



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 128/2023

In the matter between:

MBALENHLE SYDNEY NTULI

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Ntuli v The State* (128/2023) [2025] ZASCA 114 (30 July 2025)

Coram: MATOJANE, UNTERHALTER, KOEN and COPPIN JJA and DAWOOD
AJA

Heard: 6 May 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The time and date for hand-down is deemed to be 11h00 on 30 July 2025.

Summary: Criminal Law – Common purpose neither averred in the charge sheet nor proved in evidence – conviction applying the doctrine violates an accused's right to a fair trial guaranteed by s 35(3)(a) of the Constitution.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Spilg and Monama JJ and Matshitse AJ sitting as a court of appeal):

- 1 The appeal in respect of counts 6, 7 and 8 (the attempted murder counts) is upheld.
 - 2 The order of the full court is set aside and substituted with the following:
 - a) The appeal succeeds to the extent that the convictions and sentences imposed by the Newlands Regional Court (the regional court) in respect of counts 6, 7 and 8 are set aside, but the appeal is otherwise dismissed; and
 - b) The appellant shall accordingly serve an effective period of 15 years' imprisonment in respect of counts 1 to 5, from the date of sentencing in the regional court.
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JUDGMENT

Dawood AJA (Matojane, Unterhalter, Koen and Coppin JJA concurring)

Introduction

[1] The appellant, Mr Mbalenhle Sydney Ntuli (Mr Ntuli), accused number two before the Newlands Regional Court (the regional court), was convicted of the following offences:

- (a) Count 1, robbery with aggravating circumstances;
- (b) Counts 2 to 5, possession of an unlicensed firearm; and
- (c) Counts 6 to 8, attempted murder.

[2] Mr Ntuli was sentenced by the regional court as follows in respect of the aforesaid counts:

- (a) Count 1, to 15 years' imprisonment;

(b) Counts 2 to 5, to five years' imprisonment (the counts were taken together for the purpose of sentencing, and ordered to run concurrently with the sentence imposed in respect of count 1);

(c) Counts 6 to 8, to five years' imprisonment (the counts were taken together for the purpose of sentence and were ordered to run consecutively with the sentence imposed in respect of count 1). Mr Ntuli was accordingly sentenced to an effective period of 20 years' imprisonment.

[3] On appeal to it, the full court of the Gauteng Division of the High Court, Johannesburg (the full court) upheld these convictions and sentences. Mr Ntuli applied for and was granted special leave to appeal to this Court against the decision of the full court in respect of counts 6 to 8. He submits that the full court's reliance on the doctrine of common purpose in respect of these counts was a violation of his right to a fair trial.

Factual background

[4] The relevant charges, as reflected in the transcripts and accepted as correct by the parties, read as follows:

(a) Count 6, attempted murder, that the accused are guilty of the crime of attempted murder in that upon or about 31 May 2008 and at or near Northcliff in the Regional District of Gauteng the accused unlawfully and intentionally attempted to kill Marcelle Kenneth Coleridge, a male person, by shooting at him.

(b) Count 7, attempted murder, that the accused are guilty of the crime of attempted murder in that upon or about 31 May 2008 and at or near Northcliff in the Regional District of Gauteng the accused unlawfully and intentionally attempted to kill Bryan van Heerden, a male person, by shooting at him.

(c) Count 8, attempted murder, that the accused are guilty of the crime of attempted murder in that upon or about 31 May 2008 and at or near Northcliff in the Regional District of Gauteng the accused unlawfully and intentionally attempted to kill Craig Cowie (Constable Cowie), a male person, by shooting at him.

[5] It is evident from the charges themselves that the State did not indicate that it would be relying on the doctrine of common purpose in respect of the aforesaid counts. Furthermore, the State did not seek to amend the charge sheet at any stage of the

proceedings to rely upon the doctrine of common purpose. The State however sought to rely on Mr Ntuli's actual participation in the commission of the offences referred to in counts 6 to 8.

[6] Mr Allan Hoskins, the complainant on the robbery count, testified that accused one and Mr Ntuli ran out of the house shooting in the same direction and shooting at the entrance gate to the property as well. The complainants in the attempted murder counts were in the vicinity of the gate. He did not elaborate, but appeared to suggest that both accused shot at the police. His evidence, however, was directly contradicted by Inspector Marcelle Coleridge and Constable Bryan van Heerden who testified that they saw accused number three shooting at them. Constable Cowie testified that accused number one and accused number three shot at him. Detective Sergeant Elaine Crossing testified that she saw three African males exiting the house and suddenly started shooting at the police. Her evidence was not supported by any of the other State witnesses who all testified that accused number three came out of the house first, and after a short while Mr Ntuli and accused number one came out. Her evidence was also contradicted by the other witnesses regarding whether there was direct participation by Mr Ntuli in that shooting. There was accordingly conflicting evidence as to whether Mr Ntuli directly participated in the attempted murder counts.

[7] There was, in light of the contradictory evidence, insufficient evidence to establish that Mr Ntuli actually committed the attempted murders. The prosecutor also erroneously put to Mr Ntuli that Constable Cowie's testimony was to the effect that he (Mr Ntuli) came running out of the house, firing at them. This was denied by Mr Ntuli. What is clear from the evidence led in support of the State's case and the cross-examination of Mr Ntuli is that the State intended to rely on Mr Ntuli actually having committed the attempted murders, as opposed to his having formed a common purpose with his co-accused to commit the attempted murders.

[8] That is also the basis on which the regional court understood the State's case, holding, when convicting Mr Ntuli on the attempted murder counts, that:

‘By firing shots at the police in this reckless manner, you had to foresee that you might strike and injure or worse kill any officer in attendance at the scene’.¹

Thus, the regional court’s conviction of Mr Ntuli was based on his own participation, despite that not being borne out by the evidence. The regional court did not mention the applicability of the doctrine of common purpose. Rather, it relied upon the evidence of the actions of each of the accused to determine whether each of the accused had shot at the police officers.

[9] The matter, with the leave of this Court, went on appeal to the full court. The full court correctly found that the State did not prove that Mr Ntuli had shot at the police and that the charge sheet did not rely on common purpose. The full court, however, went on to say that the regional court had relied upon common purpose and could not be faulted in this regard, as it was evident to the legal representative of Mr Ntuli that the State intended to rely on common purpose, and there was no prejudice to Mr Ntuli to do so. The full court held that Mr Ntuli’s counsel never argued that the attempted murder charges were based exclusively on individual culpability. It held, *inter alia*, that there was sufficient evidence to establish common purpose, since Mr Ntuli had participated ‘in a well organised joint operation’ to rob, and that ‘each participated in the robbery and each carried his own firearm’.²

Issue for determination

[10] The sole issue for determination is whether the full court was correct in confirming Mr Ntuli’s conviction by applying the doctrine of common purpose in respect of the attempted murder charges, or whether its reliance on the doctrine violated Mr Ntuli’s right to a fair trial, as enshrined in s 35(3)(a) of the Constitution.

Legal position

[11] The authorities that follow below provide guidance regarding the approach adopted by our courts in dealing with this issue. In *S v Logoa*,³ this Court held that it is not desirable to lay down a general rule as to what is required in a charge sheet and

¹ Page 186, lines 7-10.

² See paras 40-43 and 47-49 of the judgment of the full court.

³ *S v Logoa* [2002] 4 All SA 373 (SCA); 2003 (1) SACR 13 (SCA).

that '[w]hether the accused's right to a fair trial, including his ability to answer the charge, has been impaired, will . . . depend on a vigilant examination of the relevant circumstances'.⁴

[12] In *Johannes September v The State*,⁵ the Constitutional Court held as follows: 'It is indeed desirable that the charge sheet refers to the relevant penal provision of the Minimum Sentences Act. This should not, however, be understood as an absolute rule. Each case must be judged on its particular facts. Where there is no mention of the applicability of the Minimum Sentences Act in the charge sheet or in the record of the proceedings, a diligent examination of the circumstances of the case must be undertaken in order to determine whether that omission amounts to unfairness in trial. This is so because even though there may be no such mention, examination of the individual circumstances of a matter may very well reveal sufficient indications that the accused's section 35(3) right to a fair trial was not in fact infringed.'⁶

[13] This Court in *S v Msimango*,⁷ held, *inter alia*, as follows;

'It is common cause that in convicting the appellant on count 3, the regional magistrate relied on the doctrine of common purpose, *even though it was never averred either in the charge sheet or proved in evidence*. It was impermissible for the regional magistrate to have invoked the principle of common purpose as a legal basis to convict the appellant on count 3, as this never formed part of the state's case.

Undoubtedly, the approach adopted by the regional magistrate of relying on common purpose which was mentioned at the end of the trial is inimical to the spirit and purport of s 35(3)(a) of the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution) under the heading 'Arrested, detained and accused persons'. In fact it is subversive of the notion of the right to a fair trial which is contained in s 35(3)(a) of the Constitution which provides in clear terms that:

"(3) Every accused person has a right to a fair trial, which includes the right –
(a) to be informed of the charge with sufficient detail to answer it..."

Section 35 falls under Chapter 2 of the Constitution under the heading, the Bill of Rights. Section 7 of the Constitution commands the State to respect, protect, promote and fulfill the Rights in the Bill of Rights. However, this is subject to s 36 of the Constitution. The requirement

⁴ Ibid para 21.

⁵ *M T v S; A S B v S; September v S* [2018] ZACC 27; 2018 (2) SACR 592 (CC); 2018 (11) BCLR 1397.

⁶ Ibid para 40.

⁷ *Msimango v S* [2017] ZASCA 181; 2018 (1) SACR 276 (SCA) paras 14-16.

embodied in s 35(3) is not merely formal but substantive. It goes to the very heart of what a fair trial is. It requires the state to furnish every accused with sufficient details to put him or her in a position where he or she understands what the actual charge is which he or she is facing. In the language of s 35(3)(a), this is intended to enable such an accused person to answer and defend himself in the ensuing trial. Its main purpose is to banish any trial by ambush. This is so because our criminal justice system is both adversarial and accusatory.’ (Own emphasis.)

[14] The full court, in this case, relied on the doctrine of common purpose to confirm Mr Ntuli’s conviction on the attempted murder counts, in circumstances where the State failed to alert Mr Ntuli to the fact that it intended to place reliance on that doctrine. The State, *inter alia*: -

- (a) Failed to mention that it intended to rely on the doctrine of common purpose in the charge sheet.
- (b) Incorrectly put to Mr Ntuli that he had directly shot at Constable Cowie, thereby demonstrating reliance on his direct participation as a basis for his culpability, as opposed to a reliance on common purpose.
- (c) Failed to seek an amendment of the charge sheet, at any stage of the proceedings, to include reliance on the doctrine of common purpose.
- (d) Failed to alert Mr Ntuli, at any stage of the proceedings, of the fact that it intended to rely on common purpose or collective liability.

[15] There was, accordingly, no forewarning to Mr Ntuli that his conviction was sought on the basis of common purpose. A conviction based on common purpose would, in these circumstances, amount to material unfairness. He was made to believe that the convictions were sought against him based on his own direct act of shooting at the police officers. His belief, in this regard, was strengthened by the fact that this was put to him by the prosecutor when he was being cross-examined. The State’s failure to allege in the charge sheet or alert the defence to its reliance upon common purpose is fatal to the convictions that were sustained on this basis. Absent reliance on common purpose, the State failed to discharge its *onus* to prove beyond a reasonable doubt that Mr Ntuli’s actions amounted to attempted murder.

[16] In the circumstances of this case the State's failure to have informed Mr Ntuli of its reliance on the doctrine of common purpose and nevertheless relying on that doctrine to convict him on the attempted murder counts was an infringement of his right to a fair trial. The full court ought to have upheld his appeal in respect of counts 6, 7 and 8.

[17] In the result, the following order is made:

- 1 The appeal is upheld in respect of counts 6, 7 and 8 (the attempted murder counts).
- 2 The order of the full court is set aside and substituted with the following:
 - a) The appeal succeeds to the extent that the convictions and sentences imposed by the Newlands Regional Court (the regional court) in respect of counts 6, 7 and 8 are set aside but the appeal is otherwise dismissed; and
 - b) The appellant shall accordingly serve an effective period of 15 years' imprisonment in respect of counts 1 to 5, from the date of sentencing in the regional court.

F B A DAWOOD
ACTING JUDGE OF APPEAL

Appearances

For the appellant: E A Guarneri

Instructed by: Legal Aid South Africa, Johannesburg
Legal Aid South Africa, Bloemfontein

For the respondent: V S Sinthumule

Instructed by: Director of Public Prosecutions, Johannesburg
Director of Public Prosecutions, Bloemfontein.