

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 157/2010

In the matter of:

THE STATE

and

THAPHELO PRAISE-GOD MBHELE

CORAM: CILLIÉ, J *et* EBRAHIM, J

JUDGEMENT: EBRAHIM, J

DELIVERED ON: 30 APRIL 2010

[1] This is a matter which has been placed before me on special review in terms of section 304(4) of the Criminal Procedure Act, no 51 of 1977 on the basis of the following reasons by the learned presiding magistrate:

“

1.

On 03/12/2009, 09/12/09 and on 19/01/2010 I presided in the above matter where the accused was charged with one count of theft,

The State alleged that on 30th May 2009 and at Tshiame in the abovementioned district the accused did unlawfully and intentionally steal a 9mm pistol fire arm being the property or in the lawful possession of Jabulani Cyprian Madinana. There is no other count the accused was charged of.

2.

The accused pleaded not guilty and the state called three (3) witnesses, their evidence appears on the record of proceedings. At the end of the state case the defence closed its case without giving any evidence.

3.

The evidence presented by the state did not prove that accused stole the said fire arm. It only proved that the accused was in possession of the said fire arm without a licence. The evidence is clear from the record.

4.

At the close of the defence case the state argued for a conviction on possession of fire arm without a licence. The defence concurred with the state that accused could only be convicted of possession of firearm without a licence. When both parties concurred on conviction of possession of firearm without a licence I forgot that accused was not charged of possession of the fire arm without a licence as the second count.

5.

It was also clear from me that a conviction on a charge of theft could not stand and I convicted accused on possession of fire arm without a licence without refreshing myself with charges that were put to accused. I say so because if I had done so I would have noticed that accused was never charged of possession of fire arm without licence.

6.

I submit that I erred in convicting accused of possession of fire arm without a licence. My reasons for that submission is that accused was never charged of an offence of possession of fire arm without a licence. He was only charged of theft. To add on that, an offence of possession of fire arm without a licence is not a competent verdict on a charge of theft.

7.

I am of the opinion that instead of convicting accused of possession of fire arm without a licence I should have convicted him of contravening section 36 of the General Law Amendment Act 62 of 1955 because despite the fact that he was found in possession of the said fire arm by Inspector Makhubo he decided not to testify in order to give explanation why he was in possession of the said fire arm. The evidence in Inspector Makhubo is that he received information that accused had stolen a fire arm and fled to Bergville. He then approached accused's father to accompany him to Bergville where accused was. When he arrived there he explained to the accused the purpose of his visit. Thereafter accused took

the fire arm in question behind the wardrobe and gave it to Inspector Makhubo. According to Inspector Makhubo when he asked where he got the fire arm accused said he got it from Ayanda at Khalanyoni, Tshiame B, which is in Harrismith.

For me the first two requirements of section 36 of the General Law Amendment Act 62 of 1955 were met. What was left then was for the accused to give satisfactory explanation of his possession which explanation he was supposed to give in court but he failed to do that as he did not give explanation at all.

8.

In the circumstances I am of the opinion that accused was unable to give satisfactory explanation of his possession which is the third and last requirement of section 36 of Act 62 of 1955.

9.

I am, therefore, of the opinion that the proceedings were not in accordance with justice.

10.

I, therefore, request the Honourable Judge of review to set aside the conviction of possession of fire arm without a licence and substitute it with a conviction of contravening section 36 of the General Law Amendment Act 62 of 1955.

11.

As far as sentence is concerned, I will not change it except the conditions of suspension.

I, therefore, request that the sentence read as follows:

‘Eighteen (18) months imprisonment, six (6) months of which is suspended for a period of five (5) years on condition that accused is not again convicted of theft or contravention section 36 or 37 of the General Law Amendment Act 62 of 1955 committed during period of suspension.’

12.

I contacted Correctional Services here in Harrismith where the accused is kept and it is confirmed that he is still in custody, so it will be easy for him to be brought to court and be advised of the amendments in conviction and sentence.”

- [2] Why the accused was not charged with the illegal possession of a fire arm is unclear.
- [3] The learned magistrate is quite correct that a verdict of contravening section 36 of the General Law Amendment Act, no 62 of 1955 is competent in the circumstances of this case. It is clear that the competent verdicts on a charge of theft were explained to the accused. In addition to that the accused was defended and it can therefore be accepted that his defence is acquainted with the competent verdicts on a charge of theft.

[4] The proceedings are accordingly not in accordance with justice and the following order is made:

1. *The conviction of possession of a fire arm without a license is set aside. In its place the accused is convicted of contravening section 36 of the General Law Amendment Act, 62 of 1955.*
2. *The sentence of 18 months imprisonment, 6 months of which are suspended for 5 years on condition that the accused is not again convicted of the illegal possession of a fire arm during the period of suspension is set aside. In its place the following sentence is substituted:*

“18 (eighteen) months imprisonment 6 months of which is suspended for a period of 5 (five) years on condition that the accused is not convicted of theft or contravening section 36 or section 37 of the General Law Amendment Act, no 62 of 1955 committed during the period of suspension.”

S. EBRAHIM, J

I concur.

C. B. CILLIÉ, J

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