THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No:
592/10

In the matter between:

JOHANNES KWANDA
Appellant

and

THE STATE
Respondent

Neutral citation: *Kwanda v State* (592/10) [2011] ZASCA 50 (30 March 2011)

Coram: STREICHER, BOSIELO and THERON JJA

Heard: **15 March 2011**
Delivered: **30 March 2011**

Summary: Arms and ammunition ─ Unlawful possession of firearms and ammunition in contravention of s 32 of Arms and Ammunition Act 75 of 1969 ─

Joint possession ─ The state must establish facts from which it can be inferred that the group had intention (*animus*) to exercise possession of firearms through actual detentor and actual detentor had the intention to hold on behalf of the group.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Els and Mojapelo JJ sitting as court of first instance):

The conviction of the appellant on the charges of contravening ss 32(1)(a) and 32(1)(e) of the Arms and Ammunition Act 75 of 1969, and the sentences imposed in respect thereof, are set aside.

JUDGMENT

THERON JA (STREICHER and BOSIELO JJA concurring)

[1] The appellant was one of several accused who stood trial in the Regional Court, Springs, on various charges related to conspiracy to commit armed robbery at the Springs branch of ABSA bank (the bank). The appellant was convicted of conspiracy to commit armed robbery and various contraventions of the Arms and Ammunition Act 75 of 1969 (unlawful possession of firearms and ammunition) and sentenced to an effective term of imprisonment of 35 years. On appeal, the High Court (the then Transvaal Provincial Division) (Els and Mojapelo JJ), confirmed the convictions in respect of three of the counts: conspiracy and contravening ss 32(1)(a) and 32(1)(e) of the Act (unlawful possession of a firearm and ammunition) and set aside the remaining convictions.

The appeal court also reduced the effective term of imprisonment to 25 years. The appellant appeals against his conviction of unlawful possession of a firearm and ammunition, with the leave of this court.

[2] It is therefore not necessary to deal with the facts relating to the conviction on the count of conspiracy save in so far as they are relevant to a determination of this appeal. The evidence showed that members of the South African Police Service had received information about a planned robbery at the bank. On 15 April 2000, before the robbery could be carried out, the appellant and his co-accused were arrested.

[3] Immediately prior to his arrest, the appellant had been the driver of a white Nissan Maxima vehicle. Two passengers, Isaac Zikalala (accused 10 in the trial court) and Sipho Mahlenche, were with the appellant in the vehicle. Mahlenche was seated next to the appellant in the front passenger seat. It was common cause that Mahlenche was in possession of an AK47, the subject matter of this appeal. There was some dispute as to whether the appellant was aware of the firearm in Mahlenche's possession. Mahlenche absconded during the course of the trial. It was further common cause that the appellant at no stage had physical possession of the firearm and its ammunition.

[4] The only question on appeal is whether the state had established that the appellant possessed the firearm jointly with Mahlenche. In this regard the state must prove that the appellant had the necessary mental intention (*animus*) to possess the firearm. I accept, for the purpose of this judgment, that the appellant conspired with his co-accused to rob the bank.

[5] The fact that the appellant conspired with his co-accused to commit

robbery, and even assuming that he was aware that some of his co-accused possessed firearms for the purpose of committing the robbery, does not lead to the inference that he possessed such firearms jointly with his co-accused. In *S v Nkosi*,[1] Marais J said that such an inference is only justified where 'the state has established facts from which it can properly be inferred by a Court that: (a) the group had the intention (a*nimus*) 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'.[2] Nugent JA, in *S v Mbuli*,[3] referred to the above quoted passage from *Nkosi* and commented that Marais J had 'set out the correct legal position'.[4] In *Mbuli*, the appellant and his two co-accused were charged with and convicted of being in possession of a hand grenade that had been found in their vehicle shortly after they had robbed a bank (this is the only charge of relevance to this matter). Nugent JA found that the evidence did not establish that the appellant and his co-accused had possessed the hand grenade jointly and that it was possible that the hand grenade had been possessed by only one of them. Nugent JA concluded with these words:

'I do not agree that the only reasonable inference from the evidence is that the accused possessed the hand grenade jointly. It is equally possible that, like the pistols, the hand grenade was possessed by only one of the accused. Mere knowledge by the others that he was in possession of a hand grenade, and even acquiescence by them in its use for fulfilling their common purpose to commit robbery, is not sufficient to make them joint possessors for purposes of the Act. The evidence does not establish which of the accused was in possession of the hand grenade and on that charge, in my view, they were entitled to be acquitted.'[5]

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1 1998 (1) SACR 284 (W).
2 At 286g-i.
3 2003 (1) SACR 97 (SCA).
4 Para 71.
5 Para 72.

[6] Adopting the reasoning in *Nkosi* and *Mbuli*, and even if the appellant was aware that Mahlenche was in possession of the firearm, such knowledge is not sufficient to establish that he had the intention to jointly possess the firearm with Mahlenche. In this matter there are no facts from which it can be inferred that the appellant had the necessary intention to exercise possession of the firearm through Mahlenche or that the latter had the intention to hold the firearm on behalf of the appellant.

[7] The conviction of the appellant on the charges of contravening ss 32(1)(a) and 32(1)(e) of the Act and the sentences imposed in respect thereof, are set aside.

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L Theron
Judge of Appeal

APPEARANCES

APPELLANT:	F van As Instructed by Pretoria Justice Centre, Pretoria; Bloemfontein Justice Centre, Bloemfontein.
RESPONDENT:	(Ms) P Vorster Instructed by the Director of Public Prosecutions, Pretoria; The Director of Public Prosecutions, Bloemfontein.