REPORTABLE

IN THE HIGH COURTOF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO:AR 345/2011

In the matter between:

SIBUSISO MADLALA Appellant

and

THE STATE Respondent

JUDGMENT

GORVEN J

[1] On 21 December 2004 the appellant entered the yard ofthe complainant's homestead. He was carrying an AK47 automatic firearm containing 14 live rounds in a blue bag. He was accompanied by another man. In order to gain access to the yard, they climbed over a fence.The complainant, his mother and a small child were in the yard. When the mother questioned them and requested that they leave by the gate, the other man climbed back over the fence but the appellant remained. The complainant had an altercation with the appellant during which time it became clear that the bag contained a firearm. The appellant threatened to shoot the complainant.A shot was fired from inside the bag which narrowly missed the child playing in the yard. The complainant, a

policeman, managed to wrestle the firearm from the appellant and he was arrested by police in the area who were busy investigating an armed robbery at the local Spar supermarket.

[2] As a result, the appellant was charged with three counts in the Regional Court, Pietermaritzburg. The first was of attempted murder with an alternative charge of contravening s 120(3)(b) read with other sections of the Firearms Control Act 60 of 2000 (the Act) by unlawfully discharging a firearm or handling it recklessly. The second and third counts were of contravening s 4 and s 90 respectively read with other sections of the Act by possessing an automatic firearm and 13 live rounds of ammunition for it. On 2 December 2010, he was found guilty of the alternative to count one and of counts two and three. On 6 December 2010, he was sentenced to 5 years' imprisonment on count one, 15 years' imprisonment on count two and 2 years' imprisonment on count three. Two years of the sentence on count one and the whole of the sentence on count three were ordered to run concurrently with that imposed on count two, giving an effective term of imprisonment of 18 years.

[3] The appellant was refused leave to appeal against his convictions by the trial court but granted leave to appeal against his sentences. He thereafter petitioned the Judge President of this division for leave to appeal against his convictions and this petition was refused on 23 November 2011. This appeal is thus limited to his sentences.

[4] On 25 April 2012 the attorneys for the appellant delivered a notice in terms of which he withdrew his appeal against sentence. Despite this, and despite the appeal set down on17 May 2012 being removed from the roll, the matter has been set down for hearing. There is no substantive

application for the reinstatement of the appeal or an affidavit or other evidence which shows cause for the reinstatement.

[5] However, in the interests of reaching finality in a long drawn out set of proceedings, it is as well to deal with the merits of the appeal. It would not serve the interests of justice to further delay matters on procedural grounds.

[6] It was brought to the attention of the appellant that, in respect of count two, the State intended to rely on the provisions of s 51 read with Schedule 2 to the Criminal Law Amendment Act 105 of 1997 (the CLAA). This was mentioned in the charge sheet and the learned magistrate quite properly drew his attention to the fact that this requires the imposition of a sentence of not less than 15 years' imprisonment, unless substantial and compelling circumstances warrant a downward deviation.[1]

[7] It is trite that an appeal court is entitled to interfere in sentence in limited circumstances. A material misdirection serves to vitiate the proper exercise of a discretion and allows an appeal court to substitute its own sentence. Where there is no misdirection,an appeal court may interfere only if the disparity between the sentence of the trial court and that which the appeal court would have imposed is so marked that it can be described as startling, shocking or disturbingly inappropriate.[2]

[8] The learned magistrate, in a short judgment, considered the triad of factors bearing on sentence set out in *S v Zinn*.[3]He concluded that he could not find substantial and compelling circumstances and was thus obliged to

[1]The relevant part of s 51(3)(a) of the CLA Act provides as follows: 'If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence…'.
[2]*S v Malgas* 2001 (1) SACR 469 (SCA) para 12.
[3]1969 (2) SA 537 (A).

impose 15 years' imprisonment in respect of count two. The learned magistrate took into account the personal circumstances of the appellant. He was 35 years old at the time of sentence, had completed Grade 11 at school, had one child aged 3 years, had never been married and was unemployed, having previously been employed as a driver for Junior Taxis. He also had previous convictions for robbery, a contravention of s 2 of the Arms and Ammunition Act 75 of 1969 (the old Act), which is the predecessor to the Act, by way of unlawful possession of a firearm and a contravention of the provisions of the old Actconcerning possession of ammunition without a licence to possess it. The conviction on these three counts arose from a single incident and he was sentenced on 20 March 1998 to an effective term of imprisonment of 5 years. This wasless than 7 years prior to the date on which the present offences were committed. Apart from the personal circumstances of the appellant, the learned magistrate took into account that the appellant had discharged the firearm in the presence of a small child. He also took into account that possession of an automatic firearm is a serious offence.

[9] The thrust of the appellant's submissions is that the learned magistrate misdirected himself in believing that the appellant had a previous conviction for possession of an automatic firearm. The learned magistrate, recording that the prosecutrix had argued that the appellant had been convicted of possession of an automatic firearm, went on to say, 'Mr Hassim however argued that it would be unfair for me to exceed that provision of fifteen years, something about which I am inclined to agree. In any event, I can find no provision that would entitle me to exceed that provision of fifteen years in the Act for a repeated offence.' It seems that the learned magistrate did not regard the previous conviction as one of possession of an automatic firearm since there is a pertinent provision in

the Act which provides that a second offence attracts a minimum sentence of 20 years' imprisonment.Under the old Act, possession of an automatic firearm would have led to a conviction for contravening s 32 rather than s 2. The SAP 69 reflects a conviction for contravening s 2. The learned magistrate did not apply the provisions of the CLAAfor a previous conviction for possession of an automatic firearm. It therefore does not appear that he did misdirect himself in the regard relied upon. Even ifit can be said that he believed the previous conviction to have been for possession of an automatic firearm, there is no indication that he took that into account in arriving at his sentence on count two. Any such misdirection is accordingly not a material one entitling an appeal court to interfere with the sentence.

[10] The further submission was that the circumstances surrounding the incident were not such as to warrant the imposition of the minimum sentence of 15 years' imprisonment. In this regard the appellant's counsel relied on a dictum in *S v Chowe*[4] where it was said that '[t]he imposition of minimum sentence, which is by its very nature a very long imprisonment, must be reserved for callous and heinous offences'. There are serious difficulties with this *dictum*. In the first place, it fundamentally challenges the entire rationale of the CLAA. It is the legislature which has determined that the offence in question meets the criteria required for a prescribed sentence. It has also determined the level of sentence. Concerning the CLAA, the question was asked in what respect was it'no longer to be business as usual'.[5] The answer given is illuminating:

'Instead, it was required to approach that question conscious of the fact that the legislature has ordained…the particular prescribed period of imprisonment as the sentence which should *ordinarily* be imposed… In short, the Legislature aimed at

[4]2010 (1) SACR 141 (GNP) para 26.
[5]*Malgas*para 8.

ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response…

Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit inthe amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances.'[6]

[11] The*dictum* in *Chowe*relied upon by the appellant is unfortunately not consonant with the approach set out in *Malgas*. It must be borne in mind that the prescribed sentence of a minimum 15 years' imprisonment in that matter related to a count of robbery with aggravating circumstances. Not only the *dictum*, but the entire rationale for finding substantial and compelling circumstances in *Chowe* does not standscrutiny.The parts of the paragraphs dealing with substantial and compelling circumstances read as follows:

'[26] *In casu*, the accused was 26 years old, which made him a good prospect for rehabilitation. The value of the cellphone stolen was R600. The complainant was not harmed, save to have been pointed at with the firearm. All these factors taken together, in my view, require departure from the imposition of the minimum sentence. Put differently, the combination of these factors amounts to the presence of substantial and compelling circumstances. The imposition of minimum sentence, which is by its very nature a very long imprisonment, must be reserved for callous and heinous offences.

[27] In my view, the magistrate, in finding that there were no substantial and compelling circumstances *in casu*, failed to exercise his mind judicially and has therefore misdirected himself, thus warranting interferenceby this court.'[7]

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[6]*Malgas*paras 8&9.

[7]Choweparas 26 & 27.

What, one wonders, makes the fact that the accused was 26 years old lead to the conclusion that he was 'a good prospect for rehabilitation'? Is there some inherent quality in being 26 years old which facilitates rehabilitation? Two other factors were taken with this to constitute substantial and compelling circumstances; the value of the cellphone and that the only harm the complainant suffered was to have had a firearm pointed at him. This is precisely why a court is 'required to spell out and enter on the record the circumstances which it considered justified a refusal to impose the specified sentence.'[8]This court is not bound by the approach in *Chowe* and it must be rejected as utterly at odds with that in *Malgas*, by which this court is bound.

[12] The appellant's counsel then urged us to 'place things in perspective' by having regard to a number of previous judgments. The first was the matter of *S v Nkosi& another*[9] where the court *a quo*did not impose the minimum period prescribed. It imposed a period of 5 years' imprisonment on a count of possession of two AK47 firearms and made some of the sentences run concurrently with the 15 year sentence for attempted robbery, giving a total of 22 years imprisonment for all the counts. This case is distinguishable on a number of grounds. First, it involved an appeal against the imposition of the minimum prescribed sentence on the count of attempted robbery with aggravating circumstances. It did not involve any consideration of the sentence of 5 years' imprisonment on the counts of possession of two AK47 firearms. Secondly, there was no cross-appeal on sentence and the appeal court did not consider or even mention any issues relating to the counts of possession. Thirdly, the conviction and, therefore sentence, of the first

[8]*Malgas*para 9.
[9]2011 (2) SACR 482 (SCA).

appellant was set aside and, during argument, counsel for the second appellant conceded the correctness of the sentences imposed. The matter therefore did not require any further consideration.The appeal court simply supported the imposition of 15 years' imprisonment even though the second appellant was convicted of attempted robbery rather than robbery itself. This case does not provide any useful perspective on the present matter.

[13] The next case referred to was *S v Shabalala*.[10] The following *dictum* of Theron J was relied on:

'In my view, imposing a sentence of 15 years' imprisonment on a 44-year-old married first offender, for possession of an AK47 which was not used in the commission of any offence, coupled with an explanation that the weapon was kept for his brother, induces a sense of shock.'[11]

Once again, however, the matter is distinguishable on a number of bases. In the first place, the provisions of the CLAA did not apply in this matter because the appellant was not made aware, at the appropriate time,that the State intended to rely on them. This misdirection gave the court a basis for interfering on sentence. It is clear that, if the provisions are not timeously drawn to the attention of an accused person, they cannot be used as a basis for arriving at sentence.[12] Secondly, the appellant in the present matter was not a first offender. Thirdly, the firearm was used in the commission of an offence in the present matter. Fourthly, the possession of the appellant was not passive, as in the case under discussion but was active. The appellant was not keeping the firearm for somebody else but had taken it with him into the property of the complainant. The case is therefore distinguishable

[10]2006 (1) SACR 328 (N).
[11]At 331*f-g*.
[12]*S v Langa*2010 (2) SACR 289 (KZP)paras 27 & 35.

on all the factors mentioned by the learned judge, even if no regard is had to the fact that the provisions of the CLAAdid not apply in that case but do apply in the present one.

[14] The final case relied upon by the appellant in argument was that of *S v Sibisi*.[13] The appeal court in that matter reduced the sentence for possession of an AK47 firearm from a term of 5 years imprisonment, of which 2 years were suspended on certain conditions to one where 3 years were suspended. Once again, however, there are material distinguishing features. The sentence was not one imposed under the CLAA. Also, the appellant was holding the firearm for his brother and the appeal court found that the appellant's life was under threat by his brother and that the appellant was therefore 'compelled to accede to his brother's request'.[14] In addition, the magistrate had drawn unwarranted inferences from the previous convictions of the appellant in that matter, all of which were of an extremely petty nature. This was held to give rise to a misdirection which led to the court interfering on appeal.

[15] None of the cases relied upon by the appellant, accordingly, provides much guidance for the imposition of a sentence in the present matter. They do not assist in placing this matter 'in perspective' as was submitted by the appellant's counsel. We were not referred to any other cases relevant to this matter and I have been unable to find any. In *Malgas*, the court indicated that all factors traditionally taken into account in sentencing continue to play a role. The learned magistrate did so. The overall approach was summarised in *Malgas* as follows. Once account is

[13]1998 (1) SACR 248 (SCA).
[14]At 252*e-f*.

taken of the singling out of a particular offence by the legislature for severe punishment, paragraph I of that summary concludes as follows:

'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.'[15]

[16] In the present matter, the learned magistrate, having considered the traditional triad of factors, found that there were no substantial and compelling circumstances allowing for a downward deviation from the minimum term of the prescribed sentence. Counsel for the appellant was unable to advance any argument as to which substantial and compelling circumstances were overlooked by the learned magistrate in arriving at that finding. She contented herself with reference to the cases referred to above. Even though the learned magistrate did not reason the matter out fully, I can find no basis on which to criticise this finding. The appellant was in active possession of the firearm, having taken it into the property of the complainant concealed in a bag. The firearm was used in the commission of an offence, namely count one. The appellant had a previous conviction for possession of a firearm, albeit not a semi-automatic or automatic firearm. There was no evidence as to the date on which the appellant was released from imprisonment in respect of the previous convictions, but the date on which he was sentenced was less than 7 years prior to the commission of this offence. In other words, the appellant, within a few years of having been released from custody, acquired an automatic firearm (which is not capable of being owned lawfully), carried it to the property of the complainant and used it in the commission of an offence. He showed no remorse for his conduct, pleaded not guilty and rendered no explanation

[15] *Malgas* para 25I.

as to how or why he came into possession of the firearm. He was not employed at the time of the commission of the offence and there is no indication that there are any prospects for his rehabilitation. His recidivism is to the opposite effect. As was said in *Sibisi*:[16]

'The serious view taken by the Legislature of this type of offence is amply borne out by the all too frequent reports of the senseless carnage and destruction wrought by this notorious murder weapon in otherwise peaceful and defenceless communities. It would be quite unrealistic of this or any other court not to take judicial cognisance of this state of affairs…'.

[17] A further submission made on behalf of the appellant was that the sentence on count one was the maximum permissible for that offence and that this was unduly harsh to the extent that it warranted interference on appeal. I disagree. The appellant, when confronted by the complainant, threatened to shoot him. He then loosed off a shot from inside the bag which narrowly missed a child playing in the yard. He is indeed fortunate that the shot did not strike the complainant, the child or the mother of the complainant. All in all, the sentence appears to me to be entirely appropriate.

[18] The final submission made on behalf of the appellant was that the whole of the sentence on count one ought to have been made to run concurrently with that on count two rather than only 2 years thereof. When pressed in argument, the appellant's counsel one was unable to point to any misdirection by the learned magistrate. She conceded that he considered the cumulative effect of the sentences and applied his mind to that portion which would be most appropriately made to run concurrently. I cannot fault the approach of the learned magistrate. It is not as if counts one and two were committed during the same series of events. The possession had

[16] At 251*g-h*.

arisen some time prior to the events giving rise to the appellant's conviction on count one. It was an entirely separate crime, unlike that of count three which was quite properly made to run concurrently in its entirety.

[19] I can accordingly find no basis on which to interfere in the sentences passed by the learned magistrate. There were no material misdirections nor were any of the sentences or the cumulative effect so startlingly disproportionate.

[20] In the result, the appeal against the sentences is dismissed.

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GORVEN J

I agree:

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POYO-DLWATI AJ

DATE OF HEARING:	12November 2013
DATE OF JUDGMENT:	19November 2013
FOR THE APPELLANTS:	D Barnardinstructed by The Legal Aid Board.
FOR THE RESPONDENT:	V Alamchand instructed by The Director of Public Prosecutions for KwaZulu-Natal.