IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: A25/2022
Date of hearing: 15 March 2023
Date delivered: 17 March 2023

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

17/3/23 .....
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In the matter between:

BAFANA NGWENYA **Appellant**

and

THE STATE **Respondent**

JUDGMENT

SWANEPOEL J: (HASSIM AJ concurring)

[1] The appellant was convicted on 30 June 2020 on one count of contravening section 3 of the Firearms Control Act, 60 of 2000 ("the Act"),

possession of a 9 mm semi automatic firearm (count 1), and one count of contravening section 90 of the Act, possession of 8 rounds of ammunition without being the holder of a licence in respect of a firearm that was capable of discharging that ammunition (count 2).

[2] The appellant was convicted on both counts on 30 June 2020, and on 26 March 2021 the appellant was sentenced to 15 years' imprisonment on count 1, and one year's imprisonment on count 2. This is an appeal against both conviction and sentence.

[3] The facts are simple. On 14 October 2018 some six police arrived at the appellant's home to investigate an allegation that the appellant was engaged in selling firearms. They encountered the appellant at or near his garage and asked for permission to search the appellant and the garage. When nothing was found, the police officers sought permission to search the house, which the appellant gave.

[4] It is at this point that the witnesses' versions diverge. The police officers, Constables Nkosi and Khorombi, testified that as they were walking through the house together with the appellant, he suddenly started running towards his bedroom. They followed him, and upon entering the room they saw the appellant with a firearm in his hand. The appellant, they say, threw the firearm out of the bedroom window. Const. Khorombi testified that they went outside to where the firearm had been thrown, and in a narrow passageway next to the house, they found a firearm lying on the ground. It was loaded with 8 rounds of ammunition.

The firearm and the ammunition were seized as evidence and the appellant was arrested.

[5] The appellant says that he walked with the police officers to the bedroom where his wife was still in bed. The police officers searched the room, and one of them leaned out of the bedroom window to look outside, and noticed a firearm lying on the ground in the passage. The police officers then went outside to retrieve the firearm. The appellant denies any knowledge of the firearm.

[6] Save for the two police officers, the appellant and one Lesiba Langa testified, the latter as a defence witness. The appellant denied that he had possessed the firearm, but he could not explain its presence in the passage outside the house. Langa was present at the house at the time of the incident, but he did not see the incident in the bedroom, and he could not assist the appellant's case in any material respect.

[7] It is important to note at this stage, that during the evidence of Const. Nkosi the court adjourned in order to conduct an inspection in loco at the house. Subsequently, a photo album was handed in by agreement between the parties, but the magistrate's observations were never noted on the record.

[8] Having heard the above evidence, the court a quo found the police officers to be credible witnesses, and that they materially corroborated each other's version. The court also correctly pointed out that Langa could not take the matter any further. The judgment does not show that the court

evaluated the appellant's evidence in any depth. His evidence was simply rejected as false beyond a reasonable doubt. The appellant was criticized for not calling his wife, who was in the room at the time of the arrest, and who could have corroborated his version. The appellant was convicted on both counts.

[9] After the appellant was convicted and sentenced he appointed a new attorney, who applied for leave to appeal, and for leave to lead further evidence in terms of s 309 B (5) (a) of the Criminal Procedure Act, 51 of 1977. The application to lead further evidence was granted and the court then heard the evidence of the appellant's wife, Ms Priscilla Mabuza. Ms Mabuza corroborated the appellant's version in all material respects. Having heard her evidence, the court granted leave to appeal.

[10] In evaluating Ms Mabuza's evidence the court said the following:

"The state argued that she does have a motive to assist the accused, to give a version that suits him, and that the possibility of tailoring her version is clear. It is indeed a possibility, but she gave her evidence in a clear and concise manner and although she has the best reasons to assist the accused to give false evidence, I cannot find that her evidence is false beyond a reasonable doubt."

[11] It was then not open to the court to make a finding on the conviction, as the appellant had already been convicted. Nonetheless, the court said the probabilities still favoured the State, and therefore Ms Mabuza's evidence was rejected. Not only was the court not entitled to make a finding on her credibility (which could only be considered on

appeal) but it also applied the incorrect standard of proof: if a defence witness's evidence cannot be rejected as false beyond a reasonable doubt, the matter cannot then be decided on a balance of probabilities.[1]

[12] It is not even necessary for a court subjectively to believe the appellant. A court must acquit an accused where there is a reasonable possibility that his evidence or the exculpatory evidence of a defence witness may be true.[2] In my view there is no reason to reject Ms Mabuza's evidence. Her evidence may be reasonably possibly true. In those circumstances the appeal must succeed.

[12] I must add, however, there are also two other fundamental problems with the State's case. Firstly, the court a quo failed to record any of its observations that it made at the inspection in loco. An inspection in loco gives the court an opportunity to make its own observations as to the item or place inspected. An inspection introduces real evidence into the proceedings (See: *R v Sewpaul 1949 (4) SA 975 (N)*). That evidence (the obserations made and the pointings out observed) should be placed on record. In *Newell v Cronje and Another 1985 (4) SA 692 (OK) at 698 A* the Court said the following:

"A presiding officer should, and usually does, record his observations of exhibits tendered in court, or arising from an inspection in loco and invites both parties to comment on his findings. If not objected thereto, such findings become

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[1] S v McLaggan [2013] ZASCA 92

[2] S v Kubheka 1982 (1) SA 534 (W)

evidence by consent of the parties and may properly be relied upon without being testified to on oath."

[13] Although photographs taken at the scene were introduced into evidence, the absence of a recordal of the observations made by the presiding officer is a fatal flaw in the State's case.

[14] The second fatal flaw in the State's case is the following: The State was obliged to produce evidence that the item found at the scene was in fact a firearm. To that end the State produced a ballistics report. As is customary the State led evidence on the chain of custody of the firearm, from its discovery on the scene to its delivery at the police laboratory. Const Nkosi testified that he booked the firearm into the SAP 13 register. The firearm was sealed in a forensic bag which bore an individual number. Const Nkosi could not remember the number, but after refreshing his memory from his affidavit, he testified that the number on the forensic bag was PA400392**9088** (my emphasis).

[15] Const Nkosi complained about his eyesignt being inadequate to read the affidavit properly, and upon being handed the presiding officer's glasses, he confirmed that the last four digits of the number were in fact "9038". That number differs from the SAP 13 register. There the last four digits were recorded as being "9028", which corresponds with the forensic report. The aforesaid discrepancy is fatal to the State's case as the State has failed to prove that the firearm found on the scene was the same firearm referred to in the forensic report.

[16] Counsel for the State, Ms Marriot, urged us to find that the above was a simple mistake, and, she pointed out that none of the parties had taken up the discrepancy at trial. In my view, the fact that the appellant did not specifically raise this dispute at trial does not absolve the State of the obligation to prove its case, which includes the requirement to prove that the item confiscated was in fact a functional firearm. It does that by way of the forensic report. The chain of custody is vital, and one cannot merely dismiss the incorrect number as an error.

[17] For the aforesaid reasons the appeal against conviction must succeed.

[18] I make the following order:

[18.1] The appeal is upheld.

[18.2] The conviction and sentence are set aside.

SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

I agree:

HASSIM AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

COUNSEL FOR APPELLANT	**Adv. M Van Wyngaard**
COUNSEL FOR RESPONDENT:	**Adv. M Marriot**
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