

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

Case No.: A06/2005

In the case between:

SIMON RADEBE

Appellant

and

THE STATE

Respondent

CORAM:

EBRAHIM, J *et* VAN DER MERWE, J

JUDGMENT:

EBRAHIM, J

HEARD ON:

8 MAY 2006

DELIVERED ON:

29 JUNE 2006

- [1] The appellant was convicted of the following offences in the Regional Court sitting at Odendaalsrus: -
- On count 1: culpable homicide;
- On count 2: contravening section 2 of Act 75 of 1969 (the Arms and Ammunition Act); the unlawful possession of a 9mm pistol number 44017418;

On count 3: contravening section 36 of Act 75 of 1969 (the Arms and Ammunition Act), the unlawful possession of two 9mm rounds of ammunition; and

On count 4: contravening section 36 of the General Law Amendment Act 1955 (Act 62 of 1955) in respect of the 9mm pistol and the two 9mm rounds of ammunition.

The accused was sentenced as follows:

Count 1: 5 years imprisonment;

Count 2: 1 year imprisonment;

Count 3: 15 years imprisonment;

Count 4: 3 years imprisonment.

The court *a quo* ordered appellant to serve an effective sentence of 18 years imprisonment.

[2] The appellant appeals against his respective convictions and sentences. Mr. Nkhahle who appears on behalf of the appellant has conceded that there is no merit in the appeal against the convictions in respect of counts 1, 2 and 3. In so far as the conviction on count 4 is concerned Mr. Strauss for the State has conceded that the conviction is a duplication of the convictions on counts 2 and 3 and therefore is incompetent.

[3] The substantial issue in this appeal is whether such a

duplication has occurred with regard to counts 2, 3 and 4. The rule against a duplication of convictions is a salutary one and it is the Court's duty to guard against such duplication where an accused person is charged with multiple charges supported by the same culpable facts. The question to be asked is not whether the accused has been charged with the same offence twice but whether he has been convicted and sentenced twice for the same offence.

It was contended for on behalf of the appellant

- (a) that the relevant facts proved only that the appellant was in possession of a 9mm pistol without a license and 2 live rounds of 9mm ammunition and that it was that evidence alone which the trial court relied on in convicting the appellant in respect of counts 2, 3 and 4.
- (b) that, no other evidence was advanced in support of

the conviction on count 4 and that accordingly the State had failed to prove this charge beyond a reasonable doubt.

[4] I now proceed to consider various authorities in which the guidelines to be applied in order to establish whether a duplication of convictions had occurred was dealt with. In **REX v SABUYI** 1905 TS 170, Innes C J applied the following test (at p. 171):

“Where a man commits 2 acts of which each, standing alone, would be criminal, but does so with a single intent and both acts are necessary to carry out that intent, then it seems to me that he ought only to be indicted for one offence, because the 2 acts constitute one criminal transaction.”

In **REX v GORDON** 1909 EDC 254, Kotze JP at 268 stated the following:

“Still we may adopt as a sound principle which will cover many of the cases that where evidence necessary to support the

one charge will likewise support the other, there the offences are the same.”

and at p. 269:

“.... so, on the other hand, we may safely say that where 2 different indictments or counts each lay a charge differing in its elements from that laid in the other though they both relate to one transaction, there the offences are separate and distinct.”

In **REX v VAN DER MERWE** 1921 TPD p. 1 Bristowe J (at p. 5) held referring to the so-called borderline cases:

“Generally speaking, the law is one act one offence, or rather, perhaps, that one offence is constituted by the outcome of one criminal intent in the accused’s mind, and that it is the carrying of that intention into effect which constitutes the criminal act. The difficulty is that in so many cases acts are closely connected with each other; they cannot be separated and one attributed to one intention and one to another. Often they follow closely on one another, and often the actual crime consist of a series of acts which cannot be disconnected, so that the difficulty is to decide where is the boundary line at which the series attributable to one criminal intention ceases

and the series attributable to another criminal intention begins. What we have to do is to find a satisfactory test which we can apply for the purpose of determining the question, namely, what is part of one criminal act and what must be attributed to another.”

In **REX v JOHANNES** 1925 TPD 782, Curlewis JP stated at p. 786:

“...it seems to me that the Court can safely lay down that under certain circumstances both those tests, or the one, or the other, may be applied, namely, the test of whether two acts are done with one single intent and constitute one continuous criminal transaction, and the test as to whether the evidence necessary to establish one crime involves proving another crime. It depends entirely on the circumstances of each particular case.”

In **EXPARTE MINISTER OF JUSTICE: IN RE REX v MOSEME** 1936 AD 52 the scope of the rule against a duplication of convictions was discussed by De Villiers JA who at p. 61 held as follows:

“The rule against splitting of charges (assuming it to be a valid rule) can apply only when an accused is charged in the course of one and the same trial with several offences arising out of one act or connected series of acts or transactions.”

It is wise to remember that although the learned judge in this case used the term “splitting of charges” the purpose of the principle involved is not to avoid multiple charges but rather to avoid multiple convictions in respect of the same offence.

- [5] The tests to be applied as set out in the authorities quoted above are not to be regarded as rules of law but are to be employed merely as practical guidelines alternatively as rules of practice in establishing whether an improper duplication has in fact occurred. In REX v KUZWAYO 1960 (1) SA 340 AD at 344 A – B. The appellate division held:

“Tussen hierdie twee gevalle is daar grensgevalle en ek vind dit nie moontlik om een of meer toetse te bedink wat in alle

gevalle met sekerheid sal bepaal wanneer daardie grens bereik is al dan nie. Na my mening moet die sogenaamde toetse waarna die beslissings hierbo aangehaal, verwys, nie as regsreël beskou word nie, maar slegs as nuttige praktiese hulpmiddels wat gebruik kan word om vas te stel of daar wesenlik een misdaad gepleeg is al dan nie. Dit volg dus dat by die toepassing van die reël 'n mens tot 'n groot mate afhanklik is van die gesonde verstand en billikheidsgevoel van die hof.“

In **S v GROBLER** 1966 (1) SA 507 at 523 F, Wessels JA stated the following with regard to the rule of practice to be applied in establishing whether an improper duplication of convictions had occurred.

“The test or combination of tests to be applied are those which are, on a common sense view, best calculated to achieve the object of the Rule. In so far as the ‘single intent’ and ‘continuous transaction’ test is concerned the distinction between motive and intent and the different intents inherent in different offences must not be overlooked.”

The learned Judge then went on to cite examples in illustration of this dictum and to analyse the elements of the relevant offences in order to examine whether a duplication of convictions had occurred.

In **REX v SHELEMBE** 1955 (4) SA 410 N at p. 412, Selke

J said the following:

“In some of these cases the decision went one way, in some the other. Whether a separate charge was, or was not, countenanced, seems to have depended on the Court's idea of a common sense view of the matter, and of what was fair to the accused in the light of the established facts. I am inclined to think it is impossible, in the border line type of case, to get any nearer to a general rule than that.”

The rule against a duplication of convictions is a rule primarily aimed at fairness. Its main aim and purpose is to avoid prejudice to an accused person in the form of double jeopardy, that is being convicted and punished twice for the same offence when in fact he or she has only committed one offence.

[6] I revert now to the facts of the present appeal. The first

question to be asked is whether the State proved the charges on counts 2, 3 and 4 against the appellant. This demands an analysis of the evidence with reference to the individual elements of each charge. The facts upon which the trial court convicted the appellant are briefly the following:

6.1 Both the deceased and his friends as well as the appellant and his friends were drinking liquor at a particular drinking place when acrimony arose between the two groups. One of the appellant's friends broke a beer bottle thereby splattering splinters of glass onto the deceased and his friends who then left the drinking place. The appellant followed them. He was in possession of a firearm which he pointed at them, clearly intending to shoot one of the deceased's friends, Tsokolo, who then ran away. The appellant nevertheless fired and the deceased was struck.

6.2 The investigating officer, Detective Sergeant Jeremia Tsebong Tsoeu, testified that he arrested the appellant the following morning after the shooting. He noticed the appellant holding on to the front of his trousers. The appellant was handcuffed and then searched. A 9mm Norinco Pistol was found in the front of the appellants trousers together with two live rounds of 9mm ammunition which was found in the chamber of the pistol he explained the appellant's rights to him and took him to the Police Station where he attempted to trace on the computer who the owner of the firearm was. Before he could establish this, the appellant told him where he had obtained the firearm. He also established that the appellant was not the owner of the firearm and did not have a license to possess that arm. He said he did not believe the firearm belonged to the appellant in any event because of the manner in which the appellant was holding on to it and hiding it in his trousers. He

later established the firearm had been stolen during a robbery case and a docket had been opened on a charge of robbery.

- 6.3 The appellant denied having the firearm and ammunition in his possession but he was convicted thereof after the trial court rejected his evidence as an improbability on the totality of the evidence. The appellant's evidence was just a bare denial of all the issues in respect of each of counts 1, 2, 3 and 4.

In terms of section 220 of the Criminal Procedure Act of 1977, the appellant admitted that the Norinco Pistol was an arm as defined in the Arms and Ammunition Act 75 of 1969. He also admitted that the two live rounds of ammunition also fell within the definition of that term in the said act in that they were capable of being fired from a weapon/firearm. Appellant also admitted that the pistol was a semi automatic pistol. The appellant flatly denied being in possession of the firearm and

alleged in evidence that the investigating officer was himself in possession of that arm when he arrested him. The appellant moreover denied having shot and killed the deceased.

[8] The learned trial magistrate correctly, in my view, rejected the appellant's evidence as a tissue of lies and convicted him on all four charges. The question which arises then is whether the convictions on counts 2, 3 and 4 are all competent. Bearing in mind the two rules of practice applied as guidelines and referred to in the authorities quoted in this judgement, the question to be asked now is whether the convictions in respect of counts 2, 3 and 4 are competent in so far as the evidence test and/or the single intent test is concerned. All three convictions in my respectful view are competent for the reasons set out below.

8.1 The evidence test. In regard to this test the following elements have to be proved by the state in order to

establish a *prima facie* case against the appellant:

8.1.1 as regards the charge of unlawfully possessing a firearm (count 2).

- (i) That the Norinco Pistol was found in the possession of the appellant; and
- (ii) That he had no license to possess it.
- (iii) That the pistol was a fire-arm as defined in the relevant Act.

8.1.2 As regards count 3, the charge of unlawfully possessing 2 rounds of 9mm ammunition, the State has to prove

- (i) that he was found in possession thereof;
- (ii) that he did not possess a licensed firearm from which the ammunition could be discharged.

8.1.3 As regards count 4 – that is the charge of contravening section 36 of the General Law Amendment Act 62 of 1955, the following had to be proved by the State:

- (i) That the firearm and ammunition was found in the appellant's possession.
- (ii) That there was a suspicion based on reasonable grounds that the said firearm and ammunition had been stolen.
- (ii) That the appellant had failed to give a satisfactory account of such possession.

It is quite clear from the above that the elements of the charge of contravening section 2 and 36 of Act 75 of 1969 are different to the elements of the charge of contravening section 36 of Act 62 of 1955. Accordingly all these convictions would be competent, if proved by the State beyond reasonable doubt.

8.2 The single intent test. Here too the appellant's claim of a duplication of convictions must fail as the intention in respect of a contravention of section 2 and 36 of the Arms and Ammunition Act of 1969 is to possess a firearm and ammunition without a license and the intention in respect of a contravention of section 36 of Act 62 of 1955 is to possess goods (in this case a firearm and ammunition) which had been stolen and in respect of which he is unable to give a satisfactory account for such possession.

[9] On all of the evidence therefore, I conclude that no improper duplication of convictions occurred and that the

convictions on each of counts 2, 3 and 4 are competent.

[10] This however, is not the end of the matter for the next issue which must be addressed is whether it can be argued on the evidence advanced by the State in support of its case on count 4 that the state proved its case against the appellant beyond reasonable doubt. In my view, an examination and analysis of Detective Sergeant Tsoeu's evidence establishes that the State did indeed do just that. At page 41 of the typed record of the proceedings, lines 5 – 11, the following evidence appears:

“Voordat beskuldigde vir u ‘n verduideliking gegee het rondom hierdie wapen, wat het u gedink hoe sou hy in besit kom van die wapen? Ek het net gedink dat dit is moontlik dat hy dit iewers gesteel het of geroof het.

Wat het u so laat dink? Want as iets aan u behoort u moet u bewys daarvan hê. Nou beskuldigde het dit versteek om te wys dit nie aan hom behoort het nie.”

Then at page 40 lines 16 -21,

“Het beskuldigde toe vir u ‘n verduideliking gegee omtrent die wapen, hoe hy daaraan gekom het of nie? Korrek hy het my

‘n verduideliking gegee.

Hierdie verduideliking, was dit inkriminerend van aard gewees of was dit verontskuldigend van aard? Dit was inkriminerend van aard.”

and, finally at page 43 lines 5 – 10.

“Nee meneer hy kan dit seker aan sy persoon hou waar hy wil.
Ja as hy die regmatige eienaar is, hy moes nie bang gewees
het as hy die polisie gesien het nie en probeer het om weg te
steek nie. Hy moes dit net oop en bloot gehou het en hy
moes, want hy weet moes hy het al die dokumente van die
vuurwapen.”

This evidence, the magistrate, correctly found amounted to the formation of a reasonable suspicion in the mind of Tsoeu that the firearm and ammunition had been stolen and, consequently, led to the conclusion by the trial magistrate that the appellant had failed to give a satisfactory account of his possession thereof.

[11] As regards the appeal against the sentence I am in agreement with both counsel that, interference by this court is warranted in respect of the sentence of 15 years

imprisonment imposed on count 2. Clearly the court *a quo* in sentencing the appellant misconstrued the provisions of the Criminal Law Amendment Act 105 of 1997 dealing with the imposition of minimum sentences for certain offences. A contravention of section 2 of the Arms and Ammunition Act 75 of 1969 for the unlawful possession of a pistol is not one of those offences carrying a minimum sentence in terms of the Criminal Law Amendment Act of 1997. The learned sentencing magistrate quite obviously laboured under the misapprehension in sentencing the appellant to 15 year imprisonment for the possession of a 9mm pistol that such an offence attracted the prescribed sentence of 15 years imprisonment pursuant to the provisions of section 51(2)(a) of the Criminal Law Amendment Act of 1997.

- [12] The authorities on the point are clear. In **STATE v SUKWAZI** 2002 (1) SACR 619 (N), P.C. Combrinck J in a well researched judgement, concluded that it was not the intention of the legislature that the minimum sentence of 15

years imprisonment prescribed for the possession of a semi automatic firearm, should be applicable to a conviction for the possession of a pistol without a licence as referred to in section 2 of the Arms and Ammunition Act no. 75 of 1969 even if such a pistol had a semi automatic firing mechanism or was commonly described as a semi automatic firearm.

See also: **STATE v KHONYE** 2002 (2) SACR 621 T;

STATE v MOOLEELE 2003 (2) SACR 255 T;

The unreported judgement of Van der Merwe J delivered in this court on 27 October 2005 in **MAKGASAME & OTHERS v THE STATE**, Appeal nr. A302/2004.

[13] It was conceded by the appellant's legal representative in the court *a quo*, that the firearm in question, the 9mm Norinco pistol had semi automatic power and a formal admission to that effect was recorded on behalf of the appellant.

[14] In addition, the sentence of 1 year imprisonment imposed for the unlawful possession of 2 rounds of 9mm

ammunition and the sentence of 3 years imprisonment imposed in respect of the conviction on count 4 is, in my view, also unnecessarily harsh considering that all three offences were committed at one and the same time. Consequently the sentences on these counts ought to run concurrently.

[15] The following order is then made:

1. The appeal against the convictions on count 2, 3 and 4 is dismissed and these convictions are confirmed.
2. The appeal against the sentence on counts 2, 3 and 4 succeeds.
 - 2.1 The sentence of 5 (five) years imprisonment on count 1 is confirmed.
 - 2.2 The sentence of 15 (fifteen) years imprisonment on count 2 is set aside and substituted with a sentence of 3 (three) years imprisonment which is to run from 30th May 2000.
 - 2.3 The sentence of 1 (one) year imprisonment imposed in

respect of count 3 is to run concurrently with the sentence of 3 (three) years imprisonment imposed on count 2.

2.4 The sentence of 3 years imprisonment imposed on count 4 is to run concurrently with the sentences of 3 years and 1 year imprisonment imposed on counts 2 and 3.

3. The appellant is to serve an effective term of 8 (eight) years imprisonment.

S. EBRAHIM, J

I concur.

C.H.G. VAN DER MERWE, J

On behalf of appellant:

Adv. R.J. Nkhahle
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of respondent: Adv. M. Strauss
Instructed by:
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