



**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: A210/16

THAPELO TAU

Appellant

and

THE STATE

Respondent

CORAM:

REINDERS, J *et* LOUBSER, AJ

JUDGMENT BY:

LOUBSER, AJ

HEARD ON:

06 MARCH 2017

DELIVERED ON:

23 MARCH 2017

- [1] The Appellant was convicted and sentenced in the Botshabelo Magistrate's Court on a charge of contravening section 3 of the Firearms Control Act, 60 of 2000 in that he was found in possession of a 9mm semi-automatic pistol without a licence, permit or authorisation therefore, and on a charge of contravening

section 90 of the same Act in that he was found in the possession of three rounds of ammunition for the firearm aforesaid. On the charge relating to the firearm, he was sentenced to 8 years imprisonment, and on the charge of possession of the ammunition, he was sentenced to 2 years imprisonment. The two periods of imprisonment were not ordered to run concurrently.

- [2] The magistrate thereafter dismissed an application by the Appellant for leave to appeal against both his conviction and sentence, but subsequently the Appellant obtained such leave on petition to the Free State High Court.
- [3] At the commencement of the trial proceedings, the Appellant pleaded not guilty to the charges in question. In his plea explanation he denied that his possession was unlawful, but otherwise he admitted most of the alleged facts of the matter, namely that he was found in possession of the unlicensed firearm and the ammunition in question on the date and at the place alleged by the prosecution.
- [4] Further in his plea explanation and in his evidence, the Appellant amplified his defence of lawfulness as follows:

On the evening in question, and at about 8pm, he alighted from a taxi on his way to a certain house to visit his girlfriend and a male friend of his. After alighting from the taxi, he picked up a plastic

bag on the ground, which bag contained the firearm in question. Because of the time of day, there were no more taxi's operating to take him to the police station and he therefore proceeded to his friend's house with the firearm in the bag with the intention to take it to the police station the following morning when taxi's would again be available. At his friend's house, he placed the firearm on a bed without concealing it. This was where the police found it later the same evening. He tried to tell the police how he came in possession thereof, but they refused to listen and arrested everyone in the room, including himself.

- [5] Three witnesses were called by the prosecution. Police constables Leeuw and Phantsi testified that they proceeded to the house where the Appellant and his friends were, and that they then discovered the firearm concealed under a pillow on the bed where the Appellant was sitting. There were three rounds of live ammunition in the magazine of the pistol. None of those present gave any explanation for the presence of the firearm or its origin. Constable Leeuw testified that only at the police station, and after his arrest, did Appellant tell him that he had purchased the firearm for R200,00 from a Lesotho citizen. This piece of evidence was not disputed in cross-examination by the Appellant's attorney, although the Appellant denied it when he later testified.

- [6] Captain Maputle testified that he received training in firearms and that he had tested the firearm which was found in the Appellant's possession. He fired more than one shot with the firearm, and he found it to be a semi-automatic 9mm firearm in good working

condition. The firearm was reported stolen at Botshabelo police station by a private person. When testing the firearm, he made use of an empty magazine loaded with ammunition other than the rounds found in possession of the Appellant.

- [7] In his judgment, the magistrate rejected the version presented by the Appellant as untrue. In particular, he rejected the Appellant's version that the firearm was contained in a plastic bag that he had picked up.
- [8] On appeal it was contended on behalf of the Appellant that he had not received a fair trial because the magistrate had erred by asking Captain Maputle certain questions relating to the firearm and its operation. In this respect it was alleged that it was not proven beyond a reasonable doubt that the firearm was a semi-automatic pistol.
- [9] In my view, all the arguments before us concerning the conduct of the magistrate and the evidence of Captain Maputle when it comes to the question whether the "thing" found was in fact a firearm or a semi-automatic weapon for that matter, become insignificant by the mere fact that it was never pleaded or contended on behalf of the Appellant during the trial proceedings that it was not a firearm which the police had found in his possession. Not even in cross-examination of the State witnesses was it even once contended that the "thing" found in the Appellant's possession was not a firearm. I am therefore satisfied, on the basis of Captain Maputle's

evidence, that it was correctly found by the magistrate that the Appellant was in possession of a firearm as defined by Act 60 of 2000.

[10] The fact that the firearm was a semi-automatic weapon, as pointed out by Captain Maputle, was not considered by the magistrate for purposes of sentence. In terms of section 51 of the Criminal Law Amendment Act, 105 of 1997, the legislature has prescribed a minimum sentence of 15 years imprisonment for the unlawful possession of a firearm which is a semi-automatic weapon. (See *S v Thembaletu* 2009 (1) SACR 50 (SCA)). The magistrate alluded to this minimum sentence, but remarked that, had the Appellant been charged in a Regional Court, the minimum sentence of 15 years would be applicable. He then proceeded to sentence the Appellant for possession of the firearm in accordance with the provisions of section 121 of the Act, read with Schedule 4 of the Act, which provides for a maximum period of 15 years imprisonment for such offence.

[11] As far as the conviction and sentence on the count of illegal possession of ammunition is concerned, ammunition is defined in section 1 of the Act as “a primer or complete cartridge”. The record of the proceedings in the Court *a quo* shows that no evidence relating to the ammunition in question was presented by the prosecution at all. The State has therefore failed to prove that the Appellant was found in possession of ammunition in contravention of the provisions of the Act, and therefore the conviction and sentence relating to the ammunition cannot stand.

[12] As mentioned earlier, the magistrate sentenced the Appellant to 8 years imprisonment on the count of the illegal possession of the firearm. Section 151 of the Act provides that, despite any law to the contrary, any Magistrate's Court has jurisdiction to impose any penalty provided for in terms of the Act. The only remaining question is therefore whether the period of imprisonment imposed for the illegal position of the firearm is shockingly inappropriate and harsh. It is clear from the record that the magistrate gave careful and detailed consideration to all the various material factors relevant to the assessment of sentence, and does not appear to have misdirected himself in any way. I have not been persuaded that the sentence which he imposed is not an appropriate one.

ORDER

[13] The following orders are therefore made:

1. The appeal succeeds to the extent that the conviction and sentence on count 2, namely the illegal possession of ammunition, is set aside.
2. The appeal against the conviction and sentence on count 1, namely the illegal possession of a firearm, is dismissed.

P.J. LOUBSER, AJ

I concur.

C. REINDERS, J

On behalf of the appellant:

Adv.

Instructed by:

BLOEMFONTEIN

On behalf of the respondent:

Adv.

Instructed by:

BLOEMFONTEIN