IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

APPEAL NO : A196/2014

In the Appeal of:

MOTLATSI NAMANE — FIRST APPELLANT (Accused 1 *a quo*)

THABO MAPURU — SECOND APPELLANT (Accused 3 *a quo*)

v

THE STATE — RESPONDENT

CORAM : **EBRAHIM, J, MURRAY, AJ** *et* **CHESIWE, AJ**

HEARD ON : **5 SEPTEMBER 2016**

JUDGMENT BY : **MURRAY, AJ**

DELIVERED ON : **15 DECEMBER 2016**

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[1] The 1st Appellant, **MOTLATSI NAMANE** (Accused 1 *a quo),* and the 2nd Appellant, **THABO MAPURU** (Accused 3 *a quo),* were convicted in this Court by Sesele AJ on 9 April 2014 of two counts of robbery with aggravating circumstances and two counts of murder each. Their convictions were based on the doctrine of 'common purpose' with fault in the form of *dolus eventualis.*

[2] On 10 April 2014 Appellants 1 and 2 were sentenced to 15 years' imprisonment on each of the robbery charges (Charges 1 and 2) and to life imprisonment on each of the murder charges (Charges 3 and 4). Appellant 2 was, in addition, convicted of the unlawful possession of an unlicensed firearm and unlicensed ammunition (Charges 5 and 6) and sentenced to a further 5 and 3 years' imprisonment, respectively.

[3] On the same date the Court *a quo* gave the two Appellants leave to appeal to the Full Bench of this Division. Their appeal lies only against their conviction of murder on Charge 4, however, and against their sentences of life imprisonment on Charges 3 and 4.

[4] Ms Leona Smit of the Bloemfontein Justice Centre appeared for the Appellants, while Mr Marius Strauss of the Office of the Director of Public Prosecutions represented the State.

[5] The Court *a quo* gave the State leave to amend the indictment relating to the two murder charges in Charges 3 and 4 to refer to 'murder' as defined in Schedule 2, Part 1 (a), (b)(i)), (c)(ii) and (d) of the Criminal Law Amendment Act, Act 105 of 1997, (Charge 3), and as defined in Schedule 2, Part 1(a) and (c)(ii) of the Criminal Law Amendment Act, Act 105 of 1997 (Charge 4).

[6] Accused 2 (Khadebe Mohlalisi), who was originally indicted with Accuseds 1 and 3, failed to remain in attendance so that, in terms of s 157(2) of the Criminal Procedure Act, 51 of 1977 ("the CPA"), their trials were separated.

[7] The two Appellants pleaded not guilty to all charges, offered no plea explanation and denied any involvement in the events of 8 January 2013. They did make formal admissions in terms of s 220 of the CPA, however, regarding the post-mortem reports, the causes of death as well as the identity of the two deceased persons (a police officer, Constable Mogase ("Deceased 1", Charge 3), and their fellow-robber, Louis Morake ("Deceased 2", Charge 4)), the ballistic reports and the photographs of the scene.

[8] Regarding their conviction of murder for the death of Louis on Charge 4, the Appellants contended that the Court *a quo* had erred in two respects, namely (a) by finding that the State had proved its case beyond reasonable doubt, and (b) by convicting them of his murder seeing that he was lawfully shot and killed by a police officer, allegedly 'after the robbery was completed'.

[9] Regarding their sentences of life imprisonment on both counts of murder (Charges 3 and 4), the Appellants contended: (a) that the sentences were shockingly inappropriate, and (b) that the Court *a quo* had erred in finding no substantial and compelling circumstances to justify a deviation from the prescribed sentences for murder as defined in Section 2, Part 1 of Act 105 of 1997.

[10] Briefly summarised the material evidence regarding Charges 1, 2, 3, 5 and 6 which serves as background to the Appellants' conviction on Charge 4, is:

10.1 That the Appellants and, *inter alia,* Louis, were part of a group of five who planned and on 8 January 2013 executed an armed robbery at Mi-Ning Supermarket in Ipopeng and who, in order to rob the Supermarket of cash and several other items, brought along two loaded firearms and organized two getaway cars to enable them to evade arrest (Charge 1);

10.2 That the Appellants at all material times before, during and after the robbery, were aware that some members of their group carried loaded firearms (with one of which Appellant 2 almost shot Appellant 1 in the leg before the robbery even started); that they entered the Supermarket, aimed the firearms at the people in the shop, seriously assaulted a security guard, Mr Ntlanele, threatened to kill him, and robbed him of his firearm (Charge 2);

10.3 That, while they were still in the Supermarket, a police van arrived and, as the group emerged from the shop, both Louis and Appellant 2 fired shots at the police officer (Deceased 1) who sought cover behind the van where Louis eventually shot him in the head at close range (Charge 3) and robbed him of his firearm;

10.4 That, later, in a shoot-out with the police while he attempted to evade arrest on his way to the getaway car, Louis was killed and two members of the police were wounded (Charge 4); and

10.5 Finally, that Appellant 2 was in possession of a loaded, unlicensed firearm throughout the robbery (Charges 5 and 6), with which he subdued the people in the Supermarket and fired at the deceased policeman, together with Louis, to procure the group's escape, and fled with the firearm still in his possession.

[11] Constable Mogase (Deceased 1) was killed in the group's presence (Charge 3) when they emerged from the Supermarket and attempted to flee. By the time Louis was killed (Charge 4),

however, he was by himself since the rest of the group, in fleeing from the Supermarket, split off in different directions during the police chase. His final shoot-out with the police occurred approximately 3 km from the Supermarket, some 50 minutes or more after he had killed the police officer, but while he was still on his way to Tchakela where the second getaway car was waiting.

[12] The main question is whether, in the circumstances of this particular case, Louis's death should have been held to be a separate incident, a so-called 'frolic of his own', which happened 'after the robbery was complete' and for which no liability could be imputed to his fellow-robbers, as Ms Smit submitted; or whether it was correctly held to have been an incident that was so inextricably linked to the execution of the robbery that it was still an integral part of or a foreseen *sequella* to the pre-planned robbery.

[13] Ms Smith, in contesting the Appellants' conviction on Charge 4, advanced four arguments, namely:

13.1 That the Appellants could not be convicted of the murder of a fellow robber who was shot and lawfully killed by the police;

13.2 That the incident in which their fellow robber, Louis, was shot was so far removed from the place and time of the robbery at the Supermarket, that Louis should have been found to have embarked 'on a frolic of his own' which caused his death, and that the Appellants could therefore not be have been held liable for his demise;

13.3 That the Appellants could not have had the necessary *mens rea* regarding Louis's death since they neither had common purpose with the shooter, Warrant-Officer Mndebele, nor in any way manifested sharing in such common purpose with him; and

13.4 That the Appellants could not have been convicted on the basis of *dolus eventualis* on Charge 4 since they should not have been held to have foreseen that "in the process of this robbery they would encounter resistance, would try to run away and might be forced to use the firearm which Louis used".

[14] Mr Strauss, on the other hand, argued that the appeal should be dismissed since the State had proved the Appellants' liability on

the basis of 'common purpose' by proving that both Appellants were present at the scene of the crime, i.e. the armed robbery; that they were aware that some of their group were armed; that they did make common cause with their co-accused; that they manifested their share in the common purpose by proceeding to the Supermarket with knowledge of the firearms, holding the staff and customers hostage, assaulting the old man, and robbing them of their items; that they therefore had the required *mens rea*; that they foresaw the possibility of one of them being killed and of someone offering resistance which might lead to the killing and that they were indifferent as to whether death ensued or not.

Common purpose:

[15] 'Common purpose' is defined as a situation in which two or more people either agree ('collude') to commit a crime or actively associate in a joint unlawful enterprise. Each of them is responsible for the acts which the other performs in furtherance of the common purpose if he or she:

15.1 foresaw the possibility that the other could perform that act in the furtherance of the common purpose, and

15.2 was indifferent to such acts and their consequences.[1]

[16] The participants' liability is based on their intent (*mens rea)*[2] and arises from their 'common purpose' to commit the crime[3]*.* If the participants are charged with having committed a 'consequence crime', such as murder (as *in casu),* the State need not prove beyond reasonable doubt that each participant committed conduct which contributed causally to the ultimate unlawful consequence. It need not prove precisely which member of the common purpose group caused the consequence, either, provided that it is established that one of the group brought about the result.[4] This principle has survived the new constitutional dispensation and was confirmed in **Thebus and Another v S**[5]**.**

[17] It is sufficient, therefore, for the State to establish that the co-accused all agreed to commit a particular crime or actively associated themselves with the commission of the crime by one of their group with the requisite fault element (*mens rea*). Once this is established, then the conduct of the participant who actually

[1] Hiemstra's Criminal Procedure, Issue 1, at 22-27; See also R v Hercules 1954 (3) SA 826 (A)
[2] S v Malinga 1963 (1) SA 692 (A)
[3] Burchell & Milton, Principles of Criminal Law, 2nd Ed, at p. 393
[4] Burchell & Milton, *supra*, at p. 393
[5] 2003 (10) BCLR 1100 (CC) at par [50].

caused the consequence is imputed or attributed to the other participants.

[18] Ms Smit relied on the 'common purpose' requirements which the Appellate Division set out in **S v Mgedezi**[6], namely (1) that the relevant accused must have been present at the scene of the crime; (2) that he must have been aware of the assault by someone else on the victim; (3) that he must have *consciously shared*[7] a common purpose in the true attacker's assault on the victim; (4) that he must have expressed his association in the common purpose by committing some act of association with the other person's unlawful conduct; and (5) that he must have had the required fault (*mens rea*) for the particular offence.

[19] Regarding these requirements, Ms Smit alleged, more specifically, that the Appellants cannot be held liable because (1) they were not present when Louis was killed[8], and (2) they did not make or manifest common cause with the policeman who killed Louis. The said five requirements, however, apply and need to be proved when there is no evidence of a prior agreement or plan to execute

[6] 1989 (1) SA 687 (A) at 705 I – 706 C
[7] Snyman, Strafre, 3rd Ed, at 283
[8] Snyman, *supra*, at 283:

the unlawful act from which the killing stemmed. Evidence of the prior planning of the armed robbery in the present case is clear.

[20] When a group of people participate in a robbery, such as in the present case, and one of them during the commission of the offence kills someone, the mere fact that they all had the intention to rob is not *per se* sufficient to conclude that they also all had the intent to kill. Whether each Appellant had such intention, needs to be determined from the specific facts of this particular case. An inference that the Appellants had such an intention could be made, for instance, if the relevant Appellant knew that the attacker was in possession of a firearm, or knew that there would be people who would resist the robbery[9] or would try to prevent their escape.

[21] On the evidence of this case there can, in my view, be no doubt that such an inference can be drawn regarding both Appellants. Appellant 1 played a major role in instigating and planning the robbery. Two loaded firearms were provided for its execution – one of which was carried and used by Appellant 2. An inference can safely be made that they both knew that the firearms might

[9] Snyman, Strafreg, at p. 284

have to be used to overcome resistance, or to ensure their freedom after the robbery.

[22] That both Appellants played an active role, not only in the planning, but also in the execution of the robbery is clear from the facts. Appellant 1, Louis and a third member of the group were sent into the Supermarket earlier in the morning, for instance, to inspect and make a preliminary assessment of the set-up inside the shop. They concluded that the group would not be able to execute the robbery with only two firearms, wherefore, prior to the robbery, three of the group went off to procure more firearms and Appellants 1 and 2 went to arrange two getaway cars.

[23] When the attempts to procure more firearms failed, Appellant 1 during the robbery held the security guard for Appellant 2 to assault, *inter alia* by hitting him on the head with the back of Appellant 2's firearm, injuring him to the extent that he slipped in his own blood and fell, only to be robbed of his firearm. The guard's firearm enabled Louis, ably backed by Appellant 2, to shoot the group's way out of the Supermarket premises in the face of police fire, and enabled Louis to go up to Deceased 1 and shoot

him in the head at close range before robbing him of yet another firearm.

[24] In **S v Musingadi and Others**[10] in which appellants were also convicted of murder although they had left the scene before the victim was actually killed, the Appellate Division indicated that the facts raised two closely related issues: (a) whether the common purpose to rob was expanded as events progressed so as to include a common purpose to murder; and, if so, (b) whether the appellants effectively dissociated themselves from the expanded common purpose.

[25] Both Appellants in the present case manifested their sharing of a common purpose with their co-perpetrators to commit the armed robbery not only by being actively involved in its execution, but also by their personal attention to the procurement of cars to ensure their getaway, and in facilitating their escape from the immediate crime scene to evade arrest by assisting in the procurement of another loaded firearm to eliminate the police officer who was resisting or blocking their escape with gunfire.

[10] 2005 (1) SACR 395 (SCA)

Dolus eventualis:

[26] Whether the Appellants indeed foresaw the possibility of fatal consequences stemming from the armed robbery may be determined by inference. The Appellants were both aware of the loaded firearms with which Appellant 2 and a fellow-robber were armed. It would be reasonable to infer, also, that the provision of loaded guns made both Appellants aware of the possibility of encountering 'dangerous resistance' which might need to be overcome with the said firearms. A logical inference would therefore be that they foresaw that the presence of the loaded firearms might lead to a shoot-out, and would therefore have foreseen that in the course of encountering such dangerous resistance, the use of the firearms might have possible fatal consequences.[11]

[27] On Mpho's evidence the Appellants were both involved in pre-planning the armed robbery with firearms to subdue or scare the persons in the Supermarket into submission. During the robbery Appellants 1 and 2 assisted in assaulting and robbing the security

[11] S v Nkosi, 2016 (1) SACR 301 at par [13] at 307i – 308b

guard of his firearm which Louis then used to kill the police officer. Mpho testified, furthermore, that he saw both Louis and Appellant 2 shoot in Deceased 1's direction, then saw Louis walk up to the police officer, shoot him in the head and rob him of his firearm.

Expanded Common Purpose: *mens rea* to Kill:

[28] When Louis shot Deceased 1 in the head at close range the group's original agreement to perpetrate an armed robbery was expanded to include the 'common purpose' to kill in order to escape. The direct close-range shot to the head patently demonstrated Louis's unlawful intent (*mens rea)* to kill the officer or whoever stood in his way of his escape. This intent to kill was carried over into his final shoot-out when he chased down W-O Mndebele, repeatedly firing at him while refusing to surrender.

[29] When the loaded firearms were handed out, both Appellants had to have foreseen the possibility of a confrontation with armed security guards or police officers and of someone being killed in the cross-fire, not only within the Supermarket but also in the course of their pre-planned escape, hence the need to arm themselves with two further loaded firearms before they fled from

the immediate scene of the robbery. Yet neither of the Appellants did anything to stop or prevent this, and, in fact, Appellant 2 actively participated in the shooting, indifferent as to the consequences.

[30] The evidence accordingly shows that the Appellants, like the appellants in **S v Nkosi**[12], had the necessary *mens rea* to kill, albeit in the form of *dolus eventualis,* in that they foresaw death due to the use of the firearms and, careless as to the consequences, continued their association with, and assistance to, the armed members of the group which included Appellant 2 and Louis. Criminal liability for Louis's death (Charge 4) was therefore, in my view, correctly imputed to the Appellants on the basis of common purpose.

<u>On 'a Frolic of his Own':</u>

[31] As testified by Mpho, he and Louis were still making their way between the houses to where the second getaway car was waiting for them at Tchakela's place when Louis's fatal shoot-out with the police occurred. It was not as if Louis started firing at the police

[12] S v Nkosi 2016 (1) SACR 301 (SCA)

only when the Dog Unit arrived. On Major Hoffmeister's evidence, while they were chasing the robbers, every time he and the members of the Tactical Response team got closer, Louis turned around and fired at them. Even when they momentarily lost sight of him when he fled into a house, they heard the gunshots he exchanged with the Dog Unit and when they reached the scene of the final shoot-out, he had already been fatally wounded.

[32] The relevant evidence regarding Louis's conduct after they exited the Supermarket, is the following. Mpho testified that he saw Louis and Appellant 2 shoot at Deceased 1, saw Louis shoot Deceased 1 in the head at close range and saw him take the deceased's firearm.

[33] Major Hoffmeister testified that while they were following Louis from the Supermarket, he kept turning around, firing shots at them. They continued to chase him until at a shack they lost sight of him, but heard several gunshots before they found him shot.

[34] W-O Mndebele of the dog unit stated that they saw a man matching the description of one of the suspects running in their direction (Louis). He was faced with Louis's firearm. Louis

refused to drop it when ordered to do so, even when he pointed Louis with his firearm. When Louis disappeared around the back of the house, W-O Mndebele left his partner, Constable Moshebi, with the dog in front of the house. When he rounded the corner to apprehend the suspect, he heard gunshots and saw Louis shooting at Moshebi. He again pointed at Louis with his firearm but the latter once more failed to drop his. A running gun-battle ensued. Various shots were exchanged between Louis and the two police officers before Louis started chasing Mndebele around the police vehicle while firing more shots. Even when more police vehicles arrived, Louis still refused to surrender and chased Mndebele through the open veld while they were still shooting at each other. Mndebele did a tactical roll and fatally shot Louis when the latter was almost upon him.

[35] Constable Moshebi was also wounded. They both testified that it was strange that Louis refused to surrender and kept fighting both the police and their dog.

[36] In my view Louis's conduct was, on the evidence, neither an isolated unconnected event nor so strange that it could be described as 'a frolic of his own', but was simply the reasonably

foreseeable continuation of his unlawful behaviour during the winding down of the armed robbery which was perpetrated in the course of fleeing from that scene towards the getaway car. The possibility of his or anyone else's death during their escape in view of his conduct and the presence of the loaded firearms must indeed have been foreseeable.

[37] The submission that Deceased 2 had embarked on 'a frolic of his own' therefore has no merit. On the evidence the fatal shoot-out, even though 3km from the Supermarket, was not a sudden, extraordinary, isolated or unexpected event disconnected from the robbers' escape from the Supermarket. In my view it was merely the natural extension *(sequella*) or continuation of the armed robbery. The group's pre-planned escape to and with the getaway cars was, in my view, an integral part of the planned robbery, as demonstrated by Louis's running gun-battle with various police officers, and in the execution of which plan Louis was still bent on killing any police officer who tried to stop him or his fellow-robbers, as he had already done with Deceased 1.

[38] Louis's determination not to be arrested, which manifested itself in his refusal to surrender and his unlawful engaging in the shoot-out

with the police, was, in my view, not so unusual and unforeseeable as to warrant its being classified as 'a frolic of his own', especially in the light of his earlier killing of a police officer to secure the group's escape. It differs from the circumstances in **S v Molimi and Another** [13] on which Ms Smit relied for such contention. There a robber was held to have been 'on a frolic of his own' when he, in the course of an armed robbery, took hostage a young man who was then fatally wounded by a bystander. The Appellate Division in those circumstances upheld the contention that the death of the hostage was not foreseeably part of the common purpose to perpetrate the armed robbery. On the facts of the present case, however, armed resistance to the group's escape was indeed foreseeable, foreseen and planned for and so, inevitably, was the possibility of fatal consequences.

[39] I therefore agree with Mr Strauss that the robbery was not yet completed when Louis was killed. His death occurred during his attempt to evade arrest, on his way to the pre-arranged getaway car waiting for the group at Tchakela's place, while he was still armed with his robbed, loaded firearm to counter any 'dangerous resistance' he might encounter along the way. Similarly, Appellant

[13] 2006 (2) SACR 8 (SCA) at [35] – [36]

2 was still in possession of his loaded firearm as he fled. The group, after all, still had to meet up and divide their loot.

[40] In view of Louis's continuous exchange of gunfire with the police from the moment the group exited the shop up to the point of his death, I do not regard this case as one in which the foreseeability of someone being fatally wounded during the group's escape 'would render the concept of foreseeability so dangerously elastic as to deprive it of any utility' [14] as held in *S v Nkosi.* The Court *in S v Mkize*[15] held, after all, that once it is proved that an accused was party to a common purpose to commit an armed robbery, and that he foresaw the possibility of someone being killed in the process, the place where the victim was killed need not have been in his contemplation for him to be liable.

Lawfully killed by a Police Officer:

[41] The submission that the Appellants could not be held liable for Louis's death because he was lawfully shot and killed by the police in my view has no merit either. As Majiedt JA pointed out in *S v Nkosi*: "

[14] Sv Nkosi, 2016 (1) SACR 301 (SCA) at [4] at 304
[15] 1999(2) SACR 632 (W)

> "our courts have consistently held accused persons who engage in a wild shoot-out with others in the course of an armed robbery, criminally liable on the basis of *dolus eventualis* for any unexpected deaths that may result."[16]

[42] Murder is defined as the intentional, unlawful killing of another human being. It was submitted that the Appellants cannot be held liable for Louis's killing, since that was lawfully done by a police officer. This submission was based on an erroneous premise, however, namely that, in order to have liability imputed to the Appellants, they must have made and manifested a common purpose with the police officer as the 'actual shooter', which of course they did not do. It is the unlawfulness of Louis's shoot-out with the police that is imputed to them, in fact, and it is with him that they must have made and indeed did make common purpose. Neither the lawfulness of W-O Officer Mndebele's conduct nor the Appellants' lack of common purpose with him, therefore exculpates the Appellants from imputed liability for Louis's killing as submitted.

Dissociation:

[16] Snyman, Criminal Law 5th Ed (2008) at 201.

[43] The next question to determine, is whether the Appellants did enough to dissociate themselves from the group's common purpose to be exculpated from Louis's death. Common-purpose liability is based on association with the commission of the crime by the other participants. Its converse is dissociation. The question of when the joint action ceased and a participant could be regarded as one who has stopped participating, has been addressed in several cases.

[44] The Appellate Division in *S v Musingadi and Others*[17] pointed out that not every act of apparent disengagement would constitute an effective disassociation. Whether there had been sufficient dissociation would depend on *inter alia* the circumstances; the manner and the degree of an accused's participation; how far the commission of the crime had proceeded; the manner and timing of disengagement; and, in some instances, what steps the accused took or could have taken to prevent the commission or completion of the crime.

[17] S v Musingadi and Others 2005 (1) SACR 395 (SCA) at para [35] at 407 h - i

[45] In holding that the relevant appellants had not done enough to dissociate themselves from the unlawful action[18], the Appellate Division stated, as repeated in *S v Nkosi*[19], that the greater the accused's participation, and the further the commission of the crime had progressed, the more would be required of such accused to constitute an effective disassociation, even to the point that he may be required to take steps to prevent the commission of the crime or its completion. The Court held the effectiveness of the dissociation to be a matter of degree which, in a borderline case, calls for a sensible and just value judgment. (See also **S v Wana and Others**[20]).

[46] In order to assess the adequacy of the Appellants' dissociation, one therefore needs to evaluate the nature and extent of their involvement in the robbery and consequently the degree to which they needed to dissociate to escape liability. Their unquestionably direct and active participation in the planning and execution of the robbery has already been dealt with. Their further involvement once they exited the building therefore needs to be scrutinised.

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[18] S v Musingadi, *supra*, at para [40] at 409 i
[19] 2016 (1) SACR 301 (SCA)
[20] 2015 (1) SACR 374 (ECP)

[47] Obviously Appellant 2 knew that he might have to, and did indeed, use his firearm and, despite knowing that death might ensue from such an exchange of fire, nevertheless proceeded to shoot at the police officer, and thereafter to flee with the firearm still in his possession. Appellant 1, although not armed, on Major Hoffmeister and Mpho's evidence, at first fled through the veld towards the houses with Mpho and Louis, whom he knew to have shot Deceased 1 in the head and to be in possession of the two loaded robbed firearms, and parted ways with them only when the pursuing police officers got closer.

[48] Although Appellant 2, on Mpho's evidence, fled in another direction immediately after Louis shot Deceased 1 in the head, there is no evidence that he disassociated himself from the killing by even trying to dissuade or stop Louis from that or further killing or by abandoning his loaded firearm which he might have had to use should he encounter further 'dangerous resistance' or attempts to arrest him.

[49] From the case law it is clear that mere running away after having been as materially involved as the Appellants had been in both the planning and the execution of the robbery which was expanded

into a common purpose to kill, would not constitute adequate dissociation: much more would be required of the Appellants for their dissociation to be sufficient to exculpate them from liability for the killings. In **S v Ndebu**[21], for instance, the Court made it clear that last-minute withdrawal from a common purpose just before the fatal shot was fired did not demonstrate sufficient dissociation to exculpate one of the participants in the common purpose, although it did serve as a mitigating factor with regard to sentence.[22] In **S v Sibeko and Another**[23], similarly, it was held that the fact that an accused ran away, leaving his co-accused behind, did not amount to dissociation.

[50] In *S v Mkize*[24] the court stated, furthermore, that where it is sought on an accused's behalf to establish a reasonable possibility that he ceased his active participation and abandoned the intention to commit the relevant unlawful act before a victim was killed, as *in casu,* the accused's failure to give evidence that he so abandoned that intention was relevant since it is not the Court's task to speculate on excuses for his conduct in the absence of any explanation from him. Despite the overwhelming evidence against

[21] 1986 (2) SA 133 (ZS) at 164
[22] Burchell & Milton, *supra*, at p. 404
[23] 2004 (2) SACR 22 (SCA) at paras [7] – [10]
[24] 1999 (2) SACR 634

them, the two Appellants in the present matter, however, elected merely to deny being involved in the events of 8 January 2013 at all.

[51] What more than running away is required for effective dissociation after active involvement was addressed in several cases. **S v Nomakhlala**[25] is a case in which the Appellate Division did accept an appellant's dissociation from the common purpose, for instance. The Court distinguished it from *S v Ndebu* on the basis that the appellant in *Nomakhlala* did not merely run away. He actually refused to comply with an instruction to stab the deceased before he withdrew from the scene of the crime. Furthermore, he did not initially participate in the commission of the crime with 'a full appreciation that death might ensue'[26], as, in my view, the Appellants in the present matter did.

[52] In **S v Nzo**[27], which Hiemstra[28] labelled 'a striking example of adequate dissociation from a common purpose', the appellant had, according to Hefer JA, effectively dissociated himself from the gang's common purpose to kill the deceased by voluntarily making

[25] 1990 (1) SACR 300 (A)
[26] FH Grosskopf JA, *supra* n92 at 304 b-c
[27] 1990 (3) SA 1 (A) at p. 162
[28] Hiemstra's Criminal Procedure, *supra*, Issue 8 at 22-31

a full confession of his participation in the planning of the crime ten hours before the killing took place.

[53] **S v Singo**[29] is another example of an appellant who was held to have adequately abandoned his intention to kill the deceased and to have effectively dissociated himself from the common purpose to kill the deceased. In reaching this conclusion Grosskopf JA distinguished between dissociation from a common purpose based on active association and dissociation from a common purpose based on prior agreement. The question was whether the appellant when he left the scene of the initial assault foresaw the possibility that the victim might be murdered by the crowd of which he was initially part. That Court emphasised that in the end the difference between association and dissociation is a pragmatic value judgment, taking account of all the facts, including the way in which the common purpose arose.[30]

[54] **S v Nduli**[31], for instance, involved a common purpose formed by agreement, as *in casu*, but, on the facts, no possible act of dissociation. The Court, however, did refer to "timely and

[29] 1993 (1) SACR 226 (A) [1993 (2) SA 765 (A)]
[30] Burchell & Milton, *supra*, at p. 405
[31] 1993 (2) SACR 501 (A)

unequivocal notification to the co-conspirators of the decision to abandon the common unlawful purpose".[32] That did not happen in the present case either, however.

[55] What then was the extent of the Appellant's involvement and consequently the degree to which they needed to dissociate to escape liability? The armed robbery which was pre-planned, expanded into a common purpose to kill with the fatal shooting of the police officer in front of the Supermarket to secure the group's escape. The Appellants consciously rendered aid to the actor (Louis) by affording him the opportunity or means to advance the commission of the offence.

[56] On Mpho's evidence the Appellants pre-planned the armed robbery, provided loaded firearms to subdue or scare the persons in the Supermarket, secured two getaway cars and during the robbery helped Louis rob the security guard of his firearm, which Louis then used to shoot and kill Deceased 1 and probably to deter Major Hoffmeister, the members of the Tactical Response Unit and the two officers of the Dog Unit. Appellant 2 and Louis shot in the direction of the Deceased 1 before Louis, in their presence, walked

[32] *Supra*, at p. 504 E – F

up to the officer, shot him in the head point blank, and robbed him of his firearm. The Appellants did nothing to prevent or stop this.

[57] The Appellants ran off with the money, robbed items and the firearms, with the police in pursuit. They escaped arrest, went into hiding, were arrested only after informants led the police to them and even in Court still refused to admit their involvement in the planned armed robbery and its aftermath.

[58] I find Olivier JA's observation in **S v Lungile** specially apposite to their conduct, namely that a mere departure from the scene is a neutral factor[33] and, accordingly agree that, on the facts of the present matter, it is more likely that the Appellants fled because they were afraid of being arrested, or of being injured, or to make good their escape with the stolen money and goods, than to dissociate themselves from the extended common purpose to kill whoever got in the way of their escape.

[59] In view of their active participation in the pre-planning and execution of the robbery, their assistance by subduing the security guard to enable Louis to rob him of his firearm and Appellant 2's

[33] At par [23] at 14

assistance in shooting the police officer to enable them to escape and to take with them yet another firearm, something more was required from the Appellants to dissociate themselves from the common purpose than to simply run off in different directions when the pursuing police came too close for comfort.[34] As the court held in S v Beahan[35] where there was participation in a substantial way 'a reasonable effort to nullify or frustrate the effect of his contribution is required'.

[60] And as **Gibbs J** at 350, held:

> [Even] a "declared intent to withdraw from a conspiracy to dynamite a building is not enough. If the fuse has been set, he must step on the fuse. It seems entirely reasonable to insist that the person who has counselled or procured another to commit a crime or has conspired with others to commit a crime, should accompany his withdrawal with such action as he can reasonably take to undo the effect of his previous encouragement or participation."

[61] There is no evidence that the Appellants in this case did more than run away. Apart from that, instead of stopping their fellow robbers or helping the police, they both went into hiding after successfully evading the police during their pursuit, and were only captured because of the information provided by Mpho and/or some other

[34] Burchell & Milton, *supra*, at p. 404
[35] 1992 (1) SACR 307 (ZS) at 324B-C

informants. In my view, therefore, they failed to adequately dissociate themselves from the expanded common purpose, which included the necessary *mens rea* to murder, to the extent necessary to exculpate them from liability for Louis's death.

[62] I am therefore of the view that the State did prove beyond reasonable doubt the Appellants' liability on the basis of common purpose and *dolus eventualis* regarding Charge 4. Their conviction of murder on Charge 4 must therefore stand.

AD SENTENCE :

[63] It is trite law that the sentence of an accused must be balanced between the interests of society, the offence and the personal circumstances of the accused.[36] It is also trite that a Court of Appeal will only interfere with a sentence if it is shockingly inappropriate or disproportionate to the crime, or if an irregularity occurred during sentencing.[37]

[64] In the present case Ms Smit submitted that the Appellants' sentences of life imprisonment on the two murder charges were

[36] S v Banda and Others 1991 (2) SA (D) at 355 A
[37] S v Malgas 2001 (1) SACR 469 (SCA) at para. [12]

disproportionate and that the Court *a quo* had misdirected itself in finding that there were no substantial and compelling circumstances to justify the imposition of lesser sentences.

[65] In establishing whether there are indeed substantial and compelling circumstances which would justify a departure from the prescribed minimum sentences, a court needs to determine whether the mitigating circumstances, cumulatively, outweighs the the aggravating circumstances. In the present instance the Court *a quo* held the aggravating circumstances to outweigh the mitigating ones, and therefore concluded that there were no substantial and compelling circumstances to justify the imposition of lesser sentences than life imprisonment on the murder charges.

[66] In reaching that conclusion the Court *a quo* merely listed, without any evaluation, the following personal circumstances of the Appellants as presented by their legal representatives:

Regarding Appellant 1 :

66.1 That he was 28 years old at the time of the commission of the offence; that he was married with one minor child; that

not only was he self-employed, selling vegetables and earning R800.00 per day, but also had two employees whom he paid R70.00 each per day; that he was arrested on 9 January 2013 and had been in custody awaiting trial for 15 months; that he never attended school; and that he was a first offender with no previous convictions.

Regarding Appellant 2 :

66.2 That he was 25 years old at the time the offence was committed; that he was married with one minor child; that he was unable to find permanent work, but was doing casual work from which he earned between R1800.00 per day; that he was arrested on 18 February 2013 and has been in custody awaiting trial for 14 months; that he attended school only up to Standard 5 in Lesotho; and that he was a first offender with no previous convictions.

[67] These factors the Court *a quo* then summarised, also without evaluating their impact or significance, and without indicating whether they individually or cumulatively served as mitigating factors, as: that the Appellants were about 25 and 28 years old,

respectively; that Appellant 1 had no schooling and Appellant 2 had only Standard 5; that they had limited financial means with incomes from the informal market and casual work, respectively; and that they were both breadwinners with dependants to take care of.

[68] The Court *a quo* made no mention of the fact that the Appellants were both first offenders with no previous convictions and simply dismissed their lengthy periods spent in custody as not constituting substantial and compelling circumstances.

[69] I agree with Ms Smit that although none of the above circumstances individually constitutes substantial and compelling circumstances, they should have been accorded their due cumulative weight. Regarding time spent in custody the court in **Radebe v S**[38] stated, for instance, that:

> *"The test is not whether on its own the period of detention constitutes a substantial and compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed : Whether the sentence in all circumstances, including the period spent in detention prior to conviction and sentencing, is a just one."*[39]

[38] (726/12) [2013] ZACHA 31 (27 March 2013) at para. [14]
[39] See also : S v Kruger 2012 (1) SACR 369 at 373 C - D

[70] The most serious omission, in my view, however, is that the Court *a quo* clearly did not take into account that Appellants 1 and 2 were convicted of murder based on common purpose and that their criminal liability did not arise out of their own direct perpetration of the killings, but was imputed to them on the basis of their association with the perpetrator. It did not, therefore, take into account or provide for their lesser moral blameworthiness in the sentencing.

[71] It is accepted practice that if an accused is convicted on the main offence on the basis of *dolus eventualis* and common purpose, any lower degree of blameworthiness should be expressed in the sentence.[40] This was confirmed in *S v Ndebu*[41] with reference to an accused's last-minute withdrawal from a common purpose before the fatal shot was fired, which, although it did not constitute adequate dissociation to escape common purpose liability, did constitute a lesser degree of blameworthiness so as to justify a lesser sentence.

[40] R v Longone 1938 AD 532; R v Dube 1968 (2) SA 37 (RA)
[41] 1986 (2) SA 133 (ZS)

[72] In coming to its conclusion regarding the absence of substantial and compelling circumstances, the Court *a quo* considered the following aggravating factors as serious enough to outweigh the mitigating circumstances:

That robbery with aggravating circumstances and murder are serious offences which are both prevalent in the Court's area of jurisdiction; that brutal physical and emotional injuries were inflicted on their victims during the course of the robbery; that the murder of Deceased 1 had a devastating impact on his family, colleagues and the community; that the Appellants planned the robbery and their escape and that they had had ample opportunity to dissociate themselves from the execution of their plan, but failed to do so and persisted in their denial of guilt.

[73] The Court *a quo,* in finding no substantial and compelling circumstances to exist, therefore clearly failed to take into account the fact that the Appellants were not the actual perpetrators in the two murder charges but had been convicted on the basis of *dolus eventualis* in terms of the common purpose doctrine.

[74] That, especially taken in conjunction with the fact that they were both first offenders and that they had both spent considerable periods in custody awaiting trial, together with their listed personal circumstances, in my view should have been regarded as sufficiently weighty mitigating circumstances, cumulatively, to outweigh the undoubtedly seriously aggravating circumstances pointed out by Mr Strauss, and thus to constitute substantial and compelling circumstances which would justify a deviation from the prescribed sentences of life-imprisonment regarding the two murder charges. That misdirection gives this Court a right to intervene in the sentencing.

[75] Both Appellants were very involved in planning and executing the armed robbery which led to the murders. Even though life imprisonment in my view is disproportionate to the murders in the circumstances of this case, it would not be in the interests of justice to impose less than severe sentences on them. The fact that they did nothing to disassociate themselves from the criminal activities except to flee with a firearm and some of the robbed items when they were pursued by the police, that they did nothing to assist the police to solve the murder and that they persisted in Court to deny any involvement despite the direct evidence against

them, justify sentences which would reflect the seriousness of the offence, serve as appropriate retribution, satisfy the community's sense of justice and serve as a deterrent to others.

[76] Appropriate sentences *pro rata* to the Appallant's individual participation in the robbery should therefore be imposed. As far as Charge 3 is concerned, the Appellants were both present when the police officer was shot and neither of them did anything to prevent that. They both assisted Louis in robbing the security guard of his firearm and so enabled him to kill Deceased 1 and conduct a running shoot-out with the officers of the Dog Unit. Appellant 2 also fired shots at Deceased 1 although he was not the one who fired the final fatal shot. Regarding Charge 3 I therefore deem a sentence of 25 years' imprisonment to be proportionate to Appellant 2's involvement and one of 20 years' imprisonment to be appropriate for Appellant 1.

[77] Regarding Charge 4 neither of the Appellants were physically present during the shoot-out. They could therefore at that stage no longer do anything to intervene or dissuade Louis continued refusal to surrender. In view of their active participation in the planning and execution of the robbery which expanded into a

common purpose to kill in order to escape arrest, and their failure to effectively dissociate themselves from the common purpose to kill, however, I deem sentences of 18 years' imprisonment to be appropriate for both Appellants on Charge 4.

NOTE:

This is the majority judgment which is delivered upon the authorisation of the Judge President of this Division, since **EBRAHIM J,** who has expressed a strong dissenting view regarding the Appellants' conviction on Charge 4, has unfortunately been unable to deliver her intended minority judgment because of a prolonged serious illness.

THE FOLLOWING ORDER IS MADE:

1. The appeal against the Appellants' conviction of murder on Charge 4 is dismissed.

2. The appeal against the Appellants' sentences of life-imprisonment on Charges 3 and 4 succeeds.

3. The Appellants' sentences of life imprisonment on Charges 3 and 4, respectively, are set aside and substituted with the following :

3.1 Appellant 1 is sentenced to 20 (TWENTY) years' imprisonment on Charge 3;

3.2 Appellant 2 is sentenced to 25 (TWENTY-FIVE) years' imprisonment on Charge 3;

3.3 Appellants 1 and 2 are sentenced to 18 (EIGHTEEN) years' imprisonment each on Charge 4.

3.4 Appellant 1's sentences of 20 years' imprisonment on Charge 3 and 18 years' imprisonment on Charge 4 are to be served concurrently with the sentences of 15 years' imprisonment on Charge 1 and 15 years' imprisonment on Charge 2 which were imposed on him by the Court *a quo.*

3.5 Appellant 2's sentences of 25 years' imprisonment on Charge 3 and 18 years' imprisonment on Charge 4 are to be served concurrently with the sentences of 15 years' imprisonment on Charge 1, 15 years' imprisonment on Charge 2, 5 years' imprisonment on Charge 5 and 3 years' imprisonment on Charge 6 which were imposed on him by the Court *a quo.*

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MURRAY, AJ

I concur :

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CHESIWE, AJ

On behalf of the Appellants :	Ms L Smit Bloemfontein Justice Centre Bloemfontein
On behalf of the State :	Adv M Strauss c/o The Deputy Director of Public Prosecutions Free State Provincial Division Bloemfontein