UNREPORTABLE

CASE NO: SA 75/2013

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE STATE **Appellant**

and

FESTUS NEPEMBE KIIMBA **Respondent**

Coram: SHIVUTE CJ, SMUTS JA and CHOMBA AJA
Heard: **12 October 2015**
Delivered: **26 October 2015**

APPEAL JUDGMENT

SMUTS JA (SHIVUTE CJ and CHOMBA AJA concurring):

[1] At issue in this appeal by the State is whether the High Court was correct in acquitting the respondent on counts 3 and 4, namely contravening s 2 of the Arms and Ammunition Act 7 of 1996 ('the Act') (possession of a firearm without a licence) and contravening s 33 of that Act (possession of ammunition).

[2] This appeal arises in the context of a trial where the respondent and two other accused faced these two charges as well as two far more serious charges of murder

and robbery with aggravating circumstances. The High Court found that all three accused had acted with a common purpose and convicted each of them of murder and robbery with aggravating circumstances. But the High Court acquitted all accused on the third and fourth counts of contravening s 2 and s 33 of the Act.

[3] All three accused were each sentenced to 25 years for murder and 10 years for robbery with aggravating circumstances. The High Court further directed that the sentences should run consecutively.

[4] The State subsequently successfully applied for leave to appeal to this court against the respondent's acquittal on the third and fourth counts.

[5] The factual background within which these counts arose is first referred to together with the findings of the High Court. The elements of the two offences in question are then briefly discussed. The basis upon which the State has appealed against the High Court's findings is referred to and the contentions analysed together with those of the respondent's counsel within the legal and factual context of this matter.

Factual background

[6] A great deal of evidence was led in the trial. It included a lengthy trial-within-a-trial. All three accused contested the admissibility of their statements and confessions made before police officers and peace officers. A detailed survey of the evidence led at the trial is contained in the judgment of the High Court. What follows is a brief summary of the events with greater emphasis upon the evidence relevant to the two counts which are in issue in this appeal.

[7] The deceased and his friend, a certain Mr G P Isaacks, and the latter's two daughters went to a mountainous area near the Goreangab Dam on the evening of 18 January 2007. Their purpose in doing so was to view and photograph the McNaught Comet which was to be visible at 20h15 that evening. They chose an elevated location near the dam as their vantage point for doing so. They took along camping chairs and refreshments. Whilst setting up, they noticed three men pass by.

[8] Sometime later and after it had become dark, Mr Isaacks and his daughters testified that three men emerged from the darkness and aggressively ordered them to lie down. In the process, the deceased was shot in his chest and fell on his face. The assailants took a camera, cell phones, a portable global positioning system device (GPS), their refreshments and a few further items from them. The assailants then fled the scene.

[9] Members of the Serious Crime Unit of the Namibian Police ('the Unit') were summoned to the scene and started their investigations. By tracing the cell phones stolen from the deceased and Mr Isaacks, they were able to ascertain that those phones had been used in Okahandja on the next day and also ascertained the whereabouts of those phones. The police were soon able to establish that the two cell phones, which were subsequently identified, had been sold to persons in Okahandja by the first accused and the respondent. Those purchasers gave evidence to that effect.

[10] The police also obtained the respondent's own cellular telephone number and were able to ascertain that he had been in telephonic contact with accused 1 prior to the fatal incident and a certain Mr Thomas Shipahu on the same night shortly afterwards, asking to meet with him. Mr Shipahu testified that the respondent had then after 22h00 on the night of the shooting and robbery offered him a camera for sale. Mr Shipahu took him up on this and in turn sold it to an Angolan shortly afterwards.

[11] The police were also able to ascertain that the respondent was in contact with a certain Ms Helena Kalambi, with whom he was then in a relationship. They had two children together. Ms Kalambi was then living at a village called Omuthindi in northern Namibia. She testified that the respondent had phoned her shortly after the incident and said to her that he had shot accused 3. She further testified that the respondent shortly afterwards travelled to visit her in northern Namibia and told her that if the police were looking for him, she should not disclose that she had seen him. He then returned to Windhoek. After his return, she stated that he again contacted her telephonically and asked her to look for a blue plastic bag which he had hidden by burying it at an identifiable point near her home. He said to her that this contained items of his. She further testified that she recovered the blue plastic bag in the vicinity, as directed by the respondent. She found that there were two knives, a torch and a black item resembling a cell phone contained in that blue bag. That item was subsequently identified as the deceased's GPS.

[12] The investigating officer then proceeded to trace the whereabouts and addresses of accused 1 and the respondent through informants. He established

where the respondent resided but did not find him there. In the meantime, he traced the whereabouts of accused 1 to a farm in the Maltahöhe district. Whilst on his way to arrest him, he learned that the respondent had returned from northern Namibia. After arresting accused 1, the latter was taken to the magistrate in Mariental to make a confession. Accused 1 proceeded to confess to elements of the murder and robbery and acting in cahoots or collusion with the respondent and with accused 3.

[13] The investigating officer returned to Windhoek and proceeded in the early hours of 3 February 2007 to the residence where the respondent stayed in the Havana area of Katutura. The respondent was sleeping in a room in the house at the time. He shared that room with another occupant who, together with the owner of the house, had opened up the house to the investigating officer and other members of the Unit. The investigating officer and other policemen proceeded to the room where the respondent was sleeping. He was arrested. A search for a firearm was then conducted and a member of the Unit found one under the carpet under the bed where the respondent had been sleeping. It was a 9 mm Makarov pistol with eight rounds. Although the respondent was not present in the room when the pistol was so found, the owner of the residence was present and confirmed this in his evidence.

[14] The discovery of the firearm was raised with the respondent straight after its discovery at those premises. His spontaneous response to the investigating officer was that he had robbed a Herero man of the firearm. The respondent thereafter proceeded to point out the residence of accused 3 to the police officers. The latter was then arrested at that location. Accused 3 had a wound in his stomach. He stated that it was a bullet wound, caused by the bullet which had been fired by the

respondent at the deceased. The forensic medical evidence was to the effect that a bullet had penetrated the deceased in the chest area from the front and had exited from his rear abdomen. It had not lodged itself in the deceased. Police witnesses also testified that no spent cartridges were found at the scene when it was searched on the morning following the fatal incident.

[15] The respondent indicated to the members of the Serious Crime Unit that he wanted to make a statement. He was then taken to a senior police officer and made a confession to him. As has already been pointed out, the admissibility of the confessions and statements made by all three of the accused was contested. After a lengthy trial-within-a-trial, the High Court correctly ruled that the statements made by each of the three accused concerning the charges they faced had been made freely and voluntarily and were therefore admissible as evidence in the trial.

[16] In his confession, the respondent, inter alia, stated:

> 'I was with Max (accused one), having a panga, Josef, empty-handed, and I was having a gun. I killed somebody'.

[17] The respondent further described how the three accused approached the deceased and his party in the vicinity of the dam and stated:

> 'We walked straight to them and a white man walked straight to me and I was afraid and I shot him. Max had told me that if the white man came closer I must shoot him. I shot him; the bullet went through him and strikes Joseph on the right side of his stomach' (sic).

[18] The respondent also described taking the various items from the deceased and other members of the group. He also said that Joseph (accused 3) had said to him that he (the respondent) had shot him as well. The respondent also said that he (and accused 1) told accused 3 to then go home and that they proceeded to (Mr Shipahu) to sell the camera and to Okahandja the next morning to sell the cell phones.

[19] In his warning statement it was stated by the investigating officer that the respondent was found in possession of a firearm, a 9 mm Makarov pistol with 8 rounds in the magazine, found under the bed where he was found to be sleeping. When confronted with this, the respondent spontaneously stated to the investigating officer that he and accused 1 had, 'grabbed a Herero male at Otjimuise and robbed him of his firearm'.

[20] The respondent also provided the investigating officer with the cell phone number of a driver of a minibus who had retained his luggage when he had returned from northern Namibia because the respondent did not have sufficient funds to pay his fare. The investigating officer approached the driver in question who gave evidence to the effect that a male person had travelled as a passenger from northern Namibia on 30 January 2007 and was unable to pay his fare. He then impounded his luggage, to be held against payment of that fare. When doing so, the male passenger in question had stated that he wanted to take out his firearm from the luggage and proceeded to take out an item wrapped in a cloth which he then inserted in the inside of his waist of his trousers. The fellow driver of the minibus corroborated that

evidence. When the impounded luggage was subsequently reclaimed by the investigating officer, the respondent confirmed that it was his.

[21] There was also testimony from a certain Mr Frans Dikolo that he had been robbed of his 9 mm Makarov pistol together with ammunition on about 10 January 2007. He had reported this to the police at the time. He produced a valid licence for the firearm whose serial number matched the pistol found at the respondent's residence.

[22] In his evidence, the respondent not only denied that his statements were freely and voluntarily made, but also denied that he committed any of the crimes for which he had been charged. He denied having been on the scene, having sold the camera and the cell phones and having been in possession of the GPS. This notwithstanding, there was overwhelming credible evidence to the contrary implicating him. He also denied his own cell phone number, despite evidence to that effect having been given by his previous employer. He also denied having been in contact with and having even met accused number 1 until they were first arraigned together after their arrests. This was despite having been seen with him by several witnesses whose evidence was unshaken in that respect as well as the call records of their respective cell phones and his confession. In his several denials of possessing the pistol, he also repeatedly said that he had 'never held a firearm in his life' or words to that effect. His evidence was correctly rejected as false beyond reasonable doubt by the High Court.

Findings of the High Court

[23] The High Court was satisfied that the evidence of the other two accused was also false beyond reasonable doubt and to be rejected. The High Court further accepted that the confessions and statements of all accused were made freely and voluntarily in which they admitted that they had attacked the deceased and Mr Isaacks and his two daughters. The Court found that the deceased was shot dead in the course of this attack.

[24] The High Court further found that the deceased and the other victims had been robbed. The Court further found that the respondent and first accused had after the incident offered those items for sale and that the respondent had later directed his erstwhile girlfriend to the location where he had hidden a blue plastic bag containing two knives, a torch and the GPS of the deceased.

[25] The High Court concluded that when the respondent drew a firearm and shot the deceased, his conduct was also to be imputed and attributed to the other accused as they had set out to engage in an armed robbery of the persons who were at the elevated area near the dam. The Court further concluded that the deceased had been shot by the respondent through the chest and had, as a result, died at the scene.

[26] The Court however proceeded to deal with counts 3 and 4 in the following way:

> ‘However, no connection has been established between the firearm used at the scene of crime to murder the deceased and the pistol before court, Exhibit 1. The prosecution has proved beyond reasonable doubt that the pistol and magazine before court is the lawful property of Frans Dikolo, stolen from him by unknown persons. The prosecution did not prove beyond reasonable doubt that the same pistol before court stolen from Frans Dikolo was used to shoot and kill the deceased on 18 January 2007.’

[27] The Court then concluded that the crimes of possession of a firearm and ammunition without a licence had therefore not been established and acquitted all of the accused of those offences. That was the full extent to which the High Court dealt with counts 3 and 4.

Contentions by the State and Respondent’s Counsel

[28] Counsel for the State has contended that these offences were established beyond reasonable doubt in respect of the respondent. State counsel further argued that the Court misdirected itself by pronouncing that these offences had not been established because the State had not proved beyond reasonable doubt that the firearm found in possession of the respondent was the same firearm which had been used to kill the deceased. Counsel accordingly submitted that the elements of possession as defined in the Act had been proven against the respondent beyond reasonable doubt and that the respondent should have been convicted on both of those counts.

[29] The respondent’s counsel referred to the discovery of the firearm in the room where the respondent was sleeping. Counsel contended that there were at least three other people who could have ‘possessed’ the firearm. It would appear that he

rather intended a reference to two others – namely the landlord and the other occupant of the room as the third person no longer occupied the room after Mr Dikola had been robbed of the firearm. Counsel contended that none of the three including the respondent could be directly implicated for possessing the firearm and argued that the evidence of the taxi driver about the respondent collecting his firearm from a bag was merely circumstantial.

[30] Counsel referred to *R v Blom* 1939 AD 188 at 202-3 concerning the test to be followed when reasoning by inference in criminal matters. Those principles are well established and do not bear repetition. Counsel argued that there are no reasonable grounds upon which this court would conclude that the High Court misdirected itself or committed an irregularity with regard to the acquittals on counts 3 and 4.

The offences

[31] Section 2 of the Act provides:

> 'Subject to s 1(4), 3(6), 4, 8, 24, 34(2) and 44 no person shall have any arm in his or her possession unless he or she holds a licence to possess such arm'.

[32] The sections referred to do not arise in the present circumstances.

[33] "Arm" is defined to mean "any firearm". Possession is defined to include "custody" and "possess" is to be construed accordingly.

[34] Section 33 provides:

'Subject to s 34(2) and 44, no person shall be in possession of any ammunition unless he or she is in lawful possession of an arm capable of firing that ammunition'.

[35] For a contravention of s 2, the State would thus need to establish

(a) possession of a firearm;

(b) unlawfully, that is, without a licence; and

(c) culpability in the sense of knowledge of unlawfulness.

[36] As for a s 33 contravention, the State would similarly be required to establish possession of ammunition in the absence of being in lawful possession of a firearm.

[37] In the context of similar legislation, the then Appellate Division in South Africa held[1] that the concept of possession in a penal statute comprises two elements, a physical element *(corpus)* and a mental element *(animus)*. The former consists of either direct physical control or mediate control through another while the latter entails an intention to control the physical element.[2]

Analysis of the law and evidence

[38] The State had clearly proven beyond reasonable doubt that the Makarov pistol and ammunition was found in the room, where the respondent was sleeping and concealed under a carpet under the bed he slept on. The other occupant of the room testified that he had no knowledge of the firearm. Nor did the owner of the house

[1] *State v Adams* 1986 (4) SA 882 (A) per Corbett JA.

[2] *Supra* at p 890G-891B. Followed by the High Court in *S v Kamenye and Another*, CA 12/2011 unreported 10.02.2012.

have any knowledge of it. That firearm was the subject of a lawful licence held by Mr Dikolo who had been robbed of it about a week before the fatal shooting of the deceased and the robbery. It was found with the respondent less than a month after it had been stolen from Mr Dikolo. Plainly, the respondent did not hold a licence to possess that firearm, given the fact that the valid and lawful licence had been issued to Mr Dikolo.

[39] It was also not the respondent's defence that he had a licence. Instead he denied possession and suggested that the police had planted it there. His version was rightly rejected as false.

[40] The respondent's possession of the firearm was further reinforced by the evidence of the two drivers of the minibus who had transported him from northern Namibia. Even though they did not identify him specifically or the firearm, they both unequivocally stated that the owner of the impounded luggage had been unable to pay his fare. This was confirmed by the respondent. When impounding the luggage, their unshaken evidence was that the person in possession of the luggage (the respondent) had specifically asked to remove his firearm which then occurred even though it was not openly fully visible to them. Whilst their evidence is of a circumstantial nature, it is to be considered in the context of the other evidence in the trial.

[41] Furthermore the respondent himself in his confession admitted on more than one occasion that he was in possession of a firearm at the time of the fatal shooting and that he had in fact fired the fatal shot from the firearm then in his possession.

[42] Counsel for the State is entirely correct in submitting that, whether or not it was proven beyond reasonable doubt that the specific firearm subsequently found with the respondent had been used in the shooting, was of course irrelevant to the crimes of unlawful possession of the firearm and ammunition.

[43] Applying the test in *R v Blom, supra,* the inference to be drawn - that the respondent was in possession of the firearm in question - is clearly consistent with all the proved facts which also exclude every reasonable inference other than that of possession by the respondent.

[44] The evidence thus established beyond reasonable doubt that the respondent had been in possession of the firearm and ammunition and that he did not have a licence to do so.

[45] Upon the evidence, it was clearly established that the physical and mental components of possession had been met and that the elements of the offences created in both s 2 and s 33 of the Act had been established beyond reasonable doubt.

[46] The State also proved unlawfulness and culpability by establishing beyond reasonable doubt that the respondent had no licence for the firearm. Once unlawful possession of the firearm was established, unlawfulness as contemplated by s 33 then follows.

[47] The High Court erred in considering that the State needed to establish that the firearm had been used in the commission of the other crimes in order to convict the respondent (or any of the other accused) of illegal possession of the firearm and ammunition. There is no such requirement in either section.

[48] It follows that the acquittal of the respondent in respect of counts 3 and 4 is to be set aside and replaced by a conviction on both counts.

Sentence

[49] Submissions were invited from both counsel on the question of an appropriate sentence on those counts. The respondent's counsel was also afforded the opportunity to advance reasons and present evidence as to why the respondent should not be declared unfit to possess a firearm under s 10(7) of the Act in the event of a conviction upon counts 3 and 4. Counsel conceded that such a declaration should follow in the event of a conviction in view of the provisions of the Act. Respondent's counsel however contended that the matter should be remitted to the trial court for consideration of an appropriate sentence if the appeal were to succeed. He submitted that the respondent may want to give evidence and further submissions on mitigation could then follow. After it was pointed out to him that the respondent had not given evidence in mitigation upon conviction on the two more serious charges of murder and robbery and that his personal circumstances were on record, counsel could not indicate the nature of any further evidence to be given by the respondent or on his behalf in respect of these two offences. Despite the unsupported contention concerning remitting the matter, this court is in a position to determine an appropriate sentence of these two counts.

[50] The respondent gave evidence at the trial. Even though his evidence was given on the merits (as well as in the trial-within-a-trial) and not in mitigating sentence, his personal circumstances were provided. This court would also need to take into account the interest of society and the seriousness of the crime in passing an appropriate sentence. This court would also take into account that the respondent had used a firearm and ammunition in question in committing murder and robbery with aggravating circumstances. Indeed the use of a firearm constituted the means whereby these most serious crimes were perpetrated.

[51] The offences of unlawful possession of a firearm and of ammunition are themselves also serious offences. Section 38 of the Act prescribes the sentences in respect of a contravention of each of these offences to be a fine of not exceeding N$40,000 or imprisonment for a period not exceeding 10 years or both such fine and imprisonment. These prescribed sentences demonstrate the seriousness with which the legislature and the community view the illegal possession of firearms and ammunition, given the grave potential and possibly fatal consequences which may occur when a firearm and ammunition are used.

[52] Taking these factors into account, a sentence of three years imprisonment would in my view be appropriate for contravening each of these two sections. Given the interrelationship involved in the commission of these two offences, the sentences for them should run concurrently. I would further direct that two years of each of these sentences be served concurrently with the sentence of 10 years passed by the High Court for robbery.

[53] Given these convictions, s 10 of the Act results in the respondent being deemed to be declared unfit to possess an arm. This section was drawn to the attention of the respondent's counsel who was afforded the opportunity to advance reasons and adduce evidence why the respondent should not be declared or deemed to be declared unfit to possess an arm in the event of such convictions. He correctly conceded that upon a conviction in this matter, such a declaration should be made. Indeed, the circumstances of this case demonstrate the compelling need for such a declaration in respect of a person such as the respondent who utilised a firearm to perpetrate the ruthless murder and robbery which occurred in this case.

Order

[54] In the result the following order is made:

1. The appeal against the acquittal of the respondent on the counts of contravening s 2 and s 33 of Act 7 of 1996 on 28 September 2012 succeeds.

2. The respondent's acquittal on those counts on 28 September 2012 is set aside and the following order is substituted:

'(a) The respondent (accused 2) is found guilty of contravening s 2 of Act 7 of 1996.

(b) The respondent is found guilty of contravening s 33 of Act 7 of 1996.

(c) The respondent is sentenced to 3 years imprisonment for contravening s 2 of Act 7 of 1996. Two of the 3 years imprisonment are to run concurrently with the respondent's sentence of 10 years imprisonment for robbery.

(d) The respondent is sentenced to 3 years imprisonment for contravening s 33 of Act 7 of 1996. This sentence is to run concurrently with the respondent's sentence for contravening s 2 of Act 7 of 1996 and two of the 3 years imprisonment are to run concurrently with the respondent's sentence of 10 years imprisonment for robbery'.

3. The respondent is declared unfit to possess a firearm for a period of 10 years after completing his sentences for murder, robbery and the contraventions of s 2 and 33 of Act 7 of 1996.

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SMUTS JA

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SHIVUTE CJ

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CHOMBA AJA

APPEARANCES

APPELLANT:	E N Ndlovu Instructed by the Prosecutor-General
RESPONDENT:	W T Christians Instructed by Legal Aid