

**THE SUPREME COURT OF APPEAL  
OF SOUTH AFRICA**

Case No: 202/95

In the matter between

**HOLLY NDUKUZAKHE MVELASE**

**Appellant**

and

**THE STATE**

**Respondent**

**CORAM:** SMALBERGER, NIENABER *et* MARAIS

**DATE HEARD:** 19 May 1998

**DELIVERED:** 19 May 1998

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**JUDGMENT**

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**MARAIS JA**

MARAIS JA

The appellant was convicted in a Regional Court of possession of an AK 47 rifle (count 1) and 29 live rounds of AK 47 ammunition (count 2). He was sentenced to an effective 6 years imprisonment. With the leave of the court *a quo* which dismissed his appeal against both the convictions and the sentences, he appeals to this court.

The facts relating to the incident which gave rise to the charges against the appellant appear from the judgment of the trial court and the court *a quo*. The issue is essentially one of credibility. Two policemen, Sgt Johnston and Const Luthuli, testified on behalf of the State. There were a number of discrepancies in their respective versions of the events. The trial magistrate accepted the evidence of Johnston where they differed. The only reasonable inference to be drawn from Johnston's evidence is that the appellant possessed

the AK 47 and ammunition at the time of the incident.

The appellant denied such possession. He gave a version of the events that lacks plausibility. He even went so far as to deny that any AK 47 was found at the time of the incident. It is conceded that his denial in this regard is false. This must inevitably detract from his credibility.

In the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong (*S v Hadebe and Others* 1997(2) SACR 641 (SCA) at 645 e - f). I am unpersuaded that the magistrate misdirected himself in any material respect in his assessment of the evidence, or that his factual findings were clearly wrong.

The magistrate was alive to the discrepancies in the evidence presented by the State and gave them due consideration. He had the advantage of seeing and hearing the witnesses and the appellant testify. The appellant was plainly

not telling the truth in important respects as to what happened, as was conceded by his attorney at the trial and by his counsel both in the court *a quo* and in this court. However, the contention was that he might foolishly have lied in certain respects in the belief that he could cast greater doubt on the State's case by doing so, but that his denial that he was in possession of the AK 47 rifle and the ammunition might reasonably be true.

It was implicit in the appellant's case that Sgt Johnston had decided to frame him and that, as luck would have it, he happened to have in the police vehicle an AK 47 weapon which could be used for the purpose. The magistrate pointed out that if Johnston was prepared to commit perjury to obtain a conviction against the appellant, it is most unlikely that he would have contented himself with merely giving the circumstantial evidence which he did. He would have claimed that he saw the appellant holding the gun. That is fair comment and deprives the suggestion that Johnston sought to fabricate evidence

to ensnare the appellant of any plausibility. Counsel sought to develop the hypothesis by referring to the failure to find fingerprints on the weapon; to Johnston's evidence that he removed the magazine before the fingerprint expert arrived; and to the fact that Johnston had shot and killed one of the other occupants of the car, that the other had fled, and that the appellant was the only person left who was available to be charged. It was also stressed that Johnston was a single witness in respect of critical aspects of his testimony and that the exercise of special caution in evaluating his evidence was necessary. Both courts were aware that Johnston was a single witness in certain respects and it has not been shown that there was any want of caution in evaluating his evidence.

The other submissions to which I referred a moment ago were also made in the court *a quo*. They were duly considered and rejected for good and sufficient reason and no useful purpose would be served by restating them.

Counsel for the appellant felt constrained to concede that it was inherently improbable that the AK 47 rifle was "planted" by the police, and that, as he put it, one was driven to accept that it had been in the vehicle the appellant was driving. However, that gave rise, so he argued, to the possibility that it was in the possession of one or other of the other two occupants of the vehicle. That is sheer speculation and not in accord with the evidence of either Johnston or the appellant. It provides no justification for rejecting the direct evidence of Johnston that he found no weapons in the car. In my view, no adequate grounds have been advanced for disturbing the magistrate's assessment of the evidence and the appeal against the convictions must fail.

I turn to the question of the sentences. The sentence imposed in respect of count 1 was 5 years imprisonment and in respect of count 2, 2 years imprisonment of which 1 year was ordered to run concurrently with the sentence imposed in respect of count 1. That resulted in an effective sentence of 6 years

imprisonment.

The offences committed were undoubtedly serious - see *S v Sibisi* 1998(1) SA 248 (SLA) at 251 f - i. The appellant did not give any explanation for his possession of the AK 47 and ammunition which could serve to mitigate the offences. That was a grave omission and it disabled the court from finding that mitigating circumstances in that respect existed. The appellant's personal circumstances were to his credit. He was 42 years of age at the time, had no previous convictions, and was on the face of it a respectable citizen. The fact remains that the unexplained unlawful possession of this type of weapon which has been involved in so much of the carnage which has been experienced in SA, and in Natal in particular, is a most serious offence and requires to be met with firm punishment. The magistrate has not been shown to have misdirected himself in deciding not to suspend any portion of the minimum sentence of 5 years imprisonment prescribed by the relevant legislation for a conviction of

unlawfully possessing a weapon such as this. The sentence of 5 years is undoubtedly severe, but not unreasonably so. No grounds exist for interfering with it.

The sentence imposed in respect of the second count is another matter. It was conceded by counsel for the State that it has almost invariably been the practice of the courts to order such sentences in their totality to run concurrently with the sentence imposed for unlawful possession of the firearm to which the ammunition relates in circumstances in which an accused is found in possession of both firearm and ammunition simultaneously. It was also conceded that there is no good reason why it should not have been done in this case. The practice is obviously based upon the reasonable premise that the offences are so intertwined that it would be artificial and productive of unfairness to deal with them in any other way.

The court *a quo* was under the erroneous impression that that had been

