



**IN THE HIGH COURT OF SOUTH AFRICA NORTH GAUTENG
DIVISION, PRETORIA**

NOT REPORTABLE

CASE NO D2298/2008

HIGH COURT REF. NR.: 276

DATE: 2 SEPTEMBER 2009

THE STATE
APPLICANT
V WILSON MATOME MATLOU
ACCUSED 1
FRANS MOKHWIBITSANE
ACCUSED 2

Review
Judgment:
Msimaki J
Makhafola AJ

JUDGMENT

MAKHAFQLA AJ:

INTRODUCTION:

1. Two undefended accused stood trial in the district court of Wonderboom held in Pretoria North, facing charges of contravening Section 82 of Act 129 of 1993, possession of car breaking implement to wit an L-shaped wheel spanner, committed on or about 22 September 2008, at or near Pretoria North. Both accused

pleaded not guilty and tendered no plea-explanation.

2. Both accused were found guilty as charged and sentenced as follows: Accused 1 to 8 months imprisonment and he was declared unfit to possess a firearm in terms of Section 103 of Act 60 of 2000. Accused 2 was sentenced to 20 months imprisonment.
3. The matter is laid before me by way of automatic review. Upon reading the record, 1 caused a query to be sent to the learned Magistrate for his attention and comment. The query comprised 7 (seven) questions constituted as follows:
 - 1) Are the explanations of both the accused not reasonably possibly true?
 - 2) On the state case only, is possession proved by the state against the accused?
 - 3) On the state case only, at the close of its case, were the accused not entitled to be acquitted in terms of S174 of Act 51 of 1977? (The accused did not make any plea-explanations).
 - 4) Was there any ***prima facie*** evidence that required an answer by the undefended accused when the state evidence is to the effect that at the time of their arrest they were not in possession of the said wheel-spanner?
 - 5) Are the accused obliged to give an explanation of anything not found in their possession in terms of Section 82 of Act 129 of 1903?
 - 6) Are these questions of the prosecution fair?
Vide: Record: Page 24 lines 4-9
S V 1 PI-I.ENG 1993 (2) SACK 185 (I)
at 189 S V KI BI.KA 1982 (I) SA 534 (W
LD) at 537 E R V M 1946 AD 1023 at
1027.
 - 7) Is the question by the Prosecutor not in stark contrast with the state recorded evidence found on page 24 lines 15-16 of the

record?

4. The learned Magistrate did reply to the query but had combined the answer to paragraphs 3 and 4 in one answer. This pattern was also followed when answering paragraphs 6 and 7 thereof.
5. Upon receiving the Magistrate's reply 1 caused the query the reply thereto and the record of the proceedings to be sent to the office of the Director of Public Prosecutions for attention and comment. A Senior State Advocate and a deputy director of Public Prosecutions attended to the matter and unanimously issued their comment which is very useful. I thank them for their researched comment.
6. On the state case only, possession was never proved against the accused.
Vide: Record: Page 6 lines 15-25
The evidence of Inspector Zacharia Johannes Niemand is recorded that nothing was found in their possession. The evidence of Inspector Daniel Mbolawa Matjene corroborates that of the Inspector Niemand that of finding the L-shaped wheel spanner not in the possession of the accused.
7. No intention to possess the said tool was even proved, if any needed to be proved.
8. No *prima facie* case was ever made compelling the accused to answer. Both accused were undefended. It was the duty of the trial court to *mero motu* discharge them in terms of Section 174 of Act 51 of 1977 rather than allow them to testify.
Vide: S V ZI MM ERIE en 'n ander 1989 (3) SA 484 (C)
S V AM ERIKA 1990 (2) SACR 480 (C)
S V MASHELE 1990 (1) SACR 678 (T)
9. Questions placing an *onus* upon the accused were not proper and were unfair. The court should have intervened and disallowed the Prosecution to ask them.

Vide: S V IPELENG 1993 (2) SACR 185 (T) at 189
S V KUBEKA 1982 (1) SA (WLD) at 537
E RVM 1946 AD 1023 at 1027

10. The accused were undefended and it was the duty of the presiding officer to protect their rights and to see to it that fair questions are asked by the Prosecution. That was not done. The presiding officer did not perform his duty, Moreover the accused have explained the origin oi the said spanner. There was no evidence to controvert their explanation. At best, this is a borderline case that raises doubt which should redound to the accused.
11. In the result, I am of the view that the proceedings were not in accordance with justice and I suggest that they should be set aside.

ORDER:

- 1) The convictions and sentences of both the accused are set aside.
- 2) Both accused are found not guilty and are discharge.
- 3) The Registrar is ordered to send this order to the correctional service centre where the accused are detained that they be released immediately if they are not detained for any other cases.

K. MAKHAFOLA

ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered

M.W. MSIMEKI

JUDGE OF THE HIGH COURT