IN THE HIGH COURT OF SOUTH AFRICA (TRANSVAAL PROVINCIAL DIVISION)

DATE: 3 SEPTEMBER 2007

NOT REPORTABLE

CASE NO.: A53/2005

In the matter between:

Respondent

WEBSTER J:

1. The accused were convicted in the Regional Court for the Southern Transvaal sitting at Brakpan, of robbery with aggravating circumstances, contravening the provisions of section 2 read with section 39(2) and 40 of the Arms and Ammunition Act 75 of 1969, to wit a .38 Rossi Revolver and a 9mm pistol and for the unlawful possession of 8 live rounds of ammunition without being the holders of licensed firearms capable of firing such ammunition, in contravention of section 36 read with section 39(2) and 40 of the aforesaid Act. They were each sentenced on count one, to fifteen (15) years' imprisonment. Counts two and three were taken as one for purposes of sentence and each accused was sentenced to three (3) years' imprisonment. They appealed against their conviction as well as the sentence.

3.The undisputed evidence led by the State was that complainant, the driver of the motor vehicle referred to in count one, was held up by five or six persons who were armed with firearms. They removed Rl 000 from him and thereafter placed him and a colleague of his in the rear of the motor vehicle he was driving, a Mercedes truck and drove off to a certain place where the entire contents of the truck to the value of approximately seven to eight thousand rand were removed. The truck then drove further with the two persons still locked up in the rear of the truck. A police vehicle came across the stolen truck. The driver of the police vehicle put on the blue light as well as the siren of the police vehicle. The stolen Mercedes truck, accelerated with the police firing at the truck. The truck came to a standstill ultimately and four persons - with two from each of the two doors, jumped off from the truck and fled.

3.The two police officers, Sgt Masuku and Inspector Kgole, who were in the police vehicle also alighted and pursued the fugitives. One of the four persons was shot. A firearm was found next to him. The remaining three fugitives split up - two ran together and the third on his own. The two police officers followed them. The one who ran off on his own managed to board a taxi. After travelling a short distance the taxi made a u-turn and drove up to one of the two police officers, *viz.* Inspector Kgole and stopped. The fugitive alighted from the taxi and fled again. He was ultimately arrested: it was accused number two. The other two fugitives were pursued by Sgt Masuku. At some stage in the course of such pursuit the fugitives fell onto the ground and tried to crawl on their stomachs in the long grass. One of the two fugitives stood up, produced a firearm and threatened to shoot Sgt Masuku. Masuku shot him:

this person later died. Masuku then went to the second fugitive and arrested him: it was accused number one.

4.The defence put to the State witnesses was that the two appellants had been given a lift in the Mercedes truck by someone called Jerry. Whilst travelling, shots had been fired, the truck stopped and the accused got off and fled as they did not know that it was the police that had been firing at the truck.

5.Neither of the accused testified in their own defence. The trial Magistrate found that having regard to the probabilities, the accused were part of the group that had robbed the complainant. He further rejected the suggestion that the appellants had been innocently given a lift in the truck. He found further, that the robbers had been armed and that they had all exercised joint possession of the firearms for the purpose of committing the robbery acting with a common purpose.

6.The appellant who was accused number two in the court *a quo* filed his own appeal on both the conviction and sentence. His grounds of appeal on the conviction are that the Magistrate erred in finding that because he was found in the hijacked truck he was one of the perpetrators of the robbery or was "involved in possession of the firearms and ammunition". The grounds of appeal on the sentence is that the trial Magistrate failed to take into account that the appellant was a first offender, his age, his state of health and that he has a dependant.

7.Mr. Manzini, who appeared for the appellant, submitted that the State had failed to prove that the appellant's defence that he had been given a lift in the truck could not be reasonably possibly true. He submitted further that there was no evidence linking the

appellant to the *unlawful* possession of the firearms. *Whilst submitting* that the sentence on the count of robbery was severe he *did* not submit that the *trial Magistrate* has misdirected himself on the sentence.

8. Mr. Barnard, for the State, submitted that the trail court had been correct *in* convicting the appellant and that the sentence was an *appropriate* one.

9. Two questions arose for consideration. They are whether the inference drawn by the Magistrate was the only reasonable one and *secondly,* whether *it* can be found that the trial *Magistrate failed* to *exercise his discretion judiciously* when *imposing* the sentence so imposed. It is my considered *view* that both *questions* must be answered *in* the negative on the charge of robbery and the sentence of fifteen years' *imprisonment.*

10. According to the *victim* of the robbery *five* or six people were involved in the robbery. Four *people* were seen by the *pOlice* jumping off the truck. The *pOlice* vehicle that was following the truck had the blue *lights* and the *siren* on. The police vehicle had the *police* signs on it. Both pOlicemen who pursued the appellant and the others who jumped off the truck were in police uniform. The incident happened in broad daylight. It was put to the police witnesses that the appellant and his co-accused fled because they did not know that the pursuers were the police. *This* is *inherently* improbable having regard to the facts. In my view the trial

Magistrate was correct in rejecting the appellant's imputed lack of knowledge that the pursuers were the police. The conclusion that the appellant saw the police, realized that it was the pOlice pursuing yet fled for some distance with the police firing at the~ cann.ot be consistent with the actions of a person who had been given a 11ft.

11.Further, the evidence is that the police came across the truck not very long after the robbery. The Magistrate, in his judgment, points out that it was improbable that the driver of the truck would stop to give a lift by pedestrians. The truck driver could not have been that na"lve not to realize that the hijacking of the truck would not have been reported. The trial Magistrate further pointed out that there was no evidence that there was anything wrong in the vehicle. Why then would the appellant have fled, risking being shot if he were as innocent as the appellant would have the court believe? It is strange too that the appellant would have chosen to run in the company of these people he found in the truck.

12.The appellant was one in a group of persons who were in possession of the hijacked vehicle within a relatively short time of the robbery. This fact alone placed him on his defence. Yet despite the incriminating evidence and clearly in circumstances where a *prima facie* case had been made against him he elected not to testify (S v Boesak 2001(1) SACR 1 (CC). This weighs heavily against the accused. The conclusion is inescapable that the accused was one of the robbers in count one.

13.The finding of guilt on count one was based on a finding of fact.

> There is nothing on record, and none was advanced in argument too, that the trial Magistrate misdirected himself in any way. That being so, and in the light of the findings of this court, this court cannot interfere with the conviction on count one.

14.I turn to consider the conviction on counts two and three. The trial Magistrate's reasoning is that the accused acted with a common purpose in carrying out the robbery. The robbery was executed with the use of firearms. The appellant and his co-accused saw

those weapons during the execution of the robbery. They reconciled themselves with the use of the firearms for the realization of their objective. The robbery could not have been executed without firearms. Therefore, says the Magistrate "Hulle was medepligtiges tot die besit van die vuurwapens". That is not correct.

15. The issue of unlawful joint possession of a firearm has been considered in a number of reported cases. It is not necessary, for purposes of this judgment, to deal in any detail with these judgments. Suffice it to set out what the concept of possession entails. In S v Adams 1986(4) SA 882 (A) at 890G-891B, Corbett JA, defined possession in the following words:

> "In general the concept of "possession" ("besit"), when found in a penal statute, comprises two elements, a physical element *(corpus)* and a mental element *(animus). Corpus* consists either in direct physical control over the article in question or mediate control through another. The element of *animus* may be broadly described as the intention to have *corpus,* ie to control, but the intrinsic quality of such *animus* may vary, depending upon the type of possession intended by the statute. At common-law a distinction is drawn between civil possession *(possession civilis)* and natural possession *(possession natura/is).* Under the former the *ammus possidendi* consists of the intention on the part of the possessor of keeping the article for himself as if he were the owner. Under the latter 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. In penal statutes, however, the term "possession" would seldom, if ever, be construed as *possession civilis* and this may, therefore, be left out of account. In the case of certain such statutes it has been held that "possession" connotes *corpus* and an *animus* akin to that required for *possession natura/is.* In others the

Courts have interpreted "possession" to comprehend *corpus* plus the *animus* to control, either for the possessor's own purpose or benefit, or on behalf of another (this latter alternative being equivalent to what is often termed "custody" or *detention)* or as meaning "witting physical detention, custody or control" (see S v Brick 1973(2) SA 571 at 580G)".

16.Dealing with a case similar to the one above, Marais J held in S v Nkosi 1998(1) SACR 284 at 286(g) to (h):

"The issues which arise in deciding whether the group (and hence the appellant) possessed the guns must be decided with reference to the answer to the question whether the State has established facts from which it can properly be inferred by a Court that:

(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".

Marais J went on to say at 287(i) to 288(a):

" .. .That was a matter in which six persons effected a robbery; only some of them had firearms. It was held as a necessary inference that all were in possession of the guns used in the execution of their conspiracy to rob.

Where there are no further facts available other than the fact that the robbers all knew that some of them would use guns to effect their purpose (and hence conspired to commit a robbery involving the use of guns) I am unable to exclude by a process of inferential reasoning every reasonable inference other than the inference that there was a joint intention to possess the guns used".

17.The views of Marais J were quoted with approval in S v Mbule 2003(1) SACR 97 at 115 b-c.