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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: A63/26

In the matter between

NDYEBO DOTWANA APPELLANT

AND

THE STATE RESPONDENT

CORAM: NDITA J; LEKHULENI J; THULARE J

Date of Hearing : 26 July 2026

Date of Delivering : 03 November 2026

ORDER

The appeal against the convictions is dismissed.

JUDGMENT

THULARE J

[1] This is an opposed appeal to the full court of the Division against the convictions of the appellant. He pleaded not guilty to seven counts preferred against him and was convicted only on three counts, to wit, two counts of robbery with aggravating circumstances (count 1 and 7) and one count of murder (count 6). He was sentenced to an effective 25-year imprisonment. The trial court refused his application for leave to appeal against his conviction, which leave was granted by the Supreme Court of Appeal to the full court of this Division.

[2] The State relies on common purpose in that the appellant acted with a person or group of persons or syndicate in furtherance of a common purpose, despite not being physically present inside a store or his presence being proven at the scene of the crime at the time of the commission of the offences. Five suspects were arrested in relation to these offences. They were Malibhekho Makaqayi (MM), Luyanda Lonzi (LL), Sicelo Mase (SM), Awonke Ziqu (AZ) and the appellant. SM and AZ pleaded guilty to all 9 counts preferred and were sentenced. LL pleaded guilty to seven counts and was accordingly sentenced. The charges against MM were withdrawn, and he was used as a witness in terms of section 204 of the Criminal Procedure Act, 1977 (Act 51 of 1977) (the CPA) in relation to the appellant.

[3] The first of the four grounds of appeal is that the trial court misapplied the doctrine of common purpose. The appellant submitted that he was convicted as a remote party to the commission of the crimes with reliance on the doctrine of common purpose wherein the court inferred a prior agreement from circumstantial evidence but failed to establish beyond reasonable doubt that the appellant had the requisite *mens rea* or that he associated himself with the commission of the crime. The appellant submitted that the court erred in finding that the only reasonable inference from the facts was that the appellant was a party to a prior agreement to commit robbery and murder, contrary to established principles.

[4] The second ground of appeal was that the State relied heavily on the evidence of the section 204 witness, MM, whose testimony was contradicted by other evidence, including that of appellant and appellant's mother. It was submitted that the trial court failed to treat the evidence of a single witness with the necessary caution. It was further submitted that circumstantial evidence, including phone calls, vehicle use and the alleged presence of a silver-grey Polo, was insufficient to exclude every reasonable inference other than guilt.

[5] The third ground of appeal was that the trial court failed to apply the test of reasonable doubt. It was submitted that the trial court did not properly consider whether the appellants' version was reasonably possibly true. It was further submitted that the appellant's explanation of the phone calls and vehicle use was not so improbable as to be rejected as false beyond reasonable doubt. The final and fourth grounds of appeal related to the trial court's approach to the onus of proof. It was submitted that the onus lay on the State to prove beyond reasonable doubt that the appellant was guilty. To justify the rejection of his

version, his version must be false beyond reasonable doubt and not reasonably possibly true.

Factual background

[6] On the morning of Friday 29 January 2021 SM entered Munniks Jewelers Store and went to the counter whilst LL remained at the front entrance of the store. SM spoke to one of the staff members. Shortly after the conversation SM took out a firearm from the front middle of his pants and pointed it in the direction of the staff members who were behind the counter in the store. After SM and LL secured the inside of the shop, two other males entered the store. One of them is AZ and the other an unknown suspect who was never identified and arrested. AZ and the unknown suspect searched the cupboards and drawers of the shop removing various items, together with LL and SM. All these developments were video recorded on the store security system.

[7] At some stage during the robbery, the deceased, Charl Munniks (CM) emerged from the side door exit on the inside of the store, which door leads to his house which is situated on top of the store. His arm can be seen firing shots in the direction of SM, AZ and the unknown suspect. SM can be seen firing back in the direction where CM was positioned. At the same time, LL can be seen approaching CM from his right-hand side, pointing a firearm at the head of CM and firing one shot. CM can be seen falling to the ground, where he was later certified dead. The postmortem report concluded that he died because of a single gunshot wound to his head. LL can be seen bending down and picking up

the firearm with which CM was shooting. After the shooting, the four men can all be seen exiting the store. The unknown suspect first, followed by AZ, LL, and SM. They can all be seen walking towards a blue Honda with registration C[...], which was parked in the parking area in front of the store. The blue Honda was MM's vehicle. The registration number C[...] belonged to an Opel Corsa, which the owner sold 10 years earlier but never deregistered. The appellant cannot be seen on the video footage before, during or after the robbery and murder.

[8] Only two witnesses testified for the State, MM and the investigating officer, Michael John Pretorius (MJP). Three witnesses testified in the defence being the appellant, his mother and one other. MM was warned by the court in terms of section 204 of the CPA in respect of his testimony. He testified that before being placed under witness protection, he resided in Zweletemba in Worcester. He was originally from Queenstown. In Zweletemba, he ran two businesses. He transported people between the township of Zweletemba and the town of Worcester, and also ran a small shebeen. He had been in Zweletemba for about five years. He used the blue Honda Jazz for his transport business. He used a Lesotho registration number, C[...], on the Honda vehicle. He knew the appellant, and also the appellant's nickname, Geero. He knew the appellant for about two to three years. The appellant was also in the transport business, transporting groups of people to their places of work, called staff transporting. The appellant used a silver-grey Hyundai H1, a multiple seating passenger wagon. MM and the appellant used to exchange vehicles when the exigencies demanded. If MM needed a larger vehicle, he would borrow the H1 and similarly when appellant transported fewer people he would borrow the HI, and similarly, when the appellant transported fewer people, he would borrow the Honda Jazz. The arrangement was between them and did not extend to the use

of the vehicle by others when borrowed. The one did not need to pay the other when the vehicles were exchanged during the borrowing. The one would simply leave his own vehicle with the other.

[9] On Thursday 28 January 2021, the appellant borrowed the blue Honda from MM, indicating that he wanted to use it. The appellant left his H1 with MM and left driving the Honda. Later that same Thursday, the appellant called MM and notified MM that he would not be returning the Honda the same day and that MM would get the Honda back the next day, Friday. MM had the H1 overnight whilst the appellant had the Honda overnight. On the morning of 29 January 2021, the appellant called MM, from his cell number at around 5 or 6 am. Appellant wanted his H1 to fetch the staff. Appellant came on foot to MMs home. Appellant asked MM to go with him to fetch the staff, and MM accompanied appellant. Appellant was the driver. They fetched the people and dropped the people in town. They then drove to appellants home. MM thought he was going to fetch his own car then.

[10] When they arrived at the appellant's home, MM saw four men standing right behind the Honda at the appellant's home inside the premises. MM also saw a silver-grey Polo in appellant's premises. Appellant parked the H1 behind the Honda, with the four men between the two vehicles. The men were busy changing the number plates on the Honda. MM did not know these four men, and it was the first time that he saw all of them. MM was surprised that the registration plates were being changed, but appellant did not look surprised. After MM and appellant alighted from the H1, MM wanted to take the Honda, but appellant stopped him and asked him not to take the Honda, as he, appellant,

was going to use it. Appellant told MM that MM could use the H1. MM went to the driver's side of H1, got into it, and drove home.

[11] After some time, which MM estimates to be about an hour, appellant called MM and asked him to hurry and come to his place. MM drove to appellants place. When he arrived, he found the same four men still there at appellants premises. They were busy removing a number plate that started with the prefix CW from the Honda, where the number plate is located, and replaced it with the registration plate that the Honda ordinarily used. The appellant was with the four men when MM arrived. Appellant saw what the four men were doing, but did not say anything. When MM got to the Honda, appellant told him that the Honda messed up in town. When MM asked him what he meant by that, appellant told MM that he, appellant, had given the Honda to the four men, who then went to rob in town. MM was surprised at this, as appellant knew that MM used the Honda to work and for private purposes.

[12] Appellant removed the wheel caps of the Honda out of the boot of the Honda, handed them to MM and told MM to take them and to throw them away as the Honda messed up. When MM asked appellant why he wanted the wheel caps removed and thrown away, appellant told MM that there were a lot of cars of the kind of his Honda, and that it would be easy for the police to notice the wheel caps. Appellant then told MM that if MM told the police or anyone about what appellant was telling MM, they would kill MM and his family. MM was shocked. He drove away with the Honda, threw away the wheel caps, and then drove to town. He drove to town to see for himself what was happening there. He saw a lot of people and an ambulance.

[13] MM attended a photo identification parade where he pointed out three people, SM, AZ and LL, who he identified as part of the four that he had seen at appellants home, who changed the registration plates as he earlier testified. From video footage played, MM identified his vehicle as the vehicle in which the three men he identified, together with another person, got in and drove off immediately after the murder and robbery at the jewelry store. The vehicle had been parked in a parking bay close to the front entrance of the store. The four men were wearing the same clothing during the robbery, that they were wearing when he saw them at the appellants home.

[14] When MM heard that the police were looking for him a day after the murder and robbery, he sent a WhatsApp to the appellant to enquire if the appellant knew that the police were looking for him, being MM. The appellant said he was not yet aware but would look into it. MM did not give the appellant or the others permission for the appellant to give the Honda to the others, and he did not give those others permission to use his vehicle. MM was arrested and was initially a co-accused in the matter. He was accused of having supplied his vehicle for the commission of the crimes and it was also alleged that he had travelled in front of those who robbed the store, to show them where the jewellery store was. He denied travelling in front of them or being with them at the time of the robbery or being part of the crimes committed. MM showed the investigating officer where he threw the wheel caps, but they did not find them. MM did not know of and did not participate in the murder and robbery. He did not know if appellant owned a firearm.

[15] The vehicle that MM owned broke down in Lesotho, and a friend borrowed him the Honda to use, and it was in that context that he referred to the Honda as

his vehicle. He was the one who ordinarily drove it and used it. He had observed, on the two occasions that he had been at the appellant's home, that the Polo which he found there did not have number plates. When MM handed his Honda to appellant, the Honda did not have one of the rear wheel caps. It was used in that state. When appellant told MM to remove the wheel caps, MM removed three wheel caps from the Honda.

[16] Michael John Pretorius (Pretorius) was a warrant officer in the South African Police Service (SAPS) and was a member of the detective branch in Worcester with 22 years' experience of which 20 was as a detective. He investigated serious and violent crime in Worcester and was the officer investigating this matter. He testified that he arrested LL, SM, AZ, MM and appellant. LL, AZ, and SM were identified, amongst others, by facial comparison with the video footage. SM entered the store and after being tested for temperature and sanitized, enquired about repairs to a watch. SM was attended to by one of the store workers at the time, and they had to wait for the person doing the actual repairs. It was at that point that SM and LL took out firearms and threatened the store staff members. SM took the remote-control device from the mother of the deceased. The other two male persons then entered the store and assisted in the robbery. One of the last two to enter could not be identified and the other was AZ. The robbery commenced at 9:34 on 29 January 2021. It was during the Covid 19 pandemic. Jewellery, included that which were brought in by clients to be fixed, was removed including from the drawers.

[17] It was during the robbery that the deceased, who was the owner of the store, entered the store from the side door and started shooting into the shop

floor. LL approached the deceased from the other side, shot at him and after the owner fell LL picked up the deceased's firearm, a Glock pistol, and put it in his own jacket pocket. The owner died because of that gunshot wound to the head. Pretorius testified referring to the video footage which captured the crime. The fourth person visible on the footage remained unidentified, and police could not locate or arrest him. The appellant is nowhere visible on the crime scene video. After the commission of the crime, inside the store the four men exited the store and got into a blue Honda that investigations showed belonged to MM. At the time of the commission of the crime, the Honda had a different number plate which belonged to an Opel Corsa whose owner had sold it ten years before, and the new owner did not remove the old owner's name. The four men left the store at 09:40. They were in the store between 09:34 and 09:40.

[18] Investigations led to the appellant, and it was determined that the appellant resided in Zwelethemba, which is a township in Worcester. The incident happened on a Friday, and the very next Monday the appellant was arrested. The investigations also led to LL, SM and AZ who all resided in Khayelitsha, as well as MM, who resided in Zwelethemba. SM, AZ and LL did not have any family ties in Worcester. Investigations revealed that LL had ties to Worcester through his connection to appellant. Pretorius obtained the cell numbers of all the accused from all of them individually. He then applied for the call data records of the accused for the period 1 January to 13 February 2021. AZ and SM were arrested whilst driving in a silver-grey Polo owned by AZ. At the time of their arrest, the firearm removed from the deceased at the time of the robbery, a Glock pistol with a silver slide, was found in the air vent of the Polo.

[19] The data records showed that on the morning of the incident at 05:43, the appellant called MM, and the duration of the call was 30 seconds. The appellant again called MM at 08:21:35 and the call lasted 10 seconds. The appellant again called MM at 08:25:10 and the call lasted 4 seconds. At 08:56:14 the appellant received a call from LL which lasted for 26 seconds. At about 08:59:26 LL again called appellant and call lasted 26 seconds. At 09:50:13 LL called the appellant and the call lasted 16 seconds. LL again called the appellant at 09:53:18 and the call lasted 30 seconds. At 10:05:57 MM called the appellant and the call lasted 35 seconds. MM called appellant again at 10:16:27 and the call lasted 17 seconds. LL called appellant at 10:20:11 and that call lasted 16 seconds. LL again called appellant at 10:45:19 and the call lasted 50 seconds. At 11:42:37 LL again called appellant and the call lasted 19 seconds. That morning LL and appellant had telephonic call contact seven times and MM and appellant had five such contacts.

[20] In his testimony, the appellant confirmed what MM said about the two exchanging vehicles when the one borrowed from the other. The appellant also confirmed that he knew LL as a businessman from whom he was prepared to learn. The appellant managed his family transport business. On Thursday the 28th January 2021, he collected staff and transported them. During the day he borrowed MMs vehicle which he used to travel to Roberston to collect liquor. He gave the vehicle back the same day around 7 or 8 in the evening. He did not see MM the next day, Friday, although they spoke telephonically. MM wanted to know about the liquor prices as there were people who wanted to buy liquor from appellant.

[21] On that Friday, he transported his staff as usual using H1, which belonged to his mother. He stayed with his mother, and his mother was home that day. LL came to his house that day. He had met LL through a friend, and it was already a year since he knew him. They used to meet when the appellant visited his family in Nyanga, but not often. LL first called asking for directions to come to appellant's home. LL arrived in a black BMW around past 10. LL was with other people, but appellant did not check who they were. LL parked the BMW outside next to the fence, came out, and appellant went to him while the others remained in the BMW. They spoke about the car wash business which the appellant wanted to establish. LL was in the car wash business and had experience with it. They walked to the site, which was just around the corner from the appellant's home. He was not aware that LL was involved in a robbery or a murder before LL came to him. He never discussed a robbery or murder with LL. He denied any knowledge of the robbery and murder. He never had a firearm or ammunition in his possession for which he did not have a licence.

[22] LL had visited him on two occasions before. Once with a friend through whom they met and the second time when LL was from a funeral. On those two occasions, MM was not present. He knew MM as they grew up in the same location even though MM was older than him. They were friends. He did not have MMs vehicle that morning. The appellant accepted the evidence of what happened at the store as reflected in the video footage as well. He also accepted that the vehicle seen in the video, into which the robbers left the scene, was MMs vehicle, which he as appellant had used the Thursday. He also confirmed that he spoke to LL on Friday morning. According to appellant, the first call was when LL wanted directions to come to him. LL wanted directions because on the two previous occasions that LL was there, LL was with Anele, who knew the place. LL called every time he was uncertain of where to go, giving

appellant descriptions of where he was for appellant to direct him which corner to turn, which route to follow, and how he must drive. The first call was when LL was entering Worcester. Appellant assumed that they were on the N1. He expected them to take 10 to 15 minutes to reach his home.

[23] When LL did not arrive, appellant sent him a whatsapp to ask where he was. LL did not reply to the whatsapp. Appellant expected LL at around 9:15 at the latest. LL did not arrive at the time the appellant expected him. Appellant did not call LL as he assumed that LL was not lost because if he was lost he would call. Appellant was not going to keep on calling asking where LL was after he gave LL directions. LL called him to give directions, and what LL did instead had nothing to do with him. LL arrived with other people in the car but he did not see how many people.

[24] In his bail application on the matter, the appellant had testified that on the morning of Friday, 29 January 2021, he was with MM. They went first to see a correctional officer. After that, they went and dropped the staff, and thereafter appellant went to drop MM at PEP stores where MM was to pay his DsTV. His explanation was that he made a mistake and mixed up the dates. Appellant told the bail application court that some time after he had dropped off MM, whilst he was at home, LL arrived. In the bail application appellant also told the court that LL was with two other young men when he arrived at his home. In the trial court, appellant said he had heard from LL that LL was in the company of two other males. Appellant disputed that there was a silver-grey Polo at his home on that day.

[25] He could not say whether AZ and SM were one of the people who came to his home with LL in the car. He could also not dispute that the unidentified person visible on the video was also present at his home, as MM testified. He, however, disputed that the silver-grey Polo was at his home. He disputed being part of the robbery or being the master-mind behind it. LL and the people with him left his home after 13:00. Appellant knew the time because he had KFC staff which started work at 2, which he had to deliver, and he told LL about it and that is when LL and the others left. She had a witness, Amanda, who was one of the staff members who worked at Pick n Pay, whom she collected and dropped off that morning.

[26] Unathi Dotwana (UD) is the mother of the appellant and stayed with him at the same address. She was home on the morning of 29 January 2021. There were other people who worked with her, as well as the appellant. She heard about MM but had never seen him. On that morning, she did not see any other vehicles at her home except their vehicles. It could be that MM came to her home that day so she could not tell if he was there as she did not know him.

[27] Amanda Kabayi (AK) knew the appellant and testified that appellant was their transport driver in 2021. She recalled that on the morning of Friday 29 January 2021 the appellant was their driver and when he picked her up, he was alone. After the arrest of the appellant a relative of his became the driver who took them to work. She started work at 7:00. Appellant picked her up at past 6 and dropped her at work before 7. She worked from 7:00 to 16:00. She would not know who else travelled with appellant after she was dropped off.

[28] The appellant admitted the state's version of what happened at the jewellery shop on the morning of Friday 29 January 2021 and the chain of evidence including the handling of the body of the deceased and the cause of death, as well as the handling of other exhibits including the video recording, photographs, affidavits and reports and the identification of LL, SM and AZ at the scene through facial image analysis and by MM through photo identification parades. The appellant also admitted the cellphone numbers used by him, MM and LL. The appellant denied any participation in any of the activities alleged against him in relation to the crimes.

The approach to the evidence of a section 204 witness and the circumstantial evidence.

[29] In *S v Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426A-H it was said:

'Before considering these submissions it would be as well to recall yet again that there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellate Courts to factual findings of the trial Court are so well known that restatement is unnecessary.

One looks in vain for any such misdirection on the part of the Court *a quo* in this matter. The evidence given in the Court below was fairly and accurately summarised in the judgment. Attention was given to the detailed criticisms of the evidence of the witnesses who testified for the State. They were evaluated in the context of the entire body of evidence before the Court and appropriate weight assigned to them in the light of all the evidence and the inherent probabilities and improbabilities of the case. Where caution was needed it was exercised and the Court not infrequently preferred to place no reliance upon evidence for the State which might possibly not be accurate. That being the case, the credibility findings and findings of fact of the trial Court cannot be disturbed unless the recorded evidence shows them to be

clearly wrong. In assessing whether or not such is the case, the approach which commended itself in *Moshephi and Others v R* (1980-1984) LAC 57 at 59F - H seems appropriate in the particular circumstances of the matter:

'The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.'

[30] MM and the appellant knew each other. They both made a living by transporting people and selling liquor. MM used a blue Honda Jazz with Lesotho registration number, whilst the appellant used a Hyundai H1 in their respective businesses. They had known each other for about three years. They had an arrangement in terms of which they used to borrow each other the said vehicles, for use as circumstances required. When one borrowed from the other, the one would leave his own vehicle with the other. They agree that the appellant borrowed the Honda on 28 January 2021 and left his H1 with MM. Where they differ, is whether the Honda was returned to MM that evening after it was used by appellant during the day. MM said it was not, whilst the appellant said he returned it.

[31] They also agree that the appellant used his H1 on the morning of the 29th of January 2021 to pick up people he transported to work, whom he dropped off at their workplaces. According to MM, the appellant came on foot to fetch the H1 that morning and MM accompanied the appellant to collect and drop off staff at their workplaces whereafter they went together to appellant's home. According to MM, this was for MM to fetch his Honda. According to appellant, he fetched his H1 on the 28th from MM, and according to appellant and his witness, AK, the appellant was alone when he collected and dropped staff at their workplaces that morning.

[32] The cell phone records showed that the appellant called MM at 05:43:18 and that they spoke for 30 seconds. MM said that is when the appellant indicated to him that he wanted the H1 that morning to transport his staff, as the H1 was with MM at that stage. According to the appellant, MM wanted to know about the liquor prices and indicated to the appellant he had customers for the appellant. The appellant's explanation for the call that early morning is unconvincing.

[33] MP arrested all five suspects. During the investigation, he established that LL, SM and AZ were all residing in Khayelitsha. They had no ties to Worcester. MP established through cell phone communication that there was communication between LL and the appellant. MP obtained the cell phone numbers of MM, LL and the appellant during his interviews with them. Before the robbery MM and appellant had three cell phone communication and after the robbery two. Before the robbery it was the appellant calling MM, and after the robbery it was MM calling the appellant.

[34] A conviction is possible on the evidence of a single witness who is credible. The evidence is approached with caution giving consideration to both factors which confirms and which detracts from their credibility [their credibility [*S v Webber* 1971 (3) SA 754 (A)]. The cautionary rule is a rule of practice that aims to assist judges in assessing evidence. It requires judicial officers to exercise caution before adopting the evidence of certain witnesses on the ground that the evidence of such witnesses is inherently potentially unreliable. The rule thus requires the presiding officer to cautiously regard the evidence of children [single witnesses] … and accomplices' [Nikki Naylor '*The survival of the cautionary rule'* (h[...])]. The caution includes that the evidence must be satisfactory in all material respects or be corroborated (*Stevens v S* [2005] 1 All SA 1 (SCA)). It also includes that the evidence is scrutinised with great care and accepted with great caution [*R v Manda* 1951 (3) SA 158 (A); *S v Haupt* 2018 (1) SACR 12 (GP)' (2018) 51 *De Jure* 318]. The evidence of MM was consistent and clear in his account of the events. The evidence is reliable and trustworthy, and, therefore, satisfactory in all material respects.

[35] The evidence of MM was independently corroborated by the presence of LL, who was identified as one of the suspects at the scene of the crime, at the appellants home on the day of the robbery. The appellant himself confirmed that LL was at his home, at least according to appellant at the time which was clearly immediately after the murder and robbery. LL was at that stage, even on the appellants own version, in the company of other men, who MM identified as SM and AZ. The evidence of MM was also corroborated by cell phone records. The contradictions in the testimony of MM were not material. For instance, his reference to the Honda as his vehicle, when it was borrowed to him from Lesotho, was not a material contradiction. As a section 204 witness, the

evidence of MM was both substantially satisfactory in every material respect and was corroborated by independent evidence. The cautionary rule does not require that the evidence of a single witness must be free of all conceivable criticism. The requirement is merely that it should be substantially satisfactory in relation to material aspects or be corroborated [*Rugnanan v S* [2020] ZASCA 166 para 23]. In his bail application, which was closer to the date of the commission of the crime, appellant had confirmed that he was with MM on the morning of the 29th and had driven with him to drop off the staff he transported. This was in line with the version of MM. This version changed when the appellant testified in his defence. The appellants suggestion that he was falsely implicated by MM was correctly rejected by the trial court.

The doctrine of common purpose

[36] In *Thebus and Another v S* 2003 (2) SACR 319 (CC) at para 18 and 19 the doctrine of common purpose was explained as follows:

'[18] The doctrine of common purpose is a set of rules of the common law that regulates the attribution of criminal liability to a person who undertake jointly with another person or persons the commission of a crime.

Burchell and Milton explained the doctrine as follows:

Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their common purpose to commit the crime.

Snyman points out that, the essence of the doctrine is that two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others.

These requirements are often couched in terms which relate to consequence crimes such as murder'

[19] The liability requirements of a joint criminal enterprise fall into two categoties. 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'.

[37] The appellant secured the Honda from MM, which Honda was the vehicle in which LL, SM and AZ went into after leaving the scene of crime at the store and which was the getaway vehicle in which they drove away from the scene. The appellant made sure that the Honda was with him at his home the night before the crime was committed. The appellant's home was the site from which the registration numbers of the Honda were changed before the commission of the crime, and after the commission of the crime. It was also where the wheel caps of the Honda were removed after the commission of the crime. The appellant's home was also where the vehicle with which LL, SM and AZ drove from Khayelitsha to Worcester and back on the day of the commission of the crime, which was identified as the vehicle of AZ, the Polo VW, was parked.

[38] LL was a friend of the appellant. On the day of the commission of the crime LL called the appellant six times. LL visited the appellant on the day of the commission of the crime, in the company of three other men, who included SM, AZ and another unknown male. AZ was the registered owner of the Polo VW. At the store, the robbery commenced at 09H34 and LL, SM, AZ and the unknown male exited the store at 09H40. LL took the firearm of the deceased on the scene, and this firearm was recovered inside the Polo VW of AZ when he

was arrested. When AZ was arrested, he was with SM. On the footage, the Honda had a CW registration number. When the registration plates were changed at the appellants home, the appellant did not object. When MM wanted to drive away with the Honda, it was the appellant who told MM that he, the appellant, was still going to use the Honda. The appellant was aware at that stage, of the intended use of the Honda for unlawful actions by LL, SM, AZ and the unknown male who was with them. There was no need to remove and change the registration plates if the vehicle was to be used for legitimate purposes. The Honda, secured by appellant from MM, became an integral part of the plan to execute the crime successfully. It was used as the getaway vehicle. It was the appellant who placed the Honda in the possession of LL, SM, AZ and the unknown male person.

[39] After 10am, at 10:05:57, when MM called the appellant, the appellant advised him to come and fetch his Honda. This was around 26 minutes after the commission of the crime. It was after his arrival that MM saw LL, SM, AZ and the unknown male removing and replacing the registration plates. The appellant took hubcaps from the boot, handed them to MM and instructed MM to get rid of them. It was also at that point that the appellant told MM that the Honda was involved in a robbery. There is no evidence which pointed to any relationship between MM and LL, SM, AZ or the unknown male. The connection between MM and the three men who pleaded guilty to charges related to the crime, to wit, LL, SM and AZ as well as the unknown male, was the appellant. The appellant was an integral part of the planning of the commission of the crimes. He provided a Honda which blended with the area and provided a place from which to prepare for the crime, and to clean up after, including a hiding place for the perpetrators when the search for the perpetrators would still have been hot.

[40] Two calls were made before the commission of the crimes, to wit, at 08:56:14 and at 08:59:26. In other words, roughly 38 minutes and 35 minutes before the commission of the crimes, LL called the appellant. The first call after the commission of the crimes from LL to appellant was at 09:50:13, that is roughly ten minutes after the commission of the crimes and between that time and 11:42:37, LL called the appellant four more times. There was communication between LL and the appellant immediately before and immediately after the commission of the crimes. The *Concise Oxford English Dictionary,* 10th edition, edited by Judy Pearsall, Oxford University Press, 2002, defines communicate as to share or exchange information or ideas, to convey an emotion or feeling in a non-verbal way. These circumstances point to a prior agreement between the appellant, LL, SM, AZ and the unknown male to commit the crimes. A prior agreement may be inferred from surrounding circumstances whose facts are proved beyond reasonable doubt [*S v Mzempi* 2011 (2) SACR 237 ECM para 20]. The liability of the appellant arises from his active association and participation in a common criminal design with the requisite blameworthy state of mind [*Thebus and Another; S v Mgedezi* 1989 (1) SA 687 at 705-6; *S v Ngobozi* 1972 (3) SA 476 (A)] The reasons provided by appellant for the calls, including that LL wanted to get directions to come to appellants home, an address which LL had visited more than once before on appellants own version, are flimsy and were correctly rejected.

The onus, the standard of proof and mens rea.

[41] In *S v Molimi* [2008] ZACC 2; 2008 (2) SACR (CC) para 50 it was said:

[50] It is a cardinal principle of our criminal law that when the State tries a person for allegedly committing an offence, it is required, where the incidence of proof is not altered by statute .., to prove the guilt of the accused beyond reasonable doubt. That standard of proof, "universally required in civilised systems of criminal justice," is a core component of the fundamental fair trial right that every person enjoys under s 35(3) of the Constitution. In S v Zuma and Others, this Court, per Kentridge AJ, held that it is always for the prosecution to prove the guilt of the accused person, and that the proof must be beyond reasonable doubt. The standard, borrowing the words used by Plasket J in S v T, "is not part of a charter for criminals and neither is it a mere technicality." When the State fails to discharge the onus at the end of the case against the accused, the latter is entitled to an acquittal.

In *S v T* 2005 (2) SACR 318 (E) at para 37 it was said:

[37] The State is required, when it tries a person for allegedly committing an offence, to prove the guilt of the accused beyond reasonable doubt. This high standard of proof – universally required in civilised systems of criminal justice – is a core component of the fundamental right that every person enjoys under the Constitution, and under the common law prior to 1994, to a fair trial. It is not a part of a charter for criminals and neither is it a mere technicality. When a court finds that the guilt of an accused has not been proved beyond reasonable doubt, that accused is entitled to an acquittal even if there may suspicions that he or she was, indeed, the perpetrator of the crime in question. That is an inevitable consequence of living in a society in which freedom and the dignity of the individual are properly protected and are respected. The inverse – convictions based on suspicion or speculation – is the hallmark of tyrannical systems of law. South Africans have bitter experience of such a system and where it leads to.

[42] The appellant actively associated himself with the crimes committed. His actions supported LL, SM, AZ and the unknown male. Although it was not proved that the appellant was present on the scene, the facts proved in the surrounding circumstances sustained a conclusion that the appellant made common cause with the group, including the shooter of the fatal shots. The appellant had the subjective foresight that those who entered the store, armed and going to use the firearms to subdue or ward off any defensive action, would

commit the crimes of which they were convicted. The prosecution proved beyond reasonable doubt that the appellant had the requisite *mens rea* concerning the unlawful outcomes at the time that the offences were committed, He foresaw the possibility of the criminal result ensuing and nonetheless actively associated himself reckless as to whether the result was to ensue [*Thebus and Another v S; S v Mgedezi* at 706A-B; *S v Khumalo en Andere* 1991 (4) SA 310 (A) at 350; *S v Singo* 1993 (2) SA 765 (A) at 772 and *S v Coetzee and Others* 1997 (3) SA 527 (CC) 177]. The appellant was involved in the prior agreement which his co-conspirators and associated himself with their conduct. In my view, the court a quo's finding in this regard cannot be faulted.

[43] The approach to circumstantial evidence was set out in *S v Reddy and Others* (416/94) [1996] ZASCA 55 (28 May 1996) page 20 to 23 as follows:

In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft quoted dictum in Rex v Blom **1939 AD 188** at 202-203 where reference is made to two cardinal rules of logic which 21 cannot be ignored. These are firstly, that the inference sought to be drawn must be consistent with all the proven facts and secondly, the proved facts should be "that they exclude every reasonable inference from them save the one sought to be drawn". The matter is well put in the following remarks of Davis AJA in R v De Villiers **1944 AD 493** at 508/509:-

"The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to

whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence."

Best on Evidence (Tenth Edition) section 297 page 261, puts the matter thus:-

"The elements, or links, which compose a chain of presumptive proof, are certain moral and physical coincidences, which individually indicate the principal fact; and the probative force of the whole depends on the 22 number, weight, independence, and consistency of those elementary circumstances.

A number of circumstances, each individually very slight, may so tally with and confirm each other as to leave no room for doubt of the fact which they tend to establish. Not to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the
weight of a mill-stone. Thus, on an indictment for uttering a bank-note,

knowing it to be counterfeit, proof that the accused uttered a counterfeit note amounts to nothing or next to nothing; any person might innocently have a counterfeit note in his possession, and offer it in payment. But suppose further proof to be adduced that, shortly before the transaction in question, he had in another place, and to another person, offered in payment another counterfeit note of the same manufacture, the presumption of guilty knowledge becomes strong. ..."

Lord Coleridge, in Rex v Dickman (New Castle Summer Assizes, 1910 – referred to in Wills on Circumstantial Evidence (Seventh Edition) at page 46 and 452 – 60) made the following observations concerning the proper approach to circumstantial evidence:-

"It is perfectly true that this is a case of circumstantial evidence and circumstantial evidence alone. Now circumstantial evidence varies infinitely in its strength in proportion to the character, the variety, the cogency, the independence, one of another, of the circumstances. 1 think one might describe it as a network of facts cast around the accused man. That network

may be a mere gossamer thread, as light and as unsubstantial as the air itself. It may vanish at a touch. It may be that, strong as it is in part, it leaves 23 great gaps and rents through which the accused is entitled to pass in safety. It may be so close, so stringent, so coherent in its texture, that no efforts on the part of the accused can break through. It may come to nothing - on the other hand it may be absolutely convincing ... The law does not demand that you should act upon certainties alone ... In our lives, in our acts, in our thoughts we do not deal with certainties; we ought to act upon just and reasonable convictions founded upon just and reasonable grounds .... The law asks for no more and the law demands no less"

The cumulative effect of all the proven facts was so strong that the appellant could not break it. They drove one to conclude that the denials of the appellant of any involvement in the crimes, as supported by his mother and a client, fell to be rejected as beyond reasonable doubt false. The appellant knew that the robbers who attended to the scene were armed with firearms, he made common cause with the robbers, he foresaw the possibility of a killing during the robbery and was reckless as regards the result [*S v Lunhile and Another* 1999 (2) SACR 597 (SCA). For these reasons I would make the order.

The appeal against the convictions is dismissed.

DM THULARE

JUDGE OF THE HIGH COURT

I agree and it is so ordered

T NDITA

JUDGE OF THE HIGH COURT

I agree

J.D LEKHULENI

JUDGE OF THE HIGH COURT

Appearances

For Appellant : Adv. J Weeber

Instructed by: L Weeber

For Respondent: Adv. J Ryneveld

Instructed by: NDPP