**IN THE HIGH COURT OF SOUTH AFRICA**
**(NORTH GAUTENG : PRETORIA)**

A439/15
01/07/2015

**DATE:** **10/12/2014**

**High Court Ref no:** **690/14**
**Magistrate`s Serial No:** **3/14 (Ermelo)**
**Review case no:** **FSH 22/12**

**In the matter between:**

**THE STATE**

**and**

**M.P. YENDE**

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**JUDGMENT**

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**RABIE J :**

1. This is a review judgement relating to the conviction and sentence of the accused on 5 September 2013 in the Magistrate's Court of Amersfoort on three counts. The first count related to the pointing of a firearm for which 12 months' imprisonment was imposed; the second count related to the illegal possession of a firearm for which a sentence of 15 years was imposed; and the third count related to the theft of a firearm for which a sentence of 6 years was imposed. The accused pleaded not guilty and represented himself.

2. The applicant applied for the matter to be specially reviewed and in an accompanying affidavit he set out the grounds for such a review. The applicant stated, inter alia, that he had an unfair trial for the following reasons: he was forced to conduct his own defence as a layman; it was never explained to him that he had a right to appeal against the refusal of legal aid; he never had access

to docket copies or copies of statements by witnesses and could therefore not cross-examine them properly; a copy of the charge sheet was never made available to him; and he could not make proper notes while standing in the dock and therefore had to rely on his memory which was difficult since the matter was part heard.

3. According to the accused he was legally represented by an attorney from Legal Aid. He terminated the services of this attorney because, according to the accused, the attorney did not instil confidence in him. He then appointed an attorney in private practice who had a reputation as a good criminal lawyer. The accused stated that he could not afford this attorney's fees and that the attorney then withdrew from the matter. According to the magistrate's response the private attorney had indicated that he was withdrawing from the matter because the accused did not want to follow his advice. According to the magistrate the accused had indicated that he would pay another attorney to represent him. However, when the matter commenced on 22 August 2013, the accused was not represented and on enquiry from the court indicated that he was aware of his rights to legal representation or legal aid. The magistrate also, inter alia, submitted that the accused was supposed to have made use of the petition procedure rather than a special review.

4. On the evidence before this court it appears that the accused did have a fair trial. He was initially legally represented and would have understood the case against him and would have received all relevant information. When he eventually decided to represent himself he did so of his own free will and never uttered any complaint or any difficulty. I am satisfied that the convictions and sentences of the accused cannot be set aside for the reasons mentioned by him.

5. It appears, however, that the trial court perpetrated at least one serious irregularity which had an effect on the trial and that this court would be remiss if such were not addressed. I shall now refer to the general background of the matter.

6. The events which led to the charges against the accused occurred on the night of 12 June 2011 near Daggakraal in the province of Mpumalanga. The relevant

facts were briefly the following. On the night in question the accused visited the Tavern of Mr Shongwe. Mr Shongwe testified that when he arrived at the Tavern at approximately 20:00 he found that there was trouble brewing. He was informed that certain people were armed and behaved violently. One of the persons pointed out to him was in possession of a big knife. He approached this person and asked him to leave the Tavern. The next moment the accused came from the side, pulled him by his jacket and uttered threats and swear words at him. At that moment the accused pulled out a firearm, cocked it and pointed it at Mr Shongwe and treatment to kill him. The brother of the accused attempted to push the firearm away from Mr Shongwe and in this process Mr Shongwe walked backwards towards his motor vehicle which was standing close by. The accused followed Mr Shongwe and continued to threaten him and point him with the firearm. Mr Shongwe succeeded in getting into his car and while he was starting the vehicle the accused rapped on the window with the firearm repeating that he was going to kill him. The wife and two-year-old child of Mr Shongwe was also in the car at the time and while witnessing the events, his wife called the police on her cellphone.

7. Mrs Shongwe also testified and confirmed the aforesaid events. She saw the commotion and her husband retreating to their vehicle whilst the accused was pointing a firearm at him and threatening him. She confirmed that the accused rapped on the window with the firearm and said that he pointed the firearm at all of them who were inside the vehicle. She said that she could hear the accused cocking the firearm several times and does not know why a shot did not go off. She confirmed that the accused's brother led him away and that she telephoned the police as they were driving off.

8. Mr Shongwe further testified that he accompanied the police to the parental home of the accused but could not find him. At approximately 03:00 the police came to him again and they again went to the accused's parental home but could not find him. They were directed to another house where they eventually found the accused. It is common cause that it was the house of the accused's brother and that they were the only persons present at the house. Mr Shongwe confirmed to the police that the accused was the person that had pointed the

firearm at him earlier that night. The police searched the house and found a firearm inside the house. It is common cause that the firearm was found under the mattress of a bed in the bedroom of the house. According to the accused his brother was sleeping in the bedroom whilst he slept in the kitchen area of the house. The accused denied that he was ever in possession of the firearm and there was no evidence on behalf of the prosecution that the accused was found in possession of the firearm. Regarding the appearance and identification of the firearm the only evidence emanated from the following question by the prosecutor and the answer of Mr Shongwe: "In terms of the appearance of the firearm, was it similar or totally different from the one that you were pointed with? --- It was similar to the one that was pointed to me earlier."

9. The prosecution also presented the evidence of Mr S.P. Ndaba, who testified that he returned from a night vigil earlier that night and fell asleep next to Mr Shongwe's Tavern. At some point he woke up and realised that his firearm which he had at his side, had disappeared. He asked around and was told by certain unknown people that they had heard from others that the accused had stolen his firearm.

10. At some point he came across Mr Shongwe in the street and told him that his firearm had been stolen. Mr Shongwe then took him to the police station. Mr Ndaba testified that his firearm was recovered. The Magistrate then asked the following question from him: "How did you identify it, how did you know (inaudible)? --- I know my firearm your worship and I am sure about that."

11. The last witness who testified on behalf of the prosecution was Constable O.P. Hadebe. He was tasked to investigate the aforesaid pointing of a firearm at the Tavern on the night in question. He testified that they arrived at the house of the accused's brother who gave them permission to search the house. The accused and his brother were both in the kitchen of the house when they entered. Eventually they found a silver Norinco firearm under the mattress in the bedroom.

12. Constable Hadebe then testified that they showed the firearm to Mr Shongwe who said that it was the one that was used at the Tavern. Constable Hadebe then added that he asked the accused whether he has any knowledge regarding the

firearm whereupon the accused said "yes". He said that the accused added that the firearm was not his but that the owner of the firearm was Mr Sipho Ndaba. He then arrested the accused.

13. Constable Hadebe was asked whether the firearm was sent to the forensic laboratory for analysis and he answered that he does not know because all he did was to book the firearm into the SAP 13 register. It was up to the clerk to hand the firearm to the detectives.

14. The prosecutor then put the following leading question to Constable Hadebe: "The firearm that was analysed by the forensic laboratory refers to a serial number 0300063, it is a 9 mm Parabellum calibre Norinco model 17-7B". Constable Hadebe's response was "yes". He was then asked "Is that the firearm that you recovered?" And his answer was: "Yes". One of the questions by the Magistrate to Constable Hadebe was how the complainant, Mr Shongwe, identified the firearm as the firearm that was used at the Tavern. Constable Hadebe's response was that according to Mr Shongwe he saw the firearm at the Tavern and when he showed him the firearm at the house of the brother of the accused, he positively said that the firearm "is the one that was used". The Magistrate asked whether he had given any reasons why he said so and Constable Hadebe responded as follows: "He just gave us the colour of that firearm as it was a silver firearm. He was not, I do not believe the complainant was in a position to tell whether that firearm was a Parabellum or what model of a firearm it was, but what matters is that when we went into that house we discovered a silver firearm which was identified by the complainant as the firearm that was used."

15. The last piece of evidence on behalf of the prosecution was an affidavit in terms of section 212 of the Criminal Procedure Act. The accused did not object to this affidavit being handed in. According to the affidavit a certain firearm which was a 9 mm Parabellum calibre Norinco model 77B with serial number 0300063 was a semi-automatic pistol. A magazine and two cartridges were also mentioned in the affidavit.

16. The accused testified on his own behalf. He admitted being at the Tavern on the night in question and that he had an axe with him. He denied stealing the firearm of Mr Ndaba and ever being in possession of a firearm on the night in question. He testified that he went to his parental home and thereafter to the house of his brother where he slept until the police came to the house and woke them up. He said that he had no knowledge of the firearm that was found in the house of his brother. He denied that he ever told the police that he had knowledge of the firearm and that it belonged to Mr Ndaba. He confirmed that his brother was also at the Tavern at the time that he was there.

17. After the accused had closed his case the prosecutor made submissions to the court and thereafter the accused did the same. When the prosecutor addressed the court in reply the magistrate asked the prosecutor whether there was evidence that the firearm that was found in the house of the accused's brother, was the firearm that was shown to Mr Ndaba. This question was clearly asked in order to establish whether it had been proved that the firearm stolen from Mr Ndaba was the one eventually found in the house.

18. The prosecutor confirmed that there had been no such evidence but that the inference should be drawn that the firearm that Mr Ndaba had lost was the firearm eventually found in the house. The magistrate was not satisfied with this response and indicated that he wanted to hear evidence of the person who had shown the firearm to Mr Ndaba. It would be recalled that the only evidence in this regard was Mr Ndaba testifying that his firearm had been received and that he was sure that it was his firearm. There was no evidence as to when this occurred nor as to how Mr Ndaba identified the firearm as his.

19. The prosecutor indicated that he would contact the investigating officer and the magistrate adjourned the proceedings for that purpose. On the resumption of proceedings the prosecutor indicated that he had certain documentation reflecting the serial number of a firearm and that the owner thereof was Mr Ndaba.

20. The magistrate instructed this document to be shown to the accused. Without any question directed at the accused, an answer was interpreted as follows: "No

objection your worship." The following was then said by the magistrate: "Ja goed meneer, streng gesproke het die hof nou getuienis aangehoor. Verlang u om enigsins u saak te heropen of nie?" The answer of the accused was interpreted as follows: "Nothing further your worship, I am not reopening my case." These were the last words spoken in the trial and thereafter the magistrate commenced with his judgement.

21. I am satisfied that the evidence proved beyond a reasonable doubt that the accused had pointed a firearm at Mr Shongwe and that he was thus correctly convicted of the charge relating to the pointing of a firearm.

22. On the evidence before the court it is, however, clear that there was no admissible evidence that the accused had stolen Mr Ndaba's firearm. The only evidence in that regard was double hearsay on the part of Mr Ndaba.

23. There was also no evidence that the firearm which the accused pointed at Mr Shongwe was Mr Ndaba's firearm. The question whether the accused had ever been in possession of the firearm of Mr Ndaba was an important one, not only for purposes of proving the crimes of theft and possession, but especially to allow for the sentence of 15 years imprisonment prescribed by Act 105 of 1997 to be applicable. This is so because the section 212 affidavit presented by the prosecution referred to the firearm mentioned therein as a semi-automatic firearm. Consequently, if the prosecution had proven the firearm mentioned in the affidavit as belonging to Mr Ndaba and as the one later being in possession of the accused, the chances of the accused being convicted and sentenced as prescribed in Act 105 of 1997, were much higher.

24. It is clear that the magistrate realised that there was a lacuna in the prosecution's case in this regard and that the semi-automatic firearm mentioned in the section 212 affidavit could not be connected to any of the charges against the accused. The magistrate attempted to fill this gap by asking the prosecutor to present further evidence at a time when both the cases for the prosecution and the defence had been closed and the parties had already made their submissions. In doing so the magistrate committed a serious irregularity. A court may, in terms of the provisions of the Criminal Procedure Act, subpoena a witness or cause a

witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case, but a court cannot at the end of the case identify weak points in the prosecution's case and then ask the prosecutor to present the necessary evidence in order to enable him to convict the accused. Such conduct constitutes and irregularity and, at best for the prosecution, such evidence should be regarded as inadmissible.

25. But the attempt by the magistrate to bolster the prosecution's case in any event did not have this result. The document that was handed up was a typed document reflecting, inter alia, the name of Mr Ndaba, his identity number, a description of a firearm and the serial number thereof. It is not known where this document originated from or who the author thereof was. Furthermore, the contents of this document and the import thereof was not explained to the accused and neither was he asked whether he would have any objection to the contents thereof being introduced in evidence. After the document was apparently shown to the accused it is reported that he had indicated that he had no objection. It is not known, however, what, if anything, the interpreter had said to the accused before the accused had allegedly indicated that he has no objection. It is thus also not clear in respect of what he allegedly had no objection.

26. In convicting the accused the magistrate relied on the aforesaid document as proof that the firearm found in the house of the brother of the accused had been the firearm of Mr Ndaba. This, together with certain broad and unsubstantiated assumptions, opened the way for the magistrate to conclude that the accused was the one who had stolen the firearm and had used it later at the Tavern before he took it with him to his brother's house.

27. If the aforesaid irregularity is disregarded it is evident that the prosecution had failed to prove that the accused had ever been in possession of Mr Ndaba's firearm and that he had ever been in possession of a semi-automatic firearm.

28. Reliance was also placed by the magistrate on the evidence of Constable Hadebe to the effect that after the firearm had been found in the house, the accused said that the firearm belonged to Mr Ndaba and more particularly the

fact that the accused did not deny this evidence when he cross-examined Constable Hadebe. In my view there is no justification for the inference that the accused had admitted this evidence of Constable Hadebe. The accused represented himself and if regard is had to his whole version and his denials when he testified, it is clear that his failure to put to Constable Hadebe during cross-examination that this part of his evidence is denied, was due to a mistake on the part of the accused and not because he accepted the evidence of Constable Hadebe on that point. It also needs to be pointed out that Mr Shongwe, who was present at the house, never testified that he had heard the accused making this crucial admission that the firearm belonged to Mr Ndaba.

29. Even if the matter is approached from a different angle and it is accepted for purposes of the argument that the accused had in fact wielded, and thus possessed, a firearm, the prosecution still failed to prove that the firearm possessed by the accused was a semi-automatic firearm. The section 212 affidavit indicated that a certain firearm with serial number 0300063 was a semi-automatic firearm. The question then is whether there was evidence that this particular firearm had been found in the house of the accused's brother.

30. Constable Hadebe was not aware whether the firearm found in the house had been sent to the forensic laboratory. He had merely booked it into the SAP 13 register. Then, out of the blue, the following leading statement and question was put to Constable Hadebe by the prosecutor: "The firearm that was analysed by the forensic laboratory refers to a serial number 0300063, it is a 9 mm Parabellum calibre Norinco model 17-7B. --- Yes.

Is that the firearm that you recovered? --- Yes".

If the previous evidence of Constable Hadebe is considered he could not have confirmed these two leading questions posed by the prosecutor.

31. No other evidence was led to show that the firearm collected from the house was in fact sent to the forensic laboratory or that that the firearm was the one referred to in the section 212 affidavit.

32. Having regard to the aforesaid the accused could have been convicted of the pointing of a firearm and the possession of a firearm but not of the theft of Mr Ndaba's firearm and the possession thereof and neither could he have been sentenced on the basis that he had been convicted of being in possession of a semi-automatic firearm. Consequently the conviction and sentence in respect of count 3 should be set aside. The accused was in illegal possession of a firearm which he used to point at Mr Shongwe. This court should consequently not interfere with the conviction in respect of count 2 but should interfere with the sentence in respect thereof and sentence the accused for the illegal possession of a firearm without reference to the provisions of Act 105 of 1997.

33. In respect of count 1, the pointing of a firearm, the accused was sentenced to 12 months imprisonment. In this regard the trial court considered the aggravating circumstances and the mitigating circumstances, inter alia, that the accused was a first offender. There is no reason for this court to interfere with this sentence. This court should, however, interfere with the sentence in respect of the conviction for possession as there is no prescribed sentence applicable.

34. Having regard to the mitigating as well as the aggravating circumstances as well as the nature of the crime of the illegal possession of a firearm and the circumstances attending its commission, I am of the view that the just and justifiable sentence in respect of count 2 is a sentence of 3 years imprisonment.

35. In the result the following order is made:

1. The conviction and sentence in respect of count 1 and the conviction in respect of count 2 is hereby confirmed.

2. The sentence in respect of count 2 is hereby set aside.

3. In respect of count 2 the accused is sentenced to 3 years imprisonment which sentence is ante dated to 5 September 2013.

4. The conviction and sentence in respect of count 3 is hereby set aside.

5. The accused is consequently sentenced to an effective sentence of 4 years imprisonment.

**C.P.RABIE**
**JUDGE OF THE HIGH COURT**

**I agree**

**H. DE VOS**
**JUDGE OF THE HIGH COURT**