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(1) Reportable: Yes
(2) Of interest to other Judges: Yes/No
(3) Revised: Yes/No

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IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: AR 158/2022

In the matter between:

SABELO MKHIZE	**FIRST APPELLANT**
LINDOKUHLE MCHUNU	**SECOND APPELLANT**
SBONISO KHUBISA	**THIRD APPELLANT**

and

THE STATE	**RESPONDENT**

ORDER

On appeal from: KwaZulu-Natal Local Division of the High Court, Durban (Ntshulana AJ sitting as court of first instance):

1. The appeal against both conviction and sentence is dismissed.
2. The cross-appeal succeeds to the extent that the order of the trial court in respect of counts 7 and 8 is set aside and is replaced with the order below:

'2.1 All three accused are found guilty of contravening s 4(1)*(a)* read with ss 1, 103, 117, 120(1)*(a)*, s 121 read with Schedule 4 and s 151 of the

Firearms Control Act 60 of 2000, further read with s 250 of the Criminal Procedure Act 51 of 1977 and s 51(2)*(a)* Part 2 of Schedule 2 of the General Law Amendment Act 105 of 1997 – possession of a prohibited firearm: a fully automatic firearm.

2.2 Counts 7 and 8 are taken together for the purpose of sentence and all three accused are sentenced to 15 years' imprisonment.

2.3 The sentences in counts 7 and 8 of 15 years' imprisonment is ante-dated to 06 July 2018 and shall run concurrently with the sentence of life imprisonment imposed in count 1.'

JUDGMENT

Notyesi AJ (Poyo Dlwati JP and Singh J concurring)

Introduction

[1] The three appellants stood trial in the Durban High Court, before Ntshulana AJ (the trial court), on twelve counts comprising of murder, attempted murder, two counts of robbery, two counts of kidnapping, five counts of possession of firearms and ammunition, including possession of an AK47 rifle referred to in counts 7 and 8 of the indictment, and theft of a firearm. The doctrine of common purpose was invoked. All three appellants pleaded not guilty and were legally represented throughout the trial. At its conclusion, all three were convicted on counts 1 to 6. The second appellant was additionally convicted and sentenced on counts 11 and 12. All three were acquitted on counts 7 to 10.

[2] The indictment alleged that counts 1 (murder), 2 (attempted murder), 3 and 4 (robbery) fell within s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the CLAA), which prescribes life imprisonment unless substantial and compelling circumstances justify the imposition of a lesser sentence. The aggravating circumstances alleged were that the murder was planned or premeditated and that firearms were used against law enforcement officers.

[3] Having convicted the appellants on counts 1 to 6, and the second appellant additionally on counts 11 and 12, the trial court found no substantial and compelling circumstances warranting a departure from the prescribed sentence. On count 1, each appellant was sentenced to life imprisonment; on count 2, to five years' imprisonment; and on counts 3 and 4, taken together, to fifteen years' imprisonment. Counts 5 and 6 were likewise taken together and each appellant was sentenced to five years' imprisonment. The second appellant was sentenced to fifteen years' imprisonment on count 11 and twelve months' imprisonment on count 12. All the sentences were ordered to run concurrently with the life sentence.

[4] The appeal is against both the convictions and sentences in respect of counts 1 to 6. The State cross-appeals against the acquittals on counts 7 to 10. Both appeal and cross-appeal are before this Court with the leave of the trial court. The second appellant was refused leave to appeal in respect of counts 11 and 12.

[5] The appellants submit before this Court that the State failed to prove beyond reasonable doubt that the identification of the appellants by its witnesses was reliable. They submit that they were incorrectly identified as the perpetrators and that the trial
court therefore erred in relying on the identification evidence.

[6] In relation to the sentence, the appellants contend that the sentence imposed by the trial court is shockingly inappropriate.

[7] In respect of the cross-appeal, the State contends that, although the AK47 was seen in the possession of the third appellant, the evidence as a whole establishes that all three appellants were in possession of the firearm. The State submits that the trial court erred in failing to apply the principles governing joint possession. The State contends that it had established facts from which it can be inferred that the group intended to exercise possession of the firearm through the third appellant; and that the third appellant intended to hold the AK47 on behalf of the group.

[8] The State concedes that the evidence regarding counts 9 and 10 was

materially contradictory and that convictions on those counts ought to be set aside.

[9] Both counsel agreed that, should the appeal fail and the cross-appeal succeed, this Court may impose the sentence in respect of counts 7 and 8 without remitting the matter to the trial court.

Summary of substantial facts

[10] According to the statement of substantial facts presented by the State, on or about 22 September 2015, the three appellants conspired to lure police officers from Inanda Police Station to a homestead in Namibia, Inanda. Upon their arrival, the appellants allegedly stripped the officers of their uniforms and robbed them of their firearms and personal belongings. They were armed with an AK47 rifle and a 9mm semi-automatic pistol. During the robbery, two police officials, being the deceased in count 1 was shot dead, whilst the complainant in count 2 was seriously injured.

The State's evidence against the appellants

[11] The State called twenty-seven witnesses. Sergeant (Sgt) Jojisa and Ms Noluthando Dlamini identified the appellants on two occasions: at the scene in Namibia and at an identification parade. The State also relied on circumstantial evidence, including stolen items found at the first appellant’s house, and statements made by relatives of the appellants.

[12] Sgt Jojisa testified that, on 22 September 2015, she was on duty with Sgt Moyana, (the deceased in count 1), in the General Enquiries Office at Inanda Police Station. Their duties, included taking dockets to court, assisting members of the public with service of domestic violence orders and letters of demand, attending to missing-persons files, and executing warrants of arrest.

[13] Shortly after reporting for duty, Sgt Jojisa and the deceased drove to Ntuzuma Police Station to deliver a file. On their return to Inanda, at the instruction of Warrant Officer Mbhele, they found four people waiting for assistance.

[14] The four individuals required assistance with service of documents and were invited to travel in the police vehicle. They first drove to Africa, where an elderly

woman and her granddaughter were left after the person to be served was found to be absent. The male passenger then moved to the front of the vehicle.

[15] The male passenger, whom Sgt Jojisa identified at trial as the first appellant, was to deliver a letter of demand at a homestead in Namibia. He was occupied with his red cell phone during the journey and urged the police to drive faster saying that he had arranged for someone to keep watch on the person to be served.

[16] On arrival at the homestead, the first appellant walked towards the house and called for someone to open the door, saying that he was accompanied by police. Sgt Jojisa then heard the deceased say, "*My brother what are you doing now. Please do not kill me.*" As she attempted to draw her firearm, the third appellant approached and pointed an AK47 or similar large firearm at her, saying: "*Hey whore, what are you doing?*" Another unidentified man removed her firearm from its holster. That person was later identified as the second appellant.

[17] Sgt Jojisa testified that she and the deceased were forced into the house and ordered to remove their clothes and uniforms. They were then taken at gunpoint to the police vehicle. The first appellant drove, with the third appellant and another assailant in front. At an isolated place, the first appellant placed a piece of paper in the petrol tank and fired two shots into it. He then opened the rear of the vehicle and shot the deceased several times before shooting Sgt Jojisa. She lost consciousness, later regained it and crawled from the vehicle in search of assistance. The place was later identified as Ngcungcwini.

[18] Sgt Jojisa testified that three males were involved. She identified the first appellant as the person who had sought assistance at Inanda Police Station and the third appellant as the person who had pointed the large firearm at her. She could not identify the other assailant.

[19] At the identification parade, Sgt Jojisa again identified the first and third appellants. She testified that the incident occurred in broad daylight with clear visibility and that she had several opportunities to observe the first appellant at the police station, at the scene and while he drove the police vehicle. She observed the

third appellant at close range when he pointed the firearm at her.

[20] Ms Dlamini was one of the persons who had sought assistance at Inanda Police Station. She remained in the back of the police vehicle when the first appellant and the police officers proceeded to the house in Namibia.

[21] Ms Dlamini testified that she met the first appellant at the police station and observed him using his red cell phone. She confirmed the journey to Africa and thereafter to Namibia, where the first appellant and the police officers alighted.

[22] From the back of the vehicle, Ms Dlamini saw two men pointing firearms at the police officers and also saw the first appellant carrying a firearm.

[23] Ms Dlamini identified all three appellants. She identified the second appellant as the person carrying a small firearm which he pointed at the deceased, and the third appellant as the person carrying a large firearm which he pointed at Sgt Jojisa. She identified the first appellant as the person she had seen at the police station and in Namibia carrying a small firearm. She testified that she had a clear and unobstructed view of them and sufficient opportunity to observe them. She later saw the three appellants taking the police officers from the house and placing them in the police vehicle before she walked to the police station to report the incident.

[24] At a subsequent identification parade, Ms Dlamini again identified all three appellants.

[25] The State also called the first appellant's sister, Ms Nokuthula Madlala. On 23 September 2015, she found all three appellants at her home. They appeared tired and dirty. The first appellant told her that they had been involved in a shootout with the police and that one police officer had died. They needed money to escape and offered to sell her a cell phone. She contacted her brother, Mr Mbongeni Madlala, who is a member of the police forum.

[26] When the police approached the house, Nokuthula saw the three appellants remove firearms and place them in a bucket. Mbongeni, who had just arrived, locked

them in a room. The police subsequently entered, assaulted the appellants and took them to Marianhill Police Station. Nokuthula confirmed that she had a good relationship with all three appellants. Mbongeni's evidence substantially corroborated hers.

[27] Several police officers testified. Captain (Cpt) Ngcobo attended the scene on 22 September 2015 and found the deceased lying motionless and Sgt Jojisa critically injured. He observed cartridges, a petrol cap and a piece of paper inserted into the petrol cap and secured the scene before handing it over to the Local Criminal Record Centre (LCRC).

[28] Warrant Officer Ngobese, the scene photographer, attended the Ngcungcwini and Namibia scenes. Cpt Hlongwa, the investigating officer, testified that he attended the shooting scene at approximately 13h30. A police vehicle bearing registration number B[...] was found with spent cartridges and bullet holes. The deceased was in the rear of the vehicle, partially clothed and with multiple gunshot wounds. A piece of paper found nearby was later identified as the original letter of
demand.

[29] The investigating team thereafter proceeded to Namibia. The team photographed the house, and after securing it, entered. A police uniform, cap, a jersey bearing the name of one of the officers, and the AK47 firearm seen through a window were found inside. The items were photographed and placed in exhibit bags. Cpt Hlongwa testified that he maintained a diary to establish the link between the two scenes.

[30] On 23 September 2015, Cpt Hlongwa received information that suspects had been arrested at Mpola, Marianhill. He proceeded there to interview them and conduct further investigations. He testified that he did not see the appellants being assaulted.

[31] The first appellant's father, Mr Bheki Bafana Mkhize, testified that the first appellant resided at the Namibia house. He questioned him about the shooting, and

the first appellant admitted that he had been involved in a shootout with the police.

[32] Ms Sbongile Yvonne Nzama, a clerk at Ntuzuma Magistrate's Court, testified that she assisted a person on 22 September 2015 to complete a letter of demand. She identified that person as the first appellant and recalled that she had previously assisted him. After preparing the letter, she gave him copies and advised him to attend the police station for assistance with service. She later identified him to the investigating officer and at trial.

[33] The arresting officers testified that the second appellant was arrested by Constable Zondi, who found a firearm in his possession; the third appellant was arrested by Constable Mahlangu, who found an unlicensed firearm in his possession; and the first appellant was arrested by Constable Ngcamu, who also found a firearm in his possession. All three officers denied that the appellants were assaulted.

[34] Police officers who conducted the identification parade testified that it was properly conducted and largely confirmed the evidence of the identifying witnesses.

[35] The State led further evidence, including formal evidence and admissions, which need not be repeated. The State witnesses were extensively cross-examined.

The appellants' evidence

[36] The first appellant denied the allegations. He denied being at Ntuzuma on 22 September 2015 and disputed Ms Nzama's evidence. He testified that he was at Mtshebeni Carwash until approximately 13h30 or 14h00, after which he went to Ntsakalo High School where he met the second and third appellants. They were visiting their girlfriends. After receiving a call from his father informing him that he was a suspect in the shooting of police officers, they returned to Mtshebeni and later went to Sbu's Lounge, where they consumed alcohol. That evening they went to Ntuzuma
and slept at Phume's home. He also testified that he was 25 years of age.

[37] On 23 September 2015, the appellants went to Mpola, where they were

arrested. The first appellant denied possessing a firearm and denied discussing the shooting with his sister. He admitted residing at the Namibia house but denied robbing the police of their uniforms and firearms. He maintained that he had left the house on 22 September 2015, locking it and leaving the key on top of a wardrobe.

[38] The second appellant testified that he was 20 years old and in standard 10 when arrested. He stated that he was at Mtshebeni Carwash until about 11h30 and thereafter went home and was with the first appellant. Later they visited their girlfriends. He denied the allegations against him but admitted stealing the firearm referred to in count 11 from his home for protection. He made admissions in respect of counts 11 and 12.

[39] The third appellant testified that he was 22 years old and had been 19 at the time of the incident. He was in grade 12. He denied the allegations and stated that he was at home on 22 September 2015 until the second appellant visited him at about noon. They went to Ntsakalo School to visit their girlfriends and met the first appellant
there. He could not recall his girlfriend's surname or exact home address.

The trial-within-the-trial

[40] There was a trial within a trial concerning the admissibility of confessions, pointing out evidence and the allegations of police assault. The trial court rejected the State's contention that the appellants had not been assaulted and found that they had
been assaulted. It consequently found that the State had failed to prove beyond reasonable doubt that the pointing-out statements were made freely and voluntarily and rejected reliance on warning statements containing admissions.

The trial court findings

[41] The trial court accepted the evidence of Sgt Jojisa and Ms Dlamini identifying the appellants. It also accepted that the identification parade was properly conducted and that the appellants were correctly identified. In reaching this conclusion, it relied

on *R v Masemang*,[1] where it was held:

'The positive assurance with which an honest witness will sometimes swear to the identity of an accused person is in itself no guarantee of the correctness of that evidence. One often finds that a woman who was totally unable to point out her assailant on an identification parade will, when the accused is arrested on the strength of other evidence, swear positively at the trial that she recognises him as her assailant…'

[42] In assessing the reliability of the identification evidence, the trial court applied the factors in *S v Mthetwa*[2] and found that the witnesses had ample opportunity to identify the appellants. It also considered their identification at the parade and the circumstantial evidence, including that the Namibia house was the first appellant's residence and that the police uniforms and other items, including the AK47 rifle were found there. The accepted evidence was that the attack commenced at that house.

[43] The trial court rejected the evidence of all three appellants, finding it improbable, false and inherently poor. It noted material contradictions in their versions.

Sentencing by the trial court

[44] In sentencing the appellants, the trial court considered their personal circumstances; the seriousness of the offences of which the appellants had been convicted; and the interests of society. It took into account that the prescribed punishment is statutorily ordained. In the judgment of the trial court, reliance was placed on *S v Malgas*[3] and it is apparent that the court considered the factors and guidance set out in that case. The trial court found no substantial and compelling circumstances that would justify departure from the prescribed minimum sentence.

The issues before this Court

[45] The issues on appeal are:

(a) The identification of the appellants;

(b) The appeal against sentence; and

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[1] *R v Masemang* 1950 (2) SA 488 (A) at 493.
[2] *S v Mthetwa* 1972 (3) SA 766 (A) (*Mthetwa*).
[3] *S v Malgas* 2001 (1) SACR 469 (SCA) (*Malgas*).

(c) The cross-appeal.

The contentions of the parties before this Court

[46] The appellants contend that they were incorrectly identified as the perpetrators. Counsel submitted that the trial court failed to approach the identification evidence of Sgt Jojisa and Ms Dlamini with the necessary caution and that an apparently honest and credible witness may nevertheless give unreliable identification evidence.

[47] Counsel criticised the identification of the second and third appellants by Sgt Jojisa at the identification parade. This submission is incorrect. Sgt Jojisa identified only the first and third appellants. She did not identify the second appellant either at the parade or in Namibia.

[48] The essence of the appellants' submissions is that the trial court failed to exercise sufficient caution in evaluating the identification evidence and incorrectly rejected their versions, which counsel contended were reasonably possibly true.

[49] Regarding the cross-appeal, counsel for the appellants submitted that the appellants were correctly acquitted. It was argued that the AK47 was recovered in their absence and that there was no evidence establishing their possession. In respect of counts 9 and 10, counsel relied on the contradictory evidence concerning the recovery of the firearms and submitted that the evidence of Ms Nokuthula Madlala that the appellants had placed the firearms in a bucket was inconsistent with the version of the police that firearms were recovered from their persons.

[50] The State submitted that the appellants had not identified adequate grounds upon which this Court could interfere with the trial court's acceptance of the evidence of Sgt Jojisa and Ms Dlamini.

[51] Counsel for the State submitted that the trial court correctly found the identification evidence of the two witnesses reliable. It was argued that the evidence of both Sgt Jojisa and Ms Dlamini was corroborated by other acceptable evidence, including admissions made by relatives of the first appellant, and by the recovery of

the police uniforms and other stolen items from the first appellant's house. Counsel further relied on the fact that the incidents occurred in broad daylight, with clear visibility and sufficient opportunity for the witnesses to observe the perpetrators.

[52] The State accordingly supported the trial court's findings.

[53] In respect of the cross-appeal, the State conceded that the evidence concerning counts 9 and 10 was materially contradictory and did not pursue the appeal in respect of those counts. The concession was properly made. Ms Nokuthula Madlala initially testified that the appellants threw the firearms on the floor before the police arrived but later stated that they had placed them in a bucket. Mr Madlala testified that the firearms were recovered after the appellants had been taken outside and that none were found on their persons, whereas the police testified that firearms were found on the appellants during searches.

[54] The evidence therefore did not establish beyond reasonable doubt that the appellants were in possession of the firearms referred to in counts 9 and 10. I agree that the cross-appeal in respect of those counts should be dismissed. The contradiction pertaining to counts 9 and 10 renders the evidence to be unreliable.

[55] The State submitted, however, that counts 7 and 8 stand on a different footing. Both Sgt Jojisa and Ms Dlamini testified that the third appellant was armed with a rifle at Namibia and that he used it to prevent Sgt Jojisa from intervening while the deceased was confronted by the second appellant with a pistol.

[56] The State further relied on the recovery, on the same day, of the AK47 from the first appellant's locked house. It submitted that the appellants retained control over the firearm. He had secured the house to ensure the safety of the firearm.

[57] The State contended that the trial court erred in its analysis of the evidence and application of the principle of joint possession where common purpose had been invoked. Reliance was placed on *S v Nkosi*[4] and *S v Mbuli*.[5] The State accordingly

[4] *S v Nkosi* 1998 (1) SACR 284 (W) (*Nkosi*) at 286H-I.
[5] *S v Mbuli* 2003 (1) SACR 97 (SCA) (*Mbuli*).

submitted that the cross-appeal in respect of counts 7 and 8 ought to succeed.

Applicable legal principles

[58] The acceptable legal principle is that a court of appeal will be slow to interfere with the factual findings of a trial court unless such findings are clearly wrong. In *S v Francis*[6] it was stated:

'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 conclusion, 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 witness' 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.'

[59] The present appeal is predicated on the ground that the trial court misdirected itself in assessing the reliability of the identifying witnesses, Ms Dlamini and Sgt Jojisa. The appeal therefore turns on the evaluation of evidence of identification.

[60] Evidence of identification must be approached with caution for the reason that experience has shown that it is very easy for the identifying witnesses to be mistaken.[7]

[61] In *Mthetwa*,[8] the Appellate Division cautioned against the temptation of simply accepting the evidence of an identifying witness when it stated:

'…It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration…'

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[6] *S v Francis* 1991 (1) SACR 198 (A) (*Francis*) at 198I-199A.
[7] PJ Schwikkard et al *Principles of Evidence* 5 ed (2023) (*Principles of Evidence*) at 626-627.
[8] *Mthetwa* at 768A-B.

[62] When dealing with evidence of identification, the courts should be reminded of the salutary warning stated in *S v Sithole and Others*[9] where the court stated:

'In the present case the learned magistrate quite correctly reminded herself of what was said in *R v Shekelele and Another* 1953 (1) SA 656 (T) concerning evidence of identification. It was pointed out in that case that an acquaintance with the history of criminal trials reveals that gross injustices are not infrequently done through honest but mistaken identification. A court must always bear in mind, then, that in all such cases there is an inherent prospect that even an honest witness might mistakenly identify a person. The fact that witnesses who attend identification parades sometimes point out persons who are known not to have committed the offence serves to underline the potential which exists for error.

Where a conviction depends on that evidence alone, a court must quite obviously be satisfied that the witness is truthful. What is perhaps more important, though, is that there must be no reasonable doubt that the witness is not mistaken. In our view, that will generally require something more than the mere assertion by the witness that he has correctly identified the culprit, if the inherent risk of error is to be guarded against. It may be that the person concerned is well known to the witness or it may be that the person has some distinctive feature. But once one accepts that there is an inherent potential for mistaken identification, which a court is bound to do, it would seem to us that without something more, the mere assertion by a witness that he recognises the offender will seldom suffice.'

[63] The State had also supported the findings of the trial court based on the identification of the appellants at the identification parade. Although the appellants had not attacked the lawfulness of the identification parade, it is relevant briefly to discuss it. An identification parade is held in terms of rules of practice which are based on standards of fairness in order to secure a reliable result. A court will more readily accept evidence of identification by a witness where such has been confirmed at a properly conducted parade. It is therefore essential that a court should be satisfied that there were no material irregularities at the parade.[10]

[64] The trial court had also relied on circumstantial evidence for convicting the appellants. The principles applicable to the admission of circumstantial evidence are set out in *R v Blom*[11] where it was held:

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[9] *S v Sithole and Others* 1999 (1) SACR 585 (W) at 591B-F.
[10] *Principles of Evidence* at 627-628 and the cases cited therein.
[11] *R v Blom* 1939 AD 188 (*Blom*) at 202-203.

‘(1) The inference sought to be drawn must be consistent with all proven facts. If it is not, the inference cannot be drawn.
(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn…’

[65] When indicting the appellants, the State had relied on the doctrine of common purpose. The principles applicable to the doctrine have been settled.

[66] The doctrine of common purpose was invoked by the State in the indictment. ‘The essence of the common-purpose doctrine is that the conduct of persons who act in concert is as a matter of law imputed to one another, regardless of their actual degree of participation or causal contributions. It provides for a form of complicity and finds application in group-based criminal activity where it dispenses with the need to provide proof that the conduct of each participant contributed causally to the ultimate unlawful consequence. The doctrine is of general application, but is mostly couched in terms of which relate to consequence crimes, such as murder, where it is often very difficult to determine which offender’s actions were causally responsible for the death of the deceased.’[12]

[67] In *S v Thebus and Another*,[13] the Constitutional Court firmly confirmed this principle as part of our law, when this was stated:
‘[19] The liability requirements of a joint criminal enterprise fall into two categories. The first arises where there is a prior agreement, express or implied, to commit a common offence. In the second category, no such prior agreement exists or is proved. The liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind. In the present matter, the evidence does not prove any such prior pact.’ (Footnotes omitted.)

[68] Recently, the Supreme Court of Appeal (the SCA) in *Motsitsi v S*[14] stated:
‘The doctrine of common purpose is fully entrenched in our law. Common purpose takes two forms: prior agreement amongst all the perpetrators before the commission of the offence, or active association by each perpetrator in the conduct of the group of perpetrators. The former may involve an express agreement or an implied one based on what was

[12] *S v Tilayi* 2021 (2) SACR 350 (ECM) (*Tilayi*) para 18.
[13] *S v Thebus and Another* [2003] ZACC 12; 2003 (2) SACR 319 (CC).
[14] *Motsitsi v S* [2026] ZASCA 44 para 17.

contemplated by the group. The latter while not derived from a prior agreement, "can arise on the spur of the moment and can be inferred from the facts surrounding the active association with the furtherance of the common design", as held in *S v Safatsa and Others*, and entails participation "with the requisite blameworthy state of mind", as articulated in *S v Thebus and Another*. Should the State rely upon "active association" to establish common purpose, it is required to prove beyond reasonable doubt with regard to each individual perpetrator that he:

> "…[M]ust have been present at the scene where the violence was being committed…must have been aware of the assault on the [victims] … must have intended to make common cause with those who were actually perpetrating the assault…must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others…must have had the requisite *mens rea* [ie, in the case of murder]…he must have intended [the consequences of the offence] or must have foreseen the possibility of [the person being killed] and performed his own act of association with recklessness as to whether or not death was to ensue."' (Footnotes omitted.)

[69] The fact that the doctrine of common purpose falls into two categories must never be understood to mean that the two forms are mutually exclusive. 'In other words, a finding that, the unlawful act in question falls outside an existing prior agreed common design, does not mean that it cannot also be found to have been done in the furtherance of a common purpose that arose spontaneously, or by active association before, during or after the execution of the earlier agreed common design. Furthermore, the execution of the agreed common purpose may also satisfy the requirements for active association.'[15]

[70] In the cross-appeal, the State had contended that the trial court had erred by failing to convicting the appellants in respect of counts 7 and 8 relating to the possession of the AK47 rifle which was found in the house of the first appellant. The submission raises the question of joint possession.

[71] Just as more than one person may have the physical control of an article, more than one person may also simultaneously have the mental element required for

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[15] *Tilayi* para 24.

possession. More than one person may, simultaneously (illegally), possess a firearm (which is a crime that does not require *animus domini* but only *animus detentionis*). If they have the common purpose to commit murder, but only one of them has the detention of the firearm, the mere fact that they have a common purpose to commit a murder does not necessarily mean that all of them possess that firearm. Such a deduction can only be made if the court finds that the perpetrator who had the detention intended to possess it not only for himself but also on behalf of the other(s), and that the other(s) had the intention that the perpetrator having detention should exercise the physical detention on their behalf. Such a finding cannot be made from the mere fact that the participants acted within a common purpose to commit murder, because such common purpose may equally exist in a situation in which the perpetrator having the detention of the firearm intends to possess it only for himself.[16]

[72] The principles applicable to joint possession were considered in *Nkosi* and further approved by the SCA in *Mbuli*.[17] On these principles, I turn to consider the parties' submissions.

The identification of the appellants

[73] The trial court, in my view, correctly accepted the evidence of the State witnesses with regard to the manner in which the incident of 22 September 2015 had occurred and the unfolding events. The appellants, in their written and oral submissions, did not raise any misdirections by the trial court on credibility findings. In line with the principle in *Francis*, the credibility findings of the trial court must be accepted. Reliability of the evidence still needs to be tested.

[74] The trial court carefully analysed the appellants' respective versions and correctly rejected their versions. The appellants' versions of alibi were materially contradictory and stood in stark contrast to the overwhelming and corroborated evidence of the State witnesses. The trial court justifiably rejected their alibi as false and not reasonably credible. I agree with this finding.

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[16] CR Snyman *Snyman's Criminal Law* 7 ed (2020) at 56-57.
[17] *Nkosi* at 286H-I; *Mbuli* para 71 and *Tilayi* paras 42-44.

[75] Considering the nature of the defence raised by the appellants, and the absence of any countervailing evidence proffered by them, the facts are either common cause or are not seriously challenged.

[76] Turning to the identification of the appellants. The uncontroverted evidence is that the first appellant was identified at Inanda Police Station and during the journey to Namibia, Inanda. Both Sgt Jojisa and Ms Dlamini confirmed that he had a red cell phone which he was using. Both witnesses had ample opportunity to identify him. Ms Dlamini was seated next to him at the police station, and they were together at the back of the vehicle. Sgt Jojisa had also seen him at the police station and in the police vehicle.

[77] It bears mentioning that the robbery and the entire incident took place in broad daylight just before 12h30. In its findings, the trial court concluded:

'The Court is satisfied that Sergeant Jojisa had enough opportunity for looking or observing the assailant whom they travelled with in front of the police van until they were attacked. She had enough opportunity to observe the assailant in Namibia during the ordeal if one considered the proximity of the assailant to her. If I consider carefully the evidence of identification as discussed above, the identification parade results and all the factors as articulated in the case of *S v Mthethwa* I am satisfied that Sergeant Jojisa and Ms Noluthando Dlamini correctly identified the three accused on the day in question.' (*sic*)

[78] It is self-evident that the trial court had considered and applied the factors enunciated in *Mthetwa*. I cannot find fault with the reasoning and assessment of the evidence of identification adduced by Sgt Jojisa and Ms Dlamini by the trial court. There is no merit in the submission that the court did not caution itself about the dangers inherent in evidence of identification. The appellants were correctly identified.

[79] To buttress the point, the identification of all three appellants at the parade was not contested by the appellants, and correctly so, in my view. Constable Thomas had testified that he had conducted the identification parade together with Colonel McGray. The appellants were legally represented during the identification parade. Constable Thomas had confirmed that the identification parade was conducted according to the rules and that there were no irregularities. Sgt Jojisa had

pointed the first and third appellants, whilst Ms Dlamini pointed all three appellants. The trial court correctly accepted the evidence of identification at the parade.[18]

[80] This Court is also entitled to consider and assess the evidence in its entirety. In *S v Singh*[19] it was stated:

'Because this is not the first time that one has been faced on appeal with this kind of situation, it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witnesses and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore, the defence witnesses, including the accused, must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and the demerits of the State and the defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt. The best indication that a court has applied its mind in the proper manner in the abovementioned example is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.'

[81] The trial court, in its reasons, stated that it also took into account the ballistic results which were admitted into record in terms of s 220 of the Criminal Procedure Act 51 of 1977 (the CPA). According to the ballistic results, the firearm that the second appellant stole from his grandfather was the same firearm that had been used at the scene of Ngcugcwini.

[82] It bears mentioning that the uniform and other items that were taken from the two police officers, Sgt Jojisa and the deceased, were found in the house of the first appellant where the police were first kidnapped.

[83] On the strength of *Blom* the inference is overwhelming that the appellants were the perpetrators and for those reasons, the appeal against conviction cannot stand.

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[18] *Principles of Evidence* at 626-628.
[19] *S v Singh* 1975 (1) SA 227 (N) at 228E-H.

The appeal against sentence

[84] The task of imposing an appropriate sentence is the discretion of the trial court. A court of appeal may only interfere if the sentence imposed is shockingly inappropriate; there is an irregularity or misdirection on the part of the trial court.[20] In *S v Rabie*[21] it was stated:

'1. In every appeal against the sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -

(a) should be guided by the principle that punishment is

"pre-eminently a matter for the discretion of the trial Court";

and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".

2. The test under *(b)* is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.'

[85] The State, in the indictment, referred to the provisions of s 51(1) read with Part 1 of Schedule 2 of the CLAA. The legislation prescribed minimum sentences which include life imprisonment. The appellants were legally represented during the trial and were warned about the consequences of invoking this section. The aggravating factor was that the violence was used by the appellants against the law enforcement agencies who were assisting them. The appellants had stripped the police naked, and the deceased was shot in an execution style.

[86] In *Malgas*,[22] it was held:

'Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances…

The court is obliged to take into account all relevant factors as it retains its discretion when passing a sentence.'

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[20] *S v Singh and Others* [2016] ZASCA 37; 2016 (2) SACR 443 (SCA) para 23; See also *Malgas* para 12.

[21] *S v Rabie* 1975 (4) SA 855 (A) at 857D-E; See also *S v Kibido* 1998 (2) SACR 213 (SCA) at 216G-H.

[22] *Malgas* para 25.

[87] The appellants' counsel has buttressed the point that all three appellants are of a relatively young age and that the second and third appellants are schooling. I disagree. The circumstances of this particular case far outweigh the personal circumstances of the appellants. The SCA has cautioned against any slight inclination from prescribed minimum sentences for flimsy reasons.[23]

[88] In *S v Vilakazi*,[24] the SCA held:

'…In cases of serious crime the personal circumstances 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 questions whether the accused is married or single, whether he has two children or three, whether or not he is in an employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of "flimsy" grounds that *Malgas* said should be avoided…'

[89] On a careful consideration of the circumstances of this case, the interests of society, the personal circumstances of each appellant and the aggravating nature of the case, I am of the view that the aggravating circumstances far outweigh the mitigating factors. I agree with the trial court's findings that there were no substantial and compelling circumstances to justify deviation from the prescribed minimum sentence. The grounds of appeal and the submissions about the personal circumstances of the appellants constitute those flimsy grounds that the court has been warned to avoid.

[90] In my view, any sentence with a shorter term of imprisonment would over-emphasise the personal circumstances of the appellants and under-emphasise the seriousness of the cowardly and brazen manner in which the brutal murder of a State law enforcement officer was meted out by the appellants on 22 September 2015.

[91] It follows that the appeal against sentence cannot stand.

The cross-appeal

[92] The submission of the State is that the trial court erred in not concluding that

[23] Ibid para 9.
[24] *S v Vilakazi* [2008] ZASCA 87; 2009 (1) SACR 552 (SCA) para 58.

the appellants were in the joint possession of the AK47 rifle. In my view, this submission has considerable weight. The ambush of the police was carefully planned. The first appellant had placed the second and third appellants in his house in Namibia, Inanda. He lured the police under the false pretence that he was serving a letter of demand to the house. It should be borne in mind that it was his house in the first place.

[93] When the police arrived at the house, the first appellant was the first to jump out of the police vehicle and approach the house, shouting to the second and third appellants who were inside. Both the second and third appellants were armed. The second appellant was armed with a pistol which he admitted he had stolen from his grandfather. The third appellant was armed with an AK47 rifle. On these facts, objectively viewed, it is apparent that those firearms were possessed on behalf of the three appellants who had a common purpose to rob the police of their uniforms and firearms. It is also true that both the first and second appellants used those firearms in the execution of the agreed design. The third appellant pointed at Sgt Jojisa with the AK47 rifle to prevent her from resisting or interfering in the holding up of the deceased.

[94] The two police officers were forced to enter the house where they were stripped of their uniforms and other items. The keys of the police vehicle were removed from their possession when they were placed in the rear of the vehicle. The appellants locked the house when they were leaving. On the same day, within a few hours, according to the evidence, Cpt Hlongwa, the police found the police uniforms of Sgt Jojisa and the deceased in the same house with the AK47 rifle. When the police arrived, the house was locked and secured, which indicated control of the entrance to the house. That is a strong indication that the appellants retained possession of the firearm and the items that were inside that house.

[95] I agree with the submission on behalf of the State that it would be far-fetched to assume that some other person than the appellants might have left the said firearm after the appellants had secured the house by locking it. Although the firearm was found in the absence of the appellants, the only inference that can be drawn from the facts is that the AK47 rifle that was recovered by Cpt Hlongwa is the same

AK47 rifle that was used by the third appellant during the robbery. On the objective facts and the nature of execution of the plan, the third appellant possessed the AK47 rifle on behalf of all the appellants as an instrument of effecting the common purpose of all the appellants. In my view, the test set out in *Blom* is satisfied.

[96] I have considered the principles set out in *Nkosi* and agree that the mere fact that an accused person participated in a robbery with others, who, for the purpose of that enterprise, and to his knowledge, possessed firearms, does not sustain the inference, beyond reasonable doubt, that the accused person possessed those firearms jointly with them. The situation is different in the present case. The third appellant had possessed the firearm as an instrument to carry out the joint enterprise. In *Nkosi*,[25] the court recognises such a scenario when it said:

'At least two reasonable possibilities immediately present themselves. The first is that no member of the group possesses a firearm and the group takes a group decision to acquire firearms in order to effect their purpose. They acquire the firearms and having acquired them it is decided that certain members of the group will carry the group's guns during the robbery. In that event joint possession and the intention to jointly possess is clear.

But there is another possibility. That possibility is as likely as the first if not more likely. That is some of the robbers possess guns when the robbery is planned. They indicate that when the robbery is to take place they will bring their guns with them. The group know that they are intended to be used in the robbery.

Assuming the second set of facts (as indicated as likely a scenario as the first) I do not think that in the ordinary course either the gun-holders or the group as a whole would contemplate the gun-holders yielding even partially their effective control and possession of their guns in favour of the group. What would normally (or at least often) be contemplated is that the gun-holder would control and use the weapon which he has brought along to further the enterprise but would remain the sole person in control of the gun and would take it away with him when the enterprise is completed. To put it another way, each gun-holder would use his gun as he thought desirable or necessary; he could be expected to use it in accordance with the broad plan agreed on and in execution of the common purpose to rob; but the gun would be used (so the group would contemplate) only by the gun-holder himself; the gun-holder would always retain physical possession of the gun and he would not intend to yield up his right to possess the gun and to use it as he deemed fit. I am of the view that generally or at

[25] *Nkosi* at 288A-F.

least often in the case that I postulate the individual gun-holder would not intend to cede one iota of his “right” to control his gun to the group. Nor would the group intend to acquire such right of direct control.’

[97] In the present case, the objective evidence shows that the use of the AK47 was part of the plan of the group and this can easily be inferred from the established facts. In my view, the evidence excludes all inferences save the one to be drawn, which is that (a) the group as a whole had the intention of exercising possession of the AK47 rifle through the third appellant on behalf of the group in order to overcome the police resistance as they had planned to rob them. I therefore distinguish the facts in *Nkosi*.

[98] I also agree with Van Zyl DJP in *Tilayi*[26] when he said:

‘Conceptually the question must be asked whether joint possession and the requirements formulated in *Nkosi* must at all find application in the context of an application of the principles underlying the common- purpose doctrine. In the context of the present matter the right question to ask may accordingly be whether the possession of the firearms and the ammunition by one member of the group is a criminal act (actus reus) that falls within the scope of the group's common design, and must as a result be imputed to all the other members of the group. The doctrine, after all, rests upon the legal fiction that by association one member of the group is held liable for the criminal act (actus reus) of another. Liability for the act of another arises by operation of law and is not based on the individual acts of the participants in the criminal design. A factual scenario that often seems to be the cause of befuddlement is where it is not established on the evidence that one or more of the members of a group were aware of another's possession of a firearm. The answer to that question, it is suggested, will inevitably lie in the scope of the common purpose, and the element of mens rea as it applies to every other definitional element of the crime in question. Ultimately the question in every case remains whether or not it can be concluded on the evidence beyond a reasonable doubt that each individual accused had the required mens rea for the offence in question.’ (Footnote omitted.)

[99] On the strength of what is stated in *Snyman* and the principles developed in *Nkosi, Mbuli* and in *Tilayi*, it must be accepted that once it is established either by direct evidence or inferences drawn from the facts that all the accused persons had knowledge of the firearm held by one of them and that firearm is intended by all of

[26] *Tilayi* para 44.

the accused to be used as an instrument or to aid the furtherance of common purpose, both elements of *animus tenendi* (the intention to keep the firearm) and *animus detentionis* (the intention to exercise control over it) are present and therefore, all the accused are guilty of joint possession. There could be no question that either one of the accused had no intention to possess such a firearm.

[100] In the present case, the conclusion is irresistible that the planning of robbery of police uniform, firearms, kidnapping of the police and finally shooting them was orchestrated by all three appellants. The inference is also irresistible that the design of luring the police to the house at Namibia, Inanda was carefully planned by all three appellants. It is indubitable that both the first and second appellants knew that the third appellant was in possession of an AK47 rifle whilst the second appellant had gone all the way to steal his grandfather's pistol. These firearms were intended to and indeed, were used in the robbery of the police. The intention to possess has been established.

[101] In my view, the fact that the AK47 rifle was recovered in the locked house of the first appellant, together with the robbed uniforms and other belongings of the two police officials, Sgt Jojisa and the deceased, within a space of two hours after the robbery, in the absence of the appellants, is a strong indication that the AK47 rifle was the same as the one that the third appellant used to overcome the resistance by Sgt Jojisa during the robbery within the vicinity of the house in Namibia. It is irrelevant that they were not present during recovery.

[102] The trial court was manifestly wrong in its conclusion that it cannot conclude or infer that the said AK47 rifle found in the said house is the same big rifle Sgt Jojisa and Ms Dlamini referred to in their testimonies. This conclusion is based on misappreciation of facts or incorrect application of joint possession. The trial court was persuaded in its reasoning by the mere fact that the AK47 rifle was recovered in the absence of the appellants. That reasoning is incorrect. Possession is concerned with knowledge and control of the prohibited item. Both elements had been proved beyond reasonable doubt on the facts. On application of the *Blom* test, it had been established that the firearm used by the third appellant is the same firearm that was found with the police uniform robbed from the police officers.

[103] I therefore agree with the submission of the State counsel that the trial court had erred in not convicting the appellants in respect of counts 7 and 8, which pertain to the possession of the AK47 rifle.

[104] Therefore, the order of the trial court in respect of counts 7 and 8 stands to be set aside and substituted with a finding that all three appellants are guilty of the possession of the AK47 rifle.

Findings

[105] The appeal against both conviction and sentence in respect of counts 1 to 6 should be dismissed. The cross-appeal should partially succeed insofar as it relates to counts 7 and 8.

[106] I found misdirection in respect of acquittal of the appellants in respect of counts 7 and 8. All three appellants are found guilty of possession of the AK47 rifle. In respect of counts 9 and 10, the cross-appeal cannot succeed, and the result is that the decision of the trial court stands.

Conclusion

[107] The trial court had found that there are no substantial and compelling circumstances to justify a departure from the imposition of a minimum sentence prescribed by legislation. The possession of the AK47 rifle pertains to the single incident in which the appellants had been convicted and effectively sentenced to life imprisonment. In these circumstances, where the court had found misdirection in respect of the acquittal of the appellants in counts 7 and 8, this Court is in the same position as the trial court.

[108] It is in the interests of justice that this Court, having found the appellants guilty on counts 7 and 8, should finalise the sentence. I agree with both counsel in this regard.

[109] The appellants should be convicted of possession of a prohibited firearm, namely a fully automatic AK47 rifle, in contravention of s 4(1)*(a)*, read with ss 1, 103,

117, 120(1)*(a)*, 121 and schedule 4 and s 151 of the Firearms Control Act 60 of 2000, further read with s 250 of the CPA, and s 51(2)(*a)* Part 2 of Schedule 2 of the CLAA. The minimum sentence applicable of 15 years imprisonment shall be imposed by this Court. Counts 7 and 8 are to be taken together for the purposes of sentencing and must run concurrently with the sentence in count 1.

Order

[110] The following order shall issue:

1. The appeal against both conviction and sentence is dismissed.

2. The cross-appeal succeeds to the extent that the order of the trial court in respect of counts 7 and 8 is set aside and is replaced with the following order:

   2.1 All three accused are found guilty of contravening s 4(1)*(a)* read with ss 1, 103, 117, 120(1)*(a)*, s 121 read with Schedule 4 and s 151 of the Firearms Control Act 60 of 2000, further read with s 250 of the Criminal Procedure Act 51 of 1977 and s 51(2)*(a)* Part 2 of Schedule 2 of the General Law Amendment Act 105 of 1997 – possession of a prohibited firearm: a fully automatic firearm.

   2.2 Counts 7 and 8 are taken together for the purpose of sentence and all three accused are sentenced to 15 years' imprisonment.

   2.3 The sentences in counts 7 and 8 of 15 years' imprisonment is ante-dated to 06 July 2018 and shall run concurrently with the sentence of life imprisonment imposed in count 1.

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NOTYESI

AJ

I agree

_____

POYO DLWATI JP

I agree

_____

SINGH J

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