

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: A38/2014
Appeal Date: 4 August 2014

In the matter between:

MDUDUZI KHUBHEKA

Appellant

And

THE STATE

Respondent

JUDGMENT

- [1] The appellant was accused 1 in the court a quo where he was convicted together with his co-accused, accused 2, by the Regional Magistrate, Johannesburg on a number of charges.
- [2] On count 1 he was convicted of robbery with aggravating circumstances having robbed the complainant of R400 cash and a cell phone after hitting the complainant over the head with a firearm. He was sentenced to ten years' direct imprisonment.
- [3] On count 2 he was charged with robbery of a firearm, but was only found guilty of a contravention of section 36 of Act 52 of 1956, being in possession of suspected stolen property i.e. a firearm without being able to supply a reasonable explanation for such possession. On this charge he was sentenced to five years' imprisonment.
- [4] On count 3 he was convicted of possessing an unlicensed firearm being a Norinco pistol with serial number 47002233. This is the firearm mentioned

in count 2 that was found in his possession and which was licensed in the name of Mr More. He was sentenced to five years' imprisonment on this charge.

[5] On count 4 he was found guilty of the unlawful possession of ammunition, being three live rounds. He was sentenced to four years' direct imprisonment on this charge.

[6] The court a quo ordered that the sentences imposed on counts 3 and 4 were to be served concurrently which meant that the appellant was effectively sentenced to a term of twenty years' imprisonment.

[7] With leave, the appellant now appeals both the convictions and the sentences. He was legally represented throughout his trial.

COUNT 1

[8] The State offered the testimony of three eyewitnesses to the assault and robbery of the complainant which occurred on 14 February 2006 in Bree Street in front of the entrance to a tavern by the name of "Abangane" at about 16:45 in the afternoon. The complainant, Mr Ncube and his girlfriend Portia walked down the pavement in Bree Street past the aforesaid tavern. As they passed its entrance, they were surrounded by five men who demanded money and his cell phone. One of them had a firearm which was pointed at the complainant. A fight broke out between the five assailants and the complainant which was witnessed by two policemen, Messrs Mabotja and Matjeke who both testified for the state. The assailant in possession of a firearm hit the complainant over the head with the firearm causing blood to be spilled on the assailant's white T-shirt.

[9] The two policemen ran to the scene to break up the fight. Four of the assailants fled in one direction and another fled back into the tavern at the approach of the policemen. The complainant followed the assailant who went back into the tavern and found him hiding in the toilet. He returned to the street and told the police that one of his assailants was hiding in the toilet in the tavern. The police then arrested that assailant, who was accused 2 in the court a quo.

[10] Mabotja saw the complainant being assaulted with a firearm while trying to remove the complainant's cellphone and cash. When the assailants fled, Mabotja followed the assailant armed with a firearm but lost sight of him when he disappeared into a taxi rank. He discontinued the chase and returned to Bree Street and the tavern. There he was told by the complainant that one of the assailants is hiding in the tavern where he then arrested accused 2. Accused 2 was told that he would be released if he could lead them to the assailant who was in possession of the firearm and who assaulted the complainant. As a result accused 2 led them to his own flat where they found the girlfriend of accused 2 as well as a white T-shirt with blood marks on it. Accused 2 and his girlfriend then, according to Mabotja, led them to a flat in Hillbrow. While there, the police received a phone call that led them to another flat where they found the appellant. The appellant was not wearing a shirt. The police arrested the appellant and brought him to their car where the complainant immediately indicated to them that the appellant is the person who assaulted him with a firearm. The appellant also was found in possession of the stolen firearm containing three live rounds belonging to Mr More stashed away in a laundry bag.

[11] The complainant's girlfriend Portia indicated the appellant as the complainant's attacker who hit him over the head with a firearm. Her

evidence amounted to a dock identification. She did, however, confirm the complainant's evidence that the person who attacked him with a firearm was of a dark complexion.

[12] The complainant gave a description of the appellant as follows:

“He was dark in complexion and then he had shaved hair. And then he was wearing a white T-shirt and with red eyes.”

When the police brought the appellant to him, he immediately identified the appellant as the assailant who attacked him with a firearm. In the light thereof there was no point in holding an identification parade as the complainant had already identified soon after the event the attacker who robbed him and assaulted him with a firearm.

[13] The effect of this evidence is that three State witnesses namely the complainant, his girlfriend Portia and the policeman Mabotja identified the appellant as the assailant who pointed the firearm at the complainant, demanding money and the cell phone and eventually assaulting him by hitting the complainant over the head with the firearm. Furthermore on the evidence of the police and the complainant, accused 2 led them to the appellant. Absent in the evidence of accused 2 is any indication at any stage that he told the police that they had apprehended the wrong person and that the appellant is not his “friend”. In addition, the charge sheet indicates the same address for both the appellant and the second accused. They must have known one another.

[14] The appellant's version amounts to an alibi. He denied having been involved in the incident. He also denies knowing accused 2 although both of them hail from Zimbabwe. In this regard he is contradicted by the evidence of accused 2 who said that he told the police his “friend, in whose company he was”,

stayed in Hillbrow. They drove to a particular flat, entered the flat and reappeared with the appellant. The only reasonable inference to be drawn from these facts is that accused 2 indeed led the police to the appellant, because they were friends and known to one another.

[15] Much was made by counsel for the appellant of a contradiction in the state's case. The complainant said the firearm was silver whereas Mabotja said it was black. In my view, nothing turns on this. The state's case is not that the robbery was committed with a specific firearm. For all we know, it could have been a toygun. The specificity of a firearm is only relevant to counts 2 and 3 and not count 1.

[16] In my view the evidence against the appellant on count 1 is overwhelming and for that reason his alibi was correctly dismissed as not reasonably possibly true.¹

[17] For the reasons aforesaid the appeal against the conviction on count 1 cannot succeed.

COUNT 2

[18] The evidence of Mr More was unchallenged. He testified to be the licence holder of the firearm found in the flat where the appellant was found. This firearm was proved to be a semi-automatic pistol in working order together with the three live rounds also found with the firearm by an expert.²

[19] In the light of the aforesaid evidence, it is clear that the weapon found in possession of the appellant was stolen and since he was unable to give any reasonable explanation for his possession thereof, he was correctly convicted

¹ See **S v Van Eck en 'n Ander** 1996 (1) SACR 130 (A) at 135d – e

² See Affidavit by Johannes van Rooyen handed in as an exhibit pp. 44 – 47 of the Record

for a contravention of section 36. For this reason the appeal against the conviction on count 2 can also not succeed.

COUNTS 3 AND 4

[20] The evidence of the unlawful possession of the firearm mentioned in count 2 and the ammunition found in the appellant's possession is in my view sufficient to warrant the convictions on counts 3 and 4. In my view, there is therefore no merit in the appeal against the convictions on counts 3 and 4.

SENTENCE

[21] In my view, the court a quo took into account all relevant factors and did not commit any misdirection, material or otherwise, in sentencing the appellant on count 1. There is no basis for this court of appeal to interfere with the discretionary order issued by the court a quo in regard to that sentence. However, it is correct that counts 2, 3 and 4 all arise from the same set of facts, i.e. the appellant having been found in possession of Mr More's firearm and live rounds. In my view, the court a quo should have ordered the sentences on these counts to run concurrently. Its failure to do so, in my view, amounted to a misdirection, entitling this court of appeal to interfere with a portion of the order on sentence imposed by the court a quo.

CONCLUSION

[22] I therefore make the following order:

1. The appeal against the convictions is dismissed.
2. The appeal against the sentence on count 1 is dismissed.

3. The appeal against the sentences imposed on counts 2, 3 and 4 is upheld and those sentences are set aside and substituted with the following:

“Accused 1 is sentenced to five years’ imprisonment on count 2, five years’ imprisonment on count 3 and four years’ imprisonment on count 4. It is ordered that the sentences on counts 3 and 4 are to be served concurrently with the sentence on count 2. The accused is effectively sentenced to fifteen years’ imprisonment.”

4. The amended sentence is antedated to the date of sentence, i.e. 28 July 2006.

DATED THE 7th DAY OF AUGUST 2014 AT JOHANNESBURG



C. J. CLAASSEN
JUDGE OF THE HIGH COURT

I agree



PP

M. A. MAKUME
JUDGE OF THE HIGH COURT

It is so ordered.

Counsel for the Appellant: Attorney J. Penton

Instructed by: Johannesburg Justice Centre

Counsel for the Respondent: Adv P. Schutte

Instructed by: The Director of Public Prosecutions

Argument was heard on 4 August 2014

Judgment is delivered on 7 August 2014