IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA

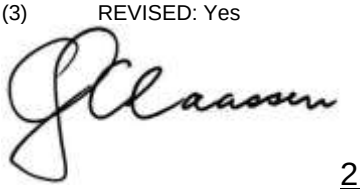
JOHANNESBURG

CASE NO: A420/2003

DATE: 01/12/2003

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: Yes



23 November 2011
SIGNATURE DATE

In the matter between:

LUCAS KGOMOTSO MOTSEMA Appellant

And

THE STATE Respondent

JUDGMENT

JOFFE J:

[1] This is said to be an appeal by Mr Lucas Kgomotso Mosema, the appellant, against his conviction on 27 September 2001 in the Regional Court for Southern Transvaal held at Germiston on each of four counts arising out of two related incidents on 22 August 2000. The appellant also appeals against the severity of the sentences imposed upon him.

[2] The first count was of armed robbery for which he was sentenced to fifteen years' imprisonment. Particulars alleged in the charge was that on 22 August 2000 and at or near Edenvale the appellant had assaulted Gareth Manson and Candice Seoukas, and had then and there attempted to rob them of a Colt bakkie with registration number KNF 385 GP and of some unspecified jewellery and an unstated number of cell phones. It was alleged that aggravated circumstances were present and that the appellant used firearms.

[3] The second count was that of the attempted murder of two policemen for which he was sentenced to ten years' imprisonment. Particulars alleged in the charge was that on 22 August 2000 and at or near Ivory Park the appellant had attempted to kill Sergeant Ferdi Gobe and Inspector Bernard Bastian Mars, both of North Rand Flying Squad of the South African Police Service, by shooting at them.

[4] The third count was of the unlawful possession of two pistols in contravention of section 2, read with other sections of the Arms and Ammunition Act 75 of 1969 for which he was sentenced to four years' imprisonment. The particulars alleged were that at the time and place mentioned in count 2 the appellant had unlawfully possessed a nine millimetre Glock pistol and a 7.65 millimetre pistol, both of which were alleged to be semi-automatic weapons. The magistrate did not find the allegation that they were semi-automatic weapons to have been proved.

[5] The fourth count was of the unlawful possession of ammunition in contravention of section 36, read with other sections of Act 75 of 1969 for which he was sentenced to one year imprisonment. The

charge contained the allegation that the prosecutor was unaware of the number of rounds of ammunition that had been in each of the two pistols.

[6] The total of the sentences was therefore an effective period of imprisonment of thirty years.

[7] At the trial the appellant was represented by Ms Swiegelaar. For purposes of the appeal Mr Jacobs appeared on his behalf. The appeal was opposed on behalf of the State by Ms Bell.

[8] The notice of appeal was drawn by the appellant himself. It is apparent that he is not a person with any legal training and that he did not understand the purposes of a notice of appeal. He has merely used the notice of appeal as an opportunity to restate his version of the facts, a version that was rejected by the trial court as false beyond reasonable doubt. The notice of appeal contains no grounds for the suggestion that the magistrate's findings of fact were incorrect and no grounds upon which the magistrate's reasons for his findings of fact could be brought into question.

[9] In Mr Jacobs' heads of argument he has briefly revealed the evidence on the magistrate's findings and neither there nor in his submissions this morning has he been able to put forward any substantial grounds of appeal. In these circumstances there is no valid appeal against the convictions before us.

[10] Nevertheless, I have read the record and it appears to me that there is a point that this court should take up in the exercise of its review jurisdiction in terms of section 304(4) of Act 51 of 1977. It

relates to count 3 in which it was alleged that the appellant had been in unlawful possession of each of two pistols.

[11] In addition, consideration must be given to the appeal against the severity of the sentences.

[12] As a preliminary before dealing with those questions I shall summarise the facts as found by the magistrate:

1. During the evening of 22 August 2000 at about 19:45 Mr Gareth Manson drove his silver coloured Colt bakkie bearing registration number KNF 385 GP to his house in Edenvale. With him in the cab of the bakkie was his girlfriend, Ms Candice Seoukas, in the passenger's seat.
2. Manson turned into his driveway and stopped there so that Ms Seoukas could get out and open the garage door. At that moment two black men appeared, each with a firearm in his hand, one at the driver's door and one at the passenger's door.
3. Manson was robbed of the bakkie, said to be worth R210 000.00 and of a gold chain, a gold watch, a ring, a Motorola V388 cell phone, and his wallet, altogether worth some R20 000.00.
4. The two black men drove off with the bakkie. Neither Manson nor Ms Seoukas could identify either of them afterwards.
5. Manson went inside the house and telephoned immediately to Vodacom 112 and reported the incident.
6. That same evening at about 19:45 Sergeant Ferdi Gobe and Inspector B. B. Mars of the North Rand Flying Squad were out on patrol in a police vehicle. They received a radio message broadcast on the police

frequency to keep a lookout for a silver coloured Colt bakkie with registration number KNF 385 GP that had just been taken in the course of a robbery in Edenvale.

7. Within a short while and at about 20:00 when they were at Ivory Park near Modderfontein Road, some fifteen or twenty kilometres from Edenvale, they saw a silver coloured bakkie ahead of them. Sergeant Gobe drove up close behind it until he could see that the registration number was indeed KNF 385 GP. He confirmed with radio control that this was the vehicle they had been told to look out for.

8. Having had the confirmation Sergeant Gobe switched on the blue light and the siren of the police vehicle he was driving as an indication to the driver of the silver Colt bakkie to draw over to the side of the road and stop. Instead the Colt bakkie accelerated away in an obvious attempt to escape. Sergeant Gobe and Inspector Mars gave chase.

9. After a pursuit of about 800 metres, the Colt bakkie came to an intersection controlled by a stop sign and made a sharp left turn. Whilst the two vehicles were travelling at right angles to each other, separated by a distance of about 100 metres, the passenger side window of the Colt bakkie opened and the passenger began to fire shots at Sergeant Gobe and Inspector Mars in the police vehicle. This was the start of the shooting which is the basis of the charge of attempted murder in count 2. Inspector Mars observed that the passenger was wearing a dark coloured shirt with white or light coloured stripes.

10. Sergeant Gobe closed the distance between the police vehicle and the Colt bakkie. The Colt bakkie crossed over to the right-hand side of the road. About 200 metres from the intersection the Colt bakkie had some sort of glancing collision with an oncoming Nissan Sentra. Sergeant Gobe began to return the fire that had been coming from the Colt bakkie.

11. The Colt bakkie swung to its left across the road ahead of the pursuing police vehice. It left the road and came to rest in a ditch on the left-hand side of the road. Sergeant Gobe brought the police vehicle up on the driver's side of the Colt bakkie and stopped about 20 metres from it.

12. Two black men emerged from the cab of the Colt bakkie, both through the driver's door and the two policemen got out of their vehicle. Each of the two men from the Colt bakkie had a handgun and both of them began to fire at Sergeant Gobe and Inspector Mars. This continuation of the murderous attack also formed part of the basis of the charge of attempted murder made in count 2.

13. The two policemen returned the fire and the two suspects dropped to the ground no more than about five metres from the Colt bakkie. The firing stopped. The policemen radioed for further police support and for an ambulance.

14. When Sergeant Gobe and Inspector Mars approached the two suspects, it was apparent that both had been hit. Beside the suspect in the dark shirt with light stripes, who had been in the passenger seat, they found a 7.65 millimetre pistol. Upon the arrival of the paramedics this

suspect was found to have died on the scene of the shooting.

15. The other suspect was wearing a plain dark coloured shirt without stripes. He had been the driver of the Colt bakkie. Beside him Sergeant Gobe and Inspector Mark found a 9 millimetre Glock pistol with two live rounds of ammunition remaining in it.

16. The latter suspect had been wounded in one leg. He was taken to Thembisa hospital. He was the accused at the trial and is today the appellant.

17. The version put up by the appellant was that he at that day paid a visit to a friend named Brian in Rabi Ridge. Another friend, named Willie, had given him a lift part of the way home to Thembisa, but as Willie's destination had been Alexandra, he had dropped the appellant by the roadside. Before the appellant had walked far and at about 20:00 hours, he had been overtaken by an acquaintance of his named Tshepo, driving the silver coloured bakkie. Tshepo had offered him a lift to Thembisa and he had gratefully accepted. After that a police car came up behind them and for no good reason that the appellant could see, the police started to shoot at them. The bakkie had been involved in a collision and had left the road. The next that the appellant knew was that he was outside the bakkie lying on the ground and he had a wound in one leg. An ambulance arrived and took him to hospital. He claim to know nothing whatsoever of the robbery or of any firing at the police. He had not taken part either in a robbery or in any shooting at the police, nor had he possessed a pistol or ammunition.

18. The appellant's version was duly tested by cross-examination. The magistrate held that it could not reasonably possibly be true and he rejected it.

[13] The convictions of the appellant on counts 1, 2 and 4 need no further discussion nor does his conviction on count 3, insofar as his unlawful possession of the 9 millimetre Glock pistol is concerned. What must be queried, however, is the magistrate's finding that the appellant was in unlawful possession of both the 9 millimetre Glock pistol, used by himself, and also the 7.65 millimetre pistol used by his passenger, who died as a result of the shooting.

[14] The magistrate stated:

> "Op aanklag 3, die besit van die twee vuurwapens, dit is so volgens S v Nkosi 1998 (1) SACR 284 (W) dat die beskuldigde kan wel skuldig bevind word van die besit van nog 'n vuurwapen wat hy nie besit het, wat die passasier besit het. Hy het geweet dat sy vriend die vuurwapen gedra het, dit gebruik gaan word op die pleging van die misdryf. Die beskuldigde het ook daardie vuurwapen besit…Op aanklag 3 word die beskuldigde skuldig bevind op besit van die 9 millimeter vuurwapen sowel as die 7.65 pistool."

[15] It is apparent that the magistrate has misapplied the decision in **S v Nkosi** 1998 (1) SACR 284 (W). The majority of the court, which judgment was delivered by Mr Justice Marais, held that where two or more armed robbers commit a robbery with a common purpose and use their respective weapons in the course of giving effect to the common purpose, it cannot necessarily be inferred that each robber is a joint possessor of the weapon used by every other robber. Sometimes and perhaps often that will not be the position.

[16] However, as the learned judge pointed out further, that is not to say that there can never be a case of joint possession of a firearm by two or more persons. On the contrary, there can be. But to establish it, the facts to establish joint possession must be proved. It must be shown first that the person A having the physical detention of the weapon had the intention to possess it, not only for himself but that he also had the intention to possess it on behalf of the alleged joint possessor B. Secondly it must also be shown that the alleged joint possessor B had the intention that the person with physical detention A should possess it on behalf of him, B.

[17] Those facts cannot automatically be inferred from the fact of a common purpose to commit an armed robbery using two or more weapons. This is so because such a common purpose is equally consistent with an intention on the part of each robber who has a weapon, to possess it for himself alone, even though he may have agreed to use it in furtherance of the common purposes to commit the robbery.

[18] Consider for example a case in which an armed robbery is committed by two or more persons, each of whom is a duly licensed holder of a particular handgun, with a common purpose to rob and to use their respective weapons for the robbery and the getaway. It is relatively improbable, even if it is not altogether impossible, that the licensed holder of a firearm, when joining with other licensed firearm holders in a common purpose to rob would truly intend to acquire joint possession of the weapons of his accomplices which he had no licence to possess.

[19] He would thereby needlessly expose himself to prosecution for unlawful joint possession of the firearms, lawfully carried by the other robbers, when the true common purpose to rob and escape could equally well be accomplished without that added complication.

[20] There have been a number of cases in which the question of joint possession in the circumstances of the execution of a common purpose has been considered. See for example **S v Fibi and Others** 1990 (2) PH 379, **Molemane and Others v The State**, an unreported judgment by Swart J, Roos J concurring in the Transvaal Provincial Division, referred to in **S v Nkosi** above at 287f – i, **Jan Bosch and Others v The State**, an unreported judgment by Streicher J (as he then was), with MacArthur J concurring in the Transvaal Provincial Division, also referred to in **S v Nkosi** above at 289b – d.

[21] **S v Khambule** 2001 (1) SACR 501 (SCA) at 507e – 509b: This was a case with interesting facts. A group of robbers had formed a common purpose to disarm certain security guards of their weapons in order to pre-empt resistance against an armed robbery that was aimed principally at stealing a large sum of money being delivered in a vehicle.

[22] When by joint efforts of the group the security guards had been disarmed and their weapons were physically held by certain of the robbers, the inference that some of the robbers had taken and had thereafter illegally possessed the weapons of the security guards on behalf of all of the members of the group of robbers, was held to be justified.

[23] The common purpose to disarm the guards plainly embraced the intention on the part of each member of the group of robbers that the particular robbers who were to take possession of the guards' weapons were to do so on behalf of all members of the group of robbers.

[24] I comment, with respect, that the decision seems plainly to be correct. However, Olivier JA in commenting at 508b on the decision in **Jan Bosch and Others v The State** above said:

> "[10] Ek kan in beginsel nie sien waarom, in gepaste situasies en indien die leerstuk van gemeenskaplike oogmerk toegepas word, die gemeenskaplike *animus* om die vuurwapens gesamentlik te besit, afgelei kan word nie. Indien dit die bedoeling van die lede van die groep is om die vuurwapens ter uitvoering van 'n roof of moord te gebruik tot hul almal se voordeel, vereenselwig hulle hul immers met die besit van die vuurwapens."

[25] This proposition is entitled to the respect to be given to an opinion of a learned judge of appeal. Nevertheless, the second sentence was not necessary for the decision of **Khambule**. It was an *obiter dictum*. Moreover, it has been disapproved of by three other learned judges of appeal. In **S v Mbuli** 2003 (1) SACR 97 (SCA) at 115b Nugent JA with Marais JA and Zulman JA concurring, agreed with the proposition in **Khambule** that there is no reason in principle why a common intention to possess firearms jointly could not be established by inference.

[26] However, Nugent JA went on to say with regard to the second sentence of the passage quoted above from the judgment of Olivier JA:

> "…but I do not agree with the further suggestion that a mere intention on the part of the group to use the weapons for the benefit of all of them will suffice for a conviction."

[27] The learned judge of appeal upheld the correctness of the analysis of Marais J in **S v Nkosi** above.

[28] The question in **S v Mbuli** was whether the appellant had been proved to be an unlawful joint possessor of a hand grenade when he and two others in the execution of a common purpose had robbed a bank. The hand grenade had been carried by only one of them. Nugent JA said at 115f:

> "I do not agree that the only reasonable inference from the evidence is that the accused possessed the hand grenade jointly. It is equally possible that, like the pistols, the hand grenade was possessed by only one of the accused. Mere knowledge by the others that he was in possession of a hand grenade, and even acquiescence by them in its use for fulfilling their common purpose to commit robbery, is not sufficient to make them joint possessors for purposes of the Act."

[29] In my judgment the disapproval in **Mbuli** of the *obiter dictum* in **Khambule** was indeed necessary for the decision and constitutes a part of the *ratio decidendi*. I therefore conclude that on the basis of **S v Nkosi** and **S v Mbuli** the law may now be stated as follows:

1. There is no rule of law to the effect that when an armed robbery is committed by two or more persons with a common purpose to commit the armed robbery joint possession of the weapons used in the robbery is to be inferred.
2. Joint possession of the weapons can only be inferred if the facts proved leaves no room for any reasonable inference other than that,
   (a) Each participant in the common purpose to rob who had physical control of a weapon intended not merely to use it but also to possess it, both for

himself and also on behalf of one or more other participants; and

(b) Each alleged joint possessor who did not himself have physical control of a weapon intended that one or more of the weapons should not merely be used but should also be possessed by another participant on his behalf.

[30] In the present matter the evidence clearly pointed to a common purpose between the appellant and the deceased robber to commit an armed robbery of the Colt bakkie from Manson, each robbery using a pistol in furtherance of the common purpose. The common purpose also extended to the use of their respective pistols to make good their escape from the police.

[31] The appellant's possession of the 9 millimetre Glock pistol was duly proved. However, there was nothing in the evidence to justify the magistrate's conclusion that the appellant had also possessed a 7.65 millimetre pistol that the deceased robber was seen to use and that was found lying beside his body. The appellant's conviction of the unlawful possession of the latter pistol must therefore be set aside.

[32] As regards sentence, Parliament has decreed the imposition of a minimum sentence of fifteen years' imprisonment for robbery, if it involves the taking of a motor vehicle and a similar minimum sentence for robbery if it is accompanied by aggravating circumstances. Aggravating circumstances include the wielding of a firearm by the robber or by an accomplice on the occasion of the robbery, whether before, during, or after the commission of the offence.

[33] The only exception that could be applicable in the case of the appellant, who was 24 when he committed the offence, was if there were "substantial and compelling circumstances" to justify a departure from the minimum sentence decreed by Parliament.

[34] In the present case, if there are no substantial and compelling circumstances, the minimum sentence or a heavier sentence had to be imposed, both because firearms were wielded at the time of the robbery and because a motor vehicle had been taken.

[35] Count 2 was in substance two counts of attempted murder rolled into one. By firing a number of shots at both Sergeant Gobe and Inspector Mars, the accused made an attempt to kill each of them. The magistrate's sentence of ten years' imprisonment on this count may notionally be seen as two consecutive sentences of five years each relating to each of the two attempts respectively, or it may be seen as two sentences, each of ten years' imprisonment for two attempts, but running concurrently.

[36] In whichever way the magistrate may have arrived at this sentence of ten years' imprisonment for count 2, it does not appear to me to be disproportionate to the gravity of the offence.

[37] In respect of count 3 the magistrate sentenced the appellant to four years' imprisonment on the basis that he had been in unlawful possession of two pistols. I have indicated that this was an error. The evidence justified no more than a verdict of guilty of the unlawful possession of one pistol.

[38] For that offence the sentence laid down in the Arms and Ammunition Act is a maximum fine of R12 000.00 or three years' imprisonment or both such fine and imprisonment. On behalf of the appellant, Mr Jacobs submitted that the cumulative effect of the sentences, even allowing for the reduction of the magistrate's sentence of four years' imprisonment, remained excessive and this court should intervene and should reduce the sentences.

[39] Ms Bell submitted that it was an extremely serious offence or serious offences and that there was no room for interference with these sentences, apart from what might be necessary, having regard to this court's approach to the question of joint possession of the pistols.

[40] In my judgment there were no substantial or compelling circumstances sufficient to justify a departure of the minimum sentence prescribed for count 1, nor, as I have indicated, is there any reason to interfere with the imposition of the ten year sentence for the attempted murder count, count 2.

[41] With regard to count 3, it is true that the weapons possessed were used in counts 1 and 2 and that there is therefore a certain measure of duplication of the punishment in punishing them for possession as well as for using them in counts 1 and 2. Nevertheless, I regard the offence, and in particular the attempted murder count, i.e. count 2, as of such a serious nature that no further interference with the magistrate's sentence would be appropriate than the reduction of the sentence of four years' imprisonment for possession to the maximum sentence prescribed in the Arms and Ammunition Act of three years' imprisonment.

[42] The sentence of one year imprisonment for possession of ammunition remains appropriate, but, in my view, it should run concurrently with the three year sentence on count 3. For these reasons I would make the following orders:

1. The appeal against the conviction of the appellant on counts 1, 2 and 4 is dismissed.
2. The appeal against the conviction of the appellant on count 3 is upheld to the extent of the deletion from the magistrate's verdict of the words "sowel as die 7.65 pistool."
3. The appeal against the sentences imposed by the magistrate on 27 September 2001 is upheld to the extent that, with effect, retrospective to 27 September 2001, the sentences are amended to read as follows:
    - 3.1 On count 1 the appellant is sentenced to fifteen years' imprisonment.
    - 3.2 On count 2 the appellant is sentenced to ten years' imprisonment.
    - 3.3 On count 3 the appellant is sentenced to three years' imprisonment.
    - 3.4 On count 4 the appellant is sentenced to one year imprisonment.
    - 3.5 The sentence on count 4 is to run concurrently with the sentence on count 3.

    Effectively, the appellant is sent to prison for 28 years.

DATED THE 23rd DAY OF November 2011 AT JOHANNESBURG

C. J. CLAASSEN J
ON BEHALF OF JOFFE J