



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE 19/8/2016

SIGNATURE

19/8/2016

Case Number: A55/16

In the matter between:

DAVID MAGAGULA

Appellant

and

THE STATE

Respondent

JUDGMENT

MAKUME J WITH HIM NKOSI AJ CONCURRING

- [1] The crisp issue in this appeal is whether the Magistrate erred in ordering that the appellant whom he had convicted of common assault should have been declared unfit to possess a firearm in terms of the provisions of Section 103(2)(a) of the Firearms Control Act No. 60 of 2000 ("the Act").
- [2] The appellant aged 64 appeared without legal representation in the Magistrates' Court held at Mkobola on a charge of assault with intent to do grievous bodily harm. It being alleged that on or about the 4th day of August 2015 he unlawfully and intentionally assaulted one Babby Sophie Magagula by hitting her with fists.
- [3] He pleaded guilty but denied having used his fists and said that he only clapped the complainant with an open hand. The State accepted the appellant's version and without much ado accepted the plea in terms of Section 112(1)(a) of the Criminal Procedure Act. The appellant was on that basis found guilty and sentenced to a fine of R300-00 or 30 days imprisonment. The Court below further made an order in terms of Section 103(2)(a) of Act 60 of 2000 and declared the appellant unfit to possess a firearm.

[4] During mitigation of sentence the Magistrate asked the accused to tell him why he should not declare him unfit to possess a firearm. In response the accused told the Magistrate that he already is in possession of a licenced firearm.

[5] The Learned Magistrate thereafter proceeded to pass sentence and the order that is now being appealed against. He thereafter informed the appellant that the appellant has 10 days within which to appeal against the sentence. Interestingly the appellant then said the following words to the Magistrate:

"I understand the sentencing. The part that I did not understand is the issue with regard to the firearm Your Worship. I have been in possession of this firearm for many years Your Worship. I have never negligently used it."

[6] Section 103(2)(a) required that "a Court which convicts a person of crime or offence referred to in Schedule 2 and which is not a crime or offence contemplated in subsection (1) must enquire and determine whether that person is unfit to possess a firearm".

[7] Subsection (1) of the Act details 15 categories of crimes. The offence of common assault with which the appellant has been convicted is not amongst the 15 categories listed therein. Accordingly this means that common assault falls under Schedule 2 of the Act and if that is so this therefore enjoins the presiding officer to

hold an enquiry and to determine if the appellant is a fit and proper person to possess a firearm.

[8] In his reasons filed on the 14th of January 2016 the Learned Magistrate concedes that the record does not show "the full enquiry due to problems with inaudible words and phrases in the Section 103(2) and therefore he cannot remember the reasons he advanced for declaring the appellant unfit to possess a firearm".

[9] The interesting thing is that the Learned Magistrate does not say what is it that was omitted in the record and what attempts did he take to reconstruct the record.

[10] It is clear that the Learned Magistrate despite his reasons did not hold an enquiry as stipulated in the Act. All that he asked the appellant is why should he not declare him unfit to possess a firearm. That is not an enquiry it was more of a conclusion by the Learned Magistrate and in that respect the Magistrate erred.

[11] The Magistrate's statement that it is his humble submission that a person who assaults ladies should not be permitted to possess a firearm is not based on any reasons advanced to justify such a conclusion.

[12] An enquiry contemplated in Section 103(2)(a) requires of a judicial officer to ask questions in order to establish whether the accused's conduct or the circumstances

of the crime justifies depriving him of his right to possess a firearm. Section 103(2)(a) is peremptory that such an enquiry be held. In the present matter it was not held, that much the Learned Magistrate concedes.

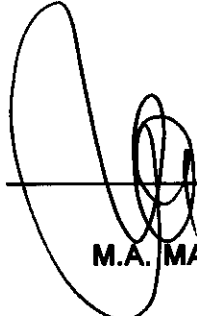
[13] In the matter of *S v Phuroe and Others* 1991 (2) SACR 384 (NC) the Court dealt with a similar section in the old Arms and Ammunition Act 75 of 1969. Section 12(1)(a) thereof bears similarity to Section 103(2)(a) of the present Arms and Ammunition Act. It was held in that matter that in Section 12(1)(b) of that Act requires a Court which finds an accused guilty of certain crimes must bring the provisions of Section 12(1)(a) to the attention of the accused and invite the accused to advance reasons why the Court should not declare that the provision of the section are applicable to him. The accused may then state his case either by way of evidence or by way of argument. If the state contends that the disqualification should stand then it should also be given an opportunity to give evidence or to present argument. Even if an accused does not avail himself of his right to advance reasons the Court should nonetheless consider whether the disqualification should stand. The proceedings under Section 12(1)(a) and (b) should be properly recorded.

[14] In the present matter no enquiry has been held. Accordingly the order by the Learned Magistrate was unjustified and should not be permitted to stand as it was not in accordance with justice.

[15] In the circumstances the following order is made:

- (a) The conviction and sentence imposed is confirmed.
- (b) The matter is remitted to the Magistrate so that he can conduct an enquiry in terms of Section 103(2) of the Firearm Controls Act No. 60 of 2000 to determine whether the accused is unfit to possess a firearm.

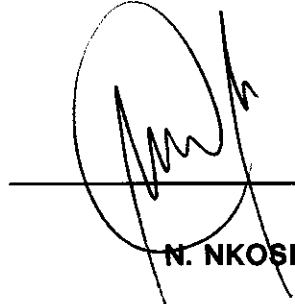
Dated at Pretoria on this the 18th day of August 2016.



M.A. MAKUME

JUDGE OF THE HIGH COURT

I agree



N. NKOSI

ACTING JUDGE OF THE HIGH COURT

CASE NO: A55/16

HEARD ON: 18 August 2016

FOR THE APPELLANT: MR. O.P. MAKUBE

INSTRUCTED BY: Makobe & Associates

FOR THE RESPONDENT: ADV. J.P. VAN DER WESTHUYSEN

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 19 August 2016