

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION**

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

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DATE
SIGNATURE

CASE NUMBER: A100/2019

In the matter between

SEKGABI, JONATHAN THLOGI

APPELLANT

and

THE STATE

RESPONDENT

J U D G M E N T

RAMLAL, AJ (DOSIO, J concurring):

[1] Sekgabi, Jonathan Thlogi, (hereinafter referred to as the appellant), was tried and convicted in the Orlando District Court in Soweto on 15 January 2019, on a charge of contravening section 120(6)(b) of the Firearms

Control Act 60 Of 2000, to wit, pointing of anything which is likely to lead a person to believe it to be a firearm, without good reason to do so.

- [2] The appellant pleaded not guilty to the charge. He was legally represented by Mr Mbodlane from Legal Aid during the trial and no plea explanation was tendered.¹
- [3] On 24 January 2019 the appellant was convicted as charged and sentenced to serve a term of four (4) years imprisonment.
- [4] A Notice of Appeal in respect of both conviction and sentence was filed by the appellant on 30 January 2019. On 1 February 2019, the appellant, represented by Adv Simelane applied for leave to appeal the conviction and sentence. The application for leave to appeal was heard on 5 April 2019 by a different Magistrate as a result of the demise of Mr Skhosana, who dealt with the trial. The application for leave to appeal the conviction was refused but leave was granted in respect of the sentence.²
- [5] On 5 April 2019, the appellant also succeeded in his application to be released on bail pending the appeal.³
- [6] From 20 May 2019, several attempts were made by the appellant to secure leave to appeal the conviction herein. The appellant was ultimately granted leave to appeal the conviction on 25 February 2022.
- [7] On 4 July 2022, when the Respondent contacted the appellant's legal representative to enquire about the status of the appeal as Heads of Argument had not yet been received for the appeal that was set down for 29 August 2022, it transpired that the Notice of Set Down was sent to the appellant's erstwhile attorneys, in error.⁴ This error was immediately rectified and the appellant's legal representative filed the Heads of Argument on 19 July 2022.

¹Caselines page 004-6

²Caselines 004-90 line 5-7

³ Caselines 005-3 (Bail Receipt)

⁴ Notice of Set down page 010-4 to 010-6

[8] The appellant applies for the condonation of the late filing of the Heads of argument. The Respondent does not oppose this application.

[9] The reasons for the appellant's non-compliance with the Rules are set out concisely and they contain just cause for the condonation to be granted.

[10] The appellant appeals the conviction and sentence on the following grounds:

10.1 that the court *a quo* misdirected itself by finding that the State proved its case beyond a reasonable doubt;

10.2 that the court *a quo* disregarded material discrepancies in the State's evidence;

10.3 that the court *a quo* failed to apply or duly consider the cautionary rule applicable to a single witness;

10.4 that the court *a quo* misdirected itself by not accepting the appellant's version to be reasonably possibly true;

10.5 that the Magistrate erred by not properly considering the appellant's personal circumstances, more specifically, the chances of rehabilitation;

10.6 that the Magistrate erred by not taking into consideration that the appellant was a first offender.

SUMMARY OF THE EVIDENCE:

[11] The complainant, **Bheki Nkabinde**, testified that on 7 June 2018 the appellant arrived at his garage to retrieve a car battery that the complainant was holding in lieu of payment of the sum of R350-00 which the complainant claimed was owed to him by the appellant in respect of a diagnostic test that was conducted on the appellant's

vehicle. The complainant later said that the R350-00 was in respect of storage costs for the vehicle that was left at his place after the diagnostic tests were completed and he was unable to establish contact with the appellant. The complainant further testified that the appellant produced a firearm which was black in colour and rusty on the side. The appellant pointed this firearm at the face of the complainant whilst the appellant and the complainant were an arm's length away from each other. When the appellant turned to leave the premises, the complainant followed him out and he saw the appellant leave with a male person who accompanied the appellant on the day.

- [12] During cross examination the complainant confirmed that the appellant had approached him on 7th June 2018 to serve a Small Claims Court summons on him in respect of the dispute that they had with each other regarding the car battery. The complainant explained that the appellant threatened to shoot him. The appellant demanded the return of the battery whilst he had the summons and the firearm in his hand. The complainant, despite being threatened and pointed with a firearm by the appellant, did not hand over the battery to the appellant.
- [13] The appellant, **Sekgabi Jonathan Thlogi**, testified in his defence at the close of the State's case. He confirmed that he went to the complainant's premises with a friend named Christopher on 7th June 2018, to serve a document from the Small Claims Court that he obtained in his attempt to retrieve the battery that the complainant was holding in lieu of a R350 payment that the complainant claimed that he was owed by the appellant.
- [14] The appellant said that he handed over the Small Claims Court document to the complainant. The complainant insulted the appellant whereupon the appellant threw the document on the floor and he then left the complainant's premises. The appellant denied being in possession of a firearm or anything that resembled a firearm on 7th June 2018 when he was in the presence of the complainant or at all.

He also denied pointing a firearm or anything that resembled a firearm at the complainant.

- [15] Mr **Christopher Mogi** was called by the defence to testify. This witness confirmed that he accompanied the appellant to the premises of the complainant on 7th June 2018. The appellant wanted to deliver a document from the Small Claims Court to the complainant.
- [16] The witness stated that he waited on the pavement outside of the garage of the complainant when the appellant went inside to hand the document to the complainant. The complainant began shouting at the appellant and told the appellant that he must stand outside. The complainant began closing the door and the appellant threw the document on the floor and left.
- [17] The witness testified that the appellant did not have a firearm in his possession on the day when he accompanied him to the complainant's premises. He also confirmed that he did not see the appellant point a firearm at the complainant. The evidence of this witness was not challenged by the State.

AD CONVICTION

- [18] In *S v Francis* 1991 (1) SACR 198 (A) at 198j-199a it was held that-

"The powers of a court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court's conclusion, including its acceptance of a witness' evidence is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness' evidence - a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional circumstances that the court of appeal will be entitled to interfere with a trial

court's evaluation of oral testimony."

- [19] In coming to its decision the court must consider the totality of the evidence led, taking into account the probabilities and improbabilities of the respective versions as well as the credibility of the witnesses. In **S v Chabalala 2003(1) SACR 134 (SCA)** at paragraph 15, the Honourable Judge Hefer AJA said:

"to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt."

- [20] An evaluation of the proceedings of the court *a quo* reveals the following:

20.1 It is improbable that the appellant would have brought a firearm or threatened to shoot the complainant with something that resembled a firearm when he was relying on a court process to settle the dispute that he had with the complainant;

20.2 It is improbable that the appellant would request another person to accompany him to the complainant and then point a firearm or threaten the complainant or use an object that resembled a firearm or to threaten the complainant in the presence of this witness;

20.3 It is unlikely that the complainant, who said that he was scared⁵ would not have returned the battery to the appellant if the appellant was pointing a firearm or something that resembled a firearm at his face;

20.4 the Magistrate incorrectly found that the appellant did not deny being in possession of a firearm or something that resembled a firearm

⁵Caselines 004-30 line 14

when the version of the appellant was that he did not have in his possession 'a firearm or anything resembling a firearm'⁶

20.5 the finding by the Magistrate that 'the fact that there was a black firearm rusty on the side still stands before me because it is undisputed' is incorrect⁷ as the appellant specifically denied being in possession of a 'firearm or anything that resembles a firearm';

20.6 the trial court misdirected itself when it placed emphasis on the payment of the R350-00 when the issue at hand which the trial court was called to adjudicate upon was whether or not the appellant had acted in contravention of the Firearms Control Act 60 of 2000 by pointing a firearm or anything that resembled a firearm at the complainant;

20.7 The trial court misdirected itself when it rejected the version of the defence witness, Christopher Mogi, in that the evidence of this witness was not challenged by the State;

20.8 The trial court descended into the arena and cross-examined the appellant, thus demonstrating bias on the part of the Magistrate;

20.9 The court *a quo* misdirected itself by placing reliability on the evidence of the complainant

[21] The trial court was aware of the cautionary rules applicable to the evidence of the single witness, and that his evidence should be subject to scrutiny. It is trite that a "trial court may accept the evidence of a single witness if it inspires confidence that it is clear and satisfactory in every respect".⁸ However, by accepting the evidence of the single witness, whilst the evidence was not satisfactory in every material respect, the Magistrate simply paid lip-service to the applicable cautionary rule.

⁶Caselines 004-37-38

⁷Caselines 004-70 lines 5-7

⁸Director of Public Prosecution v S 2000 (2) SA 711 (TPD) at 714F

- [22] Despite several contradictions in the evidence of the complainant, as detailed above, the court *a quo* accepted his evidence and rejected the evidence of the appellant.⁹
- [23] In ***S v JACKSON 1998(1) SACR 470*** it is said that “*the burden is on the state to prove the guilt of an accused beyond a reasonable doubt, no more or no less.*” The State clearly failed to prove a case against the appellant, for the reasons set out above. The appellant was therefore wrongly convicted.
- [24] In view of the determination in respect of the conviction, it is not necessary to evaluate the grounds of appeal relied upon in respect of sentence that was imposed.
- [25] In the result, I propose that the following order be made:
1. The Appeal against both conviction and sentence is upheld
 2. The conviction and sentence are set aside.

AK RAMLAL
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered

D DOSIO
JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand- down is deemed to be 10h00 on 15 February 2023.

Date of hearing: 29 August 2022

⁹ S v Sauls 191 (3) SA 172(A) at 180._

Date of Judgment:

15 February 2023

Appearances:

On behalf of the appellant:

Adv Nadeson

Instructed by:

Mbokoto Attorneys

On behalf of the respondent:

Adv J.H Spies

Instructed by:

Office of the DPP