

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: A200/2018

- (1) REPORTABLE: Yes / No:
(2) OF INTEREST TO OTHER JUDGES: Yes / No
(3) REVISED.

25/05/2023
DATE


SIGNATURE

In the matter between:

POYO KBELO

First Appellant

JOE MOGADI

Second Appellant

and

THE STATE

Respondent

Neutral Citation: *Poyo Kabelo and another vs The State* (A200/2018) [2023]
ZAGPJHC 558 (25 May 2023)

JUDGMENT

BHoola AJ (RAMLAL AJ concurring)

Introduction

- [1] This is an appeal by both appellants, from the lower court directed against both the conviction and sentence. Both petitioners, were legally represented pleaded not guilty and exercised their right to remain silent. They were refused leave to appeal against their conviction and thereafter petitioned the Judge President of this Division for leave to appeal in terms of section 309(c)(2)(a) of the Criminal Procedure Act 51 of 1977 against both the conviction and sentence and it was granted.
- [2] Both appellants were convicted on the 10th October 2017 of two counts of robbery with aggravating circumstances read with section 51(2) of the General Law Amendment Act, Act 105 of 1997 (Minimum Sentence Act). Petitioner number two was also convicted of two counts of attempted murder, one count of unlawful possession of a firearm and one count of unlawful possession of four live rounds of ammunition. The court of first instance found that there were no substantial and compelling circumstances and sentenced both petitioners to an effective 20 years' imprisonment in respect of all counts running concurrently.
- [3] The prosecution presented the testimony of four (4) witnesses and both the appellants testified in their own defence. The appellants also called witnesses. The evidence for the State can be described as two (2) scenes. Scene one is described as the robbery with aggravating circumstances of the motor vehicle.¹ The two (2) complainants were called in support of this scene. Scene two is described as the arrest. Two (2) witnesses were called in support of this scene and will be referred to as the 'arresting' witnesses.

¹ Kia Cerato Registration number CB 95 DK

- [4] The succinct common cause evidence before the court was that both the complainants were hijacked and robbed of their possessions during March 2016. One of the complainants was robbed of her motor vehicle, jewellery and handbag at gunpoint and the other complainant was also held at gunpoint and robbed of his car keys. Six days later, after a shoot-out, with the police, the stolen vehicle collided with the barriers when the appellants attempted to evade the police after a high-speed car chase.

Background

Scene One

- [5] In scene one, which was common cause: on 12h15 on the 31st March 2016 and at Du Preez Street, Alberton, Ms Denise Woods, who was in the company of her grand-daughter was held at gunpoint and robbed of her motor vehicle, jewellery and her handbag. She did not and could not identify her assailants prior to, during and after the attack. All she could remember was one of the robbers had a reflective jacket on and one was taller than the other.
- [6] Mr De Lange, testified on the same day, and on the same street, saw a red bakkie, pass his house with yellow municipal lights on top of the roof. It had three male occupants inside, who were wearing reflector jackets. The bakkie appeared suspicious to him so he followed it, making a number of U- turns until eventually they met in the T- junction in Du Preez Street facing each other, where the bakkie stopped in the middle of the T junction. At that stage there was only one occupant in the bakkie - the driver.
- [7] He continued driving because he was curious as to what became of the other two occupants of the bakkie. When he drove for about 150 meters, the said motor vehicle came out of a driveway and drove in the direction of the red bakkie. He gave the driver of the motor vehicle space to drive in front of him.

At that stage he did not realise that the motor vehicle was being hijacked. The passenger in the get-away motor vehicle opened the door and pointed him with a firearm. Thereafter, the driver of the same motor vehicle jumped out of the motor vehicle, approached him from the front on his right side and put the gun at the back of his head. He then stuck his hand inside his motor vehicle, pulled out the car key from the ignition and locked the steering without saying anything. He, thereafter, got into the motor and both the motor vehicle and the red bakkie drove away.

- [8] He could only identify one person via dock identification, who was accused number two in the trial and was not a petitioner before this Court. There was no identity parade held and the conviction of the appellants in count one was based on circumstantial evidence.

Scene two

- [9] In scene two, which related to the arrest of the assailants, the State led the evidence of the arresting witnesses: Sergeant Tshillo Robert Khurumbi, the crew and Constable Thakalani Nemutavhani, the driver. They testified that on the 6th April 2016, they were patrolling in Johannesburg, in full uniform, when they received information about the said motor vehicle with registration number CB 95 DK GP had been hijacked and heading in the direction of Grayston Drive.
- [10] When they saw the said motor vehicle, they beckoned it to stop by putting the siren and the blue lights on top of the roof, but it did not stop. At that stage they observed that there were three occupants in the motor vehicle. A high-speed car chase ensued between the motor vehicle driven by the police² and the perpetrators.

² Golf GTI

- [11] The driver of the pursued motor vehicle eventually lost control, hit the barriers and came to a halt in Grayston Drive. After the pursued motor vehicle came to a standstill, all three suspects alighted the said motor vehicle. Appellant number one fled the scene and ran into the bushes. He was chased and apprehended by Constable Nemutavhani. Appellant number two and accused number two at the trial, concealed themselves next to the car, lying on the ground. Between the two suspects, there was a firearm lying on the floor. The arresting officers did not touch the firearm and called the forensic experts. Appellant number was apprehended and brought to the scene Constable Nemutavhani. Thereafter, they arrested all the suspects. Appellant number two was not hand cuffed and he was taken by the ambulance from the scene.

Formal admissions

- [12] Photographs and the ballistics report were admitted as evidence in terms of section 220 of the CPA. It was also formally admitted that the pursued motor vehicle belonged to Ms Denise Woods when she was hijacked on the 31st March 2016. It was also admitted that this vehicle was found in the possession of the suspects, and driven by appellant number one (1), on the 6th April 2016, after it hit the barriers and was damaged.

Appellants Case

- [13] Both the appellants pleaded not guilty and denied the allegations proffered against them. They denied having assaulted, hijacked and robbed both the complainants of their belongings. They both raised the defence of an *alibi*.

The first appellant

- [14] The first appellant, initially denied he was one of the suspects. Thereafter, he made an admission in terms of section 220 and testified that he was indeed the driver of the pursued motor vehicle. He denied having stolen the vehicle on the

day in question. His version was that he got the car from one Mr. Steve Dlamini, who he knew through another person. Mr. Steve Dlamini sold cars. He wanted to buy the car and Mr. Steve Dlamini gave him to test drive the car for two days. He called his mother as a witness.

The second appellant

[15] The second appellant testified and also denied his involvement in all the allegations levelled against him. His version was he knew appellant number one for a while, but he only met accused number two on the date of the incident. Appellant number one was his brother's friend. On the 31st May 2016 around 08h00, he ferried children to school and between 13h00 and 17h30 he fetched the children from school. He did this as his daily job until his arrest on the 6th April 2016. He did not remember seeing appellant number one on the 31st March 2016. He and his alibi also did not corroborate each other.

[16] According to him on the 6th April 2016 appellant number one arrived with accused number two at his place of residence. Appellant number one wanted to see his girlfriend in town and requested that they accompany him. On their return from town, he heard bullets penetrating the car they travelled in and he was struck by bullets. He was the passenger seated on the back seat of the car. He denied opening and closing the car door and pointing or shooting at the police vehicle. He was unconscious in the motor vehicle at the scene of the crime and he regained consciousness in hospital.

Grounds of appeal

[17] On a proper conspectus, the appellants attack on their conviction and sentence turns on the following issues:

- (a) the court of first instance found that the State discharged its onus and proved its case beyond a reasonable doubt despite the fact that the State

relied on circumstantial evidence and that the complainants could not identify the appellants as part of the group that committed the offence on the 31st March 2016.

- (b) that the court of first instance erred by not considering the totality of the evidence when it rejected the appellant's version: it attached insufficient weight to the contradictions of the police officers evidence, it failed to properly consider the improbabilities in the State's version, failed to consider that common purpose was not relied upon by the State, and there were no finger prints uplifted from the firearm.
- (c) that the court over emphasised the interest of the seriousness of the offence as well as the community interest over other factors and imposed a shockingly inappropriate sentence.

Legal Principles

Circumstantial evidence

[18] A conviction can be based on circumstantial evidence. The test in evaluating circumstantial evidence was laid down in *Blom*³ where the two cardinal rules of logic that should apply was laid down:

'(1) The inference sought must be consistent with the proved facts. If not, then the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them, save the one sought to be drawn. If they do not exclude other reasonable inference, there must be doubt that the inference sought to be drawn is correct.'

[19] In *Mtsweni*,⁴ the court held:

'Inference must carefully be distinguished from conjecture and speculation. There can be no inference unless there are objective facts to infer to the other facts which sought

³ *R v Blom* 1939 AD 188

⁴ *S v Mtsweni* 1985(1) SA 590 (A)

to establish. In some cases, the other facts can be inferred with as much practical certainty as if they had been actually observed, in other words the inference does not go beyond reasonable probability. But if there are no positive facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.'

Identification

- [20] It is trite law that the evidence of identification must be considered with great caution. In *Mthetwa*⁵ Holmes JA set out the proper approach as follows: 'Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities.'⁶

Contradictions

- [21] Contradictions must be material to warrant rejection of a witness' evidence. The court must after evaluating all evidence be satisfied that the truth has been told. In dealing with contradictions the following was said in *Mkohlle*⁷:

'Contradictions per se do not lead to the rejection of a witness' evidence, they may simply be indicative of an error.'

⁵ *S v Mthetwa* 1972 (3) SA 766 (A) at 768A-C.

⁶ *R v Masemang*, 1950 (2) SA 488 (AD); *R v Dladla and Others*, 1962 (1) SA 307 (AD) at p 310C; *S v Mehlape*, 1963 (2) SA 29 (AD).

⁷ *S v Mkohlle* 1990 (1) SACR 95 (A)

[22] In *Oosthuizen*⁸ was held:

'Not every error made by a witness affects his credibility, in each case the trier of fact has to take into account such matters as the nature of the contradictions, their number and importance and their bearing on other parts of witness's evidence.'

Doctrine of recent possession

[23] The possession of recently stolen property may justify an inference that the person in whose possession the property is found is guilty of the said offence. This doctrine has been discussed in a number of cases.

[24] The Supreme Court of Appeal in *Mothwa*,⁹ stated the proper application of the 'doctrine' of recent possession : 'The doctrine of recent possession permits the court to make the inference that the possessor of the property had knowledge that the property was obtained in the commission of an offence and in certain instances was also a party to the initial offence.'

'The court must be satisfied that (a) the accused was found in possession of the property; (b) the item was recently stolen'

'When considering whether to draw such an inference, the court must have regard to factors such as the length of time that passed between the possession and the actual offence, the rareness of the property and the readiness with which the property can or is likely to pass to another person'

'There is no rule about what length of time qualifies as recent. It depends on the circumstances generally and, more particularly, on the nature of the property stolen'

'Courts have repeatedly emphasised that the doctrine of recent possession must not be used to *undermine the onus of proof which always remains with the State*'

⁸ S v *Oosthuizen* 1982 (3) SA 571 (T) from page 576 at paragraphs G to H it

⁹ *Mothwa v S* (124/15) [2015] ZASCA 143; 2016 (2) SACR 489 (SCA) (1 October 2015) at [8] to [10]

'It is not for the accused to rebut an inference of guilt by providing an explanation. All that the law requires is that having been found in possession of property that has been recently stolen, he gives the court a reasonable explanation for such possession.'

[25] The explanation of the possession advanced by appellant number one is important when adjudicating such matters that involve circumstantial evidence, since recent possession and theft is a continuing offence. The explanation advanced is relevant because the failure by the appellant to give a plausible account is not to be limited to the time when the goods were found in possession of the alleged perpetrator. The explanation of the possession may be given at any time, including during trial. The explanation will be 'satisfactory' if it is reasonably possible or shows a genuine belief of innocence. This test for awareness of unlawfulness is subjective. The test is one of dishonesty and not one of negligence.¹⁰

[26] The Magistrate found that the appellants were guilty by virtue of the doctrine of recent possession. The Magistrate rejected the first appellant's explanation of the defence of alibi because they did not corroborate each other in many respects about the how, when and the signing of the agreement. I believe it was correctly rejected by the Magistrate as being false.

[27] The proof of possession and knowledge of the robbery with aggravating circumstances was relied upon by the State by circumstantial evidence since neither Ms Woods nor Mr De Langa could identify the appellants. Both arresting witnesses testified that the first appellant was in possession of and the driver of the motor vehicle in question. Recent possession on its own would not result in finding the appellant guilty because there could be a plausible satisfactory explanation which will not be inconsistent with innocence. It is the absence of an explanation that is reasonably possibly true that gives probative weight to

¹⁰ *Nkosi and Another v S* (A260/2021) [2022] ZAWCHC 50

the circumstances of recent possession. In the absence of a satisfactory acceptable explanation by the appellants, as to how he came into possession of the motor vehicle, then the Court must consider whether the State discharged the onus that was placed on the State.

[28] In order for the state to discharge the onus, relying on circumstantial evidence, it is trite law, the court may rely on inferences, where cardinal rules for acceptance of such circumstantial evidence was laid down in *Blom* as follows:

'(i) 'The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn'

(ii) 'The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, there must be doubt whether the inference sought to be drawn is correct'

Simply put, the circumstantial evidence drawn, must be relied upon and depends on the facts that are proved by direct evidence.

Principal of joint possession and common purpose of illegal firearms

[29] In the matter of *Leshilo*,¹¹ the Court considered the principal of 'common' purpose regarding possession of firearms, as well the requirements of 'joint possession of firearms.' In summary the Court found that in cases of alleged joint possession the principles of common purpose are not applicable.

[30] The court held that '[t]he 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'.

¹¹ *Leshilo v S* (2020) ZASCA 98 (8September2020)

[31] The Constitutional Court, in *Makhubela & Another*¹² confirmed the reasoning in various cases of this Court and, in particular, that in *Khambule*¹³ had been correctly overruled by *Mbuli*.¹⁴ 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 of the others.

[32] In *Ramoba*,¹⁵ the appellant had been convicted of three counts of unlawful possession of firearms; the first count was in respect of a pistol and the other two counts were in respect of two rifles. On appeal, the court held that, in respect of the pistol, there was no evidence as to who put it inside the vehicle (in which it was found) and no evidence as to whether the appellant was aware that it was inside the vehicle. The court held that there was no evidence to establish joint possession of the pistol; it stated: '... there are no facts from which it can be inferred that the appellant had the intention to possess the Norinco pistol through the actual detentor thereof, who is in any case unknown, and whether or not the person who put it inside the Isuzu bakkie intended holding it on behalf of the group, including the appellant.'¹⁶

[33] In *Nkosi*¹⁷, it was common cause that there was physical possession of three guns by the three robbers individually. The only question was 'whether there was the necessary mental intention or *animus* to render their physical possession of the guns' possession by the group as a whole'. The test for joint possession of an illegal firearm and ammunition was set out in *Nkosi*¹⁸ where

¹² *S v Makhubela & Another* 2017 (2) SACR 665 (CC), para 46

¹³ *S v Khambule* (A187/08) [2008] ZAGPHC 322

¹⁴ *S v Mbuli* 2003 (1) SACR 97 (SCA).

¹⁵ *S v Ramoba* 2017 (2) SACR 353 (SCA)

¹⁶ See footnote 15

¹⁷ *S v Nkosi* 1998 (1) SACR 284 (W) 286 H-I

¹⁸ See footnote 17

the court stated that it must be possible to properly infer from the established facts that:

'(a) the group had the intention (*animus*) to exercise possession of the guns through the actual detentor and

(b) the actual detentors 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 and the detentors . . . to possess all the guns.'

Onus

[34] According to *Mthetwa*,¹⁹ the evidence tendered against the appellants must be adjudicated in totality and the guilt of the appellants, must be established beyond a reasonable doubt. The appellants provided an explanation of the *alibi* defence. The question the Court had to determine and establish was whether it was the only reasonable inference to draw to the detriment of the appellants.

[35] It is not incumbent upon the prosecution to eliminate every hypothesis which is inconsistent with the appellants' guilt or which, as it is also expressed, is consistent with their innocence. In *S v Sauls*²⁰, it was stated: 'The State is, however, not obliged to indulge in conjecture and find an answer to every possible inference which ingenuity may suggest any more than the Court is called on to seek speculative explanations for conduct which on the face of it,

[36] The principle in *Segalo*²¹ is relevant, in this regard where it was stated: 'The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities, and

¹⁹ *S v Mthetwa* 1972 3 SA 766 A

²⁰ *S v Sauls and Others* 1981 (3) SA 172 (A) at 182 G – H.

²¹ *Segalo v S* (A543/2010) [2017] ZAGPPHC 41 (14 February 2017) at para [15]

improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt...' is incriminating...'

Evaluation and Analysis

[37] Regarding scene one, I hold the view that there was no causal link between the arrest on the 6th April 2016 and the robbery which occurred on the 31st March 2016 since neither one of the complainants could not identify either one of the appellants. The Magistrate erred and based his conviction on counts one and two on conjecture and speculation.

[38] On a conspectus of the evidence in totality, the evidence against the first appellant is overwhelming in that he was in possession of and the driver of the motor vehicle in question on the 6th April 2016. It was common cause that both the appellants were together with accused number two when they were arrested on the 6th April 2016. The issue of mistaken identity cannot be accepted in respect of appellant number one on the 6th April 2016 because Constable Nemutavhani never lost sight of him after he alighted from the driver's side of the hijacked motor vehicle until he was apprehended. In addition, appellant number one (1) made a section 220 admission that he was the driver of the motor vehicle in question. His version of how he came in possession of the motor vehicle events was correctly rejected by the Magistrate. Therefore, I make a finding as a rejection of his version by the court, there was no legal explanation for his possession of the said motor vehicle.

[39] In the absence of any evidence relating to robbery with aggravating circumstances, in that and the fact that the Magistrate correctly in my view rejected the *alibi* defence of the first appellant. Was he then guilty of any of the

competent verdicts? S 36 of the General Law Amendment Act²² (GLAA), which provides:

'any person who is found in possession of any goods, other than stock or produce as defined in section 1 of the Stock Theft Act, 1959 (Act 57 of 1959), in regard to which there is reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft.'

[40] This, however, does not mean that this is the end of the matter because the factual finding, which was common cause is that the motor vehicle which belonged to Ms Woods was found in appellant number one's possession. The chain in respect of the recovery of the motor vehicle was admitted in terms of section 220 of the CPA. The issue for consideration was whether the appellants before the court were correctly convicted of robbery with aggravating circumstances, read with section 51(2) of the General Law Amendment Act 105 of 1997.

[41] In terms of section 260 of the CPA, a conviction of the offence created by section 36 of the GLAA is a competent verdict on a charge of robbery. From the perusal of the record, there was no indication whether the appellants were apprised of the competent verdicts or the provisions of the Minimum Sentence Act were explained to the appellants. Ideally, their attention should be drawn to the competent verdicts at the commencement of the trial. The failure to inform them of such a defect was not a fatal defect, unless a conviction on the competent verdict would render their trial unfair within the meaning of section 35(3) of the Constitution. Whether something is fair or not depends on the circumstances of the case and involves a value judgment on the factual and legal findings of each case.²³ Since the appellant offered no explanation in his plea explanation his trial could not have been rendered unfair. However, I am

²² Act 62 of 1955, ('GLAA')

²³ *S v MT* 2018 (2) SACR 595 (CC) at para 50.

mindful he was legally represented throughout the proceedings. In my view, the proven facts of this case, finds application against the first appellant, who satisfies all the elements of an offence of a contravention of section 36 of the GLAA.

[42] In terms of section 322(1)(b) of the CPA, an appeal court may give such judgment as 'ought' to have been given at the trial. Besides, the first appellant was legally represented throughout his trial and no prejudice results to the first appellant. No failure in the administration of justice will occur, should the first appellant be convicted on the competent verdict under the CPA.

[43] Regarding appellant number two and as doubtful as it seems, in the absence of being identified as a perpetrator in counts one and two, by the complainants, and in the absence of common purpose been alleged in the consequence crime, the second appellant is given the benefit of the doubt in respect of counts one and two and found not guilty and accordingly discharged.

[44] The reason for the aforesaid conclusion is that the fact that the second appellant was in the company of appellant number one, whilst he was the driver and in possession of the motor vehicle, was insufficient to show possession or 'appropriation' on the part of the second appellant of the said motor vehicle by way of inferential reasoning on the facts before me. As far as the second appellant was concerned, his post- offence conduct did not lead to a crucial link in the chain of proving his case beyond a reasonable doubt in respect of any of the charges preferred against him. He too was not identified by any of the complainants as the perpetrators who committed the robbery on the 31st March 2016. In the absence of the averments of common purpose, in counts one and two, he must be given the benefit of the doubt.

- [45] Applying the cardinal rules as stated in *Blom*,²⁴ the Regional Magistrate erred and misdirected himself by relying on circumstantial evidence. I say this because the inference drawn was not consistent with the proven facts as none of the complainants placed both the appellants on the scene on the 31st March 2016. There was no evidence led or evidential material tendered. The circumstantial evidence relied upon by the Magistrate was not substantiated by any direct evidence nor was there corroboration regarding counts one and two. The Magistrate based his findings on speculation and conjecture.
- [46] The Magistrate, convicted appellant number two only of counts three to six. Counts three to six turns on whether this aspect of evidence was credible or not by the state witnesses.
- [47] Counsel argued that the court of first instance erred in attaching insufficient weight to the contradictions of the police officers evidence, they failed to consider the improbabilities, common purpose was not relied upon by the State, and there were no finger prints uplifted from the firearm. The firearm could have come from the police. Counsel submitted that the court failed to properly consider the improbabilities in the State's version, resulting in the court not considering the totality of the evidence when rejecting the appellant's version.
- [48] The trial court found that the arresting officer's evidence were corroborated, despite the finding that he was not impressed with the evidence of Sergeant Khurumbi. His finding was that their contradictions were not material and he rejected the appellant's version. I do not believe that the Magistrate when he evaluated the evidence considered the totality of the evidence. From the evidence before the trial court and the submissions provided by Counsel, the

²⁴ *S v Blom* 1992 (1) SACR 649 E

following contractions were extrapolated from the evidence regarding counts three to six:

- (a) According to Sergeant Khurumbi when the police chased the suspects in the pursued motor vehicle, the passenger in the back seat was in possession of a firearm. This passenger opened and closed the car door and pointed them with a firearm. He was adamant that there was no shooting by the passenger. However, according to Constable Nemutavhani the passenger in the back seat fired gunshots at them when he opened and closed the car door. This is material and was not corroborated by the arresting witnesses in this regard.
- (b) Another material aspect was that Sergeant Khurumbi heard the gunshots after the motor crashed into the barriers. The sound came from the place where the collision happened. It came from the side of the person who pointed the firearm at them. According to Constable Nemutavhani the shooting commenced before the motor vehicle came to a stop. It was because of the shooting that the Kia Cerato consequently came to a stop. His testimony was, as a result of them shooting at the vehicle that appellant number one lost control of the motor vehicle and collided with the barriers. The arresting officers differ on the chronology of how the events unfolded.
- (c) Additionally, he testified that they were not the only ones involved in the shoot-out, the four back-up police motor vehicles were also involved in the shoot-out. Sergeant Khurumbi's evidence was the gun shots that he heard could not have come from the back-up vehicle because the back-up vehicle was behind them and they were trained not to shoot from behind a police vehicle. Constable Nemutavhani juxtaposed him and testified that the four back-up vehicles. Some were behind them and the others came from the opposite direction. They were also involved in the shoot-out. There was no corroboration by the witnesses in this regard. This is material when the probabilities are considered because the sound that Sergeant Khurumbi heard could have been from one of the back-up motor vehicles.

- (d) According to Sergeant Khurumbi after the motor vehicle crashed, he did not see anyone pointing a firearm at them and he could not say with certainty who the shooter was, but he was certain the shooter was the passenger seated at the backseat. He assumed the shooter was appellant number two and Constable Nemutavhani testified that he could also not say who the shooter was save for the fact that he was the passenger in the back seat. In this regard reliance was placed on the fact that because appellant number two was shot at seven times, the inference to be drawn was that he was the shooter. There was no evidence from either arresting officers that he was indeed the shooter.
- (e) This then led to the consideration of the photographs and forensic evidence. I find that the evidence of the arresting witnesses was not consistent with the photographs tendered as evidence. This is because no photographs depicted that the firearm was found in between accused number two and appellant number two but instead it was lying next to pavement according to photographs 29 and 30. They both testified that there was a handcuffed person in photograph 28 who was the same person in photograph 29. Interesting photograph 28 illustrates the suspect is lying next to the police vehicle and not next to the motor vehicle in question. Constable Nemutavhani identified the person in photograph 29 who was handcuffed as the second appellant. This was inconsistent with his testimony in his evidence in chief.

[49] Regarding the firearm the Magistrate made a finding that the firearm belonged to Appellant number two without providing any reasons for his finding. The evidence was that the firearm lay between both the assailants on the floor. At the scene of the crime there was uncertainty as to who the firearm belonged to since the firearm lay in between accused number two and appellant number two, two perpetrators. This was one of the cases that required a simple solution for fingerprints to be uplifted from the firearm, but this was not done by the forensic officers.

- [50] Counsel for the appellants submitted that there were no spent cartridges found on the scene that hit any of the police officers nor were there any bullets that hit the police motor vehicle from the alleged firearm of the appellants. Constable Nemutavhani testified he thought one of the back-up cars were hit on the tyre, however no evidence was led in this regard.
- [51] The court misdirected itself in failing to make a finding that the State proved its case beyond a reasonable doubt and gave no reasons for his finding regarding the conviction of the second appellant on counts three to six.
- [52] The issue remains who did this firearm and ammunition belong to? The Magistrate did not make a finding on joint possession. In argument on appeal the state argued the conviction should stand by virtue of the doctrine of joint possession. There was no evidence on record that appellant number two was the person who physically possessed a firearm during the robberies or that he was identified as the person who shot at them.
- [53] Regrettably, the description of the firearm in count five (5) seemed not to come from the witnesses but from the Court and the State prosecutor. The undisputed evidence was none of the police officers touched the firearm. I am baffled that at the scene the witnesses could not say who the firearm belonged to and yet the forensic department had not uplifted any fingerprints from the firearm. This is shoddiness on the part of the State.
- [54] The Magistrate erred in not providing a well-reasoned judgment in arriving at his decision. The trial court regrettably did not explain the basis for his conclusion. The test for joint possession of an illegal firearm and ammunition

was set out in *Nkosi*²⁵ where the court stated that it must be possible to properly infer from the established facts that:

- (a) the group had the intention (*animus*) to exercise possession of the guns through the actual detentor and
- (b) the actual detentors 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 and the detentors . . . to possess all the guns.'

[55] Applying the test established in *Nkosi*²⁶ and endorsed in the above cases, I am of the view that, since the firearm was lying on the ground between accused number two and appellant number two, there was no evidence from which it can be inferred that appellant number two had the intention to exercise possession over the firearm, particularly as there was no evidence before the court as to who the 'actual detentor' was.

[56] With regard to the issue of common purpose, an important issue in this regard is that attempted murder is a 'consequence crime' whereas unlawful possession of a firearm and ammunition is a 'circumstance crime.' Whilst the doctrine will apply in the attempted murder charge, it does not apply to the crime of unlawful possession. In *Makhubela & Another*²⁷ the court held:

'... the application of the doctrine of common purpose differs in relation to "consequence crimes", such as murder, and in relation to "circumstance crimes", such as possession. Burchell in *Principles of Criminal Law* differentiates between the two as follows: "The common-purpose rule is invoked in the context of consequence crimes in order to overcome prosecutorial problems of proving the normal causal contribution between the conduct of each and every participant and the unlawful consequence. Strictly speaking, the rule has *no application* in the context of criminal conduct consisting only of circumstances."²⁸ (my *emphasis*).

²⁵ *S v Nkosi* 1998 (1) SACR 284 (W) 286H - I

²⁶ See footnote 25

²⁷ *S v Makhubela & Another* 2017(2) SACR 665 (CC)

²⁸ *S v Makhubela & another* 2017 (2) SACR 665 (CC), para 47

[57] The Magistrates reason was 'the only reasonable inference that can be drawn is that 'all three of you were involved in the robbery, robberies as far as counts 1 and 2 are concerned. That number three was the shooter and he also possessed the firearm. So both of you are convicted as far as, all three of you are convicted, as far as counts one 1 and two 2 are concerned. Accused 3 is further convicted on counts 3, 4, 5 and 6.'

[58] This then leads me to the ballistics report. The Magistrate who stated in his judgment that he will return to the ballistics report but he did not do so. On a conspectus of the ballistics report, and the affidavit in terms of section 212 of the CPA, there were two sealed evidence bags, one contained the 9mm parabellum calibre Norinco model T54 semi- automatic pistol serial number obliterated with a magazine and three 9mm parabellum calibre cartridges and the second bag contained seven 5.56 X 45mm calibre fired cartridge cases and five 9mm parabellum calibre fired cartridge cases. The forensics found the 9mm pistol was capable of emitting a missile. The 9mm pistol functioned normally without any obvious defects. It was tested with ammunition that was fired in the pistol. The 9mm pistol was found to be self-loading, but not capable of discharging more than one shot with a single depression of the trigger. He also found that the device was manufactured and designed to fire centre fire ammunition. After the application of the electro-acid etching process and electromagnetic etching process, he could not determine the serial number of the 9mm pistol mentioned.

[59] On inspection of the fired cartridges, the ballistic experts finding was that none of the fired cartridges came from the firearm mentioned in count six relating to the 9mm parabellum calibre Norinco Model T54 semi – automatic pistol.

[60] Further considerations relating to the ballistics illustrates the charge sheet referred to four live rounds. The photographs referred to four live rounds, but the ballistic report referred to three live rounds. No witness was called to address

these discrepancies. In the absence of corroboration, and the fact the photograph evidence does not corroborate the evidence of the police officers and in the absence of fingerprints been uplifted, the Magistrate misdirected itself by finding that the State has proved its case beyond a reasonable doubt regarding counts five and six.

- [61] Failure to prove the possession of the firearm and possession of ammunition by application of logic and common sense, the convictions on the attempted murder cannot muster blameworthiness. As the result, the convictions on attempted murder cannot succeed.

Onus

- [62] Applying the principles set in *Mthetwa*,²⁹ in that the evidence tendered against the appellants must be adjudicated in totality and the guilt of the appellants, must be established beyond a reasonable doubt. It is not incumbent upon the prosecution to eliminate every hypothesis which is inconsistent with the appellants' guilt or which, as it is also expressed, is consistent with their innocence. In *Sauls*³⁰, it was stated: '...The State is, however, not obliged to indulge in conjecture and find an answer to every possible inference which ingenuity may suggest any more than the Court is called on to seek speculative explanations for conduct which on the face of it.' The trial court erred by failing to apply principles in *Segalo*³¹

- [63] The Magistrate, erred and misdirected himself and focussed more on the defences' version rather than ensuring that the State discharged the onus that it was burdened with. The application of the cautionary rule in so fact as identification was concerned was not applied correctly by the Magistrate. The principles relating to contradictions were not properly applied because the Court

²⁹ *S v Mthetwa* 1972 3 SA 766 A

³⁰ *S v Sauls and Others* 1981 (3) SA 172 (A) at 182 G – H.

³¹ *Segalo v S* (A543/2010) [2017] ZAGPPHC 41 (14 February 2017) at para [15]

illustrated the material contradictions in the evidence what was relevant. There were no improbabilities referred to in the State's version despite major contradictions in the State's version. The two cardinal rules according to S v Blom was also not applied properly by the trial court.

Order

[64] As a result, I make the following finding:

(a) That the first and second appellant's appeal is upheld and that the orders of the trial court convicting and sentencing both the appellants are set aside and replaced with the following orders:

- (i) That the first and second appellant's appeal against the conviction on counts one and two of robbery with aggravating circumstances read with section 51(1) of the Minimum Sentence Act is set aside and substituted with the following conviction:
- (ii) That the first appellant's appeal against his conviction on both the counts of robbery with aggravating circumstances, read with section 51(1) of Act 105 of 1997 is upheld and the said conviction is set aside and substituted with the following conviction:

'In connection with counts (1) and (2), the first appellant is convicted of the contravention of section 36 of the General Law Amendment Act'

(b) That the second appellant's appeal is upheld and that the order of the trial court convicting and sentencing him are set aside and replaced with an order that he is acquitted and discharged on all counts one (1) to six (6).

Whether the Magistrate imposed an appropriate sentence

- [65] Appellants number one was sentenced to an effective twenty (20) years imprisonment. In the light that appellant number two's appeal was upheld, focus will only be made to the sentence in respect of appellant number one (1), where it was alleged to be shockingly inappropriate.
- [66] The court is mindful that appellant number one's conviction has now changed from two counts of robbery with aggravating circumstances read in terms of section 51(2)(a) of the Criminal Law Amendment Act, 105 of 1997 to one count of possession of suspected stolen property in terms of section 36 of the GLAA.
- [67] In this appeal, the appellants submitted that the Magistrate had erred in his finding that there were no substantial and compelling reasons, when regard is had to the appellant's personal circumstances. It was contended that the sentence of 20 years' imprisonment was shockingly disproportionate and too harsh.
- [68] The task of imposing an appropriate sentence is the discretion of the trial court. A court of appeal may only interfere if the sentence imposed is shockingly inappropriate. I find that in the light of the conviction being changed to one contravention of section 36 of the General Law Amendment Act, the court may exercise its judicial discretion
- [69] In *S v Rabie*³², it was held:
- "In every appeal against the sentence, whether imposed by the Magistrate or a judge, the Court hearing the appeal: -

³² *R v Rabie* 1975 (4) SA 855 (A) at [857 D-E], *S v Kibido* 1998 (2) SACR 213 (SCA) at [216G-H].

- (a) should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial Court; and
- (b) should be careful not to erode such discretion; hence the further principle that the sentence should only be altered if the discretion has not been judicially and properly exercised. The test under (b) is whether the sentence is vitiated by irregularity or by misdirection or is disturbingly inappropriate.”

[70] In *Malgas*³³, it was held:

‘The courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances... The court is obliged to take into account all relevant factors as it retains its discretion when passing a sentence.’

[71] Counsel for appellant number one submitted in mitigation of sentence, that the appellant was 25 years of age. He was single, with one child, aged five (5) years and he was unemployed. He had no previous convictions and no pending charges against him. He was a first offender. He requested that the court deviate from the minimum sentence.

[72] On the contrary, in aggravation of sentence, the gist of the State’s submission was that the sentence imposed was not shockingly inappropriate, having regard to the seriousness of the offence and the interest of justice. In addition, the appellants failed to establish any substantial and compelling circumstance to justify a deviation from the prescribed minimum sentence. The state requested that a term of direct imprisonment should be imposed and that the sentence may run concurrently.

³³ *S v Malgas* 2001 (1) SACR 469 (SCA) at page 481i

- [73] I have to consider the first appellant's circumstances in accordance with the facts before the court and the fact that the first appellant is now convicted of possession of suspected stolen property. He was not linked or identified as the person being involved in scene one.
- [74] The Magistrate, in sentencing the appellants, considered their personal circumstances, the seriousness of the offence and the interest of justice and found that the seriousness of the offence outweighs the personal circumstances.
- [75] Other than pleading his personal circumstances, there is nothing peculiar about their circumstances.
- [76] In *S v Vilakazi*³⁴, the court held:
- 'In cases of serious crime, the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime deserving of a substantial period of imprisonment, the question whether the accused is married or single, whether he has two children or three, whether or not he is in an employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of flimsy grounds that Malgas said should be avoided.'
- [77] When looking at the circumstances of this case, the interest of society, the interest of the complainant and the personal circumstances of appellant number one and the aggravating nature of the case, I am of the view that the aggravating circumstances outweighs the mitigating factors. The sentence to be imposed must be proportionate to the offence committed.

³⁴ *S v Vilakazi* 2009 (1) SACR 552 (SCA) at par 58.

[78] I hold the view that the motor vehicle in question was a Kia Cerato. The value of the motor vehicle was not determined. A sentence with a shorter term of imprisonment would balance the appellants' personal circumstances and the seriousness of the offence that the accused is convicted of. It follows that a lesser sentence in respect of appellant number one is justified.

Order in respect of Sentence

[79] In the result the following sentence is imposed in respect of appellant number one:

1. Seven (7) years direct imprisonment which is ante-dated to run from the date of judgment which is 10th October 2017.
2. No order is made in terms of section 103(1)(g) of the Firearms Control Act 60 of 2000.



C.B. BHOOLA
JUDGE OF THE HIGH COURT (ACTING)

I agree



A.K. RAMLAL
JUDGE OF THE HIGH COURT (ACTING)

Appearances:

Date of hearing: 13 March 2023

Date of judgment: 25 May 2023

Attorney for the appellant one	:	T T. Thobane,
	:	T.T. Thobane
		Attorneys
		Johannesburg
Counsel for the appellant two	:	S. Hlazo
	:	Legal Aid South Africa
		Johannesburg
Counsel for the respondent	:	P MARASELA
		Director of Public Prosecutions
		Johannesburg