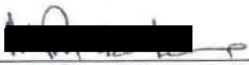




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

CASE NO: A134/2019



27 May 2025

In the matter between:

MONTSHO TSHIDISO JIMMY

Appellant

And

THE STATE

Respondent

JUDGMENT

Mdalana-Mayisela et Moosa JJ

Introduction

- [1] This is an appeal against the conviction and effective sentence of 28 years imprisonment imposed upon the appellant by the Regional Magistrate court, Orlando. The appeal is pursuant to the petition for leave to appeal against conviction and sentence having been granted by this court. The appeal is opposed by the respondent. This court granted an unopposed condonation application for the late filing of the notice of appeal.

- [2] The appellant was charged on count 1 with robbery with aggravating circumstances read with section 51(2)(a) of the Criminal Law Amendment Act 105 of 1997 ("the CLAA"); counts 2 and 4 with contravention of section 3 read with sections 1,103,117,120(1)(a) and section 121 read with Schedule 4 of the Firearms Control Act 60, of 2000 and further read with section 250 of the Criminal Procedure Act 51, of 1977 ("the CPA") – unlawful possession of a firearm: counts 3 and 5 with contravention of section 90 read with sections 1,103,117,120(1)(a), and section 121 read with Schedule 4 of the Firearms Control Act and further read with section 250 of the CPA – unlawful possession of ammunition.

- [3] The appellant (accused 1) was charged with accused 2 and 3. He pleaded not guilty to all counts and tendered no plea explanation. He was acquitted on counts 3 and 5. He was convicted as charged on counts 1, 2 and 4. He was sentenced on count 1 to 12 years imprisonment, counts 2 and 4 each to 8 years imprisonment. He was declared unfit to possess a firearm in terms of section 103 of Act 60 of 2000. He applied for leave to appeal against both conviction and sentence in the lower court and it was refused. He was legally represented throughout the proceedings in the lower court.

Factual background

- [4] The facts leading to conviction and sentence are as follows. On 25 July 2008 at around 5 am, the complainant, Richard Mzwakhe Banda left his house going to work. As he was closing a gate, he heard a sound of a firearm being cocked. He turned around and saw accused 3 pointing him with a firearm and demanding his house keys. He gave him the keys. At that stage the appellant and accused 2 emerged. They all went into the

complainant's yard. Accused 3 gave accused 2 a firearm. Accused 3 unlocked the house door and he went inside the house together with accused 2.

- [5] The appellant and complainant remained in the yard. The appellant was in possession of a screwdriver. He instructed the complainant to lay down. The complainant complied with the instruction. He searched the complainant. He took the cell phone and R1500 cash from the complainant. Thereafter, they went inside the house. The complainant's partner, Nomsa Xaba was also inside the house. She was instructed to cover her face with a blanket, and she complied. The appellant and his co-accused took the MP3 player and DVD player from the house and thereafter, they fled from the scene.
- [6] The complainant gave chase. When they noticed that he was following them, two shots were fired. The complainant took cover. When the shooting stopped, he followed them. They saw a metro police van in the street, and they jumped over the wall of another house. The complainant sought help from the metro police. The police went into the yard where the appellant and his co-accused ran into. The complainant remained in the street. The police found the appellant in the yard of a house situated four streets away from the appellant's house. They brought him to the street where the complainant was waiting. The complainant identified the appellant as one of the perpetrators of robbery. The cell phone rang inside the appellant's pocket. He was instructed to take it out. The complainant identified it as his property, and the call was from his brother. Thereafter, they all went to the complainant's house. Diepkloof police were requested to come to the complainant's house. They came and they also went to look for the missing items. They found the MP3 and DVD players behind the toilet in the yard where the appellant was found by the police.

Ad conviction

- [7] In his notice of appeal, the appellant contended that the lower court erred in convicting him on counts 1, 2 and 4 and that the respondent failed to prove his identity as a perpetrator beyond reasonable doubt. He also contended that his sister corroborated his version, and the lower court erred by rejecting it as not being reasonably possibly true.

- [8] It is triad that the powers of a court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court's conclusions including its acceptance of a witness' evidence is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witnesses' evidence – a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional circumstances that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony.¹
- [9] First, I deal with the conviction for robbery with aggravating circumstances. Both counsel for the appellant and state submitted that the state proved the identity of the appellant as a perpetrator beyond reasonable doubt. We agree with this submission for the following reasons. The complainant first saw the appellant when he emerged outside the yard. His face was not covered. They all went into the yard. The appellant remained with the complainant in the yard while the co-perpetrators went inside the house. After he searched the complainant, they both went inside the house. The complainant had sufficient opportunity to observe the appellant's face and be able to identify him.
- [10] The outside light situated 8 to 10 metres from where they were in the yard and the light inside the house were switched on. The visibility was clear. The appellant was at close proximity to the complainant when the offence of robbery with aggravating circumstances was committed. There is no question of mistaken identity in this matter.
- [11] Furthermore, the appellant was found in possession of the complainant's cell phone and arrested in the yard four streets away from the complainant's yard soon after the commission of robbery with aggravating circumstances. The MP3 and DVD players were also recovered in the yard where the appellant was found by the police in the same morning.
- [12] The appellant's version that the persons who were robbing him gave him the complainant's cell phone is improbable and false. The lower court correctly rejected it as not being reasonably possibly true. The grounds of appeal against conviction for robbery with aggravating circumstances have no merits and they must fail.

¹ S v Francis 1991 (1) SACR 198 (A) at 198J-199A.

- [13] I now deal with the ground of appeal against conviction on counts 2 and 4. The appellant contended that the admission he made to the police that he is the owner of the two firearms found in possession of his co-accused on 5 August 2008 is inadmissible because he was not informed about his rights, particularly a right against self-incrimination before he made it.
- [14] It is common cause that the state did not lead evidence during trial proving that the appellant was in physical possession of the firearm/s at the crime scene on 25 July 2008. He was charged on counts 2 and 4 with unlawful possession of firearms that were found in possession of his co-accused when they were arrested on 5 August 2008 because they informed the police that they were possessing the firearms on behalf the appellant. The state relied on the doctrine of joint possession. It submitted that it proved the requirements thereof by leading the evidence of the admission made by the appellant and the complainant's testimony that accused 3 was carrying a firearm which he later gave to accused 2 at the crime scene. The lower court convicted the appellant for joint possession.
- [15] The test for joint possession of an illegal firearm and ammunition is well established. The mere fact that the appellant participated in a robbery where his co perpetrators possessed a firearm does not sustain beyond reasonable doubt the inference that he possessed the firearms jointly with them. This is only justifiable if the factual evidence excludes all reasonable inferences other than (a) that the group had the intention to exercise possession through the actual detentor and (b) the actual detentor had the intention to hold the gun on behalf of the group. Only if both requirements are fulfilled can there be joint possession involving the group as a whole.²
- [16] It is common cause that the state did not lead evidence during trial proving the admissibility of the admission made by the appellant. The counsel for the respondent submitted that the right against self-incrimination should be limited in terms of section 36 of the Constitution of the Republic. It is correct that it is not an absolute right. However, it is a fundamental right that protects the accused person from being compelled to testify against himself or provide evidence that could lead to his or her own prosecution, and it ensures a fair trial.

² Leshilo v The State (345/2019) [2020] ZASCA 98 (8 September 2020)

- [17] The lower court erred in convicting the appellant on these charges without first satisfying itself that the admission is admissible and that the state has proved the requirements for joint possession. Furthermore, in considering the requirements for joint possession, the lower court failed to attach sufficient weight to the complainant's evidence that the appellant was in possession of a screwdriver at the crime scene. There is no evidence on record showing that the two firearms that were found in possession of the co-accused on 5 August 2008, were the same firearms that were used at the crime scene. The complainant's evidence was that he saw only one firearm at the crime scene, and he did not give a full description (serial number and make) of that firearm. When the two firearms were found in possession of the co-accused, the appellant was not present, and he was already in custody.
- [18] It would not be legally justifiable to limit the right against self-incrimination in the circumstances of this matter. We are not inclined to condone the infringement of this fundamental right. The admission made by the appellant that he is the owner of both firearms is inadmissible evidence. The state has failed to prove the requirements of joint possession beyond reasonable doubt. Accordingly, the appeal against conviction on counts 2 and 4 must succeed.

Ad sentence

- [19] It was submitted on behalf of the appellant that he is not challenging the individual sentences. He contended that the lower court erred and misdirected itself when it failed to consider the cumulative effect of an effective sentence of 28 years imprisonment, and that such failure to do so induces a sense of shock.
- [20] It is trite that sentencing is pre-eminently a matter for the discretion of the trial court. The test for interference with the sentence imposed by the trial court is not whether or not the appeal court would have imposed another form of punishment, but rather whether the trial court exercised its discretion properly and reasonably when it imposed the sentence. The appeal court will interfere where the imposed sentence is vitiated by an irregularity, misdirection or where there is a striking disparity between the sentence and

that which the appeal court would have imposed had it been the trial court or it induces a sense of shock.³

- [21] The contention about the cumulative effect of the sentences falls away because the appeal against conviction on counts 2 and 4 succeeds. We do not find it necessary to deal with the sentence of 12 years imprisonment for count 1 because the appellant is not challenging it.

ORDER

[22] The following order is made.

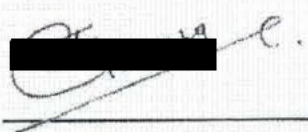
1. The appeal against conviction and sentence on count 1, robbery with aggravating circumstances is dismissed. The conviction and sentence imposed on count 1 are confirmed.
2. The appeal against conviction and sentence on counts 2 and 4, unlawful possession of firearm is upheld.
3. The conviction and sentence on counts 2 and 4 are set aside, and substituted with the following:

"Accused 1 is acquitted on counts 2 and 4, unlawful possession of firearm."


MMP Mdalana-Mayisela
Judge of the High Court
Gauteng Division,
Johannesburg

I agree

³ S v Kgosimore 1999 (2) SACR 238.



C I Moosa
Judge of the High Court
Gauteng Division,
Johannesburg

Date of delivery: 27 May 2025

Appearances:

On behalf of the appellant: Adv AJ Greyling

Instructed by: Legal Aid SA

On behalf of the respondent: Adv C Ehlers

Instructed by: National Prosecuting Authority