

SOUTH AFRICA / JUDGMENT

Jansen v S (CA&R220/18) [2019] ZAECHGC 105; 2020 (1) SACR 413 (ECG) (29 October 2019) [2019] ZAECHGC 105

COURT

Eastern Cape High Court, Grahamstown

BEFORE

D Van Zyl, J Eksteen

CASE / FILE NUMBER

CA&R 220/18

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA&R 220/18

REPORTABLE/YES

In the matter between:

ROMEO JANSEN

Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

D VAN ZYL DJP:

- [1] The appellant was convicted in the Port Elizabeth Regional Court of having been in the unlawful possession of an unlicensed 9 millimetre pistol and five rounds of ammunition in contravention of the provisions of the Firearms Control Act 60 of 2000. He was sentenced to fifteen years imprisonment in respect of the firearm, and eighteen months imprisonment for the possession of the ammunition. The terms of imprisonment were ordered to run concurrently. The appellant was granted leave to appeal on petition against both the convictions and the sentences imposed by the trial court.

[2] Dealing first with the appeal against the two convictions, the State's evidence was that on a day in February 2016, the appellant was seen at a taxi rank near a shopping centre in Korsten in Port Elizabeth. The witness in question, a Mr Raubenheimer, testified that he saw the shape of what he thought was a firearm concealed under the shirt of the appellant. The witness then telephoned a certain Mr Gouws. He informed Gouws that the appellant was at the taxi rank, and that Gouws must contact the police. Raubenheimer remained in the area and he shortly thereafter saw the police arriving who stopped a taxi that the appellant had boarded. The appellant was taken from the taxi and searched, whereafter the police left with the appellant. Raubenheimer's interest in the appellant arose from an incident that occurred a month earlier in January when, according to Raubenheimer, he was in the same area when the appellant and his friends approached him. The appellant produced a firearm. Raubenheimer ran away and he heard the sound of gunshots. The appellant was known to him as being a member of a gang called the Fat Cats.

[3] The evidence of the two police officers who arrested the appellant was that in reaction to information they received from an informer that the appellant was seen with a firearm, they proceeded to the taxi rank. On their arrival they saw the appellant in the company of another male person boarding a taxi. They stopped their police vehicle in front of the taxi, and approached the taxi. The appellant was seated in the taxi near the side door. They

saw the appellant throwing a firearm down onto the floor of the taxi. They then took the appellant from the taxi. He was searched and arrested on a charge of unlawful possession of a firearm. The appellant was taken to the police station where the firearm and its ammunition was entered into the relevant register. The firearm was loaded with seven rounds of

ammunition. Ballistic evidence, which was undisputed, was that the firearm was a semi-automatic pistol, and that cartridge cases and a bullet jacket recovered from the scene of the shooting incident in January 2016, as testified to by Raubenheimer, were fired in or from that firearm.

[4] The appellant's evidence was essentially that he was being falsely implicated and that the version of the two police officers was a concocted one. He denied having been found in possession of any firearm, or that he had any knowledge of a firearm that was found by the police. According to him, he was told that he was sought on a charge of attempted murder. However, after he was taken from the taxi he was asked whether he had any knowledge of a

firearm that was found in the taxi. He was taken to the charge office where he was charged with the possession of a firearm that was never shown to him. It was only later that he was also charged with attempted murder.

[5] The trial court considered the criticism raised in respect of the evidence of the two police officers. It found that what were labelled as contradictions in their evidence, were not material and that it was satisfied that the officers were credible witnesses whose evidence was reliable and could be accepted. The version

of the appellant on the other hand, was found by the trial court not to be reasonably possibly true, and that it must be rejected as being false.

[6] Factual findings of a trial court can only be interfered with on appeal if they were vitiated by material misdirection's or shown by the record to be wrong.[1] This approach applies equally to credibility findings.[2] It has not been demonstrated that the Magistrate's conclusion was vitiated by a material misdirection or that on the record it was wrong. The evidence of the two police officers, coupled with the evidence of Raubenheimer, established that the appellant was found in possession of a firearm and that he was immediately charged with its possession. The Magistrate was justifiably not impressed with the appellant's version. It is farfetched and inconsistent with the suggestion that he was informed that he was being sought on a charge of attempted murder, but thereafter instead charged with the unlawful possession of a firearm. I am satisfied that the Magistrate, on the evidence placed before him, reached the correct conclusion, and that there is no reason to interfere with any of his findings.

[7] With regard to the appeal against the sentences imposed by the trial court, it was not in dispute that the firearm was a semi-automatic firearm as defined in the Firearms Control Act. In the charge sheet, the State gave notice of its intention to rely on the provisions of section 51 (2) of the Criminal Law Amendment Act (as amended) (the Act). This subsection, read with Part III of Schedule 2, obliges a court to impose a sentence of fifteen years imprisonment in the case of a first conviction for "any offence relating to – (b) the possession of an automatic or a semi-automatic firearm, explosives or armament," unless substantial and compelling circumstances as contemplated by section 51 (3) of the Act are present and justify a less severe sentence.

[8] The Act introduced a discretionary minimum sentencing regime. Its purpose is the imposition of deterrent and retributive punishment and the achievement of consistency in sentencing in respect of a number of offences the Legislature considered serious and prevalent. While the Act does not expunge the discretion entrusted to a

sentencing court, it has substantially constrained it.[3] "Dodo thus upheld the constitutional validity of a minimum sentencing regime requiring consistently heavier sentences for adults, so long as it retained a residual discretionary overlay. Legislative power to constrain the courts' sentencing discretion derived, Dodo said, from the fact that '(b)oth the legislature and Executive share an interest in the punishment to be imposed by courts, both in regard to its nature and its severity'. The courts thus do not enjoy sole authority in determining

sentence."[4] The Act leaves the imposition of discretionary sentences to the court, if it is of the view that there are particular circumstances

present that would make it unjust to impose the mandatory sentences. The discretion is however circumscribed by the standard, or the benchmark as it has also been referred to, created by the sentences the Act prescribes. This aspect is more fully dealt with in paragraphs [25] and [26] of this judgment.

[9] The introduction of minimum sentences by the Act has not been without controversy, and has been much criticised. It is undeniably so, that the sentiment was that the enactment of prescribed sentences in principle unduly interfered with the discretionary powers of the court to impose what it considers to be an appropriate sentence in the circumstances of any particular case. But the criticism went further than that. The structure of the Act and the prescribed sentences have been described as incongruous and disproportionate. This criticism is primarily based on what is said to be the failure of the Act to differentiate between the various offences, and to give recognition to what the Court in *S v Vilakazi*[5] referred to as the numerous combinations of variables that accompany the commission of a crime. Simply put, the Act fails to acknowledge that some offences are either more serious or less serious than others, and that the circumstances in which offences are committed may differ from case to case.

[10] The obligation to impose a minimum sentence of fifteen years imprisonment for the unlawful possession of a semi-automatic firearm has especially been the subject matter of much criticism. When the prescribed minimum sentence is compared to the penal provisions in the Firearms Control Act, it is said to create a “bifurcated” sentencing regime for this category of offence that has the potential to produce arbitrary consequences.[6] This is said to arise from the fact that “a prescribed sentence of 15 years’ imprisonment applied, in terms of the Act, to the unlawful possession of automatic or semi-automatic

firearms, whatever their natures while a maximum sentence of 15 years’ imprisonment applied, in terms of the Firearms Control Act, to the unlawful possession of any other firearms, whatever its nature.”[7]

[11] Examples of the arbitrary consequences alluded to are the fact that the minimum sentence would find equal application to both the unlawful possession of a small calibre semi-automatic pistol, and the possession of an automatic firearm, such as an assault rifle. Further, in respect of the unlawful possession of firearms that may be of a heavier calibre than a semi-automatic pistol, such as a shotgun and a revolver, the minimum prescribed sentence would not apply.[8]

[12] The application of the provisions of the Act, where an accused has been convicted of the unlawful possession of a semi-automatic pistol, consequently became the subject matter of several decisions of the courts. It culminated in the decision in *S v Sukwazi*[9] where it was found that it was not competent for the courts to apply the provisions of the Act to a conviction in terms of the now repealed Arms and Ammunition Act.[10] In terms of that Act the unlawful possession of an automatic firearm, the possession of explosives and the possession of any armament was an offence that carried a maximum sentence of three years

imprisonment. The Court in Sukwazi found that the application of the minimum sentencing provisions to a conviction of the unlawful possession of a semi-automatic pistol would result in an absurdity. This finding was essentially premised on, firstly, the fact that there was no such offence as the unlawful possession of a semi-automatic firearm in the Arms and Ammunition Act, and that the Act could not create such an offence, and secondly, that it could not have been the intention of the Legislature that the possession of a pistol, for the sole reason that it has a semi-automatic firing mechanism, should attract a minimum sentence of fifteen years imprisonment in terms of section 51(2).[11] The ordinary meaning of that phrase is that if any other law provides differently, section 51(2) will apply.[12]

- [13] The judgment in Sukwazi was endorsed in a number of subsequent High Court judgments[13] until it was overturned by the Supreme Court of Appeal in *S v Tembalethu*. [14] The judgment in Sukwazi was found to be in conflict with an earlier finding of the Supreme Court of Appeal in *S v Legoa*,[15] that the General Law Amendment Act does not create new offences, but simply refers to existing offences where it is proved that the “arm” is a “firearm” which is an automatic or semi-automatic one, or that it functioned in that manner.[16] The Court further found that the phrase “Notwithstanding any other law” in section 51(2) was a clear indication that the increased penalty provision superseded all other laws on sentence and applied to all the offences listed in Part II of Schedule 2 of the Act.[17]
- [14] Following the repeal of the Arms and Ammunition Act and the coming into operation of the Firearms Control Act,[18] the controversy however reignited and again gained momentum with judgments which sought to distinguish the Tembalethu

judgment.

This was essentially on the basis that the Legislature, in enacting the Firearms Control Act chose, in the face of the minimum sentencing regime in section 51(2) of the Act, to introduce a scheme that limited the sentence for a conviction on a charge of the unlawful possession of a semi-automatic firearm to a maximum of fifteen years imprisonment. This disharmony between the Act and the Firearms Control Act was found by the Western Cape High Court in *S v Baartman*[19] to mean that the Legislature could never have intended to retain the uniform penalty regime in Act in respect of this category of offence, and that it was impliedly repealed by the Firearms Control Act. The use of the word “may” in the relevant penal provisions in the Firearms Control Act was further considered to be an expression of the Legislature’s intention to introduce and achieve a discretionary sentencing regime which was not subject to the minimum sentencing legislation. It was further found that the phrase, “Notwithstanding any other law” in the Act could never have been intended to override any future statute that may seek to regulate the penalties to be imposed for the unlawful possession of a semi-automatic firearm.

- [15] The Baartman decision was however disapproved of in a subsequent decision of a Full Court of the same Division in *S v Swartz*. [20] In that judgment Rogers J, writing for the Full Court, emphasized that the minimum sentences apply when the specific circumstances of the offence, bring it within the scope of the schedules to the Act, and that the words

“Notwithstanding any other law”, are clear and unambiguous and do not permit of a distinction between the law existing when the Act came into force, and law which came into existence thereafter.[21] The Court found that even if such a distinction were valid, section 51 of the Act was substituted, in terms of section 1 of the Criminal Law (Sentencing) Amendment Act that came into operation after the Firearms Control Act on 31 December 2007. Accordingly, the Legislature’s employment once again in the substituted minimum sentence provisions of the phrase “Notwithstanding any other law”, served as a clear indication that the minimum sentence provisions were intended to override the general penalty provisions in the

Firearms Control Act.[22]

- [16] Rogers J, further pointed to the fact that there is a presumption against the implied repeal of legislation, and in order for there to be such a repeal, there must be an irreconcilable conflict between the two enactments in question.[23] Such a conflict does not exist, and it is not the case that the Firearms Control Act cannot find any meaningful scope of operation unless it is found to override the Act. Further, the simultaneous operation of minimum and maximum sentencing regimes is not confined to offences relating to firearms. It similarly applied in respect of offences referred to in for example the Drugs and Drug Trafficking Act 140 of 1992, and the Prevention and Combating of Corrupt Activities Act 12 of 2004.[24] The Full Court accordingly concluded that the ratio in Tembalethu finds application to the Firearms Control Act.[25]
- [17] The conclusion in Swartz that the offence of unlawful possession of a semi-automatic firearm is subject to the minimum sentence legislation was subsequently endorsed in *S v Delport*. [26] In his judgment Binns-Ward J added to the reasoning in Swartz by observing that “... when the Firearms Control Act was enacted, the prescribed minimum sentence regime in terms of the Act was treated by the legislation as a temporary measure that was subject to periodic renewal. That might explain the inconsonance between the penalty provisions in the respective statutes when the Firearms Control Act was adopted, because the Legislature at that time presumably would have expected the penalty provisions of that Act eventually to stand alone when the “enhancing” effect of the minimum sentencing regime in terms of the Criminal Amendment Act fell away. The position was subsequently altered when the minimum sentences were placed permanently on the statute book. That happened when section 53 of the Criminal Amendment Act was deleted, also in terms of the Criminal Law (Sentencing) Amendment Act 38 of 2007.”[27]
- [18] I am full in agreement with the reasoning and the findings made in Swartz and Delport. I may add that the minimum sentencing regime was, as alluded to in Vilakazi,[28] introduced by the Legislature in response to an upsurge at the time in the commission of serious crimes. The focus of the Act is clearly on the prevention of certain crimes, the commission of which is prevalent and disruptive to a society as the one envisaged in our Constitution. The criticism levelled against the provisions in the Act, relating to firearms, focuses on the discrepancies that exist when one has regard simply to the differences in the calibre of the

firearms in question, and the failure of the prescribed sentences to reflect those differences. This is a somewhat narrow approach to the matter, as it fails to reflect the aim of the minimum sentencing regime to also prevent the commission of a number of violent crimes, the commission of which is facilitated by the use of certain types of firearms of choice by reason of the particular features thereof, such as the ease with which it can be concealed, and the capacity to fire a number of shots before the need for it to be reloaded. As stated by Kgomo AJA in Tembalethu, the “singling-out of semi-automatic firearms may well have been the result of the frequency with which these firearms have been used in violent crimes.”[29]

[19] Subsequent to the decision in Swartz, the Supreme Court of Appeal, in the decision in *S v Motlounj*[30] confirmed that the Firearms Control Act did not impliedly amend or repeal section 51(2) of the Act, and that Baartman was correctly overruled in Swartz. As in Tembalethu, it was found that the words “Notwithstanding any other law” in the Act not only “preserves other existing laws,” but “includes laws that may be promulgated into the future”. [31] The court further held that there exists no conflict between the sentencing regimes created by the Act and the Firearms Control Act, and that there is no indication that the legislature intended to repeal the former Act by the promulgation of the latter Act.[32]

[20] The trial court was accordingly correct in applying the provisions of the Act to the appellant’s conviction on the charge of the unlawful possession of the firearm. The next question is, whether it was correct in finding that there were no substantial and compelling circumstance to justify a departure from the minimum sentence of fifteen years imprisonment prescribed for the offence in terms of the Act, and therefore, obliged to impose the prescribed sentence. The principles applicable to the enquiry envisaged by the Act were clearly stated by the Supreme Court of Appeal in *S v Malgas*[33] and were endorsed by the Constitutional Court in *S v Dodo*.[34] Those principles have since become well established and it is not necessary to rehearse them in any detail for purposes of this judgment.[35]

[21] The structure of the Act was found not to do away with the principle of proportionate sentencing. In *Dodo* the Constitutional Court confirmed that the approach laid down in *Malgas*, and in particular what it termed the “determinative test” for deciding whether a prescribed sentence may be departed from, gives effect to the principle of proportionality between the offence and the period of imprisonment, and that on the construction given to section 51(2) of the Act in *Malgas*, that section does not infringe upon the rights of the offender guaranteed by section 12(1) (e) of the Constitution.[36] The “determinative test” for when the prescribed sentence may be departed from was stated as follows in *Malgas*:

“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 the sentence, it is entitled to impose a lesser sentence.”[37]

[22] As stated in Vilakazi, it is the principle of proportionality that formed the basis upon which the Constitutional Court found the minimum sentencing

legislation not to be unconstitutional.[38] It is accordingly incumbent upon a sentencing court in every case to assess whether the prescribed sentence is indeed proportionate to the particular offence. What is meant by the “offence” in this context was also made clear by the Constitutional Court in Dodo:

“‘Offence’, as used throughout in the present context, consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender. In order to justify the deprivation of an offender’s freedom it must be shown that it is reasonably necessary to curb the offence and punish the offender.”[39]

[23] The duty of a sentencing court to apply the minimum sentence legislation in a constitutional compatible manner, is therefore to approach sentence, while treating each case on its individual merits and mindful of the need to apply the minimum sentence legislation, in such a manner that it does not result in a sentence that is disproportionate having regard to the peculiar circumstances of the commission of the offence, the personal circumstances of the offender, and the interests of society.

[24] The unfortunate result of the criticism of the sentencing regime introduced by the Act, is that in some instances it also served to influence the reasoning of sentencing courts in their approach to the issue of the proportionality of the prescribed sentences. Proportionality has in some instances been approached from the premise that the prescribed sentences is per se disproportionate. This approach is wrong. It is premised on the notion that the legislature was wrong to lay down 15 years imprisonment as the minimum sentence. As it was correctly stated in Swartz, “That is not a premise on which the court is entitled to act.”[40] The reasoning adopted is usually that the prescribed sentence is out of kilter with the sentences ordinarily imposed for the offence in question, or that the prescribed sentence is not commensurate with the seriousness or lack thereof of the offence in question. This is then illustrated by having regard to sentences imposed by the courts in the past for the same offence.

[25] In *S v Matyityi*[41] the Supreme Court of Appeal, with reference to *Malgas*,[42] emphasised that the courts are obliged to impose the prescribed sentences despite any personal doubts about the efficiency of the

policy underlying the Act, or the presence of a personal aversion to the minimum sentencing regime.[43] In *Dodo* the Constitutional Court found that the *Malgas* approach to sentencing constituted “an appropriate path, which the Legislature doubtless intended, respecting the Legislature’s decision to ensure that consistently heavier sentences are imposed in relation to the serious crimes while at the same time promoting the spirit, purport and objects of the Bill of Rights.” The proper approach, according to *Matyityi*, is that the point of departure of the sentencing court must be that the prescribed sentences are generally appropriate for the kind of

offences specified, unless there are substantial and compelling factors justifying a departure therefrom.[44] This is consistent with what Cameron J in *Centre for Child Law v Minister of Justice*[45] said are the two operative effects of the minimum sentencing legislation:

“First, the statutorily prescribed minimum sentences must ordinarily be imposed. Absent ‘truly convincing reasons’ for departure, the scheduled offences are ‘required to elicit a severe, standardised and consistent response from the courts’ through imposition of the ordained sentences. Second, even where those sentences do not have to be imposed because substantial and compelling circumstances are found, the legislation has a weighing effect leading to the imposition of consistency.”[46]

[26] The enquiry envisaged by the Act calls for the sentencing court to independently apply its mind to the question whether the circumstances of the particular case are such as to render the prescribed sentence disproportionate, that is, that there is an absence of a just relationship between the prescribed sentence, the gravity of the offence in the context of the particular case, and the moral blameworthiness of the offender. In determining whether the imposition of the prescribed sentence will be unjust requires a consideration of all the factors which are traditionally taken into consideration when assessing an appropriate sentence, which includes both the mitigating and the aggravating features of the case.[47] “The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick (‘substantial and compelling’) and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained”.[48] If the sentencing court is satisfied on a consideration of the circumstances of the particular case that the prescribed sentences

would be disproportionate to the crime, the offender and the interests of society, it is entitled to impose a lesser sentence.[49] When it then imposes a lesser sentence the court is obliged to take into account the benchmark set by the Act, thereby acknowledging the seriousness with which the Legislature views the particular type of offence.[50] This obligation is the second operative effect of the Act alluded to by Cameron J in *Centre for Child Law v Minister of Police*. [51] In *S v Abrahams*[52] this was explained as follows:

“The prescribed sentences the Act contains play a dual role in the sentencing process. Where factors of substance do not compel the conclusion that the application of the prescribed sentence would be unjust, that sentence must be imposed. However, even where such factors are present, the sentences the Act prescribes create a legislative standard that weighs upon the sentencing court’s discretion. This entails sentences for the scheduled crimes that are consistently heavier than before.”[53]

[27] In argument, the appellant placed reliance on the judgment of this Court in *S v Madikane*[54] for the submission that the prescribed sentence of fifteen years imprisonment must be reserved for exceptional cases. The

premise of this argument is that the prescribed sentence must be regarded as being disproportionate a priori, and must only be applied as the exception. This argument is incorrect. It is inconsistent with the clear and unambiguous

intention of the Legislature that the sentencing court is obliged to comply with the minimum sentence regime unless it is satisfied that there are substantial and compelling circumstances that justify the imposition of a lesser sentence.[55] It is further inconsistent with the nature of the enquiry envisaged in *Malgas*, and the mandate of the sentencing court conducting the enquiry to approach the question whether there are substantial and compelling

circumstances present conscious of the fact that the legislature has ordained the prescribed sentence as the sentence that should

ordinarily be imposed for the offence in question, unless it is satisfied that there are truly convincing reasons for departing from them.[56]

[28] The judgment in *Madikane* presents a number of difficulties. In the context of addressing the proportionality of the prescribed sentence the court in *Madikane* had regard to a number of reported judgments on sentence for the unlawful possession of a semi-automatic firearm.[57] The conclusion reached was that it was “unable to find any case apart from *Tembaletu*, either prior to or after the coming into operation of the Criminal Law Amendment Act, in which a sentence of 15 years imprisonment has been regarded as appropriate for the possession of a semi-automatic pistol.”[58] This is followed by the statement, relied upon in argument by the appellant that “A sentence of 15 years imprisonment also appears to be exceptional in cases involving the unlawful possession of automatic firearms.”[59] (my emphasis). The appellant’s argument is effectively that by parity of reasoning, and the use of the word “also” in the quoted sentence, the imposition of the minimum sentence of fifteen years imprisonment must be regarded as the exception in respect of cases involving semi-automatic firearms. This argument is bolstered by the fact that in its assessment of what

would be proportionate, the court in *Madikane* noted that in most of the cases considered by it, the sentence imposed tended to be in the region of two years, and concluded:

“Even if allowance is made for the imposition of more severe sentences for the offence of the unlawful possession of a firearm that is automatic or semi-automatic as a result of the application of the Criminal Law Amendment Act, it seems to me that a sentence of 15 years’ imprisonment is unlikely to be proportional to the crime, the criminal and the legitimate needs of society in all but the most serious of cases.”[60]

[29] It may very well be so, as stated by Nugent JA in *Vilakazi*, that “it might turn out that the prescribed sentence is seldom imposed in cases that fall within the specified category”[61] of cases under in the Act. However, that conclusion may only be reached in the appreciation that it is made after applying the principles in *Malgas*, and without making any a priori assumption about the proportionality of the prescribed sentence. On a reading of *Madikane* it is evident that the suggestion that the imposition of the minimum sentence is the exception, was primarily based on the view that 15 years imprisonment is per se disproportional for the unlawful possession of a pistol, and to illustrate this apparent disproportionality, the court proceeded to embark on a review of sentences imposed for

firearm offences in the past in a number of reported judgments.[62]

- [30] A consideration of sentences imposed in the past in other similar cases generally serves a very limited purpose and is of assistance only insofar as those sentences indicate a general trend and therefore a measure of consistency in pursuit of the concept of predictable outcomes. Otherwise, “Other sentences imposed can never be regarded as anything more than guides taken into account together with other factors in the exercise of the judicial discretion in sentencing.”[63] The individualisation of the sentencing process envisaged by section 51(2) of the Act, as expressed in the Malgas principles, militates against the notion that there should be an a priori disposition against the appropriateness of the prescribed minimum sentence, and that the prescribed sentence should not be imposed

unless there are exceptional or weighty considerations justifying its imposition. As stated by Marais JA in Malgas,[64] it is an understandable tendency for sentencing courts to use, even only as a starting point, past sentencing patterns as a provisional

standard of comparison when deciding whether the prescribed sentence would be regarded as unjust. The learned Judge, however

qualified this by emphasising that “As long as it is appreciated that the mere existence of some discrepancy between them cannot be the sole criterion and that something more than that is needed to justify departure, no great harm will be done.”[65]

- [31] As the court pointed out in Delpont, a further difficulty with the reliance in Madikane on the existence of a sentencing pattern in the region of two years imprisonment for the offence of the unlawful possession of a semi-automatic firearm, is the fact that all but one of the past judgments considered by the court, concerned convictions under the repealed Arms and Ammunition Act in which the maximum sentences were much lower than those introduced by the Firearm Control Act.[66] “Moreover, many of them (the judgments considered in Madikane) were from a time in our history when the extent of criminal activity involving the use of unlawfully possessed firearms was not as pronounced as it has become in recent years.”[67] Furthermore, the judgments in S v Gwala;[68] S v Sibisi;[69] S v Moleme;[70] S v Zondi;[71] S v Khonye;[72] S v Meyer;[73] S v Metu;[74] S v Ndwane;[75] and S v Limo[76] on which reliance was placed in Madikane as evidence of the existence of a pattern of sentencing were decided before the enactment of the Act, while the judgments in S v Radebe;[77] S v Mooleele;[78] S v Manana[79] and S v Khonye[80] adopted the legal position in Sukwazi, and consequently did not apply the minimum sentence legislation at all. As stated, the decision in Sukwazi was later overruled by the Supreme Court of Appeal in Tembalethu.
- [32] As correctly stated by Binns-Ward J in Delpont, it is unhelpful and inappropriate to compare sentences imposed under a preceding statutory regime:

“when considering an appropriate sentence under the substituted regime if proper regard is not had to the context and effect of the changes introduced by the new legislation. The Arms and Ammunition Act was of 1969 vintage. Any person with experience of life in this country from 1970 to the present will be

acutely aware that the incidence of the possession of stolen and unlicensed firearms and their use in the commission of violent crime has increased enormously during that period; hence the reference in s 2 of the Firearms Control Act to ‘the proliferation of illegally possessed firearms’. It is notorious that fully automatic weapons have been used regularly in some of the most serious and violent manifestations of crime, such as in in-transit cash heists. It is in evident response to the altered environment that the legislature has introduced more severe sanctions. The almost absolute prohibition on the possession of fully automatic firearms and the stringent conditions attached in the very limited circumstances in which such firearms may be possessed reflects the danger that their unauthorised possession is considered to pose to society. The perceived dangers are identified in the purposes of the Act stated in s 2, quoted above. Determining the proportionality of a sentence with undue reliance on sentences imposed in times when the unauthorised possession of firearms posed a lesser threat than it does today and the offence was regarded less seriously is inappropriate. It fails to give due weight in the currently prevailing context to the nature of the offence and interests of society aspects of the Zinn triad.”[81]

- [33] The individualisation of cases envisaged by the enquiry in terms of the Act on an application of the principles stated in *Malgas*, and the unambiguous and peremptory terms of the Act, militate against the notion that, as a point of departure, the prescribed sentence must be said to be “unlikely” to be proportional in “all but the most serious of cases.”[82] Such an approach fails to account for the increased standard of severity of the sentences which the legislature intends should be imposed in respect of the different categories of cases specified in the Act, and that:

“It is within the altered statutory context that the principle of proportionality must be applied integrally as part of a more severe

penal framework not in disregard of it.”[83]

- [34] Accordingly, and to the extent that the judgment in *Madikane* may be authority for the proposition that the prescribed minimum sentence for the unlawful possession of a semi-automatic pistol must only be imposed as exception, I respectfully find myself in disagreement therewith.
- [35] I now deal with the merits of the appeal in this matter against the sentences imposed. The appellant has a previous conviction for the unlawful possession of a firearm. In the absence of evidence that the conviction involved the possession of a semi-automatic firearm, the trial court correctly treated the appellant as a first offender for purposes of section 51 (2) of the Act. The result was that the trial court considered the minimum sentence to be 15 years imprisonment as opposed to the prescribed sentence of 20 years imprisonment in respect of a second offender.
- [36] The personal information of the appellant placed before the trial court in argument was that he was 31 years of age at the time. He left school after having completed grade 10. He was in temporary employment as a taxi conductor earning between R100-00 to R145-00 per day. He is unmarried and has fathered two minor children who are residing with their respective mothers. The appellant has a number of previous convictions that includes theft and the

contravention of the Drugs and Drugs Trafficking Act,[84] the National Road Traffic Act,[85] and the Protection from Harassment Act.[86] The conviction which the trial court considered to be directly relevant to the present matter, was his conviction in 2015 for the unlawful possession of a firearm in respect of which he received a suspended sentence of 5 years imprisonment. His conviction in this matter constituted a breach of the conditions of that sentence and was correctly considered by the trial court as being an aggravating factor that must be given due weight in determining whether a departure from the prescribed sentence is warranted. It is a material factor relevant to making an assessment whether the accused can be expected to offend again and what his prospects of rehabilitation are. The appellant's criminal record is not indicative of an amenability to rehabilitation or reform.

- [37] In the context of applying the principle of proportionality it is incumbent to consider the circumstances in which the offence was committed. As stated in Delport:

“There will undoubtedly still be a gradation of seriousness attached to the unlawful possession of firearms. In this respect much will turn on the circumstances in which the unlawful possession occurred. There will be cases in which it will be evident that the possession, although unlawful, was relatively innocuous and that the weapon was unlikely to have been kept or used for any nefarious purpose. A sentence of 15 years’ imprisonment in such cases would clearly be disproportionate, and irreconcilable with a constitutionally compatible implementation of the prescribed minimum sentence regime. There will often be an evidential burden on an accused person to give an explanation showing that his possession of the unlicensed firearm was relatively benign.”[87]

- [38] With regard to the circumstances of the commission of the offences, this case has several features that point to the seriousness thereof. There is nothing which may indicate that the appellant's possession of the firearm and the ammunition was for any purpose other than for a criminal purpose. The appellant failed to provide any explanation that may serve to mitigate his possession. He instead chose to falsely accuse the two police officers of having fabricated the charges. The appellant carried the firearm on his person in a concealed manner, and attempted to get rid of it when he realised that he was about to be searched by the police officers after they had stopped the taxi in which he was a passenger. The firearm was loaded at the time and there is evidence that it was used in an unlawful shooting, that took place a month earlier.

- [39] The appellant had been in custody for 2 years before he was sentenced. The trial court was cognisant of this fact and quite properly took it into account as a factor relevant to the enquiry. It was quite clearly, justifiably so in my view, not persuaded that this was, by itself, a sufficient reason in the circumstances to depart from the prescribed minimum sentence. As stated in *S v Fortune*,[88] the question raised by the fact that an accused person has spent time in custody awaiting his trial, is whether the period of incarceration, taken together with the prescribed sentence, “would render a sentence so disproportionate to the offence of which the accused had been convicted as to amount in the context of all the relevant factors to substantial and compelling circumstances, warranting the imposition of a lesser sentence.”[89]

- [40] One of the traditional factors that must, according to Malgas be weighed by the sentencing court in determining the proportionality of the prescribed sentence, is the interests of society. In this context the trial court correctly took into account the prevalence of the commission of the offences in question and the use of unlicensed firearms in the commission of violent crime, and more particularly, in the unlawful activities of gangs in the Port Elizabeth area. The city is plagued by gangsterism and violent crimes in certain of its areas. It is evidenced by the number of gang related cases that involve violent crimes committed with unlicensed firearms that serve before the Port Elizabeth High Court and other courts in its jurisdictional area. It is a relevant factor that the trial court was entitled to take cognisance thereof.
- [41] In the circumstances of this case, it cannot in my view be concluded that a sentence of 15 years imprisonment is disproportionate to the crime, the criminal and the interests of society so that the imposition of the minimum sentence would constitute an injustice. There accordingly exists no reason to interfere with the trial court's finding that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence than the prescribed minimum sentence. I am further satisfied that the sentence of 3 years imprisonment imposed in respect of the appellant's possession of ammunition was an appropriate sentence. It was not suggested otherwise. The trial court correctly ameliorated the cumulative effect of the two sentences by ordering it to run concurrently.
- [42] Accordingly, and for the foregoing reasons, the appeal against the convictions on counts 5 and 6, and the sentences imposed in respect thereof, is dismissed.

D VAN ZYL

DEPUTY JUDGE PRESIDENT

I agree.

J EKSTEEN

JUDGE OF THE HIGH COURT

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Judgment

Delivered: 29

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[1] R v Dhlumayo and Another 1948 (2) SA 677 (A) at 705 to 706; S v Naidoo and Others 2003 (1) SACR 347 (SCA) at paragraph [26]; S v Francis 1991 (1) SACR 198 (A) at 198J to 199A and S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645F-F.

[2] S v Prinsloo 2016

(2) SACR 25 (SCA) at paragraph [183].

[3] Cameron J in Centre for Child Law v Minister of Justice 2009 (2) SACR 477 (CC) at paragraph [16].

[4] Centre for Child Law v Minister of Justice.

[5] 2009 (1) SACR 552 (SCA).

[6] S v Madikane 2011 (2) SACR 11 (ECG) at paragraph [20].

[7] Madikane at paragraph [20].

[8] Madikane at paragraph [21] and Delpont v S [2016] 2 All SA 504 (WCC) at paragraph [4].

[9] 2002 (1) SACR 619 (N).

[10] 75 of 1969.

[11] At page 622 to 624 of the judgment.

[12] “Law means any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law.” Section 2 of the Interpretation Act 33 of 1957.

[13] See by way of example S v Moleele 2003 (2) SACR 255 (T); S v Radebe 2006 (2) SACR 604 (0) and S v Manana 2007 (1) SACR 62 (T).

[14] 2009 (1) SACR 50 (SCA).

- [15] 2003 (1) SACR 13 (SCA).
- [16] Sukwazi at paragraphs [9] and [11].
- [17] Paragraphs [6] and [7].
- [18] 60 of 2000.
- [19] 2011 (2) SACR 79 (WCC). Baartman was followed in *S v Motloun* 2015 (1) SACR 310 (GP).
- [20]
- [2014] ZAWCHC 113 (4 August 2014).
- [21] Paragraph [16] of the judgment.
- [22] Paragraphs [15] and [16].
- [23] Paragraph [19].
- [24] Paragraph [23].
- [25] Paragraph [30].
- [26] Note 7 above.
- [27] At paragraph [18].
- [28] See paragraph [9] of that judgment.
- [29] Paragraph [11]. In *Delpont* at paragraph [38] the Court similarly pointed to the fact that heavier penalties have been provided for the unlawful possession of a firearm by reason of “the propensity of criminals to use such weapons in the perpetration of violent crime. In assessing the gravity to be attached to the offence of unlawful possession of firearms, due regard must be had to the objects inherent in the creation of the statutory offences and the attendant sanctions, namely the prevention of crime and the disincentivising of the unlawful possession of firearms in a country in which the proliferation of the possession of illegally possessed firearms has become, and continues to be, a very menacing evil.”
- [30] 2016 (2) SACR 243 (SCA)
- [31] At paragraph [20].
- [32] See paragraph [22] of the judgment.
- [33] 2001 (1) SACR 469 (SCA).
- [34] 2001 (1) SACR 594 (CC).
- [35] These principles are dealt with in paragraph [25] of the *Malgas*

judgment.

[36] Dodo at paragraph [40]. Also paragraph [27].

[37] Malgas paragraph [25]. Also at paragraph [22].

[38] Paragraph [14].

[39] Paragraph [37]. Also Vilakazi at paragraph [15].

[40] Paragraph [42].

[41] 2011 (1) SACR 40 (SCA) at paragraph [23].

[42] See Malgas paragraph [9] where Marais JA said the following: “Speculative hypothesis favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances.”

[43] See also paragraph [20] in Malgas.

[44] At paragraphs [11] and [18]. Malgas at paragraph [25].

[45] Note 3 above.

[46] Paragraph [17].

[47] Malgas at paragraph [22]. Also Vilakazi at paragraphs [15] and [18], and *S v Vermeulen* 2004 (2) SACR 174 (SCA) at paragraph [28].

[48] Malgas at paragraph [25].

[49] Malgas at paragraph [22].

[50] Malgas at paragraph [25]. See also *S v Mvumvu* 2005 (1) SACR 54 (SCA) at paragraph [17].

[51] See paragraph [25] above.

[52] 2002 (1) SACR 116 (SCA).

[53] At paragraph [25].

[54] Note 5 above.

[55] Matyityi at paragraph [23].

[56] Malgas at paragraph [25]. Matyityi at paragraph [23].

[57] At paragraphs [24] to [30].

[58] Paragraph [24].

[59] Paragraph [25].

[60] Paragraph [31].

[61] Paragraph [18].

[62] Paragraphs [24] to [30].

[63] *S v Jimenez* 2003 (1) SACR 507 (SCA) at paragraph [6] and *S v Mukuyu* 2017 (2) SACR 27 (GJ) at paragraph [25].

[64] At paragraph [21].

[65] Paragraph [21].

[66] Paragraph [27].

[67] Paragraph [27].

[68] 1994 (2) SACR 653 (A).

[69] 1998 (1) SACR 248 (SCA).

[70] 1994 (1) SACR 1 (A).

[71] 1995 (1) SACR 18 (A).

[72] 2002 (2) SACR 621 (T).

[73] 1992 (1) SACR 685 (E).

[74] 1995(2) SACR 681 (A).

[75] 1995 (2) SACR 697 (A).

[76] 1995 (1) SACR 404 (O).

[77] Note 11 above.

[78] Note 11 above.

[79] Note 11 above.

[80] Note 70 above.

[81] Para [36].

[82] Madikane at paragraph [31].

[83] Delport note 7 above at paragraph [38].

[84] 140 of 1992.

[85] 93 of 1996.

[86] 17 of 2011.

[87] Paragraph [39].

[88] 2014 (2) SACR 178 (WCC).

[89] Paragraph [15].

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