IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: A742/2013

Date: 15 May 2014

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

15/5/2014 Pretoria
DATE SIGNATURE

In the matter between:

MAXWELL MAHLANGU Appellant

And

THE STATE Respondent

JUDGMENT

PRETORIUS J,

[1] This is an appeal against conviction of the appellant by the Benoni Regional Court on contravention of Section 3 of Act 60 of 2000, unlawful possession of two (2) semi-automatic firearms (pistols); contravention of Section 90 of act 60 of 2000, unlawful possession of

ammunition (total of 21 x 9mm calibre rounds). A further appeal is against sentence. The appellant was sentenced as follows by the court a quo: count 1: 15 years imprisonment, count 2: 15 years imprisonment, count 6: 15 years imprisonment, count 8: 15 years imprisonment, count 9: 5 years imprisonment.

[2] The court ordered that the sentences on counts 1, 2 and 6 be served concurrently and that the sentences on counts 8 and 9 be served concurrently, which resulted in an effective sentence of 30 years.

[3] The court a quo refused leave to appeal against conviction and sentence. Leave to appeal was granted on petition to the High Court in respect of the convictions on counts 8 and 9 and leave to appeal was granted against sentence.

[4] The appellant, who was accused 1 in the court a quo, and five other perpetrators robbed the residence of Mrs Krynakides and robbed her two employees as well at the same time and place. The only person identified as having a firearm during the robbery, was accused 2. The six perpetrators then walked away from the scene of the robbery. They were all, according to the witnesses, dressed in two piece overalls.

[5] Members of the security company arrived, which caused the perpetrators to flee, running in different directions and divesting

themselves of their overall jackets. Mr Vermeulen, a member of the security company, saw the appellant throwing his jacket over the wall of a house. He subsequently found some of the stolen jewellery in the pockets of the appellant's discarded jacket. The appellant was apprehended by the members of the security company. Mr Vermeulen recovered a CZ75 pistol in the vicinity of the appellant's jacket. Accused 2 was apprehended by the police in an outside toilet on the same premises where the appellant was apprehended. A firearm was recovered from the toilet where accused 2 had been found.

[6] The appellant was convicted on the robbery charges, as well as the charges of possession of firearms and ammunition.

[7] The magistrate only made mention in his judgment in respect of the firearm as follows:

> *"And when they recovered the jacket later, they found that there was some jewellery, and there was a firearm next to it. And also a lot of cash which were captured in the pictures, which money was just lying around. And also two cellphones were lying there where there was a firearm and cash."*

[8] He did not draw any conclusions in respect of where the fire-arm was found. He did not deal, in his judgment, with the ammunition that was found. He only convicted the appellant as charged on this count.

[9] There is only circumstantial evidence regarding the possession of the CZ75 pistol. The court has to agree that it is not the only inference that can be drawn that the appellant was in possession of the firearm due to the place where it was found. Accused 2 could have dropped it there as well. There is a contradiction in the evidence of the state regarding the ballistic report. The CZ75 pistol was placed and sealed in a forensic evidence bag with seal number FSC1217771, whilst the ballistic report dealt with sealed evidence bag with number FSE269466. No explanation was given for this vital discrepancy. There was no evidence presented where the ammunition had been found and the court a quo erred in convicting the appellant on count 9.

[10] The evidence in regards to where Constable Meso photographed two jackets and two firearms where the appellant had been apprehended could take the matter no further. Mr Mepbure, a security officer, testified that he observed two jackets lying inside the premises where appellant was apprehended. Warrant Officer Meintjies seized the CZ75 pistol and placed it in an evidence bag and sealed it with seal number FSC1217771. His evidence was that the firearm was found at a distance of 20 meters from the jacket on the premises where the appellant was found.

[11] It is common cause in the present case, that there were at least six perpetrators and that the appellant had not been seen with a

firearm during the robberies. Two jackets were found at the premises where the appellant and accused 2 were apprehended. Nobody saw the appellant throwing the firearm over the wall or onto the ground. The firearm was found approximately 20 metre from the appellant's jacket.

[12] The state did not prove that the weapon the appellant was allegedly in possession of, was a firearm as defined in Act 60 of 2000. The numbers of the seal on the forensic evidence bag and the ballistic report do not accord, which nullifies the evidence of the ballistic report.

[13] In **R v Sibanda and Others 1965 (4) SA 241 RA** at p 246 Beadle CJ held:

> *"Where, however, there is a particularly vital fact which in itself determines the guilt of an accused, it must be proved beyond reasonable doubt. Suppose, for example, the vital fact in determining the intent to kill in a murder case is whether or not the accused used a knife in killing the deceased. If the evidence merely showed that it was 'probable' he used a knife, it could not be held against him in determining his guilt that he 'had' used a knife, because, unless there was proof 'beyond reasonable doubt' that a knife was used, the accused's guilt could not be said to have been proved 'beyond reasonable doubt'."* (Court's emphasis)

[14] In **S v Nango 1990 (2) SACR 450 (A)** Smalberger JA found at p 457 a – b:

> *"Die appellant se opset moet afgelei word van die bewese feite en omstandighede met inagneming van die logiese voorskrifte rakende omstandigheidsbewys soos geformuleer in R v Blom1939 AD 188 op 202-3."*

[15] In **S v Mbuli 2003 (1) SACR 97 (SCA)** Nugent JA held at paragraph 72:

> *"I do not agree that the only reasonable inference from the evidence is that the accused possessed the hand grenade jointly. It is equally possible that, like the pistols, the hand grenade was possessed by only one of the accused.* ***Mere knowledge by the others that he was in possession of a hand grenade, and even acquiescence by them in its use for fulfilling their common purpose to commit robbery, is not sufficient to make them joint possessors for purposes of the Act.***" (Court's emphasis)

[16] In **S v Kwanda 2013 (1) SACR 137 (SCA)** Theron JA found at paragraph 6:

> *"[6] Adopting the reasoning in Nkosi and Mbuli, and even if the appellant was aware that Mahlenche was in possession of the*

firearm, such knowledge is not sufficient to establish that he had the intention to jointly possess the firearm with Mahlenche. ***In this matter there are no facts from which it can be inferred that the appellant had the necessary intention to exercise possession of the firearm through Mahlenche or that the latter had the intention to hold the firearm on behalf of the appellant."*** (Court's emphasis)

[17] It is clear from the evidence that the state did not prove joint possession of a firearm at all. There is no evidence from which it can be adduced that the appellant was aware of the possession of the firearms by his co-perpetrators and that the co-accused had the subjective intention to possess the firearm on behalf of the appellant.

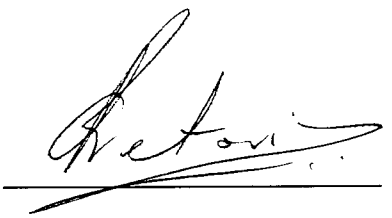
[18] If the court applies the principles as set out in these cases, then this court cannot find that the only reasonable inference to be drawn is that the firearm was in the possession of the appellant.

[19] The court has already dealt with possession of the ammunition. The state has not proved the guilt of the appellant on counts 8 and 9 beyond a reasonable doubt. This court finds that the court a quo erred in convicting the appellant on counts 8 and 9.

[20] It is thus not necessary to deal with the sentencing on these counts. The counsel for the defence has conceded that the sentences on count 1, 2 and 6 are appropriate. This court has considered these sentences as well and finds the order by the court a quo that the sentences on counts 1, 2 and 6 should be served concurrently is correct, a sentence of 15 years is appropriate.

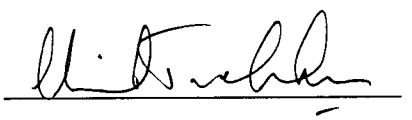
[21] The following order is made:

1. The appeal against the conviction on counts 8 and 9 are upheld;
2. The appeal against sentence is dismissed;
3. The order of the court below on conviction and sentence on counts 8 and 9 is set aside.



Judge C Pretorius

I agree,



Judge NB Tuchten

Case number	: A742/2013
Heard on	: 12 May 2014
For the Appellant	: Adv VZ Nel

Instructed by	: Legal Aid
For the Respondent	: Adv
Instructed by	: Director of Public Prosecutions
Date of Judgment	: 15 May 2014