



IN THE HIGH COURT OF SOUTH AFRICA

/MF

(GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
	
<u>23/3/18</u>	

Appeal Case No: **A383/2016**

Court *a quo* Case No: **14/0509/2011**

Date of hearing: **15 February 2018**

Date of judgment: 23 March 2018

In the appeal between:

ALPHEUS MPHAHLELE

Appellant

and

THE STATE

Respondent

JUDGMENT

DIEDERICKS (AJ)

- [1] On the 19th of September 2012 the Appellant pleaded not guilty in the Regional Court, Pretoria on the following charges:

1. Count 1:

Robbery with aggravating circumstances, read with the provisions of Section 51(2) of the Criminal Law Amendment Act, Act 105 of 1997;

2. Count 2:

Robbery with aggravating circumstances, read with the provisions of Section 51(2), Act 105 of 1997;

3. Count 3:

Robbery with aggravating circumstances, read with the provisions of Section 51(3), Act 105 of 1997;

4. Count 4:

Unlawful possession of a firearm;

5. Count 5:

Unlawful possession of ammunition.

[2] The Appellant was convicted as charged on the 17th of July 2013 by the Presiding Magistrate, Mr. T.J. Ndwandwe.

[3] On the 15th of October 2015 Appellant was sentenced as follows:

1. Counts 1, 2 and 3 were taken together for imposition of sentence. A period of 10 (ten) years of imprisonment was imposed;
2. Count 4, 12 (twelve) months of imprisonment;
3. Count 5, 3 (three) months of imprisonment.

[4] The Appellant petitioned to the High Court of South Africa, Gauteng Division, Pretoria for leave to appeal. On 13 May 2016 leave to appeal was granted by the Honourable Judges Jordaan and Maumela in respect of conviction and sentence on Counts 4 and 5.

[5] The salient facts underlying the charges on which the appeal is based is that on the 26th of January 2011 the Appellant was in the company of three other assailants (co-accused). They robbed a bread delivery vehicle on three occasions. The robberies took place shortly after the bread was delivered at certain shops and cash was available in the vehicle. Throughout each of these robberies only one of the robbers was in possession of a firearm and a second robber was in possession of a knife. At all three robberies the Second Accused (the Appellant being Accused No. 1 in the Court *a quo*) was in possession of the firearm and Accused No. 4 was in possession of the knife.

[6] After the last robbery the police intervened, causing the robbers to flee on foot, whereafter they sought hiding places at a nearby house. The police

apprehended Accused No. 2, who was in possession of the firearm in the outside toilet on the premises of the said house, whilst he had the firearm in his possession. Another Accused was arrested while he was running away and the Appellant was arrested whilst hiding inside the house.

- [7] It must be said that the *modus operandi* of the Accused was very much the same in all three robberies and each Accused had the very same role to play in each of the said robberies.
- [8] On account of the above, it was then found that the Accused was in joint possession of the said firearm and therefore that the Appellant was guilty on Counts 4 and 5, i.e. the unlawful possession of a firearm and ammunition.
- [9] At the trial both advocates for Appellant and the Respondent relied on the case of **S. v. Mbule**, 2003(1) SACR (SCA) specifically in the paragraph where the Court held as follows:

"What is prohibited by section 2 (with regard to firearms) and section 32(1)(c) (with regard to explosives) of the Arms and Ammunition Act, 75 of 1969, is the existence of a state of affairs (i.e. having possession of an armament, or a firearm, as the case may be) and the conviction will be competent only if that state of affairs is shown to exist. That state of affairs will exist simultaneously in respect of more than one person if they have common (or joint)

possession of the offending article. Their contravention of the relevant section in those circumstances does not arise from an application of the principle of common purpose (which is concerned with liability for joint activity), but rather from an application of ordinary principles relating to joint possession. Common purpose, and joint possession, both require that the parties concerned shared a common state of mind but the nature of that state of mind will differ in each case. The issues which arise in deciding whether a group possessed firearms or explosives must be decided with reference to the answer to the question whether the State has established facts from which it can properly be inferred by a court 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."

- [10] The above *dictum* actually emanates from the decision of **S. v. Nkosi**, 1998(1) SACR 284 (W) at p. 286 H – L and it was a *dictum* of Marais J.
- [11] This *dictum* (except for the reference to common purpose) was approved by the Supreme Court of Appeal in the above-mentioned case of **S. v. Mbule**,

2003(1) SACR 97 (SCA) at p. 115 B – C where Nugent JA indicated that in his view Marais J had correctly set out the legal position. However, Nugent JA, after pointing out that a mere intention on the part of a group to use weapons for the benefit of all of them would not suffice for a conviction, also said the following :

"[72] In the present case the Trial Court found as a matter of inference that those requirements had been fulfilled in respect of all the accused in relation to the hand grenade. Although the correctness of that finding was placed in issue when the accused appealed, it was not dealt with expressly by the Court a quo. I do not agree that the only reasonable inference from the evidence is that the accused possessed the hand grenade jointly. It is equally possible that, like the pistols, the hand grenade was possessed by only one of the accused. Mere knowledge by the others that he was in possession of a hand grenade and even acquiescence by them in its use for fulfilling their common purpose to commit robbery is not sufficient to make them joint possessors for purposes of the Act. The evidence does not establish which of the accused was in possession of the hand grenade and that charge, in my view, they were entitled to be acquitted."

- [12] The above principles were again revisited in the matter of **S. v. Makhubela & Another**, 2017(2) SACR 665 (CC), this time by the Constitutional Court. The following remarks in this regard were made at paragraphs 45 to 48:

"[45] What remains are the Applicants' convictions for the unlawful possession of firearms and ammunition, that is, counts 4 and 5. It is common cause that they did not have any firearms in their possession. They were, however, convicted of these charges in the trial court on the basis of the doctrine of common purpose.

[46] In convicting the Applicants for unlawful possession of firearms and ammunition on the basis of the doctrine of common purpose, the trial court departed from settled iuris prudence. The test for establishing liability for the possession of firearms and ammunition was established in **S. v. Nkosi** as follows:"

- [13] The Constitutional Court then repeats the *dictum* mentioned above and proceeds as follows in paragraph [47]:

"[47] This test has since been cited with approval in numerous judgments of the High Court and the Supreme Court of Appeal. In these judgments, the courts have found perpetrators guilty of crime involving the use of firearms on

the basis of the doctrine of common purpose, but nevertheless found that the perpetrators could not be found to be guilty of the unlawful possession of firearms on the basis of this doctrine. The test takes into account the fact that 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 that 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 of circumstances.'" [72] In the present case the Trial Court found as a matter of inference that those requirements had been fulfilled in respect of all the accused in relation to the hand grenade. Although the correctness of that finding was placed in issue when the accused appealed, it was not dealt with expressly by the Court *a quo*. I do not agree that the only reasonable inference from the evidence is that the accused possessed the hand grenade jointly. It is equally possible that, like the pistols, the hand grenade was possessed by only one of the accused. Mere knowledge by the others that he was in possession of a hand grenade and

even acquiescence by them in its use for fulfilling their common purpose to commit robbery is not sufficient to make them joint possessors for purposes of the Act. The evidence does not establish which of the accused was in possession of the hand grenade and that charge, in my view, they were entitled to be acquitted.'

[48] *Burchell defines unlawful possession of a firearm as an example of a 'circumstance crime' in relation to which the principle of common purpose cannot strictly apply in the same manner in which it applies to 'consequence crimes'."*

[14] In paragraph [50] the Constitutional Court goes further to mention as follows:

"[50] *The Supreme Court of Appeal followed a similar approach in **Kwanda** when it held that: 'The fact, that the appellant conspired with his co-accused to commit robbery, and even assuming that he was aware that some of his co-accused possessed firearms for the purposes of committing the robbery, does not lead to the inference that he possessed such firearms jointly with his co-accused'."*

[15] The Constitutional Court thereafter proceeds to mention various other cases with similar facts and comes to the conclusion that there is thus in that

particular case insufficient factual basis to sustain the conviction of unlawful possession of firearms and ammunition on the basis of the doctrine of common purpose.

[16] I am of the view that the Magistrate *in casu* erred in applying the doctrine of common purpose to the crimes of possession of a firearm and ammunition and thereby applied the doctrine of common purpose to the required joint possession principle.

[17] Under the circumstances the appeal is upheld and the convictions in respect of unlawful possession of firearms and ammunition cannot stand and must be set aside. Therefore the conviction and sentences on Counts 4 and 5 are set aside. The appeal against these convictions (Counts 4 and 5) therefore succeeds and so does the sentence on these charges. The setting aside of the sentences, however, will have no practical effect on the Appellant's incarceration in terms of the sentences imposed on him in respect of Counts 1, 2 and 3.



F. DIEDERICKS
ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

I agree



B. WANLESS
ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA