

**IN THE HIGH COURT OF SOUTH AFRICA WESTERN CAPE HIGH COURT,
CAPE TOWN**

Reportable

Case no.: A391/2010

In the matter between:

Justin Baartman

Appellant

and

The State

Respondent

CORAM

D M DAVIS J et M DONEN AJ

JUDGMENT BY

DONEN AJ

FOR THE APPLICANT

ADV P J BURGERS

INSTRUCTED BY

LEGAL AID

FOR THE FIRST RESPONDENT

ADV S M MASHIGO

INSTRUCTED BY

DPP

DATE OF HEARINGS

15 OCTOBER 2010

DATE OF JUDGMENT

05 NOVEMBER 2010

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JUDGMENT DELIVERED ON 5 NOVEMBER 2010

DONEN AJ

[1] The appellant was charged in the Regional Court, Atlantis, with a violation of section 3 of the Firearms Control Act, No. 60 of 2000 ("the Firearms Control Act"). It was alleged in the charge sheet that he unlawfully possessed a firearm without a licence, namely a 7,65mm Liama Micromax semi-automatic pistol ("*the pistot*") from which the serial number had been removed. The charge sheet further provided that this violation was to be read together with sections 120(1), 121, 103 and 151 of the said Act, as well as the provisions of Part II of Schedule 2 of the Criminal Law Amendment Act, No. 105 of 1997 ("*the Amendment Act*").

[2] The appellant was twenty-two years old and a first offender at the time of commission of the offence. He pleaded guilty. A written statement, prepared by his attorney was handed to the Magistrate. The content was confirmed by the appellant and he was duly convicted. He was sentenced to ten years of imprisonment. With the leave of the Court a *quo* he now appeals against that sentence.

[3] Before the appellant pleaded, his legal representative informed the Court that the provisions of Part II of Schedule 2 had been explained to him. The Magistrate enquired from the appellant whether his attorney had explained to him that mere possession of a semi-automatic weapon could result in a sentence of 15 years imprisonment for a first offender if certain mitigating circumstances were not present. The appellant confirmed that he understood this.

[4] In his plea explanation the appellant admitted that he had unlawfully possessed the semi-automatic firearm described in the charge sheet without a licence, and that the police had found it in his room. He explained that it belonged to a friend and that he was merely keeping it there. He knew that he had no authority, permit or licence to possess the weapon and that it was a criminal offence. He also admitted the correctness of the content of a ballistic report dated 14 August 2009. (This report does not appear to have been handed in to the Court.)

[5] There can be no doubt, therefore, that appellant was aware that he was in possession of a semi-automatic firearm at the time he committed the offence.¹

[6] The principal ground raised on appeal is that the Magistrate misdirected himself by invoking the mandatory minimum sentence provisions that apply to first offenders in terms of section 51(2)(a)(i) of the Amendment Act; rather than the provisions of section 121 of the Firearms Control Act read with Schedule 4 thereof. This schedule sets out the maximum period of imprisonment ("*penalties*") for one hundred and forty three offences created under the Act.

[7] The relevant part of section 51(2) of the Amendment Act provides as follows:

¹ See **S v Mukwevho 2010 (1) SACR 349 (GSJ)**.

"(2) Notwithstanding any other law but subject to ss (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in -

(a) Part II of Schedule 2, in the case of-

(i) a first offender, to imprisonment for a period not less than 15 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;"

[8] Part II of Schedule 2 refers, *inter alia*, to:

"Any offence relating to

(a) the dealing in or smuggling of ammunition, firearms, explosives or armament; or

(b) the possession of an automatic or semi-automatic firearm, explosives or armament."

[9] The Amendment Act came into force on 13 November 1998. According to its headnote it was intended, *inter alia*, "to make provision for the setting aside of all sentences of death" and "to provide for minimum sentences for certain serious offences".

[10] It is apparent that in passing this legislation, Parliament considered any offence relating to the possession of an automatic or semi-automatic . firearm, explosives or armament as being a serious offence and of equal

gravity to any other such offence, no matter which of the four devices mentioned in subsection (b) was possessed.

[11] Arm was defined in section 1(1)(ii) of the Arms and Ammunition Act as meaning "any firearm other than a cannon, machine-gun or machine-rifle, and including:

(i) A gas rifle or air rifle of .177 of an inch or larger calibre;

(ii) A gas pistol or revolver;

(iii) *An air pistol other than a toy pistol;*

(iv) *An alarm pistol or revolver;*

(v) *Any barrel of an arm."*

[12] The unlawful possession of armaments encompassed any cannon, rocket launcher, machine gun or machine-rifle, grenade or bomb, among others² without a permit obtained from the Minister in terms of section 32(2) of the Arms and Ammunition Act. Possession of explosives was regulated by the Explosives Act, 26 of 1956.

[13] When the minimum sentencing provisions contained in section 51(2)(a) of the Amendment Act were applied to the unlawful possession of an unlicensed semi-automatic firearm in **Sukwazi** (on a charge brought under section 2 of the Arms and Ammunition Act, 75 of 1969), the Amendment Act was described as "*ill-conceived and badly drafted*"³. It was pointed out that this Act referred to automatic and semi-automatic firearms when there was no definition of such weapons in the Arms and Ammunition Act which had created the offence.⁴ This led Combrink J to conclude that the drafters of the Amendment Act had no regard to the provisions of the Arms and Ammunition Act when they drafted the firstmentioned legislation.

[14] In **Thembaletu**,⁵ however, the Supreme Court of Appeal disapproved of the judgment in **Sukwazi** and reconciled the two Acts. Kgomo AJA said the following with reference to section 51(2) of the Amendment Act:

"[6] In my view properly construed the above provisions mean that a court convicting

2 See Milton: **South African Criminal Law and Procedure Vol III Statutory Offences 2nd Ed** paras B1-15-6, p 10 (Service No. 4 1993).

3 See **S v Sukwazi 2002 (1) SACR 619 (N)** at 623f-624d.

4 Section 2(1) thereof (read with section 39(h) provided that any person who has in his possession any arm, unless licensed to possess such arm, commits an offence.

5 See **S v Thembaletu 2009 (1) SACR 50 SCA** at 53f to 54ij.

an accused person of any offence referred to therein is obliged to impose a sentence of 15 years' imprisonment unless such court finds that substantial and compelling circumstances justifying the imposition of a lesser sentence than the prescribed one are present. The prescribed minimum sentence of 15 years' imprisonment applies to first offenders only. The phrase 'Notwithstanding any other law' in the section (ie s 51(2)) clearly indicates that the provisions supersede all other laws on sentence and apply to all offences listed in Part II of Schedule 2. That list includes an offence referred to as the possession of 'a semi-automatic firearm'. The section's wording is couched in unambiguous and peremptory terms (shall), and the offences to which it applies are stipulated.

[7] In my view once it is proved in a trial that an accused is guilty of an offence in terms of which he or she unlawfully possessed a firearm, in this case in contravention of s 2 read with ss 1, 39 and 40 of the now repealed Arms and Ammunition Act 75 of 1969, and it is proved or admitted that the firearm was 'semi-automatic' the application of its provisions relating to sentencing is triggered."

[15] The Court reasoned that though the drafting of the Amendment Act was not "a specimen of clarity", the absence of an offence of unlawful possession of a semi-automatic firearm did not compel one to conclude that "the words of the Criminal Law Amendment Act cannot be properly construed"¹. The Court reconciled the two Acts by referring to the judgment of Cameron JA in **Legoa**⁶ and found that the Amendment Act does not create new offences, but refers to specific forms of existing offence for which harsh punishment is decreed. When the commission of such offences was proved in the form specified in the schedule the sentencing Court acquired an enhanced penalty jurisdiction if the evidence regarding all the elements of the scheduled offence were led before the verdict and the trial Court found that all

⁶ **S v Legoa** 2003 (1) SACR 13 (SCA) para 18.

the elements specified in the Schedule were present.

[16] In applying section 2 of the Arms and Ammunition Act, enhanced penalty jurisdiction was acquired where it was shown that the particular "*arm*" was a firearm which was automatic or semi-automatic.⁷ In the present matter, the appellant pleaded guilty to the offence and admitted that the firearm was semi-automatic. However, reconciliation between the Act creating his offence and the Amendment Act cannot rationally be achieved.

[17] The sentencing regime under which the appellant was charged, namely the Firearms Control Act, provides for a maximum sentence of fifteen years for the unlawful possession of a semi-automatic firearm and twenty five years for a fully automatic firearm. This differentiation, in my view, suggests that legislature could never have intended to retain the uniform penalty regime, employed by the State in section 51(2) of the Amendment Act, in order to coerce possessors to submit these firearms to licensed regulation.

[18] Furthermore, while the mandatory penalties imposed for unlawful possession of a fully automatic weapon may be accommodated within the sanctioning regime under the Firearms Control Act, the penalty relating to a semi-automatic cannot: not least of all because the minimum sentence of fifteen years imprisonment under the Amendment Act is also the maximum under the Firearms Control Act.⁸

[19] The appellant violated "a *comprehensive and an effective system of firearms control* established in terms of the Firearms Control Act⁹, which commenced on 1 July 2004. From an overall reading of the Act, it is apparent that a system of regulation of firearms was introduced by means of a comprehensive regime of

⁷ **Thembaletu's case para [11] at p 56 b to i/j.**

⁸ **S v Manana 2007 (1) SACR 62 (T).**

⁹ See the headnote to the Act as well as section 2(d) thereof.

licensing, permit and official authority and that every violation created therein was attached to a prescribed maximum penalty.

[20] Section 3 thereof established a general prohibition in respect of firearms by providing that:

"No person may possess a firearm unless he or she holds a licence, permit or authorisation issued in terms of this Act for that firearm."

This general prohibition is arranged in a pattern together with one hundred and forty-two other prohibitions and directives.

[21] In terms of section 120(1)(a) a person is guilty of an offence if he or she contravenes or fails to comply with any provision of the Act.

[22] Section 121 thereof, which deals with penalties, provides that:

"Any person convicted of a contravention of or a failure to comply with any section mentioned in column 1 of Schedule 4, may be sentenced to a fine or to imprisonment for a period not exceeding the period mentioned in column 2 of that Schedule opposite the number of that section."

[23] The word "may" was used in section 121 to introduce and achieve the sentencing regime contained in Schedule 4 of the Act which had not existed previously.¹⁰ It did not vest Courts with a discretion (which they possessed in any event) that was qualified by a previous general - but overriding - statutory prescription to the contrary.

[24] The Act defined "firearm" in a manner which may include semi-automatic and fully automatic firearms.¹¹

¹⁰ Compare **BID Industrial Holdings (Pty) Ltd v Strang 2008 (3) SA 355 SCA para [61] at p 370F/G to I.**

¹¹ "firearm" means any-

(a) device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of burning propellant, at a muzzle energy exceeding 8 joules (6 ft-lbs);

(b) device manufactured or designed to discharge rim-fire, centre-fire or pin-fire ammunition;

[25] Both categories of firearm are defined. "*Semi-automatic*" means "*selfloading but not capable of discharging more than one shot with a single depression of the trigger*". "*Fully automatic*" means "*capable of discharging more than one shot with a single depression of the trigger*". One may infer from these definitions that the former is potentially more harmful to society than the latter. It therefore requires stricter control and should attract harsher punishment. This indeed is the case.

[26] Fully automatic firearms are "*prohibited firearms*" in terms of section 4.¹² The maximum period of imprisonment for unlawful possession is twenty-five years. Semi-automatic handguns¹³ such as the pistol found in appellant's possession are not "*prohibited*". They may be lawfully possessed, provided they are licensed in the circumstances described below. Possession of a semi-automatic firearm without a licence, in terms of section 3, renders an offender liable to a maximum period of imprisonment of fifteen years according to Schedule 4. The legislature therefore differentiates, according to the danger which each category of firearm poses to society in general as well as individual rights to life and the security of the person.¹⁴

[27] Differential regulation of fully-automatic and semi-automatic firearms occurs in sections 13 and 14 of the Firearms Control Act. Section 13(1) describes certain firearms in respect of which a licence may be issued for self-defence, namely:

(c) device which is not at the time capable of discharging any bullet or projectile, but which can be readily altered to be a firearm within the meaning of paragraph (a) or (b);
(d) device manufactured to discharge a bullet or any other projectile of a calibre of 5.6 mm (.22 calibre) or higher at a muzzle energy of more than 8 joules (6 ft-lbs), by means of compressed gas and not by means of burning propellant; or
[Para, (d) substituted by s. 1 (b) of Act No. 43 of 2003.] . . .
(e) barrel, frame or receiver of a device referred to in paragraphs (a), (b), (c) or (d), but does not include any device contemplated in section 5;"

12 Certain exceptions are referred to in sections 17 and 18(5) (private collection), 19 (public collections) and 20(1)(b) (theatre, film or television productions with the prior written approval of the Registrar).

13 "Handgun" means "a pistol or revolver which can be held in and discharged with one hand".

14 See the preamble to the Firearms Control Act.

"any

(a) shotgun which is not fully or semi-automatic; or

(b) a handgun which is not fully automatic".

[28] In terms of section 13(2) the Registrar may issue a licence for a semiautomatic handgun to any natural person who - (a) needs a firearm for self-defence; and (b) cannot reasonably satisfy that need by means other than the possession of the firearm.

[29] However, in terms of section 13(4) such a firearm may only be used where it is safe to do so or for a lawful purpose. Failure to comply with these requirements would render the licensee liable to a maximum period of imprisonment of two years.

[30] Section 14 of the Act deals with a licence to possess a restricted firearm for self-defence. A restricted firearm for purposes of the section is any -

"(a) semi-automatic rifle or shotgun which cannot readily be converted into a fully automatic firearm; or

(b) firearm declared by the Minister by notice of the Gazette, to be a restricted firearm".

(Semi-automatic pistols are therefore not restricted in terms of this section.)

[31] Section 14(5) prohibits a person from holding more than one licence issued in terms of this section. Violation renders a person liable to a maximum of five years imprisonment.

[32] In summary, while Part II of Schedule 2 to the Amendment Act imposes the identical minimum sentence for any offence relating to the possession of an automatic or a semi-automatic firearm, their regulation - by licencing and sentence under the later Firearms Control Act - is systematically differentiated. The mandatory minimum penalty provisions for semiautomatic firearms in the Amendment Act are

irreconcilable with the identical sentence of fifteen years that may be imposed as a maximum in accordance with Schedule 4 of the Firearms Control Act.

[33] In my view regulation of semi-automatic firearms under the Firearms Control Act cannot be harmonized with the provisions of section 51 (2)(a)(i) of the Amendment Act.¹⁵

[34] The phrase "*notwithstanding any other law*" introducing section 51(2) of the Amendment Act could never have been intended to override any future law (statute) containing the regulatory and sentencing provisions described above.

[35] In the circumstances, the sentencing provisions applied by the Magistrate, have been impliedly revoked.¹⁶

[36] Mr Burgers, on behalf of appellant, has drawn our attention to the provisions of section 35(3)(n) of the Constitution which provide that the right to a fair trial of every accused person includes the right "*to the benefit of the less severe of the prescribed punishments if the prescribed punishment for the offence has changed*". Though this submission may beg the issue, the Court is nevertheless bound to promote the spirit of fairness expressed therein in interpreting the sentencing regime that pertains to section 3 of the Firearms Control Act.

[37] The Magistrate therefore misdirected himself by sentencing the appellant pursuant to the provisions of section 51(2)(a)(i) of the Criminal Law Amendment Act. The provisions of sections 120(1), 121 and Schedule 4 of the Firearm Controls Act ought to have been applied. Consequently, this Court is

15 See generally New Modderfontein Gold Mining Co v Transvaal Provincial Administration 1919 AD 367 at 397; S v Mseleku 1968 (2) SA 704 (N).

16 In relation to the maxims "*lex posterior prior derogat*" and "*generalia specialibus non derogant*" see the Law of South Africa First Reissue 25, Part 1, paragraphs 293 at p 263 to 266.

at large to interfere in the sentence imposed by the Magistrate.

[38] During his trial the appellant elected not to give evidence in mitigation. Nor did he call any witnesses in that regard. The State and defence agreed that numerous shooting occurrences took place within the area of jurisdiction of the Regional Court. Appellant's attorney informed the Court of the appellant's personal circumstances. Before he sentenced appellant, the Magistrate found that substantial and compelling circumstances were constituted by the plea of guilty, the absence of previous convictions, the age of the accused, the fact that he had two children and the fact that no further crimes involving use of the pistol had been identified. In terms of section 51(3)(a) of the Amendment Act the Court *a quo* was satisfied that the circumstances above justified a lesser sentence than the prescribed fifteen years.¹⁷

[39] However, because the Amendment Act could not apply, the trial Court was in law vested with a discretion to sentence the appellant up to a maximum period of fifteen years. In my view that Court should be given an opportunity to exercise this discretion. I am reinforced in this conclusion by the existence of another, possibly aggravating factor. This involves the appellant's refusal to take the Court into his confidence in relation to the true ownership of the pistol. It would be preferable for this Court not to express any view on the weight to be given to this consideration, as well as certain others referred to by the Magistrate.

[40] In the circumstances, the sentence is set aside and the matter is referred back to the Regional Court for the imposition of a sentence in accordance with the provisions of the Firearms Control Act.

¹⁷ Section 51 (3)(a) provides as follows: ^u (3)(a) *If any Court referred to in 'ss'(i) 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 may thereupon impose such lesser sentence.*"

DONEN AJ

I agree

DAVIS, J