IN THE **HIGH** COURT OF SOUTH AFRICA
(TRANSV AAL PROVINCIAL DIVISION)

CASE NO.: A1317/2005

DATE: 21 SEPTEMBER 2007 NOT REPORTABLE

In the matter between:

And

RESPONDENT

THE STATE

JUDGMENT

WEBSTER J

1.The appellants were convicted on 5 June, 2001, in the Regional Court for the Southern Transvaal Division, sitting at Heidelberg of (1) robbery with aggravating circumstances; (2) the unlawful possession of an unlicensed firearm in contravention of section 2 of Act 75 of 1969; and (3) the unlawful possession of five (5) rounds of 9mm ammunition without being the lawful holders of a licensed firearm capable of firing such ammunition, in contravention of section 36 of the Arms and Ammunition Act 75 of 1969. They were each sentenced to sixteen (16) years' imprisonment for the robbery and three (3) years' imprisonment for the unlawful possession of the firearm and the ammunition, both counts having been taken as one for purposes of sentence.

2.Initially an appeal was noted against the sentence only. A few days before the appeal was heard an application to amend the grounds of appeal to incorporate an appeal against the conviction on the

NKOSINATHI IGNATIUS MBATHA 1ST APPELLANT

LINDA M MAPONYE 2ND APPELLANT

unlawful possession of the firearm and ammunition was filed. Because of the late filing of the said notice it was impossible for the trial Magistrate to respond to the proposed new grounds of appeal and supplement, if necessary, his reasons for judgment before the appeal was heard. The State's view was that the appeal should proceed particularly because of the fact that the matter had been finalised in June, 2001, rather that that it be postponed for the trial Magistrate's supplementary reasons, if any: the State indicated that it would abide by this court's decision.

3.The evidence adduced at the trial by the State can be summarised briefly as set out below. The complainant was driving a Hyundai Truck along the N3 national road when a white bakkie drove up alongside his vehicle. There were three people seated in the front of the bakkie and a fourth one at the rear. The passenger in the bakkie rolled down the window and stuck out a firearm, ordering the complainant to move off the road. The complainant complied and having done so made a u-turn and drove back in the direction from which he had come. The white bakkie followed suit. The complainant heard shots being fired: he believed that they were being fired at his vehicle. He lost control of his vehicle and jumped out whilst it was in motion. He jumped over the fence and fled into the veld. He again heard shots being fired at him whilst he was being pursued by three of the persons from the white bakkie. His evidence is that the appellants are two of those three persons. He succeeded in escaping. The same day the truck was recovered. He subsequently identified the appellants at an identification parade as having been two of the three persons who had pursued him. Neither of them had been the one who pointed the firearm at him whilst he was driving on the N3.

4.Sergeants Brand and Mokoena, both of them members of the South African Police Services, were on patrol in a police vehicle when they heard a radio report of the incident involving the complainant. They came across the complainant's hijacked motor vehicle. There were two occupants in it. Appellant no. 1 was the driver and the second appellant was a passenger. The police vehicle pulled up next to the Hyundai truck and ordered appellant no. 1 to pull up off the road. He did so. Sergeant Brand arrested the first appellant and his colleague, Sergeant Mokoena arrested the second appellant. Brand searched appellant no. 1 and found a firearm pushed in his pants at the hip. The firearm was a Z88 nine millimetre parabellum pistol. The serial number was erased. There were five (5) rounds of ammunition. Both appellants were arrested. The firearm and ammunition formed the subject matter of the charges in respect of which the appellants were found guilty and the subject matter of this appeal on the conviction.

5.The appellants' version was that they were innocently on their way to the airport when the police vehicle stopped next to them, invited them to board the police vehicle and drove them to a spot where the Hyundai truck of the complainant was standing with its engine running.

6.The second appellant further denied that he was found In possession of a firearm.

7.At the trial the first appellant was accused no. 1. In convicting the appellant on the counts relating to the firearm and the ammunition, count 3 and 4 of the charges against the appellants, the learned Magistrate found as follows:

> "Wat betref aanklag 3 en 4 is dit 'n bewese feit dat in beskuldigde no. 1 se besit gevind is 'n Z88 9mm pistool of iets wat gelyk het

5005 'n pistool sowel as 'n pistol met 'n 5 9mm rondtes ammunisie. Die enigste punt wat die Hof hier moet beslis is of hierdie voorwerp inderdaad 'n vuurwapen en ammunisie was 5005 bedoel in die wetgewing. Nou die getuie het bloot getuig dat dit 'n pistool en rondtes is, die basis van sy opinie is eintlik nie op rekord geplaas nie. Aan die anderkant is sy opinie nooit in geskil geplaas nie. Die foto's wat ingehandig is, toon ook dat die voorwerp ten minste lyk 5005 'n vuurwapen, die beskuldigdes dit in besit gehad, as daardie vuurwapen en ammunisie nie in 'n werkende toestand was nie is hulle die eerste persone wat dit sou weet. Dit is nooit deur hulle beweer nie hulle het 'n baie ernstige roof aangepak, dit is hoogs onwaarskynlik dat hulle iets sou gebruik wat nie in werkende toestand is nie. Daarbenewens was daar wel skote op die toneel gevuur alhoewel daar ook ander persone teenwoordig was. En is ek oortuig daarvan dat die Staat tog aan die hand van die omstandigheidsgetuienis genoegsaam aangebied het en ek moet miskien beklemtoon ook maar net genoeg, om aan te toon dat dit inderdaad wel 'n vuurwapen en ammunisie was 5005 bedoel in die wet. Dit is die enigste redelike afleiding wat ek kan maak, dit is nie my taak om te soek en te bespiegel oor moontlike onskuldige afleidings nie. Selfs al sou ek op hierdie punt verkeerd wees, het die Staat ten minste bewys die onwettige besit van 'n vuurwapen en ammunisie waarvan die maak onbekend is, want dit is 'n bewese feit dat skote wel op die toneel gevuur is. Al die persone alhoewel beskuldigde no 1 die vuurwapen fisies in sy besit gehad het was al die persone medebesitters hulle was medepligtiges tot daardie besit. Die vuurwapen is juis deur hulle gebruik, mag dit wees direk of indirek, ten einde die roof te bewerkstellig. En ek is ook die minste tevrede dat die Staat bo redelike twyfel besit het synde die onwettige besit van 'n vuurwapen en ammunisie synde dan 'n oortreding van artikel 2 en 36 van die onderhawige wetgewing

maar inderdaad ook besit het, korreksie, bewys het inderdaad al die bewerings in aanklag 3 en 4".

8. The grounds of appeal against the conviction are as follows:

(1) The Magistrate erred in finding that the appellants did not dispute that the firearm was in a working condition;

(2) The aforesaid finding means that the Magistrate erroneously placed the onus of proof on the appellants;

(3) The complainant did not identify either of the appellants as having been the person who pointed the firearm at him or fired at him;

(4) It is not the only reasonable inference that the firearm that was found in the first appellant's possession was in a working condition and was used in the robbery;

(5) In convicting the second appellant on counts 3 and 4 i.e. for the unlawful possession of the firearm and ammunition, respectively, the Magistrate relied upon common purpose.

9. I do not propose to deal at seriatim with each of the grounds of appeal. It is significant that the appellants do not challenge the trial court's finding that they were guilty of robbery with aggravating circumstances, such circumstances being the use of a firearm in the execution of the robbery. In argument before us it was never contested that a firearm was used in the robbery. My understanding of the grounds of appeal and the argument on behalf of the appellants is that another weapon could have been used. Any uncertainty with regard to this viewpoint is immediately dispelled by reference to the ground of appeal number 4 supra.

10. It is further my understanding that the evidence by the State that the object found in the second appellant's possession despite hiS denial of this in his evidence was not being challenged. In the

event that my understanding of the facts set out in this paragraph is erroneous my considered view is that the Magistrate's rejection of the defence version was sound and based on a properly considered evaluation of the facts in their entirety.

11.The appeal is premised on three considerations. The first is whether the firearm or object found in the first appellant's possession was a firearm capable of ejecting a projectile. This was the essence of the argument before us. The second consideration is whether there was more then one firearm in the possession of the people who robbed the complainant ad the third is whether the firearm found in the appellants' possession was possessed jointly on behalf of all the persons who participated in the robbery.

12.The essence of the first consideration is premised on the submission that there was no evidence placed before the trial court that the firearm or object found in the first appellant's possession was capable of ejecting a projectile. That firearm or object was the Z88 nine millimetre pistol referred to in the charge sheet and testified to by Sergeant Brand.

13.Section 1(1) of Act 75 of 1969 defines an "arm" as follows:

> **"Arm** means any firearm other than a cannon, machine gun or machine rifle, and includes -
>
> (a) subject to the provisions of subsection (2) and (3) -
>
> (i) a gas rifle of .22 of an inch or larger calibre or a gas pistol or revolver;
>
> (ii) an air rifle of .22 of an inch or larger calibre or an air pistol other than a toy pistol;
>
> (iii) an alarm pistol or revolver;
>
> (iv) a gas rifle or an air rifle of .177 of an inch or larger calibre;

(b) any barrel of an arm."

Subsection (2) of section 1 provides as follows:

"The Minister may from time to time by Notice in the Gazette amend paragraph (a) of the definition of 'arm' by including therein any instrument or class of instruments described in the notice, capable of being used for propelling any substance or article or by excluding from the said paragraph any instrument or class of instruments mentioned in such notice."

14. Appellants' counsel relied on the dicta in S v Shazi 1980(4) SA 494 (N) at 495 D and S v Hlongwa 1990(2) SACR 262 (N) at 263(h) where it was held that for a weapon to qualify as a firearm it had to be " ... capable of propelling missiles with sufficient velocity to render it adapted for use for offensive purposes". Whilst this definition is certainly useful it should be noted that the word firearm is not defined in the Act and includes, inter alia, a barrel of an arm which cannot, by any stretch of imagination, be 'capable of propelling missiles with sufficient velocity ... '. The definition in both cases referred to above must be understood in the context that in both cases the courts were dealing with home-made devices and not factory manufactured devices that conform to the definition enunciated in the Shazi case and not readily recognizable as a firearm of a specific category such as a pistol, revolver or rifle.

15. In both the Shazi and Hlongwa cases there was no evidence that the devices forming the subject matter of the appeals were 'capable of propelling missiles with sufficient velocity to render them adapted for use for offensive purposes'. In case the uncontested evidence is that the device was a pistol of specific calibre and make. In other words it was a specific recognisable pistol. There is no evidence that it was damaged in any way nor did it have

'damaged or missing parts' (S v Ntsamai 1945(1) PH H 85; S v Phalane 1973(4) SA 582 (T).

16.The appellants were both legally represented at the trial. In finding that the accused did not contest the evidence of the device being a pistol and the trial Magistrate did not, in my view, place any onus on the appellants. The accused, had they intended to challenge the evidence that the weapon was a Z88 nine millimetre pistol could have done so. By failing to challenge such evidence the State was entitled not to lead expert evidence that the pistol was in a working condition. As I understand the evidence referred to 'pistool' conveyed with it the ordinary grammatical meaning of the word pistol as defined in HAT Verklarende Handwoordeboek van die Afrikaanse Taal, vyfde uitgawe, as "handvuurwapen waarby die kamer 'n integrerende deel van die kort loop vorm en wat bedoel is om met een hand afgevuur te word",

17.The inquiry regarding the device found on the second appellant cannot be viewed in isolation. It must be considered against the backdrop that the complainant whilst pursued was fired at. This evidence was not disputed. Further, live ammunition was found in the firearm. These facts, taken cumulatively, lead to the irresistible conclusion that the device was a firearm as defined in the Act.

18.There is no merit in the argument that the complainant did not identify the appellants who pointed the firearm at him. The evidence is clear that the two appellants pursued him, that whilst pursuing him shots were fired, and a firearm was found in the possession of appellant no. 2. For shots to have been fired at the complainant means that the firearm was in a working condition.

19.Upon a full conspectus of all the evidence it is my considered view that there is only one point worthy of consideration and that is the appeal by appellant no. 1 that there was no evidence that he was in possession of a firearm. I agree with appellants' counsel that the Magistrate relied upon common purpose in convicting appellant no. 1 on the charges of unlawful possession of the firearm and ammunition. For the conviction against number 1 to stand the State was obliged to adduce evidence establishing that both appellants had the intention to exercise possession of the firearm though appellant no. 2 and further, that appellant no. 2 had the intention to hold the firearm on his behalf and on behalf of appellant no. 1 (5 v Nkosi 1998(1) SACR 284 (W) at 286 (h); 5 v Mbuli 2003(1) SACR 97 at 115 b - c). There is no such evidence.

20.The appeal by appellant no. 1 on the conviction for the unlawful possession of the firearm and ammunition accordingly succeeds. The appeal of appellant no. 2 fails.

21.I turn now to consider the appeal against sentence. It is a wellestablished principle that the imposition of a sentence is a matter pre-eminently for the trial court (5 v Rabie 1975(4) SA 855 (A)). It is only where the trial court has misdirected itself on the sentence that a court of appeal will interfere: that is now trite.

22.The factors advanced in support of the attack on the sentence are as follows: that the complainant did not suffer physical harm; that the appellants were 23 and 24 years of age, respectively; that the second appellant was a qualified artisan and consequently there were reasonable prospects that he could be rehabilitated; the vehicle that was the subject of the robbery was found. It was submitted that these factors despite the seriousness of the offences rendered imprisonment of nineteen (19) years on both counts

shockingly inappropriate justifying interference by this court. I found this argument startlingly shocking from counsel. Robbery, and armed robbery in particular has assumed alarming proportions. It occurs daily. Victims are injured seriously generally with firearms. Many lose their lives.

23. The robbery was a well-planned one. It was executed on the national road. There is no evidence that the complainant had been specifically targeted or was a random victim of the armed robbery. In either case the appellants and their companions executed the robbery with precision. Even the evasive action by the complainant was in vain. Having abandoned the vehicle he was driving he was pursued for some considerable distance and fired at. That he was not hit is not a factor to be taken in the appellants' favour.

24. The factors advanced on behalf of the appellants do not indicate any misdirection by the trial Magistrate. In my view they do not constitute substantial and compelling circumstances either (S v Malgas 2001(1) SACR 469 (SCA)). In my view there is no merit on the appeal against the sentence on the count of robbery.

25. With regard to the sentence on the contravention of sections 2 and 36 respectively, of Act 75 of 1969, the trial court was clearly aware of the cumulative effect of the sentence, hence the order that the sentence on the two counts be taken as one for purpose of sentence. There was in my view, no misdirection by the trial Magistrate.

26. It is my considered view that the appeal against sentence must fail.

27. The following order is accordingly made:

1. The conviction of both appellants on the charge of robbery with aggravating circumstances is confirmed;

2. The sentence of sixteen (16) years' imprisonment is confirmed;

3. The conviction and sentence of appellant no. 1 for the contravention of sections 2 and 36, respectively, of the Arms and Ammunitions Act 75 of 1969 are both set aside.

4. The conviction and sentence of appellant number 2 for the contravention of sections 2 and 36, respectively, of the Arms and Ammunitions Act 75 of 1969 are confirmed.

G WEBSTER JUDGE IN THE HIGH COURT

I agree.

C PRETORIUS JUDGE IN THE HIGH COURT