OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: **A250/2023**

In the matter between:

ZANEPHI LUNGA	First Appellant
MBASANA VELILE	Second Appellant
ZWELITHEMBA MAGWENA	Third Appellant
ANELE DONKER	Fourth Appellant

v

THE STATE	Respondent

Coram	:	Salie, J et Katz, AJ
Date of Hearing	:	26 April 2024
Written Judgment delivered	:	20 May 2024

Counsel for First Appellant	:	Adv. P.S. Smit
Attorneys for First Appellant	:	Chennells Albertyn Attorneys
Attorney for Second to Fourth Appellants:		Ms S Kuun
Counsel for Respondent	:	Adv. L Williams

JUDGMENT DELIVERED ELECTRONICALLY ON 20 MAY 2024

KATZ, AJ:

INTRODUCTION

1. This appeal concerns four adult males who were each convicted on 13 December 2021 by the Regional Court at Paarl of four separate counts (counts 2- 5). They were consequently sentenced in respect of each of the 4 counts. The different sentences imposed for the different counts were uniformly applied to the four appellants.

2. The charges arose from a robbery, in which at least one firearm was involved, that took place on 11 May 2018 at Pniel Mini Market within the Regional Division of the Western Cape.[1]

[1] Count 1 concerned a customer who was in the store at the time of the robbery; but no evidence was led in respect of the customer.

3. Counts 2[2] and 3[3] constituted aggravated robbery, count 4 the possessing of a firearm without a licence and count 5 the unlawful possession of ammunition.

4. The four appellants were each sentenced to 15 and 5 years in respect of counts 2 and 3 respectively, with the 5-year sentence imposed in respect of count 3 to run concurrent with the 15-sentence imposed on count 2. [4]

5. In respect of counts 4 and 5 taken together they were each sentenced to 5 years imprisonment.

6. The 5-year sentences for the latter two counts were to run after the completion of the first 15-year sentence.

7. They were thus each sentenced to an effective prison term of 20 years by the Regional Court on 13 December 2021.

8. They were all legally represented throughout the trial.

9. Because of certain procedural quirks[5] the first appellant's appeal, leave to appeal having been granted by the Regional Court, only concerns the conviction and sentence in respect of counts 4 and 5; whereas the second to fourth appellants' appeal, leave to appeal having been granted by this Court

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[2] Count 2 concerned the owner of the store who was in the store at the time of the robbery.
[3] Count 3 concerned a store assistant who was in the store at the time of the robbery.
[4] The 15-year sentence was imposed pursuant to the minimum sentence protocols dealt with below.
[5] Although the second to fourth appellants appeal against sentence on counts 2 and 3, no appeal lies on behalf of the first appellant against sentence on counts 2 and 3.

on petition,[6] is against the convictions in respect of counts 4 and 5 and **all** the sentences.

10. On petition this Court directed the Registrar to enrol the appeal hearings in respect of all the appellants at the same time.

BACKGROUND FACTS

11. On 11 May 2018, in Pniel, Western Cape, two men entered a convenience shore.

12. Inside the store were: the owner (Mr. Mohammed Babul) his nephew ('Asiamia') and a customer ('Sharif Whakile').

13. Mr. Babul told the trial court that two men entered his store. He initially thought they were customers.

14. One of the men, who was dressed in a yellow jacket, had a firearm in his possession.

15. The man in the yellow jacket told Mr. Babul to lie on the floor. The yellow jacketed man searched him and took Mr. Babul's phone.

[6] The Regional Court refused leave to appeal against sentence in respect of all the sentences but granted leave to appeal in respect of the convictions on counts 4 and 5.

16. The other man, dressed in 'darkish' clothing and carrying a school bag, walked around the counter and took cash, cigarettes and also Mr. Babul's nephew's phone. The men left the shop and Mr. Babul saw them alighting a white Quantum taxi.

17. He did not see the registration number of the vehicle but noticed that there was a sticker with the colours of the South African flag on the back of the taxi. Mr. Babul reported the robbery immediately by phoning the police.

18. About 10 to 12 minutes later the police phoned Mr. Babul and informed him that they had apprehended suspects.

19. Mr. Babul immediately went to the scene where four suspected robbers had been apprehended.

He identified the taxi, but he could not identify the faces of any of the men, save for noticing that one of the suspects (the fourth appellant) wore a yellow jacket. He identified goods found in the taxi as his property. The items included a box, in which he kept loose cigarettes, a CD container full of coins, cash in the amount of R 8,500 and the cell phones. The police returned the items to Mr. Babul as well as the other customer's phone that was also stolen during the robbery. Mr. Babul did not report any other stolen or missing items.

20. The store has video surveillance and the footage as well as some still images of the footage were viewed by all the parties and handed in as exhibits. Mr. Babul's version that one of the assailants wore a yellow top, the man in

possession of a firearm, the footage could not provide any assistance in identifying the two men.

21. Police officials involved with the arrest and search of suspects and the taxi and seizure of the goods found, testified in court. They told the court they received a call informing them of the suspected vehicle fleeing the scene of a robbery.

22. The police were told to be on the lookout for a vehicle with a specific 'CEY' registration number. The vehicle was apprehended on the R44 near Stellenbosch. The police ordered the vehicle to stop and the driver cooperated.

23. Inside the police found a toy gun and about a 100 metres away from the taxi, next to the road, two firearms with magazines containing ammunition. The stolen goods were found inside the taxi.

24. By consent between the parties, a ballistic report was handed into court and forms part of the record. According to the report both the weapons found had the serial numbers removed. The firearms were identified as:

One 9mm Parabellum calibre Norinco model 213 semi-automatic pistol, one magazine and eight 9 mm cartridges.

One 7 62x25 mm calibre Norinco model 54 Type semi-automatic pistol, one magazine and 4 cartridges.

25. Mr. Miya testified that he was a customer whose phone was stolen during the robbery. He could not contribute to the issue of identity.

26. The owner of the taxi testified. He stated that the tracking of the taxi demonstrated that whilst the taxi was in that area, it was not on any permitted route. In effect, the driver had gone rogue.

27. The first appellant elected not to testify. The second, third and fourth appellants testified. They claimed to be passengers that boarded the taxi at different times and places. They denied knowing each other. They all stated that the first appellant was the driver, and they denied robbing a store and being in possession of firearms or ammunition.

28. The trial court rejected the versions of the appellants.

THE ISSUES

29. During the appeal hearing three crisp issues arose for determination:

(i) Were the appellants correctly convicted on counts 4 and 5?

(ii) Were the sentences imposed on the second to fourth appellants on count 2[7] appropriate and if not, should this Court interfere with it; and

[7] The 5-year sentence for the armed robbery conviction in count 3 is appropriate. It is the 15-year sentence on count 2 that is issue.

(iii) If this Court does interfere with the sentences imposed the second to fourth appellants, is it fair that the first appellant's sentence on those counts should not be considered, because of the procedural quirk, viz that his sentence on count 2 is not before this appeal court.

CONVICTIONS ON COUNTS 4 and 5

30. In counts 4 and 5 all the appellants were found guilty of possession of firearms and ammunition respectively on the basis of the doctrine of ***joint possession***.

31. The trial court correctly (other for the fourth appellant who was wearing the yellow jacket) found that '*[t]he evidence is clear that the possession of [the] firearms cannot be linked physically to any of the accused specifically*.'

32. The State accepted that it could not prove actual possession [in respect of counts 4 and 5] on the part of the appellants, other than the fourth appellant who was wearing the yellow top and seen in possession of a firearm at the armed robbery.

33. The conviction in respect of counts 4 and 5 in respect of the first to third appellants could thus only follow if the State found that the appellants jointly possessed the firearms, though the application of the "joint possession" test.

34. The "joint possession" principle was accepted by the Constitutional Court in *Makhubela*[8] as:

"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."*

35. The Constitutional Court[9] acknowledged there would be very few factual scenarios which meet the requirements to establish joint possession.

This is because of the inherent difficulty in proving that the possessor had the intention of possessing a firearm on behalf of a group. "Awareness alone is not sufficient to establish intention of jointly possessing a firearm or the intention of holding a firearm on behalf of another."

36. In *Makhubela*, it was common cause that it could not be proven that the appellants had any firearms in their possession.

The Constitutional Court found that there was no evidence from which it could have been inferred that the appellants had the intention to exercise possession

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[8] *Makhubela v S, Matjeke v S* (CCT216/15, CCT221/16) [2017] ZACC 36; 2017 (2) SACR 665 (CC); 2017 (12) BCLR 1510 (CC) (29 September 2017) at para [46] quoting from *S v Nkosi* 1998 (1) SACR 284 (W) at 286H-I.

[9] *Makhubela* at para [55].

of the firearms through the perpetrators who had firearms in their possession, or that those persons had the intention to hold the firearms on behalf of all of the co-accused. And even if they were aware that some of their co-accused possessed firearms, that did not lead to the conclusion beyond reasonable doubt that they possessed the firearms jointly with their co-accused.

37. The principles of common purpose do not find application when an accused is tried for the unlawful possession of a firearm used in the same robbery. Rather, it is the principle of joint possession which applies.

38. The mere fact that a participant in a robbery where a co-perpetrator possessed a firearm does not generate the finding beyond reasonable doubt, that all the co-perpetrators possessed the firearms jointly.

39. The inference of joint possession is only justifiable if the factual evidence excludes all reasonable inferences other than that the group had the intention to exercise possession through the actual detentor, and the actual detentor had the intention to hold the guns on behalf of the group.

40. Only if both requirements are fulfilled can there be joint possession involving the group as a whole.

41. Indeed, mere knowledge that another person in the group possesses a firearm, or even acquiescence to its use in the execution of the common purpose to commit an offence, is not sufficient for joint possession.

42. In the trial, there was no evidence physically linking the first to third appellants to any of the firearms or ammunition.

43. Even if it is accepted that the first to third appellants knew of the presence of the firearm(s) and acquiesced in their use during the armed robbery at the mini market, this knowledge and acquiescence does not amount to the necessary *animus* to possess any or all of the firearms jointly with the other appellants.

44. The State failed to prove beyond a reasonable doubt that the first to third appellants were joint possessors of any or all of the firearms and/or ammunition and the convictions in terms of counts 4 and 5 cannot stand.

45. I would uphold the appeals against the convictions and consequently the sentences on counts 4 and 5 in respect of the first to third appellants. The fourth appellant was wearing a yellow jacket, and the yellow jacketed robber was identified as being in possession of a firearm. His conviction and sentence are not overturned.

SENTENCE ON COUNT 2 (second to fourth appellants)

46. The minimum prescribed sentence in terms of section 51(2)(*a*)(i) of the Criminal Law Amendment Act 105 of 1977 (the CLAA) was applicable to counts 2, 3 and 4.

47. Regarding the fourth appellant, I can see no reason to interfere with the sentences imposed for counts 4 and 5.

48. The minimum sentence of 15 years' imprisonment for armed robbery was imposed on all four appellants, despite the Regional Court finding that substantial and compelling circumstances existed to deviate from the prescribed minimum sentence.

49. Section 51(3)(*a*) of the CLAA provides:

"If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and ***must*** *thereupon impose such lesser sentence." (emphasis added)*[10]

50. The word "**must**" replace the word "may" by an amendment to the Criminal Law (Sentencing) Amendment Act, Act 38 of 2007.[11] As it was put in *S v Mzotsho*[12] (Sentence) at para [5] : "In both instances the court ***must*** *deviate from the imposition of the minimum sentence if "substantial and compelling circumstances" are found to exist."*[13]

51. I am the view that even before the amendment of section 51(3)(a) a sentencing court having found substantial and compelling circumstances existed had an obligation to impose a lesser sentence.[14]

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[11] Government Notice No 1257, 31 December 2007 Vol 510, *Government Gazette,* No. 30638,
[12] (63/2021) [2021] ZAGPJHC 704 (12 November 2021)
[13] The Court in *Mzotsho* concluded that substantial and compelling circumstances did not exist (para 16) and imposed the minimum sentence.
[14] The minimum sentence regime was dealt with extensively *S v Dodo* (CCT 1/01) [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC) (5 April 2001) and *S v Malgas* (117/2000) [2001] ZASCA 30; [2001] 3 All SA 220 (A) (19 March 2001).

52. The Constitutional Court has held that the use of the word "may" in legislation sometimes can be read as conferring a power coupled with a duty to use it.[15] The exercise of the power afforded is not in truth one of discretion.

53. A court will read "may" as "must" to achieve a constitutional result and to better afford constitutional protection to persons affected by the relevant decision.[16]

54. In *Saidi*, the Constitutional Court read a refugee reception officer's discretion ("may") to extend an asylum seeker's permit as a duty.

The Constitutional Court adopted this interpretation to "better afford an asylum seeker constitutional protection" and to safeguard their constitutional rights to human dignity, access to healthcare and education, and freedom and security of the person.[17]

55. Should a similar construction have applied in the minimum sentence context? In other words, once a sentencing court found that substantial and compelling circumstances existed to deviate from the prescribed minimum sentence exist must the court have imposed a lesser sentence?[18]

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[15] *Saidi v Minister of Home Affairs* [2018] ZACC 9; 2018 (7) BCLR 856 (CC); 2018 (4) SA 333 (CC) at para 17.
[16] *Saidi* at para 18; *Joseph v City of Johannesburg* [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC) at para 73.
[17] *Saidi* at para 18.
[18] Or can the sentencing court nevertheless impose the prescribed minimum after having found substantial and compelling circumstances to deviate?

56. My view is the answer would have been yes. The word "may" in section 51(3)(a), as it then was, properly construed required as matter of law that a lesser sentence be imposed.

57. This construction is supported by common sense, promotes rights[19] and in any event, it is hard to think of an example where it is rational for the sentencing court to impose the prescribed minimum having already found the existence of substantial and compelling circumstances.

58. Significantly, the Regional Court during sentencing all four appellants on counts 2 and 3 considered the minimum sentence regime. She stated:

> "*Secondly, should the Court consider handing down the minimum legislation [sic] it will lead to a sense of shocking inappropriateness. Simply and solely on the grounds thereof the Court finds substantial and compelling circumstances to deviate and construct the sentence in such a manner that it would lead to justice.*"

59. Once the trial sentencing court found there substantial and compelling circumstances existed, she could not as a matter of law have imposed the prescribed minimum sentence.

In coming to the conclusion there were substantial and compelling circumstances she had already weighed the aggravating and mitigating factors

[19] The rights implicated by the minimum sentence regime are set out in detail in S v Dood (*supra*).

regarding sentence. It follows on these facts and moreover for the reason that the two counts stem from the same event, that deviation ought to have been in respect of both sentences.

60. And it cannot be ignored that the Regional Court imposed a lesser sentence (5 years) for the one conviction of armed robbery (count 3) without explanation as to why the minimum sentence was imposed in respect of the other count (count 2), bearing in mind that both counts arose from the same sets of facts. A sentencing court that imposes the minimum sentence for one charge, but not another charge arising from the same set of facts is required to justify that difference.

61. In imposing the minimum sentence in these circumstances, the Regional Court committed a material misdirection.

62. This Court ought to set aside the sentence imposed by the Regional Court on count 2 and impose what it deems to be an appropriate and suitable sentence. That is the course I believe is in the interests of and in accordance with justice.

63. I have considered all the facts adduced at the trial, including the personal circumstances of the appellants, the nature of the crime and the interests of society. I conclude on a conspectus of all the facts that an appropriate sentence for count 2 in respect of the second to fourth appellants would be ten years imprisonment with two suspended on certain conditions.

SENTENCE ON COUNT 2 (first appellant)

64. Having come to the conclusion that the 15-year sentence imposed on second to fourth appellants was too harsh and was inappropriate, may this Court even consider that same minimum sentence imposed on the first appellant, bearing in mind he was not granted leave to appeal his sentence on count 2.

65. It seemed to me that *prima facie* it would unfair and harsh for the first appellant to be subject to a harsh and inappropriate sentence and that there is nothing this Court could do to alleviate that unfairness because he was not granted leave to appeal sentence on count 2.

66. At the hearing of these appeals on Friday 26 April 2024 the Court requested all the legal representatives to submit a note on the powers of this Court to consider sentence where such sentence was not subject to the appeal. Mr. Smit, Ms. Kuun and Ms Williams obliged.

67. The joint note suggests section 173 of the Constitution of the Republic of South Africa, 1996, which states "[t]he Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice" could be used by this Court to come to the assistance of first appellant.

68. I am doubtful whether section 173 of the Constitution can be utilized in this fashion.[20] It is a power to regulate a court's process, rather than to expand its jurisdiction. Section 173 cannot grant a court jurisdiction to interfere with sentence if there is no statutory authority providing for such jurisdiction. My conclusion is consistent with the principle of subsidiarity.[21] "Subsidiarity denotes a hierarchical ordering of institutions, of norms, of principles, or of remedies, and signifies that the central institution, or higher norm, should be invoked only where the more local institution, or concrete norm, or detailed principle or remedy, does not avail"[22] A constitutional provision ought not to be invoked without first considering the statutory scheme underlying, as in this case, this Court's jurisdiction granted by statute. In any event, I doubt section 173 can be used to grant this Court jurisdiction if it is not granted such under any legislation.

69. Section 304(4) of the Criminal Procedure Act, which states:

> *"If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall*

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[20] In saying this I am aware of various decisions in for example *S v Lubisi: in re S v Lubisi and Others* 2003 (2) SACR 589 (T) and *Hansen v The Regional Magistrate, Cape Town and Another* 1999 (2) SACR 430 (C). I prefer the approach adopted in *Van Der Merwe v S* (A449/07) [2008] ZAWCHC 107; 2009 (1) SACR 673 (C) (30 May 2008) where the Court effectively held that section 173 could not come in aid. At para [26] the Court stated: "While I am in support of the view that s 173 of the Constitution does expand the jurisdiction of the Supreme Court, I am not convinced that the provision confers additional rights on the High Court to grant leave to appeal over and above the clear provisions and processes created by the statutes and the various Rules of Court."

[21] *My Vote Counts NPC v Speaker of the National Assembly and Others* (CCT121/14) [2015] ZACC 31 (30 September 2015)

[22] My Vote Counts at [46].

have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section."

70. The jurisdictional factors set out in section 304(4) are:

    (i) criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302; or
    in which a regional court has imposed any sentence; and

    (ii) it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof; and

    (iii) the proceedings in which the sentence was imposed were not in accordance with justice.

71. If these jurisdictional facts are present, then such High Court or judge shall have the same powers in respect of such proceedings **as if** the record thereof had been laid before such court or judge in terms of section 303 or this section.

72. The powers of this Court under section 303 and 304 of the Criminal Procedure Act are to confirm, reduce, alter or set aside the sentence or any order of the magistrate's court.[23]

[23] Section 304(2)(c)(ii).

73. All the jurisdictional factors set out in section 304(4) are present in these appeals, and particularly in respect of the sentence imposed on the first appellant on count 2.[24]

74. Therefore, I conclude that this Court has the jurisdiction to confirm, reduce, alter or set aside the wrongly prescribed minimum sentence imposed on first appellant on count 2.

75. For the same reasons, the sentence (the prescribed minimum) imposed for count 2 in respect of the second to fourth appellant falls to be set aside and a fresh sentence imposed by this Court this Court ought to do the same concerning the first appellant. That is the appropriate (in accordance with justice) approach.

76. In the result, I would propose the following orders:

The appeals are upheld only to the following extent:

1. *The convictions and sentences on counts 4 and 5 in respect of the first to third appellants are set aside;*

2. *The first to third appellants are found not guilty of counts 4 and 5;*

[24] Cf. *Komanisi v S* (A22/19) [2019] ZAWCHC 39 (22 March 2019)

3. *The sentences in respect of all four appellants on counts 2 and 3 read together are set aside;*

4. *The sentences referred to in paragraph 3 above are replaced with the following:*

   "Accused number 1, accused number 2, accused number 3 and accused number 4 are each sentenced to ten years of imprisonment, two years of which are suspended on condition the accused are not convicted of any offence involving violence in the next five years, and are antedated to 13 December 2021."

5. *The balance of the appeals are dismissed.*

[redacted]

KATZ AJ

ACTING JUDGE OF THE HIGH COURT

WESTERN CAPE

I CONCUR, AND IT IS SO ORDERED.

[redacted]

SALIE J

JUDGE OF THE HIGH COURT

WESTERN CAPE