

REPUBLIC OF SOUTH AFRICA



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

24/8/2012

CASE NO : A567/2011

(1)	REPORTABLE: ☒ YES / ☐ NO
(2)	OF INTEREST TO OTHER JUDGES: ☒ YES / ☐ NO
(3)	REVISED.
2012-08-24	
DATE	SIGNATURE

In the matter between:

PRINCE PHILANI MKHULISI

APPELLANT

And

THE STATE

DEFENDANT

J U D G M E N T

BOSMAN, AJ

INTRODUCTION

[1] The appellant, Mkhulisi Prince Philani, was convicted and sentenced in the Piet Retief Regional Court on two counts, for the offence of possession of a firearm without a license, where the penal provisions of the Firearms Control Act, No 60 of

2000 provides a maximum sentence of fifteen years, and further for the possession of ammunition.

[2] He was found guilty and sentenced in respect of count 1, possession of a firearm, without license, and count 2, possession of ammunition without being in possession with the necessary license, in terms of the provisions of the Firearms Control Act, No 60 of 2000.

[3] The appellant was further found not guilty on the third charge, namely theft of a firearm.

[4] The appellant was sentenced to fifteen years imprisonment on count 1 in terms of the Minimum Sentence Act, 105, of 1997 and was cautioned and discharged, on count 2.

[5] A further order was made in terms of Section 103 of the Firearms Control Act, No 60 of 2000, and the appellant was declared unfit to possess the firearm.

[6] Appellant was duly represented during the trial.

[7] The appellant brought an application for leave to appeal against his conviction and sentence, which application was refused by the court *a quo*.

[8] The appellant then petitioned to the Judge President of the North Gauteng High Court and was granted leave to appeal against both his conviction and sentence on 6 June 2011.

The evidence on behalf of the State

[9] The witness on behalf of the State was a constable, N W Buthelezi, in the service of the South African Police Services stationed at Piet Retief.

[10] On 30 April 2009 he was on duty and on patrol together with constable Sibiya, in a marked police vehicle.

[11] He testified that they saw two boys, at approximately 21h20 and he observed that one of them was trying to hide something. They stopped the vehicle and the witness approached the accused and searched him. He found a firearm hidden on the person of the appellant and asked the appellant where the license to possess the firearm is. The appellant's answer was that he does not have a license. According to the witness the appellant told him that he found the firearm when he was digging for medicinal plants.

[12] He further asked the appellant to show him the place where the firearm was found, but the appellants answer was that it was too dark. The firearm that he found in the possession of the appellant was a 9mm pistol, with one round in the barrel.

[13] At the police station the witness observed the serial number, and when he tested the firearm, it was clean and oiled.

[14] The witness confirmed that the appellant could not produce a license in respect of the firearm. According to the witness the appellant told him that he picked up the firearm, whilst he was busy digging for herbs and that it was his intention to take the firearm to the police station. He found a person to walk with him to the police station. The owner of the firearm could not be found, but the number of the weapon was scraped off, or something like that. The number was not clearly visible.

[15] Constable Buthelezi further testified that the appellant denied that he already passed the way to the police station when the witness and the other police officer approached him. According to constable Buthelezi the appellant said to him that they, the accused and another person, would take another road to the police station as they already passed Brand Street that leads to the police station.

[16] Constable Buthelezi further said that it was if the appellant was hiding something in the front of his trousers and he then found the appellant to be in possession of the firearm.

[17] Constable Buthelezi also testified that, when the accused and the other person were asked to come with them, they wanted to try to flee, as he put it. He also testified that the firearm was cleaned and oiled.

Evidence of behalf of the appellant

[18] The appellant admitted that he was found in possession of the said firearm, on 30 April 2009. He testified that he did not know whether there was any rounds or

ammunition inside the pistol. While at the police station he observed that the police removed a round.

[19] The version of the appellant was that he do not know who's firearm it was or is and that he picked it up in a veld, on the same day around 17h00; 18h00 in the evening, after sunset.

[20] He was on his way to the police station, and he had a person with him to accompany him. The police then approached them in a vehicle, and the police vehicle's bright lights were showing on them. They were approached by the police, searched and the firearm was found in the possession of the appellant.

[21] The appellant testified that he told the police that he picked up the firearm, that it was dark and there was grass where he picked up the firearm. He denied that he already passed the way to the police station, when he was approached by the police. He also denied that he tried to escape or run away. According to the appellant the firearm was rusted, when he found it.

[22] The appellant testified that he hide the firearm in his pants, so that other people could not see it. He did not know that the firearm was cocked. Under cross-examination he was questioned about his evidence that the firearm was found around 17h00, 18h00 and at 21h20 he was still in possession of the firearm. His answer was that they walked a far distance, and they first visited their house, left certain goods there and was delayed at the house which they visited.

[23] Under cross examination he further testified that it was the other person in his presence that found the firearm, when they were looking for more medicine and on their way back to the house, he picked up the firearm.

[24] A witness was called on behalf of the appellant, one Mr Mthetwa. He confirmed that he was in the veld digging for some traditional medicine on 30 April 2009, and that the accused was with him.

[25] The witness testified that he and the accused were digging herbs, that the accused was a distance away from him when he was called by the accused who told him that he found a firearm. They then decided to go to the police station. They first went back home.

[25] When they arrived at their house, he asked somebody who could accompany the accused to the police station. He told the accused not to inform the person that would accompany him about the firearm and the witness went to Pietersburg.

[26] According to the witness Mthetwa, the accused left the house, to take the firearm to the police, approximately 17h40. The witness further testified, by car, it would take approximately 5 to 6 minutes from the house to the police station, as it was approximately 4 to 5 km. He is not sure whether the accused and the other person took a taxi or whether they went on foot. At a later stage he said that the accused left the house at approximately 18h00.

[27] The witness again confirmed that the firearm was rusty and you could see that it rained on the firearm.

Judgement of the court a quo

[28] In my view the appellant was correctly convicted on charges 1 and 2.

[29] The witness, Buthelezi, testified satisfactory in all material respects and his evidence can be regarded as proof at the State's case, in my view, beyond reasonable doubt. The actions and reactions of the accused and the other person that accompanied him, namely Mr Mthetwa was suspicious. The appellant clearly tried to hide the firearm in his clothes, where constable Buthelezi found the weapon upon investigation.

[30] The version of Appellant, namely that the firearm were found in the veld, when the appellant and the other witness were looking for medicinal plants, is highly unlikely. The firearm was clean and oiled and not rusted, according to the evidence of const Buthelezi. It was already 21h20 in the evening and the version of the appellant, that he was on his way to hand the firearm to the police, is not, under the circumstances reasonably possibly true.

[31] The accused also had two different versions regarding the question who found the firearm. He first testified that the firearm was found not by himself, but by the witness and when they left for the house, he (the appellant) picked it up. He later changed this evidence.

[32] The witness Mthetwa also testified that it was the accused that found the firearm.

[33] The version that they were on their way to the police station, must be seen against the background that the witness Mthetwa, testified that the appellant left the house at approximately 18:00. It could not take the appellant so long to get to the police station. He was further past the street that led to the police station (Brand Street) and the condition of the firearm was not rusted, as if it was lying in the veld for a while, as the appellant conveyed to the court.

[34] It is further highly unlikely that the appellant would not, to some extent investigate the firearm. His version that he was unaware of the fact that there was a round in the barrel of the firearm, is further highly unlikely.

[35] The magistrate was therefore correct in his findings that the appellant's version cannot be accepted.

[36] The suspicious behaviour of the appellant and the witness was further accentuated by the fact that the appellant's tried to run a way when he observed the police vehicle.

[37] The conviction of the appellant on count 1 and count 2, was therefore, in my view, justified.

The appeal regarding sentence

[38] The appellant is not a first offender. He was previously convicted on three counts of housebreaking with the intend to steal, four counts of theft and one count of dependents-producing medicine.

[39] The appellant was 28 years of age at the time of sentencing, married and had 2 children, respectively 5 and 6 years of age. The children were staying with their mother in Germiston. He was further employed, before his arrest, at a car wash, earning R80 to R100 per vehicle washed. The magistrate made use, *inter alia*, of his personal knowledge regarding the prevalence of crime in his jurisdictional area.

See *S v Malinga* 1962(1) SA 439 (T); *S v Steenberg* 1997(3) SA 513(b).

[40] The magistrate was further dealing with the previous sentences received by the appellant it seems to me that the magistrate took into account the necessary factors regarding the personal circumstances of the appellant as well as the circumstances surrounding the illegal possession of the semi-automatic pistol.

See *S v Rasengani* 2006 (2) SACR 431 (SCA)

[41] The fact that the appellant has previous convictions of offences that is not totally unrelated to the present offences, also play, in my view, an important role.

[42] The debate whether the sentence should be imposed in terms of Act 105 of 1997 or in terms of the Firearms Control Act, is in my view, not of crucial importance. The appellant was charged and convicted in terms of the said Act 60 of 2000. The magistrate was, in my view, correct in imposing a sentence of 15 years imprisonment having regard to the previous convictions of the appellant and the circumstances

prevailing when the crimes were committed. Schedule 4 of Act 60 of 2000, read together with section 3 and section 21 of the said Act, imposes the maximum sentence of 15 years. Part II of schedule 2 to the Criminal Law Amendment Act 105 of 1997 imposes the identical sentence of 15 years as a minimum sentence for any offence relating to the possession of an automatic or semi-automatic firearm under the Firearms Control Act. See: *S v Baartman* 2011 (2) SA CR at 79.

[43] Sentence imposed by a magistrate is a discretionary function and in my view, the sentence has been judicially and properly exercised and is not vitiated by irregularity or misdirection or is so disturbingly inappropriate that it justifies this court to interfere. See: *S v Rabie* 1975 (4) SA 855 (A).

[44] I therefore hold that the appeal against sentence should likewise be dismissed and I therefore make the following orders:

1. The appellants appeal against conviction and sentence is dismissed.



A J H BOSMAN
ACTING JUDGE OF THE NORTH & SOUTH
GAUTENG HIGH COURTS, RETORIA

I agree



T M MAKGOKA
JUDGE OF THE NORTH & SOUTH
GAUTENG HIGH COURTS, RETORIA

Representation for the appellant

Counsel	Adv DM du Plessis
Instructed by	Legal Aid South Africa, Pretoria Justice Centre

Representation for respondent

Counsel	Adv PT Nkuna
Instructed by	Director of Public Prosecutions, Pretoria