Case No 400/94 /mb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of:

MAKHANDA AARON NDWALANE

APPELLANT

and

THE STATE

RESPONDENT

CORAM: HEFER, NESTADT JJA et SCOTT AJA HEARD: 4 SEPTEMBER 1995 DELIVERED: 19 SEPTEMBER 1995

J U D G M E N T

SCOTTAJA/ ...

SCOTT AJA:

The appellant was one of five persons charged before Squires J and two assessors, sitting in the Circuit Local Division for the Southern District of Natal, with seven counts of murder and three counts of attempted murder. In addition, the appellant, on his own, was charged with two offences under the Arms and Ammunition Act, No 75 of 1969 ("the Act"). He was acquitted on the counts of murder and attempted murder, but convicted on both counts of contravening the Act. These counts were, first, contravening s 2 by unlawfully possessing two 7.62 mm Heckler and Koch G3 rifles and second, contravening s 36 by possessing 15 rounds of ammunition which were found in the magazine of one of the rifles. The rifles were handed in as Exhibit 1 and Exhibit 3 and it is convenient to refer to them as such. The counts were taken together for the purpose of sentence and the appellant was sentenced to 8 years imprisonment. The

appeal, with the necessary leave, is against both the conviction and the sentence.

All but one of the counts on which the appellant was acquitted arose out of an attack on a minibus containing some ten people by a group of armed men who fired shots into the vehicle in circumstances which indicated an intention to kill the occupants. The incident, which appeared to have been politically motivated, occurred on 4 July 1992 in the Bhomela ward near Port Shepstone, KwaZulu-Natal, and at a place not far from the home of the appellant who is the chief of what was described in evidence as the Nsimbini tribe. On 7 July 1992 both rifles were found in the appellant's house. Ballistic evidence established that three spent cartridges found about 20 metres in front of the minibus after the attack had been fired from Exhibit 3. This was also the rifle which contained the rounds forming the subject of the second count under the Act.

It was common cause that both rifles had been issued by the KwaZulu Government to Mr Gilbert Ndwalane, the brother of the appellant. According to the permits, they were to be used for the purpose of protecting he property of the KwaZulu Government. As chairman of the tribal authority of which the appellant is the chief, Mr Gilbert Ndwalane was authorised to possess weapons of this kind which had been issued to him and, in turn, issue them to deserving permit holders after they had received training at Ulundi. It appears that one of the rifles, Exhibit 1, had previously been issued to a Mr Momomo Ndwalane who was an induna in the area. After his death in 1991 the weapon disappeared but was later recovered by the police. On 22 June 1992 it was returned to Mr Gilbert Ndwalane who wished to re-allocate it to another induna. But before he could do so certain documentary approval was required from Ulundi. The other rifle, Exhibit 3, had been issued by Mr Gilbert Ndwalane to his

brother Ernest. The latter subsequently left the area to live in Durban and the rifle was returned to Mr Gilbert Ndwalane. This occurred long before the attack on 4 July 1992. It was accordingly not in dispute that during the period referred to in the indictment, viz 4 to 7 July 1992, Mr Gilbert Ndwalane was lawfully entitled to be in possession of both rifles.

The evidence relating to the counts in question was largely confined to that of two witnesses. The one was Warrant Officer Breedt, the investigating officer. The other was Mr Gilbert Ndwalane. The latter was originally to be a State witness, but was eventually called as a witness for the defence. The appellant, himself, did not give evidence.

Mr Breedt testified that on 7 July 1992 he received a radiotelephone call from members of The Special Branch Unit from Port Shepstone who were at the appellant's house where they had found a person in possession of a handgun. He said he immediately went with his

constable assistant to the appellant's house where he assumed control of the situation. He explained that a few days previously he had seen the appellant in a motor car in which there was a G3 rifle. He accordingly asked him if he was in possession of any G3 rifles. The appellant, he said, thereupon went into his house and returned with Exhibit 3. According to Mr Breedt there were 15 rounds in the magazine. He said he asked the appellant if there were any other firearms of the same calibre in the house and on being told there were not, he proceeded to search the house. During the search he noticed that the appellant appeared to be nervous and while in the main bedroom glanced up at the ceiling on a few occasions. Mr Breedt said he observed that there was a break in the ceiling. He climbed on a chair and discovered another rifle, Exhibit 1, in the ceiling. He testified that the appellant told him that he knew nothing about this weapon. Mr Gilbert Ndwalane disputed that it was Mr Breedt who had

discovered the two rifles at the appellant's house on 7 July 1992. He said that he was present when Mr Breedt arrived and by that time the other policeman had already taken possession of the firearms. He said he saw them counting the rounds taken from the magazine and there were twenty and not fifteen rounds. Nonetheless, he acknowledged that both rifles were being kept at the appellant's house. He said that Exhibit 3 was kept in a wardrobe in the appellant's bedroom. He did not dispute that the appellant was aware of this and acknowledged in cross-examination that he had personally entrusted the appellant with the safe-keeping of the weapon while he, Gilbert, was away. So far as Exhibit 1 was concerned, he said that after receiving it from Mr Breedt (on 22 June 1992) he brought it to the appellant's house. The latter was not there so he handed it to the appellant's wife and asked her to put it away pending the arrival of documents from Ulundi at which stage he proposed issuing it to an induna.

He said Mrs Ndwalane then took the rifle into a bedroom and that he, Gilbert, did not know what happened to it after that. The dispute as to the number of rounds of ammunition found in the magazine of Exhibit 3 may have been of some significance with regard to the counts on which the appellant was acquitted but it is of little consequence in so far as the contravention of the Act is concerned.

As previously mentioned, Mr Gilbert Ndwalane was entitled to be in possession of both Exhibits 1 and 3. The explanation he gave for why they were kept at the appellant's house was not seriously challenged by the State and was accepted by the Court a quo. He said that his kraal had been burned down and he had turned to his brother, the appellant, to provide him with accommodation. He worked in Durban as a security guard. Each week he did two day shifts followed by two night shifts. He would then, he said, return to the appellant's house for two days a week.

As chairman of the tribal authority he was essentially the appellant's assistant and while at his house the two of them would attend to the affairs of the tribe together. The Nsimbini tribal court house had also been burnt down in the violence which plagued the area. This occurred sometime in 1990. He said that all tribal affairs had thereafter been conducted at the appellant's house. With regard to the rifles, he explained that ordinarily he would have kept them locked up in the court house, but after the fire it was convenient to keep them at the appellant's house where other property which pertained to the tribe was also kept.

With regard to the dispute concerning the circumstances in which the rifles were discovered, the Court a quo accepted the evidence of Mr Breedt in preference to that of Mr Gilbert Ndwalane. Squires J, in delivering the judgment of the Court, described Mr Ndwalane as an "unimpressive" witness who was "unconvincing in content and plainly

uncomfortable in demeanour, and with powerful motives to exculpate his brother, the accused." It appears from the record that Mr Ndwalane's evidence concerning the discovery of the rifles was initially vague and ambivalent. It was only in cross-examination and again while being reexamined that he unequivocally asserted that the firearms had been discovered and taken into the possession of the police prior to the arrival of Mr Breedt. This evidence was also in conflict with his earlier confession that he saw the appellant hand Exhibit 3 to Mr Breedt. In the circumstances, I can see no basis for interfering with the finding of the Court a quo on this issue, nor did Counsel for the appellant attempt to advance any reason for doing so.

The issue, however, is not of much importance. As previously mentioned, it was common cause that both rifles were being kept at the appellant's house. Although Squires J did not specifically refer to the

presumption contained in s 40(1) of the Act it is implicit in the judgment

that reliance was placed upon it. The section reads:

> "40(1) Whenever in any prosecution for being in possession of any article contrary to the provisions of this Act, it is proved that such article has at any time been on or in any premises, including any building, dwelling, flat, room, office, shop, structure, vessel, aircraft or vehicle or any part thereof, any person who at that time was on or in or in charge of or present at or occupying such premises, shall be presumed to have been in possession of that article at that time, until the contrary is proved."

The presumption is far reaching and places upon an accused

person proved to fall within its ambit the burden of proving on a balance

of probabilities that he was not in possession of the article in question.

(See S v Makunga and Others 1977(1) SA 685 (A) at 698 H - 699 B.)

Mr Padayachee, who appeared for the appellant both in this Court and in the Court

below, categorised the presumption as being "unjustifiable and irrational" and initially sought to attack it on the

ground that it was unconstitutional. The appellant however was convicted and

sentenced prior to 27 April 1994, being the date upon which the Constitution (Act 200 of 1993) came into operation, and it has since been held by the Constitutional Court that in such circumstances an appeal is to be disposed of without reference to Chapter 3 of the Constitution. (See S v Mhlungu and Others 1995 (7) BCLR 793 (CC) at 813 - 814 (para 41).)

Mr Padayachee submitted that the appellant had, in any event, discharged the burden imposed upon him by the presumption in as much as the evidence established that the firearms and ammunition were at all times in the lawful possession of Mr Gilbert Ndwalane who, when not away at work, lived at the appellant's house. Counsel argued that in coming to the conclusion that the appellant had been in possession of the firearms, the Court a quo had in the circumstances placed too wide a construction on the word "possession" in s 2 and s 36 of the Act.

Section 1(1) of the Act provides that unless the context

otherwise indicates:

'"possession' includes 'custody' and 'possess' shall be construed accordingly"

The significance of the definition becomes apparent when regard is had to the common law. A distinction is drawn between civil possession (possessio civilis) and natural possession (possessio naturalis). Both comprise two elements; a physical element (corpus) and a mental element (animus). In the case of civil possession the animus consists of the intention on the part of the possessor to hold the article or object in question for himself as if he were the owner (animus possidendi), while in the case of natural possession the animus need merely consist of the intention of the possessor to control the article for his own purpose or benefit, and not as owner (see S v Adams 1986(4) SA 882 (A) at 890 H - I). In both cases, the physical element, that is to say, the physical control or custody (detentio) over the article may be exercised by the possessor

himself or by someone else on his behalf. (See R v Binns and Another 1961 (2) SA 104 (T) at 107 D and 108 A - D.) Not surprisingly the term "possession" when used in penal statutes has in the past frequently given rise to difficulties, mainly because in common parlance the term is frequently used in relation to a person who merely exercises custody or control over an article on behalf of another. In each case it has been necessary to decide whether in the context in which it is used in the statute, the term is to be given this extended meaning or whether it is to be confined to its meaning at common law. Where, as in the present case, the word "possession" is defined so as to include "custody", the ambiguity is, however, largely removed (cf S v Brick 1973 (2) SA 571 (A) at 579 H). That the word "possession" in the Act is intended to be given its wider meaning so as to include one who merely exercises physical control on behalf of another becomes even clearer if regard is had to the provisions of

s 8(l)(b), which, prior to its amendment in 1993, read as follows:

> "8 (1) Any person not being under the age of 16 years or not being a disqualified person may, with the prior consent of the holder of a licence to possess an arm and for such period as such holder may permit, have such arm in his possession, without holding any licence, provided -
>
> (a) ...
>
> (b) such person has the arm in his possession -
>
> (i) in the immediate vicinity of the licence holder or while on any land belonging to or lawfully occupied by the licence holder;"

The need of the Legislature to expressly authorise the possession referred to in the proviso is the clearest indication of the wide meaning to be given to the term "possession" as used in the Act. Indeed, if the word were to be construed in the manner suggested by Mr Padayachee the proviso would have been unnecessary. (See in relation to the previous Act, No 28 of 1937, S v Essop 1967 (4) SA 625 (T) at 626 D - 627 D.)

It follows that in order to escape conviction the appellant was

obliged to establish on a balance of probabilities that he was not in "possession" of the firearms in the sense discussed above. This he clearly failed to do. On the contrary, it was common cause that Exhibit 3 had been entrusted to him. As regards Exhibit 1, the probabilities are that he was aware of its presence in the ceiling rather than that he was not. The appeal against the conviction on both counts must therefore fail.

Turning to the appeal against sentence, Squires J, in imposing a period of imprisonment of 8 years, emphasised the appellant's previous convictions and the penalty provided for in the Act. Both factors are undoubtedly of importance. It appears that in 1987 the appellant was declared to be unfit to possess a firearm for a period of 10 years following his conviction on two counts of attempted murder involving the use of a revolver. In 1990 he was convicted of possessing an unlicensed firearm and ammunition and was sentenced to two years effective imprisonment.

In terms of s 39(2)(a) of the Act and by reason of the appellant's possession in the present case of more than one firearm, the sentence prescribed was imprisonment for a period not exceeding ten years. A further aggravating Feature was undoubtedly the extent of the violence involving the use of firearms which plagues the area in which the offences were committed, although it does appear that the appellant had played a role in attempting to restore peace to the area.

Nonetheless, the sentence of 8 years imprisonment strikes me as unduly harsh having regard to the particular circumstances in which the offences were committed. It was common cause that the appellant's brother, Mr Gilbert Ndwalane, was lawfully entitled to be in possession of both weapons and that it was his intention in due course to allocate them to some suitable person. It was also not in dispute that both Mr Gilbert Ndwalane's own kraal and the tribal court house had been burnt down in

the ongoing violence. Ordinarily he would have kept the weapons under lock and key at the court house, but this was not possible. There is nothing to suggest that the appellant possessed the weapons and ammunition for his own benefit. On the contrary, the evidence suggests that he was no more than a custodian. In my view the failure on the part of Squires J to give any or adequate weight to these circumstances amounted to a misdirection entitling this Court to impose sentence afresh.

Mr Padayachee suggested a wholly suspended sentence of imprisonment. I cannot agree. The appellant has a previous conviction for the same type of offence and for which he was sent to prison for two years. In my view a sentence of three years imprisonment would be appropriate in all the circumstances.

In the result the appeal against the conviction on both counts fails. The appeal against sentence succeeds and the sentence of 8 years

imprisonment is set aside and replaced with a sentence of 3 years imprisonment, both counts being taken together for the purpose of sentence.

D G SCOTT

HEFER JA)
-Concur
NESTADT JA)