


REPUBLIC OF SOUTH AFRICA



IN THE GAUTENG HIGH COURT
LOCAL DIVISION, JOHANNESBURG

CASE NO: A552/2013

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED
4 JUNE 2014	 FHD VAN OOSTEN

In the matter between

THAMSANQA ZUMANI

MOLEKO VILAKAZI

MDUSE TSHEPO MATHE

FIRST APPELLANT

SECOND APPELLANT

THIRD APPELLANT

and

THE STATE

RESPONDENT

J U D G M E N T

VAN OOSTEN J:

[1] In this appeal the joint possession of firearms by four occupants of a vehicle is at issue. The appellants were arraigned for trial in the Roodepoort regional court as accused 1, 4 and 3 respectively. Accused 2 absconded during delivery of judgment and after a separation of trials in terms of s 159 (3) of the CPA was ordered the trial proceeded against the three appellants. They were charged with and convicted on two charges of unlawful possession of firearms and two charges of unlawful possession of ammunition, in contravention of ss 3 and 4(f)(iv) and s 90, read with

other sections of the Firearms Control Act, 60 of 2000 (the FCA) as well as s 250 of Act 51 of 1977 (the CPA). Appellants 1 and 2 were sentenced to an effective term of 5 years' imprisonment and appellant 3 to an effective term of 10 years' imprisonment. The appeal is directed against conviction and sentence and is with leave of the trial court.

[2] A brief summary of the facts from which the charges arose, is the following. For the sake of ease of reference I will retain the appellation of the appellants and accused 2 as in the trial court. It is common cause that the four accused were the occupants of a BMW vehicle (the BMW), of which accused 1 was the driver, in Weltevreden Park, Roodepoort, at midday on the day of the incident. Accused 2 was seated behind the driver, accused 3 next to the driver, and accused 4 in the left rear passenger seat. They were all known to one another. The evidence for the State is that the BMW was observed by police officers who were on patrol duty in that area. The BMW was without a rear number plate and the occupants were acting suspiciously 'in looking to their back' which prompted the police to investigate. On their approach to the BMW and having activated the blue lights and siren of the patrol vehicle, the BMW sped off with the patrol vehicle in hot pursuit. Along the way two firearms were thrown out of the BMW: one from through the left front window (where accused 3 was sitting) and the other through the left rear window (where accused 4 was sitting). Neither of the two police witnesses who testified was able to say by which of the occupants the firearms were thrown out of the BMW. A short distance after that the BMW was forced to come to a standstill as the road ended at the boom gate entrance to a residential security complex. The two firearms were retrieved by the police and the accused were arrested. They were searched but nothing was found on them. A pair of hand gloves was found in the BMW but no relevance could be attached to it. The two firearms and the ammunition contained in the respective magazines were submitted for forensic analysis and ballistic testing and the results obtained recorded in a statement by the ballistic expert in an affidavit in terms of s 212 of the CPA, who also testified at the trial. Except that the firearms were identified as a 7,65 mm calibre Beretta semi-automatic pistol and a .38 special calibre Astra model 680 revolver and that they functioned normally, the remainder of the results obtained are for present purposes and in the view I take of this matter, not relevant.

[3] The defence version, in essence, was a denial of all the allegations concerning any knowledge or handling or being in possession of the firearms. An innocent explanation was proffered by all the accused for their presence in the BMW as well as the reason for them being in that area. Their version was found not to be reasonably possibly true and therefore rejected as false by the trial court. The finding cannot be faulted. It remains however, to consider whether the State has succeeded in proving joint possession of the two firearms and ammunition by the four occupants of the BMW, which I now turn to deal with.

[4] The principles applicable to joint ownership have authoritatively been dealt with, laid down and explained in a trilogy of cases: the *ratio* in *S v Nkosi* 1998 (1) SACR 284 (W) was approved in *S v Mbuli* 2003 (1) SACR 97 (SCA) and thereafter explained and summarised by Joffe J, in *S v Motsema* 2012 (2) SACR 96 (GSJ) para [29], as follows:

'I therefore conclude that, on the basis of *S v Nkosi* and *S v Mbuli*, the law may now be stated as follows:

1. There is no rule of law to the effect that, when an armed robbery is committed by two or more persons with a common purpose to commit the armed robbery, joint possession of the weapons used in the robbery is to be inferred.
2. Joint possession of the weapons can only be inferred if the facts proved leave no room for any reasonable inference other than that:
 - a) each participant in the common purpose to rob, who had physical control of a weapon, intended not merely to use it, but also to possess it, both for himself and also on behalf of one or more other participants; and
 - b) each alleged joint possessor, who did not himself have physical control of a weapon, intended that one or more of the weapons should not merely be used, but should also be possessed by another participant on his behalf.'

[5] Before applying these principles to the facts of the present matter, is necessary to consider the presumption created in s 117(2) of the FCA, the relevant portions of which read as follows:

'(2) Whenever a person is charged in terms of this Act with an offence of which the possession of a firearm or ammunition is an element, *and the State can show that despite the taking of reasonable steps it was not able with reasonable certainty to link the possession of the firearm or ammunition to any other person*, the following circumstances

will, in the absence of evidence to the contrary which raises reasonable doubt, be sufficient evidence of possession by that person of the firearm or ammunition where it is proved that the firearm or ammunition was found—

....

(d) in or on a vehicle and the person was, at the time—

(i) the driver of the vehicle;

...or

(vii) over the age of 16 years and present on the vehicle;

...

[emphasis added]

(see also *S v Kwanda* 2013 (1) SACR 137 (SCA); *Slinger v The State* (233/13) [2013] ZASCA 197 (2 December 2013))

[6] The State relied on the presumption and the court *a quo* found that it applied to all the accused. Before us counsel for the appellants contended that the condition relating to all reasonable steps having been taken to link the accused to the possession of the firearms, has not been met in the absence of evidence that the firearms had been submitted for examination for the presence of fingerprints. I agree. A logical and necessary step in the investigation of this case would have included examination for possible fingerprints. It is neither necessary nor appropriate to speculate as to what the possible outcome of such a procedure would have been. Fact of the matter is that this was not done and it accordingly cannot be said that the State has taken sufficient steps necessary to fulfill the condition in order for the presumption to apply. It follows that the court *a quo* wrongly applied the presumption.

[7] This, finally, brings me to the question whether the State, not being aided by the presumption, has proved joint possession of the firearms by the occupants of the BMW. In my view, at best for the State, the accepted evidence shows that the occupants of the BMW were all aware of the presence of the firearms in the vehicle. That however, is not sufficient to find that the occupants possessed the firearms jointly. Mere knowledge of the presence of the firearms, as rightly conceded by counsel for the State, is not sufficient to establish joint possession (*Mbuli* para [72]; *Kwanda* para [6]). The evidence, as I have alluded to, does not establish which of

the occupants was in possession of the firearms. The requirement of holding on behalf of or through another cannot be inferred from the evidence as a whole and has accordingly not been proved. It follows that the appellants should have been acquitted by the court *a quo*.

[8] In the result the following order is made:

The appeal is upheld and the convictions and sentences imposed in respect of all the appellants are set aside.



FMD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.



Z BUTHELEZI
ACTING JUDGE OF THE HIGH COURT

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DATE OF HEARING
DATE OF JUDGMENT

27 MAY 2014
4 JUNE 2014