



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case Number: A79/2022

In the matter between:

THEMBINKOSI SHADRACK KOEPE

Appellant

and

THE STATE

Respondent

CORAM: MBHELE, DJP *et* REINDERS, J

JUDGMENT BY: REINDERS, J

HEARD ON: 10 OCTOBER 2022

DELIVERED ON: 17 OCTOBER 2022

- [1] The appellant was arraigned in the Regional Court in Welkom on two counts. It was firstly alleged that on 8 March 2018 near Bok Street in Welkom he was in possession of a firearm, namely a 9mm Parabellum Calibre CZ Model 75 semi-automatic pistol, without being the holder of a permit or license issued as envisaged in the Firearms Control Act 60 of 2000 (count one). A second count of possession of ammunition without a permit in terms of Act 60 of 2000

on the same date, time and place was preferred against the appellant (count 2).

[2] Appellant pleaded not guilty to both counts on 25 May 2021. Having heard the evidence of four police officers and after appellant testified, he was found guilty on count one on 13 December 2021. He was acquitted on count two and thereafter sentenced to six years' imprisonment on count one. The Regional Court granted appellant leave to appeal against the conviction.

[3] A summary of the relevant evidence tendered at trial entails the following:

Constable Tie (also referred to as Letehe in the record) testified that on 8 March 2018 he was on duty patrolling Bok Street in Welkom as part of an operation, together with his two colleagues, Warrant Officer Segalo and Sergeant (at the time a Constable) Monyake. They spotted a white Toyota Corolla motor vehicle, sounded the sirens and flashed the lights of the police vehicle. The vehicle was pulled over. On approaching the vehicle, the appellant alighted and started running away. Together with Warrant Officer Segalo they gave chase after the appellant, and whilst running the appellant took out the firearm referred to in the charge sheet and threw it under a stationary taxi. He never lost sight of the appellant and eventually caught up with him, whilst Warrant Officer Segalo, after appellant had thrown the firearm under the taxi, guarded the firearm until the appellant was apprehended. The firearm was retrieved by him from underneath the taxi in the presence of the appellant, and he ensured that it was put into a safe mode. The appellant could not produce a license for the firearm and was arrested. Warrant Officer Segalo and Sergeant Monyake in essence corroborated the aforementioned witness's evidence. Of importance is the evidence of Warrant Officer Segalo that he witnessed the appellant taking out the retrieved firearm from his pants ("his tummy") whilst fleeing. Sergeant Monyake testified that he booked the firearm (and three rounds of ammunition) into the commonly known SAP13 Register. The testimony of the Investigating Officer, Warrant Officer Dlamini, revealed that he received the firearm (and cartridges) sealed in an exhibit bag. He opened the bag, placed the firearm and the three cartridges in separate bags, placed them all back in one bag and

dispatched the bag to the Forensic Laboratory in Pretoria (hereafter the “chain evidence”).

[4] Appellant testified that at the time of the incident he was travelling in a taxi on his way to Home Affairs. As he alighted from the taxi, a police vehicle stopped behind the taxi. The police requested to search him, but he ran away as he had an illegal substance “dagga” in his possession. He discarded the dagga whilst running. The police, who never lost sight of him, caught up with him. On retracing his footsteps, they averred that he had thrown a firearm under a stationary taxi. At the time of the incident he was carrying a bag, containing only a lumbar jacket, over his shoulder. Contrary to what was put to a state witness, namely that the dagga was in the appellant’s bag, the appellant testified that he took the dagga that he had thrown down, from his shirt’s pocket.

[5] The magistrate considered and evaluated the evidence, and found the state witnesses to be good and credible. The appellant’s version was rejected as being false. On that basis she found the state to have proven its case in respect of count one beyond a reasonable doubt. Mr Strauss, representing the state, submitted that in the absence of an irregularity or misdirection by the trial court, a court of appeal is bound by credibility findings thereof, unless it is convinced that such findings are clearly incorrect.

See: **S v Francis** 1991 (1) SACR 198 (A) at 204c-

J v S [1998] 2 All SA 267 (A) at 271c

[6] Mr Mokoena, appearing on behalf of the appellant, summarised the appellant’s grounds of appeal against his conviction (as contained in the appellant’s application for leave to appeal), as follows:

- “(a) The Court a quo erred in finding that the State proved its case beyond reasonable doubt even though there were contradictions on how the firearm was handled;
- (b) The Court a quo erred in convicting the Appellant, not taking into account that the chain evidence was not proven beyond reasonable doubt;

- (c) The Court a quo erred in accepting the evidence of Warrant Officer Dlamini regarding the manner in which the exhibits were handled;
- (d) The Court a quo erred in convicting the Appellant on count 1 but acquitted him on count 2 on the very same evidence;
- (e) The Court a quo erred in rejecting the version of the Appellant as false;"

[7] At the commencement of the proceedings Mr Mokoena submitted "the bone of contention" in this appeal to be the "chain evidence" not being proven beyond a reasonable doubt by the state. When prompted by the court to indicate his view on the magistrate's rejection of the version tendered by the appellant on all the evidence before her, he responsibly did not attempt to convince us that the learned magistrate was wrong in doing so. Relying amongst others on a judgment of this court, **Jantjies v The State** A70/2017 (2017) ZAFSHC 156, he however pressed hard on us to find that the trial court erred in not finding that the chain evidence had been compromised and contaminated. Such a finding, so the argument goes, should have led to the acquittal of the appellant on count one.

[8] Indeed, before us (and as is it appears from the record when the application for leave to appeal was heard) much was said and argued on behalf of the appellant in respect of the evidence tendered by Warrant Officer Dlamini in that he ostensibly had tampered with the evidence in opening the sealed exhibit bag and repacking same. In **Jantjies supra** the conviction appealed against related to a charge of theft of certain firearms. The chain evidence in respect of those firearms was accordingly of vital importance to sustain a conviction. In the matter before us however, the exhibit bag played no role in the offence itself – it being overwhelmingly proven by the accepted evidence on behalf of the state that the appellant ran away from the police officers and threw the firearm referred to in the charge street, under a taxi. Save for purposes of further investigation (for example to determine whether the firearm might have been used in other offences) it was strictly speaking not necessary for purposes of proving count one to send the firearm to a forensic laboratory. Besides, the

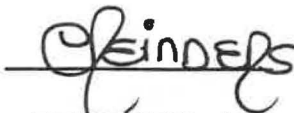
evidence shows that the firearm bearing serial number, M1485 which was booked by Sergeant Monyake in the SAP 13 is the same firearm that was received by the Forensic Science Laboratory for investigation.

[9] The magistrate was therefore correct in convicting the appellant as she did. She did not misdirect herself in respect of any relevant evidence and she applied the legal principles in considering the matter and the appellant's guilt, correctly. Despite the valiant attempts by Mr Mokoena to convince us otherwise in relation to the chain evidence, there is therefore no basis upon which we should interfere with the conviction. The result is that the appeal should be dismissed.

[10] Although no appeal lies against the sentence imposed, I might mention in passing that the learned magistrate in her judgment both on conviction and sentence made reference thereto that the firearm mentioned in the charge sheet as a semi-automatic firearm, should have prompted the prosecution to include that the offence be read with the provisions of the Criminal Law Amendment Act 105 of 1997 (the CLAA), Part II of Schedule 2. A conviction on count one would therefore have triggered the applicability of the minimum mandatory sentences as prescribed by the CLAA, namely imprisonment of not less than respectively 15 years in respect of a first offender, 20 years for a second offender and 25 years for a third or subsequent offender. The learned magistrate correctly indicated that since the appellant was not charged as such, she did not sentence the appellant in accordance with the mandatory sentences prescribed by the legislature.

[11] The following order is made:

The appeal against the conviction on count 1 is dismissed.


REINDERS, J

I concur.


MBHELE, DJP

On behalf of the Appellant:

Adv P Mokoena

Instructed by:

Legal Aid South Africa

On behalf of the Respondent:

Adv M Strauss

Instructed by:

Director of Public Prosecutions