DECLARED UNFIT TO OWN A FIREARM

Are the courts playing a role?

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This article is a follow up to a previous article dealing with the role of the police in declaring a person unfit to possess or own a firearm.[1] Similarly, it draws on a study[2] that examined how the criminal justice system excluded unfit persons from firearm ownership; the primary legal means being sections 11 and 12 of the old Arms and Ammunition Act, no. 75 of 1969. Section 12(1) refers to persons who are automatically declared unfit due to a conviction for a crime involving a firearm. Section 12(2) refers to the discretionary declaration of unfitness upon conviction for certain other crimes. As a result of the large number of crimes that are committed with firearms and the number of firearms that are stolen from legal gun owners, there is a drive by the criminal justice system to reduce the amount of firearms, both legal and illegal, in circulation. This article concentrates on s12 and reveals a number of shortcomings by both prosecutors and magistrates in the application of this section. These may have a considerable impact on the effective implementation of the new Firearms Control Act.[3]

The GunFree SA / Technikon SA study found that magistrates rarely overturned automatic declarations (where a person was convicted in a matter involving the use of a firearm) as stipulated in the legislation. However, because such a declaration is 'automatic', magistrates tended not to record the ruling, and if they did so, recorded it with the cryptic phrase "no order is made". This has lead to widespread confusion, particularly within the police, who have interpreted the phrase to mean that the court did *not* declare the person unfit.

Moreover, while the law gives the court discretion to declare a person unfit in instances not involving a firearm, prosecutors interviewed said that they tended to use these provisions only in cases involving violence.

The courts and declarations of unfitness

Broadly, section 12 of the Arms and Ammunition Act (s12)[4] refers to the declaration of a person to be unfit to possess or own a firearm on conviction of certain crimes not necessarily involving a firearm. S12 is divided into two parts, namely s12 (1), which is the so-called 'automatic deeming' provision, while s12 (2) deals with the discretionary declaration provision.

Automatic unfitness on conviction in court

In terms of s12 (1), any person convicted of the following offences is deemed to be unfit, unless the court determines otherwise:

- Possessing a firearm without a licence;
- Willfully pointing a firearm at another person;
- Failing to safeguard or to take reasonable steps to safeguard such a firearm, i.e. failing to lock away (in the prescribed safe, strong-room etc.) a firearm when it is not in his/her lawful possession, under his/her direct control, or is not carried on his/her person;
- Negligent loss of a firearm, including as a result of theft arising from the failure to lock away or take reasonable steps to safeguard the firearm;
- Unlawful discharge of a firearm thereby injuring or endangering another person or his/her property, or negligent handling of a firearm (whether discharged or not);
- Handling a firearm while s/he is under the influence of liquor or a drug which has narcotic effect, or supplies an arm to a person whom s/he knows or should reasonably suspect to be under the influence of liquor or a drug which has a narcotic effect; and
- Any offence in which a firearm was used to commit the offence (unless the conviction follows payment of admission of guilt fine).

In other words, the convicted person is ***automatically*** considered by the law to be unfit to possess a firearm on conviction of any of these offences, unless the court decides to the contrary. This judicial discretion is intended to give the accused an opportunity to present reasons why such a declaration should not be made. Procedurally, magistrates and judges are required to record such a declaration in terms of s12 (1) as 'no order is made'. This is usually done on the SAP 69 form, which records the conviction and sentence of the accused.

Discretionary unfitness on conviction in court

In terms of s12 (2), the court has discretion to declare any person who has been convicted of an offence contained in Schedule 2 of the Act unfit to own a firearm, unless the conviction follows on an admission of guilt fine. Schedule 2 offences include:

- High treason
- Sedition
- Terrorism
- Subversion
- Sabotage
- Public violence
- Intimidation
- Murder
- Malicious injury to property
- Rape
- Assault
- Robbery
- Theft of game
- Breaking or entering any premises, whether under the common law or a statutory provision, with the intent to commit an offence
- Kidnapping
- Child stealing
- Culpable homicide
- Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

The court may make such an order even where the offence was committed ***without*** the use of a firearm. In these instances, the person is not automatically deemed to be unfit to possess a firearm, but the court may make an explicit order to that effect. Procedurally this would be in response to a recommendation by the prosecutor. This situation would usually provide an opportunity for the accused to forward reasons why such a declaration should not be made.

The court is required by s12(3) to bring the provisions of these subsections to the attention of the convicted person and give him or her an opportunity to advance reasons and give evidence as to why he or she should not be declared unfit to possess a firearm.

Results of interviews with magistrates and prosecutors[5]

All the magistrates interviewed were of the opinion that a person convicted of any of the offences listed in s12(1) is automatically declared unfit to possess a firearm. Moreover, as is required by law (s12(3)), magistrates said they do inform the accused that s/he has been automatically declared unfit. This normally occurs after sentencing, and the accused is afforded the opportunity of giving reasons why such an order should not be made. According to

magistrates, the accused typically argue the following:

"I need a firearm if one day I'm employed as a security guard."
"I need it for protection."
"I may want to become a police officer."

Magistrates are, however, guided by the offence committed, and can rarely be swayed by such reasons. Yet they have found that unlicensed firearm holders are unconcerned about the declaration, since they obtain firearms illegally anyway.

Some of the magistrates complained that few prosecutors alert them to the prospect of a declaration of unfitness. They averred that it was the prosecutor's responsibility to bring the section to their attention. Magistrates attributed the failure to do so to two factors namely, the prosecutor's lack of experience and the fact that they do not regard it as their duty to warn magistrates of such a declaration. One magistrate remarked "they expect the defence attorney to place on record that he does not want the accused to be declared unfit". And, according to another magistrate, "just about every case we hear is a s12 enquiry".

Most of the prosecutors admitted that they did not, as a matter of course, alert magistrates to the possibility of a declaration because "usually the court brings up the issue automatically and there is no need for the prosecution to raise the issue", or, "it is usually the magistrate who brings it up... the magistrate is normally ahead of the prosecution on the issue".

Whether or not magistrates are alerted to the prospect of an automatic declaration of unfitness is purely academic because this is primarily reliant on administrative action. The confusion may have little practical effect because the primary mechanism of enforcement is through the administrative actions of the Central Firearms Register (CFR). If an accused applies for a firearm licence the CFR will be able to determine whether the offence for which s/he was convicted attracted an automatic declaration of unfitness. In this way, the CFR would prevent him or her from obtaining a firearm licence.

There seems to be some differences in the interpretation and application of s12(2) amongst magistrates. With respect to s12(2), the vast majority of magistrates said they would declare an accused unfit for any crime involving violence. They cited murder with a knife, robbery, culpable homicide, serious assault, rape, high treason, housebreaking, public violence, domestic violence and any other crime involving violence as examples. However, a few magistrates found it difficult to make a declaration of unfitness where a firearm was not involved. "I would not declare anyone unfit because it is not necessary if a firearm was not used", one magistrate said.

In addition, the role of the prosecutor is important. One of the magistrates said

...unless it comes out in the court proceedings that the accused may have a firearm - a possible declaration of unfitness would not spring to mind for a magistrate considering a case not involving a firearm. Otherwise, it would only come up if the prosecutor were to suggest it.

Another remarked "with crimes not involving a firearm, if there is no request from the state (prosecutor) then the issue will not come up and is ignored."

A few of the prosecutors interviewed did not request declarations of unfitness in respect of s12(2); either because there was no firearm involved, or they had no knowledge of the provision. One of the prosecutors averred that "s12(2) is never invoked", and another thought that this section was never used anywhere in South Africa. Furthermore, a minority were of the opinion that "some ignore it because the SAPS will do the [s11] enquiry". A s11 enquiry is held by the police, irrespective of whether or not a person has been convicted of a criminal offence.

It appears as if s12(2) is not used as often as it could be, given the fact that magistrates are of the opinion that 99% of violent crime matters are heard in the regional courts. This section should be used more often so as to reduce the incidence of violent crime and instil a respect for human rights. It is

preferable that there is judicial action rather than a reliance on administrative action.

In order to determine whether magistrates were routinely declaring people unfit to possess a firearm in terms of s12, the researchers examined 158 SAP 69 forms at the Criminal Record Centre (CRC).[6] The CRC is tasked with the responsibility of keeping a record of all offences committed by people in the country. When a firearm application is sent to the Central Firearms Register for approval, the CFR requests the CRC to check whether the applicant has a criminal record. The 158 forms consisted of crimes ranging from murder to negligent loss of a firearm.

The most prevalent crime (49%) in the sample was assault with the intent to commit grievous bodily harm (assault GBH).[7] Rape constituted 8% of the sample, whilst robbery and murder each accounted for 7%. Culpable homicide made up 4%, attempted murder 3%, and domestic violence 1%. Possession of arms and ammunition (3%) and negligent discharge of a weapon (3%) were some of the other crimes included in the sample. Most of these crimes fall within the category of offences specified in s12(2) listed above.

The sentences were examined in order to determine whether the offence attracted an automatic declaration or a declaration in terms of s12 (2) of the Act.

In the vast majority (88%) of cases, the magistrates did not specifically state on the SAP 69 whether or not the accused had been declared unfit to possess a firearm. That section of the SAP 69 was simply left blank.[8] In only 6% of the cases in the sample did the magistrates expressly state that the accused had been declared unfit.

Problems experienced

'No order made'

According to a trainer at Justice College, magistrates have been taught to use the phrase 'no order is made' for s12(1) and should write it down on the SAP 69 form. Where the accused is not declared unfit, the magistrate should note the following on the SAP 69; 'the accused is not deemed unfit to possess an arm' – a rather obscure but legally correct way of stating that the accused is fit to possess a firearm.

A problem also arises when magistrates do not explicitly indicate whether an accused has been declared unfit. For example, investigating officers who collect the dockets from the courts are puzzled by two things; by the phrase 'no order is made', and by the lack of accurate record keeping.[9] The confusion is however, not only confined to investigating officers – it extends to staff at the CRC who record the information from the SAP 69 forms on to their systems.[10]

Communication between courts and police

There was a difference of opinion amongst magistrates and prosecutors as to who was responsible for informing investigating officers of the declarations of unfitness. The vast majority of magistrates interviewed were of the opinion that it was not their duty to do so. They felt that the prosecutors have a responsibility to record such information on the cover of the police docket, thereby notifying the police.

Prosecutors felt that their role in informing investigating officers or the CFR of an order was limited to noting the information on the charge sheet or the docket. In addition, they averred that it was the duty of the investigating officer to ensure that such information is relayed to the CFR.

Accurate record keeping

Prosecutors indicated that magistrates are responsible for completing the SAP 69 forms and should ensure that such information is accurately captured. In some cases prosecutors complete the SAP 69 forms and magistrates are required to inspect them for accuracy and sign off these forms.

In spite of this, many of the prosecutors interviewed highlighted poor record keeping as an issue of concern.

> *What worries me is that I don't know what happens to the court record. The charge sheet is a public document, and we write it on the sentence and the declaration order. We don't know what happens to the order.*

The clerk is supposed to record it. There is also a place on the SAP 69 for this but it is not our responsibility to follow up on this which goes to the CRC.

Also,

Overall checking and scrutiny is not being done as it was in the past. In the past, a senior magistrate would check each charge sheet before being filed. This has now fallen away.

Irrespective of who is responsible for completing the SAP 69 form, it still stands to reason that all the pertinent information must be accurately recorded. The overview of SAP 69 forms at the CRC suggests that there is a systematic failure to do so.

The impact of declarations of unfitness

During the interviews with magistrates, the majority expressed concern about the impact of declarations of unfitness. Their greatest concern was whether such orders were in fact carried out. They asked questions such as,

What purpose do these orders serve?
What does the SAPS do?
How do they put these orders into effect?
What are the practical implications of the order?'

They did not seem to know what happens beyond the order being made. These concerns should be read in the context of high levels of crime and the assertion of magistrates that 99% of regional court cases involve serious violent crime – and, moreover, that the ***majority*** of the accused who appear before such magistrates are in fact unlicensed firearm holders.

Despite magistrates' concerns about the implementation of declarations of unfitness, the study found that 9% of applicants had their applications turned down by the CFR because they had been declared unfit to possess a firearm by the courts.

Furthermore, in terms of s14(2) of the Arms and Ammunition Act, the order may be set aside after a period of two years. The person against whom the order was made can appeal in writing to the Chairperson of the Appeal Board and request a discharge. The Chairperson of the Appeal Board stated that the lifting of such an order would depend on the seriousness of the contravention committed. In a case of an automatic declaration of unfitness, the Appeal Board examines the conviction, the criminal record of the person, and the merits of each case. Although there are no guidelines or regulations to consult in this regard. it is estimated that 20 declarations are lifted each month.

This is potentially a problem, because magistrates often make orders for specific periods of time, that is, 99 years or three years, after they have considered the facts of the case and perused the record of the accused. Nevertheless, it is reassuring that the Appeal Board has criteria according to which declarations are lifted and that there appears to be careful consideration with respect to each matter. In terms of the new Firearms Control Act a person can apply for the declaration to be uplifted after five years.

Conclusion

In order to address the concerns raised in this article, prosecutors and magistrates need to be re-trained on the merits of s12(2), and should also be made aware of the provisions of Chapter 12 section 103 of the new Firearms Control Act that deals with similar issues. This is sorely needed in order to ensure optimal effectiveness of the Act in reducing the incidence of violent crime.

The lack of knowledge displayed by magistrates and prosecutors about the effectiveness and implementation of declarations of unfitness points to poor co-ordination and co-operation between the courts and the police. In addition, the lack of communication within the courts amongst magistrates and prosecutors regarding such declarations is of serious concern.

Regional court presidents and senior public prosecutors must take the initiative and discuss issues of co-ordination and effectiveness in order for the courts to play a more meaningful role with respect to declarations of unfitness. It is not prudent to merely rely on the police to hold s11 enquiries.

Until then, the failure of the courts to fulfil their role indicates a denial of their responsibility.

Endnotes

1 See A. Minnaar & D. Mistry. Unfit to own a firearm? The role of the police in firearm control. *SA Crime Quarterly*, No. 4. June 2003, pp. 31-36.

2 See D. Mistry, A. Minnaar, J. Redpath & J. Dhlamini. *The role of the criminal justice system in excluding unfit persons from firearm ownership*. Gun Free SA/Institute for Human Rights & Criminal Justice Studies, TechnikonSA. December 2002.

3 Even though the new Firearms Control Act (60 of 2000) was passed in October 2000, at the time of this study (July-October 2002) it had still not been promulgated in its entirety. The full implementation of the new Act is still some way off since new draft regulations requiring public comment to reach the Central Firearms Register (CFR) by 29 April 2003 were only gazetted on 27 March 2003. These were the third set of draft regulations in the long process of implementation of the Act. Estimations by the head of the CFR were that it would be at least another six months after April before the regulations were finalised so that they could be implemented. Only at that time would all the provisions of the Act be officially promulgated in their entirety.

4 In the new Firearms Control Act provision for section 12 declarations is made in Chapter 12, section 103. This section broadly follows s12 while incorporating all the s39 provisions but with additional clarifications of offences namely:
   - 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 (s103 (1) (h))
   - any offence involving physical or sexual abuse occurring in a domestic relationship as defined in section 1 of the Domestic Violence Act, 1998 (Act No. 116 of 1998); or any offence in terms of this Act for which the accused is sentenced to a period of imprisonment without the option of a fine (s103 (1) (i) & (j)
   - any offence in terms of the Explosives Act, 1956 (Act no. 26 of 1956) for which the accused is sentenced to a period of imprisonment without the option of a fine (s103 (1) (m)

5 For the study 92 separate interviews or focus group sessions were undertaken by the researchers with police, prosecutors, magistrates and women's organisations in the four provinces of Gauteng, the Western Cape, KwaZulu-Natal and the Eastern Cape, covering both urban and rural areas.

6 A total of 376 SAP 69 files were perused but 158 were closely scrutinised.

7 Figures may not add up to 100% due to rounding off.

8 More recent SAP 69 forms have the following question: Has the accused been declared unfit to possess a firearm? Tick Yes or No. This should ease record keeping for magistrates, prosecutors and the police.

9 See previous article by Minnaar and Mistry.

10 Ibid.