

**IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)**

DATE: 02 March 2009

A143/09

**Case No: K653/08 Magistrate's
serial no: 74/08 High Court Ref
No: 1937**

**THE STATE VS THEMBINKOSI VINCENT MALANDULE AND
OTHERS**

REVIEW JUDGMENT

BOTHA J:

The four accused were convicted of the unlawful possession of a firearm (contravening section 1 of Act 60 of 2000)

They were found outside a motor vehicle of which accused one had been the driver. The vehicle was found parked outside a car wash at 01h00. Accused one confirmed to the police that it was his vehicle and consented to it being searched. The firearm was found on the driver's seat. When asked whose firearm it was accused one said that it belonged to accused two, three

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and four. Accused three said that it belonged to accused one. The four accused were arrested.

Accused one gave a plea explanation to the effect that he had given accused two, three and four a lift. They were then stopped by young men who forced them out of the car. Accused four overpowered the attacker who had a firearm. That person fled, leaving the firearm behind. They were still considering what to do with the firearm when the police arrived. Accused two gave a plea explanation confirming that the firearm was left behind by a robber. Accused three confirmed that they got a lift and that there were robbers. Accused four explained that they had to fight (with the robbers) lest accused one should suspect them.

The police evidence was that the accused did not mention an attempted robbery and did not lay any charge at the local police station.

None of the accused gave evidence.

The magistrate stated in his reasons that he did not believe the plea explanations of the accused. He relied on the presumption contained in section 117(2) of Act 60 of 2000.

I shall quote section 117(2):

(2) Whenever a person is charged in terms of this Act with an offence of which the possession of a firearm or ammunition is an element, and the State can show that despite the taking of reasonable steps it was not able with reasonable certainty to link the possession of the firearm or ammunition to any other person, the following circumstances will, in the absence of evidence to the contrary which raises reasonable doubt, be sufficient evidence of possession by that person of the firearm or ammunition where it is proved that the firearm or ammunition was found-

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- (d) in or on a vehicle and the person was, at the time-**
- (i) the driver of the vehicle;**
 - (ii) the person in charge of the vehicle;**
 - (iii) in control of all the goods on the vehicle;**
 - (iv) the consignor of any goods in or among which the firearm or ammunition was found;**
 - (v) the only person who had access to the firearm or ammunition;**
 - (vi) the employer of the driver of the vehicle and present on the vehicle; or**
 - (vii) over the age of 16 years and present on the vehicle;**

The state advocates in their memorandums support the conviction of all four accused.

The magistrate correctly rejected the plea explanations. They conflicted with the explanations given to the police. If they were true the accused would have reported the alleged attempted robbery.

The question is whether the presumption contained in section 117(2) justifies the conviction of all or any of the accused.

The presumption created in section 117(2) deals with various situations where a firearm is found without a direct link to a specific person. The wording of the subsection is elaborate and clearly aimed at surmounting the considerations that led to its predecessor in Act 75 of 1969 being declared unconstitutional in **S v Mbatha 1996(1) SACR 371(CC)**

Assuming that section 117(2) is constitutionally sound. I still do not think that it displaces general logic. It also does not make the considerations that

were considered in cases like **S v Mbuli 2003(1) SACR 97 SCA** and **S v Molimi 2006(2) SACR 8 SCA** irrelevant.

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It surely is a possibility that the four accused were in joint possession of the firearm. But it is equally possible that it was only in the possession of one of them, or two or three of them.

In this case the fact that the firearm was on the driver's seat, together with the false explanations to the police and the court and the absence of evidence under oath, justifies the inference, to the exclusion of any other reasonable inferences, that accused one at least, being the driver of the vehicle, whether alone or together with someone else, was in possession of the firearm. In the case of the other accused, it cannot be inferred with equal certainty that any of them must have been in possession of the firearm. Even if any of them possessed it jointly with accused one, it cannot be determined who they were.

In the circumstances the convictions of accused two, three and four must be set aside.

There is no reason not to confirm the sentence of accused one.

The following order is made:

- 1. The conviction and sentence of accused one are confirmed.**
- 2. The convictions and sentences of accused two, three and four are set aside.**



C BOTHA
JUDGE OF THE HIGH COURT

I agree

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B.R DU PLESSIS
JUDGE OF THE HIGH COURT