IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Not Reportable

Case No: AR 548/2018

In the matter between:

THABISO ERNEST WILLIAMS **First Appellant**

SIFISO VICTOR NZAMA **Second Appellant**

PRINCE MZIKAYISE LUPHAHLA **Third Appellant**

and

THE STATE **Respondent**

JUDGMENT

Gorven J (Chetty and Bezuidenhout JJ concurring):

[1] All three appellants, along with a fourth who was accused 2 in the court *a quo* (accused 2), were convicted and sentenced by Gyanda J as follows:

a) Count 1, robbery with aggravating circumstances, 20 years' imprisonment;

b) Counts 2 and 4, attempted murder, ten years' imprisonment on each count. The sentences on these counts were ordered to run concurrently with each other and five years of the sentence was ordered to run concurrently with that imposed on count 1;

c) Counts 5, 6 and 7, theft, 5 years' imprisonment on each count. The sentences on these counts were ordered to run concurrently with each other and with those imposed on all the other counts;

d) Counts 8 and 9, unlawful possession of firearms, and count 10, unlawful possession of ammunition, fifteen years' imprisonment on each count. The sentences on these counts were ordered to run concurrently with each other and ten years of the sentence was ordered to run concurrently with that imposed on the other counts and, in particular, count 1.

This amounted to an effective sentence of 30 years' imprisonment each. In addition, the court imposed a non-parole period in terms of s 276B of the Criminal Procedure Act 51 of 1977 (the Act). All of the offences were alleged to have taken place on 30 August 2007 in the vicinity of Newcastle.

[2] Leave to appeal to this court was granted by the Supreme Court of Appeal to all three of the appellants. It was granted to the first appellant against his convictions on counts 5 and 7, excluding the conviction relating to the Mercedes Benz motor vehicle, and on count 8. It was refused on all other counts. He was also given leave to appeal against the sentences imposed on all of the counts.

[3] It was granted to the second appellant against his convictions and sentences on counts 8, 9 and 10. Leave to appeal was also granted against the imposition of the non-parole period. It was refused on all other counts.

[4] It was granted to the third appellant against his convictions on counts 5 and 7, excluding the conviction relating to the Mercedes Benz motor vehicle, and on counts 8, 9 and 10. It was refused on all other counts. He was also given leave to appeal against the sentences imposed on all of the counts.

[5] Count 5 concerns the theft of a Ford Bantam motor vehicle (the Bantam). Count 7 relates to the theft of a VW Golf (the Golf). Count 8 relates to the possession of an AK47 automatic firearm (the AK47), without the requisite licence to do so, and count 10 to the ammunition found in its magazine. Count 9 relates to the possession of a pistol (the pistol), without the requisite licence to do so.

[6] This means that the appeal concerns the theft by the first and third appellants of the Ford Bantam and VW Golf. It concerns the possession by the first, second and third appellants of the AK47, its ammunition and the pistol. It also concerns the sentences imposed on the first and third appellants on all counts and those imposed on the second appellant on counts 8 to 10, if his appeal on the merits is dismissed. As regards all three appellants, the appeal concerns the imposition of the non-parole period under s 276B of the Act.

[7] The established facts which bear on this appeal are as follows. Vehicles described as a Mercedes [….], a Ford Bantam [….] and a VW Golf [….] had been stolen prior to 29 August 2007. On 29 August 2007, the first appellant received a text message on his cellphone from one Themba (the first name of the erstwhile accused 2). It read as follows: 'Cambry [….], Golf [….], Mercedes Benz [….], Ford Bangtom [….], Track [….].'[1]

[8] On 30 August 2007, the three appellants and accused 2 were involved in an armed robbery of Nedbank in Newcastle. The first appellant

[1] Original spelling retained.

was said to have pointed at bank employees with what was referred to as a handgun. The pistol forming an exhibit was not identified by the witness as being that item. Thereafter, all four of them drove in a silver Mercedes vehicle towards Osizweni. At an intersection leading to Madadeni en route to Osizweni, they were all involved in the attempted murders of Inspectors Mbatha and Khubekha. They thereafter abandoned the Mercedes, leaving all four doors open, at an area known as Dry Cut. The second and third appellants were arrested in a pathless veld about half a kilometre from the Mercedes. The first appellant was arrested separately from them. In retracing their course through the veld, members of the South African Police Service came across a sports bag containing the AK47 with its magazine containing ammunition. In a different place on the same course of travel, they came across the pistol. Both of the firearms in question were linked by ballistics to cartridges found inside the Mercedes. The Mercedes recovered at Dry Cut was one of the stolen vehicles. The Ford Bantam and VW Golf were subsequently recovered. The VW Golf bore a print of the second appellant. The three vehicles recovered bore the registration numbers and letters reflected in the text message.

[9] The State clearly relied on the doctrine of common purpose, which was found to be present in the charges of robbery, attempted murder and theft of the Mercedes. At issue is whether it can be said that the first and third appellants were correctly convicted, on this evidence, of the theft of the Ford Bantam and VW Golf and whether all three of the appellants were correctly convicted of possession of the firearms and ammunition.

[10] As regards the theft of the vehicles, the issue is whether the circumstantial evidence, and in particular the text message to the first appellant, is sufficient to convict the two of them. The only other evidence is that they were involved in the enterprise on 30 August 2007 with

accused 2 and the second appellant. The test for convictions based solely on inference from proved facts is long standing and notorious:[2]

'In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

(1) The inference sought to be drawn must be consistent with all the proved 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. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'

[11] There is no evidence that the appellants ever saw the vehicles. Nor that they knew that all the vehicles mentioned in the text message were stolen. Nor that the third appellant became aware of the text message. If the State intends to rely on the doctrine of common purpose, there is no evidence of any agreement between the four perpetrators to steal the vehicles. Neither does it show that either of these two appellants joined in to the theft committed by others. In my view, there are other possible inferences to draw from the proved facts. The text message to the first appellant might simply have been to communicate that one of those vehicles would be available to them to escape from Nedbank. This need not mean that they would have realised, beyond reasonable doubt, that the vehicles were stolen. Since the vehicle used was the stolen Mercedes, the inference that the first and third appellants were involved in the theft of that vehicle is a good one. That does not, however, apply to the Ford Bantam and VW Golf. In my respectful view, the court a quo erred in coming to that conclusion. As a result, the convictions of the first and third appellants on counts 5 and 7 must be set aside.

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[2] *R v Blom* 1939 AD 188 at 202-3.

[12] What of the firearms and ammunition? The court *a quo* reasoned that:

'[W]e are satisfied that the robbers possessed forearms for their joint venture and for their joint purpose. It would be illogical and unjust to hold that because we cannot say which of the robbers in particular had actual possession of the firearms in question that all of them should therefore be acquitted. We find that all four accused jointly possessed the two firearms . . . and the ammunition contained therein.

It would be absurd in the extreme for the accused to be jointly liable for the conduct of the perpetrator using the illegal firearms and weapons but be excluded from liability for the possession of the self-same illegal weapons. In this regard reference is made to the case of *S v Mbuli* 2003 (1) SACR 97 (SCA).'

It is worth first considering the basis on which the appellants were held liable for the attempted murder charges. The approach to *mens rea* relating to common purpose convictions has been said to be:

'If the prosecution relies on common purpose, it must prove beyond a reasonable doubt that each accused had the requisite *mens rea* concerning the unlawful outcome at the time the offence was committed. That means that he or she must have intended that criminal result or must have foreseen the possibility of the criminal result ensuing and nonetheless actively associated himself or herself reckless as to whether the result was to ensue.'[3]

[13] The facts in this matter bear more than passing resemblance to those in *S v Makhabela & another*,[4] where this issue was dealt with:

'The applicants may not have intended the criminal result of murder, but they must have "foreseen the possibility of the criminal result [of murder] ensuing". This is by virtue of the fact that the other perpetrators were carrying firearms, which they must have known would be used if the plan went awry, yet they nonetheless actively associated themselves with the criminal acts.'[5]

In the present matter, the conviction for attempted murder was based on the fact that, at the robbery, all four were aware that firearms were

[3] *S v Thebus & another* 2003 (2) SACR 319 (CC) para 49.
[4] *S v Makhabela & another* 2017 (2) SACR 665 (CC).
[5] *Makhabela* para 44. References omitted.

brandished. They then together entered the Mercedes, knowing that the firearms were in the possession of at least two of them and might be used if attempts were made to prevent their escape. When the firearms were used against the two complainants on the attempted murder count, they had associated themselves with the enterprise. They were thus appropriately convicted on the basis of common purpose.[6]

[14] The approach to joint possession differs markedly. The Constitutional Court[7] has upheld the *dictum* in *S v Nkosi*:[8]

'The issues which arise in deciding whether the group (and hence the appellant) possessed the guns must be decided with reference to the answer to the question whether the State has established facts from which it can properly be inferred by a Court that:

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

(b) the actual detentors had the intention to hold the guns on behalf of the group.

Only if both requirements are fulfilled can there be joint possession involving the group as a whole and the detentors, or common purpose between the members of the group to possess all the guns.' [9]

The Constitutional Court has adopted the distinction drawn by Burchell[10] in the approach to common purpose regarding 'consequence crimes' like murder and 'circumstance crimes' like possession.[11] In *Makhabela*, the Constitutional Court went on to hold:

'These cases show that there would be very few factual scenarios which meet the requirements to establish joint possession set out in *Nkosi*. This is because of the difficulty inherent in proving that the possessor had the intention of possessing a firearm on behalf of a group. It is clear that, according to established precedent,

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[6] *S v Mgedezi* 1989 (1) SA 687 (A).
[7] *Makhabela* para 46.
[8] *S v Nkosi* 1998 (1) SACR 284 (W) at 286*h-i*.
[9] This test was approved in *S v Mbuli* 2003 (1) SACR 97 (SCA) para 10.
[10] Burchell *Principles of Criminal Law* 5 ed (Juta & Co Ltd, Cape Town 2016) at 483.
[11] *Makhabela* para 47.

awareness alone is not sufficient to establish intention of jointly possessing a firearm or the intention of holding a firearm on behalf of another in our law.'[12]

[15] I see no basis to distinguish the present matter from that of *Makhabela*. The State confronted not only the difficulties adverted to there, but the difficulty of proving which two of the four were the physical detentors of the firearms and ammunition in question. On the facts of this matter, it is my view that the court *a quo* erred in the finding that the three appellants jointly possessed the two firearms and the ammunition. As a result, the convictions of the second and third appellants on counts 8 to 10 must be set aside and that of the first appellant on count 8 (being the only one of those three counts on which he was granted leave) must be set aside.

[16] This then leaves the issue of the sentences. In the light of the outcome of the appeals against their convictions, the sentences of the appellants on those counts fall away. That disposes of the appeal against the sentences of the second appellant, other than the issue of the non-parole period which will be addressed below. As regards the first and third appellants, I see no basis for interfering on appeal in the duration of the sentences imposed on any other counts. I can find no misdirections as to duration. Nor could counsel for the appellants point to any. The sentences do not induce a sense of shock due to disproportionality. The court *a quo* took into account that the offences all took place within a short period of time and formed part of a single tableau. Gyanda J also took account of the cumulative effect of the sentences and ordered that some would run concurrently with others.

[17] Given the counts which will be set aside, the sentences for the first appellant will be as follows:

a) Count 1, 20 years' imprisonment;

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[12] *Makhabela* para 55.

b) Counts 2 and 4, 10 years imprisonment on each count, which sentences are to run concurrently with each other and five years of which are to run concurrently with that imposed on count 1.

c) Count 6, 5 years' imprisonment, which sentence is to run concurrently with that imposed on all other counts.

d) Counts 9 and 10, fifteen years' imprisonment on each count, which sentences are to run concurrently with each other and ten years of which is to run concurrently with that imposed on the other counts and, in particular, count 1.

The effective sentence is thus one of 30 years' imprisonment.

[18] Given the counts which will be set aside, the sentences for the second appellant will be as follows:

a) Count 1, 20 years' imprisonment;

b) Counts 2 and 4, 10 years imprisonment on each count, which sentences are to run concurrently with each other and five years of which are to run concurrently with that imposed on count 1.

c) Counts 5, 6 and 7, 5 years' imprisonment on each count, which sentences are to run concurrently with each other and with those imposed on all other counts.

The effective sentence is thus one of 25 years' imprisonment.

[19] Given the counts which will be set aside, the sentences for the third appellant will be as follows:

a) Count 1, 20 years' imprisonment;

b) Counts 2 and 4, 10 years imprisonment on each count, which sentences are to run concurrently with each other and five years of which are to run concurrently with that imposed on count 1.

The effective sentence is thus one of 25 years' imprisonment.

[20] The second appellant was specifically granted leave to appeal against the application of the non-parole period. The other two appellants, as part of the general leave to appeal granted to them regarding all of the sentences, also have leave on this issue. This much was correctly conceded by the State in argument before us.

[21] Sentence in this matter was passed on 28 October 2010. The law on the use of s 276B of the Act was first clarified in the matter of *S v Stander*.[13] It was there recognised that, prior to the introduction of s 276B of the Act, the question of parole rested solely on the discretion of the Department of Correctional Services. As a result, the empowering of a court to direct a non-parole period amounted to an incursion of the judiciary into the executive sphere.[14] As a result, the provisions must be strictly construed and applied only in exceptional circumstances. The underlying rationale for this is that decisions affecting parole turn on a wide range of factors and a court cannot in advance determine many of these. The approach there set out was:

'[A] court, before making a non-parole order, should carefully consider whether exceptional circumstances exist. It also found, correctly in my view, that exceptional circumstances cannot be spelled out in advance in general terms, but should be determined on the facts of each case. These should be circumstances that are relevant to parole and not only aggravating factors of the crime committed, and a proper evidential basis should be laid for a finding that such circumstances exist.'[15]

In *S v Mthimkulu*,[16] the Supreme Court of Appeal emphasised the finding in *Stander* that a failure to allow parties to address the court on the applicability of S 276B in the circumstances of that matter amounts to a

[13] *S v Stander* 2012 (1) SACR 537 (SCA).
[14] *Stander* para 12.
[15] *Stander* para 20.
[16] *S v Mthimkulu* 2013 (2) SACR 89 (SCA).

misdirection.[17] This approach has found favour with the Constitutional Court.[18]

[22] As appears from what I have said above, the court *a quo* did not have the benefit of the guidance derived from this learning. It did not deal at all with the need for exceptional circumstances, or any circumstances bearing on the question of parole. It did not afford counsel the opportunity to address it on the appropriateness of imposing a non-parole period. In this, it erred. In argument before us, the State candidly conceded that there was no warrant for retaining this aspect of the sentence of any of the three appellants. This concession was well made. The non-parole period should be set aside in respect of all of the appellants.

[23] In the result:

1. The appeal of the first appellant against his convictions on counts 5, 7 and 8 is upheld and these convictions and sentences are set aside.

2. The appeal of the second appellant against his convictions on counts 8, 9 and 10 are upheld and these convictions and sentences are set aside.

3. The appeal of the third appellant against his convictions on counts 5, 7, 8, 9 and 10 is upheld and those convictions and sentences are set aside.

4. The appeals of all three appellants against the imposition of a non-parole period in terms of s 276B of the Criminal Procedure Act 51 of 1977 is upheld and the non-parole period is set aside.

5. The appeals of the first and third appellants against their sentences is refused. Accordingly, the sentences of the three appellants are as set out below.

6. The sentences of the first appellant which remain are:

a) Count 1, 20 years' imprisonment;

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[17] *Mthimkulu* paras 20&21.
[18] *Jimmale & another v The State* 2016 (2) SACR 691 (CC) para 20.

b) Counts 2 and 4, 10 years imprisonment on each count, which sentences are to run concurrently with each other and five years of which are to run concurrently with that imposed on count 1.

c) Count 6, 5 years' imprisonment, which sentence is to run concurrently with that imposed on all other counts.

d) Counts 9 and 10, fifteen years' imprisonment on each count, which sentences are to run concurrently with each other and ten years of which is to run concurrently with that imposed on the other counts and, in particular, count 1.

The effective sentence is thus one of 30 years' imprisonment.

7. The sentences of the second appellant which remain are:

a) Count 1, 20 years' imprisonment;

b) Counts 2 and 4, 10 years imprisonment on each count, which sentences are to run concurrently with each other and five years of which are to run concurrently with that imposed on count 1.

c) Counts 5, 6 and 7, 5 years' imprisonment on each count, which sentences are to run concurrently with each other and with those imposed on all other counts.

The effective sentence is thus one of 25 years' imprisonment.

8. The sentences of the third appellant which remain are:

a) Count 1, 20 years' imprisonment;

b) Counts 2 and 4, 10 years imprisonment on each count, which sentences are to run concurrently with each other and five years of which are to run concurrently with that imposed on count 1.

The effective sentence is thus one of 25 years' imprisonment.

GORVEN J

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CHETTY J

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BEZUIDENHOUT J

DATE OF HEARING:	2 August 2019
DATE OF JUDGMENT:	12 August 2019
FOR THE APPELLANTS:	B Mbatha instructed by the Legal Aid Board.
FOR THE RESPONDENT:	DA Paver instructed by The Director of Public Prosecutions.