

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



24/03/2017

Case Number: A751/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED

24/3/17

DATE

SIGNATURE

In the matter between:

NKOSANA NDLOVU

APPELLANT

and

THE STATE

RESPONDENT

Coram: HUGHES J et MANYATHI AJ

JUDGMENT

HUGHES J

[1] In this appeal the appellant seeks leave to appeal with the leave of the court a quo against his conviction.

[2] The charges that the appellant was arraigned set out below:

Count 1: Contravention of section 120 (6) (b) of the firearms control Act 60 of 2000;

Count 2: Assault with an intent to do grievous bodily harm; and

Count 3: Contravention of Section 63 (1) of the National Traffic Act 93 of 1996 together with two alternative counts.

[3] Throughout the trial the appellant was legally represented by Mr Ngubeni. He pleaded not guilty to all three counts and on 9 April 2015 he was acquitted in terms of Section 174 of the Criminal Procedure Act 51 of 1977(the Act) on count 2 and count 3.

[4] He was convicted on count 1 and sentenced to a fine of R2000.00 or six month imprisonment of which R1500.00 or 4 months imprisonment was suspended for 3 years on condition that he is not convicted of the same offence committed during the period of suspension.

[5] The facts briefly, late evening of 17 December 2014 the complainant, Clarence Hlope and his girlfriend Portia Mngomezulu (Portia) were seated in his vehicle which was park close to her home. The appellant was driving in his own vehicle with his girlfriend, Pasela Brown, in the same street. The appellant stopped his vehicle, alighted and approach the complainants, after he saw the complainant point a finger at him. An altercation ensued between the complainant and the appellant.

[6] The two insulted each other and at some point the complainant contends that the appellant produced a firearm. The appellant attempted to cork this firearm but the bullets fell to the ground. The appellant picked these from the ground, and whilst doing so, he in turn picked up a brick and hurled it at the complainant.

[7] The altercation between the complainant and the appellant concerned an old feud which centred around the appellant's girlfriend.

[8] During the course of the altercation Portia called out for her mother, Ms Martha Mngomezulu who exited their home and proceeded toward the vehicle of the complainant.

[9] Ms Martha Mngomezulu testified that she saw an unidentified man pointing a firearm at the complainant. When she saw the firearm, she raised her hands and knelt down, and begged the unidentified man not to shoot the complainant. The man yelled to the complainant that he would kill him, at the same time the complainant was yelling shoot me. Eventually this man got into his vehicle and drove off.

[10] Portia testified that on the night in question she saw the appellant wielding a firearm at the complainant. She confirmed that the bullet from this firearm fell to the ground and she saw appellant pick them from the ground. Portia corroborated the evidence of the complainant that when the appellant picking up the bullets that had fallen he also picked up a brick and threw it at the complainant.

[11] She testified that the lighting in the area was supplied by an Apollo light. She saw the appellant go to his vehicle and from the under the seat he remove a firearm. When asked to describe the firearm she said that *'it was dark, I did not see it, but if a person cocks you hear'*. She was adamant that she saw the bullets fall to the ground which the appellant picked up.

[12] The appellant conceded that he was present at the time of the altercation but denied he had a firearm. He testified that *'the mother clearly say do not shoot him and whereas by then I was not in possession of a firearm'*. On enquiring why all the state's witnesses would say he had a firearm when in fact according to him he did not, his response was that he would not speak for the other two witnesses, but with regards to the complainant, as they worked together the complainant always charges him at work alleging that he is pointing a firearm at him.

[13] In its judgement the court a quo acknowledged with regards to count 1 it was necessary for the state to prove that the item which was pointed at the complainant

was such that it lead the complainant and the witnesses to believe that it was in fact a firearm, antique firearm or an airgun.

[14] The court a quo found that Ms Martha Mngaomezulu was an honest witness and that *'she came to court and told the court exactly how she thought that what she saw in fact a firearm, because she actually went down on her knees begging this person to not shoot'*.

[15] The court a quo further concluded that from the evidence of Ms Martha Mngomezulu, *'there was an item that may have lead a person to believe that it was a firearm'*.

[16] It is prudent that one bears in mind the approach to be adopted by a court of appeal when it deals with the factual findings of a trial court. That approach is informed by the collective principles laid down in *R v Dhlumayo* 1948 (2) SA 677 (A). A court of appeal will not disturb the factual findings of a trial court unless the latter had committed a misdirection. Where there has been no misdirection on fact by the trial judge, the presumption is that his conclusion is correct. The appeal court will only reverse it where it is convinced that it is wrong. In such a case, if the appeal court is merely left in doubt as to the correctness of the conclusion, then it will uphold it. See also *DPP v S* 2000 (2) SA 711 (T); *S v Leve* 2011 (1) SAR 87 (ECG); and *Minister of Safety and Security and Others v Graig and Another* NNO 2011 (1) SACR 469 (SCA).

[17] Section 120 (6) (a) and (b) of the Firearms Control Act 60 of 2000 reads as follows:

"120 (6) It is an offence to point-

- a) Any firearm, an antique firearm or an airgun, whether or not it is located or capable of being discharged, at any other, 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."*

The appellant's submissions

[18] Adv. M van Wyngaard, counsel for the appellant, argued that the court a quo found that the state had proven that a firearm was pointed at the complainant on the day in question. In doing so the charge that the appellant was found guilty of, that is, pointing a firearm, falls under section 120 (6) (a) and not section 120 (6) (b) as charged.

[19] Counsel further submitted that section 120 (6) (a) and (b) constitute two separate offences. That the appellant should have been charged with either one of the charges, that is section 120 (6) (a) or 120 (6) (b) or both of the charges in the alternative.

[20] It is further argued on behalf of the appellant that if it is found that the court a quo was correct in accepting the evidence of the state witnesses then it is submitted by the appellant that these witnesses all testified that the appellant pointed a firearm at the complainant. No evidence was adduced that the object pointed at the complainant was not a firearm and as such it was likely to lead a person to believe that it was a firearm.

[21] The appellant contends that he should have, in the circumstances set out by the witnesses, been charged with section 120 (6) (a) and not section 120 (6) (b). The evidence being such that it proved the elements necessary to establish the offence set out in section 120 (6) (a). In conclusion, the appellant persist with its argument that the state failed to prove the offence as set on in the charge sheet under section 120 (6) (b).

The states submissions

[22] Adv. Germishuis, for the state, argued that the court a quo was alive to the fact that the charge related to an object that led the complainant and witnesses to believe that it was a firearm that was being pointed at the complainant, even though the court a quo, in the judgment, concluded that the appellant pointed a firearm. The state contends that nothing turns on the latter if one reads the judgement as a whole.

[23] Counsel for the state further pointed out that the appellant admitted that he owned a firearm but denied that he had it in his possession on the day in question.

[24] The testimony of all three witnesses is that the appellant pointed a firearm at the complainant. They could not give a description of the firearm because it was dark. However, both the complainant and Portia, testified that at some stage the bullets dropped and the appellant picked these up. They also both testified that they heard the appellant cocked the firearm, thus they knew it was a firearm. The complaint was also aware that the appellant had a firearm, as this was not the first time that the appellant had pointed his firearm at the complainant.

The court a quo's findings

[25] The court a quo in the judgement set out what was required of the state to prove count 1 in the following terms:

'... what is needed to be proven by the state and as I pointed out is that an item which, which is firearm was pointed at the complainant and it led the person to believe that it was a firearm, antique firearm or airgun.'

[26] The court a quo went on further to state that three witnesses saw the appellant with what looked like a firearm. The appellant did not give any explanation as to what they could have seen. The conclusion court a quo then makes the following conclusion *'therefore the court is convinced that the state did prove beyond reasonable doubt on the day in question a firearm was then pointed to the complainant.'*

[27] The court a quo found that the state had proven that a firearm been pointed at the complainant and not an object resembling a firearm. The judgment when dealing with sentencing reflects that the court found the appellant guilty for an offence involving a firearm: *'being found guilty of an offence where there is a firearm involved, especially in pointing the firearm, the court cannot make any other finding but to find you unfit to possess that firearm'*.

Discussion

[28] In *S v Hodgkinson* 2010 (2) SACR 511 at para [27] and [28] pages 514-515, Bertelsman J states, when interpreting section 120 (6) (b) it is clear that the legislature required intent as the form of *mens rea* as its evidence from the words used “*without good reason to do so!*” He concluded that the section clearly suggest a “*conscious decision to point an object resembling a firearm in the circumstances that would justify the inherent threat this would constitute against the person at whom such object is pointed.*”

[29] The difference between section 120 (6) (a) and (b) is that section 120 (6) (a) would be the conscious decision to point a firearm to instil the threat upon the person pointed at, whilst section 120 (6) (b) will be the pointing of an object resembling a firearm instead.

[30] In my view, section 120 (6) creates two offences though they are closely related. The one being the pointing of a firearm, section 120 (6) (a) and the other being pointing of an object or other specified article that lead a person to believe it is a firearm, such as a toy gun, section 120 (6) (b). The elements of the crimes are similar but for the difference I have just mentioned above. These are the (a) pointing of (b) a firearm or other specified article (c) at any person (d) unlawfully and (e) intentionally. See page 466 of *Criminal Law Fifth Edition* by CR Snyman.

The application of section 270 of the Act

[31] Section 270 states:

“if evidence on a charge for any offence not referred to in the preceding sections of this Chapter does not prove the commission of the offence so charged but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence charged, the accused may be found guilty of the offence so proven.”

[32] In *S v Dikole* 1982 (4) SA 731 (NC) it was held that section 270 could be invoked to convict the accused of the contravention of an offence not charged with, but where the essential elements of that charge are embodied in the offence so charged. In *Dikole* the state proved unlawful possession but not intention to deal in dagga as charged. Section 270 was invoked to convict for unlawful possession. The qualifier is that section 270 is applicable if all the essential elements of the alleged competent verdict are included in the original charge. See *S v Amas* 1995 (2) SACR 735 (N); *S v Nkosi* 1990 (1) SACR 653 (T).

[33] The problem in these instances is though the essential element embodied in the charges are similar, to my mind, the distinguishable element and that which cause the creation of two offences is that the one makes provision for the pointing of a firearm and the other for a specified article or object which would lead one to believe that it was a firearm. The one or the other is not a competent verdict of the other as they are two separate charges altogether. This is the case where the state, on the evidence before it, should have charged the appellant with section 120 (6) (a) and in the alternative section 120 (6) (b). The fact that the state failed to do so is a misfortune on their part. See *S v Tshali* 2007 (2) SACR 23 at para [14] on page 28 where the court held that as the court a quo failed to charge the appellant in that instance with the alternative as there was no reference to possession in the charge of dealing, which he was charged with, the appeal court could not substitute a conviction.

[34] In *S v Daniels & Another* 2012 (2) SACR 459 (SCA), the SCA went further and pronounced that if one looks at section 322 of the Act specifically section 322 (1) (a) an appeal court may allow the appeal if that judgment on conviction of the trial court was wrong in law or there was a failure of justice.

[35] The court a quo found that the state had proven that a firearm had been pointed at the complainant and not an object resembling a firearm or a specified article was pointed at the complainant.

[36] From the judgement dealing with sentencing it is clear that the court a quo had found the appellant guilty for the offence of pointing a firearm. The court a quo

stated “ ...being found guilty of an offence where there is a firearm involved , the court cannot make any other finding but to find you unfit to possess that firearm.”

[37] If it can be established that the conviction would have been inevitable, that is of pointing a firearm, even in the face of the irregularity of the wrong charge being put to the accused, there would not be failure of justice and if it a conviction would not have followed on the charge put to the appellant then there would be failure of justice and thus the proceeding be set aside. Refer to *S v Carter* 2007 (20 SACR 415 (SCA); *Daniels supra* at para [14].

[38] Against the merits of this conviction the appellant was wrongly charged as the evidence before the court a quo and the conviction made by the court a quo are contrary to the charge put to the appellant.

[39] In the circumstances the appeal must succeed and the conviction and sentence falls to be set aside.

[40] In the result I make the following order:

[a] The conviction and sentence is set aside.

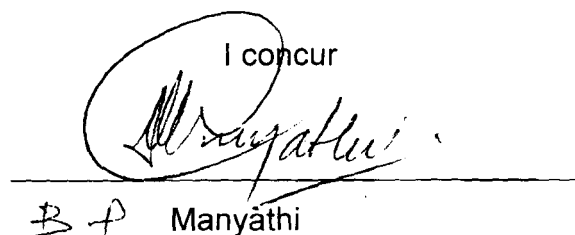
It is so ordered



W. Hughes

Judge of the High Court Gauteng, Pretoria

I concur



B. P. Manyathi

Acting Judge of the High Court Gauteng, Pretoria