
SOUTH AFRICA / JUDGMENT

Thamae and Another v S (A264/2018) [2019] ZAFSHC 64 (21 May 2019)

[2019] ZAFSHC 64

COURT

Free State High Court, Bloemfontein

BEFORE

Naidoo, Molitsoane

CASE / FILE NUMBER

A264/2018

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case No: A264/2018

In the matter between:

TSEPE ERNEST THAMAE

1st APPELLANT

TSELISO SIMON MOLOI

2nd APPELLANT

and

THE STATE

RESPONDENT

CORAM:

NAIDOO, J et MOLITSOANE J

JUDGMENT BY: NAIDOO J

HEARD ON:

11 MARCH 2019

DELIVERED ON: 21 MAY 2019

INTRODUCTION

[1] The appellants, together with three others were convicted of contravening section 3, read with other relevant provisions of the Firearms Control Act 60 of 2000 (the Act) and read with the relevant provisions of the Criminal

Procedure Act 51 of 1977 (the CPA) and the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentences Act). They were charged with one count of Unlawful Possession of Firearms (count 1) and one count of Unlawful Possession of Ammunition (count 2) in the Regional Court, Botshabelo. The firearms concerned were one 9mm Beretta semi- automatic pistol with serial number D21939 with magazine, one 9mm Parabellum semi-automatic pistol with serial number 1c-0436 with magazine and one 9mm Parabellum Vector semi-automatic pistol with serial number BBK 715 with magazine. The ammunition referred to in count 2 were 8 x 9mm short calibre cartridges, 13 x 9mm Parabellum cartridges and 8 x 9mm Parabellum cartridges. They pleaded not guilty to the charges, but on 10 December 2014, were convicted on both counts and sentenced on 17 December 2014 to Fifteen (15) years' imprisonment on count 1 and Three

(3) years' imprisonment in respect of count 2. The sentence in count 2 was ordered to run concurrently with that in count

1. The appellants were declared unfit to possess a firearm in terms of section 103(1) of Act 60 of 2000. The appellants are before us, having been granted leave to appeal against their convictions and sentences by the court a quo. Mr P Peyper represented the appellants in this court and Mr Lencoe represented the state.

[2] I pause to mention that the appellants before this court were accused 3 and 5 in the court a quo. Accused 1, Teboho Edward Teleko, had earlier appealed against his conviction and sentence, which appeal was upheld on 11 September 2017 by my colleagues Jordaan ADJP (as he then was) and Lekale J. Accused 2 (Ntsane Daniel Ntsane) and accused 4 (Thakholi Victor Semuli), have not lodged appeals against conviction and sentence.

BACKGROUND

[3] The version of the state in this matter is that the police were on routine patrol duty in the Botshabelo area when they received information about a double cab Ford Ranger vehicle coming from Lesotho, with six occupants. They spotted the vehicle and followed it to a certain spot and stopped the vehicle. They noticed six male occupants in the vehicle and asked

them to alight. They made them lie down on the ground but one of the occupants fled the scene and was not caught. The three police

officials searched the men and found wallets and cellular telephones in their possession. The vehicle was then searched in the presence of the driver. One firearm was found at the top of the passenger seat behind the driver, a second firearm was found in a pouch behind the front passenger seat and the third firearm was found under the front passenger seat. The relevant

authorities were called to undertake the necessary procedural steps at the scene and the suspects were placed under arrest. The explanation by the driver of the vehicle, in relation to ownership of the firearms, was that the firearms belonged to his friends.

[4] The version of the accused in the trial court, narrated largely by accused 1, was that they had come from Lesotho on the morning of 5 April 2014 to attend a traditional feast at the home of accused 4. They were there the whole day and in the early evening decided to go to a tavern to watch a soccer game on television. After a while the tavern became too full

and noisy so they decided to go to another place. On their way there, they were stopped by the police and all asked to alight from the vehicle and made to lie down. The police turned the vehicle they had travelled in to face the police vehicle. The vehicle was then searched and three firearms were found in the vehicle. Accused 1 was the driver of the vehicle and denied any knowledge of the firearms. He confirmed that the firearms were recovered in his presence and said that the firearms were not shown to any of the other accused at any stage. They were then placed under arrest. This version was confirmed by the rest of the accused, including the two appellants before us.

[5] The court a quo ably and extensively set out the applicable law and undertook a comprehensive analysis of the evidence before it. The conclusions

reached by the trial court were:

5.1 The version of the accused that they were not in possession of any firearms or that they were unaware of the presence of the firearms is not reasonably possibly true;

5.2 Based on the evidence it is clear that accused 1 had the necessary animus to possess the firearms with his co-accused and that they had the intention to possess the firearms on his behalf.

5.3 The positions of the firearms in the vehicle exclude every other reasonable inference, except that the accused, as occupants of the vehicle, were joint possessors of the firearms.

5.4 The state proved that all the accused were detentors of the firearms and, therefore, the only reasonable inference that the court can draw, to the exclusion of all other inferences, is that the accused as a group had the animus to possess the firearms.

5.5 The evidence points to a pooling of the firearms by the accused and therefore excludes the reasonable possibility that any of the accused intended to retain control of the individual firearms without yielding to the other members of the group the right to possess them and to use them.

[6] In this matter the appellants assail the judgment of the trial court on a number of grounds the most important of these being that the court erred:

6.1 in finding that the state proved its case beyond reasonable doubt;

6.2 in finding that the version of the appellants that they were not aware of the firearms in the vehicle, was not reasonably possibly true;

6.3 in finding that there was sufficient evidence to support the findings that the position of the firearms indicate that all the occupants of the vehicle must have been aware of the presence of the firearms, that they were detentors and joint possessors of the firearms and had a common intent or animus to possess the firearms on behalf of the group.

6.4 in finding that the evidence excluded the reasonable possibility that any of the accused intended to retain possession of the individual firearms without yielding to the other members of the group the right to possess or use them.

[7] It is trite that the state bears the onus to prove the guilt of an accused beyond reasonable doubt and that the accused person bears no onus to prove his innocence. It is equally trite that an appeal court will not lightly interfere with the findings of the trial court and will only do so if there is a misdirection on the part of the trial court in the application of the law or the facts. In my view, the only issue in this matter is whether the state proved beyond reasonable doubt that the appellants were joint possessors of the firearms that were recovered in the vehicle in which they were travelling. The trial court made several inferences, as I have indicated above, which it declared to be the only reasonable inferences that could be drawn from the evidence presented to it. In this regard it is useful to remind ourselves of the dictum in the celebrated case of *R v Blom* 1939 AD 188, where the court held at p202/3 that

“In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

- (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.”

[8] The requirements in order to prove joint possession were set out in *S v Nkosi* 1998(1) SACR 284 (W), where the court held that the conclusion of joint possession is justifiable only if the evidence excludes all other inferences except the one to be drawn, namely:

- (a) the group had the intention (animus) to exercise possession of

the guns through the actual detentor and

- (b) the actual detentors had the intention to hold the guns on

behalf of the group.

Nkosi was considered by the Supreme Court of Appeal in *S v Mbuli* 2003(1) SACR 97 (SCA), where it was approved and applied. In *S v Ramoba* 2017(2) SACR 353 (SCA), Nkosi was applied and Mbuli was followed.

[9] In the present matter, the state led no evidence to show who had placed the firearms in the vehicle, or that the occupants, including the appellants were aware of the presence of the firearms. The trial court held that from the position in which the firearms were found, the occupants of the vehicle must have been aware of the firearms in the vehicle. However, a careful examination of the evidence shows that this is not necessarily so. There is no evidence to suggest that the firearm at the top of the back seat was clearly visible or whether it was covered with something thus obscuring it from view. The firearms found in the pouch at the back of the passenger seat and the one found under the front passenger seat were clearly not visible to the occupants in the car. It is also undisputed that the vehicle passed through the border of Lesotho into South Africa without incident. It is fair to assume that the firearms may not have been in the vehicle at the time. The undisputed version of the appellants is that they were in and out of the vehicle several times during the day in question. When they left the home of accused 4 to watch the soccer match, it was early evening and the occupants included a person they did not know. This is the person that fled the scene when the vehicle

was stopped by the police.

[10] There is no evidence to the effect that when the appellants and their co-accused were at the home of accused 4 or in the tavern watching the soccer match, no one had access to the vehicle. It is therefore possible that someone could have placed

the firearms in the vehicle at that stage. The actual detentor of the firearms is therefore unknown. If the appellants had no knowledge of the presence of the firearms in the vehicle, then they could not have had the intention to possess the firearms through the unknown detentor. For the reason that the detentor is unknown, it cannot be said that he/she intended to hold the firearms on behalf of the group. There is similarly no evidence that the occupants of the vehicle were the detentors of the firearms. Even if there was evidence that one or more of the occupants were aware of the firearms in the vehicle, such knowledge is not sufficient to justify a finding of joint possession.

[11] In my view, the evidence presented by the state is insufficient to prove joint possession of the firearms by the appellants and other occupants of the vehicle, in terms of the requirements set out in *Nkosi*, *Mbule* and *Ramoba* supra. That being so, the trial court misdirected itself in drawing the inferences I have alluded to above, as the rules for inferential

reasoning in *Blom* supra have not been correctly applied in this matter. The inferences are not consistent with the proved facts, which do not exclude all other reasonable inferences being drawn from such proved facts. The correctness of the inferences drawn by the trial court, are in my view doubtful. In the circumstances the interference of this court is warranted in this matter.

The convictions in respect of count 1 therefore fall to be set aside. The ammunition referred to in count 2 was found inside the firearms mentioned in count 1, so that the convictions in respect of count 2 also fall to be set aside.

[12] I pause to mention that the state supported the contentions of the defence with regard to the state's failure to prove its case in respect of joint possession of the firearms, and did not support the convictions. Mr Lencoe, in fulfilling his ethical duty as an officer of the court, pointed out that accused 2 and 4 have not appealed their convictions and sentences in this matter, and he surmises that the lack of funds could well be the reason. He asserted that the same considerations as apply to the appellants in this matter also apply to accused 2 and 4. Furthermore, the conviction and sentence in respect of accused 1

were previously set aside. He implored the court to exercise its inherent jurisdiction and in the interests of justice and equity, to also set aside the convictions and sentences in respect of accused 2 and 4. I am in agreement with his proposal, as it is clear that exactly the same reasons that call for the convictions of the appellants in this matter to be set aside apply equally to accused 2 and 4. This court has the inherent jurisdiction to review judgments of a lower court and, in my view, this is a fitting case for this power of the court to be invoked. The interests of justice also dictate that accused 2 and 4 should be favoured with the same findings as are made in respect of the appellants herein.

[13] One other matter that requires mention is the application for condonation filed by the appellants for the late filing of their Heads of Argument in this matter. The state did not oppose the application on the basis that it was the state's

opinion that the appeal enjoyed good prospects of success. In any event, I am satisfied with the reasons advanced for the late filing of the Heads, and am of the view that condonation should be granted. With regard to sentence, it is not necessary for me to deal with that aspect. If the convictions are to be set aside, then the sentences will fall away.

[14] In the circumstances, the following order is made:

14.1 The late filing of the appellants' Heads of Argument is hereby condoned;

14.2 The appeal against the convictions and sentences in respect of counts 1 and 2 is upheld

14.3 The convictions and sentences in respect of both appellants on counts 1 and 2 are, accordingly, set aside;

14.4 The convictions and sentences in respect of accused 2 (Ntsane Daniel Ntsane) and accused 4 (Thakholi Victor Semuli), who appeared as such in the trial court, but who are not before this court, are set aside;

14.5 The Registrar of this court is directed to forthwith bring this judgment to the attention of

14.5.1 the Head of the Correctional Facility at which Ntsane Daniel

Ntsane (Ntsane) and Thakholi Victor Semuli (Semuli) are

being held, and

14.5.2 Ntsane and Semuli;

14.6 The Registrar of this court is also directed to take all the steps necessary to ensure the release from custody of the persons mentioned in paragraph 14.5.2 of this order.

S. NAIDOO, J

I agree

P MOLITSOANE J

On behalf of Appellant: Mr P Peyper

Instructed by:

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On behalf of Respondent: Adv. Lencoe

Instructed by:

The State

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