

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal Number : A238/14

In the appeal between:-

MOLEFI JONAS MOEPADIRA

Appellant

and

THE STATE

Respondent

CORAM:

VAN ZYL, J et JORDAAN, J

JUDGMENT BY:

VAN ZYL, J

DELIVERED ON:

21 MAY 2015

- [1] The appellant was charged before the Regional Court, Welkom, with two charges, namely, count 1, the illegal possession of a fire-arm (.38 special Rossi revolver) and count 2, the illegal possession of ammunition (2x9mm Parabellum rounds). The appellant was legally represented in the Court *a quo*. He pleaded not guilty, based on a total denial. At the conclusion of the trial the appellant was

convicted on charge 1, but he was acquitted on charge 2. He was thereafter sentenced to four (4) years' imprisonment of which two (2) years were suspended for a period of five years on certain conditions. The appellant applied for leave to appeal from the Court *a quo* against the conviction only, which leave was granted on 16 September 2014.

- [2] Constable Motshoane, stationed at Meloding Police Station as a member of the Crime Prevention Unit, and Constable Dithebe, stationed at the Welkom Tactical Response Team, were on duty the evening of 22 June 2013. They were doing patrol work in Meloding as part of a special operation called Tibela. At around 23h00 they saw the appellant walking in the street and he appeared suspicious. The two witnesses alighted from their vehicle and they searched the appellant. They found in his possession a .38 special revolver, loaded with 3x9mm rounds. According to the evidence of Constable Motshoane, the serial number of the fire-arm was tampered with and was therefore not visible. Because the appellant did not have a licence to possess a firearm, they confiscated the firearm and the ammunition and arrested the appellant. After the arrest was made, Constable Motshoane is the one who further dealt with the matter and the firearm and ammunition were booked into the SAP13 store at Meloding Police Station under number 286/2013.
- [3] During cross-examination of Constable Motshoane it was put to him that at the time when the appellant was approached by the said witnesses, the appellant was accompanied by his wife. This was denied by Constable Motshoane. It was

furthermore put to the said constable that he knew the appellant at the time of his arrest, that he also knew that the appellant had earlier opened a case against two other police officers and that this was the reason why the appellant had been arrested and furthermore assaulted by the two witnesses and other policemen after their arrival at the police station. Although Constable Motshoane immediately conceded that he knew the appellant from before the day of the incident, he denied the further allegations.

- [4] Constable Dithebe testified that he did not know the appellant before the day of the incident. The version of the accused regarding the presence of his wife and that he was not in possession of any firearm or ammunition, was denied by constable Dithebe.
- [5] Constable Nkoala was also called as a state witness. She was stationed at Meloding Police Station in the Detective Unit. She testified that on 27 June 2013 she was tasked to take exhibits to Pretoria. She received a bag with one firearm and three rounds of ammunition from the SAP13 store at Meloding Police Station with the number 286/2013. She placed a letter into the bag with the firearm and the three rounds of ammunition, after which she sealed the plastic bag with seal number FSC1043899. She took the sealed bag to Pretoria Ballistic Laboratory to be analysed. She handed the sealed bag to the officials at the said laboratory who is responsible for receiving exhibits and they gave her an acknowledgement receipt.

- [6] Before the State's case was closed, an affidavit in terms of Section 212 of the Criminal Procedure Act, 51 of 1977 ("the ballistic report") was handed in by agreement between the State and the defence and received by the Court *a quo* as Exhibit "B".
- [7] The appellant testified in his own defence and denied having had a firearm and/or any ammunition in his possession. He testified that at the time of his arrest he was with his wife and he repeated the version of events which was put to constable Motshoane, to which I have already referred earlier. His wife, Rethabile Mabote, was also called as a defence witness. In essence she narrated the same version of events to the Court as the appellant.
- [8] The Court *a quo* rejected the appellant's version of events and adjudicated the matter on the basis of the evidence presented by the State. Because of my findings in this judgment, I deem it unnecessary to consider whether, as submitted on behalf of the appellant in the notice of appeal, the Court *a quo* erred in this respect, or not. For purposes of this judgment, I am considering the appeal on the version of the State.
- [9] Mr K Pretorius of the Bloemfontein Justice Centre drafted the appellant's heads of argument. However, Mr Tshabalala from the said Justice Centre represented the appellant during the hearing of the appeal. Mr Tshabala based his submissions on the same grounds as those advanced in the heads of argument.

[10] Mr Thsabalala firstly submitted that there is a contradiction in the evidence of the state witnesses, in that reference was made to live rounds of ammunition on the one hand, but to cartridges on the other hand, the last mentioned being ammunition which has already been fired.

[11] Although constable Motshoane used the words “rounds”, “*ammunition*” and “*cartridges*”, he clearly intended to refer to live rounds of ammunition, considering his explanation in re-examination that they were “*unused cartridges*”. Constable Nkoala used both the word “*bullet*” and “*ammunition*”, but explained in re-examination that according to her, a bullet is a live round of ammunition and that it was bullets that were contained in the plastic bag. Constable Dithebe used the term “*ammunition*”, which is clearly a reference to live rounds of ammunition. With regards to this aspect, the Court *a quo* remarked as follows in her judgment:

“The Court also noted that the state witnesses defined cartridges or bullets or ammunition differently but that is neither here nor there and this in my opinion is one and the same thing.”

[12] The aforesaid view of the Court can therefore not be faulted as it is evident that all three witnesses indeed intended to refer to live rounds of ammunition, despite them having used different terminology.

[13] What the Court *a quo* however did not refer to specifically,

is the fact that in the ballistic report it was stated that 9mm “*cartridges*” had been received. Mr Tshabalala contended that the ballistic report therefore contradicts the evidence of the state witnesses, as the term “*cartridge*” is a description for the empty case of a bullet which has already been fired, as also testified by constable Nkoala at p. 22, lines 7 to 10. I can however not agree with Mr Tshabalala’s contention. The deponent to the ballistic report is clearly an expert in his capacity as an examiner of Forensic Ballistics related cases, as set out in paragraph 2 of his affidavit. He should therefore be considered to be knowledgeable of the provisions of the Firearms Control Act, 60 of 2000 (“the Act”). In terms of the definitions contained in Section 1 of the Act, a cartridge “*means a complete object consisting of a cartridge case, primer, propellant and bullet*”. In terms of the Act a cartridge is therefore in actual fact a live round of ammunition. That the deponent to the ballistic report was well-aware hereof, is evident from paragraph 5 of the said report where he stated the following:

“I visually inspected the cartridges mentioned in 3.2 and found that they consist of a primer, cartridge case, bullet and propellant and were designed and manufactured to be fired by a centre-firearm.”

- [14] Therefore, in my view, there is no discrepancy or contradiction regarding the description of what was allegedly found in the possession of the appellant, as it is evident that on the State’s version it was live rounds of ammunition.

[15] There is however a material contradiction regarding the number of rounds of ammunition which were allegedly found in the possession of the appellant. In this regard all three state witnesses testified that three rounds of live ammunition were found in the possession of the appellant, whilst the ballistic report states that only two rounds of live ammunition (cartridges) were received for ballistic analysis. The charge sheet in count 2 also refers to only two rounds of ammunition. This contradiction led to the acquittal of the appellant on the second count by the Court *a quo* and in this regard the following was stated in her judgment.

“The main question as regarding the second count of possession of ammunition is how many of this were found in accused’s possession; only two were tested and qualified as cartridges so the question is what happened to the third one that according to all three state witnesses was found. I find this to be a technicality but when technicality brings doubt to one’s mind it cannot also be ignored. And for that accused gets the benefit of the doubt.”

Despite this, the Court *a quo* still concluded that the State proved its case beyond reasonable doubt regarding the first count pertaining to the firearm.

[16] In the heads of argument drafted by Mr Pretorius, he made the following submission:

“The question remains whether the firearm that was confiscated from the appellant, was the same that was

referred to in Exhibit “B”. If the possibility existed that the ammunition got switched, on what basis can there be certainty about the firearm. There was no serial number and there was only referred to it as a .38 special with a flywheel. Witness 2 merely referred to it as a firearm that she received and three bullets. If such is a reasonable possibility, then the Court has no information about the firearm that was confiscated from the appellant. If so, the Court with all respect, cannot convict.”

In support of the aforesaid submission, Mr Tshabalala contended that considering the situation regarding the change in the number of rounds of ammunition, it is evident that the exhibits consisting of the firearm and the rounds of ammunition, which were all in the same bag, were either tampered with or in some or other manner contaminated. In these circumstances the appellant should also have been acquitted on the first count.

- [17] As correctly pointed out by Mr Hoffman, on behalf of the State, the chain evidence starting from the alleged booking in of the firearm and the rounds of ammunition into the SAP13 store up to the forensic analysis thereof seems, on the face value thereof, to be in order. In this regard, constable Motshoane testified that the said exhibits were booked in under number 286/2013 and constable Nkoala testified that she took the package with number 286/2013 from the SAP 13 store, sealed it with seal number FSC1043899 and handed it over to forensics in Pretoria. The forensic analyst who deposed to the ballistic report, stated in paragraph 3 thereof that he received a sealed

evidence bag with seal number FSC1043899 from Case Administration of the Ballistics Section.

[18] However, on the State's own version it has to be accepted that somewhere in the aforementioned process the exhibits became contaminated in that only two 9mm rounds of ammunition were eventually received by the forensic analyst. In these circumstances it is the only reasonable inference that the exhibits were tampered with in some or other way, either intentionally or negligently. This is the very reason why the Court *a quo* gave the appellant the benefit of the doubt regarding the second count. Considering that all the exhibits were placed in the same bag, there is in my view no basis upon which it can be justified not to give the appellant the same benefit of the doubt regarding the firearm. In these circumstances it cannot be found that the State proved beyond reasonable doubt that the firearm which is referred to in the ballistic report, is necessarily the same firearm that was allegedly found in possession of the appellant.

[19] One should be mindful of the elements of the crime with which the appellant was charged with in count 1 are (i) the possession of (ii) a firearm, (iii) unlawfulness, and (iv) culpability. Regarding the firearm-element of the crime, Section 1 of the Act gives a long, technical definition of the word "*firearm*". In S v FILANI 2012(1) SACR 508 (ECG) at 514 J and further, the following principles were established in this regard:

“It is clear, in my view, from the definition of ‘firearm’ in Act 60 of 2000, as opposed to the definition of ‘arm’ in Act 75 of 1969, that a legislature no longer intended ‘firearm’ to bear its ordinary meaning as explained in *S v Shezi supra*. In these circumstances it was incumbent on the State to prove that the weapon of which appellant was allegedly in possession was a firearm as defined in the Act.

In my view the State has failed to discharge that onus.

...

In the absence of such forensic evidence a submission of Ms Hendricks was in effect that, because the weapon in possession of the appellant discharged or propelled a missile with enough force or velocity for it to be used for defensive purposes, it must therefore fall within the ambit of the definition of a firearm in s 1 of Act 60 of 2000. In other words, on an acceptance of Ms Hendricks’ submission, any weapon which was capable of discharging or preparing a missile as set out above would fall within the ambit of the definition. In my view, however, given the increased technical nature of the various definitions of ‘firearm’ contained in the later and current Act, such a finding cannot be made in the absence of expert evidence to that effect. Certainly, it is not a matter of which this court may take judicial notice. The State failed to lead any such expert evidence and accordingly failed, in my view, to discharge the onus upon it.”

- [20] Therefore, even if the version of the arresting constables are to be accepted, expert forensic evidence is still needed for the State to proof that the firearm found in possession of the appellant, complies with the technical definition of a firearm contained in Section 1 of the Act. Considering that I

have already found that there is reasonable doubt as to whether the firearm referred to in the ballistic report is in fact the one which was allegedly found in possession of the appellant, the State has, in my view, failed to discharge its onus in this regard. The appeal must therefore succeed.

[21] The appellant's appeal against his conviction is upheld and the conviction and sentence are set aside.

C. VAN ZYL, J

I concur.

A.F. JORDAAN, J

On behalf of Appellant:

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Instructed by:
Bloemfontein Justice Centre
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On behalf of Respondent:

Adv. R. Hoffmann
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