

SOUTH AFRICA / JUDGMENT

## **S v Rasena (CA&R247/2016) [2016] ZAECHGC 78; 2017 (1) SACR 565 (ECG) (13 September 2016)**

[2016] ZAECHGC 78

COURT

Eastern Cape High Court, Grahamstown

BEFORE

S M Mbenenge, J D Pickering

CASE / FILE NUMBER

CA&R247/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CA&R

247/2016

Date

Delivered: 13 September 2016

In

the matter between:

THE  
STATE  
and  
FUNDILE  
MABHUTI RASENA  
Accused  
REVIEW

## JUDGMENT

MBENENGE J:

- [1] The accused appeared before the Magistrate, East London facing two charges namely, contravening a protection order that had been issued by the Magistrate, Mdantsane on 14 October 2015,[1] in contravention of section 17(a) of the Domestic Violence Act 116 of 1998[2] and assault.
- [2] A plea of guilty was tendered to both charges by the accused through his legal representative, who thereupon handed up a statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977[3] in respect of count 1, and applied that the proceedings in so far as they relate to count 2 be dealt with in accordance with section 112(1)(a) of the CPA.[4]
- [3] After the prosecutor had accepted the plea in respect of both counts and the magistrate had satisfied himself that the accused admitted the elements of both offences, the accused was found guilty as charged, and thereupon sentenced, on count 1, to undergo six months' imprisonment, half of which was suspended for three years on condition that the accused is not convicted of contravening section 17(a) of the Domestic Violence Act committed during the period of suspension and, on count 2, thirty days' imprisonment, the whole of which was conditionally suspended for three years.
- [4] The record reveals that during the addresses preceding the imposition of the sentences the magistrate inter alia entertained submissions from the prosecutor and the accused's legal representative regarding the fitness or otherwise of the accused to possess a firearm.
- [5] In pursuit of his application that the accused be declared unfit to possess a firearm the prosecutor submitted that the accused "hit and then he stabbed ...all because he was angry" and that, therefore, he is not worthy of being "trusted (sic) with a licence for a gun (sic)"
- [6] The following excerpt, which captures the essence of the interaction between the magistrate and the accused's legal representative,

is quite revealing:

*"Mr Hlungulu : With all due respect in this matter, the accused person has been in custody for six months, it is not that at all times he blatantly, but rather, Your Worship, we were trying to mediate the matter.*

Court: Yes, I see that.

Mr Hlungulu: Therefore, Your Worship, we ask that a suitable sentence should be one of a suspended sentence, Your Worship, considering that at least he has been in custody for a period of almost seven months now, I know it is not seven months, per se, but almost.

Court : Is the accused employed, does he have any form of income?

Mr Hlungulu: No, Your Worship

Court : Is it 103(1) that is applicable? Assault. Domestic relationship, violence involving physical or sexual abuse, occurring in a domestic relationship, so this would be 103 (1), presumable, because it is arising – it is common cause that the...(intervention)

Prosecutor: Girlfriend.

Court : So it is a domestic relationship, so 103(1), he would be unfit unless the Court determines otherwise. And there is no indication of the severity of the wounds suffered by the complainant, it makes it a little bit difficult for me. He stabbed her with a knife, I don't know whether there were serious injuries sustained or not, I mean stabbing with a knife is always serious but more so medical treatment is required, the extent of that medical treatment is unknown to the Court, it is difficult for me to do justice to the matter. Is there not J88?

Prosecutor: there is J88.

Court : Mr Hlungulu, would it not be appropriate for the Court to have sight of that?

Mr Hlungulu: Yes, Your Worship, I have just had sight of it.

Court: Handed in by consent?

Mr Hlungulu : Yes, I agree, Your Worship.

Court: All right, the J88 will be marked Exhibit B .

J88 Handed in marked Exhibit B

Court: The complainant had a laceration wound, left wrist, left side of head. Patient gives history, she was assaulted, laceration on wrist and at the back of head. It doesn't indicate whether there were sutures, left wrist, stab wound. It looks like a defensive wound." (the emphasis is mine)

[7] In addition to sentencing the accused as pointed out above, the magistrate stated:

*"No order is made in terms of section 103(1) of Act 60 of 2000, which means that you are automatically declared unfit to possess a firearm."*

That is all the magistrate said when he imposed sentence regarding the unfitness of the accused to possess a firearm.

[8] The matter is now serving before me on review at the instance of the magistrate and whose reasoning is as follows:

*“The judgment in respect of count 2 was however incompetent as section 112(1)(a) may only be utilised when there is an option of a fine imposed as well. I would have imposed a sentence of R300 or 30 days if I had properly considered the provisions of section 112(1)(a). My reasoning on sentence was that the assault committed in count two was committed at the same time and place as the contravention of the protection order in count one and the assault was committed by pushing the complainant. I regarded it relatively minor offence, not deserving of direct imprisonment.*

I would submit with respect that the judgment in respect of count two should either be confirmed, but the sentence substituted with one of R300 or 30 days imprisonment, or that the judgment and sentence in respect of count 2 should be set aside and the matter referred back to this court.

Another issue pointed out to me by senior magistrate Stander is that a section 103(2) enquiry in terms of Act 60 of 2000 should have been conducted in respect of count 2. In respect of count 1 no order was made in terms of section 103(1) of Act 60 of 2000 with the effect that the accused was automatically deemed unfit to possess firearm in respect of that charge. Senior Magistrate Stander is of the view that an enquiry should be held in respect of each conviction. It is submitted with respect that argument was heard and a decision made by the court, taking into account that both counts involved the use of violence –count one being quite serious violence. The court should have made an additional order in respect of count two. It is submitted therefor with respect that either an order be made in terms of section 103(2) in respect of count two or that the matter be referred back to this court in order to hold an enquiry in respect of count 2.”

[9] The issues confronting this court discernible from the magistrate’s reasoning are principally -

- (a) the appropriate remedy in an instance where section 112(1) (a) of the CPA has been invoked incorrectly; and
- (b) depending on the answer to (a) above, whether a separate enquiry in terms of section 103(2) of the Firearms Control Act 60 of 2000[5] should have been conducted in respect of count 2.

[10] It is indeed clear from a proper reading of section 112(1)(a) of the CPA that one of the jurisdictional factors for an appropriate invocation of section 112(1)(a) of the CPA is that the offence should not merit punishment of imprisonment or any other form of detention “without the option of a fine.” In terms of section 112(1)(b) of the CPA it is incumbent on a magistrate who is of the opinion that the offence merits punishment of imprisonment without the option of a fine to question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty.

- [11] In the instant matter section 112(1)(a) was invoked despite the fact that the resultant sentence imposed was one of imprisonment albeit wholly suspended without the option of a fine. The concession made by the magistrate that he did not properly consider the provisions of section 112(1)(a) and that, therefore, the judgment in respect of count 2 was incompetent is correct.
- [12] It therefore follows that the conviction on count 2 did not accord well with justice as it flies in the face of section 112(1)(a). The proper course to follow is to remit the matter back to the magistrate for him to conduct a proper enquiry in terms of section 112(1)(a) or 112(1)(b) and to impose a competent sentence.
- [13] That brings me to the second issue which concerns section 103(2) of the Firearms Control Act. In the first place the record does not support the magistrate's contention that "argument was heard and a decision made by the court, taking into account that both counts involved the use of violence- count one being quite serious violence." On the contrary, the record makes it abundantly clear that the debate during oral submissions on behalf of the State and the accused related to the accused's fitness or otherwise to possess a firearm following his conviction on count 1, and not otherwise.
- [14] In my view, nothing, from a reading of section 103 of the Firearms Control Act, precludes a court from holding one enquiry in relation to two separate offences in respect of which the section applies in an instance where the offences were committed at the same time and place. The fact that the separate offences relate to two different complainants should not alter the position. It might, in the final analysis, be that there will be a declaration in relation to each offence or there might be a declaration in the one and not the other.
- [15] Amongst the important issues that should be considered when an enquiry into the fitness or otherwise of an accused person to possess a firearm is the nature and seriousness of the crime of which he has been found guilty and the connection that the crime has with the use of the firearm and whether it is in the interest of the community that the accused be declared unfit to possess a firearm because of the fact that he poses a potential danger to the community.[6] In *S v Mkhonza*[7] Wallis J (as he then was) added to the list that consideration should be given to the period during which the accused has possessed a licenced firearm and whether there is any indication of previous irresponsibility in regard to that possession and use. The learned

Judge went on to say:

*"[23] Accordingly, whilst the formal enquiry mandated by section 103(2) is not a requirement in relation to a statutory disqualification under section 103(1), where the trial court convicts the accused of an offence falling under section 103(1) it is nonetheless seized with the question whether it ought to determine otherwise, that is, whether it ought to depart from the statutory disqualification and permit the accused to possess a firearm. That determination should not take place in a vacuum ... The consideration of this issue and the court's reasons for its conclusions should be as much a part of the record of proceedings as the decision on questions of guilt or sentence. Whilst some cases will be obvious*

*the more remote the offence from any use or misuse of firearms the more comprehensive should be the trial court's consideration of the question whether it should determine otherwise."*

- [16] The enquiry conducted by the magistrate, even in so far as it related to count 1, was lacking as some of the important issues that should be considered were not taken into account. The record in so far as it shows the interaction with the parties on this subject and lack of motivation for the conclusion the magistrate reached regarding the accused's unfitness to possess a firearm make it demonstrably clear that the enquiry was embarked on in a perfunctory fashion. The following remarks by Wallis J in *S v Mkhonza*[8] are apposite:

*"[22] In other words there is an obligation on the trial court to consider properly, having regard to all relevant factors, whether the case is one where the statutory disqualification from possessing the firearm should remain in place or whether it should determine otherwise. In approaching that task the court should have regard to any factor*

that bears on the issue and if there is reason to believe that all material facts bearing on that decision are not before it to cause those facts to be discovered and placed before it".

- [17] It seems to me that the section does not call for the holding of two separate enquiries, but a consideration of all the relevant factors taking into account the nature and seriousness of each crime of which the accused has been found guilty and the connection those crimes have with the use of a firearm.
- [18] The referral of this matter back to the magistrate to consider the conviction and an appropriate sentence in respect of count 2 will afford the magistrate the opportunity to hold a fresh enquiry into the fitness or otherwise of the accused to possess a firearm. The order of the magistrate which has had the effect of declaring the accused unfit to possess a firearm is therefore liable to be set aside.
- [19] In the circumstances, I grant the following order:
- (a) The conviction and sentence on count 1 are confirmed.
  - (b) The conviction and sentence on count 2 are set aside.
  - (c) The matter is remitted to the Magistrate, East London for him to –
    - (i) invoke the provisions of section 112(1) of the Criminal Procedure Act 51 of 1977 in respect of count 2; and
    - (ii) conduct a proper enquiry into the fitness or otherwise of the accused to possess a firearm in accordance with the provisions of section 103 of the Firearms Control Act 60 of 2000.

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S M MBENENGE

JUDGE OF THE HIGH COURT

I agree

J D PICKERING

- [1] The order that the accused had contravened prohibited him from- (a) assaulting, insulting, harassing, stalking and emotionally abusing Sanele Mbanjana (the complainant); (b) entering the complainant's residence, no 200436 Cuba Location,

Newlands; and (c) entering the complainant's school.

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Newlands; and

(c) entering the complainant's school.

- [2] The allegation on count 2 being that he assaulted a certain Thenjiwe Kilani by pushing her.

- [3] Hereinafter conveniently referred to as "the CPA"

- [4] The section reads: (1) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea- (a) the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and- (i) impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette; or (ii) deal with the accused otherwise in accordance with law;..."

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(i) impose any competent sentence, other than imprisonment or any other form to detention without the option of a fine or a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette; or

(ii) deal with the accused otherwise in accordance with law;...”

[5] The Firearms Control Act

[7] 2010 (1) SACR 602 (KZP), para [22]

[8] Supra

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