

A239/2005

/ES

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

DATE: 14/2/2005

reportable

Magistrate
MKOBOLA

Case No: A627/2003
Supreme Court Ref No: 4688

THE STATE v THAMI ELIAS SIBANYONI

REVIEW JUDGMENT

PATEL, J

- [1] This is an automatic review from the Mkobola magistrate's court held at Kwaggafontein. The accused was charged on three counts, namely, first, contravening section 3 of the Firearms Control Act 60 of 2000 ("FCA") for being in illegal possession of a firearm; second, contravening section 90 of Act 60 of 2000 for being in illegal possession of ammunition and third, rape.
- [2] The charge of rape was withdrawn and he was convicted on a plea of guilty on the first two counts. These two counts were taken together for purposes of sentencing and he was sentenced to three years imprisonment.

[3] When I first received this case on review, I raised certain queries with the magistrate. However it is not necessary for me to deal with them since I am satisfied with the magistrate's explanation. Suffice to say that the presiding officer needs to be meticulous in noting the most crucial and important aspects of the accused's plea and any withdrawal of any charges to avoid lack of clarity. Poor recordal might result in undermining the accused's right to a fair trial.

[4] The accused in pleading guilty to the first two counts admitted that he was not the holder of a licence issued in terms of the provision of the FCA to legally possess the firearm and the ammunition.

[5] For present purposes the relevant statutory provisions are:

[5.1] section 3 provides that

"No person may possess a firearm unless he or she holds a licence, permit or authorisation issued in terms of this Act for that firearm."

[5.2] Section 90 places the following prohibition on the possession of ammunition:

"No person may possess any ammunition unless he or she-

- (a) holds a licence in respect of a firearm capable of discharging that ammunition;
- (b) holds a permit to possess ammunition;

- (c) holds a dealer's licence, manufacturer's licence, gunsmith's licence, import, export or in-transit permit or transporter's permit issued in terms of this Act; or
- (d) is otherwise authorised to do so."

[5.3] Section 120(1)(a) makes the contravention of any provision of the FCA an offence.

[6] In this case no ballistic evidence was adduced or a report tendered in evidence that the firearm was tested and found to comply with the rather complicated and technical requirements set out in section 1 of the FCA. In the definition section, "firearm" means any-

- "(a) device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of burning propellant, at a muzzle energy exceeding 8 joules (6 ft-lbs);
- (b) device manufactured or designed to discharge rim-fire, centre-fire or pin-fire ammunition;
- (c) device which is not at the time capable of discharging any bullet or projectile, but which can be readily altered to be a firearm within the meaning of paragraph (a) or (b);
- (d) device manufactured to discharge a bullet or any other projectile of a calibre of 5.6 mm (.22 calibre) or higher at a

muzzle energy of more than 8 joules (6 ft-lbs), by means of compressed gas and not by means of burning propellant; or

[Para (d) substituted by s.1(b) of Act 43 of 2003.]

- (e) barrel, frame or receiver of a device referred to in paragraphs (a), (b), (c) or (d), but does not include any device contemplated in section 5;

(The date of commencement of the definition of "firearm" was 1 June 2001.)"

And "fully automatic" means capable of discharging more than one shot with a single depression of the trigger.

"Ammunition" means a primes or complete cartridge.

- [7] The annexure to the charge-sheet merely refers to the firearm as "9mm Nanco (841989)". The prohibited firearms are specified in section 4(1). There is no allegation that the 9mm Nanco is a fully or semi-automatic firearm.

- [8] However, where an accused pleads guilty, it is not necessary for any evidence to be adduced and that an accused can, although certain facts do not fall within his personal knowledge, admit the technical requirements. In *S v Aucamp and six similar cases* 2002(1) SACR 524 (E) the following was held, at 527a-528h, regarding admissions by an accused concerning matters of which he had no personal knowledge:

"The difficulty, however, that sometimes arises, and this is germane to the cases with which we are here dealing, concerns admissions made by an accused of which he or she has no personal knowledge. In this regard it is appropriate to quote what LEACH J, with whom PICKERING J agreed, said in the unreported case of *S v Yongana Maurice Mtiki and Others* CA & R 577/99 delivered on 16 November 1999, namely:

'It has been held in certain decisions that the admissions made by an accused during questioning under s 112 must fall within his knowledge and experience – see for example *S v N* 1992(1) SACR 67 (Ck) at 68h-i and the cases there cited. That seems to be going too far as *it appears to be well settled that an admission of fact not within an accused's personal knowledge may well be admissible against him* – see *S v Mavundla* 1976 4 SA 731 (N) at 733A and *S v Sephiri* 1979 2 SA 1168 (NC). But as was pointed out in *S v Nongabe* 1990(2) SACR 522 (O), *an admission of fact not within an accused's personal knowledge, albeit admissible, may lack meaningful probative value depending upon the circumstances of the case* – see further for example *S v Naidoo* 1985 2 SA 32 (N) at 37 in which THIRION J remarked that considerations such as the sufficiency of the accused's source of knowledge may become of decisive importance. As was observed by VAN DYK J in *S v Martins* 1986 4 SA 934 (T) at 944H when dealing with an

admission by an accused of a fact which fell beyond his personal knowledge:-

"In die besonder sal dit van belang wees om daarop te let of die ander inligting wat voor die hof geplaas is, voldoende aanduiding verskaf dat daar 'n basis bestaan vir sodanige erkenning."

As the learned authors of *Commentary on the Criminal Procedure Act* by Du Toit *et al* put it at 17-19:

"The weight of authority favours the view that an admission that does not have its factual foundation in the personal knowledge of the accused can be accepted if the court is satisfied that the admission is a reliable one."

It is nevertheless clear that while there can be no general rule to assist a presiding judicial officer in determining the reliability of an admission, as to the factual foundation of which an accused has no personal knowledge, the fact that an accused knows and understands what he is admitting, even if it be beyond his personal knowledge, is a factor to be taken into account by the judicial officer in deciding whether he can in any particular case rely on such admission. ... Indeed, in questioning an accused, where he or she pleads guilty to a contravention of s 62(5)(a) of Act 93 of 1996, with reference to

the alleged facts of the case in order to establish whether he or she admits the allegations in the charge, it would seem to me to be difficult to avoid questioning the accused as to the time in relation to his or her driving of a vehicle when the sample of his or her breath was taken and as to the equipment that was used to ascertain the concentration of alcohol in his or her breath specimen ...

... By the same token, however, HUGO J is, in my view, correct where he emphasises in *S v Vorster* 2002(1) SACR 379 heard in the Natal Provincial Division that, *where an accused pleads guilty, the court is not concerned with whether the accused is proved to be guilty, and this from evidence, but whether the court is satisfied from the admissions made by the accused and their reliability that he or she is guilty. On review this court is concerned with whether the proceedings in the lower court are in accordance with justice and with that in mind I proceed to deal with the individual cases.*"

(My emphasis in italics.)

- [9] In my view, even though in the absence of evidence regarding the type and description of the firearm the accused was rightly convicted on his plea of guilty on the counts relating to possession of a firearm and ammunition. However, my concern is that full particulars of the firearm whether it is a fully automatic or not may be crucial in determining an appropriate sentence.

It was simply alleged that he was in possession of a 9mm Nanco firearm, which allegation he admitted. Thus, the provisions of the Criminal Law Amendment Act 105 of 1997 are not applicable even if the firearm concerned can be described, according to the evidence before the court or admission by the accused, as a semi-automatic weapon. (See: *S v Khonye* 2002(2) SACR 621 (T).)

[10] In sentencing the accused the magistrate had due regard to the personal circumstances of the accused. He is 27 years old without fixed employment. Although his wife deserted him, he is a father of two children. The offender has two previous convictions, one of housebreaking with intent to steal and theft and the other for assault. The accused admitted that he knew that he may not possess a firearm since he is not licensed to do so.

[11] Further, the magistrate also considered the prevalence of the unlawful possession of firearms and ammunition in the country which lead to the legislature enacting the Fire Arms Control Act of 2000. The seriousness and magnitude of crimes where illegal firearms and ammunition are used is alarming and need to be kerbed. The courts are duty bound to impose sentences which will send out a clear message that these who possess illegal firearms and ammunition will suffer the right of the law in the interest of society.

[12] The sentence of three years imprisonment is not shockingly inappropriate for possession of a firearm and ammunition. [*S v Qwati* 2001(1) SACR 378 (NC)]

on 389b-391a.] In this Division similar sentences of three years imprisonment were confirmed for similar offences on review. [See: *S v W L Khumalo* (High Court Ref 5001) 16 September 2002; *S v A M Masombuka* (High Court Ref 5342) 5 December 2002; *S v D J Shabangu* (High Court Ref 6152) 12 November 2002; *S v J S Tholo* (High Court Ref 6305) 19 November 2002; *S v N S Ntombela* (High Court Ref 4642) 28 August 2002; *S v D T Tjale* (High Court Ref 4199) 16 September 2002; *S v S A Sekgotho* (High Court Ref 714) 6 March 2003; *S v M S Milanzi* (High Court Ref 1638) 10 July 2003.]

[13] Accordingly, I conclude that the proceedings in the court below appear to be in accordance with justice and the following order is made:

"The sentence of three years imprisonment imposed on the accused is confirmed."

E M PATEL
JUDGE OF THE HIGH COURT

I agree

M H E ISMAIL
JUDGE OF THE HIGH COURT

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