

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Review No. : 996/07

In the review between:-

THE STATE

versus

TEBOHO BRAND KELE & ANOTHER

CORAM:

BECKLEY J *et* MOCUMIE, AJ

JUDGMENT BY:

MOCUMIE, AJ

DELIVERED ON:

6 MARCH 2008

[1] The accused were convicted of robbery in the Magistrate Court, Marquard in the Free State. They were both sentenced to 12 months imprisonment wholly suspended on certain conditions.

[2] The matter came before me on automatic review in terms of section 302 read with 304 of the Criminal Procedure Act, 51 of 1977 ("the CPA"). It was clear from the record that the Magistrate had not considered the provisions of section 103(1) read with (2) and (3) of the Firearms Control Act, 60 of 2000 ("the Act"). I sent a query to that effect.

[3] In my view the conviction and sentence are in accordance

with justice. But the problem as correctly conceded by the Magistrate, lies with the non-compliance with the provisions of section 103(1) read with (2) and (3) of the Act set out below.

[4] For convenience and purposes of this judgment the provisions of s103 (1) (2) and (3) of the Act will be quoted *verbatim*. The section reads as follows:

“Declaration by court of person to be unfit to possess firearm

(1) Unless the court determines otherwise, a person becomes unfit to possess a firearm if convicted of-

- (a) the unlawful possession of a firearm or ammunition;*
- (b) any crime or offence involving the unlawful use or handling of a firearm, whether the firearm was used or handled by that person or by another participant in that offence;*

- (c) an offence regarding the failure to store firearms or ammunition in accordance with the requirements of this Act;*
- (d) an offence involving the negligent handling or loss of a firearm while the firearm was in his or her possession or under his or her direct control;*
- (e) an offence involving the handling of a firearm while under the influence of any substance which has an intoxicating or narcotic effect;*
- (f) any other crime or offence in the commission of which a firearm was used, whether the firearm was used or handled by that person or by another participant in the offence;*

(g) any offence involving violence, sexual abuse or dishonesty, for which the accused is sentenced to a period of imprisonment without the option of a fine;

(h) any other offence under or in terms of this Act in respect of which the accused is sentenced to a period of imprisonment without the option of a fine;

(i) any offence involving physical or sexual abuse occurring in a domestic relationship as defined in section 1 of the Domestic Violence Act, 1998 (Act 116 of 1998);

(j) any offence involving the abuse of alcohol or drugs;

(k) any offence involving dealing in drugs;

(l) any offence in terms of the Domestic Violence Act, 1998

(Act 116 of 1998) in respect of which the accused is

sentenced to a period of imprisonment without the option

of a fine;

(m) any offence in terms of the Explosives Act, 1956 (Act 26 of 1956), in respect of which the accused is sentenced to a period of imprisonment without the option of a fine;

(n) any offence involving sabotage, terrorism, public violence, arson, intimidation, rape, kidnapping, or child stealing; or

(o) any conspiracy, incitement or attempt to commit an offence referred to above."

(2) (a) A court which convicts a person of a crime or offence

referred to in Schedule 2 and which is not a crime or

offence contemplated in subsection (1), must enquire and

determine whether that person is unfit to possess a

firearm.

(b) If a court, acting in terms of paragraph (a), determines that a person is unfit to possess a firearm, it must make a declaration to that effect.

(My underlining)

(3) A court which has convicted a person of a crime or an offence

contemplated in subsection (1), has made a determination

contemplated in that subsection or has made a declaration in

terms of subsection (2) must notify the Registrar in writing of that

conviction, determination or declaration.

[5] From the wording of the section 103 (2) it is clear that once the accused has been convicted of an offence which does not fall in ss1 the Court must hold an enquiry. The section is obviously peremptory. In this matter, the accused were convicted of robbery. Robbery by definition is an offence which involves violence. See ss2 (g). It is also one of the listed and specified offences in Schedule 2. It does not fall in ss1 (a) but falls squarely within the ambit of s2.

[6] Where a provision is of such a nature that it does not allow the exercise of any discretion it must be complied with. In his or her reasons the Magistrate explains this non-compliance as an “*oversight*” and goes a step further to say even if it was not done in this case it will not happen in future which is acceptable. But his or her last comment that (s)he is of the view that the accused has suffered no prejudice is of concern.

[7] The purpose of the Act, is *inter alia*, “(T)o prevent the

proliferation of illegally possessed firearms and, by providing for the removal of those firearms from society and by improving control over legally possessed firearms, to prevent crime involving the use of firearms..." See section s2(b) of the Act. The use of illegally obtained firearms is a grave concern in South Africa. Society and different agencies have a role to play in the achievement of the purpose of this Act in order to enhance the Constitutional rights to life and bodily integrity. See ss2(a) of the Act. The judiciary is no exception. Judicial officers should not only adhere because the Act is peremptory. It must be adhered to well aware of the intention of the legislature in its noble endeavour to curb the use of illegal firearms in the broader context of the protection of human rights of all citizens of this country.

- [8] It is well known that robbery is committed by the use of dangerous weapons including firearms. That is why the legislature in its own wisdom included it in the list of specified offences.

- [9] In my view this is one case in which there should have been compliance with the Act. In my view the section is no different from its predecessor, s12 (1) (b) of the Firearms and Ammunition Act 75 of 1969. Numerous cases in the early 90's addressed this anomaly in a very lucid and analytical exposition of what the provisions entailed and what was expected of any judicial officer under the same circumstances. See **S v Phuroe en Agt Ander Soort Gelyke Sake** 1991 (2) SACR 384 (NC); **S v Flatela** 1991 (2) SACR 395 (NC); **S v Modise** 1992 (1) SACR 358 (O). It is in the light of this background that I am of the view that the Magistrate must hold an enquiry in terms of s103 (2) read with (3) of the Act and make an order in consequence thereof. The Magistrate is referred to two recent decisions which give guidance to hold a proper enquiry in terms of the Act. See **S v Lukwe** 2005 (2) SACR 578 (WLD); **S v Smith** 2006 (1) SACR 307 (WLD). It will not only be prudent or in the interests of justice but also for the sake of good administration of justice to refer this matter to the Magistrate Commission and the Justice College so that this anomaly is

brought to the attention of all Magistrates country wide and a repetition of this oversight does not occur.

[10] In the circumstances I make the following order:

1. **The conviction and sentence are confirmed.**
2. **The matter is remitted to the Magistrate to comply with the provisions of section 103(1), (2) and (3) of the Firearms Control Act, 60 of 2000.**

B.C. MOCUMIE, AJ

I concur.

A.P. BECKLEY, J

/sp