IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A733/2010
DATE: 201 1-09-16

In the matter between:

THEMBA NQUMA Appellant

And

THE STATE Respondent

JUDGMENT

MANTAME, AJ:

This is an appeal against conviction and sentence handed down by Magistrate Mouton on the 17th of June 2009 at Strand Regional Court.

Appellant pleaded not guilty to all seven charges that were put to him, and he was found guilty of an unlicensed firearm and ammunition - that was Counts 6 and 7. Appellant is represented by Ms Ruiters, and respondent is represented by Ms Blows.

It is common cause that appellant was legally represented at all times. Counts 6 and 7 were put together for purposes of sentence, and he was therefore sentenced to undergo eight years imprisonment.

The State led seven State witnesses, and the defence led two witnesses. All the State witnesses were members of the South African Police Services.

In summary

On 3 May 2006 these members were advised that the suspect that they had been looking for, was somewhere in S[...] Road, B[...]'s Farm in Nyanga. Members of the Bishop Lavis provincial office who were patrolling in Nyanga called for their colleagues in the Dog Unit to come and assist them. The suspect happened to be the appellant.

They informed the Dog Unit members that the suspect was driving a Mazda 323. When the suspect saw that he was followed by the police, he fled away. The police gave chase. During the chase the suspect lost control of his car, and it left the road and collided with the informal structure that was a place of worship. Immediately after the collision gunshots were fired. Almost all the police officers noticed that the appellant had a firearm in his hand, and he tried to fire some shots at the policemen. Constable Steenkamp fired a shot at the appellant, and appellant threw the firearm away.

Appellant's counsel argued that the Magistrate failed to make a finding in respect of the contradictions of the State witnesses, although she was aware of such contradictions. As a result, she erred in convicting the appellant, due to the fact that the defence witness described the firearm as old, rusty and brown, and it was not proved that appellant possessed a black 7.65mm pistol.

The respondent contended that the defence witness is a layperson in respect of firearms. It can never be expected of this witness to assist the Court in any way to arrive at the conclusion that the appellant possessed a 7.65mm pistol.

I agree with the respondent. It cannot be reasonably expected that a layperson, in the form of the defence witness, can be expected to be particular to detail in as far as the description of the firearm is concerned. I would imagine that the said witness had limited knowledge of firearms.

The fact that appellant was lying down or standing up when he was apprehended in the shack, is irrelevant, as the appellant was convicted and sentenced for unlawful possession of a firearm and ammunition.

Further, the fact that the firearm was found under the plants, or outside the door of the church, or next to the right wheel, or next to the left, back wheel, is not material in establishing the guilt of the appellant. The fact of the matter is that a firearm was seized by the police officers, with serial number 2[...].

All the evidence by the State witnesses pointed to one direction: that the appellant was seen in possession of this firearm that he threw away, and not further than a metre from where he was. It is my opinion that there has been no doubt that has been created in as far as this firearm is concerned.

In my view, there are contradictions in the State witnesses, they were not overwhelming so as not to disprove the guilt of the appellant. In rejecting the appellant's version and accepting the evidence of the State witnesses, the magistrate did not at all misdirect herself.

It has to be appreciated that the State has proven its case beyond reasonable doubt in relation to the two charges. I have no doubt that the Court a *quo* took into account all the evidence that was presented before it. In R v Dhlumavo 1948(2) SA 677 AD it was held that the fact that the trial judge did not make certain factual findings, did not mean that such evidence or facts have not been considered.

It follows that the appeal against conviction cannot succeed. Besides, it is so that, as the record of the previous convictions reflect, appellant has been on the wrong side of the law for more than eight times, and even during testimony by his doctor, Dr Johnson, it was difficult to consult with him in Pollsmoor Prison, as he was classified as a high-risk offender.

Returning to sentence

In S v Malgas it was held that, in the absence of a material misdirection, an appeal court may not be justified in interfering with the sentence imposed by the trial court, unless it can be described as shockingly, startling or disturbingly inappropriate.

Further, it is so that, when the appeal court has to decide an appeal, such has to be done within the confines of the record. In the record itself there is nothing pointing towards a misdirection by the trial court.

In my view, the conviction and sentence imposed, are reasonable in the circumstances, consequently I make the following order: **THE APPEAL IS DISMISSED.**

MANTAME, AJ

It is so ordered:

LE GRANGE, J