellant, a constable in the South African Police Service, and later died.

[4] The deceased’s son-in-law, Frans Viviers, is the neighbor of Paul Ledwaba the appellant’s brother. On 13 March 2011, Frans’ children were playing soccer in their yard. They kicked their ball into Paul’s yard. Frans proceeded to the wall between the two yards to try to retrieve the ball. He noticed the appellant walking towards the gate. He asked the appellant to throw the ball back into his yard but the appellant said he was in a hurry (he testified that he was running late to reach the airport before a flight left). The appellant got into his motor vehicle and drove away. Frans was able to retrieve the ball from Paul’s yard.

[5] Shortly thereafter the appellant returned to Paul’s house in order to fetch his wallet which he had left there by mistake. He parked his motor vehicle at Paul’s gate. He went into the house and came back to his motor vehicle. Frans approached the appellant who was already in his motor vehicle. He banged the bonnet and knocked on the window and windscreen of the appellant’s motor vehicle saying ‘if your mouth is so big come out of the car let us sort it out’. According to the appellant, Frans dragged him out of the vehicle and the two

became involved in a verbal argument, accusing each other of having a bad attitude.

[6] Frans started hitting the appellant with fists. The deceased then entered the fray armed with a sjambok. He used the handle of the sjambok to hit the appellant several times on his head and back. It is at that stage that the appellant took out his firearm and discharged a shot which struck the deceased. The deceased cried saying 'You shot me'. The appellant's response was 'Why do you hit me with a sjambok, this is not the old South Africa.' Paul and his wife came to diffuse the situation, and the appellant left. The deceased was taken to hospital where he unexpectedly died a month later from a sudden complication relating to his gunshot wound.

[7] At the trial, the appellant's version was that he had shot the deceased when he was assaulted by both Frans and the deceased. He stated that he had perceived his life to have been in imminent danger and acted in private defence. After analyzing all the evidence of the circumstances of the shooting, the trial court rejected the appellant's defence. It found that even though the deceased was the aggressor, it was not necessary for the appellant to have employed his firearm as the attack against him was already completed.

[8] This finding is unfortunate and not borne out by the evidence in that the appellant, who was minding his own business and not threatening or provoking anyone, was viciously attacked. The assault was still on-going and the appellant was reasonably entitled to defend himself. He had no other means to do so except by using his firearm. Be that as it may, whether the appellant was correctly convicted is not an issue in this appeal which lies in respect of sentence only.

[9] It is trite that sentencing is pre-eminently a matter for the discretion of the trial court and that an appeal court should be careful not to erode such discretion unless it has not been judicially exercised, or the trial court misdirected itself to such an extent that its decision on sentence is vitiated, or the sentence is so disproportionate or shocking that no reasonable court could

have imposed it.[1]

[10] In considering a suitable sentence, the trial court accepted that the deceased was the aggressor. It accepted further that the manner in which Frans approached the appellant and the words he uttered, were provocative. However, it found that the appellant being a police officer with 10 years' experience and having obtained extensive training in the handling of a firearm, would have known that it was not appropriate for him to use his firearm under those circumstance. The trial court relied on the judgment of *S v Malik*,[2] the facts of which are similar to the present matter. It found that the sentence of direct imprisonment imposed in *Malik* was the appropriate sentence in these circumstances.

[11] The court appears to have misunderstood the import of *Malik.* In that case the conviction of murder and sentence of direct imprisonment were set aside on appeal and substituted with a conviction of culpable homicide and a sentence of a fine or 12 months imprisonment with a further period of imprisonment which was suspended. It is no authority that a sentence as heavy as that imposed on the appellant is appropriate.

[12] Considering the personal circumstances of the appellant and the fact that the deceased was the aggressor, coupled with the fact that the appellant lost his employment as a result of this conviction which is punishment in itself, I find that the sentence of five years' imprisonment is unduly severe and has to be set aside. In my view, at best for the State, an appropriate sentence would be imprisonment for a period no longer than that the appellant has already spent in custody following his conviction, which is seven months.

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[1] *S v Rabie* 1975 (4) SA 866 (A*)* at 857D-F; *Bogaards* v S [2012] ZACC 23; 2013 (1) SACR 1 (CC) para 41.
[2] *S v Malik* 1987 (2) SA 813 (A).

[13] Another issue pertains to the declaration that the appellant is unfit to possess a firearm. Section 103(2) of the Act provides that:

'*(a)* A court which convicts a person of a crime or offence referred to in Schedule 2 and which is not a crime or offence contemplated in subsection (1), must enquire and determine whether that person is unfit to possess a firearm.

(b) If a court, acting in terms of paragraph (a), determines that a person is unfit to possess a firearm, it must make a declaration to that effect.'

Culpable homicide is one of the offences referred to in Schedule 2.

[14] It is clear from the language of s 103(2)*(a)* that, where a person is convicted of a crime or offence referred to in Schedule 2 to the Act, the court is obliged to hold an enquiry and to make a determination on the question whether the accused is unfit to possess a firearm. The provisions of the section are peremptory and the court seized with the matter is obliged to conduct an enquiry under the section. This was not done in the present matter. Counsel for the respondent conceded that the enquiry was not held. Therefore the declaration that the appellant is unfit to possess a firearm could not stand and ought to have been set aside by the high court on appeal. Instead, the high court confirmed the order declaring the appellant unfit to possess a firearm. That order (namely, paragraph 7 of the order of the high court) accordingly falls to be set aside.

Order

1 The appeal is upheld.

2 The order of the court below is amended by the deletion of paragraphs 3, 4 and 7 and the substitution thereof of the following:

'3 The appeal against sentence in respect of count 1 is upheld.

4 The sentence of five years' imprisonment imposed by the court a quo in respect of count 1 is set aside and in its stead is substituted:

"4.1 The accused is sentenced to seven months' imprisonment.

4.2 The sentence is antedated to 6 February 2013 in terms of s 282 of the Criminal Procedure Act 51 of 1977."'

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FE Mokgohloa

Acting Judge of Appeal

APPEARANCES

For the Appellants:	O P Makobe
Instructed by:	Messrs Makobe & Associates: Witbank
	Seobe Attorneys: Bloemfontein
For the Respondent:	L Williams
Instructed by:	Office of the Director of Public Prosecutions: Gauteng
	Office of the Director of Public Prosecutions: Bloemfontein