IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A430/2010

DATE: 15 OCTOBER 2010

In the matter between:

BENJAMIN FILANDER Appellant

and

THE STATE Respondent

J U D G M E N T

DESAI, J:

This is presently an appeal against the conviction only. It appears that the appellant was convicted on 2 February 2001 on a charge of having contravened section 39(1)(j) of the Arms & Ammunition Act 75 of 1969 (now repealed) and on 12 February 2001 sentenced to 1 000 hours of periodical imprisonment as contemplated in section 276(1)(c) of our Criminal Code. The offence itself was allegedly committed more than 12 years ago, that is in 1998. Although the explanation advanced for the long delay is not entirely

satisfactory, more especially in that the appellant was a police officer, not hearing this appeal would amount to a serious miscarriage of justice in that counsel, both for the State and the appellant, are *ad idem* that the conviction herein cannot be sustained on appeal. That is indeed so.

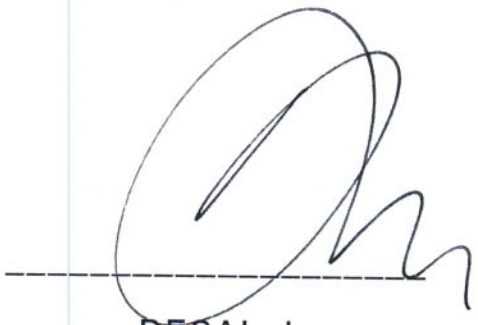
The technical defence raised by the appellant's counsel deals the State's case a fatal blow, but also on the facts of the matter, or rather the explanation advanced by the appellant, a conviction is problematic. I deal with the latter aspect first.

On the appellant's version - I may mention that he pleaded guilty and at that stage was unrepresented - he arrived home with a friend and as his wife was not at home, he could not place his firearm in the safe. Instead he placed it in his cupboard between his clothes. I think that was a temporary solution. It subsequently transpired that his friend saw him doing this and later took the firearm for his own purposes. In these circumstances, without any other evidence, the conclusion that he "failed to exercise that degree of care which a reasonable man would exercise to prevent his firearm from falling into wrong hands", is not warranted. See in this regard S v De Klerk 1992(1) SACR 181 (W) at 183D-E.

More tellingly, as appellant's counsel has pointed out, section

39(1)(j) of the afore-mentioned act was no longer in operation on 14 September 1998, that is when this offence was committed. The 1969 act was replaced by Act 60 of 1988. In this act the earlier section 39(1)(j) was replaced by section 23(a), which reads quite differently. The latter section only came into operation on 1 July 1994. (See in this regard Proclamation R74 of 1994 appearing in Government Gazette 15652 of 22 April 1994.) Quite patently the section under which the appellant was convicted, cannot on appeal be replaced with the amended version as this would amount to an irregular substitution.

In the circumstances the appeal succeeds and the appellant's conviction and sentence are set aside.



DESAI, J

MARAIS, AJ: I agree.

MARAIS, AJ

/bw