

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: A49/2024

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
15/08/2025	[Redacted Signature]
DATE	SIGNATURE

In the matter between:

HAROUN ESA
HAROUN SUHAIL

First Appellant
Second Appellant

and

THE STATE

Accused

JUDGMENT

STRYDOM, J

- [1] This is an appeal lodged by the first appellant against the convictions and sentences imposed by the Regional Court magistrate (the court *a quo*). He was convicted on one count of murder (count 1); one count of being in unlawful possession of a firearm (count 2) and on one count of being in unlawful possession of ammunition (count 3). He was sentenced to 15 years

imprisonment on count 1; to 8 years imprisonment on count 2, and to 3 years imprisonment on count 3. The court ordered the sentences on counts 2 and 3 to be served concurrently with the sentence of 15 years imprisonment imposed on count 1.

- [2] The second appellant was convicted on count 1. He was sentenced to correctional supervision in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977 (the CPA). The second appellant appeals against his conviction on count 1.
- [3] The facts of this matter are to some extent common cause. On 28 April 2019 the appellants and three other family members went to a BP filling station to fill the first appellant's Jetta (in evidence also referred to as a "Polo Vivo") motor vehicle with fuel. The first appellant was the driver of his vehicle. It should be noted that one of the state witnesses testified that the second appellant was the driver of this vehicle but nothing much turns on this. The court *a quo*, correctly in my view, accepted that the first appellant was the driver of his vehicle. After putting in fuel, he drove off and as they were exiting the filling station a white Nissan Sentra, driven by the deceased, entered the filling station against a one-way entrance. Despite the first appellant's attempts to avoid an accident with the Sentra, the Sentra, according to the evidence of the first appellant, scratched Jetta's mirror and side door. The Sentra did not stop but the respective drivers and passengers exchanged hand and finger signs towards each other whereafter the Sentra drove further to a petrol pump. Dissatisfied with the situation, the first appellant turned his vehicle around and went to park in front of the Sentra of the deceased, which was now stationary at a petrol pump. An argument ensued between the first appellant and the deceased. Two other male occupants of the first appellant's vehicle also involved themselves in the argument and the subsequent physical altercation which took place.
- [4] During the physical altercation, the first appellant was injured on his face, and he started to bleed. The contentious issue is how it came about that the first appellant got injured on his face. After the first appellant was injured, he screamed and he then produced a firearm with which he shot the deceased three

times. The deceased died on the scene and the first appellant drove to the Booyens Police Station where he handed his firearm to the police.

- [5] The appellants raised self defence (or private defence) as a justification for their actions. Before us it was argued on behalf of the second appellant that he could not have been convicted on count 1 on the basis that he formed a common purpose with the first appellant as the indictment failed to mention that the State would place reliance on the doctrine of common purpose. Moreover, the State has failed to prove that he actively associated himself with the shooting of the deceased, which was the only cause of his death. The second appellant further denied that he assaulted the deceased.
- [6] The first appellant disputed that he was unlawfully in possession of a firearm and ammunition as he was in possession of the green bar-coded firearm licence. It became common cause that the first appellant was on 4 May 2011 issued with a firearm licence for the firearm which was used to shoot the deceased. This licence, however, expired after five years, on 3 May 2016. The first appellant remained in possession of this firearm until 28 April 2019 when the shooting took place. His defence in court was that he rendered under the impression that the green bar-coded licence, without an expiry date, remained valid. He rendered this belief because of a High Court judgment to the effect that the green bar-coded licence remained valid pending a final judgment on this issue. This defence is premised on a lack of *mens rea* to be in unlawful possession of the firearm. He thought his possession of the firearm was lawful.
- [7] On behalf of the appellants, it was argued that the State witnesses contradicted each other to the extent that no reliance could be placed on their evidence. In this regard it should be noted that a video recording was admitted into evidence which provided objective evidence as to what transpired during the altercation that led to the shooting of the deceased. The last two shots were fired when the deceased was already incapacitated and lying on the ground.
- [8] In my view, there are discrepancies between the evidence of the witnesses, Mr. Maepa, Mr. Msingatha and Mr. Lukhele. None of these were material. In fact, discrepancies in the version of witnesses are expected if regard is had to the

circumstances under which this incident happened. It happened out of the blue, the petrol attendants were not observing what transpired from the same vantage point and they observed a moving scene. On the material aspects on whether the deceased attacked the appellants or *vice versa*, they stated that the appellants were the initial aggressors. None of the witnesses saw a knife in the possession of the deceased. They testified that the deceased pushed the first appellant onto a petrol pump and that the first appellant was bleeding from his face. None of the witnesses testified that the deceased picked the second appellant up from his feet and was about to stab him when the first appellant shot the deceased. They testified that the first appellant shot two further shots whilst the deceased was on the ground. They testified that the second appellant hit the deceased with fists and kicked him.

- [9] It was the case of the first appellant that after the physical altercation started, the deceased produced a knife with which he stabbed the first appellant and thereafter wanted to stab his son, the second appellant. It, thus, became important to establish whether the deceased produced a knife with which he stabbed the first appellant and was about to stab the second appellant.

- [10] As indicated, none of the petrol attendants who witnessed the incident, who testified, made any mention of a knife in possession of the deceased or even the presence of a knife on the scene after the deceased died. This includes the police who attended the crime scene. On this material aspect these independent witnesses corroborated each other. No knife could be observed on the video footage. Moreover, it is highly improbable that the deceased, not expecting to be physically attacked would have a knife at hand to stab the appellants. He came to the petrol station to either pour petrol or to inflate the tyres of his vehicle.

- [11] As it became common cause that the first appellant shot and killed the deceased, the non-material contradictions in the evidence of State witnesses when compared to the video footage and photo album could not lead to a rejection of their evidence as was argued. The discrepancies between the evidence of the state witnesses Mr. Maepa, Mr. Msingatha and Mr. Lukhele are not material. The discrepancies between the statement made to the police by Mr. Maepa was satisfactorily explained by him. These witnesses were independent, and they had

no reason to falsely implicate the appellants. It is quite understandable that their evidence could differ on certain aspects. If an altercation breaks out and people start to assault each other it will be very difficult for bystanders to relate step-by-step as to what has transpired. The perpetrators are unknown to the witnesses, things happened quickly, and gun shots were fired.

- [12] I am satisfied that the court *a quo* correctly made factual findings pertaining to the evidence. This includes a finding that the second appellant assaulted the deceased by hitting him with his fists and by kicking him. The second appellant closed his case without testifying and had thus not countered the State's case against him.
- [13] The evidence of the first appellant was correctly rejected by the court *a quo* in relation to the alleged attack by the deceased on the first appellant with a knife. The court considered the evidence in totality and, correctly in my view, rejected the version that the first appellant was stabbed by the deceased with a knife and that the second appellant was about to be stabbed. The injury sustained by the first appellant was therefore not caused by being stabbed with a knife by the deceased, but rather when the deceased managed to hit the first appellant's head against a petrol pump or pole forming part of the installation at the filling station..
- [14] On the basis that the evidence did not support a finding that the deceased produced a knife with which he attacked the appellants, the court *a quo*, in my view, correctly rejected the evidence of the first appellant. Not even his own son, the second appellant, was prepared to testify to support his father's version pertaining to the knife. The reference to the presence of a knife used by the deceased was clearly an afterthought to sustain first appellant's self-defense version. Without a finding that the deceased produced and used a knife to attack the appellant there was no justification to shoot the deceased three times and thereby killing him. There was no imminent threat to the lives of either the first appellant or the second appellant. Moreover, no warning shot was fired. Further shots were fired after the deceased was incapacitated and was lying on the ground. I agree with the finding of the court *a quo*, that after the first appellant was injured, he unlawfully started to shoot the deceased in anger. His injury

caused him to bleed, and he screamed. This was the triggering point for him to proceed to shoot the deceased. I am, however, not in agreement with the finding of the court *a quo* that the intention with which the first appellant fired the shots falls within the category of *dolus eventualis*. When the first appellant started to shoot, he shot with the direct intention to kill the deceased.

[15] In my view, the conviction of the first appellant on the count of murder should stand.

[16] Turning now to the conviction of the second appellant and the murder count 1. The indictment did not include a statement that the State would place reliance on the doctrine of common purpose for the conviction of the second appellant. The indictment was not during the trial amended to include such an averment. It has been found that this was an essential averment if the State wanted to place reliance on a common purpose. Without such an averment a court should not convict an accused applying the doctrine of common purpose as it would be inimical to the spirit and purport of s 35(3)(a) of the Constitution. This section provides the every accused person has a right to a fair trial, which includes the right to be informed of the charge with sufficient details to answer it. The main purpose of this section is to banish any trial by ambush. See: *S v National High Command* 1963 (3) SA 462 (T) at p.464; *S v Ndaba* 2003 (1) SACR 364 (W) at para 102; *S v Msimango* 2018 (1) SACR 276 (SCA) and recently *Ntuli v S* (128/2023) [2025] ZASCA 114 (30 July 2025).

[17] On this basis alone the second appellant, who did not cause the death of the deceased, as he was shot and killed by the first appellant, could not have been convicted on the count of murder placing reliance on the doctrine of common purpose. He should have been acquitted on the murder count.

[18] But apart from this, even if an allegation of a common purpose was made in the indictment, the evidence before court fell short from proving the guilt of the second appellant on this charge. In my view, the State failed to meet the requirements for placing reliance on this doctrine. There is no evidence that the second appellant knew that the first appellant carried a firearm or that he would produce a firearm and shoot the deceased. On the facts of this matter the

physical altercation between the appellants and the deceased started without a firearm being produced. The second appellant joined in on the physical attack, but it cannot be found that the intention from the outset was to kill the deceased. After the first appellant was injured, he suddenly produced a firearm and shot the deceased. There is no indication found in the evidence that the second appellant associated himself with the shooting by the first appellant of the deceased, even though he continued with his physical attack after the shooting of the deceased. There was no evidence of a prior agreement, nor was there time for such discussion. In *S v Mgadezi and Others* 1989 (1) SA 687 (AD) at 706 A-B the court discussed the requirements for a conviction based on the doctrine of common purpose. The fifth requirement mentioned was that the accused must have had the requisite *mens rea*. The court found as follows: "*so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue.*"

- [19] In my view, the State failed to prove that the second appellant intended the death of deceased. He did not contribute to the death of the deceased, and it could not have been found that he foresaw the possibility that the first appellant was going to shoot the deceased and reconciled himself with this possibility. He was assaulting the deceased when his father suddenly produced a firearm and shot the deceased.
- [20] The fact that the second appellant failed to testify cannot be used to rectify the shortcomings in the State's case as far as the second appellant is concerned. The State had at least to establish a *prima facie* case of murder against the second appellant to expect a reply through evidence. This the State has failed to do, but in my view a *prima facie* case of assault to do grievous bodily harm to deceased was established by the State.
- [21] The evidence presented by the State against the second appellant was clear that he assaulted the deceased by hitting him with fists and by kicking him. This evidence stood uncontested as the second appellant decided not to testify. In my view, this amounts to assault with the intention to cause serious bodily harm.

- [22] It was argued that second appellant could not have been convicted on the competent verdict of assault with the intention to do grievous bodily harm when an accused is charged with murder, as the indictment failed to refer to the nature of the attack or actions performed by the second appellant. It was argued that such a conviction would be in violation of the second appellant's constitutional rights in terms of sections 35(3)(a)¹ and 35(3)(i)² of the Constitution, when read with section 87³ of the CPA.
- [23] This argument raised, is in fact a constitutional challenge against the constitutionality of section 258 of the CPA. This section in relevant part reads as follows: *"If the evidence on a charge of murder or attempted murder does not prove the offence of murder or, as the case may be, or attempted murder, but—*
(b) The offence of assault with intent to do grievous bodily harm; the accused may be found guilty of the offence so proved."
- [24] Clearly, section 258, which was referred to in the murder chargesheet, provides a court with the power to convict an accused charged with murder on a count of assault with the intention to do grievous bodily harm on a victim. It is the "evidence" which should prove the competent verdict and there is no requirement that the chargesheet should contain the allegations which the State may rely upon. There was no reason to amend the chargesheet, nor was there any requirement that the second appellant had to be charged separately on a charge of assault to do serious bodily harm. The evidence in this matter pertaining to the second appellant failed to prove beyond reasonable doubt that he murdered the deceased. The evidence has proven though, that the second appellant assaulted the deceased by hitting him with fists and kicking him, whilst wearing shoes. This constituted assault to do grievous bodily harm.

¹ "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;"

² "Every accused person has a right to a fair trial, which includes the right— (i) to adduce and challenge evidence"

³ "(1) An accused may at any stage before any evidence in the respect of any particular charge has been led, in writing request the prosecution to furnish particulars or further particulars of any matter alleged in that charge, and the court before which a charge is pending may at any time before any evidence in the respect of that charge has been led, direct that particulars or further particulars be delivered to the accused of any matter alleged in the charge, and may, if necessary, adjourn the proceedings in order that such particulars may be delivered:..."

- [25] There was no proper constitutional challenge against the terms of section 258 of the CPA, which provides for a conviction on a count of assault with intent to do grievous bodily harm a competent verdict, when charged for murder. For this reason alone, the argument that the second appellant, who was legally represented, was not properly informed of the possibility to be found guilty on a competent verdict should be rejected. Moreover, this ground of appeal was not raised in the second appellant's notice of appeal.
- [26] The second appellant was wrongly convicted on an account of murder but should have been convicted on a count of assault with intent to do grievous bodily harm. Consequently, the second appellant, should be acquitted on count 1 and the conviction should be replaced with the competent verdict of assault to do grievous bodily harm.
- [27] The conviction of the first appellant on counts 2 and 3 should now be considered. The first appellant placed reliance on the green bar-coded licence he previously obtained for his firearm to argue that he was, at the time of the shooting, still under the impression that he was licenced to possess his firearm. This even though he applied for and obtained a further licence for this firearm, a licence card, exhibit "K", was issued to him valid for 5 years from 4 April 2011. It is common cause that when he shot the deceased with his .45 Auto Caliber Taurus Model PT 945 Pistol ("the firearm") on 28 April 2019, this licence had already expired on 3 May 2016.
- [28] Evidence was given by a policeman Warrant Officer Ramashiya that the green bar-coded licence was never provided to him by the first appellant. He was only given the new, expired licence. He testified that according to his knowledge the green bar-coded licence lapsed as soon as a gun owner applied for a new licence. He testified that internal police directives were sent to police stations to notify members that once a firearm licence holder applied for and was issued with a new licence the previous green bar-coded licence would no longer be valid. He rendered under the impression that this notice was also for public notice, but he could not say whether it was published. The notice was given because of an interim court order, to the effect that the green bar-coded licences remained valid pending a constitutional challenge. The notice, which was not

handed in as an exhibit, stated, according to the evidence, that the green bar-coded licence only found application if the licence holder had not migrated to the new system. Migration would take place once a new white licence card was issued with an expiry date.

[29] The court *a quo* accepted this evidence to find that the first appellant could not have placed reliance on the previous green bar-coded licence. In my view, this conclusion was misplaced. The internal directive might have summarised the legal position correctly, or not, but there is no evidence that the first appellant was aware of or had seen this directive. The defence of the first appellant was on a different footing. He testified that he rendered under the impression that even if his new licence had expired he was still the holder of a valid licence, to wit, his green bar-coded licence.

[30] He testified that he *"was waiting for the grace period from the Constitutional Court to say when they are giving, grace period should reapply and to say when they are going to find the green bar-coded licence not valid anymore, because it does not have an expiry date."* Later in his evidence he testified as follows: *"So the green bar-coded license Your Worship, when I found that my license expired I actually approached the police station, Booyens Police Station. And they said still valid until there is a ruling as such that the green bar-coded is phased out, which was never phased out until today Your Worship. And it has not got an expiry date, so it held his validity in South Africa. So there was no reason for me to renew my license Your Worship, until, until such time that we got the go ahead from the Constitutional Court and the ruling in South Africa."*

[31] If this evidence is accepted, the first appellant lacked the required *mens rea* to possess his firearm and ammunition unlawfully. He voluntarily handed this firearm and ammunition in at the police station after the shooting.

[32] In my view, this part of the evidence of the first appellant could not have been rejected. The fact that his evidence, as far as the shooting incident was concerned was correctly found to be false, does not mean that all his evidence should be rejected. This defence needs to be considered.

- [33] The prohibition against the possession of a firearm without a licence is to be found in section 3 of the Firearms Control Act of 60 of 2000. It provides that nobody may possess a firearm unless he or she holds for that firearm “(a) a licence, permit or authorization issued in terms of this Act; ..” It has been found that *mens rea* was an element of this prohibition. A person must have knowledge that his possession was unlawful before he can be convicted for his unlawful possession. In *S v Potwane* 1983 (1) 868 (AD) it was found by Corbett JA that *mens rea* was a requirement for a conviction in relation to a closely worded section, i.e. section 2 of the Arms and Ammunition Act 75 of 1969, to the current section 3. The question of whether *dolus* and *culpa* or *dolus* should constitute the element of *mens rea* in the application of section 2 was not decided.⁴
- [34] The court in *S v Mnisi* [1997] 1 All SA 248 (T) found that *mens rea* in the form of *culpa* (negligence) was sufficient to constitute the offence of the unlawful possession of a firearm. A person who possesses a firearm should take reasonable steps to establish whether his licence is valid or not. If no such steps were taken it could hardly be argued that the licence holder could accept that his licence remained valid.
- [35] Once the evidence of the first appellant is accepted there is no doubt that he lacked the intention to unlawfully possess his firearm. Whether he was negligent in this regard is a different question. Considering that he approached a police station and the Gun Law Association of South Africa to establish what the position was; that he handed in his green bar-coded licence at the police station where he participated in community policing; that there was in fact an interim order in terms of which green bar-coded licences remained valid; that there was in fact a constitutional challenge pending at some stage and a period of amnesty granted, I am of the view, that the State has failed to prove beyond reasonable doubt that the first appellant acted negligently when he thought that his green bar-coded licence was still valid, even though his new licence had lapsed.

⁴ See also *S v De Blom* 1977 (3) SA 513 (A) at 532 E-H where the accused in that matter acted in contravention of exchange control regulations. Her defence was that she was not aware that her actions constituted a contravention. The court held that if the accused wishes to rely on a defence that she did not know that her act was unlawful, her defence can succeed if it can be inferred from the evidence as a whole that there is a reasonable possibility that she did not know that her act was unlawful.

[36] I should make it clear, however, that no decision is made by this Court on the issue of whether the first appellant's green bar-code licence was still legally valid at the stage when he possessed the firearm on 28 April 2019 and shot the deceased. The finding of this Court is premised on the facts of this matter to conclude that the State failed to prove beyond reasonable doubt that the first appellant had the required knowledge of unlawfulness of his possession of his firearm.

[37] Consequently, the first appellant stands to be acquitted of counts 2 and 3.

Sentences

[38] The first Appellant was sentenced to 15 years imprisonment on the murder count. This was the minimum prescribed sentence in terms of section 51(2) of the General Law Amendment Act 105 of 1997.

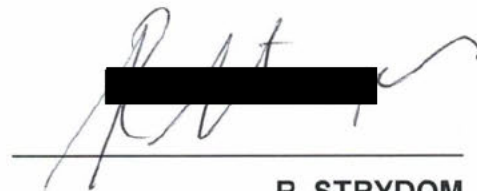
[39] The court was not satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed by the legislator. The trial court exercised a discretion in this regard. It is trite that the imposition of a sentence is in the discretion of the trial court, and the Court of Appeal may only interfere if the discretion has not been judicially and properly exercised. Further, our courts have held that the prescribed minimum sentences should not be departed from lightly.

[40] I am satisfied that the court *a quo* took into account the personal circumstances of the first appellant and considered the pre-sentencing report. The learned magistrate was aware of the fact that the first appellant's brother was shot and killed at a petrol station during 2001. Nobody was ever apprehended, and this caused him to have a feeling that an injustice took place. This again caused psychological problems. The trial court considered the evidence of Ms. Hearne who compiled the report and concluded that first appellant had diminished responsibility when he committed the crime. The court took in consideration the personal circumstances of the first appellant, that he sustained an injury during the incident and that he was a first offender.

- [41] The seriousness of the offence and the fact that the first appellant fired further shots at the deceased whilst he was lying on the ground was considered. Also, the interests of the family of the victim were weighed in the court's conclusion that there were no substantial and compelling circumstances shown to deviate from the prescribed minimum sentence.
- [42] In my view, this Court cannot find that the court *a quo* misdirected itself by not finding the presence of substantial and compelling circumstances. The appeal against the sentence of the first appellant stands to be dismissed.
- [43] The second appellant was sentenced pursuant to his conviction on the murder count. His appeal against conviction will be upheld by this Court and will be replaced with a conviction on the competent verdict of assault to do grievous bodily harm. He was sentenced to correctional supervision in terms of section 276(1)(i) on the murder count which is not an appropriate sentence for the lesser conviction, to wit, assault to do grievous bodily harm. This Court must now consider an appropriate sentence.
- [44] Because the second appellant was relatively young and a first offender when he committed this offence, a non-custodial sentence in the form of a suspended sentence would be appropriate.
- [45] The following order is made:
1. The appeal against the conviction and sentence of the first appellant on count 1 is dismissed.
 2. The appeal against the convictions and sentences on counts 2 and 3 are upheld. The convictions and sentences are set aside.
 3. The appeal against the conviction of the second appellant on the murder count 1 is upheld and set aside but replaced with a conviction on a count of assault to do grievous bodily harm.
 4. The sentence of correctional supervision of the second appellant is set aside and replaced with a sentence of 1 year imprisonment, wholly suspended for a period of five years, on condition that the second appellant is not convicted

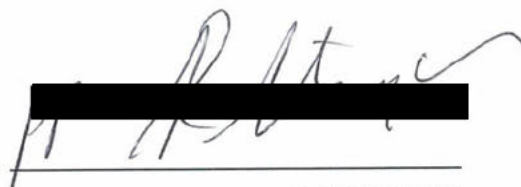
of a crime of which violence is an element and for which he is sentenced to direct imprisonment without an option of a fine, during the period of suspension.

5. The sentence of the second appellant is antedated to 13 November 2023.

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R. STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

I agree,

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S. MAKAMU
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Heard on: 4 August 2025

Delivered on: 15 August 2025

Appearances:

For The 1st and 2nd Appellant: Adv. R. Gissing

Instructed by: Strauss De Waal Attorneys

For the State: Adv. R.L. Kgaditsi

Instructed by: The National Prosecuting Authority