

SOUTH AFRICA / JUDGMENT

**Filani v S (CA&R 227/2011) [2011]
ZAECHGHC 75; 2012 (1) SACR 508
(ECG) (8 December 2011)**
[2011] ZAECHGHC 75

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J.D. Pickering, E. Revelas

CASE / FILE NUMBER

CA&R 227/2011

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

CASE NO: CA&R 227/2011

DATE HEARD: 7 December 2011

DATE DELIVERED: 8 December 2011

In the matter between

LIFA FILANIAppellant

And

THE STATERespondent

APPEAL JUDGMENT

PICKERING J:

The appellant was charged in the regional court, Port Elizabeth, with robbery with aggravating circumstances (count 1); unlawful possession of a fire-arm in contravention of section 3 of the Firearms Control Act 60 of 2000 (count 2) and unlawful possession of ammunition in contravention of section 90 of the Firearms Control Act 60 of 2000 (count 3). And kidnapping (count 4). The appellant was acquitted on the fourth count.

Despite his plea of not guilty on each of these charges he was convicted as charged. On count 1 he was sentenced to undergo 6 years imprisonment. In respect of counts 2 and 3 the sentence reads as follows:

“And then again on counts 2 and 3 you will be sentenced to undergo 6 years imprisonment. Count 2 and count 3 will run concurrently.”

It is not at all clear from the wording of the sentence whether counts 2 and 3 were taken together for purposes of sentence and, if not, whether the sentence on these counts would run concurrently with each other or whether the sentence of 6 years imprisonment imposed on counts 2 and 3, taken as one, would run concurrently with the sentence imposed upon the appellant on count 1.

The appellant now appeals against both his convictions and sentences.

The complainant on count 1, Mrs. Sam, testified that in the early hours of the morning of 2 April 2006 she was asleep, together with her three children, in a house in Motherwell when she was awoken by a sound of a door banging. She got up to see what was happening and discovered that the back door of her house, which was a stable door, had been kicked in and that the upper part thereof had fallen off its hinges. Three men were in the doorway. She stated that the window of the kitchen was covered only by a lace curtain. There was a flood light further down the street which illuminated the kitchen sufficiently for her to identify the men. One of the three men was previously unknown to her. She knew the other two men, however, one being the appellant whom she knew by

the name of Lifa and the other being a man known to her as Blindo or Mabuti. She addressed the appellant saying “Lifa, what do you want?” One of the men replied saying that they wanted money. She told them that she had none. One of the men then said “Lifa shoot”. She stated at first that she did not notice the fire-arm appellant was carrying because it was dark but then added that it was “a small fire-arm” but that she had not noticed the colour thereof. The next moment appellant fired a shot and a bullet struck the wall behind her just above her head, leaving what she called “a little, small hole” in the wall.

She ran into the children’s room. She heard the men talking in Afrikaans saying that they would take her property if there was no money. The men then took certain items belonging to her including a television, a dvd, a hi-fi, a two burner stove, two cell phones and a duvet and sheet. Most of these items were later recovered from the aforementioned Mabuti.

She stated that at the time of the incident appellant was wearing an orange t-shirt and a pair of grey trousers.

Mrs. Sam’s 15 year old daughter, Siyandumisa, was 11 years of age at the time of the incident. She stated in her testimony that she was asleep at home in a front room with her brother when she heard voices calling from outside asking that the back door be opened. The door was then kicked open. She heard her mother calling the name “Lifa”. She hid on the other side of the bed. She heard the sound of a shot but did not see who had fired it because she was not near the kitchen. A

man she did not know entered the room where she was hiding and took her outside asking what he should do to her. The appellant, whom she knew, then came to them and told the man to let her go. Appellant was wearing an orange t-shirt and grey trousers.

Warrant Officer van Eck testified that he proceeded to the house of Mrs. Sam on 2 April 2006 in consequence of a robbery report. He spoke to Mrs. Sam who gave him the names of “Lifa” and “Bundo” as being two of the perpetrators. Van Eck then accompanied Mrs. Sam to a shack. They arrived there at approximately 6:15am. Mrs. Sam pointed out a shack belonging to the Lifa who she alleged had robbed her. At the shack the appellant was found. Appellant was wearing an orange t-shirt and a pair of grey trousers. He was alone in the shack.

Appellant denied to van Eck that he had been involved in the robbery and stated that he had been sleeping with his girlfriend all night. There was no woman present in the shack. According to van Eck appellant was unable to provide him with the name and address of his girlfriend. No firearm or stolen goods were found in appellant’s shack.

Van Eck then inspected the house of Mrs. Sam. There complainant pointed out to him the hole in the wall where the bullet had struck it as well as a spent cartridge and a “bullet point”. The cartridge and bullet point were apparently taken by the photographer and, as matters turned out, were not subjected to any forensic analysis nor were any photographs handed into Court. Van Eck followed up certain information and most of the property stolen from the house of Mrs. Sam was recovered from the room of Mabuti.

The evidence of one Khahlani took the State’s case no further.

Appellant testified in his defence. As had been stated by him to van Eck he reiterated that he had been at all material times at home in bed with his girlfriend on the night in question. His girlfriend’s name, so he said, was Babalwa Zondani. He stated that when van Eck arrived he and Babalwa were still in bed together. He admitted that he was the owner of an orange t-shirt but denied that he had been wearing it that night. When van Eck found him his upper body was naked. He was wearing only a pair of trousers. He confirmed that he knew Mrs. Sam and that they were on good terms with each other. Mabuti was also a friend of his. He averred that Mabuti would testify on his behalf to the effect that appellant had not been present when Mabuti robbed the complainant in the company of other men. He accordingly denied any involvement in the commission of the offences.

The trial was thereafter postponed to enable the defence to call Babalwa and Mabuti as witnesses. In the event Mabuti, although available, was not called. It was placed on record that Babalwa’s whereabouts were unknown.

The regional magistrate found that the complainant was an excellent witness albeit that he expressed his views, inter alia, in somewhat incomprehensible terms namely:

“Well, the demeanour of the witness will serve as a substitute for evidence.”

Strangely enough, the regional magistrate made no mention whatsoever of the evidence of Siyandumisa Sam, referring to van Eck as the second and Khahlani as the third witnesses respectively. He appears to have entirely overlooked the fact that she not only testified but provided material corroboration of complainant's evidence as to identification. The only inference to draw from his failure to deal with her evidence is that, at the time of delivering his judgment at the conclusion of the trial, he failed properly to apply his mind to all the evidence which had been led before him. Thereafter, an application for leave to appeal was filed. This application made pertinent reference to the evidence of Siyandumisa Sam. In response hereto the magistrate filed further "reasons for judgment" in which he now stated that:

"The evidence of the complainant was corroborated by her daughter who was taken away by one of the assailants. The impressive corroboration was to the effect that accused was the one who stops this and demanded that the child be sent back to the house. There was no possibility

that the complainant may have colluded with her daughter to incriminate the accused."

It is quite clear, in my view, that the magistrate's belated reference in his later reasons to the "impressive corroboration" provided by the daughter's evidence was brought about by the reference to such evidence in the Notice of Appeal.

In rejecting appellant's evidence the regional magistrate appears to have drawn an inference adverse to appellant from his failure to have called Babalwa as a witness, this despite it having been put on record that her whereabouts at the time of the trial were unknown.

Be that as it may, it is abundantly clear, on a holistic view of the evidence, that appellant's alibi evidence cannot reasonably possibly be true. It was in the event, not supported by Mabuti, despite his availability as a witness. Both Mrs. Sam and her daughter knew appellant well. Although it was relatively dark at the time they were both in very close proximity to appellant and clearly each of them had a proper opportunity to identify him as one of the perpetrators. Siyandumisa, in particular, was in the street, which was flood lit, when appellant came up to her and ordered the man who was holding her to let her go. Both confirmed that he was wearing an orange t-shirt at the time. Their evidence was clear and satisfactory. Their evidence was further corroborated by van Eck who, on visiting appellant's shack found appellant dressed in an orange t-shirt.

Appellant's evidence, on the contrary, was evasive and contradictory.

In my view, therefore, the regional magistrate, despite the deficiencies in his judgment, correctly convicted appellant of robbery with aggravating circumstances on count 1 and there is no merit in the appeal against conviction on this count. The regional magistrate then proceeded to convict appellant on counts 2 and 3 stating in this regard merely that "complainant told the court that she did not know exactly who had fired the shot but it is confirmed that a shot was fired and it missed her, hitting the wall next to her."

As appears from the summary of complainant's evidence set out above the complainant, far from stating that she did not know who had fired the shot, in fact stated clearly and unequivocally that the person who fired the shot was the appellant. What she did not know was who had told appellant to fire the shot. The regional magistrate's incorrect exposition of complainant's evidence is yet another example of his careless and slapdash approach. In any event, if it was the magistrate's understanding that complainant had in fact been unable to state who fired the shot, then it is difficult to understand on what basis he convicted appellant of the unlawful possession of the firearm and ammunition.

The regional magistrate appears to have been of the view that a conviction on counts 2 and 3 followed as a matter of course in consequence of the conviction of appellant on count 1.

Mr. Geldenhuys, who appeared for the appellant, submitted that the convictions on counts 2 and 3 cannot be supported. He submitted that the State failed to prove that the weapon and ammunition used by the appellant fell within the definition of "firearm" and of "ammunition" contained in section 1 of Act 60 of 2000.

The predecessor of Act 60 of 2000 was Act 75 of 1969. Section 1(1) of Act 75 of 1969 defined "arm" as follows:

"arm" means any firearm other than a cannon, machine gun or machine rifle, and includes –

subject to the provisions of ss (2) and (3) –

a gas rifle of .22 of an inch or larger calibre or a gas pistol or revolver;

an air rifle of .22 of an inch or larger calibre or an air pistol other than a toy pistol;

an alarm pistol or revolver;

a gas rifle or an air rifle of .177 of an inch or larger calibre."

In *S v Shezi* 1980

(4) SA 494 (N) Page J, with whom Didcott J concurred, stated as follows at 495 D – E:

"The Act contains no definition of 'firearm' as such, and one must, therefore, conclude that the Legislature intended it to bear its ordinary meaning. 'Firearm' is defined in the Oxford English Dictionary as 'a weapon from which missiles are propelled by an explosive, eg gunpowder'. That the Legislature intended the word to bear this connotation in the Act is borne out by the fact that the provisions whereby its scope is extended to include weapons from which missiles are propelled by means other than an explosive, were deemed necessary."

In *S v Williams* 2005 (2) SACR 290 (C) Erasmus J, with whom Potgieter AJ concurred, stated as follows at para 12; 294e – g:

“An essential element of the alleged crime which the State must prove is the possession of an ‘arm’. In terms of the 1969 Act, the word ‘arm’, subject to certain special exclusions and inclusions, means any ‘firearm’. ‘Firearm’ is not defined in the old Act and, accordingly, has to be construed in its ordinary sense (see S v Shezi 1980

- (4) SA 494 (N) at 495D) which, it has been held, means that it is a weapon ‘capable of discharging or propelling missiles with enough force or velocity for it to be used for offensive or defensive purposes’. (See S v Hlongwa 1990 (2) SACR 262 (N) at 263h). With effect from 1 June 2001, the term ‘firearm’ is now defined, and, although ‘arm’ is no longer defined, having regard to the old definition, it is clear that the legislative intention was to interpret ‘arm’ still to mean a ‘firearm’, but as now defined in the new Act.”

“Firearm” is defined in the Act as follows:

“Firearm means any –

device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of burning propellant, at a muzzle energy exceeding 8 joules;

device manufactured or designed to discharge rim-fire, centre-fire or pin-fire ammunition;

device which is not at the time capable of discharging any bullet or projectile, but which can be readily altered to be a firearm within the meaning of paragraph (a) or (b);

device manufactured to discharge a bullet or any other projectile of a calibre of 5.6mm (.22 calibre) or higher at a muzzle energy of more than 8 joules, by means of compressed gas and not by means of burning propellant; or

barrel, frame or receiver of a device referred to in paragraphs (a), (b), (c) or (d) but does not include any device contemplated in section 5.”

In supporting the convictions Ms. Hendricks, who appeared for the State, referred to S v Matinisi 2010 JDR 1334 (ECG). In that matter the appellant was charged with murder and with the unlawful possession of a firearm in contravention of Act 60 of 2000. The cause of death of the deceased was a gunshot wound to the head. No firearm was recovered from the appellant, who, it was common cause, had no licence to possess a firearm. The appeal against the murder conviction failed. With regard to the appeal against conviction in respect of the firearm the following was stated:

“Regarding the submission that the appellant was never found in possession of an unlicensed firearm, as I have stated, the record reveals that the firearm that was used to kill the deceased was never found, either on the appellant or anywhere else. But my view is that once the evidence of Mgxeke, Noyo and Godlo was accepted, together with the common cause fact that no firearm licence had ever been issued to the appellant, such evidence constituted conclusive proof that the appellant was, at the time of the shooting at the deceased, in ‘actual’ possession of a firearm and that the firearm with which he shot the deceased was a firearm as defined in the Firearms Control Act. The trial Court correctly found that the person who killed the deceased must have been in possession of a firearm.”

It does not appear from the judgment, with respect, on what basis the conclusion was reached that the firearm with which the deceased was shot was indeed a firearm as defined in the Firearms Control Act. It may well be that that particular issue was not argued before the learned Judges and that their attention was not therefore directed pertinently to the issue under discussion in the present case.

Even were I to be wrong in this I am of the view, with respect, that the decision cannot be construed as laying down the proposition that in order to discharge the onus upon it of proving that a particular weapon falls within the ambit of the definition of a firearm in s 1 of Act 60 of 2000 the State need do no more than prove that a bullet or projectile was fired from that weapon. It is clear, in my view, from the definition of “firearm” in Act 60 of 2000, as opposed to the definition of “arm” in Act 75 of 1969, that the Legislature no longer intended “firearm” to bear its ordinary meaning as explained in *S v Shezi* supra.

In these circumstances it was incumbent on the State to prove that the weapon of which appellant was allegedly in possession was a firearm as defined in the Act.

In my view the State has failed to discharged that onus.

According to the evidence of van Eck the complainant pointed out to him the cartridge and the “bullet point” as well as the hole in the wall which was struck by the projectile. According to van Eck he pointed these out to the photographer and “these items were also photographed and collected by the photographer.”

As I have stated above no forensic analysis was conducted on these items nor were any photographs in respect thereof handed into Court. No explanation as to the whereabouts of these items was advanced by van Eck or by any other witness and, indeed, no further reference was made to the cartridge and “bullet point” thereafter. Not surprisingly, the defence attorney did not address any questions to van Eck in this regard. Had the bullet point and cartridge been subjected to forensic analysis then, depending on the results of such analysis, the State may well have been able to establish that the projectile had been fired from a device falling within the ambit of the definition of “firearm”.

In the absence of such forensic evidence the submission of Ms. Hendricks was in effect that, because the weapon in possession of the appellant discharged or propelled a missile with enough force or velocity for it to be used for offensive purposes, it must therefore fall within the ambit of the definition of a firearm in s 1 of Act 60 of 2000. In other words, on an acceptance of Ms. Hendricks’s submission any weapon which was capable of discharging or propelling a missile as set out above would fall within the ambit of the definition. In my view, however, given the increased technical nature of the various definitions of “firearm” contained in the later and current Act such a finding cannot be made in the absence of expert evidence to that effect. Certainly it is not a matter of which this court may take judicial notice. The State failed to lead any such expert evidence and accordingly failed, in my view, to discharge the onus upon it.

In all the circumstances the appellant was wrongly convicted on count 2. Ms. Hendricks conceded that similar conditions would apply to count 3 (possession of ammunition).

In the circumstances the appeal against conviction on counts 2 and 3 must succeed.

It was common cause at the trial, and correctly so, that on count 1 a minimum sentence of 15 years imprisonment was applicable in terms of Act 105 of 1997. Despite this the regional magistrate made no reference whatsoever to the issue of substantial and compelling circumstances. The only relevant part of his judgment on sentence reads as follows:

“Now considering an appropriate sentence for the accused, the court will take into consideration that accused was 20 years at the time of the commission of the offence. That he is a first offender. That he had been in custody for a period of 1 year 7 months, but the offence is a very serious offence. That accused did not show any remorse of the offence, but because of your age and also that you have stayed for a period of 1 year 7 months and that your age is promising that you may change.” (sic)

The regional magistrate has previously been seriously taken to task in a number of High Court judgments, not only for the terseness of his judgments on the merits but also for his failure properly to apply his mind to the question of substantial and compelling circumstances when considering sentence. I need only mention the following cases of which I am aware: *S v Vika* 2010(2) SACR 444 (E); *S v Bruintjies* Case no CA&R71/2010; *S v Mcoseli*, Case no CA&R129/2011 ; *S v Silwanyana* Case no CA&R338/2010; and *S v Wentzel* CA&R189/2010. His failure to give properly reasoned judgments has been variously described as being “deplorable”, “lamentable” and “unacceptable”.

The present case is, unfortunately, no exception.

The regional magistrate, in a series of judgments, has exhibited a disturbing lack of any intellectual rigour in his approach to matters before him. He has continued to do so despite the trenchant criticism of his judgments. As a regional magistrate he is possessed of very substantial powers, including the power of sentencing offenders to lengthy terms of imprisonment and, indeed, to life imprisonment. It appears that he is unable or unwilling to approach cases before him with the requisite degree of diligence. In his foreword to the first edition of *Herbstein and van Winsen, The Civil Practice of the Supreme Court of South Africa*, Davis AJA stated as follows:

“And in judges too, industry is essential. Judges are not for the most part supermen; when they think that they are they are not good judges. Many have not even been men of great ability: yet they have nevertheless made good judges. They have been careful and painstaking, modest, patient and courteous.”

Judicial officers are human: they all make mistakes of law and fact from time to time hence the necessity for appeal courts. The least that can be expected of them, however, is that they apply themselves diligently and conscientiously to the cases before them, conscious at all times of their weighty responsibility to administer justice fairly to both the State and the accused who appear before them.

As to the sentence imposed on count 1 the appellant can consider himself extremely fortunate that so lenient a sentence was imposed upon him. Had the regional magistrate applied his mind properly to the issue of the sentence to be imposed upon the appellant that sentence may well have been more severe. There is no merit whatsoever in the appeal against sentence.

In all the circumstances the appeal against conviction and sentence on count 1 is dismissed.

The appeal against the convictions and sentences on counts 2 and 3 succeeds and the convictions and sentences on these counts are set aside

The Registrar is directed to send a copy of this judgment to the Magistrates' Commission as well as to the President of the Regional Court, Port Elizabeth.

J.D. PICKERING

JUDGE OF THE HIGH COURT

I agree,

E. REVELAS

Appearing on behalf of Appellant: Adv. Geldenhuys

Instructed by: Legal Aid Centre

Appearing on behalf of State: Adv. Hendricks

Instructed by: The Director of Public Prosecutions

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