THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 559/09
No precedential significance

In the matter between:

MBULELO MAJIKAZANA
APPELLANT

and

THE STATE
RESPONDENT

Neutral citation: *Majikazana v The State* (559/09) [2010] ZASCA 29 (26 March 2010)

CORAM: **MPATI P, VAN HEERDEN, MHLANTLA, SHONGWE JJA *et* THERON AJA**

HEARD: **2 MARCH 2010**

DELIVERED: **26 MARCH 2010**

SUMMARY: Criminal Procedure – fair trial – murder – fact of presiding judge previously having heard and dismissed bail appeal not brought to his attention at commencement of trial – no credibility findings made in bail application and on appeal – in absence of any irregularity actual bias to be proved for finding of failure of justice where no application made for judge's recusal..

Fire and firearms – firearms – possession of in contravention of s 2 of Act 75 of 1969 – *mens rea* element for contravention of the

section – use of firearm for unlawful purpose establishes *mens rea*.

ORDER

On appeal from: Eastern Cape High Court (Grahamstown) (Froneman J sitting as court of first instance).

The following order is made:

1. The appeal against the conviction on count 2 (murder) is dismissed.
2. The appeal against the sentence of 25 years' imprisonment imposed upon the appellant in respect of count 2 succeeds. The sentence is set aside and replaced with one of fifteen years' imprisonment.
3. The appeal against the conviction and sentence on count 3 (unlawful possession of a firearm) is dismissed.
4. The appeal against the conviction on count 4 (unlawful possession of ammunition) succeeds and the conviction and sentence are set aside.
5. The sentence on count 2 is backdated to 4 December 2000, being the date on which sentences were imposed by the trial court.

JUDGMENT

MPATI P (Van Heerden, Mhlantla, Shongwe JJA et Theron AJA concurring):

[1] The appellant was convicted by the Eastern Cape High Court, Grahamstown (Froneman J) of murder (count 2), and unlawful possession of a firearm and ammunition in contravention of s 2 and 36 of Act 75 of 1969 (counts 3 and 4) respectively. He was sentenced to 25 years' imprisonment in respect of the murder conviction and two years' and one year's imprisonment in respect of counts 3 and 4 respectively. The last mentioned two sentences were ordered to run concurrently with the sentence on count 2.

[2] The appellant, who was the first accused before the trial court, was indicted with two other accused persons, namely Mr

Mbuyiseli Twani (accused 2) and Mr Lonwabo Fofo Jacobs (accused 3). Mr Twani and Mr Jacobs were charged with attempted murder (count 1) and the former also with an alternative to count 1, viz incitement to commit murder. They were both found not guilty and discharged.

[3] It appears that immediately after he had been sentenced on 4 December 2000 the appellant instructed the attorney who had represented him before the court below to appeal against the convictions and the sentences imposed upon him. On 25 March 2002 the attorney filed an application for leave to appeal only against the sentence of 25 years' imprisonment. He did so without an application for condonation for the late filing of the application. After the passing of the appellant's attorney, a new firm of attorneys was appointed which discovered, during the course of their investigations, that Froneman J, who presided in the trial, had also presided over, and dismissed, an appeal against the refusal of bail by the Regional Court, Grahamstown, in an application brought by the appellant and his co-accused. The bail appeal was disposed of on 7 April 2000, approximately seven months before the commencement of the criminal trial.

[4] On making the discovery mentioned above, the appellant's attorney lodged an application for condonation for the appellant's failure to timeously prosecute his application for leave to appeal. He also filed an amended application for leave to appeal, which now also contained an application for leave to appeal against the convictions of murder and the unlawful possession of a firearm and ammunition. In addition, the attorney lodged an application for a

special entry to be made on the record on the ground that the proceedings were irregular, in that the trial judge, having presided in the bail appeal, had at the time of the trial been aware of the evidence adduced during the bail appeal. For this reason, so it was contended, the appellant suffered prejudice.

[5] Although the court a quo was of the view that there were no reasonable prospects of success on appeal on either the convictions or sentences imposed upon the appellant, it decided to grant the leave sought because it was prepared to grant the application for a special entry. The court thus made the following special entry on the record of the criminal trial:

'The Judge presiding in this trial also presided in a bail appeal brought by Mr Majikazana, the first accused, in case number 91/2000 and handed down judgment dismissing the appeal in April 2000. A copy of the record and judgment in the bail appeal is attached hereto marked "A". This fact was not brought to the attention of the presiding judge before or during the trial or before judgment was delivered. The accused contends that the presiding judge would have been aware of the evidence adduced during the bail application at the criminal trial, but when the fact of the earlier bail appeal was brought to the attention of the presiding judge in 2008 he had no independent recollection of being aware of it at the time of the criminal trial. He considers that, had he been aware of that fact before the trial started he would have informed the legal representatives thereof and would probably have arranged for another colleague to hear the matter. Had the fact been disclosed during the trial he might also then have recused himself as the presiding judge.'

As has been mentioned, leave to appeal against the appellant's convictions and sentences was also granted.

[6] Both counsel for the appellant and the State were agreed that there is no indication on the record that the trial judge showed any bias. A thorough perusal of the record has led me to the same

conclusion. I could find no evidence of any bias on the part of the court a quo. Counsel for the appellant argued, however, that the proper enquiry is not whether the record exhibits any sign of bias by the presiding judge, but rather whether the ordinary reasonable lay person would have a reasonable apprehension of bias in the circumstances of this case.

[7] The appellant was charged with murder and the unlawful possession of a firearm and ammunition. The particulars of the murder charge were that on or about 9 October 1999 he unlawfully and intentionally killed Mandla Mda, a 53 year old male person (the deceased) at or near Fort Beaufort Hospital with a firearm. It is common cause that the firearm that was used in the shooting of the deceased belonged to Mr Jacobs (accused 3), but was in the possession of the appellant. At the bail application the appellant denied that he killed the deceased. He testified that he never entered the hospital where, it was common cause, the deceased was shot and killed on the day in question. During the trial, however, the appellant admitted that he had indeed entered the hospital and that he had shot the deceased. He also admitted that the deceased died as a result of the injuries he sustained from shots fired by him (appellant). He testified that when he shot the deceased he was acting in self-defence.

[8] Counsel for the appellant submitted that an ordinary reasonable person in the circumstances of this case 'would have a reasonable apprehension that the presiding officer who had heard the bail appeal might be biased when hearing the trial'. This, according to counsel, was because (a) the appellant had made 'an

about turn in his defence to the murder count'; (b) at the bail hearing an allegation was made of a previous assault in which the appellant had been involved and where he had allegedly used a firearm; and (c) the presiding judge had himself indicated that, if he had been confronted with these facts before the commencement of the trial, he might well not have proceeded with it. Counsel contended further that, if an unsuccessful application had been made for the recusal of the presiding judge, the trial would have been a nullity. And because an ordinary reasonable person would, in this case, have had a reasonable apprehension of bias, it should be found, even in the absence of an application for a recusal, that the proceedings fell short of the constitutional guarantee of a fair trial and thus a failure of justice had occurred.

[9] The record of the bail proceedings formed part of the record before us. On the question of an alleged previous use of a firearm during an alleged assault, the appellant testified that he had never been charged with any offence involving an assault where he was alleged to have used a firearm, although his firearm was subsequently confiscated by the police. He therefore had no criminal charges pending against him. In refusing bail the regional magistrate made no credibility findings against the appellant, nor against the latter's co-accused. He refused bail purely on the basis that the appellant had failed to adduce evidence to satisfy him that exceptional circumstances existed which, in the interests of justice, permitted his release.[1] In the appeal against the refusal of bail, Froneman J found no fault with the magistrate's reasoning and

[1] Section 60(11)(a) of the Criminal Procedure Act 51 of 1977.

conclusion. In doing so he made no credibility findings.[2]

[10] Section 322(1)(a) of the Criminal Procedure Act ('the Act') provides that, in a case of an appeal against a conviction or of any question of law reserved, the court of appeal may allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice. It was contended on behalf of the appellant that by presiding in the appellant's trial Froneman J committed an irregularity. The Constitutional Court has held that the meaning of the concept of a failure of justice in s 322(1) of the Act must now be understood to raise the question whether the alleged irregularity stated in the special entry has led to an unfair trial.[3]

[11] What is of importance in this matter is that no application was made for the trial judge's recusal. Counsel for the appellant submitted that during the trial neither the appellant, nor his counsel, it seemed, was aware of the fact that the trial judge had also heard the bail appeal, as the appellant was not represented by the same firm of attorneys in the regional court and in the High Court. Section 60(11B)(c) of the Act prescribes that the record of the bail proceedings, excluding information relating to the accused's previous convictions or charges pending against him or her or whether he or she has been released on bail in respect of those charges, shall form part of the record of the trial of the

[2] Compare *S v Somciza* 1990 (1) SA 361 (A) at 365H-I, where this court held that it was highly undesirable that an accused who had been found guilty by a magistrate and whose conviction and sentence had been set aside, should be retried, or that his trial should be continued, before the same magistrate, who had made strong credibility findings in respect of all the State witnesses.

[3] *S v Jaipal* 2005 (1) SACR 215 (CC) para 39.

accused following upon such bail proceedings. It is therefore highly probable, in my view, that the appellant's legal representative at the trial would have had sight of the record of the bail proceedings before the regional magistrate and on appeal at some stage during the trial or even before its commencement. It must therefore be inferred that the appellant's legal representative was aware that Froneman J had heard the appellant's bail appeal, but that he took a conscious decision against asking for the judge's recusal in accordance with his instructions and the appellant's defence.

[12] In *President of the Republic of South Africa & others v South African Rugby Football Union & others*[4] Constitutional Court held that a judge who sits in a case in which she or he is disqualified from sitting because, seen objectively, there exists a reasonable apprehension that she or he might be biased, acts in a manner inconsistent with s 34 of the Constitution and in breach of the requirements of s 165(2) and the prescribed oath of office. Because of the failure, on the part of the appellant and his legal representative, to apply for the recusal of the trial judge, the inference must be that there was no reasonable apprehension of bias before and during the trial. But, on the assumption that none of them had realised that Froneman J had dealt with the bail appeal, this court has said that the special entry procedure 'is a useful, or perhaps even necessary, one when the irregularity or illegality complained of is discovered only after the conclusion of the trial'.[5]

[13] It seems to me that where, as in the present matter, no

[4] 1999 (4) SA 147 (CC) para 30.
[5] *Sefatsa & others v Attorney-General, Transvaal, & another* 1989 (1) SA 821 (A) at 843H.

application was made for the trial judge's recusal before or during the proceedings, and the judge never entertained the question of his or her recusal in his or her mind, actual bias would have to be proved for an appeal, based on a special entry, to succeed. In those circumstances, the convicted accused's weapon would be the record of the proceedings and the reasoned decision of the presiding officer which allow for close scrutiny for any evidence of bias. As counsel for the appellant has conceded, there is nothing on the record in the present matter to indicate that the trial judge was in any way biased. In view of the fact that counsel made no submissions relating to the merits of the appeal on the murder conviction, and wisely so, it follows that the appeal in respect of that conviction must fail.

[14] I proceed to deal with counts 3 and 4 (unlawful possession of a firearm and ammunition). It is common cause that the firearm (a 9mm calibre Norinco pistol) with which the appellant shot and killed the deceased was the property of Mr Jacobs (accused 3). The facts that led to the appellant's being in possession of the firearm and ammunition are briefly the following. The appellant, his erstwhile co-accused and the deceased, were all members of the Fort Beaufort branch of Uncedo Taxi Association, which had split into two factions. The appellant and his co-accused belonged to a small faction, while the deceased was part of the main faction. There were hostilities between the two factions.

[15] During the afternoon of 9 October 1999 a fight broke out at the Fort Beaufort Taxi rank involving an assault upon the appellant by certain members of the main faction and during which Mr

Jacobs was stabbed.[6]Having fallen onto the ground as a result of being stabbed and whilst being assaulted further, Mr Jacobs managed to draw his licensed firearm and fired three shots in the direction of his assailants, who scattered and moved away from him. This gave him an opportunity to get up and run to the appellant's combi where he found the appellant, Mr Twani, and a Mr Thamsanqa Grootboom. (There was some evidence that at least two shots were also fired subsequently by a member of the main group.) It is not in dispute that the appellant, Mr Twani, and Mr Jacobs left the scene in the appellant's combi which was driven by Mr Grootboom. As they drove away Mr Jacobs replaced the magazine in his firearm with a fully loaded one, but then requested that he be taken to the hospital as he was feeling weak as a result of the stab wound. Upon their arrival at the Fort Beaufort Provincial Hospital Mr Twani called for a stretcher.

[16] It is common cause that Mr Jacobs did not enter the Fort Beaufort Hospital. He testified that after their arrival at the hospital he was taken out of the combi and conveyed in a bakkie that was driven by one Mr Xolani Nondumo, to a hospital at Alice, where he was admitted. It was at the hospital at Alice where the appellant later informed him that he (appellant) had taken possession of his shoes, firearm and certain other personal items.

[17] The appellant testified that on their way to the Fort Beaufort Hospital they[7]enquired from Mr Jacobs as to how he was feeling. The latter did not respond, but his firearm 'dropped to the combi'. The appellant took possession of it because, he said, 'the combi was mine'. When asked under cross-examination whether he had a licence to possess the firearm he said:

[6] The acceptance of Mr Jacobs' evidence by the court a quo was not challenged.

[7] The appellant said: '. . . we enquired from Mr Jacobs . . ..'

'M'Lord, the car that belongs to . . . myself, the firearm of accused no 3 dropped into the car belonging to me, if I live [leave it?] and that firearm is found just lying in the car belonging to me, I am the first person to be asked about it.'
From this explanation I think it can be accepted that the appellant's intention was to safeguard Mr Jacobs' firearm and to return it to him at the appropriate time.

[18] It was not in dispute at the trial that at all relevant times the appellant was the holder of a licence to possess a firearm and did indeed lawfully possess one.[8] At the end of the appellant's cross-examination the following is recorded:

'And I put it to you lastly that you were in an unlawful possession of Mr Jacobs' firearm and ammunition . . .. That is correct.'
The appellant's legal representative did not seek to clarify this response in re-examination.

[19] In this court Mr Els, for the State, submitted that the appellant should not have been convicted on count 4 (unlawful possession of ammunition). I agree. It is alleged in the indictment that the appellant 'unlawfully had nine rounds of 9mm calibre ammunition in his possession, whilst not being in lawful possession of a firearm from which the aforementioned ammunition could be discharged'. As has been mentioned above, the appellant lawfully possessed a firearm from which, according to his undisputed evidence, 9mm calibre ammunition could be discharged. It follows that his appeal against his conviction on count 4 must succeed.

[20] In respect of the unlawful possession of the firearm counsel for the appellant contended that it is reasonably possible that the appellant did not consider his taking possession of the firearm as unlawful and that he should therefore receive the benefit of the

[8] He described it as a '9mm CZ'.

doubt. Counsel argued that, in taking possession of the firearm under the circumstances in which he did, the appellant thought that he was acting with due care and diligence. In convicting the appellant on this charge (and that of the unlawful possession of ammunition) the trial court reasoned as follows:

'As far as the unlawful possession of the firearm and ammunition are concerned the accused admitted that he did not have a licence for the firearm and the ammunition. His taking into possession of these items to safeguard them does not appear to be covered by any exemption in the relevant Act. Even if there was an implied permission to safeguard the firearm on behalf of accused no 3 there was no need to take the firearm with him into the hospital. The mere fact that he did so adds to the suspicion of his intent in going into [the] hospital.'

It is necessary to place these remarks by the trial judge in their proper context.

[21] I have mentioned above that when the appellant and his companions arrived at the Fort Beaufort Hospital with the injured Mr Jacobs, Mr Twani called for a stretcher. The evidence was that on the advice of Ms Xoliswa Mahlanyana, an employee at the hospital, Mr Twani, in the company of the appellant, went into the casualty section where the former took a stretcher which he pushed out and towards the appellant's combi and there assisted in placing Mr Jacobs on it. At that stage, however, the deceased, who had been grazed by a bullet in his right hip at the taxi rank, was already inside the casualty section, having been conveyed there by a colleague, Mr Fetty Notana. He had been placed on a wheelchair by a male nurse, Mr Themba Mvimbeli. The appellant apparently saw the deceased and, instead of going back to his vehicle with Mr Twani to assist Mr Jacobs, he advanced towards the deceased, who was being wheeled away by Mr Mvimbeli,

precisely so as to hide him from members of the appellant's group.[9]A nursing sister, Ms Zukiswa Dasheka, testified that she attempted to intervene by blocking the appellant from getting to the deceased, but that the appellant warned her to move aside 'if you don't want me to shoot you'. From a distance of approximately four to five paces, according to Ms Mahlanyane, the appellant produced a firearm and shot the deceased three times. He did so despite pleas for mercy from the deceased, who had raised both hands, and Mr Mvimbeli. Before the appellant had produced the firearm, he uttered the following words, directing himself at the deceased: 'Oh, you are here', and 'I have arrived now', or words to that effect. The deceased subsequently died from injuries sustained as a result of the shooting. It was upon hearing these shots that Mr Twani suggested that Mr Jacobs be taken to the hospital at Alice.

[22] Possession of a firearm without a licence was, at the relevant time, prohibited by s 2 of the Arms and Ammunition Act,[10]except in certain circumstances prescribed in the Act, but which are not relevant for present purposes. A person who contravened the provisions of s 2 made himself or herself guilty of an offence (s 39(1)(h)). However, proof of possession of a firearm without a licence did not necessarily lead to a conviction. This court has held that *mens rea,* the sense of knowledge of unlawfulness (wederregtelikheidsbewussyn), was an element of the offence[11]and the State bore the onus of proving it.[12]

[9] The deceased had told Mr Mvimbeli about the fighting at the taxi rank.
[10] 75 of 1969, now repealed by the Firearms Control Act 60 of 2000.
[11] *S v Potwane* 1983 (1) SA 868 (A).
[12] Compare *S v Ngwenya* 1979 (2) SA 96 (A) at 100A-C.

[23] Mr Jacobs was unable to explain how his firearm came to be in the possession of the appellant. In those circumstances, the appellant's version that he took possession of the firearm when it 'dropped to the combi' and his explanation for taking it into his possession must, in my view, be accepted. Properly construed the appellant's version was that he took the firearm because he realised that if it were to be found in his vehicle he would be expected to explain its presence. I am prepared to accept that when he took possession of the firearm the appellant did not have the necessary *mens rea*to found criminal liability. The same, however, cannot be said after the shooting. I agree with counsel for the State that after he had intentionally shot the deceased in the circumstances testified to by the three hospital employees and accepted by the trial court, the appellant could not have believed that he was still holding the firearm innocently. He knew that he was in possession of the firearm without a licence and that he had used it in the commission of an offence. He must have realised, after the shooting, that he had just committed an offence with a firearm for which he had no licence. The *mens rea* therefore established. It cannot be argued that, at the time the appellant decided to use the firearm to shoot the deceased, he was still merely safeguarding it. It follows, in my view, that the appellant was correctly convicted of the unlawful possession of the firearm.

[24] No submissions were made on behalf of the appellant regarding the sentence imposed upon him by the trial court in respect of this conviction. It therefore remains for me to consider the appeal against the sentence of 25 years' imprisonment imposed in respect of the murder conviction. In considering

sentence the court a quo took the following factors into account: The appellant was, at the time of the commission of the offence, 27 years of age, unmarried, but with one child whom he maintained. During 1996 he was injured in a taxi-related shooting as a result of which he had to undergo surgery and, at the time of the trial, was still receiving medical treatment for the injury he had sustained. The court found that the appellant 'did not go to the hospital in a pre-meditated fashion to shoot the deceased' and that he had been unaware of the deceased's presence there. The fact that the appellant had been in custody for almost fourteen months since the day of the incident was also taken into account. The court then went on to say:

'I accept these submissions on your behalf by your legal representative and an acceptance of these submissions means that there is no obligatory sentence that you must be imprisoned for life.'

[25] It seems to me, however, that the court a quo did not apply its mind to the provisions of s 51(2)(a)(i) of the Criminal Law Amendment Act[13] which ordained that a first offender, who had been convicted of murder where the murder was not planned or pre-meditated, shall be sentenced to imprisonment 'for a period not less than 15 years'.

[26] The appellant was a first offender. There is no indication, on the record, that the court a quo considered the statutory minimum sentence of 15 years' imprisonment for first offenders as a starting point for arriving at an appropriate sentence. The failure by the court a quo to apply its mind to the provisions of the relevant Act constitutes a misdirection, in my view. This court is therefore at

[13] 105 of 1997.

large to consider sentence afresh.

[27] Counsel for the State informed us that he would not advance any submissions to support a sentence in excess of the prescribed minimum of fifteen years' imprisonment. It is true, as observed by the court a quo, that the appellant had committed the most serious crime that one could imagine, namely the unlawful killing of another human being. The court also remarked that the appellant 'killed this person in a hospital when he was defenceless in a wheelchair'. It is also true that offences related to taxi violence were, at the time, prevalent in the country, but I doubt whether these factors would have driven the court below to have considered imposing a sentence in excess of the statutory minimum of 15 years' imprisonment, had it applied its mind to the relevant statutory provision. There is certainly nothing on the record to indicate that the court intended to impose a sentence in excess of the statutory minimum.[14]

[28] Counsel for the appellant did not contend that substantial and compelling circumstances exist which would justify the imposition of a lesser sentence than the prescribed minimum sentence. I am satisfied that none exist. We were urged, however, to consider deducting, from the sentence to be imposed, the equivalent of the period of the appellant's incarceration from the date of the commission of the offences to the date upon which he was ultimately sentenced by the trial court, viz a period of approximately 14 months. In this regard counsel relied on the decision of this court in *S v Vilakazi*.[15]I do not think that a sentence

[14] Compare *S v Mbatha* 2009 (2) SACR 623 (KZP).
[15] 2009 (1) SACR 552 (SCA).

of fifteen years' imprisonment will be disproportionate to the seriousness of the offence (murder) committed by the appellant. I am accordingly not persuaded that there should be any deductions from it.

[29] In the result the following order is made:

1. The appeal against the conviction on count 2 (murder) is dismissed.

2. The appeal against the sentence of 25 years' imprisonment imposed upon the appellant in respect of count 2 succeeds. The sentence is set aside and replaced with one of 15 years' imprisonment.

3. The appeal against the conviction and sentence on count 3 (unlawful possession of a firearm) is dismissed.

4. The appeal against the conviction on count 4 (unlawful possession of ammunition) succeeds and the conviction and sentence are set aside.

5. The sentence on count 2 is backdated to 4 December 2000, being the date on which the sentences were imposed by the trial court.

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JUDGE OF APPEAL

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