

SOUTH AFRICA / JUDGMENT

Molao v S (A44/2024) [2025] ZAGPPHC 647 (9 June 2025) [2025] ZAGPPHC 647

COURT

North Gauteng High Court, Pretoria

BEFORE

W Domingo, L.A. Retief

CASE / FILE NUMBER

A44/2024

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: A44/2024

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

DATE

9 June 2025

SIGNATURE

In

the matter between:

JAMES

MOLAO

Appellant

and

THE

STATE

Respondent

This

judgment is prepared and authored by the Judge whose name is reflected as such and is handed down electronically by circulation to

the parties/ their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for

handing down is deemed to be June 2025.

JUDGMENT

DOMINGO, AJ (RETIEF, J CONCURRING)

INTRODUCTION

[1] This is an appeal against the conviction and sentence imposed upon the appellant, James Molao on a charge of attempted murder by the presiding Magistrate, Ms N.L. Moila on the 23 May 2023 in the Regional Magistrate Court in Springs [Court a quo].

[2] On 28 February 2023 the appellant pleaded not guilty on the following charges:

2.1 Count 1, attempted murder, that on 19 August 2021 at Springs in the regional division of Gauteng the appellant unlawfully and intentionally attempted to kill Sergeant Mashala, a male person, by pointing a firearm at him and pulling the trigger;

2.2 Count 2, possession of a firearm, that is contravening section 3 of the Firearms Control Act 60 of 2000, in that the same day, 19 August 2021, at Springs in the regional division of Gauteng, the appellant unlawfully had in his possession a nine millimetre pistol without holding a licence in terms of the Act to possess same;

2.3 Count 3, pointing of a firearm, that is contravening section 120(6)(a) of the Firearm Control Act 60 of 2000, in that the same day, 19 August 2021, the appellant pointed a firearm or air gun or antique firearm which was loaded and capable of discharging, that is a nine millimetre pistol, to another person, which was Sergeant Mashala.

2.4 Count 4, impersonating a police officer, that is contravening section 68(1) of Act 68 of 1995, in that the same day, 19 August 2021 at Springs in the regional division of Gauteng, the appellant unlawfully and internationally pretended to be a member of the South African Police Services.

- [3] On the evidence before the Court a quo, the appellant was convicted on counts 1 and 4 and the appellant was found not guilty by the Court a quo on counts 2 and 3.
- [4] On 23 May 2023, the Court a quo imposed a sentence of eight years imprisonment for count 1 and two years imprisonment for count 4. The Court a quo ordered that the sentences on counts 1 and 4 run concurrently in terms of section 280(2) of the Criminal Procedure Act 51 of 1977 [Criminal Procedure Act].
- [5] The appellant throughout the trial proceedings was legally represented. The appellant chose not to testify thus the appellant did not challenge the evidence of the state witnesses. The appellant also did not call any witnesses to testify on his behalf.
- [6] The state relied on the evidence of two witnesses, namely, Sergeant Leseba Mantato Solomon Mashala [Sergeant Mashala] and Sergeant Modise Ben Kholofelo Makgoale [Sergeant Makgoale].
- [7] The appellant applied for leave to appeal in respect of both conviction and sentence on 23 May 2023. His application for leave to appeal was refused. The appellant then petitioned for leave to appeal to the High Court and on 2 August 2023, the appellant's leave to appeal on conviction and sentence was granted only on count 1, attempted murder.
- [8] Before proceeding to deal with the grounds raised by the appellant in his filed petition, this Court will consider the evidence and thereafter the Court a quo's findings.

EVIDENCE

- [9] Sergeant Mashala testified that on 19 August 2021 he was driving and doing patrol duty with Sergeant Makgoale when he noticed the appellant walking in the street. The appellant was wearing a police uniform which did not exhibit any rank structures or name tag. After calling out to the appellant and inquiring from him which police station he was from, the appellant pulled out a firearm and pointed it directly towards Sergeant Mashala. At this time of the incident Sergeant Mashala was seated together with Sergeant Makgoale in the police vehicle and Sergeant Mashala had his window rolled down. The appellant pulled the trigger of the firearm, and Sergeant Mashala immediately ducked. The firearm did not discharge. The appellant ran away, and Sergeant Mashala and Sergeant Makgoale alighted from their vehicle and chased after him. A Sergeant Galushi and Sergeant Phokane who were also in the area noticed Sergeant Mashala and Sergeant Makgoale chasing the appellant and they assisted them in apprehending the appellant. The firearm was

seized from the appellant and one round was found in the magazine. The appellant was unable to present a firearm licence.

- [10] Sergeant Makgoale's testimony corroborated that of Sergeant Mashala. Sergeant Makgoale testified that he was doing crime prevention with Sergeant Mashala. They noticed the appellant walking while wearing a police uniform without any rank structures or bearing a name tag. The appellant was stopped and questioned. The appellant pulled out a firearm

which he cocked, and pointed at them and he pulled the trigger. When the appellant realised that the firearm did not discharge, he ran away. They chased after the appellant and finally managed to apprehend him with the assistance of other police colleagues. The firearm was seized from the appellant by Sergeant Phokane, who handed the firearm to Sergeant Mashala. The firearm was booked in terms of the SAP13 procedure and placed in a bag and sealed with a number. One round was found in the magazine of the firearm.

[11] The defence placed on record that they were not admitting that the weapon seized from the appellant was a semi-automatic firearm. The prosecution postponed the trial in order to call a ballistic expert. After consultation, the prosecution decided not to call the expert to testify, as it would not take the case any further. The ballistic report was however handed in as Exhibit C.

[12] The relevant parts of the ballistic report in terms section 212 of the Criminal Procedure Act, inter alia reads as follows:

“6.1 The blank pistol is designed or manufactured to discharge only 9mm P.A.K calibre blank cartridges.

6.2 The barrel of the blank pistol is obstructed with an insert that prevents it from propelling a bullet or projectile through the barrel.

7.1 The device was manufactured or designed to discharge centre-fire blank pepper ammunition.”

[13] The appellant’s legal representative applied for the appellant to be discharged in terms of section 174 of the Criminal Procedure Act, as amended on counts 1, 2 and 3 as the firearm alleged to be in the appellant’s possession was not a firearm.

[14] The state conceded that the firearm was analysed by Warrant Officer Ngobeni as per Exhibit C and it was a blank pistol, and blank pistols are excluded from the Firearms Control Act 60 of 2000 [Firearms Control Act].

COURT A QUO’S FINDINGS

[15] The Court a quo held that for a conviction on count 2 and 3 the state had to prove that the weapon found in possession of the appellant was a firearm as defined in section 1 of the Firearms Controls Act. According to the South African Explosives Act[1] blank guns are excluded from the Firearms Control Act and a user does not have to require a license to possess blank guns. As a result, thereof, and the state’s concession that blank pistols are excluded from the Firearms Control Act, the Court a quo ruled that on count 2 and 3 the appellant was discharged in terms of section 174 of the Criminal Procedure Act as amended.

[16] The Court a quo then proceeded with the charge of attempted murder and held according to the trial proceedings record that:

“The elements of attempted murder does not include that the firearm in question must be a firearm as defined in section 1 of the Firearms Control Act. The elements of attempted murder are attempt to kill another person unlawfully with intent to kill, and the application to discharge the accused in terms of section 174 on count 1 is refused.”

- [17] The Court a quo in evaluating the totality of evidence placed before it agreed with the version of the state while being mindful of the merits of the case as the only evidence placed before it was the state’s evidence as the appellant elected to remain silent.
- [18] The reasons proffered by the Court a quo for agreeing with the version of the state are that the state led the evidence of two police officers who were patrolling on crime prevention. The witnesses corroborated each other’s testimonies in material respects as to what transpired at the scene of the incident. The two witnesses had no motive to implicate the appellant; it was common cause that they did not know the appellant prior to the incident. The evidence is that the appellant pulled a gun, pointed it at Sergeant Mashala, cocked it, and pulled the trigger. Upon realising that it did not fire that is when the appellant ran away. By pulling the trigger the appellant knew that the firearm would fire. His intention was to kill; he did not know the firearm would jam. The firearm in possession of the appellant was a blank pistol. The Court a quo held that “while blank cartridges are less dangerous than live ammunition they can still be dangerous and can still cause fatal injuries. If blanks are shot closer than a couple of feet they can be deadly. Attempted murder is the failed or aborted attempt to murder another person.” The Court a quo found that the appellant by pulling the trigger, had the intention to kill Sergeant Mashala. The Court a quo in its findings focussed on the action and intention of the appellant.
- [19] In exercising its sentencing discretion the Court a quo was mindful of the purposes of sentencing being retribution, prevention, deterrence and rehabilitation. The Court a quo made reference to the *S v Swart*[2] case where the Supreme Court of Appeal held that retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. In determining a sentence that is just and fair, the Court a quo considered the triad of factors as set out in the *S v Zinn*[3] case. The Court a quo took into account the appellant’s personal circumstances, the nature of the crimes, including the gravity and extent, and the interest of the community. The Court a quo also referred to *S v Rabie*[4] where the Court held that punishment should fit the criminal, as well as the crime, be fair to society and be blended with a measure of mercy.
- [20] The Court a quo in exercising its sentencing discretion had regard to the appellant’s personal circumstances that he was 43 years old, married with two children aged 12 and 3 years old, he was a personal trainer earning R3 000 per month and that the highest standard he passed was grade 10. Furthermore, the Court a quo had regard to the the five previous convictions of the appellant that happened 10 years ago. The Court a quo took into account that the sentences that were previously given to the accused did not rehabilitate him and that the victim in Count 1 was a police officer. The Court a quo noted that “society is crying out loud on crimes against our police officers who are supposed to take care of the

community. Police officers are being attacked daily and killed.” From the evidence the Court a quo held that Sergeant Mashala was affected emotionally, as he testified that he was lucky to be alive. The Court a quo held that what aggravated this incident even more was that the appellant wore a police uniform, and he did not learn any lessons from his previous brush with the law. Thus, all of that proved that the appellant was a violent person who is a danger to society.

- [21] The Court a quo thus sentenced the appellant to eight years imprisonment on count 1 and two years imprisonment on count 4, to run concurrently. In terms of section 103(1) of the Firearms Control Act, the appellant was previously declared unfit to possess a firearm, the Court a quo ruled that this status quo would remain. Furthermore, the Court a quo held that in terms of section 103(4) of the Firearms Control Act, the Court ordered a search and seizure of all firearms and ammunition which might still be in the possession of the appellant.

GROUND OF APPEAL

- [22] The appeal against conviction on count 1, attempted murder is based on the following submissions made by the appellant. The Court a quo:

22.1 Erred in finding the blank firearm was capable of inflicting a fatal shot at close distance, there was no expert testimony in this regard;

22.2 Erred in finding the state had proved its case beyond reasonable doubt;

22.3 Erred in finding the essential elements of the charge had been proved, particularly the intention aspect on the count of attempted murder;

22.4 Erred in finding the version of the accused to not be reasonably possibly true.

- [23] The appeal against sentence on count 1, attempted murder is based on the following submission made by the appellant:

23.1 The sentence is shockingly inappropriate.

23.2 The Court a quo should have given more regard to the duration of the sentence.

- [24] It was submitted by counsel of the appellant that the state’s witnesses conceded that they did not observe the appellant pulling the trigger. There was no evidence that when the two witnesses ducked, the weapon was still aimed at Sergeant Mashala. Thus, there was no direct evidence that the appellant pulled the trigger. There was no evidence that the appellant thought that the weapon will shoot. It was submitted that the appellant was in possession of a weapon designed to fire “blank pepper ammunition.” The evidence in fact proved that the weapon that was found in possession of the appellant was not a firearm in terms of the Firearms Control Act.

- [26] The Court directed both the appellant and respondent's counsel to Annexure C, of the trial proceedings record which was the attempted murder charge sheet. An issue that was not canvassed in detail in the notice of appeal was the glaring fact that the charge sheet stated that the appellant was charged with the attempted murder of Sergeant Mashala by "pointing a firearm at him and pulling the trigger."
- [27] Counsel for the respondent directed the Court to the case of Anthony v S[5] and averred that even in robbery cases, where the complainant is threatened with a toy firearm during a robbery, the perpetrator must be convicted with robbery with aggravating circumstances which would attract a minimum sentence of 15 years imprisonment because the complainant is threatened with bodily harm and for that reason, aggravating circumstances are present.
- [28] The court was not convinced with this submission by Counsel as the present case was distinguishable in that the charge sheet specifically mentioned that the unlawful and intentional attempt to kill Sergeant Mashala was done by "pointing a firearm at him and pulling the trigger."
- [29] This Court finds that in the absence of a finding of guilty on the charges of count 2 (possession of a firearm) and count 3 (pointing a firearm) it cannot logically and factually be held that the appellant can be found guilty of attempted murder by "pointing a firearm." From the record in this matter, it is clear from the evidence that the weapon found in the possession of the appellant was not a firearm as defined in section 1 of the Firearms Control Act. In the premises, this Court finds that the Court a quo erred in finding the appellant guilty on the charge of attempted murder as its findings on conviction did not align with the attempted murder charge brought against the appellant in accordance with the charge sheet on record. Thus, this Court finds that the Court a quo erred in finding the essential elements of the charge of attempted murder had been proved, and furthermore this Court finds that the Court a quo erred in finding that the State had proved its case beyond reasonable doubt. The appellant's second and third ground of appeal stands to be upheld.
- [30] Having regard to the record of proceedings, the appellant remained silent throughout the trial proceedings and did not testify as a result his version of events was not placed before the Court a quo. In the circumstances, this Court finds that it cannot be held that the Court a quo erred in finding the version of the appellant to not be reasonably possibly true, when the Court a quo never heard the appellant's version of events. As a result, the appellant's fourth and final ground of appeal must fail.
- [31] In conclusion, the the appellant's appeal against his conviction on count 1 is upheld and it follows that the sentence on count 1 falls. The appellant's conviction and sentence in respect of count 4 stands.

ORDER

- [32] I propose that the following order is made:

32.1 The appeal is upheld and the conviction on count 1 and the resultant sentence is set aside.

32.2 The conviction and sentence on count 4 stands.

W DOMINGO

ACTING JUDGE OF THE HIGH COURT

PRETORIA

I agree and so it is ordered.

L.A. RETIEF

JUDGE OF THE HIGH COURT

APPEARANCES

For the Appellant: ADVOCATE VAN WYK instructed by LEGAL AID SOUTH AFRICA For the
Respondent: ADVOCATE L.A. MORE instructed by DIRECTOR OF PUBLIC PROSECUTIONS

[1] Act 26 of 1956 and Act 15 of 2003.

[2] 2004

(2) SACR 370 (SCA).

[3] S v Zinn 1969

(2) SA 537 (A).

[4] 1975 SA 855 (A).

[5] 2002

(2) SACR 453 (C).

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Prepared on 9 October 2026 · Esheria