

IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

High Court Ref No: 1174/05
Magistrate's Serial No: 108/2005
Special Review Case No: CH2025/05

22 February 2006

Magistrate
KEMPTON PARK

THE STATE v CHABANGU, CAIPHUS

REVIEW JUDGMENT

MBHA, J:

[1] The accused appeared before the Tembisa Magistrate Court on a charge of contravening section 3 of the Firearms Control Act, 60 of 2000 read with section 250 of the Criminal Procedure Act, 61 of 1977. He was legally represented during his trial.

[2] On 7 September 2005 he pleaded guilty to the charge and a statement in terms of section 112(2) of Act 51 of 1977 was tendered into court on his

behalf.

[3] The accused was sentenced to a fine of R5 000,00 (Five Thousand Rand) or 10 (ten) months' direct imprisonment which was wholly suspended for a period of 5 (five) years on condition that he was not convicted of contravening the Firearms Control Act during the period of suspension.

[4] This matter was referred for review in terms of section 304(4) of Act 51 of 1977.

[5] It is clear from the memorandum dated 13 October 2005 which was submitted by the Senior Magistrate Mr J W Marais that the guilty plea tendered by the accused in terms of section 112 of Act 51 of 1977 raises a serious question that a "*not guilty*" plea should have been recorded.

[6] Section 112(2) of Act 51 of 1977 makes it clear that an accused person can be convicted on the strength of a written statement and sentenced by the court if the court is satisfied that accused is guilty of the offence to which he has pleaded. The court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.

[7] A guilty plea in terms of section 112(2) of Act 51 of 1977 is a formal admission of all the elements of the crime and there should be no issue

between him and the State. The guilty plea must also contain a factual basis surrounding the crime committed. See in this regard *S v Mkhize* 1978 (1) SA 264 (N); *S v Nyambe* 1978 (1) SA 311 (NC) at 312; *S v Lebokeng and Another* 1978 (2) SA 674 (OFS) at 676A and *S v Nixon* 2000 (2) SACR 79 (W) at 86.

[8] The guilty plea should never contain a ground of justification even if phrased in an exculpatory manner. See in this regard *S v W and Another* 1994 (2) SACR 777 (N) at 780H-J.

[9] If this happens, a not guilty plea should be entered and the trial should commence in terms of section 113 of Act 51 of 1977.

[10] In *S v Potwane* 1983 (1) SA 868 (AD) the accused took a firearm from the deceased and handed it to the police. He was convicted of unlawful possession of a firearm. The Court of Appeal accepted that such possession is unlawful but held that it was reasonably possible that the accused did not know that his possession was unlawful in the circumstances and that he did not have the necessary *mens rea*.

[11] In this case the accused admitted in his statement in terms of section 112(2) of Act 51 of 1977 that he was in possession of a firearm. However, he states that he had recovered the said firearm from an unknown black male

who had pointed it at him during a robbery at his hair salon. The accused makes it clear in his guilty plea that he had the intention of handing the firearm to the police on the following day and that he never had the intention of possessing the firearm permanently. He states that he was unfortunately arrested by the police before he had the opportunity to go to the police station.

[12] The State did not rebut these facts and the magistrate did not clarify the factual basis of the accused's statement. The accused's statement distinctly provides a ground of justification for the possession of the firearm.

[13] As a result the contents of the accused's guilty plea do not amount to an unequivocal admission of all the elements of the crime. His ground of justification negates the purpose of the guilty plea.

[14] I am of the view that the magistrate should have questioned the accused or should have entered a "*not guilty*" plea and proceeded with the trial. I accordingly make the following order:

1. The conviction and sentence are hereby set aside.
2. The accused's trial should start *de novo* before another magistrate.

**B H MBHA
JUDGE OF THE HIGH COURT**

I agree:

**D S S MOSHIDI
JUDGE OF THE HIGH COURT**