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

Case Number: A 230 /2022

In the appeal between

BANDILE NDABENI **APPELLANT**

And

THE STATE **RESPONDENT**

Coram: Wille J *et* Nyati, AJ

Heard: 17 February 2023

Delivered: 21 February 2023

JUDGMENT

WILLE, J:

Introduction:

[1] This is an appeal with leave from the lower court against conviction. The appellant was convicted in the lower court on two counts of the illegal possession of semi-automatic firearms and one count of the illegal possession of ammunition. The appellant was sentenced to direct imprisonment for twelve years on each count for illegally possessing semi-automatic firearms. These sentences were ordered to run concurrently. In addition, the appellant was sentenced to direct imprisonment for four years for the unlawful possession of ammunition. The latter sentence was wholly suspended subject to certain appropriate conditions.

Appeal grounds:

[2] The appellant advances that the core witness on behalf of the respondent was a single witness and that the conviction was not justified because the court *a quo* did not apply the cautionary rule regarding evaluating this evidence. This is on the issue of identification. On the contrary, the respondent contends that the judicial officer in the lower court was mindful of the probative weight that fell to be attached to the core witness for the respondent and that this evidence was evaluated with caution. Further, the appellant advances that the 'chain of custody' in connection with the two firearms and the ammunition found on the scene was inadequate and that some difficulties existed in connection with the handling of these exhibits after they were taken into custody (on the scene) when the appellant was arrested. The respondent, in turn, argues that all these shields raised by the appellant are highly technical in nature and that the position taken by the appellant merely amounts to a legal stratagem advanced by the appellant in an attempt to escape his convictions.

Evidence:

[3] The respondent presented the evidence of three witnesses. The appellant testified and presented his version of events to the lower court. The first and core witness by the respondent was the arresting officer. He was on duty and patrol in the area when he heard gunshots. He noticed three men running together before they split up and went in separate directions. He pursued one of these men, who later turned out to be the appellant.

[4] While on the run, the appellant was brandishing a firearm in each hand. He never lost sight of the appellant during his pursuit of the appellant. The appellant was requested to stop running. In response, the appellant dropped the firearms (he was carrying) and jumped onto the roof of a house in the immediate vicinity. The appellant was apprehended and taken to the scene where he had dropped the firearms (in his possession) onto the ground. The appellant was asked about the ownership of the two firearms and responded that he had received the same from a friend. The appellant

was arrested, photographs of the firearms were taken, and the firearms were placed into police custody.

[5] The second witness for the respondent was a member of the police attached to the forensic services department of the police. On the scene, he was met by the arresting officer. The firearms were pointed out to him. He took photographs of the firearms with the ammunition, took forensic swabs and placed the firearms under police custody. He placed the firearms and ammunition in a safe for safekeeping. The following day these exhibits were sent for finger-print analysis and ballistic analysis. Regrettably, no affidavits were produced supporting some of these subsequent events. The respondent submitted into evidence the photographs of the scene and the ballistics report.

[6] The final witness for the respondent was a high-ranking police officer from the forensic department who merely explained how the firearms and ammunition were processed at the forensics department. She testified that, according to her, no irregularities occurred concerning the processing and handling of the exhibits in this case.

[7] The appellant testified that he was in the area at the time and on the day in question and was on his way to see his family. For no apparent reason, the police pointed their firearms at him and ordered him to lie down on the ground. The police took him to the backyard of a house (in the area), and they subsequently arrested him. This was also for no apparent reason.

Consideration:

[8] The appellant did not engage with or challenge that there was an audible firearm discharging at that time in the area. The appellant did not tell the police that he was on his way to his family and that he was innocently on the scene. The appellant did not challenge that he stated to the arresting officer that he received the firearms from a friend. It is so that there is no obligation upon the appellant to demonstrate his

innocence. However, considering the version of events presented by the appellant, these omissions are striking in these peculiar circumstances.

[9] One of the core arguments advanced by the appellant is that because the policeman who had obtained custody of the firearms during the fingerprint phase of the investigation was not called as a witness, it was not demonstrated that the actual firearms seized at the scene of his arrest were those submitted for subsequent forensic analysis. The appellant's submissions in this connection do not touch upon any 'tampering' irregularities involved in this process. The argument simply is that the chain of evidence did not remain intact in connection with these exhibits. This argument bears further scrutiny as this seems to be a highly technical argument.

[10] The second witness (called on behalf of the respondent) delivered the sealed exhibit bags containing the firearms and ammunition seized at the scene to the forensic department for analysis. These were assigned reference numbers and entered into an official exhibit register kept at the forensic department. These exhibits were kept in a safe at the forensic department. A laboratory technician booked these exhibits out of the safe to the laboratory for testing and returned them for safekeeping. It is so that when the exhibits were returned to the second witness for the respondent, they were housed in new exhibit bags with different exhibit reference numbers. This is then the 'irregularity' argument piloted on behalf of the appellant.

[11] However, these events were more than adequately explained by the testimony presented by the witness employed by the forensic department. This bearing in mind that he was the same policeman who attended the scene, took photographs of the exhibits and took them into safe custody. The explanation was that the forensic laboratory protocols, in any event, required that when the exhibits were re-sealed from the 'original' exhibit bags, these original bags would also be included in the new exhibit bags with their new reference numbers. The evidence was that the exhibits seized at the scene were the same exhibits dispatched for ballistic analysis. These exhibits were sent for ballistic analysis intact and without any tampering. Our jurisprudence indicates

that it is not a requirement to prove how exhibits were transported to their eventual destination for forensic analysis.[1]

[12] The legal arguments presented by the respondent in this connection are fortified by the factual evidence and the evidentiary material in support of these facts handed in during the trial in the lower court.

[13] I say this because the following evidence was presented in support of the respondent's case in connection with this issue, namely: (a) that the exhibits sent for analysis were the same exhibits handed in and seized at the scene; (b) that these very exhibits were photographed at the scene and sent for ballistic analysis; (c) that there was a series of 'custody-chain' photographs of these exhibits; (d) that there was a paper trail of how the exhibits were dealt with; (e) that the original exhibit bags were retrieved inside the new sealed bags in which the exhibits were eventually housed; (f) that at all material times, a complete description of the brands and names of the firearms (as well as the calibre thereof) remained the same and, (g) that the evidence was also consistent that the serial number of one of the firearms was removed from the frame of the firearm. This feature was also notable in a photograph taken at the scene, which was submitted into evidence.

[14] As alluded to earlier, the shields raised by the appellant were technical defences. These shields are, in my view, far-fetched. On this score, the respondent is not required to counter every speculative argument that counsel can conceive without evidence to substantiate these arguments.[2] In my view, speculative defences are just that and no more.

[15] In my view, it is clear from the mosaic of evidence presented that the appellant had possession of the firearms and ammunition shortly before he was arrested. It is trite that in the absence of a demonstrable and material misdirection a trial court's

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1 *S v Du Plessis* 1972 (4) SA 31 (AD) at par 34.

2 *S v Ntsele* 1988 (2) SACR 178 (SCA).

findings of fact are presumed to be correct and that they will only be disregarded on appeal if the recorded evidence shows them to be wrong. It is against this principle that the credibility and factual findings of the trial court, decried by the appellant, must be considered. I do not find any misdirection by the judicial officer in evaluating the evidence presented in this case. Thus, the appeal must fail.

Order:

[16] For these reasons, the following order is granted, namely:

1. That the appeal against the appellant's convictions is dismissed.

2. That the convictions and sentences imposed upon the appellant are confirmed.

WILLE, J

I agree:

NYATI, AJ