IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Not Reportable
Case No: A62/2025

In the matter between:

LWANDO ROZANI	First Appellant
XOLILE MAQWEQWE	Second Appellant
and	
THE STATE	Respondent

Coram: **ADAMS, AJ (RALARALA, J concurring)**
Heard on: **24 April 2026**
Delivered on: **29 June 2026**

Summary: Criminal law - Appeal against conviction and sentence - Murder - Attempted murder - Unlawful possession of firearm and ammunition - Common purpose - Charge sheet not expressly alleging common purpose on all counts - Whether defect cured by evidence in terms of s 88 of Criminal Procedure Act 51 of 1977 - Accused throughout aware State relied on participation in group enterprise - No prejudice established - Identification evidence - Single witness - Cautionary rule -

Identification corroborated by pursuit, police observations, DNA evidence and surrounding circumstances - Firearm possession - Firearm not recovered from appellant - Whether personal possession proved beyond reasonable doubt - Appellant's version - Reasonably possibly true test - Version rejected as inherently improbable when weighed against cumulative evidence – Sentence - Minimum sentence legislation - Substantial and compelling circumstances found - Concurrent sentences ordered - Whether sentence shockingly inappropriate - Appeal dismissed.

ORDER

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1. The appeal against conviction is dismissed.
2. The appeal against sentence is dismissed.

JUDGMENT

ADAMS, AJ

Introduction

[1] This appeal arises from the conviction and sentence of the Appellants in the Regional Court, Khayelitsha. The First Appellant was convicted of murder, attempted murder and related offences arising from a sequence of events commencing at Merse Road, Rylands on 23 September 2014 and culminating in a police pursuit and exchange of gunfire. The Second Appellant was convicted on counts relating to murder, attempted murder, unlawful possession of a prohibited firearm and unlawful possession of ammunition.

[2] On 26 April 2023, the Appellants were sentenced to lengthy terms of direct imprisonment. The effective sentence imposed on the Second Appellant was 18 years' imprisonment. Leave to appeal having been refused by the regional court, the

Appellants successfully petitioned this Court and obtained leave to appeal against both conviction and sentence.

[3] A point in limine concerning the fairness of the proceedings arising from a missing portion of the record was initially raised on behalf of the First Appellant. Following the recovery and reconstruction of the missing record, that issue was abandoned. The appeal accordingly proceeds on the merits of the convictions and sentences imposed by the court a quo.

Common cause facts

[4] Much of the factual matrix was either formally admitted or remained undisputed. It is common cause that on the evening of 23 September 2014, an incident occurred at Murcia Road, Rylands, involving several armed assailants and Mr. and Ms. Wentzel. During the incident, Mr. Wentzel was assaulted and threatened with a firearm whilst seated in a motor vehicle. Ms. Wentzel fled the scene and heard multiple gunshots whilst escaping.

[5] Following the incident, the perpetrators entered a white Nissan Tiida and departed. A police pursuit followed shortly thereafter. During the chase an exchange of gunfire occurred between the occupants of the Nissan Tiida and members of the South African Police Service.

[6] The confrontation culminated in one suspect being fatally wounded. The deceased was later identified as Ayanda Leon Oyana. The Nissan Tiida was recovered bearing damage consistent with the exchange of gunfire. The post-mortem examination confirmed that Oyana died as a result of multiple gunshot wounds, including a fatal wound to the chest.

[7] Formal admissions were recorded in terms of section 220 of the Criminal Procedure Act 51 of 1977 ('the CPA'). The integrity of the chain of custody, the handling of exhibits, the admissibility of forensic reports and the reliability of the scientific processes employed were admitted. The forensic evidence therefore stood as objectively reliable evidence before the court a quo.

The evidence before the court a quo

[8] The State's case comprised eyewitness testimony, forensic and ballistic evidence, DNA analysis, photographic evidence, scene plans, formal admissions and various affidavits admitted into evidence.

[9] Officer Abrams testified concerning the recovery of cartridge cases, bullet fragments and firearms from the various scenes. Forty-three cartridge cases, together with additional cartridge cases and bullet fragments, were collected and secured. A firearm together with ammunition was also recovered and subjected to forensic examination.

[10] Ballistic analysis established that the firearms recovered were functional and capable of firing ammunition. The evidence confirmed the occurrence of the shooting but did not identify which individual discharged a particular firearm.

[11] DNA evidence was obtained from various exhibits. Swabs were taken from components of firearms, clothing items, gloves, a beanie and a grey cap. The beanie was linked to Accused 1. The grey cap contained a mixture of DNA attributable to Accused 1 and the Second Appellant. A glove contained DNA mixtures linking certain accused to exhibits recovered during the investigation. Significantly, however, none of the accused could be linked by DNA evidence to the interior components of the Nissan Tiida.

[12] The post-mortem report confirmed the identity of the deceased and established the cause of death. Photographic evidence depicted the various crime scenes, the route of the police pursuit and the condition of the Nissan Tiida after the exchange of gunfire.

Admissions and their evidential effect

[13] The admissions recorded in terms of section 220 of the CPA materially narrowed the issues in dispute. The integrity of the forensic evidence, the chain of custody and the scientific reliability of the DNA and ballistic evidence were not challenged.

[14] The DNA evidence did not directly place either Appellant inside the Nissan Tiida at the critical moment nor did it identify a specific shooter. Its significance lay in the inferential and corroborative value it provided when viewed together with the remaining evidence.

[15] Similarly, the ballistic evidence established the occurrence of the shooting and the use of firearms but did not identify the individual who discharged any particular weapon. The post-mortem evidence established the cause of death but not the identity of the individual responsible for the fatal shot.

[16] These evidential limitations were expressly recognised by the court a quo. The convictions were not based upon any single item of evidence but upon the cumulative effect of all the evidence considered together.

The Grounds of Appeal

[17] A proper reading of the First Appellant's heads of argument reveals that the appeal is founded upon the following principal grounds:

17.1 The trial court erred in permitting, alternatively relying upon, what is alleged to have been an irregular amendment of the charge sheet to introduce the doctrine of common purpose in respect of Counts 3, 5 and 7, thereby

occasioning prejudice to the First Appellant.

17.2 The trial court erred in finding that the First Appellant was one of the perpetrators involved in the robbery charge in Count 3 and one of the gunmen responsible for the offences charged with in Counts 4 and 5.

17.3 The trial court erred in convicting the First Appellant on Count 7, namely the unlawful possession of a firearm, on the basis of joint possession or common purpose.

17.4 The trial court committed material irregularities in relation to the conduct of the cross-examination of witnesses, particularly that of Amon, thereby infringing the First Appellant's right to a fair trial.

17.5 The trial court erred in rejecting the First Appellant's version notwithstanding the contention that it was reasonably possibly true.

17.6 The sentence of 15 years' imprisonment is alleged to be disturbingly inappropriate, disproportionate to the offences and circumstances of the case, and such as to induce a sense of shock.

[18] A proper reading of the Second Appellant's heads of argument reveals that the appeal is founded upon the following principal grounds:

18.1 The court a quo erred in finding that the Second Appellant was one of the occupants of the white Nissan Tiida pursued by the police and in accepting the identification evidence linking him to the vehicle and the offences in question.

18.2 The court a quo erred in convicting the Second Appellant on the charges relating to the unlawful possession of a firearm (Count 6) and unlawful possession of ammunition (Count 8), notwithstanding his denial that he was ever in possession of either the firearm or the ammunition.

18.3 The court a quo erred in finding that the Second Appellant acted in concert with the First Appellant, alternatively in furtherance of a common purpose, in relation to the offences of murder (Count 4) and attempted murder (Count 5).

18.4 The court a quo failed to properly evaluate the Second Appellant's version and erred in rejecting it, notwithstanding the contention that his explanation was reasonably possibly true and ought therefore to have

resulted in his acquittal.

18.5 The court a quo erred in imposing a sentence of 18 years' imprisonment, which the Second Appellant contends is disturbingly inappropriate, disproportionate to the offences and the circumstances of the case and induces a sense of shock.

The Approach on Appeal

[19] The principles governing criminal appeals are settled. The State bears the onus of proving the guilt of an accused beyond reasonable doubt. In assessing whether that burden has been discharged, the evidence must be considered holistically and not piecemeal. As was emphasised in *S v Van der Meyden*[1], the proper enquiry is whether, upon a conspectus of all the evidence, there exists a reasonable possibility that the accused's version may be true. The Court is not required to determine whether each individual item of evidence establishes guilt beyond reasonable doubt, but whether the totality of the evidence excludes any reasonable doubt.

[20] It is equally trite that a court of appeal will not lightly interfere with factual findings made by a trial court. In *S v Francis*[2], the Appellate Division held that the powers of a court of appeal to interfere with findings of fact are limited because the trial court enjoys the advantage of seeing and hearing the witnesses testify. Absent a material misdirection, such findings are presumed to be correct and will only be disturbed if clearly wrong. This approach aligns with the time-honoured principles articulated in *R v Dhlumayo and Another*[3]*,* which dictate that an appellate tribunal must show deference to the trial court's factual findings unless they are demonstrably wrong.

[1] 1999 (1) SACR 447 (W) at 448f–i
[2] 1991 (1) SACR 198 (A) at 204C–E
[3] *1948 (2) SA 677 (A)*

Evaluation of the grounds of appeal

The Alleged Irregular Amendment of the Charge Sheet

[21] The First Appellant contends that the trial court erred in permitting the introduction of the doctrine of common purpose in respect of Counts 3, 5, and 7, notwithstanding that common purpose was not expressly pleaded in those counts.

[22] During argument, however, counsel for the First Appellant, Mr Paries, correctly conceded that the heads of argument conflated the provisions of sections 86 and 88 of the CPA. He further accepted that there was no formal application by the State to amend the charge sheet in terms of section 86.

[23] The complaint therefore does not concern an amendment of the charge sheet but rather whether any omission in the charge sheet was cured by the evidence in terms of section 88 of the CPA. In this regard, section 88 provides that a defect arising from the omission of an essential averment in the charge is cured by evidence led at trial, provided the issue is not raised before judgment.

[24] The Respondent submits that from the outset the State's case was, that the perpetrators acted together in the commission of the offences and that the First Appellant was fully aware of the case he was required to meet. The defence advanced throughout was one of complete denial and mistaken identity, rather than a contention that he was present but did not associate himself with the conduct of the others.

[25] The issue is therefore not whether the charge sheet was amended, but whether the First Appellant suffered any prejudice as a result of the omission. The Respondent contends that no such prejudice was established and that the trial court was entitled to consider the doctrine of common purpose on the evidence before it.

[26] The Appellants accepted that the evidence established the occurrence of the robbery, the police pursuit, the exchange of gunfire and the death of Oyana. Their principal contention was that the State failed to prove beyond reasonable doubt that they were participants in those events. The Appellants adopt a common stance, and

their respective counsels advanced arguments that mirror one another. I do not propose to repeat those submissions seriatim but shall address them as a single body of contentions to avoid repetition.

[27] Counsel submitted that the identification evidence was unreliable, emphasizing the stressful circumstances under which the observations were made, the delay between the incident and the identification procedure and the absence of an identification parade.

[28] It was further contended that the forensic evidence was inconclusive. The Appellants submitted that the DNA evidence did not place them in the Nissan Tiida at the relevant time, that the ballistic evidence did not identify the shooter and that the State's case depended upon impermissible inferential reasoning.

[29] Counsel for particularly the First Appellant nevertheless properly made several important concessions. It was accepted that the lighting conditions at Merse Road were sufficient to permit observation. Although the incident occurred at night, the area was illuminated by streetlights and nearby residential lighting. The adequacy of the lighting was therefore not genuinely in dispute.

[30] Counsel further accepted that Mr. Wentzel enjoyed approximately four separate opportunities to observe at least one of the perpetrators during the unfolding events. The challenge was therefore directed not at an absence of opportunity for observation but at the reliability and weight of the subsequent identification.

[31] It was further accepted by both Appellants that their presence in areas relevant to the commission of the offences was not entirely disputed and that the forensic evidence admitted in terms of section 220 remained uncontested.

Evidence of identification

[32] The First Appellant challenges the trial court's reliance on the identification evidence of Mr. Wentzel. The applicable principles are well established. In *S v Mthetwa*[4], Holmes JA cautioned that because of the fallibility of human observation, honesty does not necessarily guarantee reliability. Factors such as lighting, visibility, proximity, opportunity for observation, prior knowledge of the accused, the duration of observation and the mobility of the scene must all be considered.

[33] The court a quo approached the evidence with precisely the caution required by *Mthetwa*. It expressly recognised the stressful circumstances under which the observations were made, the lapse of approximately three months before the photographic identification and the absence of an identification parade.

[34] However, the trial court also took account of factors enhancing reliability. Counsel for the Appellants properly conceded before this Court that the adequacy of the lighting was not genuinely disputed, and that Mr. Wentzel enjoyed four separate opportunities to observe one of the perpetrators. The evidence therefore cannot be characterised as involving a fleeting observation under poor conditions.

[35] Furthermore, the court a quo did not rely upon the identification evidence in isolation. It considered the identification together with the objective forensic evidence and the surrounding circumstances. This approach accords with the cautionary principles articulated in *Mthetwa* and discloses no misdirection.

Common purpose

[36] The Appellants contend that the State failed to establish the requirements for liability based on common purpose. The argument overlooks the factual findings made by the court a quo.

[37] The evidence established that the perpetrators acted as a group from the inception of the robbery through to the police pursuit and the eventual exchange of

[4] 1972 (3) SA 766 (A) at 768A–C

gunfire. The evidence further established continuing participation in the criminal enterprise. The Appellants did not disengage from the enterprise. On the contrary, the evidence established continuing participation during the armed flight from the police.

[38] The principles governing common purpose have been authoritatively stated in *S v Mgedezi*[5] and subsequently affirmed by the Constitutional Court in *Thebus v S*[6]. Liability arises where an accused associates himself with the conduct of others pursuant to a common design and actively participates in the execution thereof.

[39] It is common cause that shots were fired at police officers and that police returned fire. Oyana was killed during that exchange. The issue is therefore not whether the fatal shot was fired by a police officer or a co-perpetrator but whether the resulting death was a foreseeable consequence of the common criminal enterprise. The court a quo correctly concluded that it was. Individuals who embark upon an armed robbery, flee in a hijacked vehicle and engage in a gun battle with police officers must necessarily foresee the possibility of death resulting from that conduct. The requirements of dolus eventualis were accordingly established.

[40] In this regard, the court a quo correctly relied on the reasoning in *S v Molimi and Another*[7] and *Thebus*, recognising that persons who engage in an armed confrontation with police officers must necessarily foresee the possibility of death resulting from that conduct. The fact that Oyana may have been struck by police fire does not interrupt the chain of causation where the fatal consequence flowed directly from the execution of the common criminal enterprise.

[5] 1989 (1) SA 687 (A)
[6] (CCT36/02)[2003] ZACC 12; 2003(6) SA 505 (CC); 2003 (10) BCLR 1100 (CC); 2003 SACR 319 (CC) (28 August 2003)
[7] 2008 (2) SACR 76 (CC)

Forensic and circumstantial evidence

[41] The Appellants criticised the court a quo for relying on DNA and other forensic evidence. Much of the State's case was circumstantial. The proper approach to circumstantial evidence remains that set out in *R v Blom*[8]. The inference sought to be drawn must be consistent with all the proved facts and the proved facts must exclude every reasonable inference save the one sought to be drawn.

[42] The criticism is misplaced. The trial court expressly recognised the limitations of the forensic evidence. It accepted that the DNA evidence was circumstantial and that the ballistic evidence did not identify a particular shooter.

[43] The trial court correctly directed itself to these principles. It did not treat the DNA evidence, ballistic evidence or identification evidence as individually decisive. Instead, it considered their cumulative effect. The DNA evidence linked the Appellants to exhibits associated with the perpetrators. Their presence in relevant locations was not entirely disputed. The sequence of events connected the robbery, the flight, the police pursuit and the ensuing exchange of gunfire.

[44] Having considered the totality of the evidence, the court concluded that the only reasonable inference consistent with the proved facts was that the Appellants were participants in the criminal enterprise. That conclusion accords with the principles articulated in *Blom*.

[45] The court a quo carefully considered the versions advanced by the Appellants. Those versions were not rejected merely because they appeared improbable. They were rejected because, when measured against the objective evidence and inherent probabilities, they could not reasonably possibly be true. The DNA evidence, the identification evidence, the undisputed presence of the Appellants in relevant locations and the surrounding circumstances collectively rendered the versions advanced by the Appellants untenable.

[46] The trial court's rejection of the Appellants' versions accords with the

[8] 1939 AD 188 at 202–203

principles articulated in *S v Shackell*[9] . An accused is entitled to an acquittal if his version is reasonably possibly true, even if improbable. However, a court is not obliged to accept a version which is so inherently improbable that it cannot reasonably possibly be true when evaluated against the objective facts.

[47] The court a quo did not reject the Appellants' versions merely because they were improbable. It rejected them because they were irreconcilable with the objective evidence and the proven facts. That conclusion cannot be faulted.

Sentence

[48] Sentencing is pre-eminently a matter for the discretion of the trial court. It is settled law that an appellate court will not disturb a lower court's sentence unless the judicial discretion was improperly exercised, a material misdirection occurred, or the punishment is shockingly inappropriate.[10]

[49] The court a quo correctly applied the triad formulated in *S v Zinn*[11], namely the crime, the offender and the interests of society. The record demonstrates that the court a quo correctly considered the personal circumstances of the Appellants, the seriousness of the offences and the interests of society. It also had regard to the prescribed minimum sentencing regime applicable to certain counts.

[50] The approach to departures from minimum sentences is governed by *S v Malgas*[12], while appellate interference is justified only where the sentence is vitiated by a material misdirection or is so disproportionate as to be "shocking", "startling" or "disturbingly inappropriate".[13]

[51] The court a quo found substantial and compelling circumstances and deviated from the prescribed minimum sentences. It further ordered substantial concurrency between the sentences imposed. In doing so it displayed the mercy referred to in *S v*

[9] 2001 (4) SA 1 (SCA) para 30
[10] *R v Dhlumayo and Another* 1948 (2) SA 677 (A). *see also S v Pieters* 1987 (3) SA 717 (A) at 727F–H
[11] 1969 (2) SA 537 (A)
[12] 2001 (1) SACR 469 (SCA)
[13] Malgas supra at para 12

Rabie and later endorsed in *S v RO*[14]. The effective sentences imposed reflected a careful balancing of all relevant considerations.

[52] Viewed holistically, the effective sentence imposed does not induce a sense of shock. The offences were grave, involved the use of firearms, an armed confrontation with police officers and the loss of life. No material misdirection has been demonstrated. Nor can it be said that the sentences imposed induce a sense of shock or are disturbingly inappropriate. No basis exists for appellate interference.

Conclusion

[53] The criticism directed at the court a quo cannot be sustained. The record demonstrates a careful and methodical evaluation of the evidence. The trial court distinguished between evidence sufficient to sustain convictions and evidence that was not, acquitting where the State failed to discharge the onus and convicting only where guilt had been established beyond reasonable doubt.

[54] The court a quo correctly evaluated the identification evidence, properly appreciated the limitations of the forensic evidence, correctly applied the doctrine of common purpose and appropriately rejected the Appellants' versions as not reasonably possibly true.

[55] The convictions are supported by the evidence and the sentences imposed disclose no basis for appellate interference.

<u>Order</u>

[56] In the result, I propose the following order:

[56.1] The appeal against conviction is dismissed.

[56.2] The appeal against sentence is dismissed.

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[14] *S v RO & Another* 2010 (2) SACR 248 (SCA), para 30. ; *S v Rabie* 1975 (4) SA 855 (A) at 862D–F,

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M.F. ADAMS

Acting Judge of the High Court

I agree, and it is so ordered.

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N.E. RALARALA

Judge of the High Court

<u>Appearances:</u>

For the Appellant: A Paries
Attorneys for Appellant: Davies Attorneys

For the Respondent: N Breyl
Attorneys for Respondent: Directorate of Public Prosecutions, Western Cape