

IN THE HIGH COURT OF SOUTH AFRICA

(ORANGE FREE STATE PROVINCIAL DIVISION)

Review Nr :307/2003

In the review between:

THE STATE

versus

SAMUEL NTSANE MOHAPI

CORAM: RAMPAI et EBRAHIM JJ

JUDGMENT: RAMPAI J

DATE DELIVERED: 6 MARCH 2003

[1] This is a review case from a district court via a regional court. The accused was arrested on 15 May 2002 according to evidence. The first charge against him was contravention of section 2 of the Arms and Ammunitions Act No 75/1969. The prosecution alleged in the charge sheet that he was found with a firearm, namely a 9 mm pistol, in his possession without a licence at Rammulotsi in the Viljoenskroon district on Wednesday 15 May 2002. The second charge was contravention of section 36 of the Arms and Ammunitions Act 75/1969, in other words, unlawful possession of ten rounds of ammunition.

[2] On Friday 6 September 2002 he again appeared in the said district court where he pleaded not guilty to both charges before Mr AJ Barnard the district court magistrate. Attorney Moahlodi conducted his defence. He was then tried. On the same day he was convicted on both charges.

[3] Instead of sentencing the accused in terms of section 39(2) of the Arms and Ammunitions Act No 75/1969 after convicting him, the district court magistrate stayed the proceedings in the district court. He then referred the accused to the Kroonstad regional court for sentence. He did so in terms of section 116 of the Criminal Procedure Act No 51/1977. He considered that the penal provisions of section 51 of the Criminal Law Amendment Act No 105/1977 were applicable seeing that the firearm in question was a semi-automatic weapon.

[4] In the Kroonstad regional court the matter was allocated to Mr GJ Visagie for sentence. He perused the record of the proceedings in the district court. Having applied his mind to the facts and the evidence adduced, he was doubtful as to whether the proceedings in the district court were in accordance with justice. He then acted in terms of section 116(3)(a) of the Criminal Procedure Act No 51/1977 and asked the district court magistrate to furnish reasons for the conviction. The reasons were given in a two page letter dated 22 January 2002.

[5] The regional court magistrate, Mr GJ Visagie, refrained from sentencing the accused as the district court magistrate Mr AJ Barnard had requested. He was still having some reservations as to the correctness of the conviction. He held the view that the version of the defence was reasonably and possibly true. That is

the one thing. The other thing was that he was also of the view that the committal of the accused for sentence by the regional court assuming the conviction to be correct, was improper. In the light of these two uncertainties, the regional court magistrate in turn referred the case to this Court for review.

[6] I deem it convenient to start with the second issue raised in this review. Here the enquiry is whether the referral from the district court to the regional court was correct regard been had to the circumstances of this particular case.

It will be recalled that the first charge against the accused was contravention of section 2 of the Arms and Ammunitions Act No 75/1969 in other words, possession of an unlicensed firearm. There was no allegation in the charge sheet that the firearm found in the possession of the accused was a semi-automatic arm. The prosecution merely stated in the charge sheet that the accused had in his possession at the relevant place and time a firearm, namely a 9 mm pistol. There was virtually no hint in the charge sheet itself that the pistol so found was a semi-automatic arm the unlawful possession of which attracted the prescribed minimum sentence in terms of section 51 of the Criminal Law Amendment Act 105/1997.

[7] Testifying for the prosecution Captain MB Mabeleng said:

"Die 9 mm pistool is 'n semi-outomatiese pistool wat by die beskuldigde gekry is."

That was all the evidence there was concerning the description of the firearm in this case. The prosecutor Mr GN Mtabane left it there. The defence lawyer, Ms Moahlodi did not touch it at all. It must be borne in mind that there was no formal admission in terms of section 220 of Act 51/1977 made by the defence that the pistol in question was a semi-automatic firearm. Moreover, the presiding judicial officer did not, at the commencement of the proceedings, or at any other stage before the conviction, warn the accused or the defence lawyer of the special and drastic penal provisions of section 51 of the Criminal Law Amendment Act No 105/1997 read with subsection (b) of the third category of the offences specified in part 2 schedule 2. The prescribed minimum sentence for the possession of a semi-automatic firearm is ordinarily 15 years direct imprisonment. It is crystally clear to me that neither the accused nor his lawyer appreciated the danger which a verdict of guilty would entail.

[8] After the magistrate had pronounced the verdict that he found the accused guilty, the prosecutor stood up and said the following on p 22 of the record:

"Aangesien beskuldigde skuldig bevind is oor die besit van 'n semi-outomatiese vuurwapen en ammunisie word hof se leiding gevra."

The response of the magistrate was as follows:

"Wet 105 van 1997 aan beskuldigde en beskuldigde se prokureur verduidelik. Verduidelik die Wet op minimum vonnisse. Ook verduidelik dat die hof nie die jurisdiksie het om die vonnis te kan oplê nie."

(*Vide* p 23)

Ms Moahlodi was apparently stunned. She was simply speechless. The impression I get is that the dramatic turn of the proceedings took her by complete surprise.

[9] Besides the aforesaid passage, or shall I say a sentence extracted from Captain Mabeleng's testimony, there was no further evidence whatsoever on which his conclusion that the pistol was a semi-automatic firearm was based. He was not asked to distinguish between an automatic firearm on the one hand and none automatic firearm on the other - let alone a functional distinction between a semi-automatic firearm on the one hand and a fully automatic firearm on the other. Although Captain Mabeleng has considerable experience as a member of the South African Police Service, he did not claim to be an expert in the field of firearms. What the extent of his knowledge of firearms is, does not appear *ex facie* the record.

Upon vigilant examination of the circumstances of this case, it certainly cannot be said that the accused has had a fair trial. The finding of the district court magistrate that the firearm was a semi-automatic weapon was in my view erroneous. The evidence on which such view was based was too thin to justify such a finding. In my view the prosecution did not discharge the onus of proving that the firearm found in the possession of the accused was indeed a semi-automatic firearm. It being the case, the accused was entitled to be sentenced in accordance with the ordinary provisions of section 39(2) of the Arms and

Ammunitions Act No 75/1969 and not the extra-ordinary penal provisions of section 51 of the Criminal Law Amendment Act 109/1997. It follows therefore, that the referral of the accused from the district court to the regional court for sentence was not a procedural option open to the district court magistrate. A district court magistrate had the jurisdiction to sentence the accused assuming the conviction was in order.

[10] A similar situation arose in **S v NDLOVU** 2003(1) All SA 66 SCA. At paragraph 8 Mpati JA said:

"An allied submission made by counsel was that at no stage was the appellant pertinently alerted to the fact that he stood in peril of the sentencing regime of the Act being applied if he was convicted. In response to this latter submission counsel for the State contended that apart from the fact that reference was made in the charge sheet to section 50 of the Act the appellant was legally represented and that 'everyone knew what it was all about'."

In dismissing the contention by counsel for the State, Mpati JA observed at par 9:

"The difficulty with this argument of course is that there is no indication whatsoever in the record that the appellant or his legal representative had the slightest idea, prior to sentence, that the appellant was facing the prospects of imprisonment of 15 years in terms of the minimum sentencing provisions of the Act. Apart from mentioning, in the course of his judgment and while summarising the facts, that '[d]ie wapen is 'n semi-outomatiese vuurwapen', the magistrate does not appear to have advised the appellant at any stage of the consequences of this finding, if made."

[11] In the instant case, absolutely no prior advice was given to the accused. He was not pertinently forewarned about section 51 of the Criminal Law Amendment Act 105/1997. Everyone said nothing about it until the magistrate had found the accused guilty. By then it was too late for the defence lawyer to tighten her belt. She had been ambushed. The accused's right to a fair trial had been violated. *Vide* **S v SELEKE EN ANDERE** 1976(1) SA 786 (TPD) at 682H which was quoted with approval by Cameron JA at par 20 in the recent decision of **S v MICHAEL LEGOA** 2002(4) All SA 373 SCA and again by Mpati JA at par 12 in **S v NDLOVU**, *supra*. Stressing the concept of substantive fairness as embraced in a guaranteed constitutional right to a fair trial, Mpati JA elucidating

the said passage in **S v SELEKE** *supra* as ably translated from Afrikaans to English by Cameron JA said:

"And I think it is implicit in these observations that where the State intends to rely upon the sentencing regime created by the Act a fair trial will generally demand that its intention be pertinently brought to the attention of the accused at the outset of the trial, if not in the charge sheet then in some other form, so that the accused is placed in a position to properly appreciate in good time the charge that he faces as well as its possible consequences.

..... It is sufficient to say that what will at least be required is that the accused be given sufficient notice of the State's intention to enable him to properly conduct his defence."

No forewarning to invoke section 51 of the Criminal Law Amendment Act 105/1997 was at all given in the instance case. In **S v NDLOVU** *supra* an attempt was made to do so. But even that attempt did not impress the Supreme Court of Appeal. In this case where no warning not even an attempt was given the accused was clearly prejudiced. He was deprived of the opportunity to properly prepare and conduct his defence. The penalty provided for in section 39(2) of the Arms and Ammunitions Act 75/1969 for possession of ordinary firearm is R12 000 or 3 years imprisonment or both. The penalty provided for the possession of a semi-automatic firearm in section 51 of the Criminal Law Amendment Act 105/1997 is 15 years imprisonment without the option of a fine unless there are substantial and compelling circumstances to deviate from the sentence. The prejudice is too obvious to see. The reservation of the regional court magistrate was therefore valid. The referral was improper. It was potentially prejudicial to the accused. The noble notion of a fair trial demands both substantive fairness as well as procedural fairness. The criminal proceedings cannot be seen and declared to have been in accordance with justice if anyone of these two tenets of justice is missing.

[12] I now turn to the merits. The version of the accused was that two men came to his tuckshop on the night in question. They had firearms to sell. They were aggressive. They did not believe that he a shopkeeper, could not afford to buy a firearm for R500. They began to loot his shop. Among others, they took R60 from a bowl he used as a sort of money-box. They told him they would come back for the balance (R440). They went away leaving one firearm behind in his shop. While all this was going on he did not utter a word because he knew Gopalang very well. According to my understanding he meant that Gopalang was

apparently a notorious or troublesome young man. He feared for his life. Gopalang's companion was a certain Lethebela. The accused perceived both as armed and dangerous. Captain Mabeleng testified that Gopalang was one of the six suspects who were arrested that night in connection with charges of armed robbery and murder at Vierfontein.

[13] After the robbers had gone away, the accused locked the door of the shop, put the firearm in the bag and concealed it. The shop was the front part of his dwelling. His aim was to take the firearm to the police the next day. He told his wife about the incident and slept. During the same night the police came to his house. They were led by Gopalang. He took out the firearm the police were looking for. He was then arrested.

[14] The district court magistrate rejected the accused's version as a pure story which he fabricated afterwards.

"Ek kon glad nie bevind dat beskuldigde se weergawe enigsins moontlik waar kan wees nie."

(*Vide* p 2 letter from district court magistrate dated 22 January 2002.)

It is so that the accused gave no explanation to the police of where he got the firearm from. But the State witness Captain Mabeleng confirmed during cross-examination that at the time of the arrest in the early hours of Wednesday 15 May 2002 the accused gave him no explanation because he, the captain, advised him of his right to remain silent and warned him of the consequences of speaking up about the firearm and the ammunition found in his possession. The accused heeded the warning and remained silent. In my view the presiding judicial officer erred in holding this fact against the accused. No unfavourable inference can be legitimately drawn from the action of a suspect who chose to assert his fundamental right to remain silent. By giving no explanation the accused was perfectly within the ambit of his constitutional protection. Secondly, the police found the firearm bagged and hidden in the accused's bedroom. This fact does not mean much in favour of the prosecution's case. It must be kept in mind that the accused's dwelling was a shack. He was not the sole occupant of the shack. The firearm was loaded. A loaded firearm is a deadly weapon. I can see nothing wrong with the actions of the accused. Any person who wraps up a loaded firearm and conceals it may be prompted to do so by considerations of safety. The accused was never asked why he put the firearm in the bag and why

he concealed it. A vendor who hardly had a cash register probably had no safe in which he could have locked the firearm away. To avoid any possible accident by negligent handling of a firearm, he might have thought it advisable to hide it away in order to make doubly sure it was not within easy reach by any other occupant of the shack. But he might also have hidden it away with some criminal motive as the district court magistrate believes. Therefore, there are at least two possible motives - the one evil the other noble. Since the accused was never specifically asked to explain what his motive was in hiding the firearm he is entitled to the benefit of the doubt, which is that the district magistrate should have found that it was doubtful whether the motive for the concealment was nefarious or innocent.

[16] Thirdly, the accused was arrested in the early hours of Wednesday 15 May 2002. It seems the police arrived shortly after the firearm was delivered. He testified that he intended taking the unwanted firearm to the police the next day. The next day should not be understood to mean Thursday 16 May 2002. I understand it to mean after daybreak of the same day Wednesday 15 May 2002. He was not prepared to go to the police immediately at night. It was safer during daytime than at nighttime to go to the police. The district court magistrate made an unfavourable finding against the accused on this point. He remarked:

"..... en die vraag is dan, hoekom gaan hy nie dadelik polisie toe nie, hoekom eers tot die volgende dag wag?"

During cross-examination the accused answered the prosecutor's question by saying he feared for his life which was why he did not immediately go the police at night. He was fearful to venture out at night because he was aware "the robbers or the sellers" were still armed with another firearm. He was uncertain whether they had gone away or whether they were still hanging around his place. Unfortunately for the accused the police arrived before dawn. His good intentions were overtaken by the unexpected early arrival of the police. In my view the explanation of the accused is reasonable. In those circumstances he did not have to put his fears aside, leave his family at an ungodly hour of the night alone and walk 5 km forward journey only to hand the unwanted firearm to the police and walk another 5 km return journey back home.

Fourthly, the district court magistrate found the accused was untruthful as to how the firearm came into his hands. The version of the accused was that the two men did not negotiate the terms of the transaction with him. They decided to sell the firearm to him. They fixed the price. They took a deposit from the bowl. They undertook to collect the balance later. They left the firearm behind. The accused

in essence alleged that he was never a party to the sale of the firearm found on his premises. He was not a willing buyer. He did not purchase the firearm. He said in his evidence in chief on p 14:

"Ek kon nie iets sê nie, net stil gebly"

[18] Now if the version of the accused is true, then there was no genuine sale agreement here. The entire deal was a unilateral transaction and not a valid bilateral contract between two willing parties who were *ad idem* in respect of all the *essentialia* of the transaction. Where there was no meeting of the minds there could have been no sale. Since the accused lacked *animus acquirendi* he could not have had *animus possidendi*.

It can be accepted that the accused's version that the firearm was brought to his premises by Gopalang and Lethebela is true. It was Gopalang who led the police to where the firearm was. But Gopalang Alfred Somfula was not called to rebut the forced or the alleged forced or unilateral nature of the transaction as alleged by the accused. It seems to me that the finding of the district court magistrate that:

"..... die geforseerdery 'n klomp leuens is."

was a misdirection on the part of the district court magistrate. The real issue here was *mens rea*. It seems to me that the accused did not receive the firearm at all. The firearm was dropped with duress in his shop. He did not accept it *cum animo possidendi*. On the facts it appears to me that the accused did not have the requisite criminal intent to possess the firearm found in his house. Fifthly, the district court magistrate also described as a bunch of lies the accused's claim that he did not call the police though he had a cell phone because he did not know how. The magistrate found it unbelievable that a man who had a cellular phone would not know the emergency number of the police. The district court magistrate was of the opinion that the accused ought to have known the police emergency telephone number 10111. No penetrating questions were put to the accused during cross-examination to establish that he in fact knew the number. It is not sufficient to find that he ought to have known the number since he had a cellular phone. The court did not know the highest level of education the accused had achieved, if he had received any formal schooling. The court did not know whether the accused was able to make any sense of a telephone directory, assuming he had one. His evidence that he did not know the police emergency

number and his further evidence that he did not know how to telephone the police cannot, without more, be summarily dismissed as false.

[19] Having considered all the relevant facts, the totality of the evidence, the magistrate's reasons for conviction and especially the incident of onus, I agree with the view of the regional court magistrate that the version of the accused must have been accepted as reasonably and possibly true. There was nothing on oath to gainsay it. The State has not succeeded to discharge the onus of proving the contrary in my view. It must always be remembered that no onus rests on the accused to convince the court about the truth of his version. If he gives an explanation which is reasonably and possibly true he must be acquitted even if such an explanation is improbable. *Vide* **REX v DIFFORD** 1937 AD 370 at 373.

[20] For the reasons enumerated above I am not satisfied that the proceedings in the district court were in accordance with justice. Accordingly the conviction of the accused is hereby set aside. So is his referral to the regional court for sentence.

MH RAMPAL, J

I CONCUR:

S EBRAHIM, J