

SOUTH AFRICA / JUDGMENT

Ward v S (A273/2016) [2021] ZAGPPHC 472 (27 July 2021)

[2021] ZAGPPHC 472

COURT

North Gauteng High Court, Pretoria

BEFORE

Strydom, Mthimunye

CASE / FILE NUMBER

A273/2016

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

REPORTABLE: YES

/ NO

(2)

OF INTEREST TO OTHER

JUDGES: YES/NO

(3)

REVISED.

27

July 2021

CASE NO: A273/2016

In the matter between:

CHARLES WARD

Appellant

And

THE STATE

Respondent

JUDGMENT**STRYDOM J:****Introduction**

- [1] The appellant was convicted in the Regional Court held at Heidelberg on charges of a contravention of section 5(b) of the Drugs and Drugs Trafficking Act 140 of 1992 (“the Act”), i.e., dealing in cannabis (count 1); a contravention of section 3 of Firearms Control Act 60 of 2000, i.e., the possession of an unlicensed firearm (count
- 2) and also on a count of contravening section 90 of Act 60 of 2000 (“the Firearms Control Act”), i.e. the unlawful possession of ammunition (count 3).
- [2] The appellant was sentenced on count 1 to 10 years imprisonment of which two years imprisonment was suspended for a period of five years under certain conditions and as far as counts 2 and 3 were concerned, these counts were taken together for sentencing purposes and the appellant was sentenced to 12 months imprisonment which was wholly suspended for a period of five years on certain conditions.
- [3] Leave to appeal against the conviction and sentence was granted to the appellant by the Regional Court Magistrate. No appeal insofar as the sentence on counts 2 and 3 were pursued before this court.

The conviction

- [4] The Learned Magistrate found that there was not much in dispute in this case as the facts were, for most, common cause. This was indeed correct insofar as the evidence led by the state witnesses was concerned. This is however not the case as far as the version of the appellant is concerned.
- [5] The appellant’s version was that on the occasion when the premises was searched by the police and a cannabis cultivation project was found he slept over for the night at these premises. The premises was rented and occupied by an acquaintance of appellant known as Mr Coetzee (hereinafter referred to as “Coetzee”) and his girlfriend, accused 3 (hereinafter referred to as “Ms James”). Coetzee was accused 1 in this matter but before the matter proceeded in the Regional Court on trial, he died. The appellant denied that he was aware that Coetzee established a hothouse in an outbuilding close to his house where he cultivated cannabis.
- [6] Apart from admitting that the appellant was aware that Coetzee was a smoker of cannabis, appellant denied that he saw two drying racks with cannabis in Coetzee’s house when he slept over.

- [7] The learned magistrate failed to make a credibility finding against the appellant whereby he rejected his version that he did not cultivate cannabis, nor that he was aware of it. What the learned magistrate did was to refer to the common cause facts as ascertained from the state's case and thereafter he drew certain inferences from the evidence as provided by the state, upon which he then concluded that the appellant was a co-perpetrator in the cultivation of cannabis in contravention of the Act. The magistrate found that the appellant was, as far as the cultivation of cannabis in the outbuilding was concerned, "the brains behind it all, sharing his knowledge with Coetzee and Coetzee only being the labourer".
- [8] It is only by implication that this court can conclude that the learned magistrate rejected the denial of the appellant as not being

reasonably possibly true as such direct and specific finding was not made.

- [9] For purposes of this appeal this court should first consider what the proven facts were which could have laid the basis for inferences to be drawn. Considering that there was no direct evidence that the appellant was aware of the cultivation of cannabis in the outbuilding, the question remains whether the circumstantial evidence is thus that the only reasonable inference to be drawn is that the appellant was a co-perpetrator in the cultivation of cannabis.

- [10] The court a quo in my view was correct in its finding that with regard to circumstantial evidence from which inferences are to be drawn, the court should look at all the evidence and not to portions of the evidence on a piecemeal basis. The Learned Magistrate referred to *R v De Villiers* 1944 AD 493 and purported to quote from this case according to the written judgment. The quoted portion does, however not appear from the De Villiers judgment. The relevant portion of this judgment appears on pages 508 and 509 where in was found as follows:

"The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond doubt inconsistent with such innocence."

- [11] Counsel on behalf of the appellant and on behalf of the state were ad idem that the following facts were indeed common cause:

11.1 That the appellant, the co-accused James, and Coetzee were present at the premises situated at No. 80 Kwikstertjie Street, Boschfontein ("the premises") on 25 April 2015 when members of the South African Police Services (SAPS) conducted a search of the premises.

11.2 The said premises was at the time leased by Coetzee and he and Ms James, who were in a relationship, resided there .

11.3 The appellant was acquainted with Coetzee and James and by prior arrangement stored some of his personal belongings on the premises.

11.4 That the appellant would on occasion stay over at the premises.

11.5 That the appellant was previously the co-owner of a business venture trading as Wendell Hydroponics also known as “Hortishop”.

11.6 The appellant was a qualified horticulturist whilst Coetzee was a welder.

11.7 When the police raided the premises they inter alia found in the main house in the lounge and study, drying racks with cannabis on it.

11.8 Various old diaries of the appellant were found in the room where he was sleeping, of which three contained sketches of hydroponic systems and notes with reference to cannabis cultivation.

11.9 In the room the appellant was sleeping in, on the window behind the curtains was a calendar which contained the handwriting of Coetzee

with entries on certain dates when harvesting and other events should take place in relation to the cultivation of cannabis.

11.10 In the outbuilding, which was under lock and key, and the contents not at all visible from the outside, the police found a cannabis

cultivation operation with a certain degree of sophistication which required some know-how how it should be done.

11.11 Chemicals and fertilizer which emanated from the appellant’s Hortishop business were found in the outbuilding. It was common cause that these chemicals and fertilizers could be used for any form of cultivation of other plants besides cannabis.

11.12 Coetzee at all times admitted and confessed to the police that all the cannabis found on the premises belonged to him and that he was the person responsible for the cultivation and drying of same.

[12] Apart from these undisputed common cause facts, there was no evidence to gainsay the appellant’s version that on this occasion when the SAPS searched the premises he was only sleeping over for one night. There was similarly no evidence that the appellant was aware of the cultivation of cannabis in the outbuildings but as far as this aspect is concerned the court found that it was unconvinced regarding the many innocent explanations offered by the appellant, because if one looks at the totality of the evidence, adduced in support of the inferences required to be drawn, the court was convinced that the appellant was the brains behind all of this.

[13] Before this court it was argued that the learned magistrate was correct in drawing such an inference considering the following facts:

13.1 The appellant was a horticulturist and would have had the specific knowledge to create a “hothouse” with reference to

lighting, humidity, nutritional and ventilation requirements to cultivate indoor plants. Against this Coetzee was only a welder and it was not expected that he would have acquired such knowledge.

13.2 Plant nutrients and chemicals which emanated from the appellant’s horticultural business which he previously ran was found in the outbuilding where the cannabis was cultivated.

13.3 That the cannabis cultivation area was equipped with similar equipment than those illustrated in the sketches found in the diaries of the appellant.

13.4 In the room where appellant was sleeping a calendar was placed on the window behind drawn curtains with certain inscriptions made in Coetzee’s handwriting pertaining to cannabis cultivation.

13.5 There was also inside the main house in full view of anybody, drying racks containing cannabis.

[14] This evidence is what is commonly referred to circumstantial evidence as this is not direct evidence which points to appellant’s

cultivation of cannabis. No such evidence was presented by the state. Circumstantial evidence is evidence that asks a trier of fact to consider the evidence and then to draw inferences from such evidence.

[15] It is a trite principle in our law that an inference can only be drawn from the proven facts if such inference is the only reasonable

inference which can be drawn from such evidence. Other reasonable inferences must be excluded.

[16] In my view taking into consideration the mentioned circumstantial evidence, there is a strong suspicion that the appellant must have been aware of the cultivation of cannabis that took place in the outbuilding. That the appellant through his version wanted to distance himself from any knowledge of what was happening in the out buildings is also clear. It should be mentioned that it is highly improbable that appellant as a horticulturist would not have seen that racks of cannabis in the house where he slept over. The court does not believe appellant’s version in this regard.

[17] The question however remains if it can be found by way of inferential reasoning that the appellant was a co-perpetrator in the cultivation

of the cannabis in this outside building on the premises. The question is not whether the appellant was aware of what was taking place in the outbuilding but whether he participated in the cultivation of the cannabis. Is the only reasonable inference

to be drawn from the facts as stated hereinabove that appellant cultivated cannabis? If so, he was correctly convicted as it was not contested before this court that the cultivation of cannabis, as was found taking place in the outbuilding, would be in contravention of the Act. The question goes further, is it not a reasonable inference that Coetzee was the sole cultivator of the cannabis. This is what he confessed to the police during their search. In this regard, there was evidence that information about the cultivation of cannabis in hothouses was freely available to anyone. In my view, the learned magistrate erred in his finding that it was difficult to imagine that Coetzee, who was a welder by profession, would possess the know-how, to from scratch, bring about the cultivation of a whole dagga plantation with the sophisticated equipment installed therein. The only reasonable inference to be drawn is not that a welder could not set up a cannabis cultivation hothouse, especially if information how it could be done was freely available albeit from the appellant.

[18] In the diaries found in the room where the appellant was sleeping, sketches were made of a hydroponic system which was not the system

installed in the outbuilding. These kind of sketches one can expect to find in the dairies of a horticulturist who on his own uncontested

version was busy with community projects involving horticulture.

[19] The evidence of the police officer De Bruin, was that the system which was found in the outbuilding might as well have been a system for the cultivation of ordinary vegetables. This system was not only for the cultivation of cannabis. The fact that some of the products which originated from a Hortishop was found inside the outbuilding in my mind cannot lead to an inference that it was the appellant who brought it into the outbuilding for the cultivation of cannabis. The evidence was that the appellant and Coetzee were acquaintances for a couple of years and that Coetzee was aware of the business of the appellant. A reasonable possibility is that he could have bought these items from the previous business of the appellant. Moreover, the evidence was that a certain amount of items belonging to the appellant were stored on the premises occupied by Coetzee. These products could have been taken from storage to where it was found in the outbuilding.

[20] Taking all the factors into consideration cumulatively, I am of the view that the only reasonable inference to be drawn is not that the appellant was cultivating cannabis in the outbuilding as was found by the learned magistrate. The finding of the magistrate that Coetzee, who admitted that he was the cultivator, was only a labourer has no foundation whatsoever. Add to this that the calendar in the room where appellant slept had on it notes in the handwriting of Coetzee and further that it was common cause that the key to the outbuildings was always in the possession of Coetzee. This evidence does not correspond with a finding that Coetzee was only the labourer and appellant the main brain behind this

all.

- [21] In my view, it is also a reasonable inference from the proven facts that Coetzee, after obtaining as much information as possible, including possibly from the appellant, proceeded to cultivate the cannabis in the outbuilding of the property he was renting. This he could have done with or without the knowledge of appellant. Mere knowledge of the cultivation of cannabis by the appellant would not render him guilty of the offence he was charge with.
- [22] There exists a strong suspicion that the appellant was assisting Coetzee in the cultivation of the cannabis and that he might be an accomplice in such cultivation. The point is, the court cannot convict on a suspicion but only on proven evidence and on inference drawn from such evidence which meets the requirements of the well know test. This in my mind is not such a case as other reasonable inferences can be drawn from the evidence. In my view, the state has failed to prove the guilt of the appellant beyond reasonable doubt.
- [23] Accordingly, I am of the view that the conviction and sentence on count 1 should be set aside.

Conviction on the possession of firearm and ammunition

- [24] The evidence as far as these convictions are concerned is also undisputed.
- [25] The appellant slept over for one night in a room in the house of Coetzee and James. As he was about to go to bed Coetzee came into the room and placed a .22 rifle in the room behind the door where the appellant was sleeping. Coetzee said it was for safety and appellant was aware of previous security problems at the premises. There was no evidence that the appellant at any stage handled this rifle and when the SAPS searched the house, the next morning the rifle was still in the same position where Coetzee left it. It was also common cause that this was also the explanation provided by appellant to the police when the firearm was found.
- [26] The magistrate found that a person possesses a firearm if such person keeps or guards the firearm temporarily for someone else (*possessio naturalis*). On this basis appellant was convicted of possession of an unlicensed firearm.
- [27] It was also common course that Coetzee was the person who possessed this firearm at the time when it was placed by him behind the door of a room in his home.
- [28] In *State v Ndwalane* 1995

- (2) SACR 697 (A) and more particularly p 702 B-F the court found that requirements which should be met to constitute possession for purposes of the Firearm Control Act will be a physical element (corpus) and a mental element (animus). In the case of natural possession or possessio naturalis the animus need merely consist of the intention of the possessor to control the article for his own purpose or benefit and not as owner. The court found in Ndwalane that the reference to the word “possession” in this Act includes “custody”.
- [29] The factual enquiry which remains in the current case is then whether the appellant obtained custody of the firearm when it was placed by Coetzee in the room he was sleeping in for the night. That it was available for him to use in the case of an emergency was undisputed. Does availability for usage amount to custody? The test whether a person has custody of a firearm would depend on the facts of each particular matter. I am of the view that the appellant did not obtain custody of the firearm merely because it was placed in the room he was sleeping, behind the door, by the possessor of this firearm. The firearm was not left in the room for the appellant to keep or to guard, albeit temporarily. It was merely placed there by Coetzee should it become necessary to be used. Fact is it was placed in a room in a house which was occupied by Coetzee. He could have remove the firearm at any stage to be stored at a different place. The appellant in my view never formed an intention to exercise any form of custody or control over the firearm. The fact that the appellant was aware of the presence of the firearm does not mean that he formed any intention to possess the firearm in any way whatsoever.
- [30] I am of the view that on the facts of this case, the state has failed to prove beyond reasonable doubt that the appellant possessed the firearm or the ammunition therein.
- [31] Accordingly, the conviction and sentence on counts 2 and 3 should be set aside.
- [32] The following order is made:
- (1) The appeal against the convictions on counts 1, 2 and 3 are upheld.
- (2) The sentences on counts 1, 2 and 3 are set aside.

RÉAN STRYDOM

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

PRETORIA

I agree,

D. P. MTHIMUNYE AJ

ACTING JUDGE OF THE HIGH COURT

Date of Hearing: 19 July 2021

Date of Judgment: 27 July 2021

Appearances:

For the appellant: Adv M Van Wyngaard

For the state: Adv K Germishuis

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