

IN THE HIGH COURT OF SOUTH AFRICA**(WESTERN CAPE HIGH COURT, CAPE TOWN)****CASE NUMBER:**

A493/2010

DATE:

4 MARCH 2011

5 In the matter between:

MZWANDILE RILITYANA

Appellant

and

THE STATERespondent

10

J U D G M E N T**BLIGNAULT, J:**

This is the judgment in the matter of Mxwandile Rilityana as
15 appellant. Appellant was charged in the Regional Court at
George on six counts. The first four counts flowed from
certain incidents which took place on 14 September 2006 in
Thembaletu, Zone 6. Appellant was acquitted on these four
counts. The fifth count was that on 7 October 2006, he was
20 unlawfully in possession of a firearm, namely a 7,65 millimetre
pistol at Azizani, Zone 6. The sixth count was that he was
unlawfully in possession of ammunition, to wit six cartridges
(7,65 millimetres). Appellant was convicted on counts 5 and 6
and sentenced to five years imprisonment on both counts
25 taken together.

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Appellant appeals against his conviction with the leave of the magistrate. He does not appeal against his sentence. Appellant was accused 2 at the trial. Accused 1 was charged
5 on the same first four counts, but acquitted on all four. Much of the evidence at the trial concerned the first four counts. It is not necessary to discuss it.

Ms Ntombizaki Mabula testified that the appellant arrived at
10 her house in the early hours of the morning of 7 October 2006 and started to knock repeatedly on her front door. Her neighbours, Bongani and Lungani arrived. She went outside and saw that appellant was pointing a pistol at Bongani. These two neighbours grabbed appellant and they took his
15 pistol from him. Appellant managed to run away before the police arrived. At some stage one Vuyane also arrived on the scene.

The next witness was Lungani Mtalami. He testified that early
20 in the morning of 7 October 2006, he was woken up by his cousin, Bonzani, who stayed in the same house as he. They were neighbours of Ms Mabula. They saw that appellant was knocking on Ms Mabula's door. When Ms Mabula opened the door, appellant took out a firearm from the front of his body.
25 He and Bongani tried to hold him inside the house, but he ran

away. After a while, Elliot Feni, a detective in the South African Police Service arrived and they went to appellant's home, where he was arrested. The witness had meanwhile taken a firearm from appellant. He held on to it and handed it
5 to the police.

Mr Vuyani Menzi said that he lived close to Ms Mabula. He tried to find out what was going on and was then told about appellant's conduct. He saw that appellant was begging two
10 persons not to call the police and appellant promised to give them a firearm. It was decided to call the police anyway. He also said that he saw a firearm which was in Lungani's possession. They tried to detain appellant in the house, but he was unruly and later ran away. He returned later with a
15 group of persons and demanded that the firearm be returned to him. Appellant then broke Lungani's window and took his music equipment.

Mr Elliot Vuzi Feni is a constable in the South African Police,
20 stationed at George. On 7 October 2006, in the early hours of the morning, his cousin, Lungani, phoned him and reported an incident involving a firearm. At the address in question he found Lungani and Vuyani in possession of a firearm. They told him that they had been threatened by appellant with a
25 firearm. All three of them went to appellant's house and found

him there. He admitted that he had been involved in a quarrel. Appellant did not admit that the firearm was his or that he had threatened anyone.

- 5 The appellant also testified. His evidence was summarised in the judgment of the magistrate:

10 "Beskuldigde 2 het wel onder eed kom getuig, maar u het geen getuie geroep nie. U het kom getuig dat u die klaer, Mozair, glad nie ken nie. U was nooit daar by die betrokke winkel nie. U weet ook nie eens waar die winkel is nie. Dit is nou die gedeelte wat handel met die eerste vier klagtes."

- 15 In regard to his version, he summarised the evidence in respect of the incident at the house of Ms Mabula. He testified that he was there that evening, looking for his girlfriend. He said that he was unnecessarily attacked by Bongani and Lungani. He denied that he possessed a firearm or pointed it
20 towards anybody. He said that this was a fabricated story.

The judgment of the magistrate was quite comprehensive. He dealt fully with the evidence of all the witnesses, firstly the witnesses on the first four counts and then he dealt with the
25 evidence of the witnesses on the fifth and sixth counts, and in

particular that of the appellant. In this regard he said the following:

5 "Mnr Rilityana u verweer ten opsigte van aanklag 5
en 6, dit is nou die gebeure daar by me Mabula se
huis waar u beweerdelik dan in besit gevind is van
die wapen is baie vaag. U ontken net dat u die
wapen gehad het. Dit maak nie sin in die lig van
die feite voor die hof nie. Indien dit nie u wapen
10 was nie en wel in die besit was van Bongani en
Vuyani, hoekom sal hulle die polisie laat kom?
Hulle is dan in besit van die ongelisensieerde
wapen, hoekom sal hulle die polisie se aandag
daarop vestig? Daar is tog baie makliker maniere
15 om uit 'n beweerde aanranding te kom. Meneer, u
weergawe en bewerings ten opsigte van die voorval
die aand van 7 Oktober 2006 is totaal onwaarskynlik
en deurspek van leemtes. Hier is die staat se saak
so sterk, dat die hof nie anders kan as om u
20 weergawe te verwerp nie."


Counsel for appellant on appeal, submitted that there are
material differences in the versions of the witnesses with
regard to certain events. She mentioned two such
25 contradictions. The first concerned the circumstances in which

appellant managed to run away. The second concerned the colour of the firearm. I do not find it necessary to discuss these alleged contradictions in depth, in my view they are not material. In the prevailing circumstances one can hardly
5 expect a witness to remember all aspects of the matter.

The magistrate made it clear what his findings were in regard to the facts and the credibility of the witnesses. In my view he did not misdirect himself or err in any way. In the absence of
10 a misdirection or such an error, it is trite law the power of a court of appeal to interfere with a decision of a lower court, closely circumscribed.

In the result, APPELLANT'S APPEAL AGAINST HIS
15 CONVICTIONS ON COUNTS 5 AND 6 IS DISMISSED. HIS
CONVICTIONS ON COUNTS 5 AND 6 AND THE RESULTANT
SENTENCES ARE CONFIRMED.

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BLIGNAULT, J

SAMELA, J: I agree.

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SAMELA, J