

SOUTH AFRICA / JUDGMENT

Len v S (A03/2014) [2025]

ZAGPJHC 402 (23 April 2025)

[2025] ZAGPJHC 402

COURT

South Gauteng High Court, Johannesburg

BEFORE

MMP Mdalana-Mayisela, G Malindi

CASE / FILE NUMBER

A03/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

CASE

NO: A03/2014

(1)

REPORTABLE: NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED:

NO

In

the matter between:

JARROD

CRAIG

LEN

Appellant

And

THE

STATE

Respondent

JUDGMENT

Mdalana-Mayisela J

- [1] The appellant appeals against the conviction of contravention of section 120(6)(b) of the Firearms Control Act 60 of 2000 and assault common by the magistrate, Hillbrow Court on 2 June 2022. The appeal is pursuant to leave having been granted by the lower court on 16 November 2022. The appeal is opposed by the respondent.
- [2] The appellant was charged with contravening the provisions of section 120(6)(b) read with sections 1, 103, 120(1)(a) and section 121 read with Schedule 4 of the Firearms Control Act – pointing of anything which is likely to lead a person to believe it is a firearm; and assault with intent to do grievous bodily harm. He pleaded not guilty to both charges. He was convicted on count 1 as charged and on count 2 with assault common.
- [3] The sentence was imposed on 13 October 2022. On count 1 he was sentenced to 12 months imprisonment, which is wholly suspended for a period of five years, on condition that he is not convicted again of contravention of section 120 of the Firearms Control Act committed during the period of suspension. On count 2 he was sentenced to a fine of R3000 or nine months imprisonment, of which R2000 or six months imprisonment is suspended for a period of three years, on condition that he is not convicted again of assault committed during the period of suspension. He was legally represented throughout the proceedings in the lower court.
- [4] The allegations against the appellant were as follows. On count 1, the state alleged that on 22 May 2020 and at or near Melrose in the district of Johannesburg, the appellant did unlawfully point anything which is likely to lead a person to believe that it is a firearm, an antique firearm or an airgun at Louis Green without good reason to do so. On count 2, it was alleged that upon the same date and at the same place, the appellant unlawfully and intentionally assaulted the complainant by grabbing his right arm and twisting it backward with intent of causing him grievous bodily harm.
- [5] To prove its case against the appellant, the respondent led the evidence of three witnesses, namely, the complainant, Louis Green, medical doctor, Rodney L Feinberg and investigation officer, sergeant Madume Stanley Makabedo. The appellant testified in his defence and also led the evidence of his father, Basil Eric Len and his company CEO, Hatley Shapiro. I do not intend to summarize the evidence of the witnesses in this judgment. Their evidence was mechanically recorded, and it was also summarized in the magistrate's merits judgment. We have read the appeal record, including the judgments of the lower court. I will refer to the evidence that is relevant to the issues in dispute before us.
- [6] The grounds of appeal are as follows.

6.1] The lower court erred and misdirected itself in finding that there were no inherent improbabilities in the complainant's evidence and that he was a credible and reliable witness.

6.2] The lower court erred and misdirected itself in failing to consider that the complainant was, to a large extent a single witness and it failed to apply the cautionary rule to his evidence.

[6.3] The lower court erred and misdirected itself in finding corroboration for the complainant in the evidence of dr Feinberg and investigating officer,

[6.4] The lower court erred and misdirected itself in accepting the complainant's explanation for all the contradictions between his oral evidence and the statement that he gave to the police.

[6.5] The lower court erred and misdirected itself in finding that the appellant's witnesses were biased without any evidence to support such

conclusion.

[6.6] The lower court erred and misdirected itself in finding that the respondent proved the elements of the offence of contravention of section 120(6)(b) of the Firearms Control Act.

[6.8] The lower court erred in finding that the state has proved both charges against the appellant beyond reasonable doubt.

[7] First, I deal with the ground of appeal that the respondent failed to prove the elements of contravention of section 120(6)(b) of the Firearms Control Act. Section 120(6) provides as follows.

"120(6) It is an offence to point-

(a) Any firearm, an antique firearm or an air gun, whether or not it is located or capable of being discharged, at any other, without good reason to do so, or

(b) Anything which is likely to lead a person to believe that it is a firearm, an antique firearm or an airgun at any other person, without good reason to do so."

[8] It was argued on behalf of the appellant that the respondent charged the appellant with the contravention of section 120(6)(b) but tendered the evidence in relation to the contravention of section 120(6)(a). It failed to prove the elements of the offence of the contravention of section 120(6)(b), and the appellant should have been acquitted on count 1.

[9] The complainant testified that he saw the appellant sitting inside his Polo VW car pointing a firearm that looked like a black or charcoal Glock at the complainant's upper body. It was also mentioned in his statement that he gave to the police that the appellant pointed at him with a firearm although it was not described. The appellant contended that he carried a silver revolver with a black handle inside a moon bag which was tied around the chest area with a strap. He disputed that he pointed it at the upper body of the complainant.

- [10] The issue about the caliber of the firearm is immaterial because it is common cause that the appellant was in possession of a firearm at the scene of the alleged crimes. The material issue in dispute according to the charge sheet is whether he consciously pointed an object resembling a firearm at the complainant to instill the threat upon him while seated inside the car. No evidence was tendered by the respondent that the appellant pointed at the complainant anything which was likely to lead him to believe that it was a firearm, an antique firearm or an air gun, without a good reason to do so. The lower court accepted the evidence of the complainant that the appellant pointed a firearm at him without good cause to do so, and it convicted him of the contravention of section 120(6)(b) as charged and not section 120(6)(a).
- [11] The appellant's counsel relied on the case of *Nkosana Ndlovu v The State*[1] where Hughes J dealt with the difference between section 120(6)(a) and (b). In that case the appellant had conceded that he was present at the scene but denied possession of a firearm. The state witnesses had testified that he pointed a firearm. He was charged with contravening section 120(6)(b) instead of section 120(6)(a). Hughes J said the following:
- "(29) The difference between section 120(6)(a) and (b) is that section 120(6)(a) would be the conscious decision to point a firearm to instill the threat upon the person pointed at, whilst section 120(6)(b) will be the pointing of an object resembling a firearm instead."*
- [30] In my view, section 120(6) creates two offences though they are closely related. The one being the pointing of a firearm, section 120(6)(a) and the other being pointing of an object or other specified article that leads a person to believe it is a firearm, such as a toy gun, section 120(6)(b). The elements of the crimes are similar but for the difference I have just mentioned above. These are the (a) pointing of (b) a firearm or other specified article (c) at any person (d) unlawfully and (e) intentionally. See page 466 of Criminal Law Fifth Edition by CR Snyman."
- [12] Hughes J further said that one or the other is not a competent verdict of the other as they are two separate charges altogether. I agree with the views expressed by Hughes J. In the current matter, the state in the lower court was aware that the complainant stated that the appellant pointed at him with a firearm in his statement given to the police, before the charge sheet was formulated against the appellant. The state, when considering the evidence before it, should have charged the appellant with section 120(6)(a) and in the alternative with section 120(6)(b). It failed to do so. The appellant was wrongly charged.
- [13] The lower court failed to appreciate the difference between section 120(6)(a) and (b). It convicted and sentenced the appellant of an offence that was not proven by the state beyond reasonable doubt. In this regard, it committed a material misdirection. On this error alone, this court is entitled to set aside the conviction and sentence on count 1 and acquit the appellant.

- [14] I now deal with the remaining grounds of appeal. It is common cause that the appellant was in possession of a firearm at the scene. The complainant's version was that after he stopped his car in front of the appellant's car, he alighted and walked towards the appellant's car. When he was about 2 meters away from the appellant, he saw that the appellant was pointing a firearm towards his upper body. He raised his hands in the air, turned and walked back to his car. He got into his car. While he was sitting inside, the appellant came to his car, twisted the complainant's right hand and removed the keys from the ignition. The complainant got out of his car again and went to the appellant's car. He removed the key from the ignition. The key chain broke, and the key fell on the floor.
- [15] The appellant disputed that he pointed a firearm towards the upper body of the complainant. He testified that after the complainant cut off his car, he remained seated in his car. He unzipped the moon bag containing his firearm to be easily accessible. The complainant came to his car. He was swearing at him and banging on his car window with his hand. At this stage he noticed that Shapiro was in the area, and he was observing the scene. When he realized that the complainant was an old man and that it was not a criminal act, but a road rage incident, he zipped his moon bag. He did not take out his firearm from the moon bag. The complainant left and walked towards his car still swearing.
- [16] The appellant alighted from his car and approached the complainant before he reached his car. He asked him "what are you doing?" He observed that the complainant's balance was impaired, his speech was slurring, his eyes were bloodshot, and he was smelling of alcohol. He then went to the complainant's car and removed a key from the ignition. The complainant also went back to his car and removed a key from the ignition. The key chain broke, and the key fell on the floor. He told the complainant that they should wait for the arrival of the police. The complainant stopped swearing and asked him not to call the police. He told the complainant that they are both Jewish men and that there was no need to fight. They returned each other's keys. There was no physical contact between them. The complainant apologized and told him that he prays with his father at Norwood. They left the scene.
- [17] Shapiro testified that he started observing the scene when he was about 40 meters away. He corroborated the appellant's version that the complainant was banging on the window of the appellant's car. When the complainant left the appellant's car, the appellant went to the complainant's car and removed the key from the ignition. The complainant also went back to the appellant's car and removed the key from the ignition. He did not witness the alleged assault. He also did not see the appellant pointing a firearm at the complainant.
- [18] The complainant's version that he was pointed at with a firearm and assaulted by the appellant is improbable on the following basis. He testified that he raised his hands in the air, turned and walked back to his car because he was traumatized and feared for his life. I accept the appellant's version that the complainant was banging on his car window while he was seated inside because it is corroborated by Shapiro. In my view, the complainant would not swear at the appellant and bang the car window while the appellant was seated inside if he was pointed at with a firearm. He would not go back to the appellant's car and remove the

key from the ignition if he was assaulted, traumatized and feared for his life. He testified that after pointing of a firearm and assault the appellant asked him if he was a policeman. It is highly unlikely that the appellant would point a firearm and assault the person he suspected to be a policeman without good reason to do so.

- [19] The complainant testified that the appellant assaulted him by twisting his arm backward with the intention of causing him grievous bodily harm. He also gave new evidence about further assault during his cross examination saying “well, ja I mean bumping me, pushing me. You know, is that an assault, maybe technically an assault, but was I hurt by it, no I was not hurt by it.”
- [20] However, he did not inform his family about this incident when he arrived home. The incident happened on Friday. He consulted the medical doctor about this alleged injury seven days after the incident. The doctor noted the clinical findings, but he did not make a conclusion. He also testified that he was advised to undergo surgery for the alleged injury. Dr Feinberg did not recommend future medical treatment in the J88 report. The allegation of future surgery is not corroborated by the treating medical doctor. He also did not report the incident to the police within a reasonable time. He reported it four days after it occurred without a valid reason.
- [21] The aforesaid facts cast doubt on the veracity of the complainant’s evidence. It is uncertain whether the complainant sustained the alleged injury during the incident in question or it was pre-existing or it was sustained after the incident in question.
- [22] The lower court erred in finding corroboration of the complainant’s version on this material issue in dispute in Dr Feinberg’s evidence. Dr Feinberg was not at the scene when the injury was allegedly inflicted. He conceded that it could have been sustained on any day before consultation. Dr Feinberg had no personal knowledge of the identity of the perpetrator or how the injury was sustained. The investigating officer also could not corroborate the complainant’s version pertaining to assault and pointing of a firearm. He was not at the scene, and he did not witness the incident. There is no corroboration of the complainant’s evidence on the material issues in dispute.
- [23] The appellant denied that he assaulted the complainant at the scene. He is corroborated on this issue by Shapiro who was observing when the appellant removed the key from the ignition and who testified that he did not see the alleged assault.
- [24] The complainant was a single witness on the material issues in dispute. The lower court simply paid lip service on the applicable cautionary rule. The complainant’s evidence was not clear in some material respects. He was not a good witness as it appears from the following quotations. There were material inconsistencies in his oral evidence and between his oral evidence and statement made to the police. First, in his statement he stated that:

“.. he gave me his name he said he is JARROD LEN cell phone no: 0[...] and his car was written crystal clear pools and cell phone number.”

[25] In his cross examination he said:

“MR GREEN: No. He said – yes, he said to me he is Jarrad Len. He never gave me a number. I got the number off the side of his car. I got the name of his company, went home, looked on the internet for whatever the pool company is and got the phone number.

MR LENWOOD: So, the very same person that points you with a firearm, assaults you. This very same person says to you, well, my name is Jarrad Len. This is who I am.

MR GREEN: No.

MR LENWOOD: Well, you just said now he gave you his name.

MR GREEN: I gave him my name as well. I said I am Louis Green.

MR LENWOOD: I put it to you it is highly illogical that a man that points you with a firearm, is going to give you his name when his actions are illegal.

MR GREEN: Well, he had signage on his car, so he had no choice but to give me his name.

MR LENWOOD: But your statement says he gave you his name.

MR GREEN: Well, I got his name off the car. I got the name off the car and I googled the pool company to get the phone number.

MR LENWOOD: So, his name is not on his car.

MR GREEN: His company name is not on his car.

MR LENWOOD: His name.

MR GREEN: I never said his name is on the car. I said he gave me his name. I never said his company name – his name is on his company car. I got the company name and I googled the company name to get the phone number to give to police.

[26] Second, in his statement he said the following:

“I stopped at the red robot and the car behind me came straight through the red robot I hooted and he carried on and two robots after I pulled up behind the guy the robot turned green and he pulled off in front of me blocking me I swerved right and he pushed me off the road. I then got out of the car walked to his car and asked what he was doing.”

[27] In his oral testimony he denied that he was pushed off the road and stopped. He said during his examination in chief:

“I waited for the cars on the left to clear. I indicated, and then moved into the next lane and as I moved into the left lane, he swerved and cut me off.

I Managed to swerve back into the right lane and actually lost control of the car a little bit, but she ended up in front of his car, stopped stationary.

Yes, so he cut me off and I put my foot on the brake and turned right, and went to the right side and the back of the car came out and I stopped, and I was in front of his car when I stopped. I then got out of my car and approached his vehicle.”

[28] In his re-examination he said:

“MR GREEN: So, I was driving in the left lane, as I have testified. He came from the right lane and – so, I was passing him. I was on the left lane and he was in the right lane. I went on the left side of him to pass him. And he accelerated and pulled in front of me like this. And I swerved out into the right lane and then the back of the car moved and I stopped on the left-hand side of the left lane.

[29] There are two mutually destructive versions on what transpired at the scene. The complainant was a single witness for the state on what transpired at the scene. The contradiction between his previous statement and oral evidence on whether he was pushed off the road before he stopped is material in determining who was the aggressor. There is no objective evidence supporting his previous statement that he was pushed off the road when he swerved to the right lane. If his version in the previous statement that he was pushed off the road was to be accepted, there is no plausible explanation on how then his car landed in front of the appellant’s car in the left lane. If his inconsistent oral testimony that he was not pushed off the road but he was behind the appellant in the left lane and swerved to the right lane was to be accepted, there is also no plausible explanation offered by him on how the back of the car that was swerving to the right lane moved back to the left lane and cut off the appellant’s

moving car that was driving ahead of him when he was still in the left lane. His version in this regard is improbable. He was not a credible witness.

[30] The appellant testified that he was driving in the left lane at Athol Oaklands, nearest corner Kernick. He stopped at the red robot. When the robot turned green, he pulled off. He heard hooting. He then looked in the rearview mirror. He saw the man inside a car behind him waving his hand as well as holding his hooter with another hand. The vehicle behind him was driving extremely close to his vehicle in the left lane. It then swerved into the right lane trying to hit his vehicle. He immediately picked up the Medi Response black handheld radio and called the control room for help. The vehicle that was trying to hit his car then gruesomely cut off his car in his lane. He was trapped he could go nowhere. He had to stop his car.

[31] The appellant’s version that he was cut off in the left lane by the complainant’s car was corroborated by Shapiro, who testified that an Audi A1 had stopped 45 degrees in front of the appellant’s car. The lower court was wrong in rejecting the evidence of Shapiro without valid reason. The finding that Shapiro was biased was without substance. It was not disputed that Shapiro was present at the scene and that his observation commenced when he was about 40 meters away.

- [32] The sketch plan drawn by the complainant corroborated the appellant's version that the complainant cut off his car in the left lane. The complainant also conceded to this version in his oral testimony. The photo taken by the appellant on the scene also corroborated this version.
- [33] In considering the totality of the evidence on record, the complainant's evidence on what transpired at the scene is not clear in some material respects. It has material inconsistencies and inherent improbabilities. It was not corroborated objectively. His conduct at the scene showed that he was the aggressor. The state failed to discharge the onus placed on it. It did not prove the elements of both counts and competent verdict beyond reasonable doubt. Therefore, this court is entitled to interfere with the factual findings of the lower court.
- [34] The appellant's version on what transpired at the scene is clear in all material respects. It is corroborated objectively, probable and reasonably possibly true. The appellant had no duty to explain the motive for the complainant's actions at the scene. The lower court erred in rejecting it as being not reasonably possibly true. He is entitled to his acquittal on both counts.

ORDER

[35] In the premises, the following order is made:

1. The appeal against conviction on both counts is upheld.
2. The conviction and sentence on count 1 - contravention of the provisions of section 120(6)(b) and count 2 - assault common are set aside.
3. The appellant remains fit to possess a firearm.

MMP Mdalana-Mayisela

Judge of the High Court

Gauteng Division, Johannesburg

I agree

G Malindi

Judge of the High Court

Gauteng Division, Johannesburg

(Digitally submitted by uploading on Caselines and emailing to the parties)

Date of delivery: 23 April 2025

Appearances:

On behalf of the appellant: Adv LM Hodes SC

Instructed by:

Ulrich Roux & Associates Attorneys

On behalf of the State: Adv VH Mongwane

Instructed by:

National Prosecuting Authority

[1]A4751/2015 GD delivered on 24/03/2017

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