THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 525/2019

In the matter between:

JOSEPH TIAMO MTHEMBU **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Mthembu v The State* (525/2019) [2019] ZASCA 160 (28 November 2019)

Coram: Navsa, Saldulker, Swain and Dlodlo JJA and Eksteen AJA

Heard: 14 November 2019

Delivered: 28 November 2019

Summary: Attempted murder and unlawful possession of – firearm and ammunition – appeal against conviction and sentence – appellant found in possession of firearm and ammunition – sufficiency of evidence – ballistic testing linked firearm to offence of attempted murder – conviction and related sentences justified – appeal dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Mokgoatlheng et Vally JJ sitting as court of first instance):

The appeal is dismissed.

JUDGMENT

Dlodlo JA (Navsa, Saldulker and Swain JJA and Eksteen JJA concurring):

[1] After a trial in the Regional Court for the Regional Division of Gauteng, Tembisa (the regional court), the appellant was convicted and sentenced as follows: on count 1, the attempted murder of Sergeant K Phase Themane, where s 51 of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentences Act) was invoked, a sentence of 10 years' imprisonment; on count 3, the possession of an unlicensed firearm in contravention of s 3 of the Firearms Control Act 60 of 2000 (the Firearms Control Act), a sentence of 15 years' imprisonment; and on count 4, the possession of ammunition in contravention of s 90 of the Firearms Control Act, a sentence of 3 years' imprisonment. The regional court ordered that the sentences on counts 3 and 4 run concurrently. Having been refused leave to appeal by both the magistrate's court and the Gauteng Division of the High Court, Johannesburg (the high court), the appellant was granted special leave to appeal by this court. The appeal is limited to conviction and sentence on count 1 and sentence only on count 3.

[2] The offences arise from an incident where two police officers narrowly escaped death. On or about 31 January 2009, Constable Morris Zitha and his colleague, Sergeant Themane, were on night duty. At 3am the two police officers stopped a Red Jetta motor vehicle that had two male occupants, being the driver and a passenger. In the

performance of their duties, the two police officers intended to conduct a search of the occupants and the vehicle. Constable Zitha proceeded to the passenger whom he instructed to alight from the vehicle. Sergeant Themane moved towards the driver and proceeded to the driver's side of the vehicle.

[3] As the passenger was alighting he produced a firearm and shot in the direction of Constable Zitha, who took cover behind the open passenger door. The passenger fired several shots at the police officers. Both driver and passenger abandoned the vehicle and fled on foot. The occupants of the vehicle were both unknown to Constable Zitha and Sergeant Themane. Constable Zitha categorically told the trial court that he was unable to identify either of the occupants of the vehicle. He added that the incident happened so fast that he could not see the faces of the two occupants.

[4] It was only after the two occupants of the vehicle fled that Constable Zitha realised that Sergeant Themane had been shot in the leg and was bleeding profusely. Constable Zitha summoned an ambulance, a police photographer and a fingerprint expert. It is common cause that at the scene of the shooting, a balaclava and cartridges were found. The cartridges were collected and sent for ballistic examination. At the trial Sergeant Themane stated that he knew the person who shot him and that it was the appellant. He claimed he had an opportunity to observe and saw the face of his assailant. He was adamant that the street lighting and the lights from the motor vehicle enabled him to identify the appellant. This evidence has to be contrasted with his written statement, in which he said that he did not know, and would not be able to identify his assailant. The trial court accordingly, correctly rejected Sergeant Themane's identification of the appellant.

[5] Seven hours after the incident referred to above, at approximately 10am, police officers were manning a roadblock in Tembisa, when they stopped a blue Mazda Rustler motor vehicle. It had three occupants, being a male driver, the appellant, and a female passenger. The police officers proceeded to search the occupants and the vehicle. During the search Constable Ramatapa found a firearm with ammunition at the front of the

appellant's waist. When the appellant was asked about the firearm he said that he was the owner of the firearm and had a licence to possess it. The appellant then made a phone call with the asserted objective of having the licence brought to him. The phone call yielded no firearm licence. Thereafter, the appellant instructed the female passenger, his girlfriend, to accompany the driver of the vehicle to Alexandra Township to fetch the licence. No licence was forthcoming, resulting in the arrest of the appellant for possession of an unlicensed firearm and ammunition.

[6] The appellant's evidence was that their vehicle was stopped at a roadblock and the occupants and the vehicle were searched. However, according to him, nothing was found on his person. He claimed that the firearm was found in the vehicle, under the seat on which he had been sitting. He initially denied that there had been a female passenger in the vehicle. Subsequently, he changed his version and admitted her presence. His implausible explanation for his initial denial was that it was an endeavour on his part to protect the female passenger's marriage. He denied he had sent his girlfriend and the driver to fetch his firearm licence. Instead, his evidence was that they had been instructed to go to Tembisa Township to fetch a licence for a TV and DVD player found in the vehicle.

[7] The appellant's testimony in relation to the first incident was that at 3am, when the shooting in respect thereof took place, he was at home. In short, he denied any involvement at all in respect of that incident.

[8] The cartridges found at the first scene and the firearm found in possession of the appellant, were sent for ballistic examination. The ballistic report and the affidavit compiled by the ballistic expert were admitted in terms of s 220 of the Criminal Procedure Act 51 of 1977 (the CPA) and proved that the spent cartridges found at the scene of the shooting (on count 1 and 2), were fired from the firearm found in the possession of the appellant at the roadblock. The trial court, having correctly rejected the identification of the appellant by Sergeant Themane, proceeded to decide the matter on the strength of the circumstantial evidence.

[9] The principles underpinning circumstantial evidence are trite. Courts must consider the cumulative effect of all items of circumstantial evidence. The fact that it was ballistically proven that the spent cartridges found at the scene at which the two police officers were shot, were fired from the firearm found in possession of the appellant, only 7 hours after the shooting, was the essential element in the circumstantial evidence linking the appellant to the shooting.

[10] In *R v Blom*[1] this court set out two cardinal rules of logic when considering circumstantial evidence and reasoning by inference. These rules are:

'(1) The inference sought to be drawn must be consistent with all the proved facts. . .

(2) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn.'

All circumstantial evidence depends upon the facts that are proven by direct evidence. In other words, the conclusion that the court reaches must necessarily account for all the evidence. No evidence may be ignored.[2]

[11] In *S v Essack & another*,[3] the following passage by Lord Wright in *Caswell v Powell Duffryn Associates Collieries Ltd*[4] was quoted:

'There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.'

[12] An additional factor is that the court below correctly concluded that the appellant's evidence lacked credibility and that his evidence, on material aspects, was wholly unreliable. Thus the court below correctly convicted the appellant of the attempted murder, contemplated in count 1. In respect of the unlawful possession of a firearm and ammunition, contemplated in counts 3 and 4, the following is material:

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[1] *R v Blom* 1939 AD 188 at 202-203.
[2] *S v Van der Meyden* 1999 (1) SACR 447 (W) at 450.
[3] *S v Essack & another* 1974 (1) SA 1 (A) at 16C-E.
[4] *Caswell v Powell Duffryn Associates Collieries Ltd* [1939] 3 All ER 722 at 733.

At the roadblock, the appellant was found in possession of a 9mm parabellum Tauris semi-automatic pistol, which contained 6 live rounds of ammunition and failed to furnish the police officers with a licence entitling him to possess that firearm and ammunition. The possession of the firearm and ammunition established the appellant's guilt on counts 3 and 4.

[13] I turn to the appeal against the sentence on count 1 (attempted murder) and on count 3 (the possession of an unlicensed firearm). Relying on *S v Mokela*,[5] counsel on behalf of the appellant, contended that the sentences should have been ordered to run concurrently because the relevant offences are 'inextricably linked' in terms of locality and submitted that they were committed with one common intent. It was submitted that the trial court had failed to consider the cumulative effect of the sentences. In the latter regard, reliance was placed on *Zimila v State*[6] a judgment of this court. In effect, the appellant's submission was that the sentences were inappropriate. But the trite principle of our law is that sentence is the prerogative of the trial court. This court, in *S v Snyders*,[7] reaffirmed the principles that a court of appeal will not interfere with a sentence imposed by a trial court, unless it is of such a nature that no reasonable court ought to have imposed it, or it is out of proportion to the gravity or magnitude of the offence, or it induces a sense of shock or outrage, or it is grossly excessive or inadequate, or there was an improper exercise of its discretion by the trial court, or the interests of justice requires it. The mere fact that a court of appeal would have imposed a lighter sentence if the punishment were within its discretion, is not in itself sufficient reason for it to intervene.

[14] It appears from the record of proceedings that the trial court considered the appellant's personal circumstances, the seriousness of the offences, and the interests of the community before sentencing the appellant on the several counts. I bear in mind that shooting at police officers is certainly a serious offence that is becoming a daily occurrence in this country. Police officers are the protectors of the South African

[5] *S v Mokela* [2011] ZASCA 166; 2012 (1) SACR 431 (SCA) para 11.
[6] *Zimila v S* [2017] ZASCA 55 para 5.
[7] *S v Snyders* 1982 (2) SA 694 (A); [1982] 4 All SA 215 (A) at 216.

community. Courts need to send a message that attacking police officers is not to be tolerated. It is trite that an appropriate sentence should necessarily reflect the severity of the crime, while at the same time giving full consideration to the mitigating and aggravating factors surrounding the person of an accused. Put differently, the sentence must reflect the blameworthiness of an offender or should be proportional to what an offender deserves. It should have regard to or serve the interests of society. Essentially, as stated in *S v Zinn*,[8] a sentencing court must consider the crime, the offender and the interests of society. Sentencing is, of course, not there to satisfy public opinion, but to serve the interest of the public.[9] The sentence of 10 year's imprisonment for the attempted murder was entirely appropriate. As regards the sentence imposed for the unlawful possession of a firearm, the conviction attracted a minimum sentence of 15 years imprisonment, in the absence of substantial and compelling circumstances, in terms of s 51(3)*(a)*(i) of the Minimum Sentences Act. The unlawful possession of firearms has caused untold harm in this country. Unless it is punished appropriately, it will never be contained. Almost all violent crimes, including robbery, involve the use of firearms that are unlawfully possessed. If courts do not punish the possessor of the unlawfully possessed firearm appropriately, they would be guilty of failing to protect the public.

[15] The trial court considered the cumulative effect of the sentences imposed and directed, in terms of s 280(2) of the CPA that the sentences imposed in respect of counts 3 and 4 run concurrently. I am unable to find that the sentencing discretion was not exercised properly, reasonably and judicially. There is, in my view, no room for interference with the trial court's sentencing discretion in this appeal.

[16] For these reasons the following order is made:
The appeal is dismissed.

[8] *S v Zinn* 1969 (2) SA 537 (A); [1969] 3 All SA 57 (A) at 61.
[9] *S v Mhlakaza* 1997 (1) SACR 515 (SCA); [1997] 2 All SA 185 (A) at 189.

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DV Dlodlo

Judge of Appeal

APPEARANCES:

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