

SOUTH AFRICA / JUDGMENT

Puwane v S (A654/2011) [2012] ZAWCHC 76 (16 March 2012)

[2012] ZAWCHC 76

COURT

Western Cape High Court, Cape Town

BEFORE

Allie, Mantame

CASE / FILE NUMBER

A654/2011

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IN

THE HIGH COURT OF SOUTH AFRICA (WESTERN CAPE HIGH COURT, CAPE TOWN)

Case

No: A654/2011

In

the matter between:

SABELO

PUWANE

.....Appellant

Versus

THE

STATE

.....Respondent

JUDGMENT

DELIVERED ON 16 MARCH 2012 Allie, J [1] The appellant was charged in the Blue Downs Regional court on 29 September 2010 with one count of illegal possession of a firearm, namely a semi-automatic pistol and one count of illegal possession of 6 rounds of ammunition. He had legal representation and pleaded not guilty. [2] Appellant was convicted as charged and sentenced to 5 years direct imprisonment for the count of illegal possession of a fire arm and 18 months for illegal possession of ammunition, which sentence was ordered to run concurrently with the sentence imposed for count 1. [3] He now appeals against both his conviction and sentence. [4] Sergeant Webu, testified on behalf of the state. He received a call from an informant on 19 September 2009 at 6h26 am and acted upon the information he received. He found the appellant sitting in the driver's seat of a light blue Toyota Corolla in Jafta Street, Bloekombos. [5] He asked the driver to stand outside the vehicle while he searched it. Then he saw a plastic bag in the hand

of the driver and he searched it. At that point, he found a firearm in the waist of the driver. There were six cartridges in the firearm. He identified the appellant as the driver. [6] The second witness to testify on behalf of the state is Sergeant Vutula. He confirmed that he heard Webu ask the appellant for permission to search his car and he saw Webu search the car and thereafter search the appellant and find a firearm on the appellant. He said that there were serial numbers on the firearm that Sergeant Webu found on the accused after searching him and that those serial numbers confirmed that the firearm was stolen. Thereafter he said that he wrote in his statement that the firearm did not have a serial number on because that was what Webu said and Webu inspected the firearm. [7] The appellant's counsel argued that this discrepancy in the state's evidence is material. The court a quo found that it was not material. If Vutula did not inspect the firearm at the scene, as he said, then his evidence concerning the absence of serial numbers is in any event hearsay evidence for which no application in terms of Section 3(1) of the Law of Evidence

Amendment Act was brought and is accordingly inadmissible. Since the appellant did not challenge the illegality of his possession but instead chose to challenge the fact that he was in possession of the firearm and ammunition, the point about the serial numbers is not material. [8] Vutula said that when they arrived at the police station, he found out that the firearm was stolen. He claimed to have been observing the appellant throughout the time that he stood outside the blue Toyota vehicle while Webu searched it and when Webu searched the appellant and found the firearm on him. [9] The appellant's legal representative put it to both state witnesses that there was taxi violence in the area at the time and that Webu wanted the appellant to implicate a taxi owner, one Jezile with the illegal possession of the firearm but both witnesses denied the allegation. [10] The appellant testified as follows. He was driving on his way to court when his path was blocked by a police vehicle. A second police vehicle parked behind his vehicle and the police officer, Webu, asked him to climb out of his vehicle. [11] Three police officers searched the vehicle and one stood next to him. A police officer produced a firearm and put it on the front seat of his car and said this is the firearm they found in his car. During cross examination, he could not say where the firearm came from but he alleged that the police put it in the front of his vehicle. This aspect was not canvassed with the state witnesses during cross examination.

JUDGMENT

DELIVERED ON 16 MARCH 2012

Allie, J

- [1] The appellant was charged in the Blue Downs Regional court on 29 September 2010 with one count of illegal possession of a firearm, namely a semi-automatic pistol and one count of illegal possession of 6 rounds of ammunition. He had legal representation and pleaded not guilty.

- [2] Appellant was convicted as charged and sentenced to 5 years direct imprisonment for the count of illegal possession of a fire arm and 18 months for illegal possession of ammunition, which sentence was ordered to run concurrently with the sentence imposed for count 1.
- [3] He now appeals against both his conviction and sentence.
- [4] Sergeant Webu, testified on behalf of the state. He received a call from an informant on 19 September 2009 at 6h26 am and acted upon the information he received. He found the appellant sitting in the driver's seat of a light blue Toyota Corolla in Jafta Street, Bloekombos.
- [5] He asked the driver to stand outside the vehicle while he searched it. Then he saw a plastic bag in the hand of the driver and he searched it. At that point, he found a firearm in the waist of the driver. There were six cartridges in the firearm. He identified the appellant as the driver.
- [6] The second witness to testify on behalf of the state is Sergeant Vutula. He confirmed that he heard Webu ask the appellant for permission to search his car and he saw Webu search the car and thereafter search the appellant and find a firearm on the appellant. He said that there were serial numbers on the firearm that Sergeant Webu found on the accused after searching him and that those serial numbers confirmed that the firearm was stolen. Thereafter he said that he wrote in his statement that the firearm did not have a serial number on because that was what Webu said and Webu inspected the firearm.
- [7] The appellant's counsel argued that this discrepancy in the state's evidence is material. The court a quo found that it was not material. If Vutula did not inspect the firearm at the scene, as he said, then his evidence concerning the absence of serial numbers is in any event hearsay evidence for which no application in terms of Section 3(1) of the Law of Evidence Amendment Act was brought and is accordingly inadmissible. Since the appellant did not challenge the illegality of his possession but instead chose to challenge the fact that he was in possession of the firearm and ammunition, the point about the serial numbers is not material.
- [8] Vutula said that when they arrived at the police station, he found out that the firearm was stolen. He claimed to have been observing the appellant throughout the time that he stood outside the blue Toyota vehicle while Webu searched it and when Webu searched the appellant and found the firearm on him.
- [9] The appellant's legal representative put it to both state witnesses that there was taxi violence in the area at the time and that Webu wanted the appellant to implicate a taxi owner, one Jezile with the illegal possession of the firearm but both witnesses denied the allegation.
- [10] The appellant testified as follows. He was driving on his way to court when his path was blocked by a police vehicle. A second police vehicle parked behind his vehicle and the police officer, Webu, asked him to climb out of his vehicle.

- [11] Three police officers searched the vehicle and one stood next to him. A police officer produced a firearm and put it on the front seat of his car and said this is the firearm they found in his car. During cross examination, he could not say where the firearm came from but he alleged that the police put it in the front of his vehicle. This aspect was not canvassed with the state witnesses during cross examination.
- [12] At the police station, after he was arrested in the morning, he saw three taxi owners with the investigating officer. The taxi owners told him to say he received the firearm from Jezile. He believes the police wanted him to implicate Jezile so that they could arrest him. This evidence does not make sense because if the firearm was planted on him by the police, then the alleged corrupt police officers would tell him to say it belonged to Jezile in the morning when he was arrested and not many hours later after he was already arrested for possession of the firearm and ammunition or they would plant the weapon on Jezile himself rather than contrive a charge against the appellant. [13] During cross examination, the witness said for the first time, that the police searched his vehicle without asking him if he consented to the search. The allegation that Webu obtained the appellant's permission to search the vehicle was never challenged during cross examination of the state's witnesses. [14] The accused claimed that he did not know that he could intervene and speak to his attorney while the state witnesses were being cross examined but the record reflects that his attorney did approach him while cross examining the state witnesses. [15] He said that the firearm was too big for him to conceal in his waist but this was never put to the state witnesses. [16] The ballistics report was handed in by the state after the defence agreed with its content. This report was not challenged by the defence. The deponent to the Section 212(4) affidavit stated that he found a serial number on the firearm. The section provides that the affidavit is prima facie proof of the facts alleged therein, [see *S v Veldthuisen* 1982 (3) SA 413 (A) at 416 G - H and *S v Greeff* 1995 (2) SACR 687 (A) at 689j - 690a.] Since this evidence was not challenged by the defence it became conclusive proof. Mr Webu is not a firearms expert and could easily have been mistaken in his observation of no serial number on the firearm at the time when he found it on the appellant. That discrepancy is clearly not material in the light of the appellant's defence and his failure to challenge the ballistics report. [17] The magistrate rejected the evidence of the appellant as being so improbable that it could not be believed. I in fact find that the evidence of the appellant is not reasonably possibly true and does not accord with common sense. [18] I would accordingly uphold the conviction. [19] Turning to the sentence, the accused was 38 years old with previous convictions for the same offences. He earned an income of approximately R3 000 per month and was the sole breadwinner. He has 3 minor children to support.
- [12] At the police station, after he was arrested in the morning, he saw three taxi owners with the investigating officer. The taxi owners told him to say he received the firearm from Jezile. He believes the police wanted him to implicate Jezile so that they could arrest him. This evidence does not make sense because if the firearm was planted on him by the police, then the alleged corrupt police officers would tell him to say it belonged to Jezile in the morning when he was arrested and not many hours later after he was already arrested for possession

of the firearm and ammunition or they would plant the weapon on Jezile himself rather than contrive a charge against the appellant.

- [13] During cross examination, the witness said for the first time, that the police searched his vehicle without asking him if he consented to the search. The allegation that Webu obtained the appellant's permission to search the vehicle was never challenged during cross examination of the state's witnesses.
- [14] The accused claimed that he did not know that he could intervene and speak to his attorney while the state witnesses were being cross examined but the record reflects that his attorney did approach him while cross examining the state witnesses.
- [15] He said that the firearm was too big for him to conceal in his waist but this was never put to the state witnesses.
- [16] The ballistics report was handed in by the state after the defence agreed with its content. This report was not challenged by the defence. The deponent to the Section 212(4) affidavit stated that he found a serial number on the firearm. The section provides that the affidavit is prima facie proof of the facts alleged therein, [see *S v Veldthuizen* 1982 (3) SA 413 (A) at 416 G - H and *S v Greeff* 1995 (2) SACR 687 (A) at 689j - 690a.] Since this evidence was not challenged by the defence it became conclusive proof. Mr Webu is a not a firearms expert and could easily have been mistaken in his observation of no serial number on the firearm at the time when he found it on the appellant. That discrepancy is clearly not material in the light of the appellant's defence and his failure to challenge the ballistics report.
- [17] The magistrate rejected the evidence of the appellant as being so improbable that it could not be believed. I in fact find that the evidence of the appellant is not reasonably possibly true and does not accord with common sense.
- [18] I would accordingly uphold the conviction.
- [19] Turning to the sentence, the accused was 38 years old with previous convictions for the same offences. He earned an income of approximately R3 000 per month and was the sole breadwinner. He has 3 minor children to support.
- [20] The court did not apply the minimum sentence as it was not mentioned in the charge sheet nor was it pointed out in court at the commencement of the trial. [21] The court a quo found that the fact that the accused had previous convictions and he was found in possession of a semi-automatic firearm, as set out in the ballistics report, were aggravating factors. The court a quo took account of the fact that the appellant was in prison for two years, awaiting trial. [22] I can find no basis for interfering with the sentence imposed because in the light of the circumstances present in this case, the sentence is not startlingly inappropriate nor disproportionate to the seriousness of the offences in question. [23] I would confirm the sentence. IT IS ORDERED THAT: The appeal is dismissed. ALLIE, J I agree MANTAME, AJ

- [20] The court did not apply the minimum sentence as it was not mentioned in the charge sheet nor was it pointed out in court at the commencement of the trial.
- [21] The court a quo found that the fact that the accused had previous convictions and he was found in possession of a semi-automatic firearm, as set out in the ballistics report, were aggravating factors. The court a quo took account of the fact that the appellant was in prison for two years, awaiting trial.
- [22] I can find no basis for interfering with the sentence imposed because in the light of the circumstances present in this case, the sentence is not startlingly inappropriate nor disproportionate to the seriousness of the offences in question.
- [23] I would confirm the sentence.

IT IS ORDERED THAT:

The appeal is dismissed.

ALLIE, J

I agree

MANTAME, AJ

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