

SOUTH AFRICA / JUDGMENT

**S v A R; S v R B; S v A C (B5/2019; B78/2019;
SHA70/2018) [2019] ZAWCHC 146; 2020 (1)
SACR 580 (WCC) (1 November 2019)**
[2019] ZAWCHC 146

COURT

Western Cape High Court, Cape Town

BEFORE

K M Savage, L J Bozalek

CASE / FILE NUMBER

B5/2019; B78/2019; SHA70/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

High

Court Ref No: 19517

Magistrate's

Serial No: 04/19

Case

No: B5/2019

In

the matter between:

THE

STATE

and

AR Accused

High

Court Ref No: 19686

Magistrate's

Serial No: 08/19

Case

No: B78/2019

RB Accused

High

Court Ref No: 19687

Magistrate's

Serial No: 126/19

Case

No: SHA70/2018
AC Accused

JUDGMENT

SAVAGE J:

Introduction

- [1] Three matters came before me on automatic review in terms of s 302(1) of the Criminal Procedure Act 51 of 1977 (as amended).
- [2] In *S v AR*, on 18 April 2019, the 15 year old accused was convicted of assault with the intent to do grievous bodily harm. The minor accused, who was born on 11 June 2003, was sentenced in terms of s 72 of the Child Justice Act 75 of 2008 to a community-based sentence on condition that he is monitored by a probation officer within the period of one year, he attends school, socialises with friends from his own peer group and attends programs offered by the Department of Social Development. The magistrate recorded on the J15 form under sentencing that the accused was “not unfit to possess firearms”.
- [3] In *S v RB*, on 25 July 2019, the 16 year old accused was convicted of housebreaking with the intent to steal. The magistrate ordered that in terms of s 78 of Act 75 of 2008 the passing of sentence on the minor accused, who was born on 19 May 2003, was suspended until 15 August 2021 and the accused was released on condition that he appears in front of a magistrate if he is called do to so before the date of suspension. The magistrate recorded on the J15 form under sentencing that the accused was “not unfit for a firearm”.
- [4] In *S v AC*, on 5 June 2019, the 16 year old accused was convicted of assault with the intent to do grievous bodily harm. The minor, who was born on 28 December 2002, was sentenced in terms of s 76 of Act 75 of 2008 to compulsory residence in Horizon Youth Care Centre for a period of 18 months. The magistrate recorded on the J15 form under sentencing that no order was made in terms of s 103(1) of Act 60 of 2000.
- [5] Having first received the *S v AR* matter, on 7 August 2019 I sent the following enquiry to the magistrate:
- ‘On what basis and acting in accordance with which statutory provision was it determined in the J15 that the 15 year old accused was “not unfit to possess firearms”’.
- [6] The magistrate replied on 3 September 2019 stating:
- ‘In terms of section 103 Act 60 of 2000 subsection (1) “Unless the court determines otherwise a person became unfit to possess a firearm if convicted of
- (g) any offence including violence...”’.

The court was of the opinion that the accused person is 15 years old and could not apply for a firearm licence because he can only apply for such licence after he has reached the age of 18 years. To declare him at such a young age unfit for a firearm can jeopardise his future. He can change his life and become a good citizen of this country in the future and want to possess a firearm.

This was the reason why the court note[d] on the J15 that the accuse[d] person at this stage is “not unfit to possess a firearm”

’.

Section 103 of the Firearms Control Act

Section 103(1)

[7] In terms of s 103(1) of the Firearms Control Act 60 of 2000, unless the court determines otherwise, a person convicted of an offence set out in s 103(1)(a) - (o),[1] “becomes unfit to possess a firearm”. The default position is that of unfitness to possess a firearm unless the court, having regard to relevant facts and circumstances,

determines otherwise.[2]

[8] In *S v Mkhonza*,[3] which concerned the loss of a firearm by the accused, it was recognised that some cases falling under s 103(1) may not be “very serious”, and that if regard is had to the personal circumstances of the accused there may be “no justification for disqualifying the accused from the right to possess a firearm”. [4] What is required in such circumstances is that an accused should be invited to place before the court facts which may be relevant to such a determination where such an order “otherwise” is sought. [5]

[9] Gun ownership is not a fundamental right under our Bill of Rights. It is a privilege regulated by law, under the Firearms Control Act,[6] the purpose of the Act, as stated in s 2, is to:

“(a) enhance the constitutional rights to life and bodily integrity;

- (b) prevent the proliferation of illegally possessed firearms and, by providing for the removal of those firearms from society and by improving control over legally possessed firearms, to prevent crime involving the use of firearms;
- (c) enable the state to remove illegally possessed firearms from society, to control the supply, possession, safe storage, transfer and use of firearms and to detect and punish the negligent or criminal use of firearms;
- (d) establish a comprehensive and effective system of firearm control and management; and
- (e) ensure the efficient monitoring and enforcement of legislation pertaining to the control of firearms.”

[10] Section 3(1) provides that no person may possess a firearm without the requisite licence, permit or authorisation. Any right to possess a firearm requires a firearm licence for which a competency certificate is required.[7] This certificate may only be issued to a person who is 21 years old; is a South African citizen or permanent resident; is a fit and proper person to possess a firearm; is of stable mental condition and not inclined to violence;[8] and has not been convicted of an offence violence or sexual abuse.[9]

[11] In the three matters before this court the accused are minors who have been convicted of crimes involving either violence or dishonesty (housebreaking). That portion of s 103(1) relevant for current purposes is therefore the following:

“(1) Unless the court determines otherwise, a person becomes unfit to possess a firearm if convicted of –

...(g) any offence involving violence, sexual abuse or dishonesty, for which the accused is sentenced to a period of imprisonment without the option of a fine;...”

[12] Since none of the accused have been sentenced to a period of imprisonment without the option of a fine, s 103(1) does not apply and it follows that the reference by the magistrate to the applicability of this subsection in both S v AR and S v AC was erroneous.

Section 103(2)

[13] Unlike s 103(1), in terms of s 103(2) a court “must enquire and determine” whether a person convicted of a crime listed in Schedule 2 is unfit to possess a firearm. Section 103(2) reads as follows:

“(a) A court which convicts a person of a crime or offence referred to in Schedule 2 and which is not a crime or offence contemplated in subsection (1), must enquire and determine whether that person is unfit to possess a firearm.

(b) If a court, acting in terms of paragraph (a), determines that a person is unfit to possess a firearm, it must make a declaration to that effect.”

[14] The provisions of this subsection are peremptory and the court seized of the matter is obliged to conduct an enquiry under the section.[10] In S v Phuroe en Agt Ander Soortgelyke Sake[11] the factors to be considered by a court in determining whether the accused was fit to possess a firearm were stated to include

- (a) the accused’s age and personal circumstances; (b) the nature of any previous convictions; (c) the nature and seriousness of the crime of which he has been found conviction and the connection that the crime has with the use of a firearm; (d) whether there is any indication that the accused may make use of his or her licensed firearm for the purpose of committing offences; and
- (e) whether it is in the interests of the community that the accused be declared unfit to possess a firearm because of the fact that he or she poses a potential danger to the community.

[15] Schedule 2 sets out the crimes and offences which oblige the court to undertake the enquiry in terms of s 103(2)(a),[12] including –

“7. Any crime or offence –

...(c) involving violence, sexual abuse or dishonesty, in respect of which an accused was not sentenced to a period of imprisonment without the option of a fine;...”

[16] A narrow interpretation was given to paragraph 7(c) of Schedule 2 by the court in S v Makolane[13] where it was stated that:

“As regards [s103(2)], and only in respect of a jail term with an option of a fine, would a court be under an obligation to make an enquiry to establish whether or not such declaration of unfitness to possess a firearm is justified...”

[17] In that matter the court was concerned with an admission of guilt fine under s 57A of the Criminal Procedure Act, finding that in such instance since there was no court appearance, there could be no declaration made by the court in terms of s 103(2)(b).

[18] An enquiry in terms of s 103(2)(a) is peremptory where an accused has been convicted of a crime or offence detailed in paragraph 7(c) of Schedule 2, in respect of which the accused has not been sentenced to a term imprisonment without the option of a fine. Paragraph 7(c) does not provide that an enquiry is only required

where the sentence imposed is imprisonment with the option of a fine, as stated in Makolane. As much is apparent from a plain reading of paragraph 7(c) from which it is clear that what is contemplated is any sentence imposed save for imprisonment without the option of a fine.

[19] In each of the three matters before me, I am satisfied that the convictions are in accordance with justice, as do the sentences imposed in S v AR and S v AC and the decision to suspend the passing of sentence in S v RB. The sentence of compulsory residence at a child and youth care centre imposed in S v AC, having regard to s 76(3)(a) of the Child Justice Act, does not constitute a sentence of imprisonment for purposes of s 103(1) or s 103(2) since the Child Justice Act clearly differentiates between imprisonment and compulsory residence. This is apparent from the fact that the Act empowers a court to impose, in addition to a sentence of compulsory residence, a sentence of imprisonment to be served after completion of the period of compulsory residence.[14]

[20] Each of the three matters involve a sentence contemplated by paragraph 7(c) of Schedule 2. Each accused has been convicted of a crime involving either violence or dishonesty and has not been sentenced to a period of imprisonment without the option of a fine. It follows that on conviction the court was required in terms of s 103(2)(a) to enquire and determine whether “that person is unfit to possess a firearm”. It appears that in each matter such an enquiry was conducted albeit cursorily.

[21] The purpose of s 103(2) is to ensure that the court seized with a matter which falls within the ambit of the provision, with knowledge of all relevant facts, determine whether to declare a person unfit to possess a firearm. It is only where a court “determines that a person is unfit to possess a firearm” in terms of s 103(2)(a) that “it must make a declaration to that effect” in terms of s 103(2)(b). The Act does not require a declaration that a person is “not unfit” to possess a firearm, or indeed that such person is “fit” to possess a firearm. Where unfitness is determined a declaration is required, but the converse does not apply.

[22] Having regard to s 103(2) and the stated purpose of the Act, I consider it to be in the interests of justice that any declaration made be limited to that which is expressly required by s 103(2)(b). It is relevant that the three matters before me involve the conviction of child offenders who have fallen foul of the criminal justice system. Declaring a youthful offender to be fit to possess a firearm prospectively, which could only be relevant some years in the future when he or she may lawfully apply for a firearm licence, is not required by the Act and does not appear to be what was contemplated by the legislature. The effect of such a “fitness”

order is that it risks sending an inappropriate message to the young offender that despite violent criminal conduct he or she is

considered fit to possess a firearm. In the context of the serious challenges faced by this country with violent crime, and the

consequent suffering and loss that it causes, I do not consider such an order to be in the interests of justice.

[23] It follows for these reasons that the declaration by the magistrate in *S v AR* that the accused is “not unfit to possess firearms” and in *S v RB* that he is “not unfit for a firearm” do not accord with the provisions of s 103(2)(b). Although in *S v RB* sentencing was postponed, the court appears to have been required in terms of s 103(2) on conviction to determine whether the accused was unfit to possess a firearm in terms of s 103(2). In both *S v AR* and *S v RB*, to the extent that the magistrate sought to record that that the court had had regard to the provisions of s 103(2) and decided to make no declaration of unfitness, it should properly have stated that no order was made in terms of s 103(2)(b) and not that the accused was not unfit to possess a firearm, since the statute required no such declaration. In *S v AC* the magistrate had regard to whether a declaration of unfitness should be made and, although incorrectly relying on s 103(1), determined that no such order should be made. That decision cannot be faulted.

Order

[24] In the result, the following orders are made:

1. In *S v AR*:

1.1 The conviction and sentence of the accused is in accordance with justice, save for the order that the accused is “not unfit to possess firearms” which order is set aside and replaced with the following:

“No order is made in terms of s 103(2)(b) of the Firearms Control Act 60 of 2000”.

2. In S v RB:

2.1 The conviction of the accused and the decision to postpone sentence is in accordance with justice, save for the order that the accused is “not unfit for a firearm” which order is set aside and replaced with the following:

3. In S v AC:

3.1 The conviction and sentence of the accused is in accordance with justice.

3.2 The recordal that no order is made in terms of s 103(1) is corrected as follows:

K M SAVAGE

Judge of the High Court

L J BOZALEK

Date of judgment: 1 November 2019

[1] Save for s 103(1)(g), included are the unlawful possession of a firearm or ammunition; any crime involving the unlawful use or handling of a firearm; the failure to store firearms or ammunition in the manner required by the Act; the negligent handling or loss of a firearm; the unlawful handling of a firearm while under the influence of an intoxicating or narcotic substance; an offence involving the abuse of alcohol or drugs or the dealing in drugs; commission of a crime in which a firearm was used; an offence under the Firearms Control Act or Explosives Act 26 of 1956 when sentenced to prison without the option of a fine; domestic abuse; sabotage, terrorism, public violence, arson, intimidation, rape, kidnapping or child stealing; or a conspiracy, incitement or attempt to commit any of the offences set out in s 103(a) – (n).

[2] See Hiemstra Criminal Procedure (2018) at 28-2 to 28-3; S v Mkhonza [2009] ZAKZPHC 9; 2010

(1) SACR 602 (KZP); [2009] 3 All SA 358 (KZP) at para 14.

[3] S v Mkhonza (supra).

[4] At para 21.

[5] Masakazi v S [2007] JOL 20613 (E).

- [6] Minister of Safety and Security v South African Hunters and Game Conservation Association [2018] ZACC 14 at para 1.
- [7] Section 9(1).
- [8] Section 9(2)(a)-(d).
- [9] Section. 9(2)(h)(i).
- [10] S v Mkhonza (supra) at para 17 with reference to S v Smith 2006
- (1) SACR 307 (W) at paras 8 and 11; S v Maake 2007
- (1) SACR 403 (T) at para 18.
- [11] 1991
- (2) SACR 384 (NC) at 387 a-d.
- [12] These include (in addition to para 7(c) of Schedule 2), high treason; sedition; malicious damage to property; entering any premises with the intent to commit an offence under the common law or a statutory provision; culpable homicide; extortion; any conspiracy, incitement or attempt to commit any offence referred to in Schedule 2; and a conviction under the Firearms Control Act which results in a sentence which is not imprisonment without the option of a fine.
- [13] 2006 (1) SACR 589 (T) at 592I-593A.
- [14] See A v S
- [2016] ZANHC 5 at para 11.

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