IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

CASE NO:

360/2002

In the matter between:

DAVID NKETUMANE MAFIRI
APPELLANT

and

THE STATE
RESPONDENT

CORAM: **OLIVIER, MTHIYANE and CONRADIE JJA**

HEARD: **17 MARCH 2003**
DELIVERED: **31 MARCH 2003**

Summary: Unlawful possession of a firearm and ammunition in contravention of ss 2 and 36 of Act 75 of 1969 – firearm and ammunition found under a pillow on a bed in a bedroom at the appellant's house – whether his explanation was reasonably possibly true.

JUDGMENT

MTHIYANE JA:

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[1] The appellant was arraigned in the Transvaal Provincial Division (before Motata J) on 24 charges involving murder, possession of a firearm and ammunition in contravention of ss 2 and 36 of Act 75 of 1969 ('the Act'), unlawful possession of an AK 47 rifle and a contravention of s 36 of Act 62 of 1955. At the commencement of the trial some of the charges were withdrawn, and on some of the others he was acquitted. The appellant was convicted on only five charges, namely attempted murder, a contravention of s 36 of Act 62 of 1955, unlawful possession of an AK 47 rifle and unlawful possession of a pistol and ammunition and he was sentenced to a total of 10 years' imprisonment. The trial judge refused leave to appeal but this Court granted the appellant leave to appeal to the Full Court, both against his convictions and sentences.

[2] The appeal succeeded on three of the charges (a contravention of s 36 of Act 62 of 1955, attempted murder and unlawful possession of an AK 47 rifle) but failed in respect of the remaining two charges (unlawful possession of a pistol and ammunition). This appeal is against the decision of the Full Court (Botha, Webster and Basson JJ) dismissing the appeal on the above two charges, and it comes before us with special leave granted by this Court.

[3] It is not in dispute that the pistol and ammunition were found in the appellant's house at Jane Furse, in what was then known as Northern Province. The events leading up to the finding of these items and the appellant's subsequent arrest were the following. At approximately 2 pm on

28 December 1994 the appellant was confronted by two policemen, Inspector Golach and Sergeant Burger, both members of the Firearms Unit attached to the South African Police Services. The appellant was at the time driving in his Opel vehicle approaching the intersection of Jane Furse and Pietersburg roads. The police asked if they could search his vehicle, and he agreed. The vehicle was searched and nothing was found. The appellant was then taken to his house. Again he indicated that he had no objection to his house being searched. In a bedroom under the pillow on a bed Burger found a 9mm pistol and 26 rounds of ammunition. The appellant gave an explanation.

[4] There is a dispute as to how entry into the bedroom was gained. The police said that the room was unlocked with a key which was produced by the appellant. This was denied by the appellant, who said that the bedroom was not locked at the time. He further pointed out that there would have been no reason for the bedroom to be locked because his wife and children were at the house. Indeed, the police did not dispute that the children were present at the time. As to the door through which access was gained, Golach and Burger gave conflicting versions. Golach said that they entered the bedroom through an inside door leading to the lounge. Not so according to Burger, who said that entry was gained through a door that led to the outside of the house.

[5] The appellant's version was that the bedroom in which the pistol and ammunition were found was at the time used and occupied by a friend of his, one Elias Makakula, and that he had no knowledge of the pistol and ammunition. When he tried to explain this to the police he was dismissively told: 'jy gaan voor praat'. The appellant was arrested and taken to Burgersfort police station, but when he gave an explanation he was this time told: 'al daardie sal jy vir die hof sê.'

[6] Both Golach and Burger said that the appellant did give an explanation. However in their statements dated almost two years after the incident they allege that the appellant said that he had bought the pistol in order to defend himself. This was however not mentioned by either of them in Court, nor was the appellant cross-examined on this allegation.

[7] Against this background, it seems to me that the principal question for decision in this appeal is whether the explanation given by the appellant was reasonably possibly true. His explanation was rejected by the trial court without reasons, save for the assertion by the trial judge that he believed Golach and Burger. The probabilities do not appear to have been considered by the trial judge.

[8] The Court *a quo* advanced four grounds for its rejection of the appellant's explanation. It said that 'the appellant's evidence that the firearm

was found in a room occupied by Makakula [was] "unconvincing"'. It gave the following reasons:

(a) It [the appellant's explanation] was not supported even by members of his (the appellant's) family;
(b) it was improbable that if it (the room) was occupied by someone else it would have been left unlocked if there was a firearm under a pillow on a bed;
(c) the version that Makakula was the occupier of the room and that he could be found at the taxi rank at Burgersfort was never put to Golach and Burger;
(d) It is highly improbable that the police would not have taken note of the explanation and followed it up.

[9] Before dealing with the above grounds it is necessary to re-iterate the test to be applied when assessing the explanation given by an accused in a case such as this. The following has been said in this Court that:

'there is no obligation upon an accused person, where the State bears the onus, "to convince the court". If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgements of this Court and other courts the test is whether there is a reasonable possibility that the accused's evidence my be true.'[1]

[10] I proceed to consider the grounds relied on by the court *a quo* in the light of the above test. I am not persuaded that any one of the above grounds advanced for the rejection of the appellant's explanation is valid. As to (a), the appellant was under no obligation to call members of his household to testify. This looks suspiciously like putting the *onus* on the appellant. The *onus* was on the State to prove his guilt beyond reasonable doubt.

[11] As to the second point (b), to the effect that it was improbable that Makakula would have left the room unlocked when there was a pistol and ammunition under a pillow on a bed, it must be remembered that the version of the police was contradictory as to the door through which entry was gained. If the door through which they entered led into the lounge, so that entry had first to be gained through the main door before entering the bedroom, then there was nothing improbable about the appellant's version. If there were people at the appellant's house and the main door was lockable, then, in my view, there would have been nothing improbable about Makakula leaving the bedroom door unlocked. If on the other hand the door through which entry was gained led to the outside, the court *a quo* would have been justified in its reasoning that it was improbable that Makakula would have left the door unlocked. But, the difficulty is that there are two conflicting versions on the point. The improbability referred to by the Court

[1] *S v V* 2000 (1) SACR 453 (SCA) at 455 b-c
S v Shackell 2001 (2) SACR 185 (SCA) at para 30

a quo as a basis for its rejection of the appellant's version is only capable of acceptance if one selects only one of the versions of the two policemen. The *onus* was on the State to present such evidence as to satisfy the court that the appellant was beyond reasonable doubt in possession of the pistol and the ammunition found in the bedroom. In any event even if the appellant's version was improbable that was not the end of the matter. His version could only be rejected if it was so 'improbable that it cannot reasonably possibly be true'.[2]

[12] As to (c) I do not agree that the appellant's version was not put to the witnesses. From the record it appears that the gist of the appellant's version was put to both Golach and Burger in cross-examination. Curiously none of the two witnesses responded or even remotely suggested that the appellant had told them that he had bought the pistol for the purpose of defending himself. All they did was to deny that the bedroom was occupied by Makakula.

[13] As to (d) the Court *a quo* reasoned that had the appellant's explanation been given to Golach and Burger they would have followed it up. I do not agree. It must be remembered in respect of the charge of unlawful possession of an AK 47 rifle of which the appellant was acquitted, the appellant told Golach and Burger that it belonged to George but they did not follow that up. In those circumstances I do not think that it can be assumed that they would have acted differently when it came to an explanation relating to Makakula and his occupation of the bedroom in question.

[14] The State bore the *onus* to show that the appellant knew that there was a pistol and ammunition under the pillow on a bed in the bedroom and exercised control over it. *Mens rea* is required for a contravention of s 2 of the Act.[3] For such proof the State relied on the evidence of Golach and Burger. The Court *a quo* was dismissive of the defence's criticism of their evidence on the basis of the similarity of their statements, as being not well founded. With respect there is something to be said for this criticism. The statements in question were identical virtually in all respects, word for word, line by line, paragraph by paragraph with only minor differences in respect of their names and personal particulars. When Golach and Burger were asked to explain the similarity, both of them said that at the time they wrote out their statements independently while sitting in separate offices and thereafter had them typed and signed. Each statement runs into three typed pages and both Golach and Burger attributed the similarities to pure co-incidence. Clearly, they were not telling the truth. The Court *a quo* also postulated that the statements may have been taken by another officer who

[2] *S v Shackell supra* at para 30

[3] *S v Potwane* 1983 (1) SA 868 (A)

impressed his own verbiage on the documents. With respect this is indulging in speculation. Neither Golach nor Burger suggested this as likely to have occurred. Both of them attributed the identical nature of their statements to a coincidence. When they were asked to sign a year and some nine months later, their evidence was that the statements were retrieved from a computer. It is significant, that nowhere does the trial Court say that Golach and Burger were found to be reliable and honest witnesses. All that the trial judge said was that he believed them in respect of the main bedroom, which in itself does not take the matter any further because it was common cause that the pistol and the ammunition were found in a bedroom. Furthermore, the trial Court misdirected itself on this aspect because there was no evidence that the pistol and ammunition were found in the main bedroom. The evidence was that these items were found in a bedroom.

[15] Against this background and in the overall evaluation of the probabilities, it seems to me that there are three key points to consider in the determination of this matter. First, it is unlikely that the appellant would have taken the police to the bedroom if he knew there was a pistol and ammunition under a pillow. Secondly, it is unlikely that he would have taken the police to the bedroom and freely produced the key to it. It is most likely that he would have tried to dispose of the key, or pretend that he did not have the key to the room or that it was with his wife or embark on some or other delaying tactic. Between the place where he was stopped on the road and arrested and his house, there was sufficient time and opportunity for the appellant to dispose of the key, if he had one. In my view the appellant's behaviour was not consistent with that of someone who knew that there was a pistol and ammunition in the bedroom. Thirdly, the appellant's defence was that he gave an explanation to the police and was told that he would have to tell his story in court. I do not think that there is anything improbable about that version, as I have also indicated earlier in the judgment.

[16] In my view, once the appellant had mentioned Makakula as being the person who occupied the bedroom in which the pistol was found, it was incumbent on the State to pursue it, given the *onus* that rests on it to establish the guilt of the accused beyond reasonable doubt. Even though that took place some 6 years after the appellant's arrest, a delay for which the appellant was not to blame, the fact of Makakula having resided at the appellant's house is not something that could on the facts of this case not have been established even at that stage. The appellant was not pressed in cross-examination on whether Makakula existed at all nor did the prosecution enquire as to whether he could still be found. The appellant did testify that Makakula could be found at the taxi rank. It seems to me that even at that stage the matter could have been stood down to establish

whether Makakula did use and occupy the bedroom where the pistol and the ammunition were found. It was still open to the State to apply to reopen its case for this purpose.

[17] In cases dealing with unlicensed possession of firearms and ammunition it should be borne in mind that on the law as it stands at present, the State is no longer assisted by the presumption of possession whereby an *onus* was cast on an accused under the then s 40 (1) of the Act.[4] The presumption of possession was declared unconstitutional in *S v Mbatha; S v Prinsloo.*[5] It therefore follows that the State will in those cases have to deal with the matter in the usual manner either by direct evidence or by placing before the court facts from which an inference could be drawn that an accused person was in possession of the pistol in question. I do not think that failure on the part of the appellant to call members of the household as witnesses provides a basis from which an inference of guilt could be drawn.

[18] For the above reasons I am not persuaded that the State succeeded in discharging the *onus* of establishing the possession on the appellant's part, and therefore his guilt beyond reasonable doubt.

[19] The appeal is accordingly allowed and appellant's conviction and sentence on the two remaining charges are set aside.

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KK MTHIYANE
JUDGE OF APPEAL

CONCUR:

OLIVIER JA
CONRADIE JA

[4] That section provided as follows:
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.

[5] 1996 (2) SA 464 (CC) at 479 G