THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 730/13
Reportable

In the matter between:

THE STATE **Appellant**

and

BONGANI SEHOOLE **Respondent**

Neutral citation: *The State v Sehoole* (730/13) [2014] ZASCA 155 (29 September 2014)

Coram: NAVSA ADP, PILLAY and MBHA JJA and SCHOEMAN and DAMBUZA AJJA

Heard: 8 September 2014

Delivered: 29 September 2014

Summary: Interpretation and application of ss 3 and 4 of the Firearms Control Act 60 of 2000 – accused charged with unlawful possession of a firearm in terms of s 3 of Firearms Control Act 60 of 2000 in circumstances where the serial number thereof had been filed off – the decision of the high court that he should have been charged under s 4 instead of s 3 and therefore entitled to be acquitted, set aside – the State as dominus litis elected charges to be preferred against the accused.

ORDER

On appeal from the South Gauteng High Court, Johannesburg (Willis J et Mphahlele AJ) sitting as court of first instance):

1 The appeal is upheld in respect of both points of law.
2 The order of the high court is set aside in its entirety. The effect is that the convictions and related sentences by the regional court are reinstated.
3 The matter is remitted to the South Gauteng High Court for a de novo hearing on the respondent's appeal.

JUDGMENT

MBHA JA (NAVSA ADP, PILLAYJA, SCHOEMAN AND DAMBUZA AJJA CONCURRING)

[1] On 14 November 2011, the respondent was convicted in the Kempton Park Regional Court (the regional court) of contraventions of ss 3 and 90 of the Firearms Control Act 60 of 2000 (the Act), in that he was in unlawful possession of a firearm and ammunition. He was sentenced to 10 years' and 5 years' imprisonment for unlawful possession of a firearm and ammunition, respectively. The sentences were ordered to run concurrently. The matter came on appeal before the South Gauteng High Court, (Willis J et Mphahlele AJ) which set aside the convictions and related sentences. The State (the appellant) is appealing against the judgment of the court below on a question of law in terms of s 311(1) of the Criminal Procedure Act 51 of 1977 (the CPA). The appeal is with leave of the court below.

[2] The principal issue for determination in this appeal is whether the high court was correct in finding that a person found in unlawful possession of a firearm the serial number of which has been filed off, can only be charged with contravening s 4(1)(*f*)(iv) of the Firearms Control Act 60 of 2000 (the Act), or whether the State has the discretion to charge such a person with contravening s 3 of the Act which, if one has regard to the penal provisions in relation thereto, is the lesser offence. This appeal also raises the question of the discretionary power, which the State has as dominus litis regarding the preference of charges that may be brought against an accused person.

[3] The background which can be gleaned from the evidence led before the regional court is briefly as follows. On 25 January 2011 the respondent, Mr Bongani Sehoole, was driving a Colt bakkie with three passengers. He was stopped by two police officers of the South African Police Service (SAPS), Sergeant Kladie (Kladie) and Constable Filtane (Filtane). Upon questioning the respondent, the police officers became suspicious. They then decided to search the vehicle and its occupants.

[4] Kladie proceeded to search the occupants on the driver's side whilst Filtane proceeded to search those on the passenger side of the bakkie. When Kladie asked the respondent to alight so he could search him, he noticed that the respondent was attempting to hide his hands in a suspicious manner. When questioned about this, the respondent replied that he could not walk properly as he had been involved in an accident. As the respondent was alighting Kladie noticed his right hand going towards his back. Kladie grabbed the respondent and on searching him, found a 9mm Beretta pistol tucked inside the back of his trousers. The firearm had a magazine containing fifteen rounds of ammunition. The serial number of the firearm had been filed off. On discovering the concealed firearm, Kladie screamed 'firearm firearm', whereupon one of the vehicle's occupants who was on the passenger side, immediately fled the scene. The respondent was then arrested.

[5] As alluded to earlier, the respondent's appeal to the high court against both conviction and sentence was successful. Regarding the unlawful

possession of the firearm, the high court reasoned that since the serial number had been filed off, a conviction in relation to s 3 of the Act was incompetent. Essentially the high court found that the respondent should have been charged under s 4 instead of s 3 of the Act. The high court took the view that the respondent had been charged under the wrong section of the Act, and was therefore entitled to an acquittal. The primary question in this appeal is whether that finding was correct.

[6] Regarding the unlawful possession of ammunition, the high court found that there had been no '. . . chain linking the finding of the ammunition with a ballistic report to confirm that it was in fact ammunition . . .'. The high court then held that there was no evidence that the ammunition found in the possession of the respondent, was in fact ammunition and acquitted him on this charge. The second question in this appeal is whether that conclusion was correct. It is necessary to record that because of the view the high court took on these two issues, it did not proceed to decide the disputes of facts and whether the State had otherwise proved its case beyond a reasonable doubt.

[7] I now turn to consider the relevant provisions of the Act. Section 3 provides:

'(1) No person may possess a firearm unless he or she holds for that firearm –

(*a*) a licence, permit or authorisation issued in terms of the Act;

(*b*) . . . .'

Section 4, in turn, provides:

'(1) The following firearms . . . are prohibited firearms and may not be possessed or licensed in terms of this Act, except as provided for in sections 17, 18(5), 19 and 20(1)(*b*);

(*a*) Any fully automatic firearm;

. . .

(*f*) any firearm –

(iv) the serial number or any other identifying mark of which has been changed or removed without the written permission of the Registrar.'

[8] These two sections share one essential feature, and it is that both prohibit the possession of unlicensed firearms. However, the following are the essential differences between the two sections. Section 3 contains a general prohibition against the possession a firearm without a licence. Section 4 deals with prohibitions in instances where firearms may not be possessed at all except under exceptional circumstances, which relate to the licensing of such firearms to private and public collectors, and for business purposes, and a firearm where the serial number has been changed or removed without the written permission of the registrar. There is also a difference in the maximum penalty which may be imposed for offences committed in breach of either section. Schedule 4 of the Act prescribes a maximum penalty of 15 years' imprisonment for a breach under s 3, and a maximum penalty of 25 years in respect of s 4.

[9] The two sections each prohibit possession of firearms in circumstances referred to above. However, for a successful prosecution in terms of s 4(1)(*f*)(iv), the State must also prove that the firearm's serial number or identifying mark has been removed or altered without the written permission of the Registrar.

[10] The State as dominus litis has a discretion regarding prosecution and pre-trial procedures. For instance the State may decide, inter alia, whether or not to institute a prosecution; on what charges to prosecute; in which court or forum to prosecute, when to withdraw charges and so forth. The State can elect to charge a person with a less serious offence. This position was aptly summed up by Waglay J in *S v Khalema and Five Similar Cases*,[1] where the court was called upon to review the practice of magistrates in the districts courts whereby they *mero motu* transferred cases from their roll to the regional court, when he said that:

'[21] It is also self-evident from the reading of the various subsections of s 75 that it is the prosecutor who is dominus litis and because she is in control of the police docket, she is in the best position to make an informed decision regarding the court

[1] *S v Khalema and Five Similar Cases* 2008 (1) SACR 165 (C). See also *S v Zuma* 2006 (2) SACR 257 (W) at 265a-b.

of first instance, the forum for the trial and the timing of the transfer of a case, if necessary.

[22] The common denominator through all the subsections of s 75 is that *the prosecuto*r . . . is the party who dictates the route a case will take towards being finalised. It is the prosecutor who makes the decision. Absent this decision by the prosecutor the magistrate in the district court cannot transfer a matter out of her court to a higher court . . .

[23] Section 75 is clear: it provides that a case cannot be transferred to the regional court or high court unless the prosecutor so requests . . . .'

[11] In this case the State elected to charge the accused with the less serious offence under the general prohibition of possession of a firearm without a licence in terms of s 3, rather than under s 4 of the Act. There is no statutory provision which compels the State to charge a person with the more serious offence.

[12] Ordinarily, courts are not at liberty to interfere with the prosecutor's discretion unless there are truly exceptional circumstances for doing so. For example this might happen where a prosecutor has not exercised his or her discretion properly. However when preferring a particular charge against an accused, courts are not at liberty to interfere with the discretion exercised by the prosecution during a trial. In the matter of *Minister of Police & another v Du Plessis*,[2] this court stated as follows:

'Courts are not overly eager to limit or interfere with the legitimate exercise of prosecutorial authority. However, a prosecuting authority's discretion to prosecute is not immune from the scrutiny of a court which can intervene where such a discretion is improperly exercised ... Indeed a court should be obliged to and therefore ought to intervene if there is no reasonable and probable cause to believe that the accused is guilty of an offence before a prosecution is initiated.'

[13] In my view, the State's decision to prosecute the respondent under s 3 of the Act did not fall into the abovementioned categories warranting the court to interfere and be prescriptive regarding the charge that was preferred in a case where a firearm was unlawfully possessed, notwithstanding the fact that

[2] *Minister of Police & another v Du Plessis* 2014 (1) SACR 217 (SCA).

the serial numbers of that firearm may have been filed off. Clearly, if courts were to decide what charges an accused should face and dictate to the State when and how an accused should be charged, this would undermine the independence of the prosecution as provided for in s 179 of the Constitution. There might in an appropriate case be room for a court to comment on choices made by the prosecution. This is not such a case.

[14] In the light of what I have stated above, it follows that the high court erred in holding that the State should have charged the accused under s 4 and not s 3 of the Act, and that consequently he was entitled to an acquittal. As stated earlier, having reached that conclusion, the high court did not find it necessary to deal with the conflict between the evidence of Kladie and the respondent concerning the possession of the firearm.

[15] I now turn to consider the count of unlawful possession of ammunition and the high court's reasoning on this aspect. The State has appealed on a point of law on this issue as well.

[16] In respect of the conviction in relation to unlawful possession of ammunition, the high court said the following:

'[4] Insofar as the possession of ammunition is concerned the classic "regspunt" has been taken, viz. how do we know that it is ammunition? There is not a chain linking the finding of the ammunition with a ballistic report to confirm that it was in fact ammunition.'

Thus the high court made the following order:

'(i) The appeal against conviction and sentence is upheld;

(ii) The following is substituted for the order of the court a quo:

"The accused is acquitted."

(iii) The appellant is to be released from custody immediately.'

[17] I have already dealt with the high court's reasoning in relation to the acquittal on the count of unlawful possession of a firearm.

[18] Section 90 of the Act prohibits any person from possessing ammunition unless he or she holds a licence in respect of a firearm which is capable of firing that ammunition, or holds a permit to possess that ammunition.

[19] The State adduced ballistics evidence in the form of an affidavit in terms of section 212 of the CPA concerning the firearm in question. It will be recalled that Kladie had testified about the ammunition he had found in the firearm. Whilst it is undoubtedly so that a ballistic report would provide proof that a specific object is indeed ammunition, there is no authority compelling the State to produce such evidence in every case. Where there is acceptable evidence disclosing that ammunition was found inside a properly working firearm, it can, in the absence of any countervailing evidence be deduced to be ammunition related to the firearm. Needless to say, each case must be judged on its own particular facts and circumstances.

[20] In the light of what I have stated above, it follows that the high court erred in finding that a ballistic report was the only manner of proving that the offence was committed.

[21] Initially, counsel for the respondent urged this court to consider sentencing the accused afresh in the event the appeal by the State on the question of law is upheld. Later it was conceded that in the event the appeal was upheld on the law points, it would have the effect that the regional court's order would be reinstated and that the matter would have to be remitted to the high court for a de novo hearing on the respondent's appeal.

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

1 The appeal is upheld in respect of both points of law.

2 The order of the high court is set aside in its entirety. The effect is that the convictions and related sentences by the regional court are reinstated.

3 The matter is remitted to the South Gauteng High Court for a de novo hearing on the respondent's appeal.

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B H MBHA

JUDGE OF APPEAL

APPEARANCES:

For Appellant:	G L Roberts SC
	R Bester
	Instructed by:
	Director of Public Prosecutions, Johannesburg
	Director of Public Prosecutions, Bloemfontein
For Respondent:	M F Miller
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