47/94

Case No 51/93

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

RICHARD MTSHEMLA	First Appellant
SAMUEL MOTLOUNG	Second Appellant
JACKSON TYANINI	Third Appellant

and

THE STATE	Respondent

CORAM: JOUBERT, KUMLEBEN, F H GROSSKOPF, HOWIE JJA et VAN COLLER AJA

HEARD: 22 March 1994

DELIVERED: 29 March 1994

J U D G M E N T

HOWIE, JA .....

HOWIE JA,

The three appellants were convicted in a regional court of contravening the Arms and Ammunition Act, No 75 of 1969 ("the Act"). It was held that they had been in illicit possession of an AK 47 rifle and 34 rounds of ammunition in conflict with s 32 (1)(a) and s 36 of the Act respectively. They were sentenced to terms of imprisonment. They appealed unsuccessfully to the Transvaal Provincial Division against their convictions but were granted leave by that Court to pursue the present appeal.

It was common cause at the trial that the appellants were the occupants of a motor car travelling along the N3 highway near Heidelberg on the afternoon of 26 October 1990; that when the car stopped some distance short of a Defence Force road-block second appellant threw a

bag containing the weapon and ammunition in question out of the left rear door on to the gravel shoulder of the roadway; that the car was then driven off; that it was stopped at the roadblock where the appellants were arrested and questioned; that the AK 47 was a weapon referred to in s 32 (1)(a) of the Act; and that the appellants were not in lawful possession of an arm capable of firing the ammunition.

In support of the appellants' plea of not guilty their attorney stated their defence as being that they were unaware, when the bag was ejected, that it contained the firearm and ammunition.

On the strength of the facts which were common cause the State relied at the trial on the presumption in s 40(1) of the Act. It reads thus:

> "Whenever in any prosecution for being in possession of any article contrary to the provisions of this Act, it is proved that such article has at any time been on or in any

> premises, including any building, dwelling, flat, room, office, shop, structure, vessel, aircraft or vehicle, or any part thereof, any person who at that time was on or in or in charge of or present at or occupying such premises, shall be presumed to have been in possession of that article at that time, until the contrary is proved."

The magistrate held that the State was entitled to rely on this presumption and that it placed an onus on each appellant to prove (in the context of the plea explanation) the essential fact that he was ignorant of what the bag contained. Only the first and second appellants testified. The magistrate found their evidence untruthful and therefore inadequate to discharge the onus upon them. It followed, he found, that their evidence certainly could not avail the third appellant, who had chosen not to testify. In consequence the conviction of each appellant was inevitable.

The Court a quo considered that the presumption had been correctly applied by the magistrate and upheld the

convictions.

In this Court counsel for the appellants submitted that s 40(1) had been misconstrued by the magistrate and the Court below and that it was not open to the State to rely on the presumption until it had first been shown beyond reasonable doubt that each appellant was throughout aware that the firearm and ammunition were in the car.

That submission is not tenable. In the first place, whether the words "have in possession" in s 32(1) of the Act, or the words "be in possession" in s 36, are to be construed as denoting **corpus** together with the intention to exercise control for one's own benefit, or are to be construed as "witting physical detention, custody or control" (see **S v Brick**, 1973(2) SA 571(A) at 580C) the alleged possessor of the illicit article in question "must at least be aware that he has the (object) concerned in his

physical control": **S v Adams** 1986(4) SA 882(A) at 891 F-G. As pointed out in the last-mentioned case at 891 H-I, this necessary mental element is not the same as that required in order to constitute **mens rea.**

In the second place, if an accused is required to disprove possession it must follow that he must negative that mental element; he must show that he was unaware that he had the illicit article under his physical control. That, of course, is the very defence raised here.

And that the appellants were indeed required to disprove possession is clear from this Court's decision in **S v Makunga and Others** 1977(1) SA 685(A). In that case the 8 accused men were found asleep in a hut in the course of a police raid. In searching the hut in the presence of the accused, the police found an FN rifle, 6 other firearms, a toy pistol and a variety of ammunition. The trial Court, whose decision is reported as **S v Mukunga and**

Others 1976(3) SA 193 (N), found that the FN rifle, and ammunition for it, had been in the possession of the sixth accused; that no single accused had possessed more than one firearm; and that they did not jointly possess all the ammunition. The guilt of the sixth accused having been determined, the remaining question concerned the liability of the other seven accused in respect of the other six firearms.

After referring to the wording of the presumption and stating that the **onus** it placed on an accused was open to discharge not only on his evidence but all the relevant evidence, this Court proceeded to state the following in the course of its judgment (see 698H-699B):

> "It was contended by **Mr Fuller** in argument before the Court **a quo** that accused nos. 1, 2, 3, 4, 5, 7 and 8 had established by a preponderance of probabilities that no one of them possessed the FN rifle or the ammunition for it. It was, furthermore, established that no one of them possessed more than one of the remaining articles found in the hut (i e, six firearms and a toy

pistol). It followed, so it was contended, that it was established that one of the seven accused was in possession of the toy pistol, and since that accused remained unidentified, none of the above-mentioned seven accused could be convicted. The contention was rejected by the Court **a quo**, and rightly so in my opinion. Counsel's contention would undoubtedly have been sound if the **onus** to prove possession of any one firearm by any particular accused rested on the State. In my opinion, however, the Court **a quo** adopted the correct approach in the light of the provisions of sec 40(1) of the Act, i e, there was an **onus** on each one of the seven accused to establish by a preponderance of probabilities that **he** was not in possession of any one of the six firearms found in the hut. In my opinion, no one of the accused succeeded in discharging that **onus**. The mere fact that on the evidence it was probable that one unidentified accused was in possession of the toy pistol is wholly insufficient to discharge the **onus** which rested on each one of the seven accused."

Accordingly, applying the law as stated in the **Adams** and **Makunga** cases, the onus was upon each appellant in the present case to establish on a balance of probabilities that he was not in possession of the rifle and ammunition and this entailed proving that he was

unaware of their presence in the bag.

Before assessing whether the appellants' **onus** was discharged, it remains, as far as the relevant law is concerned, to deal with the decision in **S v Tshabalala** 1988(4) SA 883 (W). Although this case was not relied upon by appellants' counsel in arguing the appeal, it was referred to in both counsel's heads of argument. It was also considered by the Court **a quo** which decided not to follow it.

The three accused in the **Tshabalala** case were charged under the Act in a magistrate's Court with the unlawful possession of a pistol. While they were travelling in a van the pistol was seen by a police patrol being thrown out of the passenger's window. Initially all the accused denied any knowledge of the pistol but at the trial two alleged having seen the other accused throwing an object out of the driver's window. The magistrate

relied on the presumption in convicting all the accused. The judgment of the Witwatersrand Local Division on appeal **(van der Walt J, Harms J concurring)** proceeded (at 885 E) as follows:

> "Ek het egter 'n probleem met die toepassing van die vermoede ten aansien van al drie insittendes van die bakkie. Die artikel meld nie 'elke' of 'enige' persoon nie, maar verwys slegs na 'n persoon'. In die strafreg kan 'besit' omskryf word as direkte fisiese besit of indirekte besit deur middel van 'n agent, met 'n meegaande bedoeling van die besitter om beheer oor die voorwerp uit te oefen (**S v Adams** 1986 (4) SA 882 (A) op 890G-891H).
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> Al wat die vermoede in art 40(1) doen is dat, waar daar geen getuienis teen 'n beskuldigde van direkte fisiese besit is nie, besit vermoed word indien die beskuldigde 'n persoon is soos waarna die artikel verwys. Met ander woorde, dit vergemaklik die Staat se bewyslas. Die besit wat daar vermoed word, is besit soos hierbo omskryf. Dit volg dus dat, sonder bewys van enigiets meer aan die kant van die Staat, slegs een persoon uit hoofde van die vermoede fisiese besit met die bedoeling om te beheer oor daardie artikel kan uitoefen. Waar daar meerdere persone is waarop die vermoede betrekking kan hê en minder artikels as die aantal persone of slegs een vuurwapen (soos in hierdie geval) moet die

Staat iets meer bewys om die vermoede teen meerdere persone te laat geld.

Wat die Staat dan verder moet beweer in die klagstaat en bewys, is feite waarvan 'n gemeenskaplike opset aan die kant van al die persone wat aangekla word, om die vuurwapen te besit of om dit te gebruik, gesamentlik te gebruik, afgelei kan word. Na my mening kan art 40 nie so vertolk word dat die vermoede van besit sonder meer teen meer as een persoon gelyktydig geld nie. Waar **S v Mukunga and Others** 1976(3) SA 193 (N) dui op so 'n vertolking, kan ek, met respek, nie daarmee saamstem nie. Die feite in daardie saak is egter aanduidend van 'n gemeenskaplike opset om wapens te besit vir gebruik in voortslepende stamgevegte in die gebied van Msinga, veral aangesien die beskuldigdes in daardie saak gelyktydig by die hut aangekom het, gaan slaap het en die vuurwapens in die hut rondgelê het of gestaan het toe hulle slapend daar aangetref was deur die polisie. In daardie omstandighede sou die vermoede van besit wel meerdere persone kan tref, want die feite word aangevul, soos ek aangedui het.

In hierdie appèl was geen sodanige getuienis nie. Slegs 'n vuurwapen wat by die linkerkantste venster van 'n bakkie uitgegooi is waarin daar drie persone was. Van die grootste belang is die feit dat die Staat uitdruklik dit gestel het in besonderhede verskaf, dat daar nie op 'n gemeenskaplike opset om te besit staatgemaak word

nie.

> Die vermoede kan derhalwe net geld teen een van die drie insittendes en die Staat kon nie daarin slaag om te bewys teen wie die vermoede moet geld nie. Na my mening is die saak nòg teen appellant nòg teen beskuldigdes nrs 2 of 3 bewys en behoort die appèl te slaag."

Quite obviously the attention of the Court in **Tshabalala's** case was not drawn to this Court's decision in **Makunga's** case or to the fact that the English text of the Act (the signed text) refers not to "a person" but to "any person".

Quite apart from the provisions of s 6(b) of the Interpretation Act, No 33 of 1957, in terms of which, unless the contrary intention appears, words in the singular include the plural, it is manifest that the above-quoted **dictum** of this Court in **Makunga's** case is decisive of the proposition that the presumption applies irrespective of the number of accused or the number of illicit articles in issue. One may add, briefly, that

there is nothing in the wording of s 40(1) of the Act, properly interpreted, which supports the construction set out in the **Tshabalala** judgment at 885 H-I. As pointed out in **S v Gxokwe and Another** 1992(1) SACR 267(C) at 273 i - 274 b (in which matter, incidentally, this Court's decision in **Makunga's** case was also not referred to) the interpretation adopted in **Tshabalala's** case necessarily involves the incorporation of words into the section which the legislature clearly did not intend, expressly or impliedly, to include. It also overlooks the fact that possession can be not merely direct or mediate but also joint.

For all these reasons **Tshabalala's** case was, in my respectful view, wrongly decided.

Turning to the evidence relative to the appellant's knowledge of what the bag contained, the officer in charge of the roadblock, Lt Goosen, testified as

follows in recounting an explanation which he said appellants proffered during questioning after their arrest:

> "Hulle het vir ons gesê dat hulle die vuurwapen by hulle gehad het en hulle was op pad na Heidelberg polisiestasie om dit in te handig en toe hulle die padblokkade gewaar het hulle hom uitgegooi omdat hulle bang was dat hulle dalk afgekeer sou word."

Under cross-examination it was put to Goosen that appellants were not fluent in Afrikaans and would deny giving that explanation. He said that they were fluent and that this was indeed what they had said. He then added:

> "Ek kan net aan u noem, aan die hof noem dat hulle ook gesê het dat hulle die vuurwapen opgetel het. Dat hulle die sak langs die pad gewaar het en die vuurwapen opgetel het en toe op pad was om hom in te handig."

Referred to the fact that in his initial account of appellants' alleged explanation he omitted saying that they claimed to have picked up the weapon, Goosen acknowledged his omission but maintained that this was

indeed what the appellants had said. It was then put to him that the appellants would also deny having offerred this further information.

The only other State witness was a rifleman named Muller who had been posted in a position some kilometres ahead of the roadblock as a member of what was referred to as a stopper-group. The function of this group, so one infers, was to watch out for precisely the sort of incident that occurred when the progress of the car in question was interrupted so that the bag could be ejected.

Muller said that after the car had driven off he went to the bag. He parted the sides of its opening with the barrel of his service rifle and then saw the AK 47 and the ammunition inside. One of his colleagues then reported the find by radio to Goosen's personnel, thus leading to the car's subsequently being diverted and stopped when it reached the roadblock. In cross-

examination it was put to Muller that the bag had been locked but he denied that.

From the defence evidence it transpired that the first and third appellants were trade union officials and that second appellant was a shop steward in the employ of a company that had shortly before dismissed a number of workers. A meeting was held in Johannesburg on the day in question to discuss the dismissal. All the appellants attended. At that meeting a committee was elected to deal with the problems of the dismissed workers. Because most of the latter lived in Ratanda township at Heidelberg, that was where the appellants - who were either involved with, or members of, the elected committee - were bound on the occasion referred to by the State witnesses. For the purposes of their journey the car in which they were travelling had been lent to them by its owner, Johannes Mashiloane.

Focusing specifically on the first appellant's evidence, he said in chief that as he emerged from the meeting a man named Bongani told him that there was a bag inside the car which contained his (Bongani's) axe. He asked the first appellant to look after it for him. It was when the roadblock was spotted that first appellant (who was in the front passenger's seat) recalled Bongani's request and, not wishing to court any trouble should they be stopped at the roadblock, he asked second appellant to throw the bag out. He said that he only learnt that there was an AK 47 in it after he had been arrested. He maintained that it was not true that they had told Goosen that they were taking the weapon to the Heidelberg police station. He said they were not asked whose firearm it was or who the owner of the car was.

Asked under cross-examination what arrangement Bongani had made to retrieve the axe, the first appellant

said nothing was discussed; he merely assumed that because both Bongani and the second appellant lived in a place named Zonke, the car, and thus the axe, would be taken there by the second appellant. The first appellant said he did not check that the bag was in the car or where it was in the car. Nor did he tell the other appellants about it; he forgot all about the axe, until he saw the roadblock. Not even second appellant remarked on the bag's presence as far as he could recall and it is appropriate to mention in this connection that it emerged during the second appellant's evidence that the bag was approximately 700 millimetres in length and took up virtually the entire left rear foot well. As a result, and because it was a small car, the second appellant sat in the centre of the rear seat both before and after they dropped a third passenger at Vosloorus.

Asked why he wanted so urgently to get rid of the

axe, the first appellant said he did not want the axe to be found because they could have been arrested for possessing it. Faced with the suggestion that they could simply have said that it belonged to Bongani and they were looking after it for him, he altered his stance and said that the real reason was that they were in a hurry to get to the meeting at Heidelberg and to have to explain all about the axe at the roadblock would make them late. His third version, a short while later, was that they could not give any explanation at all because they were assaulted.

Referred to Goosen's evidence, the first appellant said he could not remember that Goosen spoke to him or that he even saw Goosen. Asked why the assault accusation had not been put to Goosen, the first appellant said that his attorney was aware of the assault aspect because the appellants had instructed him to lay a charge against those responsible for the assault. Questioned

further on this subject by the magistrate, the first appellant said that the assault occurred just after they were asked where the firearm came from and before they could give any answer. In fact, so he said, they were not given any chance to answer; instead, they were told what to say.

The second appellant's evidence was that he was given the car keys by Mashiloane after the meeting in Johannesburg. He chose not to drive, however, because he did not have his public driving permit with him. He therefore unlocked the car and got into the rear seat. He was already there when the other appellants got in. He saw the bag but did not touch it or comment on it. Asked why he sat in the centre of the rear seat he said he was able in that position to speak to the third appellant who was driving. When the first appellant told him later to jettison the bag he did so without question. Only

thereafter did he hear mention that the bag contained an axe.

When the prosecutor enquired why he did not tell their interrogators at the roadblock the simple story that he had been told by the first appellant to eject the bag, he said he was not asked that. When the same question was put to him by the magistrate, he said he did in fact give that explanation. Asked why he did not move the bag to make more room for himself when he entered the car, he replied that although it was in his way he was able to sit comfortably enough.

The aforegoing survey of the relevant evidence clearly demonstrates the self-evident inherent improbabilities in the defence case. If the appellants were indeed requested to look after the bag there is no reason to think that Bongani was unaware of the contents or their obvious significance and value. That he should have

made absolutely no arrangement as to when and where he would recover the gun and ammunition is extraordinary. For all he knew, the appellants might have looked inside the bag, realised the implications and have taken fright, roadblock or no roadblock. In that event they could have disposed of the bag either in the manner they eventually did or by throwing it into the veld where it might have been found only much later, if ever.

In the second place, if the first appellant did think the bag contained just an axe, there was really no convincing reason why he would have wanted to get rid of it. That he in fact had no reason is obvious from his prevarications.

As to the allegation that they were asked about the origin of the firearm but not afforded any chance to reply, this is plainly absurd.

That the second appellant made no comment or

enquiry regarding the bag which must have been in his way to an inconvenient extent, is also far-fetched. So, too, is his omission to ask any questions about the reason for the bag's disposal.

As if these features were not enough in themselves effectively to prevent the discharge of the appellants' onus, their alleged ignorance as to the contents of the bag was countered primarily by evidence of Goosen, that they knew it was a firearm, but also the evidence of Muller, who said the bag was readily capable of being opened and inspected.

No sensible explanation suggests itself why Goosen would have fabricated a fundamentally exculpatory explanation for their possession. If he was intent upon advancing the prosecution's cause a more incriminating account would have been more likely. And there is nothing to show that when he came to testify he knew what the

defence was, thus, laying the foundation for the possible suggestion that he contrived an account that would destroy it.

Having considered all the evidence it may justifiably be said that the magistrate was entitled to reject the defence evidence as false beyond reasonable doubt. But it is unnecessary to go so far. It suffices to say that the evidence of the first and second appellants was markedly improbable both inherently and by comparison with the State evidence. And, one notes again, the third appellant did not testify. The onus upon all the appellants was therefore not discharged and it follows that they were correctly convicted.

The appeal is consequently dismissed.

C T HOWIE, JA

Joubert, JA)
Kumleben, JA)
F H Grosskopf, JA) Concur
Van Coller, AJA)