REPORTABLE

THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO. AR 407/08

In the matter between**:**

NSUKUKAYIFANI PATRICK DUBE	1ST APPELLANT
NDODO OSCAR JELE	2ND APPELLANT
DONGAZI JIMMY JAMES NGOBENI	3RD APPELLANT
SYDNEY NGESILE JOE KANANA	4TH APPELLANT
SMANGALISO SIMANGA CYRIL SIBIYA	5TH APPELLANT
CHARLIE EPHRAIM TEMBE	6TH APPELLANT
KHULILE GLENWOOD ZOKO	7TH PPELLANT
BONGANI NHLANHLA GABELA	8TH APPELLANT
JOHANNES MOHLOPHEKI LETSOALO	9TH APPELLANT

and

THE STATE	RESPONDENT

APPEAL JUDGMENT Delivered on 14 September 2009

SWAIN J

[1] In the early hours of the morning on Sunday 20 March 2005,

some of the appellants were assiduously applying themselves to the task of drilling into the vault of the First National Bank (the Bank) at Harding The remaining appellants had taken up positions as look-outs outside the Bank.

[2] The fulfilment of their objective of laying their hands on the money in the vault was however frustrated by the arrival of the police, who surrounded the Bank. In the course of an attempt to escape by those appellants inside the Bank, one of their number was shot by Detective Inspector Crouse and died from his wounds a few days later. All of the appellants were arrested.

[3] As a consequence, they all appeared before Theron J and two assessors to answer to the following charges:

[3.1] Count 1 Housebreaking with intent to commit theft and attempted theft

[3.2] Count 2 Murder

[3.3] Count 3 Attempted murder

of which they were convicted and sentenced to terms of imprisonment, the details of which I will deal with in due course.

[4] Leave to appeal against the convictions on Counts 2 and 3, as well as the sentences imposed on all of the counts, was thereafter granted by the learned Judge.

[5] What was established by the evidence was that all of the appellants were parties to a common purpose to break into the Bank and steal the money in its vault, which formed the basis for their conviction on Count 1. The sole issue raised in respect of the challenged convictions is whether the Court *a quo* correctly found on the facts, that the State had established beyond a reasonable doubt, that the appellants possessed the requisite subjective intention in respect of the counts of murder and attempted murder. In other words, intention in the form of *dolus eventualis*, because it was clear on the evidence, that the will of the appellants was obviously not directed at the death of their cohort *(dolus directus)*, nor at the attempted murder of Detective Inspector Crouse, by their deceased cohort.

[6] As stated by Holmes J.A. in

S v Sigwahla 1967 (4) SA 566 (A) at 570 E

"Subjective foresight, like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did do so".

[7] In similar vein is the following dictum of Olivier J A in

S v Lungile & Another
1999 (2) SACR 597 (SCA) at page 602 para 16

"but this court has cautioned, on several occasions, that one should not too readily proceed from 'ought to have foreseen' to 'must have foreseen' and hence to 'by necessary inference in fact did foresee' the possible consequences of the conduct inquired into. *Dolus* being a subjective state of mind, the several thought processes attributed to an accused must be established beyond any reasonable doubt, having due regard to the particular circumstances of the case".

[8] The drawing of an inference from the proved facts that an accused "foresaw a particular consequence of his acts can only be answered by deductive reasoning. Because such reasoning can be misleading, one must be cautious".

Lungile's case *supra* at 603 a – b

[9] The following proved facts relevant to this enquiry emerge from the evidence of Mr. Emile Lundall and Detective Inspector Crouse, both of whom gave evidence on behalf of the State. The evidence of Lundall is of particular importance, because he was privy to all of the planning of the break-in of the Bank by the appellants. The appellants believed they had successfully bribed

him to participate in their criminal mission, to ensure that he did not reveal any activation of the alarm at the Bank, which was monitored by his employer, Prestige Security. The truth of the matter however, was that he had revealed the plans of the appellants to his employer and the South African Police Services (SAPS) at the outset, and had kept the SAPS appraised of developments, as the planning proceeded.

[10] The following facts emerge from Lundall's evidence:

[10.1] The appellants were not planning a robbery, but a break-in of the Bank and would require a three hour period, during which he would be required to keep people away from the vicinity of the Bank, not reveal what they were doing and if the alarm was activated, to respond to it, but not reveal their presence. Because they had specialist alarm people involved, they were confident that if the alarm did go off, it would only sound once.

[10.2] They had obtained the co-operation of the Harding SAPS, as well as the investigating officer, if anything went wrong.

[10.3] Lundall informed two of the appellants that the Bank had requested him to place a guard at the Bank, for the weekend when the break-in was planned, because the drop safe in front of the Bank was broken. They wanted to know if the guard would be armed or unarmed, and he responded that he would be unarmed. The appellants discussed this issue, and then told Lundall that he

must place an "oldish" guard there for the weekend. They said they would kidnap the guard, tie him up and take him somewhere for the duration of the break in. When Lundall told them that they must not hurt the guard, they said this would not be a problem. However, he was told later that no guard must be placed at the Bank, to which he agreed.

[10.4] Lundall was also told that they would break into the back of the Bank and if he had to respond to the alarm which may go off once, that he must not alert anybody. In addition, he was needed to chase away any people walking next to the Bank because there would be a risk of noise from drilling into the vault. In addition, he was told that the policeman on duty that night had a cell phone on him, so that they would be able to contact him.

[10.5] Shortly after the appellants broke into the bank, Lundall was advised by his office that the alarm had gone off, and he contacted Superintendent Claasen, who responded that the police were in position, that he must go to the scene, check it as normal and report that all was in order. This was at approximately 02h35.

[10.6] On his arrival at the Bank he noticed a police van parked in the vicinity. This police vehicle then proceeded into the yard of the Bank, towards the back area and parked next to his vehicle. He then noticed that the bullet proof window had been removed from the fire escape door and was lying next to the wall.

He assumed that was the point of entry. The fire escape door was standing slightly ajar. He then met Inspector Gabela who was driving the police van and he thought to himself that the Inspector must definitely have seen the window lying on the floor. However, the Inspector said to him that everything looked okay and there were no problems. He agreed with the Inspector and said that everything looked in order. The Inspector had a Constable in the police van with him. They then parted.

[10.7] Appellant No. 8 then informed Lundall that the appellants inside the bank were concerned about some drunk patrons outside the nightclub in the vicinity, who had crossed the road towards the Bank. They were about to start drilling into the vault and were concerned that these persons would hear the noise. The appellants inside the Bank wanted Lundall to remove these people from the street. Lundall said it would be difficult for him, as a security guard, to do this. He told them they should rather telephone the policeman they had on their side, as it would be much easier for him to remove these persons. One of the appellants then phoned the policeman and shortly thereafter the police van arrived and removed these people.

[10.8] Thereafter a vehicle arrived at the ATM at the Bank, and a call was received from the appellants inside the Bank, that they were concerned about its presence. Lundall assured them that he knew the people in the vehicle, they did not have to worry about them as they probably only wanted to draw money. The people in

the Bank must have had somebody checking out of the window as to what was happening outside the Bank. The vehicle then left.

[10.9] Lundall then telephoned Superintendent Claasen, having left the scene to attend to another alarm activation, and told her he presumed that the appellants had started drilling into the vault.

[11] What then transpired at the Bank of relevance to the present enquiry, is taken up by the evidence of Detective Inspector Crouse, who testified as follows:

[11.1] On the arrival of the police at the bank, he noticed the back door was standing slightly open, and he could hear a drilling noise from inside the Bank. Whilst standing there his eyes saw movement inside the Bank, because a blind on the window had been opened and some of the lights were switched on inside the Bank.

[11.2] He saw that there were males running to the back door where he was standing. He realised that if he could see them, they could see him, so he moved away from the door, which opened outwards. He had his firearm drawn. As the door flung open, he shouted "it is the police". A male appeared in the door with an object in his hand and attempted to strike him with it. This person tried to strike him with this object again, even though he had shouted "police" for the second time. He then fired at this person, causing this

person to go backwards into the Bank. This caused the other persons, who were following, to turn around and run back towards the vault area of the Bank. He then established that the object this individual had attempted to strike him with was a crow-bar. He had not thought, at any stage, that the object the deceased possessed was a firearm.

[11.3] He then heard noises coming from the stairway leading to the first floor, and he then went up the stairs and started searching the offices with other members of the police, as a result of which appellant Nos. 3, 4, 5 and 6 were found and arrested.

[12] It was common cause that none of the appellants were in possession of firearms when they were arrested. However, two of the appellants were licensed gun owners.

[13] From this evidence the following emerges:

[13.1] The statement that the appellants enjoyed the co-operation of the SAPS, at least to the extent of the Inspector on duty that night, was no idle boast. The Inspector concerned turned a blind eye to the clear evidence of a break-in and, when summoned, removed the drunken patrons of the night club from the street outside the Bank.

[13.2] The appellants believed they had neutralised any danger of detection by virtue of the alarm being activated, because of the co-operation of Lundall.

[13.3] The appellants had look-outs stationed inside and outside the Bank, to prevent detection as a result of the noise of drilling.

[13.4] Up until the stage when the police arrived, the operation was well planned. Thereafter however, the conduct of the appellants indicates panic and a lack of any co-ordinated plan to deal with what was clearly the unexpected arrival of the police.

[14] In my view, a reasonable inference to be drawn is that the appellants never subjectively foresaw that they would be apprehended, because they had taken careful steps to eliminate the danger of discovery by the police, the private security company, as well as members of the public.

[15] The drawing of such an inference is supported by the evidence that they were all unarmed. Apprehension by the police and possibly the private security company would, to the knowledge of the appellants, carry with it the real danger that firearms could be used to arrest the appellants.

[16] At the very least, the absence of firearms supports the drawing of a reasonable inference that even if the appellants subjectively foresaw the possibility of arrest, their subjective intention was that there would be no "resistance dangerous to life" In other words, the appellants, being unarmed, did not reconcile themselves to a "dangerous resistance" to arrest with all its attendant consequences.

[17] In this context, the dictum of Schreiner A C J (as he then was) in

R v Bergstedt 1955 (4) SA 186 (A) at 188 H – 189 A

is apposite.

"In the present case knowledge of the probability that in the event of interference by the police or others there would be resistance dangerous to life depended on knowledge that one of the party had a pistol, for apart from that fact there would be no ground for inferring a mandate to offer such dangerous resistance. Although, once the mandate to attain a result, such as the death of a person, is proved, the means is not important (*Rex v Shezi and Others* 1948 (2) S.A. 119 (A.D.) at p. 128), here, as a matter of evidence, knowledge of the presence of the means was vital. This brings me to a consideration of the evidence as to the appellant's knowledge that one of the party had a pistol and to the failure of the summing up to refer to this evidence."

[18] In the present case "the dangerous resistance" offered by the deceased was not in the form of a firearm, but by way of a crowbar.

As in Bergstedt's case however, on the evidence, possession of a firearm by one or more of the appellants, coupled with the knowledge of such possession by the remaining appellants, would be a necessary ground for inferring a mandate to offer such "dangerous resistance". Put differently, the evidence does not establish that the appellants subjectively foresaw that one of their number would arm himself with one of the housebreaking implements, and thereby offer "dangerous resistance" to an armed policeman, resulting in the assailant's death. If "dangerous resistance" to arrest by the police, or the private security company, was subjectively foreseen by the appellants, they would have ensured that one or more of their number was armed with a firearm.

[19] The significance of the possession of a firearm, by a member of a common purpose to commit the crime of housebreaking with intent to steal and theft, is illustrated by the following dictum of Holmes J A in

S v Malinga & others 1963 (1) SA 692 (A) at 695 A – B

"In the present case all the accused knew that they were going on a housebreaking expedition in the car, and that one of them was armed with a revolver which had been obtained and loaded for the occasion. It is clear that their common purpose embraced not only housebreaking with intent to steal and theft, but also what may be termed the get-away. And they must have

foreseen, and therefore by inference did foresee, the possibility that the loaded fire-arm would be used against the contingency of resistance, pursuit or attempted capture."

[20] This of course does not mean that the presence, or absence, of a firearm is a determining factor in all cases. Each case must be judged on its own facts. In the present case however, the evidence reveals that because of the careful planning of the operation, the appellants did not subjectively foresee, nor plan for the contingency of armed "resistance, pursuit or attempted capture". Simply put, the State did not prove beyond a reasonable doubt that the conduct of the deceased in utilising a housebreaking implement to resist arrest by attacking an armed policeman, leading to the demise of the deceased, was foreseen by the appellants who reconciled themselves to this possibility. In acting as he did the deceased embarked upon a "frolic of his own" in the words of Cachalia A J A in

S v Molimi & Another 2006 (2) SACR 8 (SCA) at 20 g – i

"By taking a hostage he had, in my view, embarked on a frolic of his own. These actions could hardly have been foreseeable by the other participants in the common purpose. To hold otherwise, as the Court *a quo* did, would render the concept of foreseeability so dangerously elastic as to deprive it of any utility. To put it another way, the common purpose doctrine does not require each participant to know or foresee every detail of the way in which the unlawful result is brought about. But neither does it require each participant to anticipate every unlawful act in which each of the participants may conceivably engage in pursuit of the objectives of the common purpose."

[21] This conclusion then requires examination of the manner in which the learned Judge reached the opposite conclusion, as expressed in the following passage from the Judgment:

"It is clear from the precautions taken by the group that they foresaw the possibility that somebody in the vicinity could hear the drilling and interfere with their plan, possibly by notifying the police.

Once it is accepted that the persons planning the housebreaking foresaw the possibility of apprehension, it must also be accepted that they foresaw all the risk *(sic)* that go hand in hand with apprehension, such as arrival on the scene of armed police officers and the possibility of death. In this matter, the group foresaw all these associated risks and took measures to prevent them from eventuating. The fact that they took preventative measures, does not negate the fact that they foresaw the possibility of risk and apprehension and its associated dangers."

[22] With respect, this reasoning conflates the concepts of an appreciation of the risk of harm, with the steps taken to avoid the occurrence of such harm.

[23] The fact that the appellants foresaw the possibility of apprehension does not mean they foresaw the possible consequences of apprehension, and reconciled themselves to such an eventuality. Precisely because of their foresight of the possibility of apprehension, they took extensive steps to prevent its

occurrence. The nature of the steps taken by the appellants, to prevent the risk of harm of apprehension materialising, has to be weighed in deciding whether the appellants nevertheless subjectively foresaw the possibility of apprehension and the consequences of apprehension arising, and reconciled themselves to that possibility. The learned Judge, with respect, erred in concluding that the taking of preventative measures by the appellants did "not negate the fact that they foresaw the possibility of risk and apprehension and its associated dangers".

For the reasons set out above, in my view, precisely because of the steps taken by the appellants to prevent the risk of apprehension materialising, they did not subjectively foresee the realisation of such a risk, nor its attendant dangers.

[24] A further factor relied upon by the learned Judge, was the following:

"Having fixed their colours to the mast as they did, by falsely denying involvement, it will, in the circumstances of this matter, be pure speculation to hold that the evidence discloses the reasonable possibility that they did not foresee the possibility of death. An accused who deliberately takes the risk of giving false evidence in the hopes of escaping conviction altogether cannot expect a Court to make findings in his favour and I emphasize, in the absence of evidence justifying a conclusion in his favour. See ***R v MLAMBO*** 1957 (4) SA 727A. This was not one of those cases where there was evidence forming part of the State's case which could serve as a factual basis to justify such an inference in favour of the accused."

[25] In the light of the evidence led by the State, set out above, I am satisfied there was sufficient evidence to form a factual basis for drawing the inference I have drawn.

[26] Turning to the issue of whether the evidence establishes that the appellants are nevertheless guilty of the crime of culpable homicide, on the count of murder. As stated by Snyman in Criminal Law (4th Edition) page 266:

"The same principle applies to culpable homicide: if it is proved that a number of people had a common purpose to commit a crime other than murder (such as assault, housebreaking or robbery), and that in the course of executing this common purpose the victim has been killed, the one perpetrator's act of causing the death can be attributed to the other members of the common purpose. However, the negligence of one perpetrator can never be attributed to another. Every party's negligence in respect of the death must be determined independently."

I agree with the learned author's view.

[27] The possible negligence of each of the appellants would have to be established, by applying the test of whether a reasonable person in the circumstances of the appellants, would have foreseen the death of the deceased. It is not necessary that the reasonable person foresee the precise way in which the deceased died, that he should foresee the possibility of death in general, is sufficient.

S v Bernadus 1965 (3) SA 287 (A) at 307 B – C

On the present facts however what the reasonable person would have to foresee, is the death of the deceased as a consequence of an attempt to apprehend him.

[28] A consideration of the evidence as to the steps taken by the appellants to avoid apprehension, equally leads me to conclude that a reasonable man would not have foreseen the possibility of such an occurrence. Consequently, it is unnecessary to consider whether a reasonable person would have taken steps to guard against such a possibility and if so, whether the appellants failed to take such steps.

Kruger v Coetzee 1966 (2) SA 428 (A) at 430

[29] Turning to the issue of the sentences imposed. In the light of the conclusion I have reached as to the convictions on the counts of murder and attempted murder, the only sentence to be considered is that on the count of housebreaking with intent to commit theft and attempted theft.

[30] Mr. Howse, who appeared for the 8th appellant, submitted that the crime was facilitated by the police and that this aspect should

receive full recognition in the sentence imposed. In this regard he relied upon

S v Hammond 2008 (1) SACR 476 (SCA) at para 29

[31] It is clear however that in Hammond's case the appellant "was seduced by police agents to participate".

Hammond's case *supra* at para 29

In the present case the police did no such thing. They simply monitored the situation and allowed the appellants to proceed with their plan, until their conduct had established the crimes encompassed by Count 1. In this regard I do not agree with the criticism of Mr. Howse, which he directed at the police, namely that many of the aggravating features of this crime were facilitated or created by the police. It is of course true that the police could have prevented the break-in from ever taking place, but to place the blame on the police for the unexpected turn of events which resulted in the death of the deceased, is unjustified.

[32] It is trite law that in the absence of any misdirection by the Court *a quo*, this Court may only interfere with the sentence imposed if it induces a sense of shock.

S v Hlapezula & others 1965 (4) SA439 (A) at 444 A

or where a striking disparity exists between the sentence imposed by the trial Judge and the sentence which, according to the Court of Appeal, should have been imposed.

S v Masala 1968 (3) SA 212 (A) at 214 H

[33] When due regard is had to the fact that the appellants spent approximately two and a half years in custody awaiting trial, which factor was considered by the learned Judge, I find a striking disparity between the sentence imposed by the learned Judge and the sentence which I would impose.

[34] It is only on this aspect that I disagree with the weight attached by the learned Judge to the various aggravating and mitigating factors relevant to the imposition of sentence. The learned Judge sentenced appellant No. 4 to eighteen years' imprisonment, and the remaining appellants to fifteen years' imprisonment on this count. Due regard being had to the period spent in custody, the practical effect of the sentences imposed is that appellant No. 4 will have spent twenty and half years in prison, and the remaining appellants seventeen and a half years in prison, on Count 1.

[35] I am of the view that an appropriate sentence in respect of Count 1, would be fifteen years' imprisonment in respect of appellant No. 4, and twelve years' imprisonment in respect of the remaining appellants. It is this disparity which I regard as striking, which leads me to conclude that the sentences imposed by the learned Judge must be altered.

[36] The order I would therefore propose is the following:

> The appeals of all of the appellants in respect of Count 2, that of murder and Count 3, that of attempted murder, are upheld and the convictions and sentences imposed in respect of these counts are set aside, and replaced with a verdict of not guilty on Counts 2 and 3.
>
> The appeals of all of the appellants in respect of the sentences imposed in respect of Count 1, that of housebreaking with intent to commit theft and attempted theft are upheld, the sentences are set aside and replaced with the following sentences:
>
> Appellant Nos. 1, 2, 3, 5, 6, 7, 8 and 9 are sentenced to 12 (twelve) years' imprisonment on Count 1.

Appellant No. 4 is sentenced to 15 (fifteen) years' imprisonment on Count 1.

I agree

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K. PILLAY J

I agree

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MADONDO J

It is so ordered

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SWAIN J

Appearances/

Appearances:

For Appellant Nos. 1 – 7 & 9	:	Adv. H. Potgieter
Instructed by	:	H.J. Groenewald Attorneys Pretoria
For Appellant No. 8	:	Adv. J. Howse
Instructed by	:	Mbambo & Company Kwadukuza
For the Respondents	:	Adv. D. Paver
Instructed by	:	Director of Public Prosecutions Pietermaritzburg
Date of Hearing	:	04 September 2009
Date of Filing of Judgment	:	14 September 2009