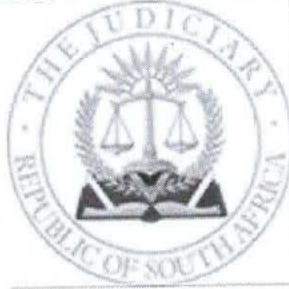


REPUBLIC OF SOUTH AFRICA



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

CASE NO: A19/2024

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED
3/3/2024	
DATE:	SIGNATURE

In the matter between:

TSHABALALA, THULANI

Appellant

AND

THE STATE

Respondent

JUDGMENT

MIA J:

INTRODUCTION

[1] The appellant appeared in the Regional Court Lenasia, as accused 1 and his co-accused as accused 2. A third accused appeared separately after a

separation of trials wherein he concluded a plea and sentence agreement with the State and was sentenced to ten (10) years imprisonment. Accused 1 and 2 were arraigned on two charges of robbery with aggravating circumstances as intended in terms of section 1 of Act 51 of 1977 of the Criminal Procedure Act (the CPA) and a charge each of unlawful possession of a firearm and unlawful possession of ammunition, in contravention of sections 3 and 4(f)(iv) and s 90, read with other sections of the Firearms Control Act, 60 of 2000 (the FCA), as well as s 250 of the CPA. The accused were acquitted on the fifth charge of reckless and negligent driving. The court a quo granted leave to appeal against counts related to possession of an unlicensed firearm and unlicensed ammunition, accepting that the sentence would be amended in the event of a successful appeal. The appeal is opposed.

BACKGROUND

[2] The allegations against the appellant were that, accompanied by accused 2 and the third accused, they robbed the complainant of his Nissan Navara, motor vehicle and two cellphones. The three accused drove off in the vehicle, with third accused, who appeared in separate trial proceedings, driving the vehicle. They failed to stop at a roadblock, causing the police to pursue them in a police vehicle. The Nissan Navara then drove into oncoming traffic and collided with two vehicles, a Toyota and a Polo. The Nissan Navara overturned after colliding with the two vehicles.

[3] The complainant, accompanied by his friend, followed the Nissan. At the police roadblock, they informed the traffic officers about the robbery. The traffic officer confirmed that the Nissan had passed through the roadblock without stopping and was being pursued by their officers. The complainant continued in the direction that the Navara was travelling and came upon the accident where his vehicle had collided with two vehicles and overturned. The three persons in the vehicle were already in the back of the police van. The complainant identified the accused and enquired from accused 2 where his

cellphone is. He was informed that it was in the laptop bag in the overturned vehicle. He retrieved it from the bag.

[4] When the matter came before the court a quo accused 1 and 2 appeared separately from accused 3 as he had entered a plea bargain with the state and was convicted and sentenced to ten (10) years imprisonment.

The appeal

[5] The appellant appeals against the convictions of possession of a firearm and possession of ammunition. On his version, he and his co-accused were selling t-shirts when they met the third accused, who was driving a Nissan Navara. The third accused offered them a lift. While driving, they became aware of a Mazda following them. The third accused did not stop at the roadblock as he did not have his driver's licence.

[6] The appellant confirmed that the Nissan Navara collided with two vehicles, as indicated above. Where the accused are extracted from the vehicle which was the subject of the robbery and given the time frame, it appears inevitable that they were linked to the activity preceding the collision. It is improbable that the driver who had recently taken the vehicle at gunpoint would delay in his escape by stopping along the roadside to give a lift to his friends. The complainant's version that they were in close pursuit of the vehicle and had it in sight for most of the time further discounts the version of a delay to pick up the first and second accused.

[7] The accused's version was in essence a denial of the allegations except for failing to stop at the roadblock and colliding with two vehicles before the Nissan overturned. The accused, however, agreed with the state's version regarding the roadblock and the collision. Their version was rejected by the court a quo and found to be not reasonably possibly true.

DISCUSSION

[8] The issue for determination is the possession of the firearm and ammunition. The test in respect of joint possession by more than one detentor is crystallised by the Supreme Court of appeal referring to the decision in *S v Nkosi*¹, that.

[9] Whether all the accused had possession of the firearm and ammunition is answered by whether the State proved from which the court could infer:

a) *"The group had the intention(animus) to exercise possession of the guns through the actual detentor and*

b) *The actual detentor 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 members of the group to possess all the guns"*²

[10] Counsel for the appellant relied on the above test and argued that the appellant was not in possession of the firearm and ammunition. This it was argued was because the appellant was not found in possession of the firearm. The firearm was removed from the vehicle after the appellants and his co-accused were removed from the vehicle. Moreover, he continued, the identification of the appellant was unreliable. Thus, the State had not met its case to sustain a conviction of unlawful possession of the firearm and ammunition.

[11] He argued further that the witnesses colluded in the matter and fabricated evidence.

¹ *S v Nkosi* 1998 (1) SACR 284 (W) at 286 h-i.

² *S v Mbuli* (422/2001) [2002] ZASCA 78; 2003 (1) SACR 97 (SCA) (7 June 2002,) see also *S v Nkosi* 1998 (1) SACR 284 (W) at 286 h-i.

[12] The court a quo considered the deviations in the testimony of the Metro police officer and the South African Police Services officer. Much was made about the chain of custody of evidence by the court a quo. The court a quo accepted the evidence of the complainant that he recognised the appellant because he held the firearm and this was confirmed by Mr Graham Clark, his friend who was present at the scene. What was not in dispute was that the three accused were pulled from the vehicle. The appellant agrees with that part of the evidence.

[13] What is determinative of the conviction in respect of possession of the firearm is the evidence of the complainant and Mr Clark that the appellant wielded the firearm. Not only did the complainant and Mr Clark recall the appellant and his co-accused. They had the opportunity to confirm their identity at the collision.

[14] The test for possession in a group where the firearm was not found in possession of one person, requires the State to prove that the group had the intention to exercise possession of the firearm and ammunition through the actual detentor, and that the actual detentor had the intention to hold the firearm loaded with ammunition on behalf of the group. In the present matter, the complainant identified the appellant as the person who held the firearm. There was no evidence contradicting this version other than that the firearm was not found in possession of the accused. The evidence of the complainant and Mr Clark gives clarity to the question who held the firearm. Since the appeal before this court relates only to the appellant who was positively identified as the person who held the firearm, the recovery of the firearm from the vehicle only affirms the complainant's version that a firearm Which only the appellant was seen wielding and was the only firearm recovered from the Navara vehicle, was in the possession of the appellant. Even if I am wrong in this analysis, he was on possession by virtue of the Nkosi doctrine as set out above.

[15] It is sufficient that the appellant was identified as the detentor and convicted of possessing the firearm and ammunition.

[16] Whilst the court a quo focussed extensively on the chain evidence, the evidence is clear that the appellant had possession of the firearm. The conviction of possessing the firearm and ammunition cannot be faulted based on the evidence of the complainant and Mr Clark. Even though the appellant denied the incident relating to the robbery, the complainant's evidence regarding the incidents was clear, consistent and satisfactory and corroborated by Mr Clark.

[17] Having considered all the elements, it is apparent that the court a quo correctly convicted the appellant. The approach suggested in *S v Chabalala*³ is that:

"The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of the inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt."

CONCLUSION

[18] Considering the above approach, the State's evidence met the appropriate onus. The complainant and the corroborating witness, Mr. Clark's evidence regarding the identity of the detentor of the firearm, is beyond reproach. The appellant's version that he was given a lift along the way is improbable, given the Nissan was rushing from the scene at high speed. There could not reasonably have been an opportunity to stop and pick up passengers. This version was correctly rejected As not reasonable possibly true.

[19] Regarding the sentence, this is pre-eminently a matter of the trial court's discretion. The SCA indicated in *S v Salzwedel and Others*⁴, that an appeal

³ *S v Chabalala* 2003(1) SACR 134 (SCA)

⁴ 1999(2) SACR (SCA) at 586a- 588b

court can only interfere with the trial court's sentence if it misdirected itself or the sentence was shockingly inappropriate.

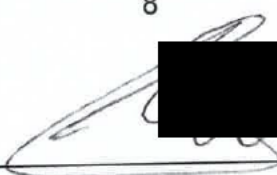
[20] The Court a quo distinguished between the minimum sentence applicable for possession of an unlicensed firearm which incurs a penalty of 15 years imprisonment and a prohibited firearm where the serial number was erased which incurs a penalty of 25 years imprisonment. The possession of ammunition incurs a penalty of 15 years imprisonment. Whilst the views expressed when the sentence was handed down travelled a convoluted route, the court considered the circumstances of the appellant. The court a quo was alive to the minimum sentence, and the possible deviation in the presence of substantial and compelling circumstances, which the court did not find were present.

[21] Where the court ordered the fifteen years on count 1 to run concurrently with the sentence on count 2, given the time and space of the offences and absence of substantial and compelling circumstances, there is no misdirection. The sentence of five (5) years imprisonment on count 4 was ordered to run concurrently with the sentence on count 3 during the handing down of passing the sentence. Having regard to the circumstances of the offences, the use of the firearm, that the vehicle was damaged extensively and the impact on the complainants, I cannot find that the sentence was shockingly inappropriate or that there was a misdirection.

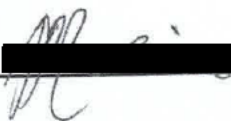
ORDER

[22] Consequently, I make the following order:

1. The appeal against sentence is dismissed.


S C MIA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree


G MALINDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

On behalf of the appellant	: Adv PJC Kriel
Instructed by	: BDK Attorneys
On behalf of the respondent	: Adv LR Surendra
Instructed by	: National Prosecuting Authority
Date of hearing	: 1 August 2024
Date of judgment	: 3 March 2026