IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO. 324/94

In the matter between:

T V METU

APPELLANT

VERSUS

THE STATE

RESPONDENT

CORAM: SMALBERGER, NESTADT et SCHUTZ JJA

DATE HEARD: 18 Augustus 1995

DATE DELIVERED: 28 August 1995

SCHUTZ JA

J U D G M E N T

SCHUTZ JA:

The appellant together with his wife, who was the second accused, was convicted by a regional court of the unlawful possession of a pistol and certain ammunition. Their appeals to the Witwatersrand Local Division against conviction and sentence failed. The appellant now appeals against conviction and sentence with leave of that court. His wife did not seek to appeal further, presumably because she was not sentenced to an obligatory prison sentence.

The appellant was found guilty on three counts, all arising

out of the same incident. The first count related to the a 9 mm Browning pistol, the second to thirty one 9 mm, eighteen 7.65 mm, eight 6.35 mm, fifty .38 inch special, twenty 6.35 mm, fifty .22 inch and one .45 inch cartridges. Count three related to a single AK 47 cartridge, intended for use in a machine gun. The appellant was sentenced to three years imprisonment on the first count, four on the second, and two on the third. The sentences were to be served concurrently, so that the effective term of imprisonment imposed was four years.

The State case was founded upon the evidence of detective sergeant Hendriks, whose evidence is largely uncontested. On 7 December 1992, acting on information, he went to the two accused's home at No 451 Mailulupark, Vosloorus, where they lived with their

three children aged 11, 9 and 7. The appellant was not at home on that day, but his wife was. Hendriks entered through the kitchen door and went straight to an apparently unoccupied bedroom next to the main bedroom. The wife followed Hendriks into the room, which was the object of his first search. In it were a double bed, a single bed, a wardrobe and built in cupboards. He opened the top drawer of the wardrobe and stuck his hand in behind it. In due course he fished out two bags containing the various articles which are the subject of the three charges ("the weaponry"), as also some holsters and gun-cleaning equipment. Although her case is not before us, it should be mentioned that Hendriks's evidence was accepted that her initial animation deserted her when she saw the trend of his search, and that she gave no answer

when he asked her whose were the articles that he had brought out. Again according to Hendriks, it was only at a considerably later stage that she told him that the articles belonged to one Wellington Dey, who had been shot dead by the police some eight months before. Hendriks's later enquiries revealed that Wellington Dey was himself a policeman, and that he had been shot by members of the vehicle robbery squad. Hendriks then arrested the wife.

The following day the appellant came to his office. After making some statements which were not admissible, the appellant claimed, as had his wife, that the weaponry found belonged to Wellington Dey.

The appeal on the merits largely revolved around the

submission, variously couched, that it was reasonably possible that the weaponry had been introduced and possessed, unknown to the appellant, by either of two earlier occupants of the room, Wellington Dey aforementioned, and after him the wife's brother, one Efraim Jantjie. The essential conflict between the evidence of Hendriks and that of the appellant relates to what the latter said at the former's office. According to the appellant he said that a camouflage suit also found during the search of the house on 7 December belonged to Wellington Dey. He did not say anything about the weaponry. Indeed he knew absolutely nothing about it. Hendriks on the other hand, whilst agreeing about the camouflage suit, gave evidence that the appellant had also said that the weaponry belonged to Wellington Dey. He did not say nor

imply that he knew nothing about it.

The magistrate accepted the evidence of Hendriks and rejected that of the then two accused. Hendriks he described as an excellent witness, fair in favour of the accused, observant and possessed of a good memory. The appellant's version, in so far as it conflicted with that of Hendriks, he had no difficulty in rejecting. Mr du Plessis, for the appellant, argued the appeal on the footing that he had to accept that Hendriks's account of his conversation with the appellant was correct.

The appeal was accordingly concerned with whether an inference of knowledge of the presence of the weaponry must be drawn from Hendriks's evidence. The difficulty in the appellant's way once

Hendriks's version of their conversation is accepted is that the statement that the weaponry belonged to Wellington Dey necessarily implied knowledge of its presence. It may be that it was owned by Dey but that does not affect the inference of knowledge on the appellant's part. It is an ingredient of the reasoning leading to an inference of knowledge. As the magistrate said: "Jy kan tog net so 'n stelling maak as jy weet dit is Dey se goed en jy kan tog net so 'n stelling maak as jy weet dit is daar." Nor do arguments that the appellant was advancing merely a suggestion or a theory or a possible explanation help in the face of Hendriks's clear evidence, and in the absence of evidence from the appellant himself that he spoke in that mode. His version is that he said nothing about Dey's connection with the weaponry.

Once it is found, as I think it must be found, that the appellant had knowledge of the weaponry a finding of at least joint possession follows, and Mr du Plessis did not argue to the contrary. Either the appellant held the same for himself, or he knew of its introduction into his house by either Dey or Jantjies, and exercised physical control after the death of the one or the departure of the other.

Accordingly the appellant was rightly convicted on counts one and two. For the moment I have excepted count three because of a point very fairly raised by Mr Sheer, who appeared for the State. In count three the appellant was charged with contravening s 32(l)(e) of the Arms and Ammunition Act 75 of 1969 ("the Act") in that he possessed ammunition intended to be fired from a machine gun or any similar

armament, namely one AK 47 cartridge. In terms of s 1 a machine gun includes any firearm capable of delivering a continuous fire for so long as pressure is applied to the trigger thereof. It was proved that the cartridge found was intended to be fired from an AK 47 but there was no evidence that an AK 47 is a machine gun. To my mind it would be quite unrealistic for this Court not to take judicial cognizance, as the magistrate also appears to have done, that an AK 47, that notorious murder weapon, can be set to operate as a machine gun. From this it is not to be inferred that the State may with impunity be careless about proving the qualities of possibly less well known weapons. This point out of the way I am of the opinion that the appellant was rightly convicted also on count three.

The magistrate found the charges proved without resort to the presumption contained in s 40(1) of the Act but held that in any event it did have application to the appellant's situation, and that he had not discharged the onus cast upon him of disproving possession. In the course of so doing the magistrate rightly distinguished the case of S v Tshabalala 1988(4) SA 883(W) on the footing that the two accused, both with knowledge of the presence of the weaponry, as husband and wife, exercised joint control over the household.

In the light of this Court's finding as to proof of actual possession it is unnecessary to say anything about the conceivable unconstitutionality of the presumption contained in s 40(1) - see .S v Zuma and Others 1995(4) BCLR 401(CC) at 421 1-422 E. We express

no view on the matter.

It follows that the appeal against conviction falls to be dismissed.

In sharply differentiating the sentences on the husband and the wife the magistrate relied mainly on the appellant's previous convictions, and on the acknowledgment by his attorney that in that household the man dominated.

On two separate occasions in 1985 the appellant had been found guilty of unlawful possession of a firearm and ammunition. On the first occasion the sentence was R300 or 150 days imprisonment and on the second R80 or 40 days. He also had a fraud and a forgery conviction relating to driving licenses, one for dealing in dagga, and

sundry others.

The magistrate rightly placed emphasis on the awful toll taken by unlawful firearms in our country, and took into account the nature and quantity of what was found (178 cartridges in all) and the fact that one cartridge was intended for use in an AK 47 assault rifle. The magistrate further took into account all the personal circumstances of the appellant which were laid before him.

Apart from contending that the sentence of four years induces a sense of shock, Mr du Plessis raised further points in his heads if not in his oral submissions. He said that the magistrate had not given sufficient attention to the appellant's personal circumstances. I do not agree. The magistrate weighed them carefully, and in particular the

fact that the two accused by then had four young children. Then it is complained that the magistrate did not pay sufficient attention to the cumulative effect of his sentences. The answer to that is that there are no cumulative sentences.

Finally it is contended that insufficient weight was attached to the circumstances in which the weaponry came into the house. The question raised is whether it is reasonably possible that the appellant did not take an active part in bringing the weaponry into or thereafter keeping it in the house, but that this was the work of Dey or Jantjies and if so, whether it mitigates.

Ownership on the part of Jantjies is speculation. But in the case of Dey there is the evidence of Hendriks that the appellant told him

at their first meeting of Dey's ownerhip. That is the evidence that has

convicted the appellant, but even though in the sphere of sentence it

becomes a self serving statement I think it is admissible in the appellant's

favour. In R v Valachia 1945 AD 826 at 837 Greenberg JA said:

> "(T)he rule is that when proof of an admission made by a party is admitted, such party is entitled to have the whole statement put before the Court and the judicial officer or jury must take into consideration everything contained in the statement relating to the matter in issue."

What is before us is an a priori case. It is not a matter even

of looking at the rest of the statement but of looking at the very

statement itself. Moreover, it would be unjust and illogical to give heed

to what comdemns whilst ignoring what may temper it.

But admission of evidence in such circumstances does not necessarily entail that much weight should be attached to it: Lambrechts v African Guarantee and Indemnity Co Ltd 1955(3) SA 459(A) at 467 G-

H. In this case I think that significant weight should be attached to the appellant's words. He was speaking to a policeman about a policeman, so that it would be relatively easy for his addressee to make some inquiries about Dey, which is what he did in fact. The tone of Hendriks's evidence is such that it seems to me that he accepted Dey's ownership as a real possibility, helped on no doubt by Dey's apparent violent propensities. Then there is the fact that the wife independently attributed ownership to Dey. Not at once, which is significant. If she and the appellant had concerted that they would give this explanation if

caught, one would have expected her to blurt it out at once. Her extra-curial statement may not be admissible as such, but her action throws some light upon that of the appellant.

Accordingly I am prepared to accept for purposes of sentence that the appellant's possession was of the passive kind already described.

That is a considerable mitigating factor, even in the absence of evidence from him. One may ask why he did not at once turn this cache over to the police, but I can appreciate that for a man in his position, with two previous possession convictions this may not have been an easy thing to do.

That leaves the question whether the magistrate has not

already taken this failure into account. In his judgment on sentence he made no mention of it, although in his main judgment he appears to have been ready to accept that the weaponry belonged to Dey. I would have thought that if the magistrate considered it a distinct and significant point of mitigation he would have mentioned it as such. Also I think that an unsuspended sentence of four years is an indication that he did not give weight to it.

In the result the sentence should be ameliorated to allow for this point.

The order of the Court is:

1. The appeal against conviction is dismissed.

2. The appeal against sentence is upheld. The sentence is set aside and replaced with the following.

"Op aanklag 1 word beskuldigde 1 gevonnis tot twee jaar gevangenisstraf, op aanklag 2 tot vier jaar gevangenisstraf en op aanklag 3 tot twee jaar gevangenisstraf. Twee jaar van die vonnis op aanklag 2 word opgeskort vir vyfjaar op voorwaarde dat die beskuldigde nie gedurende daardie tyd skuldig bevind word aan oortreding van artikel 2 of 32 of 36 van Wet 75 van 1969 gepleeg gedurende die tydperk van opskorting nie.

Die hof beveel dat die onopgeskorte dele van hierdie drie vonnisse gelyktydig uitgedien moet word, dit wil sê effektief twee jaar gevangenisstraf."

W P SCHUTZ JUDGE
OF APPEAL

SMALBERGER JA
CONCUR
NESTADT JA