IN THE HIGH COURT OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE No. A452/09

REPORTABLE

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED.	
.....	.....
DATE	SIGNATURE

In the appeal between:

EMMANUEL MUKWEVHO Appellant

and

THE STATE

JUDGMENT

WILLIS J:

[1] The appellant appeals against conviction, but not sentence, with the leave of the court *a quo*. Obviously, if the appeal against conviction succeeds, the sentence falls away. The appellant was arraigned before the Regional Court in Soweto. He was charged with one count of unlawful possession of a firearm and a further count of unlawful possession of ammunition. Count one (the count of unlawful possession of a firearm) reads as follows:

POSSESSION OF A FIREARM

> That the accused is guilty of the offence of contravening the provisions of Section 3 read with Sections 1, 103, 117, 120(1) (a), Section 121 read with Schedule 4 and Section 151 of the Firearms Control Act, No. 60 of 2000, and further read with Section 250 of the Criminal Procedure Act, No. 51 of 1977- Possession of a firearm (read with Section 51 of the Criminal Law Amendment Act, No. 105 of 1997)
>
> In that on or about 07/04/2008 and at or near Kempton Park in the Regional Division of Gauteng, the accused did

unlawfully have in his possession of the following firearm, to wit **9mm Parabellum Calibre Norinco Model 201 C Semi-automatic** without holding a licence, permit or authorization issued in terms of the Act to possess that firearm.

Count two (the count of unlawful possession of ammunition) reads as follows:

POSSESSION OF AMMUNITION

That the accused is guilty of the offence of contravening the provisions of Section 90 read with Sections 1, 103, 117, 120(1) (a), Section 121 read with Schedule 4 and Section 151 of the Firearms Control Act, No.60 of 2000, and further read with Section 250 of the Criminal Procedure Act, No. 51 of 19977- Possession of ammunition (read with Section 51 of the Criminal Law Amendment Act, No. 105 of 1997)

In that on or about 07/04/2008 and at or near Kempton Park in the Regional Division of Gauteng, the accused did unlawfully have in his ammunition (*sic* - i.e. the word "possession" was omitted) to wit **4 (9mm) cartridges** without being the holder of

(a) a licence in respect of a firearm capable of discharging that ammunition;
(b) permit to possess ammunition;
(c) a dealer's licence, manufacturer's licence, gunsmith's licence, import, export or in-transit permit or transporter's permit issued in terms of this Act;
(d) or is otherwise authorized to do so.

The appellant, who had the benefit of an advocate representing him, pleaded not guilty in respect of both counts. The appellant's counsel advised in respect of the plea explanation given at the beginning of the

trial that the appellant "will exercise his constitutional right to remain silent". The appellant was convicted on both counts on 5 January 2009. In terms of section 51 (2) (a) (i) of the Criminal Law Amendment Act, No 105 of 1997, read with part II of Schedule 2 thereof, a first offender (as the appellant indeed was) who is convicted of possession of a semi-automatic firearm is liable to be sentenced to a minimum of 15 years' imprisonment, unless, in terms of section 51(3) thereof the court is satisfied that "substantial and compelling circumstances exist which justify the imposition of a lesser sentence". On the same day as conviction, the learned magistrate imposed a sentence of 15 years' imprisonment in respect of count one and five years in respect of count two. He ordered the sentences to run concurrently. The effective sentence is therefore 15 years. It may be appropriate to mention at this stage that the appellant gave no evidence whatsoever in respect of either conviction or sentence. His counsel applied for a discharge in terms of section 174 of the Criminal Procedure Act, No. 51 of 1977, as amended. This application was dismissed. The appellant was 24 years of age at the time.

[2] Constable Tshabalala testified that, acting on information, he and Sergeant Mujapiwe, who were on patrol at the time, went to the home of the accused in Kempton Park on 7 April 2008. The appellant was sleeping at the time. He was searched by Tshabalala and a firearm was found between his body and his trousers. There was no holster. Tshabalala asked the appellant if he had a licence to posses this firearm but the appellant failed to produce any such licence. In the firearm were four rounds of ammunition. Having confiscated the firearm and arrested the appellant, Constable Tshabalala put the firearm and ammunition in a sealed plastic bag and booked it in the "SAP 13" (the register of items seized by the police during investigations). The "SAP 13" number of the entry was 307/08. The forensic bag's number was written in his diary or "pocket book". He says this number was not recorded elsewhere (this appears to mean

that the forensic bag number was not recorded in the SAP 13). The docket has no record of the seal number of the forensic bag. The serial number of the firearm was recorded by him in the "SAP 14" and his diary. Neither the "SAP 14" nor the diary was not produced in evidence. No evidence was led as what either the "SAP 13" or "SAP 14" are or were. The "SAP 13" is common knowledge to this court at least and, in any event, one can infer what it is from the evidence. Constable Tshabalala describes the firearm as a "**L**orinco" whereas the charge sheet refers to a "**N**orinco". The difference may not be a mere error of spelling or pronunciation. As far as I have been able to ascertain, a Lorinco is a different type of firearm from a Norinco. This difference, as will appear more fully later on, may not be unimportant.

[3] Sergeant Mujapiwe confirmed the evidence of Constable Tshabalala. Constable Majela confirmed that a 9mm Lorinco pistol with cartridges had been booked in the "SAP 13" under number 307/08. These were in a sealed forensic bag. The sealed forensic bag had number FSE340218. Constable Majela refreshed his memory from his statement. The serial number of the firearm was recorded as 49108772. According to Majela, this serial number was written in the "SAP 13". He took the sealed bag to the forensics laboratory and there he handed it over. Majela says that the seal number of the forensic bag was recorded in the "SAP 13" (this is contrary to the evidence of Tshabalala).

[4] The report of the forensic ballistics expert Cindy Maria Silva Bekarees was handed in terms of section 212 of the Criminal Procedure Act. She confirms that she opened this sealed bag, that it contained a firearm having this serial number as well as the cartridges. She described the firearm as a "9 mm Parabellum Calibre Lorinco 201 C semi-automatic pistol". The State then closed its case. As has been recorded above, the appellant then unsuccessfully

applied for a discharge. Thereafter, he closed his case without leading any evidence.

[5] In section 1 of the Firearms Control Act, No.60 of 2000, "semi-automatic" is defined as meaning "self-loading but not capable of discharging more than one shot with a single depression of the trigger". No evidence was led in this regard. The appellant was at the risk of receiving a severe minimum sentence if convicted as charged. In *S v Nziyane*[1] Botha J, with Du Plessis J concurring, held, when referring to the provisions of section 51 of the Criminal Law Amendment Act, No. 105 of 1997, insofar as they relate to the minimum sentence for possession of an unlicensed semi-automatic firearm, that:

> Die woorde dra na my mening die betekenis oor die feite wat aanwesig moet wees om die minimum vonnis verpligtend te maak by skulgigbevinding moet vassstaan in die sin dat dit inbegrepe moet wees in die feite waarop die skuldigbevinding gegrond is.

In other words, in order to attract the prescribed minimum sentence, all the necessary elements must be proven at the stage of conviction, including the fact that the weapon in question was a semi-automatic one. In this case, questions arise not only whether the appellant was in unlicensed possession of a firearm and ammunition but also whether the firearm was the one described in the charge and whether it was a semi-automatic one. There is also the question of *mens rea* to which I shall refer separately at a later stage.

[6] The sealed bag is indeed linked to the "SAP 13" number 307/08, the entry made by Constable Tshabalala. None of the following were, however, tendered as evidence: the diary, the record of the "SAP 13" entries or the "SAP 14". There was no explanation for the absence. Not even copies thereof were produced to the court *a quo*. The content of

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[1] [2000] 2 All SA 391 (T) at 394j-3295a

these documents was directly in issue. In the absence of an acceptable explanation for the unavailability of the original document, no evidence is ordinarily admissible to prove the contents thereof except the original document itself.[2] This is the so-called "best evidence" rule. This rule has not escaped criticism as a relic from the Dark Ages, before the advent of photocopying machines.[3] Nevertheless, in my opinion, in the absence of a suitable explanation these documents should have been produced in order for the defence to cross-examine to test the veracity and accuracy of the information allegedly recorded therein, more especially as there are differences between Tshabalala and Majela's evidence of what was recorded in those documents.

[7] Furthermore, the learned magistrate disallowed the defence counsel's request that Tshabalala's allegedly inconsistent previous statement be handed in as an exhibit. He also disallowed the handing in of Constable Majela's statement. In my opinion, the learned magistrate erred in both respects. Then there is the issue that the charge alleges the firearm was a "Norinco" but the evidence was that it was a "Lorinco" – and these may indeed be different kinds of firearm.

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[2] See, for example *R v Pelunsky* 1914 AD 360; *Ex parte Roche* 1947 (3) SA 678 (D); *R v Hodge* 1949 (2) SA 323 (E); *R v Halem* 1949 (3) SA 274 (T); *R v Van Der Merwe* 1952 (1) SA 143 (SWA); *R v Zungu* 1953 (4) SA 660 (N) at 661-2; *Mabena v Brakpan Municipality* 1956 (1) SA 179 (T); *R v Pierce* 1956 (1) SA 183 (T); *R v Nhlanhla* 1960 (3) SA 568 (T); *R v Gemeenskapsontwikkelingsraad v Williams & Others* (1) 1977 (2) SA 692 (C) at 698A; *S v Omega Bearing Works (Edms) Bpk* 1977 (3) SA 978 (O); *S v Miles* 1978 (3) SA 407 (N); *Standard Merchant Bank v Rowe* 1982 (4) SA 186 (T); *Standard Merchant Bank v Creser* 1982 (4) SA 671 (W) at 674B; *Singh v Govender Brothers Construction* 1986 (3) SA 613 (N); *S v Ngesi* 1986 (2) SA 244 (E) at 246D-E; D. T. Zeffert, A. P. Paizes, and A. St. Q. Skeen, *The South African Law of Evidence*, LexisNexis: Durban, 2003, 357-9.

[3] See, for example, *Welz and Another v Hall and Others* 1996 (4) SA 1073 (C) at 1079C-D.

[8] A few observations in regard to whether the firearm in question was a "Norinco" or a "Lorinco" may be apposite. The State is bound by the charge and a variance between what is alleged and what is proven can result in the setting aside of the conviction[4]. The critical test is one of *prejudice*. In *R v Bruins*[5] Tindall JA said:

> Under the circumstances it seems to me that in a case like the present, where, though the *nomen criminis* is the same, the particulars of the offence of which the accused has been convicted are entirely different from those alleged in the charge, the accused has been prejudiced.

During the course of this term, Farber AJ and I had to consider an appeal in a case which involved the robbery, with aggravating circumstances, of a motor vehicle. We were confronted with a situation in which the description of the motor vehicle in which the suspects were apprehended was materially different from that alleged in the charge sheet. The complainant's evidence correlated with the information in the charge sheet. The police evidence did not. There was no identification of the suspects at the scene of the crime at the time when the crime was committed. We felt obliged to intervene to acquit. I accept that there is a qualitative difference between a misdescription of a firearm in respect of which an accused person is alleged to have been in unlawful possession and a motor vehicle. I accept that one cannot be comfortable with a conclusion that a "Lorinco" is "entirely different from" a "Norinco". Nevertheless, one cannot escape a sense of disquiet about confirming a conviction and a 15 year prison sentence for unlawful possession of a firearm in circumstances where the evidence as to the make of that firearm is inconsistent with that alleged in the charge sheet.

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[4] See *R v Bruins* 1944 A.D 131 at 135 and *S v Mandela and Another* 1974 (4) SA 878 (A) at 882E.

[5] 1944 A.D. 131 at 135

[9] The record shows that the learned magistrate was often impatient with counsel for both the State and the accused. Counsel for the State was inexperienced. We all have our bad days. All judicial officers have to work in stressful conditions. The police and prosecutors also work under trying conditions. Nevertheless, however exasperated we may be in regard to the rampant levels of crime in our society, we must remember that in terms of the Constitution (section 35 (3)), every accused person has a right to a fair trial. We cannot too easily allow society's justifiable demands to "put criminals behind bars" to compromise reasonable standards of police work, prosecutions and judicial proceedings, more especially when compliance with such standards need not be onerous. We cannot put persons in gaol without requiring a high standard of the necessary evidence. Put differently, there has to have been sufficient *quantum* of proof before it can be found that an accused person committed the crime in question – proof beyond a reasonable doubt. One's sense of unease is acute when there is the prospect of lengthy periods of imprisonment, such as fifteen years in this case. In view of the fact that counsel for the defence, from the earliest opportunity, made it clear that the chain of evidence was being contested, it is my opinion that, in all the circumstances, the conviction cannot stand. It was not in accordance with justice. It must, in fairness to the learned magistrate, be recorded that, when he considered the application for leave to appeal, he appeared much more relaxed and appears readily to have conceded that he may have erred. I should also record that, in my opinion, the learned magistrate was correct in refusing leave to appeal on the question of sentence: if the conviction stands, so does the sentence.

[10] The compulsory minimum sentence of 15 years shows just how serious this case is. This compulsory minimum sentence underlines the point that there must be certainty that the firearm in question was indeed a semi-automatic one, never mind a firearm. Not only was the

appellant denied a fair opportunity to test these aspects but the chain of evidence linking the search of the appellant to the report of the ballistics expert appears to have been deficient.

[11] In case I have been overly pedantic in regard to the procedural aspects and the chain of evidence to prove the possession of the actual firearm alleged in the charge sheet, I shall now deal with the question of whether, even if one accepts that the firearm in question was indeed found on the person of the appellant, he had the necessary *mens rea*. The general principle is that *actus non facit reum nisi mens sit rea.* In the context of our criminal law, this Latin expression entails that, ordinarily, an accused person cannot be convicted of a crime unless he or she had a blameworthy state of mind. This principle was affirmed in *S v Qumbella*[6], *S v Oberholzer*[7] and *S v De Blom*[8]. The *De Blom* case, with which every student of criminal law will be familiar, has been followed in cases too innumerable to mention. This blameworthy state of mind may take the form of *dolus* (generally understood to mean "intention") or *culpa* (generally understood to mean "negligence").[9] There appears to have been no reported case directly in point relating to possession of semi-automatic firearms in terms of section 3 of the Firearms Control Act, No. 60 of 2000. In *S v Tshwape and Another* [10] which was quoted with approval in *De Blom*,[11] Corbett J, as he then was, said as follows:

> Without attempting to formulate a proper definition of *mens rea*, it seems to me that conduct which falls within the terms of a statutory offence, will only escape the taint of criminality on the ground of absence of *men rea*, where it appears that

[6] 1966 (4) SA 356 (A)

[7] 1971 (4) SA 602 (A)

[8] 1977 (3) SA 513 (A) at 529A

[9] *De Blom* at 529A

[10] 1964 (4) SA 327 (C) at 330A

[11] at 529F-G

> the person concerned through ignorance or mistake was at that time unaware of some fact or circumstance which either by itself or in conjunction with other facts and circumstances rendered such conduct an offence.

Although Botha and Du Plessis JJ were not, in the *Nziyane* case, dealing pertinently with the question of *mens rea*, it seems to me that the fact that the firearm in question was a "semi-automatic" one (and, by definition, "self-loading but not capable of discharging more than one shot with a single depression of the trigger") is not merely part of the narrative or description of facts in the charge sheet: it constitutes an essential element of the alleged offence. Guided by the *Nziyane* case, by which I am in any event bound, I come to this conclusion that the semi-automatic feature of the firearm is an essential element of the alleged offence precisely by reason of the fact that it is the possession of this very type of firearm that brings a severe minimum sentence into operation. Moreover, it is not good enough to prove that an accused person possessed a firearm which so happens to be a semi-automatic one. With the *Tshwape* and *De Blom* cases as my guide, it seems to me that it must be proven, at least by necessary inference, that the accused person must have known (*dolus*) or ought to have been aware of the relevant facts (*culpa*) which give rise to that prescribed minimum sentence for such possession – and assumed the risks that attached thereto. Ordinarily, when it comes to possession of a firearm, it will be a matter of ready inference that a person found in actual physical possession thereof either must have known or ought to have known that it was a firearm. When it comes to possession of a *semi-automatic* firearm, that inference is not quite so easily drawn. Nevertheless, the issue of whether such an inference may be drawn should not, generally, be unduly problematic for the prosecution. Ordinarily, the inference can readily be drawn that a person proven to have discharged a semi-automatic firearm either knew or ought to have known that it was "self-loading but not capable

of discharging more than one shot with a single depression of the trigger". Furthermore, cross – examination of an accused person should assist in determining how credible the denial by the accused person of the absence of either *dolus* or *culpa* in regard to its semi-automatic quality may be. In the present case before us, even if it accepted that it has been proven that he was in possession of a firearm, there is nothing to justify the necessary inference that the appellant must have been aware or ought to have been aware of the fact that it was a semi-automatic.

[12] The question then arises: even if the appellant cannot be convicted of possession of a semi-automatic firearm, may he nevertheless be convicted on a competent verdict in respect of such a charge (assuming, for purposes of this discussion, that it is accepted that his possession of a firearm has been satisfactorily proven)? Section 270 of the Criminal Procedure Act provides as follows:

> If the evidence on a charge for any offence not referred to in the preceding sections of this Chapter does not prove the commission of the offence so charged but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved.

In *S v Mwali*[12] the Supreme Court of Appeal ("the SCA") had to deal with the question of a competent verdict of a contravention under section 36 of the General Law Amendment Act, No. 62 of 1955 (the failure to give a satisfactory account of possession of goods in respect of which there exists a reasonable suspicion that they had been stolen) where the accused had been charged with the theft of a motor vehicle but had neither been charged in the alternative with such an alternative verdict nor it had brought to his attention that there was a

[12] 1992 (2) SACR 281 (A) at 283j-284d

risk of such a conviction in terms of section 264 (1) (c) of the Criminal Procedure Act. Nicholas AJA, delivering the unanimous judgment of the court, said: "Even though neither course be followed, however, the accused would not be entitled to succeed in an appeal against or review of the conviction unless it appeared that he was prejudiced by the failure". The court then referred to various cases in which this principle had been affirmed elsewhere.[13] Justifying the court's view that there had been no prejudice, Nicholas AJA went on to say:

> It does not seem that, if he had been charged under s 36, or if he had been told that he stood in jeopardy of a conviction under that section, his conduct of his case would have been any different or that he could have had any other line of defence.

In *S v Jasat*[14] the SCA reaffirmed the principle of prejudice being decisive and, as had occurred in *Mwali*, that, in determining whether there had been any prejudice by either the State or the court failing pertinently to draw attention to the possibility of a competent verdict, the court would consider whether the defence may have been conducted differently.[15] The SCA observed that the accused had been represented by senior and junior counsel and said:

> It is difficult to conceive, even as after having heard argument, how the appellant would have conducted his defence differently, by means of cross-examination or the tendering of evidence, if the charge had been formulated along the lines on which the appellant was ultimately convicted.

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[13] *R v Dayi and Others* 1961 (3) SA 8 (N) at 9E-G; *S v Mogandi* 1961 (4) SA 112 (T) at 114A; *S v Arendse en 'n Ander* 1980 (1) SA 610 (C) at 613A-B; and *S v Human* 1990 (1) SACR 334 (C) at 336-8

[14] 1997 (1) SACR 489 (SCA)

[15] At 493h-494a

In *Jasat* the accused had been charged with housebreaking with intent to steal and theft but was convicted of housebreaking with intent to trespass and trespass in terms of section 262 (1) of the Criminal Procedure Act. The SCA also observed that:

> Any qualified lawyer would know that a main charge comprehends every verdict which is a competent one on such a charge, and that in preparing his defence an accused should be alive to the eventuality of such a conviction.

Of course, the fact that an accused person enjoyed the benefit of legal representation will normally defeat a complaint that the question of competent verdicts was neither explored nor explained to him. That now seems to be settled law. On the other hand, I do not think it can be elevated to an absolute principle or that the SCA intended this to be the case. It is too well known that, in the end, each case must be decided on its own merits. It remains desirable, as was said in *R v Dayi*,[16] that, where the State contemplates asking for a competent verdict in the alternative to a count, the State should do so in the charge sheet, even though the failure to so will not necessarily vitiate such a competent verdict. In the present case, the prosecutor, the appellant's counsel and the court *a quo* all seemed to have understood that this was an "all-or-nothing" case. The defence was conducted accordingly. The Firearms Control Act is relatively new legislation: it came into operation only on 1 July, 2004. The law reports are replete with examples of how the courts have grappled with applying the minimum sentence legislation contained in the Criminal Law Amendment Act, on the one hand, and acting in accordance with justice, on the other. It is not difficult to imagine that, notwithstanding the fact that the appellant enjoyed the benefit of legal representation, he may have be conducted his defence differently and indeed may not have relied upon his constitutional right to remain silent (section 35(3)(h) of the Constitution) if he had been made aware of the precise nature of any alternative verdict which the State may have sought and that, by conducting a different line of defence, he may have avoided a compulsory minimum sentence of 15 years' imprisonment. In my opinion, it will be desirable, especially where the State seeks a conviction on a charge of possession of a particular type or *genus* of firearm as

[16] 1961 (3) SA 8 (N) at 9E; referred to with approval in *S v Mwali* (*supra*) at 284c

a "stand-alone" count (i.e. not with other more serious counts such as murder, rape or robbery where such a firearm is used as an instrument of such offence), to set out in the charge sheet itself such alternative and competent verdicts which it may seek.

[13] Accordingly, for reasons that are both varied and mixed, I am of the opinion that the conviction cannot stand. The following is the order of this court:

(a) The appeal is upheld;

(b) The following verdict is substituted for that of the court *a quo*:

"The accused is acquitted on both counts".

DATED AT JOHANNESBURG THIS 7th DAY OF DECEMBER, 2009

N.P. WILLIS

JUDGE OF THE HIGH COURT

I agree.

G. FARBER
ACTING JUDGE OF THE HIGH COURT

Counsel for the Appellant: Adv. *M. B. Mulaudzi*

Counsel for the State: *R. Molokoane*

Date of hearing: 07 December 2009

Date of judgment: 07 December 2009