C. of A. (CRI) No.6 of 1980

IN THE LESOTHO COURT OF APPEAL

In the Appeal of :

NKO MAHLOANE Appellant

v

R E X Respondent

HELD AT MASERU

Coram:

SCHUTZ, J.A.
VAN WINSEN, J.A.
MARAIS, A.J.A.

J U D G M E N T

Van Winsen,J.A.

Appellant was convicted in the Magistrate's Court, Maseru of a contravention of section 3(2)(a) read with section 43 of the Internal Security Arms and Ammunition Act No. 17 of 1966 in that appellant wrongfully and unlawfully had in his possession a firearm and five rounds of ammunition, he not being in possession of a current firearm certificate. He was sentenced to a fine of R150 or 5 months imprisonment and was declared to have forfeited to the State the firearm, a pistol, and five rounds of ammunition. On appeal to the High Court of Lesotho the conviction in respect of the firearm was sustained but the sentence was reduced to M50. The forfeiture order was set aside and another order substituted, the terms of which are not relevant to the present appeal.

Appellant lodged a further appeal to this Court but on the 12th of January, 1981 his appeal was struck off the roll on the ground that it was not properly before this Court due to his failure to apply to the High Court for leave to appeal to this Court and for condonation of the late filing of the necessary application. The High Court refused to grant condonation and appellant now approaches the Court for condonation and for leave to appeal. The Crown opposes the granting of the application for condonation and for leave to appeal substantially upon the ground that there are no reasonable prospects of success on appeal.

/The

The facts relative to this case are not in dispute, the issue between appellant and the Crown being whether on the undisputed facts it has been proved that appellant was in possession of an uncertificated firearm.

The facts lie in a narrow compass. The evidence adduced on behalf of the Crown in the Magistrate's Court was briefly to the following effect.

Troopers Nkomo and Lesibo repaired to the house of the appellant in Roma at Between 1 and 2 a.m. on the 16th of January 1979. The troopers sought entrance to the house but when they received no reply from within they forced their way in. Inside they found appellant and one Mokete Libe. Appellant was in possession of a firearm which was knocked out of his hand and troopers took possession of this weapon. Nothing turns on this fact since appellant held a licence to possess this firearm Trooper Lesibo testified that Libe had in his hand something which looked like a plastic object which he threw away in the house near some grain bags, and a suitcase. A search for this resulted in the finding at the spot where this object had been thrown of a firearm wrapped in plastic, the muzzle and trigger of which was exposed. Appellant admitted to the troopers that he had no licence for this firearm. He also stated to them that he had been given it by his late uncle. Appellant gave no evidence and did not call any witnesses.

For reasons not apparent from his judgment, the magistrate hearing the case against appellant found the case against him proved. The High Court to which the appellant appealed found that it was reasonable for the magistrate to have drawn the inference that appellant was in possession of the firearm which Libe had in his hand when the troopers burst into the house.

The issue on appeal is whether upon the undisputed evidence set out above such an inference can be drawn.

It is argued on behalf of appellant that the evidence disclosed that in fact it was Libe who was in physical possession of the firearm in question and not the appellant, at the time the troopers entered the house. The possession did not "revert" to appellant, so it was contended, when Libe threw the firearm amongst the grain bags. Accordingly the prospects of success on appeal were such that the Court ought to accede to the application for condonation and for leave to appeal.

/The Act

The Act under which appellant is charged contains no definition of the word "possession" nor can it be deduced from its terms that the Legislature intended that mere physical detention of an uncertificated firearm would constitute possession of that firearm. I can see no reason to differ from the conclusion arrived at by Jacobs C.J. in the case of Ralitsoanelo Ralintsi v. Rex LLR 1971-73 p. 68 that possession of an article under the Act in question envisages both the physical detention of the article and the mental element of an intention to control the article. In my view the only reasonable inference to be drawn from the facts above set out is that appellant was in possession of the firearm in the sense above described. He had become the owner of the firearm by donation and he must, when he acquired it and kept it in his house, have acquired possession of it in that sense. There is no reason why it should be assumed, in circumstances such as these, that the appellant, who was the owner of the firearm, had surrendered possession of it to Libe. No doubt, it is theoretically possible that he had done so, but the appellant was best able to say whether this hypothetical possibility was an actuality. He chose not to enlighten the Court. If the circumstances had been truly neutral, there might have been something to be said for the view that the appellant's failure to testify took the Crown's case no further. But, in my view, they were not neutral in the sense that the inference that the appellant had surrendered possession to Libe was just as likely as the inference that he had not. There is also the fact that the explanation given to the police at the time by the appellant contained no suggestion that he, in turn, had given or lent the firearm to Libe. In the face of all this, the appellant's failure to testify does, in my view, become highly significant. It re-inforces the inference that the appellant had not surrendered possession of the firearm to Libe. Indeed, it renders it the only reasonable inference which can be drawn. It can never be said that a visitor to a house, merely by reason of his having in his hand an object in the house belonging to his host, has possession of the object in the sense defined above. He might have it in his hand to admire it, to use it, to evaluate it, or for some other reason. Clearly a prosecution against Libe for being in possession of the firearm in question could never have succeeded. Had there been evidence that when the troopers found him, Libe had, for instance, in pursuance of a purchase or a donation, received delivery of the firearm from the appellant, the position would have been different. There was, however, no evidence of

/any such

any such transaction having taken place and appellant did not choose to testify to the effect that possession of the firearm, which had originally been with him, had been transferred to Libe. In the face of these circumstances it cannot be said that there is a reasonable prospect of success on appeal.

In view of this conclusion it is unnecessary to deal with the question of whether, had such prospect existed, this Court would have interfered with decision of the Court a quo refusing to condone the appellant's failure timeously to bring his application for leave to appeal. I also refrain from expressing an opinion as to whether the matter sought to be raised on appeal is a matter of fact or law.

Application for leave to appeal is accordingly refused.

Signed: L. de V. van Winsen
L. DE V. VAN WINSEN
Judge of Appeal

I agree Signed: W.P. Schutz
W.P. SCHUTZ
Judge of Appeal

I agree Signed: R.M. Marais
R.M. MARAIS
Acting Judge of Appeal

Delivered on this 3rd day of July 1981 at MASERU

For Appellant :
For Respondent: