

IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG DIVISION, PRETORIA

Case Number: 910/06

In the matter between:

GEORGE MARTIN HODGKINSON **Appellant**

and

THE STATE

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO ☒ YES

(2) OF INTEREST TO OTHER JUDGES: YES/NO ☒ NO

(3) REVISED: ☒

16/10 Respondent

CASE SIGNATURE

JUDGMENT

1. This appeal demonstrates how easily the mighty apparatus of the criminal law may be brought into operation and render results that are both unwarranted and unnecessary. This appeal represents the end of a criminal trial that had its origin on the 11th December 2004. A seemingly innocuous practical joke was elevated, (if that is the correct expression) to a grave offence that had to be tried in the Magistrates’ Court, requiring at least four appearances there, an application for leave to appeal against the – rather unfortunate – conviction and a hung Court of Appeal that necessitated the referral to a Full Bench of the High Court, resulting in an acquittal after the appellant had obviously spent many thousand Rand in legal costs. The court intimated that the reasons for the eventual decision would be supplied later. They follow below.

2. The appellant was convicted in the Magistrates' Court for the district of Pretoria North of a contravention of Section 120 (6)(b) of the Firearms Control Act 60 of 2000 and was sentenced to payment of a fine of R 2 000, 00 or 90 days' imprisonment in default of payment. The whole sentence was suspended for three years on condition that the appellant was not convicted of having contravened the said section during the period of suspension.
3. The appellant appealed with leave of the court *a quo*.
4. His appeal was heard on the 17th March 2009, but as the members of that court could not agree, the matter had to be referred to the full court, which upheld the appeal and set aside the conviction and sentence.

Section 120(6)(b) of the Firearms Control Act 60 of 2000

5. Section 120 (6) of the Firearms Control Act 60 of 2000 ("the Act") reads as follows:
It is an offence to point-
 - (a) *any firearm, an antique firearm or an airgun, whether or not it is loaded or capable of being discharged, at any other person, without good reason to do so; or*
 - (b) *anything which is likely to lead a person to believe that it is a firearm, an antique firearm or an airgun at any other person, without good reason to do so.*
6. The appellant was charged with both offences created by this statutory provision in the alternative. He was convicted of the alternative count.

The facts

7. The appellant is the owner and manager of a motor vehicle agency known as Stetson Motors, doing business in Pretoria North.
8. The complainant, Mr Phillemon Kupedi Molekwa, was employed as a general labourer by the accused until the 11th December 2004.
9. The appellant testified that a water pistol had been kept in the office of this business for a considerable period of time prior to the incident that led to his prosecution.
10. This water pistol was lying openly in the office and the appellant and his employees, including the complainant, would indulge in some practical jokes from time to time and spray water on one another with the water pistol.
11. The presence of the water pistol on the premises was not only well known to everybody who frequented the premises, including the complainant, it was also shaped in such a fashion that no reasonable person would ever mistake it for a real firearm.
12. The appellant is the licensed owner of a handgun that he normally wears on his body for protection. According to the appellant, its shape and size differs completely from the appearance of the water pistol. The real handgun needs to be cocked before it can be fired.
13. The appellant's description of the water pistol and the handgun is supported by two employees who were called as State witnesses.

14. The complainant alleged that he approached the appellant on the 11th December 2004 to enquire from him whether he, the complainant, could occupy the flat that the appellant was having constructed on the business premises.
15. The appellant was emerging from the bathroom at that moment, and when the complainant spoke to him, the appellant turned around, drew the firearm, cocked it and pressed it against his stomach.
16. He denied any knowledge of the water pistol on the premises and insisted that the appellant had drawn the real firearm on him. The appellant was alleged to have acted in an aggressive fashion when doing so.
17. Complainant also denied under cross-examination that the appellant had worn a jacket under which the real firearm would have been hidden.
18. The appellant was supported by the two other State witnesses that were called, Messrs Kruger and Ngubene, that a water pistol was on the premises and that the complainant himself had played with it in the past.
19. Mr Kruger furthermore confirmed the correctness of the appellant's version as far as the events of the morning in question were concerned, namely that the appellant had emerged from the bathroom with the filled water pistol, clearly intent on squirting Mr Kruger with water when the complainant approached him from behind. The appellant turned around and in the process pressed the water pistol against the complainant's body. The latter took fright,

stepped back and fell on his back, but laughed with everybody else in the office at the joke.

20. The complainant came back after some time to enquire about the flat. His request was turned down. He left later in the day and did not return.
21. The appellant denied any intention of threatening the complainant or anybody else.
22. The trial magistrate refused an application in terms of section 174 of the Criminal Procedure Act 51 of 1977, in spite of the support that the state witnesses gave to the appellant's version.
23. The appellant did not contradict himself in the witness stand and created the impression of an honest man who had intended no harm to the complainant and bore him no ill-will.
24. The trial court accepted that the appellant had not pointed his real firearm at the complainant and therefore acquitted him of the charge of pointing a firearm.
25. The magistrate convicted the appellant of the alternative charge, motivating the conviction as follows:
"The state need not prove that the object which was pointed at the complainant was a real gun. All they have to prove is that the complainant believed the object to be a gun..."
26. Bearing in mind that the court rejected the complainant's emphatic evidence that he had been threatened with a real firearm that had actually been cocked in his presence before it was pointed at him, it is difficult to understand on

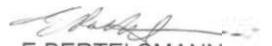
what basis the trial magistrate held that the complainant had believed the toy pistol to be a real gun.

The interpretation of section 120(6)(b)

27. Apart from the foregoing, the trial magistrate erred in the interpretation of the statutory provision. The *mens rea* that has to be proven for a successful prosecution of an alleged offence in terms of section 120(6)(b) is clearly intent, not *culpa* or, as the portion quoted from the trial court's judgment would suggest, strict liability.
28. The fact that the Legislature requires intent as the form of *mens rea* is evident from the wording of the section, '*...without good reason to do so.*' This phrase clearly suggests a conscious decision to point an object resembling a firearm under circumstances that would justify the inherent threat this would constitute against the person at whom such object is pointed.
29. The verb "*to point*" similarly describes a conscious, deliberate action. The Oxford Dictionary (Google version) defines the word as "*direct someone's attention in a particular direction by extending one's finger; direct or aim (something)*".
30. The present statute's predecessor, Act 75 of 1969, expressly provided that the pointing of a firearm had to be wilful to constitute the statutory offence; see *S v Sam* 1980 (4) SA 289 (T); compare further *R v Humphries* 1957 (2) 233 (N) and *S v Van Antwerpen* 1976 (3) SA 399 (T).

31. The present provision is differently worded, but it is clear that the Legislature did not intend to introduce a different test of *mens rea*.
32. The trial court failed to appreciate that intent was an essential element of the offence the appellant was charged with.
33. The conviction and sentence were therefore set aside.

Dated at Pretoria on this ^{15th} day of June 2010.


E BERTELSMANN
Judge of the high Court


W RC Prinsloo
Judge of the High Court


E M Makgoba
Judge of the High Court