FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A105/12

In the matter between:

EDGAR SIPHO MAKIBILE	First Applicant
HENDRIK MANDLA MDLULI	Second Applicant
FRIKKIE LERASA MOFOKENG	Third Applicant
NKATHAZO JACOB MSIMANGA	Fourth Applicant

and

THE STATE	Respondent

CORAM: LEKALE, J *et* DA ROCHA-BOLTNEY, AJ

HEARD ON: 4 FEBRUARY 2013

JUDGMENT BY: LEKALE, J

DELIVERED ON: 21 FEBRUARY 2013

INTRODUCTION AND BACKGROUND

[1] On 5 January 2011 the appellants, who were legally represented, appeared before the Regional Court at Odendaalsrus and pleaded guilty to one count of aggravated robbery, one count of unlawful possession of semi-automatic pistol and one count of unlawful possession of a revolver as

charges 1, 2 and 3 respectively. They were, thereupon, all convicted on the basis of their respective statements submitted in terms of section 112(2) of the Criminal Procedure Act (CPA). On 9 February 2011 they were, eventually, each sentenced to 6 (six) years imprisonment on charge no 2 and 4 (four) years imprisonment on charge no 3, which were directed to run concurrently, with the effect that they each had to serve 5 (five) years imprisonment in respect of both charges. On the robbery charge the fourth appellant was sentenced to 15 (fifteen) years imprisonment, while the other appellants were each sentenced to 12 (twelve) years imprisonment.

[2] They all felt aggrieved by the convictions and sentences on charges 2 and 3 and the sentences on charge no 1. They, thereupon, applied unsuccessfully for leave to appeal against the same. They, thereafter, petitioned the Judge President of this court for leave and, on 27 March 2012, leave was granted to the first and fourth appellants to appeal against the convictions and sentences on charges 2 and 3 and to the two other appellants to only appeal against the sentences on charges 2 and 3.

[3] We only have two appeals before us after the second appellant's appeal technically lapsed following his death. In fact, it appears from the record that he passed away before an application for leave to appeal had been launched on his behalf and, *a fortiori*, before this court was petitioned and could grant

leave to appeal, because, according to Mr Reyneke for the appellants, he entered immortality on 16 September 2011.

[4] The third appellant's appeal was removed from the roll at the commencement of the proceedings due to his failure to prosecute the same after he terminated the mandate of the Legal Aid South Africa on 27 June 2012.

[5] On convicting the appellants on all the charges the trial court found that they each admitted all the elements of the offences and that none of their explanations disclosed any valid legal defence to the charges.

[6] The court below, further, found that the robbery was well-planned and orchestrated regard being had to the fact that some of the miscreants came from Gauteng and were armed with unlawful firearms, inclusive of a semi-automatic pistol. The trial court, further, observed that a shot was fired in the direction of the robbery victim, although he was not struck.

[7] On imposing the relevant sentences, the court *a quo* found that substantial and compelling circumstances existed which warranted a departure from the prescribed minimum sentences of fifteen years in respect of the robbery charge and fifteen years in respect of unlawful possession of a semi-automatic firearm. The trial court, thereupon, proceeded to enter such circumstances as being the fact that the first appellant has a

clean record, the guilty pleas entered by the appellants, the fact that none of the affected people sustained any injuries, although a shot was fired which served as a serious threat, the fact that all the loot was recovered and, as such, the enterprise in question suffered no patrimonial loss as well as the fact that the appellants spent one year five months each in custody as awaiting trial inmates.

[8] In argument Mr Reyneke, for the appellants, contends that there was no evidence whatsoever before the trial court to show that the two appellants shared a common intention with the actual holders of the firearms to exercise possession over the firearms in question and, as such, charges 2 and 3 could not be sustained as against the appellants.

[9] Mr Reyneke, further, submits that in the light of the appellants' personal circumstances as well as the fact that they pleaded guilty and spent a lengthy period in custody awaiting trial, the sentences in question should be directed to run concurrently with the sentences imposed in respect of charge no 1 in the event of the court confirming the convictions on those charges. In his view, the fact that the two appellants were not the actual *detentors* of the firearms reduces their moral blameworthiness and recognition should, as such, be taken of the fact that the firearms were carried and possessed in order to facilitate the commission of the robbery in charge no 1.

[10] Mr de Nysschen, on the other hand, filed a cross-appeal for the aggravation of the sentences and submits that the convictions are in order because the appellants admitted the facts from which it is clear that they had joint possession of the firearms and, in fact, pleaded guilty to the relevant charges.

[11] Mr de Nysschen, further, submits that the trial court misdirected herself when considering whether or not substantial and compelling circumstances existed for departing from minimum sentences. He concludes that the fifteen years imprisonment prescribed for unlawful possession of a semi-automatic firearm, as a minimum sentence, should be imposed and supports the four year sentences imposed in respect of charge no 3.

[12] The gravity of the offences involved, the circumstances in which they were committed, as well as the circumstances surrounding the arrest of the two appellants and their companions are patent from the section 112(2) statements submitted for each appellant during the trial, as well as the submissions made in mitigation and aggravation of the sentences.

[13] It is clear from the statements in question that on the fateful morning the appellants and their two fellow miscreants were at the Spar Supermarket at Odendaalsrus where they assaulted the owner and robbed him of his property to the value of R74 386,00 inclusive of cash. The appellants' two companions carried a semi-automatic pistol and a revolver respectively and

a shot was fired in the direction of the owner, who, fortunately, was not struck. The workers were tied up and, fortunately for all the victims, the police arrived and took control of the situation.

AD CONVICTIONS

[14] It is correctly submitted for the appellants and, effectively, conceded for the State that the enquiry for establishing whether or not there was joint possession by a group of persons is whether or not the State has established the facts from which it can properly be inferred, as the only reasonable conclusion, that:

(a) the group had the common intention (*animus*) to exercise possession over the relevant item through the actual *detentor*; and

(b) the actual *detentor* had the intention to hold the item in question on behalf of the group. (See **S v Mbuli** 2003 (1) SACR 97 (SCA) at 155 b – c.)

[15] It is, further, correct as effectively contended for the appellants, that mere knowledge by the appellants that their fellow robbers were in possession of the firearms is not *per se* sufficient to prove joint possession. (See **S v Mbuli**, *supra*, at paragraph [72].)

[16] In the written submissions Mr Reyneke limits his argument to the section 112(2) statements of the appellants and only to

certain portions thereof. He appears oblivious of the relevant contents of the statements of their fellow robbers. In his oral submissions he, however, correctly concedes that those statements are relevant and should be considered.

[17] In our view a proper enquiry in the instant matter extends to all the section 112(2) statements insofar as the second leg of the inquiry relates to the state of mind of the actual holders of the firearms insofar as the court is required to determine whether the actual *detentors* had the intention to hold the firearms on behalf of the group. In our view the enquiry requires the court to interpret the relevant statements as a whole as the case is in the interpretation of contracts and other documents. The task entails looking at the relevant words and phrases in context and not in isolation, as correctly conceded by Mr Reyneke. (See **Swart v Cape Fabrix (Pty) Ltd** 1979 (1) SA 195 (A) at 202c.)

[18] As correctly submitted by Mr de Nysschen, the two appellants admit as follows in their respective statements after pointing out that they were not in possession of firearms, but knew that their fellow robbers were and that the firearms were going to be used in the robbery:

> "**I admit that the firearms and the ammunition that were taken to the laboratory for analysis [are] the same that my friends and I had in our possession during the commission of the offence.**"

(See page 8 lines 9 – 12 of the record.)

> "**I admit that I am not a firearm licence holder for any of the firearms that we had in our possession.**"

(See page 14 lines 23 – 24 and page 17 lines 7 – 8 of the record.)

> "**I admit that the results in the section 212 affidavit are those of the firearms and ammunition that I had with my co-accused during the commission of the robbery.**"

(See page 115 paragraph 7 lines 13 – 17 of the record.)

[19] The appellants' fellow robbers, on their part, declare as follows in their statements after admitting that they were in possession of the relevant firearms:

> "**... I admit that the results and the findings of the 212 statements are those of the firearms and ammunitions we had with my friends during the robbery.**"

(See page 11 lines 2 – 5 of the record.)

> "**I admit that I am not a firearm licence holder for any of the firearms that we had within our possession.**"

(See page 15 lines 8 – 10 and page 15 lines 15 – 17 of the record.)

[20] In our judgment the frequent appearance of possessory pronouns "**our**", "**we**" and "**my**" in relation to possession in all the statements that served before the court below is indicative of the fact that, although only two robbers actually carried firearms, all the robbers, inclusive of the appellants, exercised possession over such firearms.

[21] It is, further, clear, in our view that when the appellants declare that they were not in possession of firearms, they actually mean that they did not carry any firearms but they jointly possessed the relevant firearms with the actual *detentors*. The only reasonable inference which may be drawn from the said statements, inclusive of the fact that the appellants had a common purpose with the other two miscreants to rob, is that they and their companions had the intention to possess the firearms jointly.

[22] We are, thus, in respectful agreement with counsel for the State that the convictions cannot be faulted on the grounds relied upon by the appellants or on any ground whatsoever regard also being had, as pointed out above, to the fact that, at all material times to the charges, the appellants were acting in concert with the actual *detentors* in the commission of the robbery. In this regard we are of the view that the fact that the appellants acted in concert with the actual *detentors in the commission of robbery* is a factor from which, together with other relevant factors, an inference of joint possession may, in

an appropriate case, be drawn.

AD SENTENCES

[23] It is contended for the appellants that the sentences should be directed to run concurrently with the sentences imposed for aggravated robbery because the appellants were not the actual *detentors* of the firearms and the firearms in question were only possessed in order to carry out the robbery.

[24] On behalf of the State it is submitted that no substantial and compelling circumstances existed to justify a departure by the trial court from the fifteen years prescribed in respect of charge no 2.

[25] The legal position is that a departure from prescribed minimum sentences is justified only in the event of substantial and compelling circumstances actually being found and seen to exist. (See generally **S v Malgas** 2001 (1) SACR 469 (SCA).)

[26] In the absence of such circumstances courts are obliged, as a matter of law, to implement the prescribed minimum sentences. (See **S v Matyityi** 2011 (1) SACR 40 (SCA) at page 53 paragraph [23].)

[27] In determining whether or not substantial and compelling circumstances exist regard is had to the ultimate cumulative impact of the mitigating circumstances on the relevant crime

and the interests of the society with a view to establishing if, in the circumstances of the particular matter, the minimum sentence is just or appropriate. (See **S v Malgas**, *supra*, in general.)

[28] Marginal differences in personal circumstances or degrees of participation of co-offenders which might generally justify differentiating between the co-offenders are not, without more, justification for a departure from minimum sentences as correctly pointed out by Mr de Nysschen. (See **S v Malgas**, *supra*, at page 481.)

[29] As correctly pointed out for the State, the fact that the appellants pleaded guilty in the instant matter is, at best for them, neutral because they were caught *in flagrante delicto* and, as correctly found by the trial court, did not have any reasonable option but to plead guilty. (See **S v Barnard** 2004 (1) SACR 191 (SCA) at 197.)

[30] A plea of guilty in the instant matter does not *per se* indicate genuine remorse on the part of the appellants. It is not evident from the material properly before the trial court what motivated the appellants to commit the crimes and it is, further, not apparent *ex facie* the record what triggered their pleas of guilty. The trial court, therefore, correctly concluded that the appellants and their fellow miscreants were motivated by self-enrichment and greed and that their change of heart was really

as a result of lack of options on their part due to the circumstances under which they were apprehended. (See **S v Matyityi**, *supra*, at 47 a – d.)

[31] The finding that there exist substantial and compelling circumstances to depart from the prescribed minimum sentences goes against the gist of the factual findings and conclusions of the trial court as correctly and effectively pointed out for the State. The reasoning of the trial court in this regard, with respect, resembles a movement of a horse which, in the course of a smooth run, suddenly shies away from a stone. All the factors relied upon to justify lesser sentences are, in fact, either aggravating in nature or neutral at best for the appellants.

[32] There exists, as correctly submitted for the State, no legal justification for departing from the minimum sentences of fifteen years in the present matter. We are, as such, at liberty to interfere and re-adjust the scales of justice to bring them in line with the gravity of the offence, the interests of the society as reflected in the prescribed minimum sentences in question and the personal circumstances of the individual appellants. (See **S v Pieters**, 1987 (3) SA 171 (A).)

[33] There exists nothing on record with regard to how and why the firearms were acquired. There, thus, exists no basis on which to conclude that the firearms were possessed for the sole purpose of committing the robbery herein. In our observation

what is patent *ex facie* the record is that the serial numbers on the firearms had been removed and, as such, the firearms could not be identified thereby.

[34] In the absence of such legal justification for lesser sentences, the prescribed minimum sentence prevails as of law. Failure by the courts to observe the duty to impose minimum sentences, where appropriate, invariably leads to injustice as justice extends both to the perpetrator of a crime and the society. Courts should, therefore, not shy away from imposing prescribed minimum sentences where no substantial and compelling circumstances exist. The subjective views of the presiding officer, with regard to the appropriateness of such sentences without a legal cause therefor, are simply irrelevant to the matter.

[35] The cross appeal must, therefore, succeed.

ORDER

[36] In the result the first and fourth appellants' respective appeals are dismissed.

[37] The convictions on all the three charges, as well as the sentences in respect of charges 1 and 3, are confirmed.

[38] The cross-appeal is upheld and the sentences imposed on the

first and fourth appellants in respect of charge no 2 are set aside and in their place and stead are substituted the following for each of first and fourth appellant:

"**AD charge no 2 :**

Accused 2 and 5 are each sentenced to 15 (fifteen) years imprisonment in terms of section 276(1)(b) of the Criminal Procedure Act read with section 51 of Act 105 of 1997 as amended.

The 4 (four) years imprisonment imposed in respect of charge 3 shall run concurrently with the 15(fifteen) years in respect of charge 2 with the result that each accused shall serve an effective 15 (fifteen) years imprisonment in respect of the two charges."

[39] The sentences are antedated to 9 February 2011.

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L. J. LEKALE, J

I concur.

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P.W. DA ROCHA-BOLTNEY, AJ

On behalf of appellants: Adv J.D. Reyneke
Instructed by: Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of respondent:	Adv J.M. de Nysschen
Instructed by:	Office of the Director of Public Prosecutions BLOEMFONTEIN

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