



06/05/2015
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A300/15

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

High court Ref.no. : 132/15
Magistrates serial no. : 1/2015
Case no. : RC5/57/12

In the matter between:
THE STATE

And

KABELO DLHAMINI

REVIEW JUDGMENT

BAQWA J

- [1] This matter has been brought by way of special review in terms of section 304 (4) of the Criminal Procedure Act 51 of 1997 after it was discovered that the accused had been charged and convicted under an obsolete piece of legislation.
- [2] The facts are briefly summarised as follows:
The accused was charged with contravention of section 2 read with section 1, 12, 39 (1) (h), 39 (2) of the Arms and Ammunition Act 75 of 1969 which was repealed by Act 60 of 2000, the Firearms Control Act.

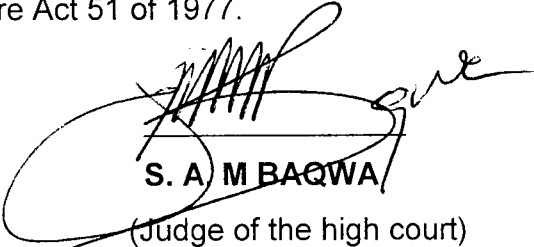
- [3] He appeared in court, pleaded guilty and tendered a statement in terms of section 112 of the Criminal Procedure Act. He was convicted as charged and it was then that the magistrate realised that the charge had been brought under repealed legislation.
- [4] The Firearms control Act of 2000 came into operation on 1 July 2004 and the definition of a firearm contained in section 1 (xii) of the Firearms Control Act includes a number of instruments which are not included in the repealed Arms and Ammunition Act No 75 of 1969. In terms of section 1 (xii) of Act 60 of 2000 a firearm means any:
- 4.1 device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of burning propellant at a muzzle energy exceeding 8 joules (6ft.-lbs);
 - 4.2 device manufactured or designed to discharge rim-fire, centre-fire or pin-fire ammunition.
 - 4.3 device which is not at the time capable of discharging any bullet or projectile but which can be readily altered to be a firearm within the meaning of paragraph 4.1 or 4.2;
 - 4.4 device manufactured to discharge a bullet or any other projective of a calibre of 5.6 mm (.22 calibre) or higher at a muzzle energy of more than 8 joules (6 ft-lbs) by means of compressed gas and not by means of burning propellant; or
 - 4.5 Barrel frame or receiver of a device referred to in paragraph 4.1, 4.2, 4.3, or 4.4 but does not include any device contemplated in section 5.
- [5] Section 40(1) of the repealed Arms and Ammunition act 75 of 1969 contained a presumption that could be used by the State to prove possession. This presumption was however, declared unconstitutional in **Mbata; Prinsloo 1996 (1) SACR 371 (CC)**. The unconstitutionality thereof was based on the fact that the section placed an *onus* on the accused which forced him to testify to avoid

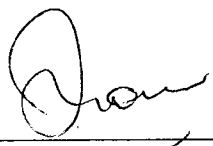
a conviction.

- [6] The Firearms Control Act 60 of 2000 also contains a number of presumptions which, if put into operation make it easier for the State to prove the commission of the offence. The words "*in the absence of evidence to the contrary which raises reasonable doubt*" in section 117 of the Act, clearly indicate that a court will have to draw a conclusion upon proof of the basic facts required by the section which conclusion will result in an evidential burden on the accused to present evidence which raises a reasonable doubt as to his guilt. The accused however, cannot be forced to testify nor will he have to "disprove" the allegation of the State on a balance of probabilities. In this sense, it is clear that section 117 of the Act cannot be equated with section 40 of the repealed Arms and Ammunition Act 75 of 1969 and should therefore be able to withstand a constitutional challenge.
- [7] Considering the fact that some of the provisions of the repealed Act 75 of 1969 have been removed by the provisions of the Firearms Control Act 60 of 2000, whilst keeping in mind that serious offences are committed through use of these unlicensed firearms, it would seem appropriate that the following order be made:

7.1 The conviction is set aside

7.2 The prosecution is ordered to continue, **de novo** in terms of Sections 313 and 324 of the Criminal Procedure Act 51 of 1977.


S. A. M. BAQWA
(Judge of the high court)


J.W. LOUW
(Judge of the high court)