



**IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)**

CASE NO: A225/2013

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHERS JUDGES: **NO**
- (3) REVISED

23/0/2013
DATE


SIGNATURE

In the matter:

NGIDI, PHUMALEL WAKHE SOFA

APPELLANT

Versus

THE STATE

RESPONDENT

JUDGMENT

THOBANE AJ:

- [1] The appellant was arraigned in the Boksburg Regional Court on two counts.
Possession of a Firearm, read with the provisions of Section 51 of Act 105 of 1997

and Possession of Ammunition.

- [2] The appellant was legally represented throughout the trial proceedings.
- [3] The appellant pleaded not guilty to both counts but was found guilty on the first count and acquitted on the second one.
- [4] The appellant was sentenced to 15 years imprisonment and was in terms of section 103(4) of Act 60 of 2000, declared unfit to possess a firearm.
- [5] The Court *aquo* refused the appellant leave to appeal both conviction and sentenced.
- [6] Having petitioned this Court, leave was granted to appeal against both conviction and sentence on the 1st April 2010.

AD CONVICTION

- [7] The issues that are common cause are as follows
 - 1. That the appellant was near Lincoln Scrap Yard on the 13th August 2008,
 - 2. That a firearm was found,
 - 3. That the firearm was a semi-automatic pistol,
 - 4. The ballistic report in terms of section 212(4)(a) and 8(a) of the Criminal Procedures Act.
 - 5. The SAP 13 register,
 - 6. The 212 ballistic report.

[8] The crisp issue in dispute is whether the appellant was in possession of a firearm on the day.

[9] The state bore the onus of proving its case beyond a reasonable doubt as is required by law. To do so, the state called three witnesses. The appellant testified in his own defence.

THE EVIDENCE

[10] Mr. Michael Mabe Mohlape, a security guard (response officer), testified that he received a message through radio control that there were suspicious looking people next to the scrap yard. He drove there and on arrival saw a lot of people gathering. He also saw two people talking. He approached them but on seeing him they walked away taking different directions. He followed the one wearing blue overalls who appeared to be concealing something. This person walked downhill and on reaching the base of the hill he tried to climb up, while holding to the ground with one hand. It is then that he noticed that he had a firearm. He then pointed him with his firearm and ordered him to throw away the firearm he had. He called for help and handcuffed that person. He then stood guard at the scene until the police came and arrested the appellant.

[11] Serele Moloi testified that he is a police officer and that on the day in question they were doing patrols when they received a complaint via radio control. They attended the scene and on arrival were told by Mr Mohlape that two people stormed out of a Mazda vehicle, ran away, tripped each other and one of them fell. The one that fell was said to have been in possession of a firearm. This person was already handcuffed on their arrival. Enquiries were made as to the origins of the firearm but there was no answer provided, save that said firearm had been touched by many people. The firearm was taken to the police station and the appellant was arrested.

- [12] Zandile Somana testified that he is a security official. On the day in question he saw two suspicious looking motor vehicles and he then phoned radio control to report those vehicles. Further that he informed the attending security officer, Mr Mohlape, about the two motor vehicles. He later saw that the appellant was handcuffed. Then the police came and the appellant was taken away.
- [13] The appellant testified that he went to the Scrap Yard to sell some scrap metal. He entered the premises and a transaction took place. He was given a slip indicating that R1500-00 was due to him. He was informed to go and wait outside with others. He did so. He went to buy food and was on his way to buying cold drink when he was approached by a security vehicle which had two officers. He had a firearm pointed at him. They enquired about a firearm found somewhere and they there and then started assaulting him. He was taken back to the Scrap Shop and placed near the gate, while handcuffed. He was then taken to the police station. He denied knowledge of any firearm.
- [14] The parties addressed Court as to the merits of the case and were unanimous in their belief that the evidence before Court was that of a single witness and therefore was subject to the necessary caution. The appellant was convicted on count 1 but acquitted on count 2.
- [15] The onus to prove the guilt of the accused always rested on the state. There was no duty on the accused to prove his innocence.

S v V 2000 (1) SACR 423 SCA

S v Shackell 2001 (4) SA (1) SCA

[16] The Court was confronted with evidence of a single witness. *"A Court should approach the evidence of a single witness with caution and should not easily convict upon such evidence unless it is substantially satisfactory in all material respects or unless it is corroborated."* Leon J, **S v Ganie 1967 (4) SA 203 (N)**.

[17] The magistrate correctly found that he ought to approach the evidence with caution in view of the fact that it was evidence of a single witness.

[18] The question therefore is whether the evidence led in the court *aquo* is:

18.1 Substantially satisfactory in all material respects, or

18.2 Is corroborated.

S v Ganie 1967 (4) SA 203 (N)

S v Mocke 2008 (2) SACR 674 (SCA)

S v Sauls and Others 1981 (3) SA 172 (A)

[19] I propose to analyse the evidence tendered in an endeavour to determine whether it does meet the requirements set out above. I further propose to deal with the issue of corroboration first.

[20] Mr Mohlape is the only person who testified that he saw the appellant having the firearm in his possession. His evidence evolved from the time he arrived at the scene up until the time he is said to have seen the firearm. On arrival at the scene he saw nothing that led him to suspect that the appellant had a firearm. However on following him he testified that he saw that; *"in front of his stomach there was an unusual shape and form like he was concealing something..."*. Later he testified that when the appellant was trying to climb up, and put his hand in front of his stomach, *"I then realized at that moment that this person is in possession of a firearm"*.

[21] Undoubtedly, the sighting of the firearm in the possession of the appellant is without corroboration. Mr Moloi came to the scene and on arrival saw the firearm about “*a meter or two*” from where the appellant lay handcuffed. Mr Somana did not see the firearm at all.

[22] On the whole therefore and based on the above, I can not find that the evidence of the single witness, the complainant, was corroborated as to the possession of the firearm.

[23] The Court should not view this evidence in isolation. **S v Meyden 1999 (2) SA 79 (WLD)**. Nugent J, stated as follows:

“A court does not base its conclusion, whether it be to convict or acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence”.

[24] Which leads me to the second consideration as to whether the evidence of the single witness is substantially satisfactory in all material respects. The exercise requires the consideration of all evidence and not only the evidence of the complainant.

[25] There were numerous contradictions for the court *aquo* to contend with. I will list them and their origins.

25.1 Mr Mohlape testified that when he was contacted by radio control, he was told about two suspicious looking people. Mr Somana however testified that he reported to radio control about two suspicious looking motor vehicles. The version of Somana is corroborated by Mohlape’s statement to the police.

25.2 Mohlape testified that when he approached the two people who were around or outside the scrap yard, they walked away, taking different directions. Moloi testified that he was informed by Mohlape that the two people had stormed out of the

Mazda and ran to the direction of the railway line.

25.3 Mohlape's testimony as to how the appellant came to be on the ground, differed with the information he conveyed to Moloi. He told Moloi that the two persons he had followed, while running away, tripped each other and one of them (appellant), fell down.

25.4 Mohlape testified in court that he followed the appellant who when trying to climb up an uphill, revealed a firearm tucked in front of him. In the police statement he indicated that he saw him touch the front of his trouser and he presumed that he was going for his firearm.

25.5 Mohlape testified that he was alone when he cornered the appellant. This version differs with his written statement in that he said therein that he was with George. This version, contained in his statement, corroborates the version of the appellant who testified that he was chased by two security guards.

25.6 Mohlape testified in Court that he is the one who handcuffed the appellant. In his statement he indicated that it is George who handcuffed the appellant. The latter version corroborated the appellant.

25.7 In Court Mohlape testified that he pointed the appellant with his firearm and instructed him to pull out whatever he had in front of his trouser. In his police statement he indicated that he instructed the appellant to lie down and that any movement he will be shot at.

25.8 In his testimony in Court Mohlape indicated that he instructed the appellant to throw away the firearm whereas in his police statement he indicated that the appellant simply threw away the firearm without being told to do so.

There are other minor contradictions which may appear to be immaterial when viewed alone. Cumulatively viewed however they are material to the main issues.

[26] The finding by the magistrate that Mohlape made a good impression on the Court, viewed against the contradictions in his evidence in Court as well as his statement to the police was misplaced. Especially because Mohlape admitted that there were

contradictions. The magistrate himself admitted there were contradictions but excused them by saying Mohlape made a mistake.

[27] The magistrate was critical of the evidence of Moloi. He indicated that his evidence was not satisfactory. The magistrate however in summarizing the entire evidence nit picks parts of his evidence and says it corroborates the evidence of Mohlape.

[28] In my view, it can not be said that the evidence of the complainant, being a single witness, was satisfactory in all material respects. Nor can it be said that it was corroborated.

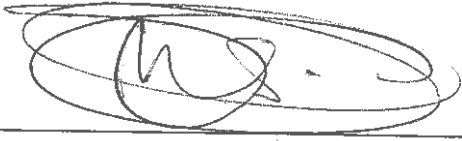
[29] The evidence of the appellant is reconcilable with the facts, therefore could be reasonably possibly true. To the extent that there is doubt in the evidence of the state, the appellant must be given the benefit of such doubt.

[30] I do not plan to deal with the appeal against sentence due to the order I plan to make below.

[31] I can not find that the guilt of the appellant has been proved beyond a reasonable doubt.

[32] In the premise I make the following order:

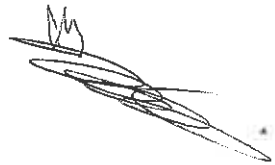
1. The appeal is upheld,
2. The appellant's conviction and sentence is set aside.



SA THOBANE

Acting Judge of the High Court

I AGREE.



B MASHILE

JUDGE OF THE HIGH COURT

Date of hearing: 15/10/2013

Date of judgment: 23/10/2013

Counsel for Appellant: Adv. K Cosyn

Counsel for Respondent: Adv. G Baartman.