HH 154-03
Civ. Appeal 394/01
GIFT GIBSON MWALE Applicant
versus
THE STATE Respondent

HIGH COURT OF ZIMBABWE
HLATSHWAYO AND MAKONI JJ
HARARE, 8 and 11 September, 2003

Criminal Appeal

Advocate Zhou for the appellant
Mr *Mushongwe*for the respondent

MAKONI J: The applicant appeared before the Regional Court in Harare and was charged and convicted of the following charges -

COUNT 1

C/S 27(b) of The Firearms Act Cap. 10:09 it being alleged that on the 14th March, 2000 and at 15 Barbra Tredgold Road, Mbare, Harare, the appellant unlawfully, knowingly and without lawful cause pointed a firearm at Detective Constable Francis Zanga.

COUNT 11

C/S 4(1) of the same Act, it being alleged that on the 31st March, 2000 and at No 7 Connaught Court, Samora Machel Avenue, Harare the appellant unlawfully had in his possession a firearm, namely a Walther pistol serial number 771552 not being a holder of a valid firearm certificate in respect thereof in force at the time

Count ll C/S 4(4)(a) of the same Act it being alleged that on the 31st March, 2000 and at 7 Connaught Court, Samora Machel Avenue Harare, the appellant had in his possession eleven rounds of Walther pistol ammunition without a valid firearm certificate in force in respect thereof at the time.

He was acquitted on the fourth count of armed robbery.

He was sentenced as follows -

Count 1 - 2 years imprisonment

Count 2 - 6 years imprisonment of which 1 year imprisonment was suspended on the usual conditions.

Count 3 - 1 year imprisonment

The sentence for Count 3 was ordered to run concurrently with the sentence in Count 2.

He appealed against both conviction and sentence.

The facts in respect of Count 1 are that on 4th March, some three Police Officers proceeded to No 15 Barbra Tredgold Mbare. It is not clear from the evidence what their mission was as their evidence on that aspect was contradictory. When they arrived they saw the appellant and his friend. The two were on the Police wanted list. When they saw the Police approach they stood up and went to the back of the house and later ran out of the yard. The appellant then went to a white Corolla which was parked in front of the house. Cst Zanga followed the appellant to the motor vehicle. As he was approaching, the appellant produced and pointed a pistol to his chest. He told him to retreat or else he would shoot him. Cst Zanga retreated and the appellant got into the motor vehicle and drove away.

As regards Count 2 and 3 on the 31st March at about 06.10 hours three Police Officers proceeded to No 7 Connaught Court, Samora Machel Avenue with the intention of arresting the accused in connection with the offence in Count 1 and other offences. When they arrived they knocked at the door and there was a delay before the door was opened by one Shupikai Masere, the owner of the place. As they were waiting for the door to be opened, one of them returned to the station to get some reinforcements. The two who remained got into the flat, with Shupikai in front as a human shield in case the appellant

attacked. They searched the flat and found the appellant hiding in the base of a bed. The appellant was holding a pistol in his right hand. He was ordered to come out and as he did he was holding the pistol facing downwards. Cst Mthupa kicked the hand which was holding the pistol and it fell to the ground and Cst Mosaland pushed it away from the accused with his leg. He later removed the magazine and there were 7 rounds of ammunition. The appellant was arrested and taken to the police station. The officers later returned to the flat in the company of Shupikai and they recovered ll rounds of ammunition in the hole in the base where the accused was hiding. On the basis of these facts he was

charged with and convicted of the three counts referred to above.

I will deal with the counts separately.

COUNT 1

The applicant's main ground of appeal is that the court *a quo*, having found inconsistencies in the evidence of the State witnesses, erred and misdirected itself in proceeding to convict the applicant on the basis of the same evidence.

The State in its Heads of Argument indicated that they did not support the conviction in respect of Count l.

It is my view that the concession was properly made. The only independent witnesses gave evidence which differed in material respects from that of the three Police witnesses.

The three Police witnesses evidence was contradictory in some material respects which were pointed out by the trial magistrate. There is also no explanation as to why the Police failed to record statements from the many independent witnesses who witnessed the incident.

In view of the above inconsistencies it was unsafe to convict the appellant.

COUNTS 2 & 3

These are interconnected in that the offences were committed at the same place. Applicant's main grounds of appeal are that firstlt the Court *a quo*misdirected itself by failing to recognise that there were three versions in the State case of where the pistol was recovered.

Secondly that the court *a quo*failed to address its mind to the fact that Shupikai was a suspect witness and that her evidence could not support the State case in view of her sudden departure from her earlier statements.

Thirdly that the Court *a quo*misdirected itself by rejecting out of hand the possibility that the pistol belonged to Shupikai and not the accused.

It was submitted on behalf of the Applicant that three versions of where the pistol was recovered emerged from the State Case.

The first one was that of the two Police Officers who arrested the appellant and it was that the pistol was found in appellant's right hand as he emerged from the base of the bed.

The second one was contained in the preamble to the warned and cautioned statement and it was that the pistol was in the appellant's black pair of trousers whilst he was hiding in the therapeutic base bed.

The third version is as was contained in Shupikayi's statement and affidavit which differed from her evidence-in-chief. The version is that the pistol and 7 rounds of

ammunition were recovered in the hole in the base of the bed after the accused had been handcuffed and instructed to sit down. It was submitted that Shupikayi had difficulties in explaining the inconsistencies.

It was further submitted that in view of the three versions, it was unsafe to convict the appellant.

The respondent supports the conviction. It was submitted on behalf of the respondent that the evidence of the Police Officers who raided the place is corroborative of each other and finds support in the testimony of Shupikai. The Officers testified that when appellant came out of the base he was holding a pistol in his right hand. They also testified that the ammunition was recovered in the hole where the appellant was hiding and it was of the type used in the pistol recovered from the appellant. It was further submitted that the court *a quo*was justified in believing the evidence of the State witnesses and rejecting that of the accused because the evidence was overwhelming.

The issue is whether the court *a quo*misdirected itself in making a finding that the pistol and ammunition were recovered in the possession of the appellant.

It is common cause that the appellant was arrested at No 7 Connaught Place on the 31st March, 2000 whilst hiding in the base of a bed owned by Shupikai. It is also common cause that Shupikai was applicant's girlfriend and occupied the flat in question.

It is my view that the magistrate's reasoning in rejecting accused's defence cannot be faulted. He clearly analysed the evidence and clearly spelt out the basis for rejecting applicant's version. The evidence of the two Police Officers was very clear and straightforward. It is corroborative of each officer. There is no challenge to their evidence in the Notice of Appeal. It was supported by Shupikai's evidence-in-chief. Although Shupikai's evidence was contradictory in some respects it did not detract from the main thrust of the evidence. Her evidence was clear even under cross-examination that she first saw the gun whilst she was still holding the bed. She was cross-examined at length on that point. Her contradictions can be attributable to confusion. This incident must have

shocked her for example when she was asked to give the applicant the knife she remained

standing suggesting some confusion. In my view she was able to explain the discrepancies set out in the affidavit, her statement and her evidence-in-chief. She explained that she indicated to the Police some portions she did not agree with but the Police indicated that they were only concerned with the material aspects of what happened. She also explained that she did not read the statement before signing it as the police indicated that they had re-typed the statement.

In view of the above, the Magistrate's reasoning in rejecting the appellant's version and accepting that if the State cannot be faulted and the appeal against conviction cannot stand.

As regards sentence the applicant's grounds of appeal are that firstly the court *a quo*misdirected itself in rejecting that torture, assault and inhumane treatment, to which applicant was subjected to, amounted to special circumstances in terms of the Firearms Act.
Secondly that it misdirected itself in determining that for it to amount to a special circumstance, torture on the appellant had to have other factors and that that reasoning ignored the extent of the injuries suffered by the applicant at the hands of the police. Thirdly, that the total effective sentence of 7 years induced a sense of shock and outrage.

It was submitted on behalf of the appellant that the appellant was assaulted and tortured whilst in police custody. He was examined by Dr Banda, after obtaining an order from this court. Dr Banda gave evidence in the court *a quo*of the injuries sustained by the appellant. A Dr Chipuriro called by the State also testified as to the injuries he observed but they differed on the seriousness of the injuries. It was further submitted that the court should have found these to be special circumstances.

The court was referred to *Michael*v *The State*SC 59/98 and *Knife*v *The State*SC 60/98,

It was submitted on behalf of the State that the issue of special circumstances was given adequate consideration. regard having been had to the torture of the appellant by the police. The trial magistrate analysed the facts of the cases referred to above by appellant's counsel and came to a conclusion that there were no special circumstances.

I associate myself with the submissions made by the respondent. The trial magistrate thoroughly analysed the cases referred to him and distinguished them from the present matter. He gave detailed reasons

for distinguishing them. In my view his reasoning is sound and cannot be faulted. The facts in the *Michael Kinfe , supra*were described by EBRAHIM J as "clearly unique and highly unusual". The same can also be said of the facts in *Carl Blanchard and two others*v *The State* . But the same cannot be said about the facts in the present matter. I therefore find that there was no misdirection on the part of the trial magistrate when he made a finding that there were no special circumstances.

In the result the appeal against conviction and sentence in respect of Count 1 succeeds. The conviction and sentence is set aside. The appeal against conviction and sentence in respect of Count 2 and 3 fails.

L M Kasore and Company, appellant's legal practitioners
Office of the Attorney-General, respondents' legal practitioners