REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A180/2021

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

SIGNATURE 05/04/2022 DATE

In the matter between:

SESEKO: PETER ARNOLD	FIRST APPELLANT
NTSHINGILA: MBONGISENI WILGET	THIRD APPELLANT

AND

THE STATE	RESPONDENT

Delivered: this judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of his matter on Caselines. The date for handing down is deemed to be ....

JUDGEMENT

NDLOKOVANE AJ

INTRODUCTION

[1.] The appellants appeal against their convictions and sentences of attempted murder, numerous counts of robbery with aggravating circumstances, possession of an unlicensed firearm and possession of ammunition, resulting from a robbery incident that occurred in 2014 near Benoni in the Gauteng Province. They were each sentenced to lengthy terms of imprisonment.

A SUMMARY OF STATE EVIDENCE

[2]. A substantial part of the evidence on behalf of the state is common cause. The divergences will become apparent in due course. British American Tobacco Company("BATC") is in the business of transporting tobacco with attendant security. In respect of count 1, it is common cause that on 21 October 2014 at approximately 13h45, one of its armoured, delivery vehicles containing a built-in safe ('the armoured vehicle'), digital recorder and CCTV cameras, installed, driven by one Mr. Dumisane Edward Kanye was robbed at Kapane Street, Daveyton by a group of men. It transported delivery products ('cigarettes') on behalf of the British American Tobacco Company to its clients operating as hawkers in the Benoni area. The estimated stock value robbed on the day in question was between R120 000 00-R130 000.00. The robbers appeared at gunpoint, instructed him not to look at them in the face, out of shock he fell on the ground, he was then searched whilst still on the ground and the keys of the BATC vehicle he was driving were taken from his pocket. He was taken to the vehicle and placed on the passenger's seat, however, he later managed to escape and hid near one of the houses in the vicinity.

[3.] In respect of count two and three, it is further common cause that, Mr. Thage, the complainant was shot and injured during the ordeal and his firearm was lost in the process.

[4.] Mr. Moshifa is the only witness who placed the appellants on the crime scene on the day in question. It was his evidence that his tavern was fitted on the outside with a CCTV camera which captured the whole incident regarding the robbery. The recordings thereof were handed in the court *a quo* and were marked as exhibit "A" and forms part of the record before us. Over and above the video footage as aforesaid, it was his evidence that he knew the appellants very well and had not seen them for the first time during the robbery incident. This piece of evidence is corroborated by the appellants themselves who testified that he is falsely implicating them in the robbery incident as a result of some 'bad blood' between them. According to Mr. Moshifa, he observed the robbery unfolding whilst standing at his gate and had later observed the video recordings too. This in turn, makes his evidence to be that of a single witness in respect of identification of the appellants.

THE APPELLANTS' VERSION

[5.] The appellants' evidence may be summarised as follows. The first appellant raises an *alibi*. According to him, he was at a shebeen from 10h00 until 21h00 on the day in question. He estimates the distance between the shebeen and the crime scene as 500 meters. In a nutshell, he denies being involved in the robbery and that Mr. Moshifa is falsely implicating him as a result of some 'bad blood' between them.

[6.] Likewise, appellant 3, who's a hawker and operating a business selling hats, belts, and sunglasses, denies being at the crime scene. He could however not recall his whereabouts at the time of the robbery. However, He also points the finger at Mr. Moshifa who is falsely implicating him in the robbery because of some 'bad blood' between them.

THE APPLICATIONS FOR LEAVE TO APPEAL

[7.] The appellants applied to the court a *quo* for leave to appeal against their convictions and sentences. The trial court refused the appellants leave to appeal on 10 August 2017 and they were subsequently granted leave to appeal by this court against their convictions and sentences.

[8.] One of the grounds of appeal on conviction as appearing in the notice of appeal and in the appellant heads of arguments can be summarised as follows: The court *a quo* misdirected itself in the evaluation of one of the state witnesses, Mr. Mochifa, who was a single witness on identification of both appellants at the crime scene. In amplification of this point during the hearing of this appeal, Mr. Van As on behalf of appellants 1 and 3 submitted that the court a *quo* should have exercised more caution in accepting his evidence as a single witness.

[9.] Further, another ground of appeal raised on behalf of the appellants is that the court *a quo* erred in concluding that the perpetrators had a common purpose in committing robbery relating to the service pistol of the complainant Mr. Thage as there was no physical control of the said pistol. Mr. Van As took this point further during the hearing and submitted that there must exist evidence that the perpetrator during the commission of the robbery must have had the firearm and in fact did something about it, failing which, there cannot be any conviction in this regard.

[10.] Another ground of appeal in relation to counts: 4 and 5, is that, regarding the count of possession of an unlicensed firearm and ammunition, the court *a quo erred* in finding that the joint possession principle was applicable erred and/ or misdirected itself.

[11.] Regarding sentence, Mr. Van As submitted that the court *a quo* ought to have taken all sentences together and should have granted one sentence instead as all offences emanated from a single incident. In failing to do that, the court *a quo* erred by overemphasising the issue of seriousness of the offences and thus rendered its sentences shockingly harsh and inappropriate. In his submission, he is of the view that an appropriate sentence for appellant 1 ought to have been 15 years as opposed to 20 years' imprisonment. Whereas, in respect of appellant 3, an appropriate sentence ought to have been 17 years' imprisonment sentence instead of 32 years' imprisonment sentence. The court *a quo* also ought to have ordered that the imprisonment sentence of 10 years he was sentenced in an unrelated matter ought to have been ordered to run concurrently with the sentences in this matter.

APPLICABLE LEGAL PRESCRIPTS

EVIDENCE OF SINGLE WITNESSES

[12.] In the present matter, it is common cause that the evidence of Mr. Thage,was that of a single witness regarding the robbery of the delivery vehicle, It is so in an instance where the version of the State and that of the appellants are mutually destructive, and where credibility must play a significant role. It is indeed so that the evidence of a single, competent and credible witness in a case such as this, involving as it does the testimony of a single witness, the merits of the witness must be weighed against factors which militate against credibility.

[13.] Dealing with a single witness's testimony, the Court in ***S v Sauls and Others***[1], held:

"The trial Judge will weigh [her] evidence, will consider its merits and demerits and, having done

so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings

or defects or contradictions in the testimony, [he] is satisfied that the truth has been told."

[14.] In ***S v Mahlangu and Another***[2]the appeal Court held that the trial Court was entitled to base its findings on the evidence of a single witness as long as this evidence was substantially satisfactory in every material respect or if there was corroboration thereof.

DOCTRINE OF COMMON PURPOSE AND PRINCIPLE OF JOINT POSSESSION

---

[1] *1981(3) SA172(A).*
[2] *2011(2) SACR164(SCA).*

[15.] Another legal principle worth consideration in this present matter is that of the doctrine of common purpose as opposed to the principle of joint possession. I now turn to deal with the legal position on the two.

[16.] There has been some confusion regarding the application of the principles of common purpose and joint possession where firearms are utilised in the course of a robbery or a housebreaking. Accused persons are frequently convicted of robbery with aggravating circumstances on the basis of common purpose, even if their role is relatively minor. In the absence of proof of a prior agreement, what has to be shown is that the accused was present together with other persons at the scene of the crime; aware that a crime would take place; and intended to make common purpose with those committing the crime as evidenced by some act of association with the conduct of the others[3]. However, the principles of common purpose do not find application when convicting an accused for the unlawful possession of the firearm used in the same robbery. Instead, it is the principles of joint possession that apply.

[17.] The test for joint possession of an illegal firearm and ammunition is well established. The mere fact that the accused participated in a robbery where his co-perpetrators possessed firearms does not sustain beyond reasonable doubt, the inference that the accused possessed the firearms jointly with them. In ***S v Nkosi***[4] it was held that this is only justifiable if the factual evidence excludes all reasonable inferences other than (a) that the group had the intention to exercise possession through the actual detentor and (b) the actual detentor had the intention to hold the guns on behalf of the group. Only if both requirements are fulfilled can there be joint possession involving the group as a whole[5]

---

[3] S v Mgedzi 1989(1) SA 687 (A) at 705-706.

[4] *1998(1) SACR 284(W)*

[18.] The above position was confirmed by the Supreme Court of Appeal in ***S v Mbuli***[6]. A conviction of joint possession can only be competent if more than one person possesses the firearm. The court found that mere knowledge by others that one member of the group possessed a hand grenade, or even acquiesced to its use in the execution of their common purpose to commit a crime, was not sufficient to make them joint possessors thereof. In coming to its conclusion the Supreme Court of Appeal overruled its previous decision in ***S v Khambule***[7], where it was held that the mere intention on one or more members of the group to use a firearm for the benefit of all of them would suffice.

[19.] The Constitutional Court, in ***Makhubela v S***[8], confirmed the reasoning in various cases of the Supreme Court of Appeal and, in particular, that *S v Khambule* had been correctly overruled by *S v Mbuli.* As observed by the Constitutional Court there will be few factual scenarios which meet the requirements of joint possession where there has been no actual physical possession. This is due to the difficulty inherent in proving that the possessor had the intention of possessing the firearm on behalf of the entire group, bearing in mind that being aware of, and even acquiescing to, the possession of the firearm by one member of the group, does not translate into a guilty verdict for the others.

[20] With regards to the joint possession of firearm, on the facts, considering the legal principles discussed above, I am satisfied that although appellant 3 was the actual possessor of the firearm, appellant 1 was a joint possessor of same.

[21.] Regarding the conviction on the doctrine of common purposes, there can be no question that the robbers had agreed to attack the delivery vehicle and that the attack was carefully planned; that all the robbers participated in its execution, including the appellants; and that each robber associated himself with the acts perpetrated by the others, this includes the armed robbery of innocent civilians at the crime scene and the attempted murder of Mr. Thage. This alone is sufficient to establish a common purpose. The appellants foresaw and reconciled themselves with the possibility that

---

[6] *2003(1) SACR 97 SCA.*
[7] *2001(1) SACR501(SCA).*
[8] *2017(2) SACR 665(CC).*

the execution of the armed robbery by their co-conspirators - who were heavily armed with firearms could result in the robbery of the delivery vehicle and attempted murder of a person/s. They were thus rightly convicted by the trial court.

POLICE STATEMENTS

[22.] Another issue as appearing from the notice of appeal and appellants' heads of arguments which is also worth being considered herein is that relating to police statements as compared to the evidence of witnesses, especially Mr. Mochafi during the trial. Indeed, "*the purpose of an affidavit was to obtain the details of an offence so that it could be decided whether a prosecution should be instituted against the accused. It was not the purpose of such an affidavit to anticipate the witness's evidence in court, and it was absurd to expect of a witness to furnish precisely the same account in his statement as he would in his evidence in open court*". (my emphasis)[9]. I am satisfied that even though the two statements he made to the police are contradictory to his evidence in the court a quo as can be seen from the record, such contradictions are not material to an extent that the court could not follow what happened on the crime scene.

SENTENCE

[23.] The appellants after they were convicted at the regional court of Gauteng sitting in Benoni on charges of:2 counts of Robbery with aggravating circumstances, attempted murder; possession of an unlicenced firearm, and unlawful possession of ammunition, were sentenced as follows:

> Counts 1 and 2 - Robbery with aggravating circumstances- Appellant 1 was sentenced to 15 years' imprisonment and appellant 3 was sentenced to 20 years' imprisonment. Both counts were taken together as one for the purpose of sentence.
>
> Counts 3- attempted murder: Appellant 1 was sentenced to 5 years' imprisonment and appellant 3 was sentenced to 7 years' imprisonment

---

[9] *S v Bruiners en 'n Ander (supra) at 434i-j).*

Counts 4 and 5 – possession of unlicenced firearm and ammunition -Appellant 1 was sentenced to 5 years' imprisonment and appellant 3 was sentenced to 7 years' imprisonment. Both counts were taken together as one for the purpose of sentence.

Count 6- Robbery with aggravating Circumstances-Appellant 3 was sentenced to 15 years imprisonment.

[24.] It is trite that sentencing lies in the discretion of the trial court. In the absence of material misdirection by the trial court, an appellate court cannot approach the question of sentence as if it were the trial court and then substitute the trial court's sentence simply because it prefers to do so.

[25.] The court a quo imposed the minimum sentences prescribed in the **Criminal Law Amendment Act 105 of 1997** ('Act 105 of 1997') in respect of the three charges of robbery with aggravating circumstances. After considering the factors required to be taken into account in the imposition of sentence, including the appellants' personal circumstances, the court *a quo* came to the conclusion that there were no substantial and compelling circumstances to deviate from the prescribed minimum sentences.

[26.] In this regard, the court *a quo* said that the robbery was planned, and brazenly executed on a public road by some heavily armed robbers who did not hesitate to indiscriminately shoot, and, I would add, almost killed an off-duty police official who was in the process robbed of his service pistol. They terrorised defenceless motorists and by-passers to overcome any resistance. These robberies of delivery vehicles are becoming an epidemic in this country and communities expect the courts to impose severe sentences for these crimes. The appellants were not first offenders and have been in conflict with the law on previous other matters even though some were committed a while back had completed high school and earned some form of income. The trial court remarked that they are a "*calibre of ruthless people, who don't care for life or limb of any other person*'. Accordingly, the seriousness of the crimes outweighed their personal circumstances.

[27.] The reasoning of the court a *quo* cannot be faulted. The Supreme Court of Appeal in **S v Malgas**[10] has held that the prescribed minimum sentences should not be departed from lightly and for flimsy reasons. The legislature has ruled that these are the sentences that ordinarily, and in the absence of weighty justification, should be imposed for the specified crimes unless there are truly convincing reasons for a different response. I agree with the court a *quo* that this is not such a case. Accordingly, the sentences are appropriate.

ORDER

In the result, I propose that the following order be made:

1. The appeal is dismissed.

NDLOKOVANE N
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree and it is so ordered

BAQWA S
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

FOR THE APPELLANT: ADV. F VAN AS

[10] 2001 3 ALL SA 220(A)

INSTRUCTED BY:	LEGAL AID SOUTH AFRICA
FOR THE DEFENDANT:	ADV. EV SIHLANGU
INSTRUCTED BY:	THE STATE (NPA)
HEARD ON:	10 MARCH 2022
DATE OF JUDGMENT:	