CASE NO 74/97

In the matter between:

WELLINGTON GIYANE SIBISI Appellant

AND

THE STATE Respondent

CORAM : MAHOMED CJ, SMALBERGER et

EKSTEEN JJA

HEARD : 4 NOVEMBER 1997

DELIVERED 21 NOVEMBER 1997

J U D G M E N T

EKSTEEN JA:

The appellant was convicted in the regional court at Eshowe on two counts of contravening section 32(1) (a) and (e) of Act 75 of 1969 (the Act) firstly, by being in unlawful possession of a machine gun or machine rifle, to wit an AK-47 rifle, and secondly, by being in unlawful possession of four live rounds of AK-47 ammunition. He pleaded guilty to both counts and was sentenced by the magistrate on the first count to five years' imprisonment of which two years was conditionally suspended. On the second count he was cautioned and discharged. An appeal against the sentence on the first count to the Natal Provincial Division was dismissed, but that court granted leave to appeal to this Court.

In the course of the magistrate's questioning of the appellant in terms of section 112 of Act 51 of 1977 the appellant readily

conceded his unlawful possession of the rifle with the knowledge of its unlawfulness, and that he knew that it was a machine gun i.e. that it was a firearm capable of delivering a continuous fire as long as pressure was applied to the trigger. When asked why he possessed this gun, he replied:

> "It was kept there by my brother. I have mentioned his name already. I refused to keep the firearm. I said I cannot be able to keep this thing at this kraal. He said I must keep it because I had already seen it and that should he be arrested I would be the cause of his arrest. ...I then kept it because he had so spoken."

The magistrate then took him up on this statement and the following passage appears from the record:

> "Court: So you had known it was wrong?
>
> Accused: Yes.
>
> Court: But you were forced as you say?
>
> Accused: That was when he and myself were arguing when I said 'This thing must be taken to the police'. Court: Mr Sibisi let's not waste each other's time please.

Were you forced to possess this firearm and ammunition or not? Accused: No I was not lawfully forced. Court: Now what are you trying to say please? Accused: That is the person who forced me but the law did not force me."

At the end of this exchange the magistrate entered a plea of not guilty and requested the prosecutrix to lead evidence. Constable Khumalo was thereupon called. He deposed to going to the appellant's kraal on 6 September 1994, and searching the appellant's house. In the bedroom under the mattress of a double bed he found the AK-47 rifle and the four rounds of ammunition. The appellant explained to him that the rifle belonged to his brother who had asked him to keep it for him. His brother, he said, was in Johannesburg. When asked whether the appellant had made mention of the fact that he had been forced to keep the firearm, Constable Khumalo replied in the negative.

 The

appellant, though offered the opportunity to cross-examine the constable, declined to do so. After the State had closed its case, the magistrate offered the appellant the opportunity of giving evidence himself or of calling witnesses to present his "version of the events". He told the appellant inter alia that

> "the evidence before Court that I take into account at this stage is what this constable said who testified here, as well as all your admissions, apart from the fact that you tried to exculpate yourself. If you want the Court to take that into account in considering whether you are guilty or not, you and your witnesses will have to testify about that."

The appellant declined to give evidence himself or to call any witnesses and closed his case. His sole recorded remark in argument was to the effect that he should not be convicted because "this thing did not belong to me".

In his judgment convicting the appellant the magistrate rejected the appellant's "little tale that your brother forced you to

keep this firearm" as inherently improbable and false.

After conviction the appellant admitted the following previous convictions ...

on 13.04.1972 theft of mealies worth R2 from a mealieland for which he was sentenced to 5 cuts.
on 15.09.1980 "conveying passengers for reward" for which he was fined R100.
on 13.02.1987 culpable homicide for apparently hitting his victim with his fist. He was sentenced to one year's imprisonment which was wholly suspended for 3 years.
on 07.02.1989, arson involving a hut worth R800 for which he was fined R100.
on 28.06.1989 he was again convicted of unlawful road transportation for which he was fined R150 or 75 days' imprisonment.

In mitigation of sentence the appellant, a 38 year old ambulance driver of Kwa-Ceza Hospital, told the Court that he was earning R1 400 a month and was supporting 12 members of his family, that he was the only person working and that should he be convicted he would lose his work. When asked how long the

firearm had been in his house, he replied that it had been left there

"after the elections" - i.e. probably some 4 or 5 months. The record

then proceeds:

> "Court: Why did you keep it for him?
> Accused: He said he will return and take it and that he was unable to go back to Johannesburg with the same in his possession. Court: So you had to keep it whilst he was in Johannesburg? Accused: Yes, he said he would return and take it. Court: And why was he not arrested, why did you not take the police to him? Accused: I was scared for my life because he had mentioned the threatening words to me. Court: I have already said that that is a lie. He never threatened you. So do you want to try another excuse? Accused: No. There is none."

In sentencing the appellant the magistrate referred to the prevalence

of the offence and of the acts of atrocity perpetrated by AK-47

rifles in that area, as well as to the fact that the appellant had been

prepared to keep the gun under his mattress for so many months.

He then went on to say:

> "I do not believe your story for one moment that you were forced by your own brother to keep that firearm. The most that I will accept in your favour is that he did bring it there and asked you to keep it for him whilst he was in Johannesburg..... You must be deterred - you and others from possessing these weapons. ... As far as your previous convictions are concerned, although they are not for similar offences, it is quite clear that you do not really worry about the laws of this country. You do what you want to."

The offence of contravening section 32(l)(a) of the Act by being in unlawful possession of a machine gun or machine rifle is regarded by the legislature as a most serious offence. Section 39(2) (aA) (i) provides for a sentence of imprisonment for a period not exceeding 25 years and for a minimum sentence of imprisonment for a period of not less than five years, without the option of a fine.

These penalties are to be seen in contradistinction to the much

lesser penalties provided for the unlawful possession of smaller and

less dangerous arms (cf. sec. 39(2) (a) and (b)). 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 cognizance of this state of affairs (cf S v Metu 1995 (2) SACK 681 (A) at 684 e-f). The severe penalties enacted by the legislature for the possession of such a notoriously dangerous weapon - which includes mere custody (section 1) - can be seen as an attempt to discourage and contain to some extent the all too prevalent carnage.

It was submitted on the appellant's behalf that he was a somewhat reluctant custodian.

This seems to have been the

impression the appellant sought to convey in his answers in terms of section 112 of Act 51 of 1977, but it is not clear from whence this reluctance sprang. He seems to suggest that the reluctance sprang form the fear that he himself might be found in what he fully realized would be unlawful possession of a dangerous weapon. He says he told his brother "This thing must be taken to the police". By keeping it he would be exposing himself to prosecution and to imprisonment. This objection seems to have been overcome by his brother's remark to the effect that

> "1 must keep it because I had already seen it and that should he be arrested I would be the cause of his arrest."

What the appellant meant to convey with these words is not clear. At first blush it might appear that the appellant's brother had appealed to his moral responsibility not to allow his brother to be arrested for the unlawful possession of the weapon by refusing to

keep it at his kraal. Later on, however, when asked why he had not taken the police to his brother he replied:

" I was scared for my life because he had mentioned the threatening words to me."

This suggests that what his brother had said to him contained a threat to his life. What his brother said to him would therefore have amounted to this: that the appellant had seen the gun in his possession, and therefore knew that he was in unlawful possession of it, and that if he should be arrested he would know that the appellant must have told the police and therefore have been the cause of his arrest, and that he would get even with him (the appellant) by killing him. In these circumstances the appellant felt compelled to accede to his brother's request. This seems to be in fact what the appellant was trying to convey to the Court.

The reason why there is this lack of clarity for the reluctance

which the appellant says he had for keeping the gun for his brother, is due to his failure to give evidence either on the issue of his conviction or in mitigation of sentence. Had he done so the whole issue could have been explored and the true source and degree of reluctance determined. The magistrate was clearly not impressed by the suggestion of any compulsion, and regarded the alleged threat by appellant's brother as inherently improbable and false.

The magistrate did however accept in the appellant's favour that he had been a mere custodian, and that he had been requested by his brother to keep the gun. Even if one were to accept that the appellant may have been somewhat reluctant to accede to the request, the fact remains that he did so accede. He consented to take custody of the gun for his brother and to keep it safely for him until he returned form Johannesburg in due course, and came to

fetch it for his own use. When one considers to what use this weapon could be put one is driven inexorably to the chilling conclusion that the only feasible use would be to kill human beings. This conclusion could not have escaped the appellant and would have underlain the reluctance he claimed to have had.

In dismissing the appellant's appeal against sentence the Natal Provincial Division pointed out that more sympathy might have been felt if the appellant had possessed a handgun for defensive purposes or if there had been evidence of a fear of attack from rival political or other groups. The Court found that the magistrate had not misdirected himself on sentence and that the sentence did not differ to such an extent from the sentence it would have imposed as to constitute a striking disparity. It granted leave to appeal to this Court, however, on the ground that at the hearing it had not been

referred to cases such as S v Gwala 1993 (2) SACR 653 (A) and that, in the light of that judgment, another Court might come to the conclusion that the sentence was too severe.

In Gwala's case the appellant had been in possession of, (1) two AK-47 rifles as well as (2) four hand grenades and (3) a quantity of ammunition. The magistrate had sentenced him to five years' imprisonment on each of the first two counts, and one year's imprisonment on the third. It ordered two years' imprisonment on the first two counts to run concurrently so that he should serve an effective sentence of 7 years. This latter aspect was clearly not the effect of the magistrate's judgment, and on appeal the Natal Provincial Division corrected the sentence by making four years on the second count run concurrently with the five years on the first.

On a further appeal to this Court the sentences were further reduced

to three years' imprisonment on each of the first two counts and it

was ordered that 18 months on each of those counts be conditionally suspended. The one year's imprisonment on the third count stood as it was. The appellant was therefore sentenced to an effective period of four years with a further suspended sentence of three years.

The appellant in that case was a member of Umkonto we Siswe (MK) which was the military wing of the ANC. The weapons which were found in his possession had been brought to him by another member of MK, who had instructed him to keep them in safe custody. This feature was seen as mitigatory and weighed heavily with this Court in reducing the sentence. This was fully in line with the reasoning in S v Marina and Others 1990 (4) SA 709 (A) at 717 G - 718 E, and 719 B-C. Such considerations

do clearly not apply in the present case.

It was also submitted to us that the magistrate might be perceived to have been unnecessarily inimical to the appellant, and that this presumably may have clouded his judgment on sentence. There certainly were certain passages in the record where the magistrate may well have shown greater consideration for an undefended accused, such as e.g. his curt enjoinder to the accused not to "waste each others time please". Then again when the accused, in trying to answer the magistrate's questions in the proceedings on sentence, sought to revert to his brother's threat to kill him, the magistrate abruptly cut him short by remarking, "I have already said that that is a lie, he never threatened you, so do you want to try another excuse". Such remarks might better have remained unsaid. They hardly serve to create an impression in the

mind of an undefended layman of unbaised and even-handed justice.

In passing sentence the magistrate's remark that the appellant's previous convictions make it clear that he does not really worry about the laws of the country and that he does what he wants to, was both unwarranted and uncalled for. All his previous convictions, if one has regard to the sentences imposed, were of an extremely petty nature. Even the conviction of culpable homicide was punished with a wholly suspended sentence which must reflect a minimal degree of negligence. To say therefore that his previous convictions display a proclivity to set the law of the country at nought, and simply to do as he pleases is not justified. This remark was made immediately before the imposition of sentence and would appear to have been taken into account in its determination. As such, in my view, it amounts to a misdirection and renders the

whole sentence open to reconsideration.

Although the magistrate does not specifically say so it seems clear that he must have taken the personal circumstances of the appellant into account. The circumstances, which would include the personal qualities of the appellant himself, had much to ameliorate the seriousness of his transgression, and this was reflected in the magistrate imposing the minimum permissible sentence in terms of the law, and suspending two years of that sentence. Had the magistrate been more detached in his approach and had he not misdirected himself in the way he did it seems to me that he would have considered justice to require an even greater concession to the appellant. To give effect to such justice as I see it, this Court should reduce the sentence.

In doing so I do not seek in any way to detract from the

seriousness of the offence, or to create the impression that Courts

should not visit such offences with severe penalties. In the ordinary course I would not have regarded the sentence imposed by the magistrate as being unduly severe, and had it not been for the magistrate's misdirection, I would not have been inclined to interfere with the sentence. Each case however must be considered on its own merits and a sentence imposed to fit the crime and at the same time to be just to the criminal. In addition to all the other mitigating factors in the present case, which I do not propose setting out again, and which were properly taken into account by the magistrate, the additional personal considerations reflected in the misdirection and which the magistrate failed to take into account warrant the present interference with his sentence.

In the result the appeal succeeds to the extent that the

sentence imposed by the magistrate is altered to read

> "Five years' imprisonment of which three years is suspended for five years on condition that the accused is not again convicted of a contravention of Section 32(1) (a) of Act 75 of 1969 by being in possession of a machine gun or a machine rifle."

EKSTEEN JA

CONCURRED: MAHOMED CJ
SMALBERGER JA