

SOUTH AFRICA / JUDGMENT

Kula v S (CA&R163/2017) [2017] ZAECHGC 113 (17 October 2017)

[2017] ZAECHGC 113

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G H Bloem, N Msizi

CASE / FILE NUMBER

CA&R163/2017

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO. CA & R 163/2017

In the matter between:

SAKHIWO KULA Appellant

and

THE STATE Respondent

APPEAL JUDGMENT

Bloem J.

[1] The accused was charged in the regional court at Port Elizabeth with attempted murder and unlawful possession of a firearm in contravention of the provisions of the Firearms Control Act[1]. He pleaded not guilty to the charge of attempted murder and guilty to the charge of unlawful possession of a firearm. He was convicted on the strength of the written statement made by him in terms of section 112 (2) of the Criminal Procedure Act.[2] At the conclusion of the trial he was also convicted of attempted murder and sentenced to ten years' imprisonment.

He was sentenced to four years' imprisonment in respect of the unlawful possession of a firearm. The magistrate did not order the four years' imprisonment to run concurrently with the ten years' imprisonment. The appellant applied to the magistrate for leave to appeal against sentence only. That application was refused. The appellant was granted leave by this court, on petition, to appeal against the sentence.

- [2] The facts upon which the appellant was convicted of unlawfully possessing a firearm are that on Saturday, 12 September 2009 and while walking along Palo Street, Motherwell, Port Elizabeth he came across a friend who requested him to take his firearm to his wife. The appellant agreed and took the firearm from his friend. Along the way he met another friend with whom he went to a tavern where the two of them stayed until the early hours of the following day. In his plea the appellant explained what happened when the tavern closed at approximately 02h00. He stated:

“The last thing I remember is leaving the tavern with my friend to go home. I was very drunk. The firearm had been in my possession the whole time. The next thing I remember is waking up in hospital on Thursday, 17 September 2009.”

- [3] It appears that when the appellant was on his way home Mzuxolile Bekwayo, a policeman, and his partner, constable Vuza, were going around checking that taverns were closing down. As they were travelling along Palo Street constable Bekwayo heard two shots being fired. They came across two ladies and a gentleman who were running and looked frightened. Constable Bekwayo asked them who fired the shots. They indicated that the shots came from the direction in which the policemen were travelling. While the two policemen were driving along Palo Street they saw two males walking in their direction. When they were near the men constable Vuza stopped the vehicle. Constable Bekwayo alighted and asked the two males where the shots were from. One of them pointed at a nearby street. When constable Bekwayo turned his head he looked into a firearm pointed at him by the appellant who fired a shot at him. He pulled his service firearm and fired five shots at the appellant. The appellant dropped his firearm whereafter he himself dropped to the ground. An ambulance and senior police officers were summoned. The appellant was hospitalised under police guard.
- [4] The appellant’s plea, that he had the firearm in his possession throughout his stay at the tavern and that he was very drunk, was accepted by the prosecutor. There was accordingly no dispute about his state of intoxication. The appellant’s evidence was that, because his state of intoxication, he cannot remember that he was involved in an altercation with the police. The magistrate rejected the appellant’s version as false.
- [5] Approximately two weeks before the hearing we requested the parties to address us on the appellant’s conviction of attempted

murder. That was despite the fact that he applied for and was granted leave to appeal against sentence only. The request for heads of argument in respect of the conviction of attempted murder stems from the possibility that the conviction might not have been in accordance with justice. On constable Bekwayo’s version the appellant allegedly pointed a firearm at his face while he (constable Bekwayo) had his back towards the passenger’s side of the police van. Constable Bekwayo testified that he was “in the middle of the bakkie - towards the middle of the bakkie there was a shot that was fired. I quickly took my firearm and retaliated. I shot five times. I saw that his firearm was going up. The firearm fell on the ground and he also fell.”

- [6] Ballistic tests were performed on both firearms. At the trial the report prepared in respect of those test was handed in by agreement as evidence. It is stated in that report that five spent cartridges were collected on the scene. They were linked to the firearm in possession of constable Bekwayo. No spent cartridge allegedly fired from the firearm in the appellant's possession was found on the scene. Constable Bekwayo was not injured by the shot allegedly fired from the firearm in the appellant's possession. The side of the police van which was immediately behind him was also not damaged. When he was cross-examined on that aspect constable Bekwayo referred to a bullet hole at the rear door of the police van. He did not explain when and how the appellant could have caused that hole. Mr Els, counsel for the state, conceded, correctly so in my view, that constable Bekwayo's version generally, but in particular his reference to the hole at the rear door of the police van, was improbable.
- [7] The magistrate convicted the appellant because he accepted constable Bekwayo's evidence. The reason for such acceptance seems to be the fact that the appellant could not dispute constable Bekwayo's evidence because of his state of intoxication.

The magistrate rejected the appellant's evidence because, according to him, the appellant contradicted himself. According

to the magistrate the appellant initially testified about his experience at the police van but later testified that what he had

earlier testified about was what he had heard from other persons. In my view the appellant's evidence throughout was that he did not know what happened at the police van. He earlier testified about what he had been told by others. In this regard the record reflects the following evidence given by the appellant when he was cross-examined:

"Now you indicated to your attorney that the last memory you were coming out of the tavern. That you remember, correct? --- Yes.

How far is the tavern from where you heard that you were shot now from the people around the community? You said "mos" now you were told later on that you were shot. How far now from that tavern to the place where you were in fact shot? --- I am not in a position to give you the distance in kilometres or in metres.

Is it from here to the (indistinct) down the road? Is it from here to the fourway stop there in the corner? Is it from here, from the shopping centre maybe, to the shopping centre? --- From here to the circle.

And you also confirmed that from the tavern you also remembered that you were in fact about to part ways with Masixole because he was going to go to Ngwali and you were going to go to Palo, correct? That you remember. --- Correct.

So at those stages from the tavern up until then you were not on blackout, correct? Because you remember. --- I do not remember anything. I was informed.

Now that is new. I thought you were only told what happened, that is now in relation to the incident but your attorney asked you what was your last memory. You were coming out of the tavern with Masixole an Masixole was going to Ngwali and you were going to Palo, so I am saying to you now that is new to me because you indicated to the court earlier that you were told later on about the incident, what happened but in relation to your last memory you indicated to your attorney that your last memory is you were coming out of the tavern and you were about to separate with Masixole, Masixole about to enter Ngwali. That is your

last memory. Tell me if I am wrong. --- No that is wrong. That is not what I said.”

[8] Throughout his evidence the appellant’s version was that he left the tavern with his friend, Masixole, who was going to Ngwali while he, the appellant, was on his way home in Palo Street. The prosecutor’s second question in the above quotation seems to suggest that he accepted that the appellant had been told “by the people around the community” what transpired at or near the police van when he was shot.

[9] When constable Bekwayo gave evidence-in-chief, he was asked about the appellant’s state of intoxication through a leading question. The record reads as follows in that regard:

“Now as he was pointing at you, this person, what did you make of him? In what state was he? Did you see if he was intoxicated or he knew basically what he was doing, he was aware of what he was doing now from your observation as you were looking at each eye to eye? --- I did not see him as someone who was intoxicated. I only viewed him as someone who was very cruel because when he pointed me with the firearm ...”.

[10] When that same question was put to him under cross-examination, he did not deny that the appellant was very drunk. The record in that regard reads as follows:

“Now the accused as far as your allegation is concerned is in a very difficult position because he says that he cannot remember how, he does not know how he was arrested, he does not know about the shooting-out between himself and the police because he was very drunk. --- That is what he says.”

[11] The prosecutor seemed to have lost sight of the fact that he accepted the appellant’s plea wherein he stated that he was very drunk and that, from the time that he left the tavern, he can remember only when he woke up in hospital after approximately five days.

[12] In a criminal case the onus is on the state to prove the guilt of an accused beyond reasonable doubt. The accused, on the other hand, “is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, R v Difford 1937 AD 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite

perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.”[3] Nugent J (as he then was) stated that the “proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical

corollary is that he must be acquitted if it is reasonably possible that he might be innocent.”[4]

[13] Regard being had to all the evidence, particularly the fact that constable Bekwayo was shot at close range without sustaining an injury, that the police vehicle was not damaged and that no spent cartridge fired from the firearm in the appellant’s possession was found on the scene, together with the appellant’s evidence that he was under the influence of liquor to such an extent that he cannot remember what happened, a reasonable possibility exists that the appellant might be innocent. I am not satisfied that the evidence established the appellant’s guilt beyond reasonable doubt. He was accordingly entitled to be acquitted by the magistrate. His conviction on attempted murder and the sentence imposed in respect thereof should accordingly be set aside.

[14] Regarding the sentence imposed in respect of the unlawful possession of a firearm, the parties submitted that it is a serious offence which is prevalent within the area of jurisdiction of this court. The legislature has deemed the unlawful possession of a firearm so serious that a maximum period of fifteen years’ imprisonment may be imposed.[5] The appellant should not have gone to a tavern with a firearm for which he did not have a licence. The magistrate considered the appellant’s personal circumstances which include various previous convictions,[6] the interest of the community as well as the seriousness of the offence of which he had been convicted and balanced them against each other to arrive at the sentence which he has imposed. In my view a sentence of four years’ imprisonment for the unlawful possession of a firearm serves the interests of society and the appellant under the circumstances of this case. Ms Mazibukwana, attorney for the appellant, conceded that in the circumstances of this case such a sentence is fair and appropriate. There is accordingly no reason for this court to interfere with the sentence imposed by the magistrate. The result is that the appeal against sentence should be dismissed.

[15] In the result, it is ordered that:

15.1. The conviction and sentence for attempted murder are set aside.

15.2. The appeal against the sentence of four years’ imprisonment for the unlawful possession of a firearm is dismissed.

G H BLOEM

Judge of the High Court

Msizi AJ,

I agree

N MSIZI

Acting Judge of the High Court

For the appellant: Ms N M Mazibukwana of Legal Aid South Africa, Grahamstown.

For the state: Adv D Els of the office of the Deputy Director of Public Prosecutions, Grahamstown.

Date of hearing: 11 October 2017

Date of delivery of the judgment: 17 October 2017

- [1] Firearms Control Act, 2000 (Act No. 60 of 2000).
- [2] Criminal Procedure Act, 1977 (Act No. 51 of 1977).
- [3] S v van der Meyden 1999 (1) SACR 447 (W) at 448f-g.
- [4] S v van der Meyden at 449j-450a.
- [5] Section 3 (1) (a) as read with Schedule 4 of the Firearms Control Act, 2000 (Act No. 60 of 2000).
- [6] In 1995 the appellant was convicted of housebreaking with intent to steal and theft. The passing of sentence was postponed to 30 January 1999. In 2000 the appellant was again convicted of housebreaking with intent to steal and theft whereafter correctional supervision for three years was imposed coupled with community service. In 2001 he was convicted of indecent assault and sentenced to ten years' imprisonment. In 2008 he was convicted of using or having in his possession dangerous dependent producing substance and sentenced to six months' imprisonment.

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