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12th March 1987

African National Congress
P O Box 31791
LUSAKA
Zambia

Dear Sir

re: **MAJIJA AND OTHERS : APPEAL**

We refer to the above matter and regret to advise that on Wednesday the 11th of March 1987 the above appeal was dismissed by the Honourable Mr Justice Barrington Jones.

We attach hereto a copy of the judgment and look forward to receiving your further instructions herein.

Yours faithfully

A R Khan
RAHIM KHAN & COMPANY

IN THE HIGH COURT OF BOTSWANA

Criminal Appeal No. 205 of 1986
(Gaborone Case No. G. 523 of 1986)

In the matter between:

(1) DALUVUYO VILINDLELA MAJILA)
(2) BONGO TAMSANQA QINA)
(3) NONTOTUTHUZELO NYATHAZI MABUTYANA) Appellants
(4) SIMPIWE MINI)

and

THE STATE Respondent

For the Appellants Adv. D.A. Kuny SC (instructed by A.R Khan & Co.)
For the State - Mr D.N. Seretse

J U D G M E N T

BARRINGTON-JONES J:

The Appellants were convicted of Unlawful possession of of Arms and Ammunition contrary to section 9 (1) and (5) of the Arms and Ammunition Act by the Senior Magistrate, Gaborone on the 8th August 1986 and each sentenced to seven years' imprisonment.

On the same day all the appellants appealed against conviction and sentence; and the appeal was heard on the 28th January, 1987.

It was common cause at the trial that 3 AK Rifles, 1 AK 47 rifle, 14 magazines (loaded with 30 rounds each), 10 limpet mine bases, 18 hand grenades, 38 detonators, 2 anti-personnel mines and 138 rounds of ammunition were found by the police on the 19th May, 1986 in a vehicle (a Volkswagen Kombi (registration number KRD 063T) in which the appellants had driven from Johannesburg to

Gaborone the previous day.

The arms and ammunition were found in two closed bags in the back of the Kombi and that there were other bags in the vehicle which belonged to the appellants. The appellants' evidence was that the bags containing the arms and ammunition belonged to one Jackson Malambo, and that it was Malambo who had placed them in the vehicle in their absence.

It was Mr. Kuny's contention that whilst the learned senior magistrate had adopted the correct legal approach towards the question of onus, common purpose and the manner in which the evidence of the appellants should be assessed, he had misdirected himself in applying those principles in evaluating the evidence of the appellants; and also to the question of whether their explanation as to how the arms and ammunition came to be in their Kombi was reasonably possibly true. He said that it was common cause that if the appellants' explanation was reasonably possibly true, then although the weapons had been found in the Kombi which was used by all four of them, and to that extent one or other of them might have had physical control or ' detentio' of the bags; they could not be said to be in possession in the legal sense since they had no knowledge (and therefore no mens rea) which was a necessary element in an offence contrary to section 9 of the Arms and Ammunition Act; so that he submitted that the senior magistrate's rejection of the appellants'

explanation was:

(i) based upon an incorrect evaluation of the facts (ii) tortuous and facile and (iii) without regard to the probabilities.

I now turn to the main heads of argument in respect of the appellants' convictions, together with my conclusions on the points raised:-

(1) Whilst Counsel for the appellants contends that there was no allegation or proof of a conspiracy or common purpose between the appellants; State Counsel submitted that conspiracy or common purpose need not be directly alleged but may be shown from the factual circumstances of the case such as antecedent acts which may bring the parties together and/or showing various subsequent acts in which they concurred, and it was his view that such was equally applicable where the accused are not actually charged with conspiracy; but with an offence in which it is alleged that they acted in concert to commit it, and he cited R v Segale 1959 (1) SA 589 in support of that submission. It was thus State Counsel's contention that the trial magistrate made findings of fact which went to show beyond reasonable doubt that the appellants were bent on a common purpose to commit the offence (viz unlawful possession of Arms and Ammunition) upon which they had been convicted.

On this ground it is clear that Segale's case (supra) is good authority for the proposition that a conspiracy need not be established by proof that actually brings the parties together, but may be shown like any other act

by circumstantial evidence. That judgment also makes clear that on charges of conspiracy, the acts and declarations of each conspirator in furtherance of the common object are admissible against the rest, and it is immaterial whether the existence of the conspiracy or the participation of the accused be proved first, though either element is nugatory without the other; and that the same rule applies even where the charge is not directly for the conspiracy but for the acts resulting therefrom. It thus applies where parties are charged with an offence and the case against them is that they acted in concert to commit it; it makes no difference whether the particular trial is of one or some or all the conspirators.

Boshoff J., went on to explain the position in clear terms when he said:

> 'If we ignore the word conspiracy and take the simple case arising in our law, where A is charged as a socius in a crime committed by B, there are two elements for the State to prove (a) the acts done by B in the course of the commission of the crime, and (b) the complicity of A in those acts. Included in the acts done by B are declarations and writings in so far as they are acts and are not tendered as evidence of the truth of their contents. The second element - the complicity of A must be proved by evidence other than the declarations or admissions of B ...'

I have thus concluded that the fact that there was no allegation or proof of a conspiracy in this trial in no way derogates from the offence with which the

appellants were charged and their subsequent conviction for the unlawful possession of arms and ammunition contrary to section 9 (1) and (5) of the Arms and Ammunition Act. On the question of 'common purpose' it is well settled that where two or more persons are concerned in the furtherance of such which is unlawful; every act and statement of each of them made in pursuance of the common purpose is, in law, the act or statement of them all.

The learned trial magistrate in some seven pages of his judgment carefully reviewed the evidence in a thoroughly dispassionate and objective manner and concluded that ...' the concerted conduct of the accused suffice to cogently establish a basis for the irresistible inference that the four accused, bent on a common purpose, had knowledge of the weapons in the vehicle and intended to exercise control over them.'

So that it is perfectly apparent that the trial magistrate did find on the evidence before him that the appellants were bound in common purpose in their unlawful possession of the arms and ammunition.

I therefore find no merit in this ground of appeal.

(2) Mr. Kuny's next point was that there was no evidence as to (i) which of the appellants was physically in possession of the arms and ammunition and (ii) that there was no evidence that any of them had handled the bags which contained such arms.

Mr Seretse immediately conceded that it was difficult, if not impossible, for the State to show who actually amongst the appellants physically possessed the arms, but

submitted that it was sufficient on the evidence of the appellants' actions and words proved against them, to establish beyond reasonable doubt that all or any of them, together with others, formed a common intention to prosecute an unlawful purpose. On the question of the criminal liability of each of the appellants Mr. Seretse referred to Rex v Dominiko Omenyi s/o Obuka 10 E.A.C.A. 81. That was a 1943 case in Uganda where eleven appellants were convicted of murder.

> It was impossible to say who actually caused the death and it was held that it had to be decided whether the evidence and the actions or words proved against one of them established beyond reasonable doubt that (i) he, with others, formed a common intention to prosecute an unlawful purpose (such intention could, of course, be formed at any time and it is not necessary that there should have been some previous meeting at which they conspired to do the act), (ii) that the offence of murder was a probable consequence of the prosecution of that unlawful purpose, and (iii) that murder was in fact committed in prosecution of that unlawful purpose.

In the circumstances of that particular case the Court found that any one of the accused was a party to a common intention to kill the deceased.

It was therefore Mr. Seretse's contention that whilst there was no direct evidence as to which of the appellants was actually in possession of the arms, the evidence was such that the magistrate was entitled to find all of them in possession, and he submitted that the State was not required to prove which of them had actually handled the bags containing the arms. In the light of the evidence led State Counsel submitted that it had been proved that all four appellants formed a common intention to prosecute an unlawful purpose and that the offence of unlawful possession of arms and ammunition was a probable consequence of the prosecution of that unlawful purpose, and that thus the appellants were in unlawful possession of the arms as set out in the charge.

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Whilst it is true that there was no evidence led as to which of the appellants was physically in possession of the arms, I do not find the absence of such to be a ground so as to suggest that the conviction was thereby unsafe. I say this because it is evident from the trial magistrate's judgment that he was very much alive to the issues in question when he said:-

> 'Another principle relevant to the character of the evidence before me relates to the essential quality of circumstantial evidence. I register my observation at once that the prosecution has established no direct evidence to prove knowledge or control of the weapons against the accused and relies entirely on circumstantial evidence. The general principle is that the quality of such evidence that would suffice to uphold a verdict of guilty is the set of circumstances that is so water-tight that it leaves no room for any other hypothesis other than that of guilt. The established circumstances intended to prove guilt must point to no other co-existing circumstances which would weaken or destroy the inference of guilt.'

and he went on to pose the question - 'whether the established facts suffice to support an irresistible conclusion that the accused knew about the weapons in the Kombi; and whether the explanation given in their defence had destroyed or weakened the intended inference'; and he then dealt with two further questions (i) Is the defence tenable? and (ii) Is it reasonably plausible? After carefully and objectively considering the evidence of each of the appellants, and here it is to be noted that the 2nd and 3rd and 4th appellants confirmed the evidence

(explanation) given by the 1st appellant; the magistrate rejected it, finding it untenable, and defying human credulity. So that it was made abundantly clear that the learned senior magistrate found each and all of the appellants in unlawful possession of the arms; so that I do not consider that the ground raised by Mr. Kuny to be of any substance.

On the second point made by Mr. Kuny under this head i.e. that there was no evidence that any of the appellants handled the bags containing the arms, I would only remark that 'handling' is more usually seen in the context of handling stolen goods; and here it is important to keep in mind that there was no allegation that the arms were stolen; and thus the two vital ingredients in an offence of Unlawful possession of arms and ammunition contrary to section 9(1) & (5) of the Act which requires to be proved beyond reasonable doubt are (i) that the accused was 'in possession' of the arms and (ii) that the accused had 'knowledge' (i.e. mens rea) of such arms.

'possession' is defined in Section 5 of the Penal Code as follows:-

> (a) 'be in possession of' or 'have in possession' includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to, or occupied by oneself or not) for the use or benefit of oneself or of any other person;

(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;

and 'knowingly' used in connection with any term denoting uttering or using is defined as implying knowledge of the character of the thing uttered or used.

So that I have concluded that whilst there was no evidence that any of the appellants had 'handled' the bags containing the arms, that factor is of no moment simply because 'handling' is not an essential ingredient of an offence contrary to section 9 (1) & (5) of the Act.

As I see it, on the evidence before him, the learned trial magistrate was entitled to find the appellants were in unlawful possession arms on the basis of the definition of 'possession' contained in section 5 of the Penal Code; and that they all had knowledge of the arms contained in the bags.

I therefore perceive no merit in this ground of appeal.

However, if, on the other hand, Mr. Kuny was saying that there was no evidence that the appellants had 'handled' the bags containing the arms after Malambo had left them in the Kombi; I would only comment that the learned trial magistrate was at pains to reject the appellants' evidence regarding the alleged role of Malambo. He dealt with this evidence at considerable length and said,

inter alia:-

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> !..So the transfer of possession of the weapons must have been part of a pre-conceived arrangement, at least by Malambo, but most probably by all the accused too. I do not accept the suggestion that it was a mere coincidence that Malambo, who at the time he wants either to get rid of the weapons or to transfer them into the custody of another for furtherance of the purpose intended for their use, conveniently, and without prior arrangement, meets the right persons at the right time, when both Malambo and the 1st accused are checked in at an isolated hotel in the suburbs of Gaborone.
>
> Coincidences of this nature, even where they happen by some stroke of chance, have the subsequent character of exciting curiosity especially amongst strangers or even between friends who have not met for a long time. So the detached casual attitude alleged to have prevailed between Malambo's movements and the accused does not make a reasonable impression on my mind in the context of the circumstances I have discussed .....
> I get the impression that such explanation is merely intended to distance themselves as much as possible from the presence and identity of the bags and the contents thereof. ..... the casual approach to the whole issue was unrealistic and it could have been meant to disguise the true relationship between the accused and Malambo; the purpose of the trip, and their (the accuseds') awareness of the bags containing the arms in the Kombi ....'

(my emphasis)

I therefore do not find any merit in this particular aspect of the ground as argued by Mr. Kuny.

(3) Mr Kuny then submitted that none of the appellants had knowledge of what was contained in the bags and because this had not been proved, an essential ingredient of the offence was missing.

State Counsel in conceding that knowledge is an essential ingredient and must be proved, submitted that both the physical and mental element of the offence had been proved beyond reasonable doubt because (i) the appellants having been found to have a case to answer were required to

give a reasonably probable explanation as to the presence of the arms in their Kombi in order to negate the State's case and on this he cited Losole Sekalaba v The State (Criminal Appeal No 8 of 1984) and Fanuel Mashixa v The State (Criminal Appeal No 21 of 1984); and (ii) the trial magistrate had found the appellants' explanation not to be probably reasonable against objective reasoning, and the normal pattern of events; and had thus found (iii) that the explanations given by the appellants were highly unbelievable and unreasonable, (State v Dipholo 1983 (5) SA 757 and State Defford 1937 AD 370.

In Lesole Sekalaba's case (supra) the late Mr. Acting Justice Isaacs in dealing with the explanation offered by an accused person said:-

> 'I think in all cases where the accused does give an explanation which may be contradictory to the State's case, the Court must consider whether or not it can possibly be true even if not probably so. If it is so highly unreasonable so as to be no question of being believed by anybody, it may be entirely rejected. But even if the Court disbelieves the explanation that alone in my opinion is not the end of the matter.'

He then adverted to a statement taken from The State v Difforo 1937 AD 370, as follows:-

> 'no onus rests on the accused to convince the Court of the truth in any explanation he gives. If he gives an explanation even if that explanation is improbable the Court is not entitled to convict unless it is satisfied not only that the explanation is improbable but beyond reasonable doubt that it is false. If there is any reasonable possiblity of his explanation being true then he is entitled to be acquitted.'

and the learned Judge took note that the aforementioned

statement was approved in the State v Difolo 1983 (4) SA 757

The judgment of the learned trial magistrate reveals that he was extremely careful in considering the 'explanations' of the appellants and was mindful that he was required to be satisfied not only that the explanations given were improbable but that he was required to find beyond reasonable doubt that such explanations were false.

'In this regard, the learned trial magistrate had this to say:

> 'On the whole, my impression of the defence is that it bears the typical hall-marks of a tall story; it is densely imbued with suspicion and is so inconsistent with reality and commonsense that it rebels against objective reasoning and against the normal pattern of events. So that one feels about it, and I am sure even the most gullible listener, is that the story defies normal human credulity and must be rejected. On that plane of reasoning I find that the defence is not tenable.'

I am therefore satisfied that the learned trial magistrate was at all times mindful that no onus rested on the appellants to convince him of the truth of their explanations and that even if such explanations were improbable he was not entitled to convict unless he was satisfied not only that the explanations were improbable but beyond reasonable doubt they were false. In the result he found such explanations untenable because he believed them to be beyond human credulity, and so he rejected them as being palpably false.

He was thus able to find on good cogent grounds that the appellants did, in fact, have knowledge of the arms contained in the bags found in their Kombi.

As my brother Hallchurch J., had occasion to say in Simon Tumpa v The State (Criminal Appeal No. 343 of 1986)

> 'It is well established in our Courts of law that the onus is on the appellant on appeal to show that the inferior court has made wrong findings of fact see Maswikiti v Maswikiti (1974) 1 BLR 57, The State v Kunj 2 BLR 20, Samuel Manake & Basutli Mazebedi v The State (Criminal Appeal No. 72 of 1980 and Mayward v West Midlands Regional Health Authority (1985) All E.R. 635.
>
> These authorities establish that is is a well established rule that an appellate court will not set aside a judgment of an inferior court based upon fact unless it is satisfied that the decision is wrong. The onus is on the appellants to satisfy the appellate court that the court below was wrong in its estimate of the credibility of the witnesses whom it believed.'
>
> In the result I find no merit in this ground of appeal.

In the last analysis, I am unable to find that the learned trial magistrate's rejection of the appellants' explanations was based upon an incorrect evaluation of the facts, neither do I find his judgment tortuous or facile. I further consider that he properly considered and tested the probabilities presented by the appellants' evidence and after proper and careful consideration rejected it as being false.

I therefore find myself in agreement with Mr Seretse's submission that the State proved its case against the appellants beyond all reasonable doubt and that the trial magistrate did not misdirect himself on any relevant factor pertaining to the case, and I therefore uphold the convictions and dismiss the appeal against them.

On the question of the sentences imposed, Mr. Kuny, whilst conceding at the hearing that section 9 (5) of the Arms and Ammunition Act provides only for a minimum sentence of 5 years' and a maximum of 10 years', submitted on the facts of the case that it would have been appropriate to impose the minimum sentence of 5 years', not only to serve as a deterrent but also to be seen as suitably retributive and rehabilitative, since all four appellants were first offenders; and it was highly improbable that they would ever commit such an offence again in the future in Botswana.

Mr. Seretse, in reply, submitted that the learned trial magistrate had given proper reasons why he was imposing a severe sentence and had noted that apart from being first offenders there were no other effective mitigating factors in respect of themselves or the circumstances giving rise to the offence. He took the view that the sentences were not disturbingly inappropriate and that this Court should be slow to interfere with the sentences imposed. (Simon Mudangule v. The State (Criminal Appeal No. 30 of 1986).

It is well settled that an appellate Court should be slow to interfere with a sentence unless it came to that Court with a sense of shock or was wrong in principle.

Earlier decisions clearly indicate that an appellate court will not alter a determination arrived at by the exercise of a discretionary power merely because it would have

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exercised that discretion differently. There must be more than that. The appellate court after careful consideration of all the relevant circumstances as to the nature of the offence committed and the person of the accused, will determine what it thinks the proper sentence ought to be, and if the difference between that sentence and the sentence actually imposed is so great that the inference can be made that the trial court acted unreasonably, and therefore improperly, the appellate court will alter the sentence. If there is not that degree of difference the sentence will not be interfered with.

In giving his reasons for sentence the learned trial magistrate said:

> 'The gravity attaching to the possession of weapons and arms of war relate to the alarm and threat such weapons occasion to the public. In this case I notice that the amount and number of such weapons were many - the big number therefore relates to their destructive potential and is the degree of threat and alarm the possession of such a large amount of weaponry causes. So on the basis of the amount of weaponry found in possession of the accused I have a mind that the scale of penalty must accordingly border on the maximum prescribed by law.'

So that after considering S. v. Anderson 1964 (3) SA 494 in which it was said:

> 'A court that interferes with a sentence imposed by a lower court, itself exercises a discretion when it imposes a new sentence and there cannot, therefore, be a ready-made test in the strict sense of the word. Nor is it advisable to attempt to lay down a general rule as to when the court's discretion to alter a sentence will be exercised.'

and after referring to Ramaloko v State (Criminal Appeal No. 43 of 1983

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Visser v. The State (1974) 1 BLR 68, R. V. Sandig 1937 AD 296 and R v. Ramanka 1949 (1) SA 417, I have concluded that the sentences arrived at in this case do not come to this Court with any sense of shock, neither am I able to find them to be wrong in principle having regard to the amount and varied extent of the arms and ammunition with which the appellants were found in unlawful possession; so that I am unable to find that the trial court acted unreasonably and therefore improperly in imposing the sentences that it did. I therefore decline to interfere with the sentences imposed.

I would only add that a number of similar cases have come before me in recent months, but this one is quite the most serious, involving as it does hand grenades, detonators, limpet mine bases, tank mines as well as ammunition. Clearly, the learned trial magistrate considered that because of the extent of the arms and ammunition possessed the resultant sentence should be seen as a deterrent to others who might be minded to possess such arms and ammunition. I perceive no fault in that, having regard to the present difficult conditions that prevail in this country.

It follows then that the appeal against the sentences must also be dismissed.

GIVEN AT THE HIGH COURT, LOBATSE, this 11th day of MARCH, 1987.

(J. BARRINGTON JONES)

PUISNE JUDGE.

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