IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case Number: A209/2022
Magistrate case Number: SHC58/18

In the matter between:

FUZILE RALA Appellant

and

THE STATE Respondent

Date of hearing: 11 August 2023 (Appeal determined in terms of section 19(a) Superior Courts Act 10 of 2013)
Date of judgment: 12 September 2023 (delivered electronically)

JUDGMENT

PANGARKER AJ (SHER J concurring)

Introduction

1. The appellant appeals against his conviction and sentence imposed by the Wynberg Regional Court on six serious offences which emanate from the same incident which occurred in Gugulethu. The appeal is dealt with in terms of section 19(a) of the Superior Courts Act 10 of 2013. The appellant was sentenced to life imprisonment for murder (count 1) and has an automatic right of appeal, and the appeal in respect of counts 2 to 6 is with leave of the Regional Court.

2. I summarize the charges and sentences imposed by the Regional Court as follows:

Count 1: Murder read with section 51(1) of the Criminal Law Amendment Act 105 of 1997 – life imprisonment

Count 2: Robbery with aggravating circumstances – 15 years' imprisonment

Count 3: Attempted murder of Constable Asanda Momoza – 10 years' imprisonment

Count 4: Possession of an unlicensed firearm (9mm Parabellum Glock semi-automatic pistol) - 15 years' imprisonment

Count 5: Possession of 7 x 9mm calibre live rounds of ammunition – 3 years' imprisonment

Count 6: Attempted murder of Constable Kudwa Sambula – 10 years' imprisonment

3. To give more context to count 1, the State alleged that the appellant murdered Zolani Noethe by shooting him with a firearm and relied on section 51(1) of the Criminal Law Amendment Act (CLAA)[1] that the deceased's death was caused by the appellant in the commission of robbery with aggravating circumstances where the appellant acted in common purpose with the deceased in the commission of such offence. In respect of count 2, the appellant was convicted of aggravated robbery of Constable Momoza's

[1] Read with Part 1 of Schedule 2 of the CLAA

Beretta semi-automatic service pistol and used a firearm during the commission of the offence. In respect of counts 3 and 6, the appellant was charged with and convicted of the attempted murder of Constables Momoza and Sambula by shooting at them with a firearm.

Proceedings in the Regional Court

4. The appellant was legally represented throughout the trial and he pleaded not guilty to counts 1 to 5, whereafter the matter was postponed on the first trial day. When the matter resumed on 28 September 2020, the State added count 6, to which there was no objection and in respect whereof, a plea of not guilty was also tendered. The appellant offered no plea explanation in respect of the six charges he faced.

5. The State called five witnesses, who were all police witnesses, and after the conclusion of Warrant Officer Engelbrecht's evidence, the State closed its case. Thereafter, the appellant elected not to testify and closed his case. The record reflects that on the magistrate's enquiry regarding count 1, the defence advised the Court that there would be no admissions as the State intended not pursuing the murder charge, presumably because there was insufficient evidence to secure a conviction.

6. However, on the next Court date, the State applied to re-open its case in order to admit into evidence the post-mortem report and further chain evidence related to the murder charge. The defence objected to the application and after hearing argument, the magistrate granted the State's application to re-open its case.

7. As a result, the post-mortem report and chain statements were handed into evidence and marked as Exhibit B, and thereafter, the State closed its case. Pursuant to the magistrate's ruling that the appellant was entitled automatically to re-open his case, the latter elected to testify in his own defence and called no witnesses. As the appeal is

against conviction on all six charges, I proceed below to set out the material aspects of the evidence led during the trial in the Regional Court.

Evidence presented by the State

8. On 23 August 2017, at approximately 22h00, Constables Sambula and Momoza[2] of Gugulethu SAPS accompanied an ambulance and its personnel to NY147, a residence in Gugulethu. The police's assistance was needed because ambulance personnel were regularly robbed when entering Gugulethu. Momoza was the senior colleague and the driver of the marked police vehicle and parked outside NY147 while the ambulance personnel attended to a patient inside the residence. Sambula was his passenger and was seated in the front passenger seat. The police were requested to assist the ambulance personnel to load the patient into the ambulance, but before they could alight from the vehicle, two males armed with firearms, approached the police vehicle from each side.

9. The suspect who approached Sambula's side of the vehicle, pointed a firearm at him. Sambula looked toward his colleague and saw another man[3], whom he identified as the appellant. The appellant knocked with a firearm against the driver's side of the vehicle, to instruct him that the officers should exit the vehicle. Momoza exited the driver's side of the vehicle very quickly and managed to hit the armed man, grabbed his hand and pushed at him to avoid being shot. Momoza and the man became involved in a scuffle, and as Momoza tried to gain the upper hand, the man pointed the firearm directly against Momoza's stomach and shot him.

10. Momoza's Beretta pistol fell to the ground during the scuffle which had progressed to the opposite side of the road. After being shot, Momoza experienced numbness in his left leg and he fell to the ground and lost consciousness briefly. On

[2] Witnesses are referred to by their surnames in the judgment
[3] Sambula identified the man as the appellant

regaining consciousness, he could not find his firearm and saw the man who shot him, approaching him and firing in his direction, but was unable to do anything due to his injury. Momoza assumed that the man had robbed him of his service firearm.

11. In the meantime, on the other side of the police vehicle, Sambula had also exited the passenger side. The suspect facing him pointed a firearm at him and demanded Sambula's firearm and all the while, Sambula could hear shots being fired from the driver's side of the vehicle. Sambula testified that he shot the suspect who pointed a firearm at him and then ran to Momoza where he saw his colleague lying face-down on the ground.

12. It was at that stage, as Sambula ran around the vehicle, that he saw the appellant approaching him with a firearm in one hand and Momoza's firearm in his other hand, and continuing to shoot at him. Sambula returned fire and shot at the appellant who fell to the ground[4] on the other side of the road, but the shootout did not end there. Sambula, realizing that his ammunition was spent, ran back to the passenger side of the police vehicle to take cover, and all the while the appellant continued approaching and shooting at him.

13. Sambula managed to take an R5 rifle from the vehicle and fired two shots at the appellant who fell down opposite the police vehicle. Sambula ran to the appellant and proceeded to kick the firearms out of the appellant's hands. Sambula then called for back-up assistance and ran to assist the injured Momoza.

14. Other police officers and another ambulance arrived on the scene and transported the appellant and Momoza to hospital for medical attention. Sambula pointed out firearms to police who arrived on the scene. The suspect whom Sambula had shot on the passenger side of the vehicle, had died on the scene.

15. Sambula estimated the appellant to have been 10 to 12 metres from him when

[4] The evidence indicates that the appellant was on the opposite side of the road, near or on the pavement

he shot him and the latter fell on the other side of the road. As to the lighting on the scene, both police officers testified that there were street lights on the road and where the appellant was lying after the shooting. Furthermore, Momoza could clearly see the person who pointed the firearm at him and identified the appellant as the man with whom he had a scuffle and who had shot him. Neither of the two officers knew the appellant prior to the incident.

16. Sambula stated that he estimated the entire shooting incident lasted about 5 minutes and that the appellant wore dark clothes and a dark blue/navy-coloured beanie or cap on his head. On this aspect, Momoza was forthright that he could not describe the clothing which the appellant wore but that he was indeed wearing a cap, beanie or hood on his head. Furthermore, Sambula confirmed Momoza's evidence that the appellant was in possession of two firearms, one of which belonged to Momoza.

17. Sambula and Momoza were adamant that there was no taxi rank in the area nor were there any taxis available at 22h00 in the vicinity where the shooting occurred. Sambula indicated that there were no other pedestrians present and that the appellant was alone in the street at the time of the robbery and shooting. Sambula also pertinently denied that the appellant ran when he heard gunshots: his evidence was that if the appellant's version were true, one would have expected the appellant not to run in the direction of the shooting, which is what he did.

18. Sambula estimated being approximately one metre from the appellant when he approached Momoza's side of the police vehicle. Momoza denied that he could be mistaken as to the identity of the appellant as they were involved in a scuffle and the latter had a firearm. Momoza elaborated that the appellant had looked at him when he knocked on the window with a firearm, that there was eye-to-eye interaction between them, and the appellant's face was visible beneath the cap. Furthermore, he had a clear view of the appellant's face.

19. Sergeants Mthunzi Mabeta and Luvuyo Mpangele of Gugulethu SAPS testified

that on 23 August 2017 they were patrolling in Gugulethu. They responded to information received of a shooting incident at NY147 and on their arrival at the scene, the officers noticed Momoza lying on the side of a police vehicle, and the appellant was lying on the opposite pavement. Both men had sustained gunshot wounds. They also saw another suspect lying on the ground on the passenger side of the police vehicle, who was already deceased.

20. Sambula informed Mabeta that he had shot the deceased and the appellant. Mabeta saw a black 9 mm firearm usually used by Metro police, and a Berretta pistol lying next to the appellant, plus a firearm lying next to the deceased. This observation is confirmed by Mpangele. Mabeta placed the firearms in forensic bags and photographs were taken and exhibits collected by the forensic department who had also arrived on the scene. Mabeta confirmed that the street was well lit at the time of his arrival and that the appellant wore dark clothes, but did not remember whether the appellant wore a hat or beanie.

21. Mpangele opened a docket and attended to contacting forensic officers to attend to the crime scene. He recalled that there were spent 9mm cartridges found on the scene but did not recall if there were live rounds found in any firearms. As with the other witnesses for the State, Mpangele was adamant that the appellant was on the scene at NY147 Gugulethu. As to lighting, his evidence corroborates that of the other witnesses regarding street lights which were well lit.

22. The last witness for the State was Warrant Officer Pieter Gideon Engelbrecht stationed at the Forensic Science Laboratory in Parow. He testified about the ammunition and firearms he analyzed which related to Gugulethu CAS number 454/8/2017. The witness's section 212 statements, to which the appellant did not object, were admitted into evidence as Exhibits A and B, respectively.

23. The significant findings from his evidence are that he received and tested the following: a 9mm Parabellum Glock semi-automatic firearm with serial number erased,

containing seven unfired cartridges plus one fired cartridge case; a 9mm calibre Beretta semi-automatic pistol containing unfired cartridges; a 9mm Parabellum Vector semi-automatic pistol with a magazine; an R5 automatic assault rifle without a magazine; a .38 special Rossi revolver with serial number erased; plus, fired and unfired cartridges. The witness was not cross-examined.

24. After its successful application to re-open its case, the State requested to hand in the post-mortem report and further chain statements related to the deceased mentioned in count 1 (murder), to which there were no objections.

The appellant's evidence

25. The appellant sold fruit and vegetables on the train and on the day of the incident, he took the last train for the evening to Nyanga Junction where he then proceeded to board a taxi at approximately 22h00 for Phillipi East. The taxi dropped off passengers at several stops, but then had a breakdown in Gugulethu and the driver gave him taxi fare for another taxi. As he walked along the pavement toward the second taxi, he saw an ambulance and police vehicle and heard gunshots, which spurred him on to run, and whilst running, he was shot in the leg. He lost consciousness and was taken to hospital.

26. The appellant wore a cardigan, grey trousers and a navy cap, was unarmed and had his cellphone in his possession. He confirmed that there were indeed street lights in NY 147 where he was shot and he saw people in the street while he was walking on the pavement. His further evidence was that the ambulance and police vehicle were opposite him.

27. The appellant could not dispute the police officers' evidence that there was no taxi route in the area where the incident occurred but denied that there were no taxis operating at 22h00. His version put by his legal representative to Momoza and

Sambula, that he was transferred to a taxi, was denied by him: according to the appellant, he walked a distance to find a taxi in the next street. He could not explain why his legal representative would put to witnesses that he was transferred to a different taxi, when his version was that he had walked to find another taxi.

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28. When confronted with the evidence of Momoza and Sambula, the appellant denied that he shot at them, and stated that he was simply an innocent passer-by and had not participated in the robbery. On the Court's questions, the appellant denied being in possession of firearms, did not dispute that Sambula had shot him, and stated that he was not aware of what was on the ground next to him after he was shot[5]. He denied being involved in a scuffle with Momoza and suggested that the police officers were mistaken when they alleged and identified him as the person who robbed and shot Momoza. Lastly, the appellant denied knowing the deceased, Zolani Noethe.

The judgment on conviction

29. In his very detailed judgment, the magistrate thoroughly considered the evidence and found Momoza and Sambula to be credible and reliable witnesses. Importantly, the magistrate found that the police had no reason to implicate the appellant and he accepted the State's version as to how the incident unfolded. He rejected the appellant's version, which was found to be fabricated and not reasonably possibly true, and was consequently rejected.

30. Furthermore, the magistrate found that the appellant and deceased deliberately armed themselves with an intention to rob the policemen and that the appellant must therefore have foreseen the possibility that they would use their firearms to overcome any resistance by the police to their objective.

31. In addition, the magistrate found that the appellant had voluntarily accompanied

[5] This is a reference to the firearms which the witnesses stated were found next to the appellant on the ground

the deceased to rob the police, that neither he nor the deceased disassociated themselves with the robbery and the appellant should therefore have foreseen the consequences thereof. The magistrate found that the appellant's criminal liability for the deceased's death was imputed to him on the basis of common purpose. The magistrate held that the State had proved its case beyond reasonable doubt in respect of all six counts.

Grounds of appeal ad conviction

32. The appellant's ground of conviction is that the magistrate erred when finding that the State proved its case beyond reasonable doubt and in rejecting the appellant's version as not being reasonably possibly true. The ground of appeal turns on the following aspects: was the evidence of Constables Sambula and Momoza as to the identification of the appellant, reliable?; if so, what was the appellant's purpose and role at the scene of the shooting?; and, does the evidence sufficiently link the appellant to the offences?

Identification of appellant

33. During the trial, the appellant placed his identity in dispute and suggested that he was an innocent passer-by who was in the wrong place, at the wrong time. The issue of identification rests mainly on the evidence of Momoza and Sambula. From the evidence considered holistically, the following material facts were clear: firstly, the street and area where the police vehicle and ambulance were parked and where the shooting occurred, were well and brightly lit, and this much was admitted by the appellant. In fact, one of the police witnesses (Mabeta) described a large or big bright light in the street where the incident had occurred and was not challenged on this aspect during cross examination.

34. Secondly, Momoza's evidence that he had direct eye contact with the appellant who knocked on the driver's side with a firearm, while looking into the vehicle, was not disputed by the appellant. That being the case, a reasonable inference is drawn that the appellant's face was close enough to Momoza for the latter to be in a position to clearly note the appellant's features, which he described during the trial[6]. Accepting this to be the case, it then follows that Momoza had a clear and unobstructed view of the appellant from the time he approached the driver's side of the police vehicle. Certainly, the appellant took no issue with Momoza's description of his features.

35. From the evidence, it is furthermore apparent that Momoza had a further opportunity during the scuffle with the appellant to observe his features and identify him, and he remained consistent that they were moving and in close proximity to each other. The cross-examination on the interaction between the appellant and the police officer during the scuffle was ineffectual.

36. Thirdly, there were no obstructions impeding Momoza's view of his attacker nor Sambula's view of the appellant who approached and shot at him. In addition, Sambula had a further opportunity for observation, when he ran to the appellant and kicked the firearms out of the appellant's hands.

37. Fourthly, the police officers' evidence that the appellant wore a dark cap/beanie on his head was not disputed. In my view, the magistrate correctly found the State witnesses' version as to identification of the appellant, their observations when tested against factors such as lighting on the scene, visibility, proximity to the appellant, and the opportunity for observation, to be consistent and reliable[7].

38. I also agree that there was no reason for the witnesses, who had no prior interaction with the appellant and did not know him, to have falsely implicated him. Their evidence is also supported by Mpangele and Mabeta who arrived on the scene and saw

[6] He described the appellant as having a bigger nose and deep set eyes
[7] See S v Mthetwa 1972 (3) SA 766 (A) 768 A-C

two firearms next to the appellant. Accordingly, the appellant's submission on appeal that the matter revolves around the issue of disputed identity, is rejected.

The appellant as an innocent passer-by

39. The magistrate correctly weighed the evidence as to identity against the appellant's version of being an innocent passer-by, apparently caught in the crossfire by police and alleged unknown persons. The appellant's version of having to find a taxi after 22h00, after the taxi he travelled in had broken down, when considered against the police officers' consistent denial of taxi services in the area, was riddled with inconsistencies and improbabilities.

40. Even more telling was the fact that the appellant could not explain what happened to other passengers in the second taxi he was approaching when he was shot by Sambula. Had his version been true, one would have expected passengers to have run for cover when they heard the shots being fired, yet the evidence does not support this scenario as no other pedestrians or civilians were on the scene at the time of the robbery and shooting.

41. Thus, the respondent's submission that if he were indeed an innocent passer-by, the appellant would not run towards Sambula, has merit. The evidence indicates that the appellant ran towards Sambula and in his thorough and detailed assessment of the facts, the magistrate was indeed correct to reject the appellant's version that he was innocently passing by NY147 when the shooting occurred.

42. There is a further telling fact which, in my view, puts paid to the appellant's version: even if Momoza and Sambula were mistaken about the shooter's identity, and the appellant was merely innocently walking by, one has to ask why he was seen with firearms in his hands after he was shot? Here, Sambula's evidence is corroborated by Mpangele and Mabeta, who confirm that one of the firearms was Momoza's Beretta,

found next to the appellant. It follows thus that the only conclusion to draw from the State witnesses' evidence is that the appellant was the person armed with a firearm, who approached and shot Momoza during a scuffle and also shot at Sambula.

Robbery with aggravating circumstances (count 2)

43. I agree with the magistrate's finding in the judgment that the appellant and the deceased, Zolani Noethe, had the sole purpose to rob the police of their firearms. The unchallenged evidence indicates that the appellant and deceased were both armed with firearms and they announced their arrival at the police van, by approaching each police officer's side of the vehicle, simultaneously.

44. Momoza and Sambula faced the appellant and the deceased with their lives clearly in danger and had to act swiftly, as is apparent from the evidence. In respect of the offence of robbery with aggravated circumstances, the Constitutional Court had the following to say in ***Minister of Justice and Constitutional Development and Another v Masingili and Others***[8]:

> *'[34] In spite of the practice of treating armed robbery as what sometimes appears to be a separate crime, it is not. It is robbery. Robbery is the theft of property by unlawfully and intentionally using violence or threats of violence to take the property from someone else. The elements of robbery are: the theft of property; through violence or threats of violence; unlawfulness; and intent. The definitional elements of armed robbery are no different. The aggravating circumstances are relevant for sentencing. Intent regarding the circumstances is not required for conviction, exactly because an accused will be convicted of robbery, given that armed robbery is merely a form of robbery.'*

[8] [2013] ZACC 41 par 34 - Footnote 39 of the judgment as it appears in paragraph 34: *Ex parte Minister of Justice: In re R v Gesa; R v De Jongh* 1959 (1) SA 234 (A) at 238C-E. See also Snyman above para 23 at 517.

45. The magistrate found that the State had proved robbery with aggravated circumstances beyond reasonable doubt. Having regard to the record, there is no doubt that the State proved the elements of unlawfulness, the intention to commit aggravated robbery, the violence[9], and the aggravating circumstance as defined in section 1(1) of the Criminal Procedure Act 51 of 1977, being that the appellant wielded the firearm before, during or after the commission of the offence.

46. The situation which ensued was not one where the appellant grabbed or dispossessed Momoza of his Beretta while they were involved in the scuffle. Momoza's firearm fell to the ground during the scuffle, and after the appellant shot him, he fell to the ground and lost consciousness. Shortly thereafter, Momoza regained consciousness and on searching for the firearm, he could not find it and saw the appellant approaching and shooting at him. Momoza testified that he presumed the appellant had his Beretta.

47. From the above discussion, what thus remains is the theft element of the offence of robbery. Whilst I take no issue with the magistrate's findings and conclusion in respect of the robbery with aggravated circumstances offence, the judgment was silent on the elements of the offence. I am of the view that a comment is required on the element of theft.

48. Momoza testified that the scuffle with the appellant lasted about two minutes, and it is apparent from Sambula's testimony, that he estimated the entire incident to have lasted five minutes. That being the case, and given that the appellant was seen after the shooting to be lying on the ground with two firearms in his possession, it follows as a matter of logic and inferential reasoning that after he shot and effectively disabled Momoza, the appellant must have immediately picked up, and therefore appropriated Momoza's Beretta for himself, and then proceeded to shoot at both officers as described by them.

[9] The shooting of Momoza

49. In those factual circumstances, and having regard to ***Ex parte Minister van Justisie: In re S v Seekoei***[10], I am thus satisfied that the application of the violence (that is, the shooting of Momoza) and the theft to which that violence was directed, and which was made possible by the violence, was essentially one continuous action constituting the crime of robbery. Accordingly, the theft element of the offence was thus proved by the State.

50. The magistrate found that the appellant made common purpose with the deceased to execute the robbery of the police officers. Certainly, from the evidence tendered during the trial and given the appellant and the deceased's brazen approach, it is reasonable to conclude that the appellant was aware of the reasonable likelihood that the police would use their firearms to protect themselves and prevent a robbery.

51. Thus, to have ordered the armed officers to exit their vehicle, could only have resulted in a shootout between the police, the deceased and the appellant. The picture painted of the circumstances and how it unfolded, leaves one in no doubt that the appellant and deceased acted in concert and in the furtherance of a common purpose of robbery. The magistrate's finding on this aspect is certainly correct.

Murder (count 1)

52. In ***Nkosi v S***[11]*,* the issue was whether the appellant was correctly convicted of the murder of a fellow robber in circumstances where a victim of the robbery shot the person in self-defence. Majiedt JA stated as follows at paragraph 7 of ***Nkosi***:

> *'[7] I am mindful of the fact that intent is a subjective state of mind and that 'the several thought processes attributed to an accused must be established beyond any reasonable doubt, having due regard to the particular circumstances*

[10] 1984 (4) SA 690 (A) 707E-F
[11] [2015] ZASCA 125

of the case' (per Olivier JA in S v Lungile & another (493/98) [1999] ZASCA 96; 1999 (2) SACR 597 (SCA) para 16). Equally important is to be cognisant that 'the question whether an accused in fact foresaw a particular consequence of his acts can only be answered by way of deductive reasoning. . . [b]ecause such reasoning can be misleading, one must be cautious' (see S v Lungile and another para 17). The facts in Lungile are more comparable with those in the present instance. In the course of a robbery at a store, a policeman arrived on the scene and exchanged gunfire with one of the robbers (the second appellant) resulting, amongst others, in the death of one of the store's employees. In upholding the conviction of the other robber (the first appellant) on murder and, after setting out the general principles quoted above, Olivier JA held that the inference was inescapable that the first appellant did foresee the possibility of the death of the employee since he knew that at least two of his co-conspirators were armed with firearms[12]*, that the store was located in the main street of Port Elizabeth opposite a police station and that the robbery would be committed in broad daylight. The following dictum in Lungile (para 17) is apposite:*

> *'Generally speaking, the fact that the first appellant had prior to the robbery made common cause with his co-robbers to execute the crime, well-knowing that at least two of them were armed, would set in motion a logical inferential process leading up to a finding that he did in fact foresee the possibility of a killing during the robbery and that he was reckless as regards that result.' (Compare also: R v Bergstedt 1955 (4) SA 186 (A) and S v Nkombani & another 1963 (4) SA 877 (A) at 893 F – H.)'*

53. The submission by the appellant's counsel that the appellant did not foresee the reasonable possibility of the deceased being shot, has no merit in light of the common purpose principle, the facts of the matter and the authority referred to above. I say this because in making common purpose with Zolani Noethe, the fellow robber, and embarking upon the robbery of the police officers, the appellant knew that there was a more than reasonable possibility that the officers would offer resistance and that he and

[12] My emphasis

Noethe may have to use their firearms, and that the result would be an exchange of gunfire. This is exactly the factual scenario which ensued.

54. That being the case, the magistrate's conclusion that the appellant did in fact foresee that in those circumstances, there existed the possibility of a killing during the robbery and that he was reckless as to the result and eventuality, cannot be faulted. In the result, the magistrate's finding that the appellant is guilty of the murder of the deceased on the basis of *dolus eventualis* is correct.

The remaining counts (counts 3 to 6)

55. In respect of counts 2 to 6, there seems to be no material submissions by the appellant's counsel other than a general submission that the appellant's version was reasonably possibly true. I disagree with this submission, and as illustrated above, it is apparent that the magistrate was correct to accept the State witnesses' evidence and reject the appellant's version. I am furthermore satisfied that the State proved the appellant's guilt beyond reasonable doubt in respect of the remaining counts[13].

56. It is trite that on appeal, interference with the findings of fact of the trial Court is limited to an instance where the magistrate committed a misdirection[14]. As illustrated in this judgment, the appellant has failed to show that the magistrate committed any misdirection and thus his findings in the judgment are presumed to be correct[15]. It therefore follows that the appeal against conviction in respect of all the counts thus must fail.

Grounds of appeal ad sentence

[13] Counts 3 to 6

[14] S v Francis and Another [1990] ZASCA 141 at 18-19

57. The grounds of appeal in respect of the sentences imposed on the appellant are summarized as follows: that the magistrate misdirected himself by failing to find that there were substantial and compelling factors warranting a deviation from the prescribed minimum sentences; the magistrate over-emphasized the interests of the community and under-emphasized the appellant's personal circumstances; the magistrate failed to temper the sentence with mercy and failed to consider the appellant's opportunity for rehabilitation; and, the magistrate failed to take into account other sentence options and that the sentences should run concurrently.

Submissions ad sentence

58. The appellant's counsel submits that the magistrate failed to take into account the appellant's personal circumstances as recorded in the probation officer's report[16] and that the appellant was in custody, awaiting trial, for 5 years at the time he was sentenced. It is thus contended that these factors considered cumulatively, warrant a deviation from the prescribed minimum sentence. We are asked on appeal to replace the sentences with an appropriate sentence having regard to the above submissions.

59. The respondent's submission is that the appellant showed no remorse for his conduct and that the offences were so serious that they merited the imposition of the applicable minimum sentences. Furthermore, it is submitted that there were no substantial and compelling circumstances justifying a deviation from the prescribed sentences.

Interference on appeal

60. The test for interference on appeal in the sentence imposed by a lower Court is

[15] S v Hadebe 1991 (2) SACR 641 (SCA) 645 E – F
[16] Exhibit F

whether the Court *a quo* committed a material misdirection by imposing the sentence, or whether the sentence imposed by it is shocking, startling or disturbingly inappropriate[17].

61. In sentencing an offender, the trial Court must be cognizant of the primary purposes of punishment which are prevention, deterrence, retribution and reformation. Furthermore, the Court should be mindful that the *"punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy"*[18]. In order to achieve this balance between the relevant factors and elements underpinning the imposition of a just and balanced sentence, the trial Court should thus ensure that in passing sentence, one element in the sentencing process is not emphasized at the risk of the other.[19]

Appellant's personal circumstances and interests of society

62. The appellant was convicted of six extremely serious offences, three of which attract prescribed minimum sentences in terms of section 51 of the CLAA. From the probation officer's report, it is apparent that the appellant hails from the Eastern Cape and that prior to moving to Cape Town, he was employed. At the time of sentencing, he was in his early 40s, married, with three minor children and one major dependent child, and a first offender. His wife sold household goods and he derived an income from selling produce daily on trains and being a money lender. The probation officer also reported that the appellant did not take responsibility for the commission of the offences and maintained his denial that he did not commit the offences of which he was convicted.

63. From the judgment, I note that the magistrate considered the appellant's personal circumstances, which are neither exceptional nor remarkable. Juxtaposed against the appellant's personal circumstances, are the interests of society, one of the

[17] S v Malgas [2001] ZASCA 30 par 12; see also S v van de Venter [2010] ZASCA 146 par 14
[18] Per Holmes JA in S v Rabie 1975 (4) SA 855 (A) 862G-H

considerations in the ***Zinn*** triad. As to the interests of society, the observations of Heher JA in ***Gardener and Another v S***[20] are, in my view, apt:

> '*[68] True justice can only be meted out by one who is properly informed and objective. Members of the community, no matter how closely involved with the crime, the victim or the criminal will never possess either sufficient comprehension of or insight into what is relevant or the objectivity to analyse and reconcile them as fair sentencing requires. That is why public or private indignation can be no more than one factor in the equation which adds up to a proper sentence and why a court, in loco parentis for society, is responsible for working out the answer.'*[21]

64. Whilst I take cognizance of the appellant's counsel's submissions, I agree with the magistrate that the appellant's circumstances do not trump the interests of society, particularly having regard to the nature and circumstances of these offences. All six offences are on the upper scale of serious and violent crimes. As a reminder, the offences occurred at 22h00 and police officials who were accompanying ambulance personnel who themselves needed escorting as they faced ongoing attacks and robberies in Gugulethu, were specifically targeted by the appellant and deceased.

65. The appellant had no regard for the safety of the surrounding Gugulethu residents and ambulance personnel when he and the deceased embarked upon such blatant acts of aggression against the police officers who were guarding the ambulance. Thus, to argue that the magistrate over-emphasized the interests of society above the personal circumstances of the appellant, in my view, ignores the circumstances of the events and the appellant's commission of very serious offences.

66. I would go so far as to state that the interests of the Gugulethu community

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[19] Moswathupa v S [2011] ZASCA 172 par 4; S v Banda 1991 (2) SA 352 (BG) 354E-G

[20] [2011] ZASCA 24 par 68

specifically and the broader society in the Western Cape would see it as a failure of the Court's and judicial function were their interests sidelined in favour of the appellant's unremarkable circumstances. Surely the commission of offences perpetrated against the police, in the manner in which these crimes occurred, cannot be countenanced and tolerated by society, which call for the imposition of the prescribed sentences. Society is to be protected against such heinous offences where the sole purpose of the appellant and the deceased was to rob the police of their service firearms.

67. Thus, long term imprisonment with a view that it acts as a deterrent for the specific appellant and others who harbour thoughts of embarking on similar conduct, is not inappropriate, shocking nor disproportionate to the crimes and would serve the interests of society. Having regard to his judgment on sentence, I hold the view that the magistrate did not commit a misdirection when he afforded proper weight to the interests of society and the need for a deterrent sentence in view of the very serious offences committed by the appellant.

Other sentence options

68. As for the ground of appeal that the magistrate failed to take account of other sentencing options, the probation officer's report explores the sentence options of correctional supervision, a suspended sentence and direct imprisonment, and the officer reported that the first two options were not appropriate as the appellant did not accept responsibility for his actions for the commission of serious offences. The magistrate indeed considered the other sentence options and in view of the serious nature of the offences, was correct not to have found those options appropriate.

69. The events at NY 147 had the hallmarks of a shoot-out between police and armed suspects, and but for the quick-thinking actions of Constable Sambula, a relatively inexperienced police officer at the time, the injuries and loss of life on the

[21] See also S v Homareda 1999 (2) SACR 319 (W) 324b

scene could potentially have been more serious. The after-effect of the conduct of the appellant and Zolani Noethe, was that the latter was killed and Constable Momoza was so seriously injured that he underwent seven operations, could barely work longer than three hours a day and was living daily on medication at the time he testified in the Regional Court. In my view, the seriousness of the offences was correctly emphasized by the magistrate.

Time already spent in custody as substantial or compelling factor?

70. A further ground of appeal is that the magistrate had no regard to the appellant's time spent in custody awaiting trial, which according to the submissions, is a substantial and compelling factor which justified a deviation from the prescribed minimum sentences for counts 1,2 and 4 respectively. Lewis JA in ***Radebe and Another v S***[22] discussed the weight to be given to an accused person's period spent in custody awaiting trial and the approach and assessment to this factor when determining whether a sentence is to be reduced or not, and cautioned that:

> *'[14] A better approach, in my view, is that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. And accordingly, in determining, in respect of the charge of robbery with aggravating circumstances, whether substantial and compelling circumstances warrant a lesser sentence than that prescribed by the Criminal Law Amendment Act 105 of 1997 (15 years' imprisonment for robbery), the test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed:*

[22] [2013] ZASCA 31 par 14

whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one.' (my emphasis)

71. In respect of murder (count 1), the seriousness of this offence has been recognized in Part I of Schedule 2, read with section 51(1) of the CLAA, in that a first offender faces a minimum sentence of life imprisonment if the death of the victim was caused by the accused in the commission of aggravated robbery. This is exactly what transpired in this matter.

72. In respect of count 2, the robbery was planned and the police were unsuspecting targets for the appellant. The appellant could easily have opened the vehicle door as Momoza testified, as it was unlocked, yet Momoza was ordered outside, a firearm pointed at him, and he had no choice but to comply. In the scuffle which ensued, the appellant shot him in his stomach, resulting in an extensive loss of blood, lengthy hospitalization and severe impact on Momoza's quality of life and his ability to perform his official duties. The aggravating factors attendant upon the execution of the robbery cannot be under-emphasized, and but for Sambula's swift response, the probability existed that the appellant would have fled the scene with a SAPS firearm or proceeded to rob the ambulance personnel.

73. The unlawful possession of the Glock firearm (count 4), which was a firearm that had its serial number removed, was correctly viewed in a very serious light. This was the firearm which the appellant used to rob Momoza and which Mabeta identified as being a service firearm of Metro police. The magistrate was correct to view this offence in a very serious light.

74. The appellant's five years spent in custody awaiting trial were considered by the magistrate. The magistrate found that there were no substantial and compelling factors warranting a deviation of the prescribed minimum sentence in terms of section 51 (3) of the CLAA in respect of counts 1, 2 and 4. It is thus evident that he considered the time spent in custody not to be a factor which, when considered with the other factors,

warranted a deviation of the prescribed minimum sentence in relation to the aforementioned offences.

75. The trial Court's record reflects that the appellant was denied bail in the District Court before the matter was transferred for trial to the Regional Court in terms of section 75(2) of the CPA[23]. Furthermore, the reasons for postponements ranged from a possible section 105A plea and sentence agreement, the appellant's changed instruction and consequent withdrawal of legal representation, appointment of legal aid, role players being on leave, long court rolls and COVID-related issues. The time spent in custody seemed to have had little or no effect on the appellant's attitude toward his convictions and his role in the offences as is evidenced by the remarks of the probation officer that the appellant did not take responsibility for the commission of the offences.

76. It is thus safe to say that the failure to take responsibility and express remorse for his conduct in the commission of very serious crimes, are aggravating factors which in my view militate against considering rehabilitation as a significant factor in the sentencing process. The report also indicated that the appellant joined the 28s gang while in prison.

77. All circumstances and factors considered, the time spent in custody awaiting trial, seen against the backdrop of the seriousness of the offences, the interests of society, the aggravating and mitigating factors, is not a substantial or compelling factor justifying the deviation of the prescribed minimum sentences in respect of counts 1, 2 and 4. On an assessment of all these factors, I hold the view that the individual prescribed minimum sentences imposed in counts 1, 2 and 4 are not disproportionate to the circumstances of the case and the particular offences.[24] Accordingly, the magistrate committed no misdirection when he found that there were no substantial and compelling factors warranting a deviation as allowed by section 51(3) of the CLAA.

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[23] See J47

[24] See, for example, S v Vilakazi [2008] ZASCA par 15

The sentences imposed on counts 3, 5 and 6

78. In respect of the two attempted murder counts (counts 3 and 6), the sentences of 10 years' imprisonment imposed on each of these counts, are neither shocking, startling nor disturbingly inappropriate. I have already referred to the effect of the shooting on Momoza, but wish to add that from my consideration of the record, it is apparent that a letter from a specialist psychiatrist was handed to the magistrate containing a request that Momoza be assisted early and as a preference as he had difficulty sitting for lengthy periods[25].

79. During the course of the trial, he also underwent another operation and from his testimony, his recovery is surely slow and very painful. In the prime of his career as a police officer of more than 15 years' experience at the time, Momoza's career and life were severely impacted as a result of the appellant's conduct and actions, for which no responsibility was taken, much less any remorse or regret was expressed.

80. As for Sambula, the evidence indicates that as a result of the incident, he was very traumatized and underwent trauma counselling, and stayed off work for a period of time. From the facts, Sambula faced an appellant who was advancing with two firearms, and who continued shooting at him, and this conduct puts the brazenness of the appellant's attack into perspective: nothing was going to stop him from achieving his objective. The fact that Sambula was not hit by a bullet fired by the appellant certainly does not count in the latter's favour, and in my view, the sentence of 10 years' imprisonment is proportionate to the offence of attempted murder. Similarly, the three years' imprisonment imposed on count 5 does not brook any interference on appeal.

81. To conclude the above discussion, I am satisfied that on each of the offences (counts 1 to 6), **each of the sentences imposed in respect of those counts**, were neither shocking, startling nor disturbingly disproportionate in view of the circumstances of the crimes and all the other relevant factors considered. On each sentence

[25] See letter dated 12 July 2019, by Dr Q Cossie

considered and imposed individually, there is thus no room to interfere on appeal in the magistrate's sentence judgment.

Concurrency and cumulative effect of sentences imposed

82. There remains a final ground of appeal which is that the magistrate erred by failing to allow the sentences to run concurrently and thus failed to consider the cumulative effect of the sentences imposed. As a starting point, section 280 (2) of the CPA provides that where a person is convicted of more than one offence at trial, and where imprisonment is imposed, the sentences shall commence the one after the expiry, remission or setting aside of the other in the order which the Court directs, unless the Court *"directs that such sentences of imprisonment shall run concurrently"*[26].

83. Section 39(2)(a)(i) of the Correctional Services Act 111 of 1998 states that any determinate sentence of imprisonment to be served by an offender is to run concurrently with a life sentence to be served. Hence, it is apparent from this section that by operation of its provisions, any determinate sentences imposed on an offender would by operation of the law, run concurrently with life imprisonment and that the sentencing Court need not make an order as contemplated in section 280(2). In this respect, I am in agreement with Van Zyl AJ (Gamble J concurring) in ***Yose and Another v S***[27]. More so, in ***S v Mashava***[28] the Supreme Court of Appeal (SCA)**,** referring to section 39 (2)(a)(i), stated that a determinate sentence which is imposed in addition to life imprisonment is subsumed by the life imprisonment because a *"person has one life and a sentence of life imprisonment is the ultimate penal provision*"[29].

84. Thus, for all practical purposes and on the face of it, the magistrate need not have made an order that the sentences on counts 2 to 6 would run concurrently with life

[26] Section 280(2) CPA
[27] [2022] ZAWCHC 130 par 19
[28] [2013] ZASCA 200 par 7
[29] Footnote excluded from above quote

imprisonment on count 1 by virtue of the legislation I refer to above. However, the difficulty arises when regard is had to the cumulative effect of the sentences imposed on counts 2 to 6. In total, the number of years' imposed totals 53 years' imprisonment. In my view, the fact that life imprisonment was imposed on count 1, and that the sentences on counts 2 to 6 are to run concurrently with life imprisonment by operation of section 39(2)(a)(i) of the Correctional Services Act, does not detract from a sentencing Court's duty, when imposing multiple sentences, to consider the cumulative effect of the sentences imposed, in this instance, 53 years' plus life imprisonment[30].

85. In this regard, the argument by the appellant's counsel has merit. It is not suggested on appeal that because the offences all arose from a single event, occurring at the same place and time, that the offences were to be taken together for purposes of sentencing. In any event, this aspect was not raised on appeal and we have not received submissions in this regard. To be clear, and with reference to my findings above, I found no basis to interfere with the magistrate's sentences imposed in respect of each of the six counts, which I have found to be appropriate and commensurate with the facts, circumstances, sentencing guidelines and the offender.

86. However, that said, it is apparent that the cumulative effect of the 53 years imposed on counts 2 to 6, was not considered by the magistrate and ultimately may amount to a sentence which is harsher or stricter than life imprisonment on count 1. In essence, 53 years' imprisonment may be more onerous than life imprisonment. In ***S v Bull and Another; S v Chavulla and Others*** [31], the SCA reiterated that life imprisonment is the most severe sentence and the most appropriate where an offender is to be removed from society.

87. In this matter, the imposition of life imprisonment on count 1 is not only imposed to comply with the provisions of section 51(1) of the CLAA but also to remove the appellant, who showed no remorse for his conduct and committed serious crimes, from

[30] See Willemse v S [2021] ZAWCHC 92 par 8; Kruger v S [2011] ZASCA 219 par 10
[31] 2001 (2) SACR 681 (SCA) par 21

society. In my view, life imprisonment would give effect to all six offences committed by the appellant in the circumstances of the matter.

88. In conclusion, I am concerned that the cumulative effect of the sentences imposed on counts 2 to 6 is high and excessive, and ultimately disproportionate to the offender, the circumstances and society's interests, and thus this aspect is not purely academic. While it is not the sentencing Court's role to be concerned about the appellant's future eligibility for parole, as that falls within the purview of the Department of Correctional Services, the sentences as they currently stand may have the potential to impact on the appellant's rights in terms of section 12(1)(a) of the Constitution, which is the right not to be deprived of freedom arbitrarily or without just cause[32]. To that extent, I find that the magistrate's failure to consider the cumulative effect of the sentences and the concurrency thereof, warrants interference on appeal to the limited extent as set out in the Order below.

Order

89. In the circumstances, the Orders which I propose are as follows:

a. The appeal against conviction on counts 1 to 6 is dismissed.

b. The appeal against the sentence on count 1 (life imprisonment) is dismissed. The sentence of life imprisonment is confirmed.

c. The appeal against the sentences imposed on counts 2 to 6 is dismissed and such sentences are confirmed.

d. In terms of section 280(2) of the Criminal Procedure Act 51 of 1977, it is ordered that the sentences imposed on counts 3, 4, 5 and 6, shall run

[32] See Makhoka v S [2019] ZACC 19 par 13-19 – while the matter in Makhoka dealt with a non-parole order, the findings and concerns raised by the Constitutional Court are relevant

concurrently with the sentence imposed on count 2. This order is backdated to 4 August 2022.

e. The cumulative effect of the sentences (on counts 1 to 6) is thus life imprisonment.

M PANGARKER
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered

M SHER
JUDGE OF THE HIGH COURT

APPEARANCES:

For Appellant: Ms A de Jongh

For Respondent: Adv B V Maki