IN SOUTH GAUTENG HIGH COURT

JOHANNESBURG CASE NO: A350

DATE: 28/02/2013

In the matter of the appeal of:

BONGANI SEHOOLE Appellant

and

THE STATE

J U D G M E N T

WILLIS J:

[1] The appellant appeals against conviction and sentence with the leave of the court *a quo*. The appellant was arraigned in the Regional Court Kempton Park on one count of contravening Section 3 of the Firearms Control Act, No.

60 of 2000, that is unlawful possession of a firearm and one count of contravening section 90 of the same Act, unlawful possession of ammunition. The appellant was convicted and sentenced to 10 years imprisonment on the first count and 5 years imprisonment on the second count. It was ordered that the sentences run concurrently.

[2] By reason of the ultimate conclusion that the court will reach it is unnecessary to analyse the evidence in any great detail, save to indicate that the appellant was apprehended by the police in what would may be described as a “roadblock”. There were other persons in the vehicle. The vehicle was searched. The evidence of a single policeman is that the appellant had the firearm in his possession, behind his back. The appellant’s version is that the firearm was in the vehicle and that he was in the vehicle with other persons, some of whom ran away. That is common cause.

[3] A policeman did testify that he had searched the vehicle and had not found the firearm in the vehicle. Counsel for the State has submitted that this is some corroboration but the fact of the matter is that there is a single witness relating to the possession of the firearm.

[4] Insofar as the possession of ammunition is concerned the classic “regspunt” has been taken, *viz*. how do we know that it is ammunition? There is not a chain linking the finding of the ammunition with a ballistic report to confirm that it was in fact ammunition.

[5] Mr *Meiring*, who appears for the appellant has, however, raised an ingenious point: the firearm in question had the serial number filed off it buut the appellant was charged in terms of Section 3 of the Firearms Control Act which provides as follows:-

> "**General prohibitions in respect of firearms and muzzle loading firearms** -
>
> 1. No person may poses a firearm unless he or she holds for that firearm -
>
> (a) a licence permit or authorisation issued in term of this Act; or
>
> (b) a licence, permit authorisation or registration certificate contemplated in item 1,2, 3, 4, 4A or 5 of Schedule 1."

Mr *Meiring* has submitted that the appellant was incorrectly charged and that he should have been charged in terms of Section 4(1)(f)(iv) which reads as follows:

> "The following firearms and devices are prohibited firearms and may no be possessed or licenced in terms of this Act, except as provided for in section 17, 18(5), 19 and 20(1)(b):
>
> …
>
> (f) any firearm -
>
> ...(iv) the serial number or any other identifying mark of which has been changed or removed without the permission of the Registrar."

[6] Clearly possession of a firearm, the serial number of which has been filed

off, is a different offence from possession of a firearm in respect of which one does not have a licence. Ms *Coetzee*, counsel for the State, valiantly submitted that the purpose of Section 4(1)(f)(iv) is to prevent the holder of a licenced firearm from filing off the serial number for use for some other purposes. I certainly agree that this must be one of the evils that this section has designed to prevent, but it cannot alter the fact that a different offence exists with regard to possession of a firearm with the serial number filed off from possession of a firearm which is unlicensed.

[7] The elements of the offence in terms of Section 4(1)(f)(iv) are not subsumed under the elements of Section 3 (1) and therefore one does not deal with the situation where the elements of the one offence constitute a crime in terms of the other. and that therefore a competent verdict is possible in terms of section 270 of the Criminal Procedure Act, No. 51 of 1977, as amended.

[8] What should have happened is that the appellant should have been charged in the alternative with possession of a firearm without a serial number. This may seem a somewhat “regs-tegniese punt”, but the fact of the matter is that we, in South Africa, have a duty to maintain proper correct standards with regard to prosecution. If we allow this kind of sloppiness to creep in who knows where it might end, especially where one is dealing with fairly technical statutory contravention.

[9] Be that as it may, I do not think that there will be any serious miscarriage

of justice. The facts alone leave one with a certain degree of discomfort about the accuracy or the correctness of their confliction. It is unnecessary to express a final view on that. It seems to me that the appellant must succeed in any event as a question of law.

[10] Accordingly, I propose the following be the order of the court:

(i) The appeal against conviction and sentence is upheld;

(ii) The following substituted for the order of the court *a quo*:

10 "The accused is acquitted."

(iii) The appellant is to be released from custody immediately.

MPHAHLELE AJ: I agree.

WILLIS J: It is so ordered.