

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, PRETORIA

Case Number: A64/2024

(1) REPORTABLE: NO/YES
(2) OF INTEREST TO OTHER JUDGES: NO/YES
(3) REVISED: NO/YES
4/12/2025
DATE
[Signature]
SIGNATURE

In the matter between:

Mlungisi Frank Sindane

Appellant

and

The State

Respondent

This judgment was handed down electronically by circulation to the parties' and or the parties' legal representatives by email and by being uploaded to CaseLines. The date for the hand down is deemed to be 4 December 2025.

Judgment

Thupaatlase AJ (Mooki J concurring)

Introduction

[1] The appellant, together with his co-accused, were charged with various offences including one count of armed robbery (i.e. aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 51 of 1977), two counts of murder, one count of illegal possession of a firearm, and one count of possession of ammunition. It was alleged by the State that the offences were committed on 29 September 2015 at Mamelodi. The State further alleged that the offences were committed in furtherance of a common purpose hatched by the accused and his co-robbers.

[2] The appellant, who appeared as accused two during the trial together with his co-accused, pleaded not guilty but both were found guilty by the regional court on all counts after trial, and each was sentenced as follows:

[2.1] on count 1 (armed robbery): 15 years imprisonment;

[2.2] on counts 2-3 (murder): each count life imprisonment;

[2.3] on count 4 (illegal possession of firearm) 15 years imprisonment, and

[2.4] on count 5 (illegal possession of ammunition) 5 years imprisonment. The sentences were ordered to run concurrently, and the appellant and his co-accused were both declared unfit to possess a firearm in terms of section 103 of the Firearm Control Act, 60 of 2000. The effective sentence was life imprisonment.

[3] As a result of the imposition of life imprisonment by the regional court the appellant exercised his right of automatic appeal as envisaged in section 309 of the Act. He noted an appeal against all convictions and the sentences. When the matter was called before us, the appeals against conviction count 1 (armed robbery) and count 2 and 3 (murder) were expressly abandoned by Counsel appearing on behalf of the appellant.

[4] Counsel conceded that the appellant was correctly convicted in respect of those counts. He proceeded to argue appeals only in respect of convictions on count 4 - 5 and sentences in respect of all counts. At the conclusion of his argument counsel also conceded the appropriateness of the sentence imposed in respect of the armed robbery charge (count 1).

Background

[5] The facts can be briefly stated as follows: At around 18h00 on 29 September 2015 a Chinese national who is a complainant in this matter was together with his wife and child inside his shop in Denneboom, Mamelodi. Also inside the shop was a security guard as well as a number of customers. Armed robbers stormed the shop and demanded money from the male Chinese national, and the appellant packed some items in a big bag he had in his possession. Two of the robbers were armed with firearms. The complainant and the guard were assaulted during the robbery. The complainant was forced to go into his office as the robbers demanded money. After the robbers had exited the office, the complainant remained behind and it was whilst he was in the office that he heard gun shots. He thought that the robbers had either killed or injured his wife and child. He took out his licensed firearm and fired at the robbers. He shot and killed two of them. The two robbers who were shot dead were armed with guns.

[6] The police arrived and took over the scene and began with investigations. The people who were still inside the shop were ordered to remain lying on the floor. The police were shown video footages by the complainant, and the appellant and his co-accused were identified as part of the robbers and were arrested.

[7] During the trial both the appellant and his co-accused admitted their presence in the shop and the role they played as depicted in the video footages. However, they denied having been part of the gang that robbed the shop owner. They insisted that they were forced by the armed robbers to participate. It is also common cause that the video footages didn't have audio recordings.

Issues on appeal

[8] As indicated at the commencement of this judgment Counsel for the appellant abandoned appeals in respect of the convictions for armed robbery and two counts of murder. He conceded that he was not able to point out any misdirection by the trial court in respect of those convictions. I believe that given the evidence such concession was advisedly made. Counsel submitted that the conviction on the count of illegal possession of firearm was susceptible to attack.

[9] It was submitted that there was no evidence to sustain a conviction of illegal possession of firearm. The argument advanced was that the appellant was at no stage in possession of a firearm during the robbery and further that in the absence of such evidence, he should be acquitted of the charge. The State argued that given the concession that armed robbery and murder convictions were correct, it was unfathomable that it can be said that the appellant should be exonerated from illegal possession of a firearm. It was submitted that the evidence should be assessed holistically and that by way of inferential reasoning the court was correct in concluding that the appellant illegally jointly possessed a firearm.

Legal Principles

[10] The approach regarding the issue of joint possession of a firearm was authoritatively dealt as follows in *S v Mbuli* (422/2001) [2002] ZASCA 78; 2003 SACR 97 (7 June 2002) at para 71:

‘Common purpose, and joint possession, both require that the parties concerned share a common state of mind but the nature of that state of mind will differ in each case. Perhaps Olivier JA had in mind the principles of joint possession, rather than the doctrine of common purpose, when he said in *S v Khambule* 2001 (1) SACR 501 (SCA) at par.10 that that there is no reason in principle why a common intention to possess firearms jointly could not be established by inference, but I do not agree with a further suggestion that a mere intention on the part of the group to use the weapons for the benefit of all of them will suffice for a conviction. In my respectful view Marais J set out

the correct legal position when he said the following in *S v Nkosi* 1998 (1) SACR 284 (W) at 286h- i ‘the issue which arise in deciding whether the group (and hence the appellant) possessed the guns must be decided with reference to the question whether the State has established facts from which it can properly be inferred by a Court that:

- (a) the group had the intention (*animus*) to exercise possession of guns through the actual detentor and
 - (b) the actual detentors had the intention to hold the guns on behalf of the group
- Only if both requirements are fulfilled can there be joint possession involving the group as a whole and the detentors, or common purpose between the members to possess all the guns’.

[11] To further illustrate the point I propose to liberally quote from the judgment of *Makhubela v S; Matjeke v S* (CCT216/15,CCT221/16) [2017] ZACC 36; 2017 (2) SACR 665 (CC); 2017 (12) BCLR 1510 (CC) (29 September 2017). The judgment stated at para [46] that:

‘ In convicting the applicant for unlawful possession of firearm and ammunition, on the basis of common purpose, the trial court departed from settled jurisprudence. The test establishing liability for possession of firearms and ammunition was established in *S v Nkosi* as follows:’

[12] The court went on to approvingly quote the *Nkosi* decision which was endorsed by *Mbuli* supra. The *Makhubela; Matjeke* judgment continued to state the position as follows at para [47]:

‘ The test has since been cited with approval in numerous judgments of the High Court and the Supreme Court of Appeal. In these judgments, the courts have found perpetrators guilty of a crime involving the use of firearms on the basis of the doctrine of common purpose, but nevertheless found that the perpetrators guilty of a crime involving the use of firearm on the basis of the doctrine of common purpose , but nevertheless found that the perpetrators could not be found to be guilty of the unlawful possession of firearm on the basis of this doctrine. The test takes into account the fact that the application of the doctrine of common purpose differs, in relation to “consequence crimes”, such as murder, and in relation to “circumstance crimes”, such as possession’.

[13] Despite the appellant and his co-robbers being shown to commit armed robbery and murder as shown the video footages, the law still requires the State to discharge the onus to prove that the appellant had the necessary mental intention to possess the firearm. In *S v Kwanda* [2017] 74 the SCA clarified at paras 51-3 that:

'The fact that appellant conspired with his co-accused to commit robbery, and even assuming that he was aware that some of his co-accused possessed firearms for the purpose of committing the robbery, does not lead to the inference that he possessed such firearms jointly with his co-accused'.

[14] The evidence which was admitted and upon which the appellant was convicted doesn't show that there was a stage during either before or during the robbery when the appellant was ever in physical possession of a firearm. After the robbery the firearms were found near the bodies of the robbers who were shot dead by the complainant. The question remains whether a joint possession of a firearm is the only inference that could be drawn. I conclude that mere knowledge by the appellant that his co-robbers were in possession of a firearm even in circumstances where he foresaw the use of such weapon is, on settled law, not enough to sustain a conclusion that he jointly possessed a firearm with the other robbers.

[15] The evidence clearly establishes which of the robbers were armed. This doesn't include the appellant and his co-accused, who is not before court. The evidence doesn't link the two of them to such possession. The only way joint possession can be imputed to the appellant is by way of inferential reasoning. This court concludes that there is insufficient factual basis to sustain the conviction of unlawful possession of firearms and ammunition based on common purpose. I find that the trial court erred in convicting the appellant on these counts.

[16] It follows that the convictions in respect of illegal possession of firearm and ammunitions cannot stand and must be set aside. The appeal against these convictions (count 4-5) succeeds.

[17] I have already noted that the appellant appeared with a co-accused who is not before court, and his appeals have lapsed but are capable of being reinstated. I

propose to follow the direction in *Mbuli* supra. In the premises it is directed that the registrar of this court refer this judgement to Legal Aid South Africa with a request that appropriate steps be taken to bring an appeal of the appellant's erstwhile co-accused before this court, at least in relation to this charge.

Ad Sentence

[18] The argument regarding appeal was only in respect of life imprisonment imposed for the two murder convictions. It was contended that the learned magistrate erred in failing to give due consideration to the personal circumstances of the appellant, and that the court didn't take into account the pre-conviction incarceration which was in excess of three years and further that the court should have taken into account that the appellant was convicted of murder based on *dolus eventualis* as a form of *mens rea*.

[19] The power of the appeal court is circumscribed in that sentencing falls primarily within the discretion of the trial court. The appeal court may interfere where the trial court has not properly and reasonably exercised its discretion in imposing a sentence. The corollary is that where the trial court has unreasonably exercised its discretion, the appeal court will be justified to interfere. See *S v Salzwedel and Others* 1999 (2) SACR 586 (SCA).

[20] It is for the trial court to determine which factors should influence the measure of punishment and the value to be attached to those factors. It is also so that mere misdirection in itself is not sufficient to entitle this court to interfere with sentence imposed by the trial court. The misdirection must be of a nature, degree or seriousness as to show that the trial court didn't exercise its discretion at all or exercised it improperly. See *S v Kidibo* 1998 (2) SACR 213 (SCA).

[21] The appeal court may also interfere where it is demonstrated that the sentence is 'strikingly' and disparate between a sentence imposed and that which the appeal court would have imposed. It is not sufficient for the appellate court to regard its own choice as an appropriate sentence. See *S v Sadler* 2000 (2) SACR 511 (SCA).

Personal Circumstances

[22] There is no denying that the personal circumstances of an accused play a significant role when sentencing is considered. The court is required to give due weight to those factors, and in this regard the trial court had the benefit of a pre-sentence report and noted that same have been taken into account. It is also true that the personal circumstances of the accused in serious cases recede to the background. In *S v Vilakazi* 2009 910 SACR 552 (SCA) at para 58 the court expressed itself as follows:

'The personal circumstances of the appellant, so far as they are disclosed in the evidence have been set out earlier. In cases of serious crime, the personal circumstance of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the question whether the accused is married or single, whether he has two children or three, whether he is in employment, are themselves largely immaterial to what the period should be, and those seem to me to be the kind of "flimsy" grounds that *Malgas* said should be avoided'.

I am satisfied that due weight was given to this aspect. The trial court dealt with the personal circumstances of the appellant. The court also had regard to the probation report that was compiled on behalf of the appellant.

Mens rea in the form of dolus eventualis as mitigating factor

[23] The appellant argued that the fact that he was not the person who pulled the trigger should be considered a mitigating factor and be considered to be a substantial and compelling factor. He argued that had the trial court took that fact into account it will have deviated from the minimum sentence. Counsel for the appellant referred to the case of *S v Ndhlovu* 2002 (2) SACR 325 (SCA) at para 56 the court held as follows regarding the issue of *dolus eventualis* when sentence is considered:

'I consider in this case, as in accused 3 and 4, the fact that oblique intent to kill was proved (dolus eventualis) counts as a mitigating factor of substance'.

[24] This court is of the view that this aspect should be considered as part of the factors that needs to be taken into account. The factor shouldn't be elevated to such prominence that on its own it is regarded as a substantial and compelling factor to justify a deviation from prescribed minimum sentence. In the case of *S v Rapitsi* 1987 (4) SA 351 at 358F held that the fact that the crime was committed not with direct intent but with dolus eventualis can in appropriate circumstances be mitigating because it reduces the moral blameworthiness of the offender. The determination is fact based. The court further cautioned against applying 'sliding scale method' and to decide the question of whether or not extenuating circumstances were present in a given case only by reference to the degree of foreseeability. I am satisfied that due weight was given to this aspect by the trial court.

Pre-conviction incarceration (Period awaiting trial)

[25] It was further submitted on behalf the appellant that the court misdirected itself and erred in not considering the period of time the appellant was in custody before the trial was concluded. The point whether the period awaiting trial should be considered has occupied the attention of courts. This is understandable given the backlogs in trial rolls across the country. The matter was settled by the SCA in the matter of *Loyiso Ludidi and Others v S* (983/2020); 056/2024) [2024] ZASCA 162; 2025 (1) SACR 225 (SCA) where the court reviewed a number of judgments where this aspect was dealt with and concluded at para 15 that:

'This court in dealing with a sentence of life imprisonment in Ncqobo v S confirmed that the period spent in custody before conviction and sentencing is not on its own, a substantial and compelling circumstance. It is merely a factor in determining whether the sentence is disproportionate and unjust. It was held that two years spent in custody would make minimal impact on a sentence of life imprisonment and did not render the sentence shockingly disproportionate'. (reference omitted)

[26] In *Ludidi* supra the accused was in custody for five years and eight months before sentencing. The court indicated the reason for delays need to be investigated. In this case the delay before the appellant was sentenced was three years and eight months. It appears to this court that such a delay cannot be attributed to either the appellant or the State. The trial was delayed due to heavy rolls that are facing courts on daily basis. It was not shown that such delay was attributable to the State.

Conclusion

[27] I am satisfied that the trial court considered all the factors that were placed before it, including a report from the probation officer. The trial court made reference to the seriousness of the offences committed by the appellant and his co-robbers and concluded that there were no substantial and compelling factors to justify deviation from prescribed minimum sentence.

[28] The trial court took into account the warning in *S v Malgas* 2001 (1) SACR 469 (SCA) that specified sentences are not to be departed from lightly and for 'flimsy' reasons. The trial court was alive to the seriousness of this case. The trial court noted that violence was also directed at a small child and innocent customers who were going about their daily activities. I am satisfied that the trial court didn't misdirect itself when it considered sentence.

[29] As indicated above the convictions in respect of unlawful possession of firearm and ammunition cannot stand and must be set aside. The appeal against conviction (count 4 and 5) therefore succeeds, though given the life sentences meted in 2 counts of murder (count 2 and 3) this has no practical effect on the appellant's incarceration.

Order

In the result the following order is made:

1. The appeal is partially upheld.
2. The order of the regional court (trial court) is set aside only to the extent set out below:

(a) The appeal by the appellant against convictions on counts 4 and 5 is upheld.

(b) The convictions and sentences on these counts are set aside.

3. The Registrar of this Court is directed to refer this judgment to Legal Aid SA with a request that appropriate steps be taken to bring accused no.1's appeal before this court in relation to count 4 and 5.


T THUPAATLASE
JUDGE (Acting) OF THE HIGH COURT
GAUTENG DIVISION (PRETORIA)

I concur


O MOOKI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION (PRETORIA)

Date of Hearing: 15 October 2025

Judgment Delivered: 4 December 2025

Appearances

For the Appellant : Adv LA van Wyk

Instructed by : Legal Aid SA

For the Respondent : Adv. ME Mafunisa

Instructed by : Director of Public Prosecutions– Pretoria .