

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN**

CASE NO: CA&R 51/18

Reportable	Yes
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In the matter between:

ANDILE MAKELENI

1ST Appellant

NKOSANA MXUBE

2ND Appellant

and

THE STATE

Respondent

FULL BENCH APPEAL JUDGMENT

D VAN ZYL DJP:

1) The two appellants were convicted on a number of counts which included the unlawful possession of a firearm (count 5) and its ammunition (count 6) in

contravention of sections 3 and 90 of the Firearms Control Act 60 of 2000 (the Act). They were given leave to appeal against their convictions only on those two counts.

2) The charges arose from events which took place on the night of 16 February 2016 and resulted in the tragic killing of Sergeant Gilwa, a police officer who was stationed at the Kinkelbos police station. The evidence was that while on patrol, two police officers stopped a speeding vehicle that was driving on the national road (N2) near the town of Colchester. The vehicle, a light open truck (a bakkie), had five occupants. Two of the occupants were seated inside the bakkie and the remaining three were sitting on the load bed of the vehicle.

3) After an initial search of the vehicle the two police officers requested assistance. The deceased and warrant officer Nel responded. Upon their arrival they approached the vehicle and promptly started with a search of the occupants who were all outside the vehicle. While busy with that, warrant officer Nel heard a commotion. He saw the deceased involved in a struggle with one of the occupants. He approached in an attempt to assist the deceased. The occupant concerned then produced a firearm from the front of his pants. He fired a shot at warrant officer Nel who sustained a gunshot wound to his shoulder.

4) Nel ran away and took cover behind a police vehicle from where he heard another gunshot. He saw the occupants of the bakkie running in different directions. Some went towards Colchester and others in the direction of the bakkie. Nel and the other two police officers fled in the two police vehicles. The deceased was later found with a fatal gunshot wound next to the road in the area where he and Nel had earlier attempted to search the occupants of the bakkie. The bakkie was found abandoned at a nearby crossing. It was searched and a firearm and ammunition was found on the back of the vehicle.

5) Following their arrest the two appellants were charged with and convicted of the murder of the deceased, the attempted murder of warrant officer Nel, a robbery that was committed the day before in Stutterheim, and the unlawful possession of a firearm and ammunition. The latter two convictions were in respect of the firearm and the ammunition that was found in the vehicle at Colchester. In the appeal the only issue that was raised for determination was that of joint possession. It was contended that regardless of the fact that the two appellants may have acted with other unknown persons in the furtherance of a common purpose, it cannot be concluded that they jointly possessed the firearm and the ammunition, or that they did so jointly with the remainder of the group of persons who were in the vehicle.

6) The trial Court did not state the basis for the appellants' convictions on counts 5 and 6. The nature of the evidence placed before the trial Court and its reasoning however strongly suggests that it convicted the appellants on the basis of the doctrine of common purpose.

7) In terms of sections 3 and 9 of the Act the unauthorised possession of a firearm or ammunition is a punishable offence. Possession is a legal concept that has developed in the context of the different branches of the law. It has been the source of much confusion. Criminal possession appears to be no different. The word "**possess**" is not defined in the Act. As a legal concept possession consists of two core elements, the exercise of physical control (**corpus**) over an article with the intention (**animus**) to do so. The concept of possession in a criminal context is no different and it is accordingly the exercise of a required degree of control over an object together with the intent to do so. (S v Adams 1986 (4) SA 882 (A) at 890 G – H).

8) The **animus** element does not form part of the culpability (**mens rea**) of the offence, but of the description of the act of possession (**actus reus**) required for a conviction. (See Snyman Criminal Law 6th ed at page 68). It is important to keep this distinction in mind when dealing with possessory crimes. (S v Mosoinyane 1998 (1) SACR 583 (T) at 592 c –d). The **animus** element determines the intent with which a person exercises physical control over an object. It serves not only to will the exercise of control over the object, but is determinative of the legal consequences which are to flow therefrom. What the precise content is of the intent (**animus**) with which a person is required to control the object in question in determining whether it constitutes a statutory crime, is to be determined with reference to the intention of the legislature in any particular case (Snyman at page 63 and 427. Also S v Brick 1973 (2) SA 571 (AD) at 579 H). Considering the purpose of the Act expressed in section 2 thereof, it has been suggested that the intention of the legislature is to criminalise the physical control over the firearm with the intention of possessing it, either as if the possessor were the owner, or merely to keep or guard it on behalf of, or for the benefit of, somebody else (Snyman at page 429). It is not necessary for present purposes to express any views in this regard.

9) Control is a question of fact and dependant on the circumstances of each case. Control of an object or article may be direct, that is by the exercise of actual physical control over it, or in the absence thereof, control may be exercised indirectly by the ability to exercise control over the object, for example, the exercising of control over access to the place where the article is kept. (S v Adams at 890 G –H).

10) The mental element of **animus** in turn requires not only knowledge of the existence of the object, but also an awareness of the exercise of control over it. (Snyman at page 65. See also S v Brick at 580 C – D and S v Mosoinyane at 592 b – c).

11) A person may be the sole possessor of an object or he may jointly possess it with other persons if they simultaneously have the required **animus** for possession. There is no direct evidence, or evidence from which the inference can be drawn that any one of the two appellants were either directly or indirectly in control of the firearm and ammunition. The evidence proved that there were two firearms in the vehicle. The one firearm was used by an unidentified person to shoot the deceased and his partner Nel. That firearm was never found. The other firearm and its ammunition, the subject matter of counts 5 and 6, was later found on the back of the abandoned bakkie. The evidence does not serve to find the inference that either of the two appellants were in physical control thereof, or that they exercised some measure of control over it.

12) The State furthermore did not seek to place reliance on any of the presumptions of possession in section 117 of the Act. That section requires the State to show, as a jurisdictional fact to the application of the presumptions therein, that “**despite the taking of reasonable steps it [the State] was not able with reasonable certainty to link the firearm or ammunition to any other person**”. The question is then whether the appellants jointly possessed the firearm and ammunition with any other person or persons whom the trial Court found they acted within the furtherance of a common purpose to kill the deceased and attempted to kill warrant officer Nel.

13) The test for establishing liability for the joint possession of a firearm and ammunition where there is more than one perpetrator was established in *S v Nkosi* 1998 (1) SACR 284 (W), and confirmed by the Constitutional Court in *S v Makhubela* 2017 (2) SACR 665 (CC) at para [46], to be the following:

“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.”

14) This test has been cited with approval in a number of decisions, including the Constitutional Court in *S v Makhubela* 2017 (2) SACR 665 (CC) where the Court said the following: **“In these judgments, the courts have found perpetrators guilty of a crime involving the use of firearms on the basis of the doctrine of common purpose, but nevertheless found that the perpetrators could not be found to be guilty of the unlawful possession of firearms on the basis of the doctrine.”** On a reading of *Makhubela* and other judgments dealing with joint possession in the context

of sections 3 and 9 of the Act, it is evident that the mere awareness by an accused, or his acquiescence in the possession and use of a firearm by a member of a group of persons with whom he has committed another crime in the furtherance of a common purpose, have been held not to be sufficient on its own to establish joint possession of a firearm used in the commission of that other crime (Makhubela at para [55]. See also *S v Mbuli* 2003 (1) SACR 97 (SCA); *S v Kwanda* 2013 (1) SACR 137 (SCA) and *S v Ramoba* 2017 (2) SACR 353 (SCA)).

15) The test in *Nkosi*, according to the Court in *Makhubela*, takes into account the fact that the application of the common purpose doctrine differs in relation to “**consequence crimes**” such as murder, and in relation to “**circumstance crimes**,” such as possession (at para [47]. See also Burchell *Principles of Criminal Law* 5th ed at page 483.) The doctrine of common purpose of course finds application to a variety of crimes other than consequence crimes (*S v Thebus* 2003 (2) SACR (CC) at para [18] fn 19). What is correct however is the point upon which the reasoning turns, namely that it is the nature of the crime and the factual circumstances of any particular case that will dictate the content of the test that must be applied to the question whether the conduct of one perpetrator must be imputed to another. In the case of a possessory crime, whichever test is applied, whether it is by way of an application of the principles applicable to common purpose, or simply the ordinary principles applicable to joint possession, it must account for the element of possession in determining whether the conduct of one perpetrator must be imputed to another. Put differently, a crime where the criminal act (**actus reus**) is the possession of an object, the imputation of that act to another must be determined in the context of the elements of possession as a legal concept, and the fact that **animus** as a requirement for joint possession is different to that of personal possession. It is not the intent to exercise

control over the object to the exclusion of others, but the intent to hold it in behalf of a group of persons, who are in turn required to have the intent to exercise control of the object through another.

16) In *S v Mbuli* 200(3) (1) SACR 97 (SCA) Nugent JA explained it as follows at para [71]:

“What is prohibited by both those sections is the existence of a state of affairs (ie having possession of an armament, or a firearm, as the case may be), and a conviction will be competent only if that state of affairs is shown to exist. That state of affairs will exist simultaneously in respect of more than one person if they have common (or joint) possession of the offending article. Their contravention of the relevant section in those circumstances does not arise from an application of the principles applicable to common purpose (which is concerned with liability for joint activity) but rather from an application of ordinary principles relating to joint possession. Common purpose, and joint possession both require that the parties concerned share a common state of mind but the nature of that state of mind will differ in each case. Perhaps Olivier JA had in mind the principles of joint possession, rather than the doctrine of common purpose, when he said in *S v Khambule* 2001 (1) SACR 501 (SCA) at para [10] that there is no reason in principle why a common intention to possess firearms jointly could not be established by inference, but I do not agree with the further suggestion that a mere intention on the part of the group to use the weapons for the benefit of all

of them will suffice for a conviction. In my respectful view, Marais J set out the correct legal position [in Nkosi].”

17) Possession is a factual question. There will seldom be direct evidence that the group had the intention to exercise possession of a firearm through the actual detentor, or that the latter had the intention to hold it on behalf of the group. Intention is a state of mind that can be inferred objectively from the conduct of the accused and his co-perpetrators. The existence of the requisite intention is a question of fact and degree and in most cases the outcome will inevitably depend on an inference drawn from other facts found to have been proved. Like any other fact, it can be established by circumstantial evidence, or by a combination of direct and circumstantial evidence (S v Hoosain 1987 (1) SA 1 (A) and S v Humphreys 2013 (2) SACR 1 (SCA) at para [13]).

18) It matters not that that evidence may also be relevant to establish the existence of a common purpose in relation to crimes other than the unauthorised possession of a firearm and ammunition. It is not the fact that an accused shared a common purpose with his co-perpetrators to commit a crime other than the possession of a firearm or ammunition that proves that he also jointly possessed that firearm and ammunition with his co-perpetrators. The question is rather whether the facts found to have been proved justify an inference, by applying the test in R v Blom 1939 AD 188 (at 202 to 203), that the accused had the requisite **animus** to establish joint possession as envisaged in Nkosi. (Nkosi at 287 b – c and Ramoda at para [11]). The finding made must account for all the evidence, including the evidence of the accused, or the lack thereof, which may be relevant to his state of mind.

19) Counsel for the State submitted that an inference as envisaged in Nkosi can be drawn from the fact that the appellants were found to have made common cause with a group of five unidentified persons who robbed a bottle store a day earlier in Stutterheim; that the robbery and their getaway was well planned with the robbers being in cell phone contact with one another; that they then waited until night time to make their way towards Port Elizabeth; and that two firearms remained with them to facilitate their escape and overcome any possible resistance.

20) The conduct of the two appellants and their co-perpetrators which preceded the events which resulted in the death of the deceased, cannot in my view assist the State. The reason is twofold: Firstly, it lacks particularity and is insufficiently proximate in time and place to support the inference of intent sought to be drawn therefrom. Secondly, as stated, the **animus** element of possession requires that as a point of departure, and before even considering the requirements for joint possession, an accused must have had knowledge of the presence or existence of the object he is said to have possessed. Knowledge is an awareness of a fact or circumstance (Black's Law Dictionary). There is no evidence, or evidence from which it may be inferred that the appellants had knowledge of the firearm and ammunition in the vehicle. There is nothing to suggest that it was visible to the appellants, and the mere presence of the appellants in the vehicle cannot without more find an inference of knowledge thereof.

21) In the result, and for the foregoing reasons, the appeal is upheld and it is ordered that the two appellants' convictions on counts 5 and 6 and the sentences imposed in respect thereof are set aside.

94 High Street

GRAHAMSTOWN

Date Heard: 11 March 2019

Judgment Delivered: 26 March 2019