

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: A49/2020

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

SIGNATURE

22 January 2021
DATE

In the appeal of:

TSHWARELO SIBIYA

Appellant

and

THE STATE

respondent

T.A.N. Makhubele J and G.T. Avvakoumides AJ

JUDGMENT

AVVAKOUMIDES AJ

1. The appellant was convicted in the Regional Court, sitting at Oberholzer, on a charge of possession of a firearm together with a charge of possession of

ammunition. The appellant was sentenced to 12 years imprisonment on count 1-, and 3-years imprisonment on count 2 and the Trial Court ordered that the two sentences must run concurrently. The appeal lies against the convictions and sentences.

2. The charges emanate from an incident on 5 April 2018. A security officer, Olwethu Magwanya, testified that on 5 April 2018 he was on duty with a security officer, Mr Nkolisi. At approximately 10h00 that morning they were in the vicinity of a slime dam behind the New Village residential area when Mr Magwanya and his colleague noticed smoke around the slime dam. The two security officers approached the slime dam and noticed four men in the process of burning industrial pipes. When the four men noticed the two security officers they dispersed and started to run away but were successfully apprehended by the two security officers. One of the four, wearing a white T-shirt, threw a firearm to the ground. Mr Magwanya testified that the person who threw down the firearm was the appellant. The four men were arrested and taken to the police station.
3. Warrant Officer Botha testified that he was on duty when Mr Magwanya brought in the four men to the police station. An unlicensed firearm was handed to him and the firearm was documented in the SAP13 register with number SAP13A 532/2018. At the conclusion of Warrant Officer Botha's evidence, the State handed in a ballistic report on the firearm and then closed its case.

4. The appellant testified that he was arrested on 5 April 2018 being in possession of iron pipes which belonged to the mine. He and the three other men were in the process of burning the pipes when the two security officers arrived at the scene and fired shots at the four men. The four men were made to lie down on the ground and photos were taken of them at the scene by the security officers. The four men were searched and money together with cell phones were found in their possession. The appellant denied that any firearm was dropped to the ground by him and testified that he first saw the firearm when the four men were taken to the police station. He further testified that when the security officer was requested to point out the person who was in possession of the firearm, he took some time while looking at the four men before he pointed to the appellant. The appellant immediately denied that he was in possession of the firearm. He also testified that there were several other people at the dam who were picking up scrap metal and denied that it was only the four of them at the slime dam.

5. The appellant submitted that the learned Magistrate erred in convicting him on the count of possession of firearm and ammunition. The State only called Mr Magwanya who, under cross-examination, testified that the other security officer was his manager. He admitted that photographs were taken by one of the managers at the mine and that this manager should still have the footage. The photographs were not produced at the trial. According to Mr Magwanya, his manager was no longer working the area of Carletonville and his whereabouts are unknown. The State did not attempt to locate the

manager neither was the person who took the photographs called to testify.

6. The appellant denied that he was dressed in a white T-shirt and maintained that he saw the firearm for the first time at the police station. The appellant thus argued that the State was duty bound to locate and call Mr Magwanya's manager who would corroborate the evidence of Mr Magwanya regarding the firearm and whether the appellant was wearing a white shirt, and further that it was he who dropped the firearm to the ground. The appellant further argued that the State could and should have called the manager who physically took photographs of the four men. This would at least show what the appellant was wearing on the particular date.
7. The appellant argued that a negative inference should be drawn from the failure by the State to call any of these witnesses to corroborate the evidence of a single witness, namely Mr Magwanya. In this regard the appellant relied on *S v Teixeira* 1980 (3) SA 755 (A). In *S v Teixeira* the court held that in similar circumstances, the failure by the State to call the other witness to testify justified an inference that in State counsel's opinion his evidence might possibly have given rise to contradictions which could have reflected adversely on the credibility and reliability of the single witness. The court went on further to state that *"the Court a quo had erred in concluding that the evidence of the single witness had been satisfactory in every material respect, and that it was safe to convict appellant of murder on the strength of her uncorroborated evidence, notwithstanding the*

improbability inherent in her version”.

8. The evidence of Warrant Officer Botha, so argued the appellant, does not assist the State's case. Warrant Officer Botha did not make a statement and could not remember any details. He could not remember what clothing the appellant was wearing and could not remember whether the security officer hesitated before pointing out the appellant as the person in possession of the firearm. Although the firearm was registered in the SAP13 file under Warrant Officer Botha's name, he denied that it was his handwriting. There was also no link between the firearm which was examined by Warrant Officer Coertzen in Exhibit B and the firearm handed in and registered in the SAP13 register.
9. The State did not produce any evidence of the exhibit bag number or any evidence as to who conveyed the firearm to the laboratory. The appellant submitted that although the defence had agreed to the handing in of the ballistic report, no admissions were made in respect thereof or as to the correctness thereof. The appellant submitted that even if it were to be accepted that the firearm was handed in by Mr Magwanya, it does not mean that the State is absolved from its duty to prove that the appellant was in possession of the firearm.
10. The appellant referred to *S v Sithole* 1999 (1) SACR 585 (W) in which Nugent and Schwartzman JJ, held as follows:

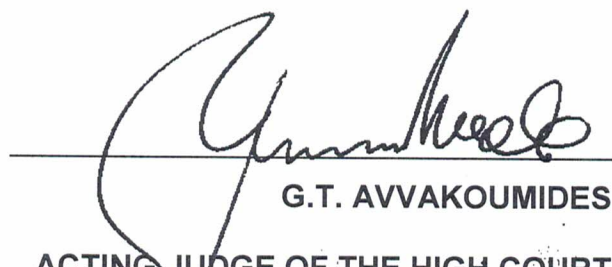
"There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true. These are not two independent tests, but rather the statement of one test, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same no reasonable possibility that the evidence exculpating his is not true. The two conclusions go hand in hand, each one being the corollary of the other. Thus in order for there to be a reasonable possibility that an innocent explanation which has been proffered by the accused might be true, there must be at the same time a reasonable possibility that the evidence which implicates him might be false or mistaken".

11. Consequently, the appellant submitted that the State has failed to prove that the appellant was in possession of the firearm. The appellant was, in separate proceedings, convicted of theft and sentenced to two years imprisonment. The Trial Court did not take this into account and no order was made that the effective sentence of 12 years would run concurrently with the 2 years imprisonment for the theft. The appellant thus submitted that the learned Magistrate misdirected himself when considering the sentence. According to the record the Magistrate emphasized the murder rate and violent crimes, including sexual offences and xenophobia in South

Africa. In doing so, the appellant argued that the learned Magistrate had lost sight of the fact that the appellant had not been charged of any violent crime except for being convicted for possession of a firearm and ammunition there was no other evidence produced by the State of any violent crime committed by the appellant. Consequently, and particularly in the light that the appellant did not have any previous convictions for violent crimes, the appellant submitted that the sentence is shockingly disproportionate with the facts of the case.

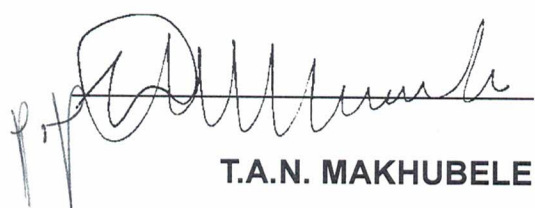
12. The State submitted that the evidence of Mr Magwanya was satisfactory in every material respect. It was submitted that the Trial Court had regard to the cautionary rule applicable and that the Trial Court was aware of the fact that the evidence of a single witness would have to be satisfactory in every material respect. This is unfortunately not borne out by the record and the evidence before the Trial Court. On the conviction the State did not make any meaningful submissions regarding the conviction. I am not persuaded that the State discharged the onus resting upon it to show that it was indeed the appellant who was in possession of the firearm and the ammunition. For the aforesaid reasons it is unnecessary for me to consider the submissions made about sentence. In my view the appeal has merit and must accordingly succeed.
13. I make the following order:

13.1 The appeal against the conviction and sentence is set aside.



G.T. AVVAKOUMIDES
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree



T.A.N. MAKHUBELE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 01 September 2020

Date of judgment: 22 January 2021

Delivered: This judgment was prepared and authored by the Judge(s) whose name(s) is/are reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 22 January 2021.

Appearances:

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