REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: SS135/2011

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

DATE: 3/12/2021

SIGNATURE OF JUDGE:

In the matter between:

MZAYIFANI EPHRAIM DLAKAVU	**FIRST APPELLANT**
SIHLE ENOCH NGCONCO	**SECOND APPELLANT**
TSIETSI DRIFT MALUPE	**THIRD APPELLANT**

And

THE STATE

JUDGMENT

MOLELEKI AJ:

Introduction:

[1] This is an appeal against conviction and sentence by Victor J of this division (the court a quo). Only the third appellant was granted leave to appeal both conviction and sentence by the court a quo on 14 February 2018. Leave to appeal in respect of the first and second appellants was granted by the Supreme Court of Appeal on 16 May 2019 and on 11 July 2019 respectively. However, second appellant was granted leave to appeal sentence only. After heads of argument were received from the parties, it was deemed prudent for the appeal to be considered on the papers, thus dispensing with oral submissions.

[2] The appellants were arraigned on the following charges:-

- Robbery with aggravating circumstances on 22 March 2010 of a Citroen motor vehicle with registration numbers WTM 170 GP;
- Robbery with aggravating circumstances on 29 March 2010 of an Audi A6 motor vehicle with registration numbers RPR 752 GP;

  Both counts of robbery were as intended in Section 1 of Act 51 of 1977 read with the provisions of section 51(2) The Criminal Law Amendment105 of 1997;
- Murder of the owner of the Audi A6 (in count 2), Mr Frank Carim Rahaue on 29 March 2010, read with the provisions of section 51(1) of Act 105 of 1997;
- Contravention of section 3 of The Firearms Control Act 60 of 2000, unlawful possession of a firearm; and
- Contravention of section 90 of The Firearms Control Act 60 of 2000, unlawful possession of ammunition.

- It was alleged by the State that the appellants conspired to commits all the above mentioned offences; that at all material times they acted in concert and in furtherance of the execution of a common purpose.

[3] The appellants pleaded not guilty in respect of all the charges. First appellant was convicted of all the charges, whereas, second and third appellants were acquitted in respect of count 1 but were convicted of counts 2 to 5 respectively on 22 March 2012. They were sentenced as follows:

Count 1 in respect of 1st appellant, Fifteen (15) years imprisonment;

Count 2- Fifteen (15) years

Count 3- Life imprisonment

Count 4- Five (5) years imprisonment;

Count 5 Three (3) years imprisonment in respect of all three respectively.

The court a quo ordered that the sentences to run concurrently in terms of section 280(2) of the Criminal Procedure Act, 51 of 1977. Therefore, the effective term of imprisonment imposed was a sentence of life imprisonment.

[4] It is not in dispute that the crimes were actually committed. The issue for determination is whether the trial court came to the right conclusion that it was proved beyond reasonable doubt that the appellants acted in common purpose in the commission of the crimes for which they were convicted and sentenced. The court will only deal with the evidence it regards as relevant for the determination of this appeal.

BACKGROUND FACTS

[5] Although there is no appeal that lies against conviction and sentence in count 1, it is important to indicate the background that led to the conviction in respect thereof as it forms the basis of the other charges. On 22 March 2010 the complainant in count 1, Ms Amanda Nontuthuzelo Tjale was approached by unidentified men travelling in a Mercedes Benz A Class motor vehicle soon after she drove onto the driveway of her home. She was travelling in a Citroen motor vehicle. One of the men who was armed with a firearm rushed into the yard before she could close the gate, ordered her out of her motor vehicle. Subsequent thereto another man entered the yard and she ran away. They drove off with her motor vehicle. She was called to the police station on 30 March 2010 to identify her motor vehicle. She noticed that the front part of the motor vehicle had been damaged and that false registration plates had been fitted but was able to identify it with its licence disc.

[6] Counts 2 to 5 relate to the incident of 29 March 2010, wherein the driver of an Audi A6 motor vehicle (the deceased) was followed to the driveway of his house, fatally shot at and robbed of his motor vehicle. The deceased died at the scene. Police officers collected cartridge cases from the scene of the shooting the same day. The men who robbed the deceased of his motor vehicle arrived at the scene driving the Citroen motor vehicle which was robbed on 22 March 2010 from the complainant in count 1 and that is where it was abandoned when the robbers drove away in the deceased's motor vehicle.

[7] The State's key witness was Mr Ofentse Moamogoe (Moamogoe) who was fully implicated in the commission of the said offences. He was charged thereto, pleaded guilty and was sentenced to 25 years imprisonment. Following his conviction and sentence he testified against the appellants.

[8] Moamogoe testified that on 29 March 2010 he received a telephone call from the first appellant with whom he had been acquainted for over a year prior to this day. They agreed to meet in Rosebank. The first appellant arrived in a

Mercedes Benz A Class in the company of two men who were by then not known to him. The two men are the second and third appellants. The second appellant was driving the A Class. They all drove to Orange Grove. During the course of their journey the first appellant handed a set of keys of a Citroen motor vehicle which first appellant said Moamogoe would drive. The Citroen was parked at second appellant's flat and Moamogoe fetched it from there. Moamogoe and the first appellant consumed liquor and drugs whilst they travelled together in the Citroen, and the second and third appellants travelled in the A Class. They all ended up at the second appellant's flat. Moamogoe and first appellant continued to use drugs. Third appellant enquired if they were going to proceed to do what they had planned to do. It was at this stage that first appellant informed Moamogoe that the reason Moamogoe was called was for Moamogoe to become their driver as Moamogoe was familiar with the Northern Suburbs. A discussion ensued in the presence of all four of them wherein it was agreed that they would have to go out to "spin", which meant, they were going to go out to commit crime so as to make quick money with which they could buy more liquor and drugs. As they set out to leave, first appellant went to the A Class and brought a firearm with. All of them left in the Citroen with Moamogoe as the driver.

[9] As they were driving around trying to spot a victim whose motor vehicle they could hijack, the 1st appellant was playing with the firearm, pointing it at passing motorists and threatening to shoot. The first appellant's conduct amused second and third appellants whereas it made Moamogoe uncomfortable. Along the way, they became embroiled in an argument as to which motorist to target. They eventually spotted an Audi A6 driven by the deceased which they eventually agreed to follow. As the deceased drove onto the driveway of his house and waited for the garage door to open, the first appellant instructed Moamogoe to block the deceased' motor vehicle from behind. First appellant alighted from the Citroen with the firearm in hand, approached the deceased who was still sitting in his vehicle talking on the phone and pointed the firearm at him. The deceased drove his vehicle

towards the direction of the Citroen, thus colliding with it. This caused the first appellant to fall to the ground. As soon as he stood up, he approached the deceased who at that point had alighted from his vehicle. The first appellant fired two shots and the deceased fell to the ground. At all times, Moamogoe together with second and third appellants remained in the Citroen. However, when the deceased alighted from his vehicle second appellant alighted from the Citroen and ran away. The third appellant also alighted, went and stood next to the first appellant with the deceased lying on the ground. Moamogoe, who was shocked by the unfolding of events also ran away.

[9] Mr Masindi and Ms Maphumulo testified that in 2010 they were employed as security officers at a residential complex in Paulshof, where second appellant was a resident. One of their duties was to manage the access control of the complex. Both stated that, on 29 March 2010 whilst, a Citroen arrived at the gate with two occupants, followed by the A Class which was driven by second appellant. Second appellant was also in the company of one other person. Second appellant confirmed that the occupants of the Citroen were his visitors and they were allowed in. Shortly thereafter, the Citroen exited the residential complex with all four men that drove in in the two vehicles. Ms Maphumulo on the other hand stated that, of the four men, she knew third appellant as he used to visit second appellant.

[10] Second appellant does confirm that on 29 March 2010 he was in the company of Moamogoe as well as first and third appellants and that they followed the deceased's Audi A6. However, first and third appellants deny that they ever were in the company of Moamogoe and second appellant on that day.

[11] The trial court's findings on Moamogoe's evidence were that his evidence was clear and consistent. With the trial court having accepted the evidence of Moamogoe, corroborated to some extent by the evidence of Maphumulo and Masindi, the appellants were found guilty in respect of counts 2 to 5 based on the principle of common purpose.

[12] The powers of a court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court's conclusion, including its acceptance of a witness' evidence is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness' evidence - a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional circumstances that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony.[1] **S v Francis** 1991 (1) SACR 198 (A) at 198j-a A

[13] The court a quo in its judgment made it clear that it was convinced that it was safe to reject the evidence of the appellants.

[14] It is trite that credibility findings are the preserve of a trial court. **Rex v Dhlumayo and Another** 1948 (2) SA 677 (A). The trial court has made credibility findings in respect of each of the appellants. This court therefore, finds itself limited not to interfere unless such findings can be faulted on the record. See **S v J** 1998 (2) SA 984 (SCA) @ 1006.

[15] BASIS OF APPEAL

FIRST APPELLANT

It is contended by the 1st appellant that the court erred in finding him guilty based on the evidence of a co-accused, who also conceded that he was under the influence of liquor and cocaine. Further that there was no shred of

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evidence, either in the form of a firearm or ammunition that was found in his possession.

In respect of sentence, the 1st appellant did not make any submissions despite the fact that the parties were afforded an opportunity to file supplementary heads of argument.

SECOND APPELLANT

In respect of sentence, the court erred in imposing life imprisonment on the count of murder and in not finding that substantial and compelling circumstances which allowed deviation from the minimum prescribed sentences existed; it was not just and proportionate taking into account all the relevant sentencing principles; did not take into account the lesser role the appellant played (he did not fire the shot and fled the scene at an early stage), did not take into account that the appellant co-operated with and assisted the police in their investigations and that the court over-emphasised retributive elements of sentencing as far as sentencing is concerned.

It was submitted further that, in the absence of material misdirection, the appeal court may yet be justified in interfering with the sentence imposed by the trial court, when the disparity between the sentence of the trial court and the sentence which the appellate court could have imposed had it been the trial court. If the said sentence can be described as shocking, startling or disturbingly inappropriate, then the appellate court can interfere.

THIRD APPELANT

The court erred in accepting the evidence of an accomplice without corroboration and without giving due weight that the accomplice had an incentive to lie; the accomplice was mistaken as to the identity of the appellant as he was under the influence of alcohol and cocaine, was seeing the applicant for the first time whilst seated at the backseat of the motor vehicle, which limited his ability to observe the appellant; there is not enough evidence

to show that the appellant formed common purpose to rob and kill the deceased; there is no evidence the 3rd appellant intended the 1st appellant to possess the firearm and ammunition on his behalf nor does it show that the appellant had the physical detention or mental intention to possess the firearm and ammunition.

With regards sentence, even if the appellant was correctly convicted, the sentences imposed, particularly life imprisonment, is startlingly inappropriate having regard to the fact that the appellant was not the main perpetrator, that everybody was under the influence of alcohol and drugs and that he was a first offender.

THE RESPONDENT

Counsel for the respondent submitted in the heads of argument that no demonstrable and material misdirection were committed by the trial court in its findings of fact and credibility; that the State's case as a whole was so overwhelming that it indicated the guilt of the appellants on all the charges. The respondent stated that the evidence of Moamogoe satisfied the requirements as laid down in the Hlapezula matter supra. The court correctly made strong credibility findings in Moamogoe's favour and that he was corroborated by Masindi and Maphumulo. Further that the doctrine of common purpose was correctly applied.

In respect of sentence it was contended that there were no substantial and compelling circumstances, the trial court having considered all the traditional factors appropriate in sentencing. The primary aims of punishment were also taken into account. It is averred that this case fell within the worst categories of murder as it was extremely brutal. The deceased was defenceless, was hunted down like an animal and paid with his life in order for the appellants to satisfy their craving for more drugs. It was submitted the appellants showed no remorse at all. According to the respondents, all counts deserved the

respective sentences imposed and they are not shockingly inappropriate under the circumstances.

[16] APPROACH TO EVIDENCE OF ACCOMPLICE

The danger in so far as evidence of an accomplice is concerned lies in the possibility that he may falsely implicate other accused. The trial court was fully alive to the dangers associated with evidence of an accomplice and it applied cautionary rules. The judgment stated in paragraph 4 "The cautionary rule applies in that the court must warn itself of the danger of convicting upon the evidence of an accomplice. The court refers to other factors which can properly be regarded as reducing the risk of convicting an innocent person. The classic cases in this regard are R v Mthlego 1964 SA 712 (A), R v Ntanana 1948 (4) SA 471 (A) at 404 and 406, R v Mponponzo 1958 (4) SA 471 (A) at 476 and S v Hlapezula and Others 1965 (4) SA 439".

At par 6 the court stated that "Mr Moamogoe had already been convicted and sentenced. Despite vigorous cross-examination the defence could not extract any reason why he would falsely implicate the accused".

[17] In **S v Zitha and Others** 1965 (1) SA 166 (E) Munnik J stated at 170 "The cautious court or jury will often properly acquit in the absence of other evidence connecting the accused with the crime, but no rule of law or practice requires it to do so. What is required is that the trier of fact should warn himself, if the trier be a jury, that it should be warned of the special danger of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are truth. This special danger is not met by corroboration of the accomplice in material respects not implicating the accused, or by proof of aliunde that the crime charged was committed by someone, so that satisfaction of the requirements of section 285 does not

sufficiently protect the accused against the risk of false incrimination by an accomplice. The risk that he may be convicted wrongly although sec. 285 has been satisfied will be reduced, and in the most satisfactory way, if there is corroboration implicating the accused. But it will also be reduced if the accused shows himself to be a lying witness or if he does not give evidence to contradict or explain that of the accomplice"

[18] From the evidence given by Moamogoe it cannot be said he was intent on sinking the appellants by falsely implicating them. He was fair in explaining the involvement of each one of them. Where necessary he exonerated them of some involvement. At the same time he did not downplay his own involvement.

[19] The trial court's reasons for rejecting the appellants' evidence is set out in paragraphs 33 to 49 of the judgment (pages 357 to 365 of the record). This is where this court's restraint comes about as it does not have the benefit of "all the incidental elements so difficult to describe which make up the atmosphere of an actual trial" see **Rex v Dhlumayo and Another** 1948 (2) SA 677 (A).

The appellants did not say much in their defence, save to deny the evidence by Moamogoe. That left very little for the trial court to adjudicate upon.

[20] Clearly, the trial court was alive to the danger of false incrimination of the appellants by the accomplice. As a result of the trial court's awareness of this danger, it took time in analysing the evidence of Moamogoe. This, the court did together with other evidence.

[21] INTOXICATION

Even though Moamogoe had consumed liquor and cocaine, it does not seem that his recollection of the events was impaired. The quantity of consumption is not clear from the record. For this reason also, his evidence calls for a

cautionary approach. However, the objective circumstances relating to Moamogoe's observation such as how the damage to the Citroen was sustained, corroboration by the second appellant as well as evidence by independent witnesses, Mr Masindi and Ms Maphumulo, who confirmed Moamogoe's evidence to the effect that they went to second appellant's place in two vehicles and left shortly thereafter in the Citroen, instils confidence in his evidence.

[22] The court is further of the view that Moamogoe had ample opportunity to observe the other appellants and in particular third appellant. When they first met in Rosebank, third appellant was seated at the back of the A Class. They met again along Louis Botha Avenue after Moamogoe had been to second appellant's flat to fetch the Citroen. All the appellants were standing outside the vehicle whilst Moamogoe was seated inside the Citroen and they had a discussion, where after they all drove to second appellant's flat. They were at the flat and they assisted in fixing the connection of the second appellant's television set. There was therefore, ample opportunity for observation. After the commission of the offences Moamogoe together with first and third appellants walked back to second appellant's flat. This interaction afforded Moamogoe sufficient opportunity for observation.

[23] THE EVIDENCE OF SECOND APPELLANT

The evidence of Moamogoe was corroborated by that of second appellant in all material respects save where he exculpates himself. However, Moamogoe was not in a position to dispute second appellant's version that he ran away from the scene prior to the deceased being shot and killed. Second appellant's evidence was meticulously evaluated and tested to determine the issue of possible false incrimination. Second appellant implicates himself by admitting being in the company of first and third appellants as well as Moamogoe and being present at the scene of crime. He, however does not take any personal responsibility in the criminal activities that played out.

The legal representatives of first and third appellants cross-examined second appellant thus testing and seeking to discredit his evidence. They also dealt with the evidence of second appellant when they presented their defences. That being so, the first and third appellants cannot claim that his evidence should not be used to confirm the credibility of Moamogoe.

[24] In determining whether Moamogoe fabricated his evidence, this court takes into account that he surely would have exaggerated the involvement of the appellants in respect of all the counts. However, he did not do so. He even conceded that he was not able to tell the exact stage at which second appellant fled the scene. He did not even profess to know how first appellant got to be in possession of the Citroen. The trial court was rigorous in its examination of Moamogoe's evidence in order to arrive at its acceptance for purposes of convicting the appellants.

[25] The common cause and proved facts are that the robbery took place as alleged by the State witnesses; a firearm was used in respect thereof; the deceased was robbed of his motor vehicle and was shot dead; cartridge cases were collected at the scene but the firearm was never recovered; the Citroen motor vehicle that was robbed in respect of count 1 was recovered at the scene of the robbery in count 2 and its front part was damaged.

[26] THE ISSUE FOR DETERMINATION

The main issue that remains to be decided is the involvement of the appellants in the offences referred to in the charge sheet as members of a group that attacked the deceased in count 2, robbed him of his Audi A6 motor vehicle whilst they possessed an unlicensed firearm loaded with ammunition.

[27] In his defense, first appellant maintained that he never arranged to meet with Moamogoe on 29 March 2010. He stated that, although Moamogoe was known to him, they never socialized together nor had they ever exchanged telephone numbers. He denied being in possession of the Citroen motor vehicle nor has he been at second appellant's flat as he is not known to him. According to first appellant, the last time he was in the company of Moamogoe was towards the end of March 2010 at Cosmo City whilst they were both visiting a certain Makatske.

[28] Motive to falsely implicate the first appellant is one of the factors the court should consider. In **Maseti v S 2014 (2) SACR 23 (SCA)** par 24 to 27 it was stated that an accused who claims to have been falsely implicated is under no obligation to explain the motives of his accusers, and should not be asked to do so as he bears no onus. However, when he gives such alleged motives, as in this case, such alleged motives must be analyzed together with all the evidence. Should the court find that there is no basis for the complainant to have falsely implicated the accused; the court has to determine whether the State has proved its case beyond reasonable doubt.

According to first appellant, he had a misunderstanding with Moamogoe at Makatse's place. Although not repeated under oath, it was further asserted to Moamogoe that the reason for implicating him was due to the plea bargain Moamogoe had struck with the State. He went on to raise motive once again in respect of second appellant. This he said was due to a fall out between him and second appellant whilst they were in prison.

[29] However, from the evidence, there appears to be no reason for Moamogoe to have falsely implicated first appellant. Moamogoe was adamant that he admitted his knowledge of the incidences of 29 March 2010 to the police officers who effected the arrest. This was long before the matter reached a

plea stage. In fact, Moamogoe's version that first appellant was known to second and third appellants was confirmed by second appellant.

[30] To put it mildly, first appellant was the most unsatisfactory witness who was also untruthful. His version as to him meeting with Moamogoe at Makatske place was not put to Moamogoe. First appellant mentioned it for the first time in his evidence in chief. Clearly, he adjusted his version as the trial proceeded. He was active during the trial and was afforded an opportunity to consult with his legal representative during the trial but failed to put this version.

[31] Robbery consists of the theft of property by intentionally using violence or threats of violence to induce submission to the taking thereof. According to the evidence of Moamogoe, after meeting with first appellant as arranged, first appellant handed the keys of a Citroen motor vehicle to him. The Citroen was parked at second appellant's flat. This was the vehicle which was used to follow the deceased in counts 2 and 3. Second appellant corroborated Moamogoe in this respect. When confronted by first appellant pointing a firearm at him, the deceased collided with the Citroen. The damages to the Citroen was confirmed by the owner of the Citroen.

[32] First appellant's version is so ludicrous and highly improbable that it could not reasonably possibly be true. His denial of the fact that on 29 March 2010 he was in the company of Moamogoe and the other two appellants as well as the exculpatory version put forward by him in these proceedings are, on the totality of the evidence, not reasonably possibly true. His suggestion that Moamogoe and second appellant told a false story is not reasonably possibly true.

[33] In so far as second and third appellants are concerned, on the day the offences were committed, other than second appellant corroborating Moamogoe that all four of them were together, evidence of independent witnesses, Mr Masindi and Ms Maphumulo was also presented. Although there may be discrepancies as to who was travelling in which vehicle, the court consider them to be credible and the discrepancies were not material.

[34] COUNTS 2 TO 5

The evidence of Moamogoe has already been accepted. He stated that first appellant was in control of the operation of 29 March 2010. Whilst they were at second appellant's flat there was a discussion about going "spinning" and Moamogoe would be the driver. Whilst driving around scouting for a culprit, a tense argument ensued as they could not agree in the election of the culprit. The question is whether this is a clear indication of their active participation?

[35] COMMON PURPOSE

As already mentioned above, the appeal concerns both conviction and sentence in respect of first and third appellants, whereas in respect of second appellant it is in respect of sentence only. It has to be determined whether the appellants had common purpose to rob and murder. This requires investigation into the intention of the appellants.

[36] The doctrine of common purpose has been defined as follows: "... if 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." Snyman,[2]

[37] It is trite that the basis of common purpose can be by way of prior agreement which may be express or implied. It may also be by association between the co-perpetrators and it is not necessary to show that the participation of the co-perpetrators was causally connected to the consequent crimes. It is sufficient for the State to prove that one of the group members caused the consequent crime. However, the intention of each of the co-perpetrators must be determined independently without reference to the mental state of the other participants. **S v Le Roux and Others** 2010 (2) SACR 11 (SCA).

The State would therefore have to prove beyond a reasonable doubt that each of the participants 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. **S v Thebus** 2003 (2) SACR 319 (CC).

[38] EVALUATION

First appellant was in full control of the entire operation to go and make quick money (spinning). There was planning discussions in preparation to go out spinning in order to make quick money. He instructed Moamogoe to drive the Citroen having handed him the keys thereto. He fetched the firearm shortly before they left for "spinning". He instructed Moamogoe to block the deceased's vehicle in and he fired shots at the deceased fatally wounding him

[39] It is not necessary for the appellants to have physically participated directly in the commission of the offences. The doctrine of common purpose provides

[2] Snyman *Criminal Law* 4th ed at 261.

that if two or more persons decide to embark on some joint unlawful activity the acts of one are imputed to the other/s which fall within their common purpose. See **R v Dhlumayo** and Another 1945 AD 410 at 415.

[40] Clearly, as already stated above, first appellant was overseeing the operation. He contacted Moamogoe to be the driver during the operation and there was prior agreement with second and third appellants. After the deceased had been shot at, third appellant alighted from the Citroen, went and stood next to the first appellant with the deceased lying on the ground. The second and third appellants were present when the consequent offence was committed.

[41] The key question to answer is whether on the totality of the evidence it has been established that the second and third appellants had the necessary ***mens rea*** concerning the unlawful outcome at the time the offences were committed.

[42] The factual and credibility findings of the court a quo cannot be faulted or criticised. The trial court was detailed, the judgment well-reasoned and supported by evidence. The appeal is approached on the basis that these findings are correct.

[43] The first appellant was in possession of a firearm. He was wielding it as they were driving around pointing it at passers-by. They all went into the motor vehicle knowing that one of them, first appellant was in possession of a loaded gun. Having spotted the deceased as their culprit and parking him in, first appellant alighted with his hands raised and pointing the firearm at the deceased whilst approaching his motor vehicle. Eventually shots were fired at the deceased and he was fatally wounded. The first and third appellants

denied being present at the scene, which version was rejected by the trial court and rightfully so.

[44] The principle of common purpose does not require each participant to know or foresee every detail of the manner in which the unlawful act will be brought about, nor does it require each participant to anticipate in every unlawful act in which each one of them may engage whilst carrying out the objectives of the common purpose.

[45] The first appellant was armed with a firearm, therefore, third appellant was aware of the reasonable likelihood that the first appellant may have to use the said firearm. He reasonably foresaw resistance hence the need for one of them to be armed with a firearm. The fact that prior to the robbery there was a discussion at second appellant's flat, all the appellants made common cause with each other to execute the crime; they were aware that the first appellant was armed. Therefore, the logical inference is that, the appellants did foresee the possibility of a killing during the robbery. By forging ahead with their plans, despite this foresight, they reconciled themselves with that possibility. The shooting of the deceased, was therefore, an envisaged incident in the crime which they planned to commit. The deceased died of a bullet wound to the head and cartridge cases were collected from the scene. From the evidence of Moamogoe, it is clear that first appellant was in possession of a firearm the make and calibre of which were unknown. Moamogoe described it as a revolver, identifying it by its revolving chamber, which he says first appellant was playing with.

[46] At the outset of the proceedings the appellants made certain admissions one such admission being the truthfulness and correctness of an affidavit deposed to by Sergeant Reginald Moloto marked Exhibit "F" relating to the cartridge cases found at the scene of the crime. In this case, the deceased died of a

gunshot wound. The bullet went through the left frontal bone, passing downwards, backwards, exiting the skull through the right occipital bone. All of this taken together supports the deduction that the weapon had the requisite muzzle energy and that it was designed to propel a bullet through a barrel or cylinder. That being so, it would make no sense to find the appellants guilty of murder but not be able to hold that there was unlawful possession in the absence of evidence indicating that there was authorisation to possess. First appellant has not placed any evidence before the court that he was legally authorised to be in such possession. The court will deal with the aspect of unlawful possession of a firearm in respect of second and third appellant below.

[47] The conviction of the first and third appellants in respect of the robbery with aggravating circumstances and murder on the basis of dolus eventualis is confirmed.

[48] MISDIRECTION

The trial court was correct in convicting the first appellant on counts 4 and 5 respectively, that is, unlawful possession of firearm and ammunition. However, the legal basis of the trial court for convicting second and third appellants of unlawful possession of firearm and ammunition needs to be interrogated.

[49] COUNTS 4 AND 5 IN RELATION TO SECOND AND THIRD APPELLANTS

The application of the doctrine of common purpose where a firearm or firearms were used during the commission of a robbery has to be

distinguished from the principle of joint possession. It is trite that the principles of common purpose do not apply when convicting an accused for the unlawful possession of the firearm used in the course of the same robbery. The test for joint possession of an illegal firearm and ammunition is clear. The fact that an accused participated in a robbery where his co-perpetrators were in possession of firearms does not necessarily lead to the inference that the said accused possessed the firearms jointly with them. **Leshilo v S** (345/2019) [2002] ZASCA 98 (8 September 2020).

[50] The inference that the accused possessed the firearms jointly can only be drawn if the facts of the particular case are such that they exclude all reasonable inferences other than that:

- The group had the intention to exercise possession through the actual dentor
- The actual dentor had the intention to hold the firearms on behalf of the group.

Both these requirements have to be met. Mere knowledge by others that one member of the group possessed a firearm, even if they had permitted its use in the execution of common purpose, does not suffice to make them joint possessors.

[51] The appellants denied Moamogoe's evidence that first appellant was playing with the firearm whilst they were in the motor vehicle which would have suggested that they saw the firearm. Even if this court were to accept that they saw the firearm and knew that it would be used in the commission of the robbery, they cannot be found to be joint-possessors. That would be so, even if they had permitted its use in the robbery. The State presented no evidence from which it can be inferred as the only reasonable inference that the appellants intended to possess the firearm jointly with first appellant, nor can it be inferred first appellant intended to hold the firearm on their behalf.

[52] Accordingly, the appeal on conviction in respect of counts 4 and 5 in so far as they relate to second and third appellants should succeed. As a consequence, the appeal in respect of sentence thereof is impacted.

[53] SENTENCE

The issue that remains to be determined is the sentence imposed by the trial court.

It is trite that sentencing is a judicious exercise which lies exclusively with the discretion of a sentencing court. Regard will have to be had to all the factors relevant to sentencing, that is, the personal circumstances of the offender, the nature and circumstances of the offence, the impact of the offence on the complainant, the family as well as the society. To that, should be included the mitigating and aggravating circumstances.

[54] For the purposes of judgement on sentence, the following personal circumstances of the appellants appear to have been placed on record:

FIRST APPELLANT

He was a 35 year old married father of four children. The highest level of education being standard nine. He was self-employed as a hawker selling shoes and bags and earning an income of between R3 000 and R4 000 per month. He had been in custody since October 2010 (17 months) until the finalisation of the matter. The previous convictions he had were more than ten

years old. At the time of the commission of the offence first appellant had consumed alcohol and drugs.

SECOND APPELLANT

He was 35 years old at the time and unmarried but has three children with different mothers. Both his parents were still alive at the time of sentencing. The highest level of education is standard 9. Prior his arrest he was self-employed selling soft goods and earning an amount of R3 500 per month. From his earnings he maintained his children. He has a previous conviction of theft in 2008, theft of a motor vehicle in 2011 which he committed in February 2010. He was in custody from 23 June 2010 awaiting the finalisation of this matter (21 months).

THIRD APPELLANT

He was 30 years old, unmarried and had a three year old child. He was employed as a supervisor at the time of his arrest. He has no previous convictions. He was arrested on 14 May 2010 in respect of this matter and had been in custody since then (22 months).

[55] The essential inquiry in an appeal against sentence is not whether the sentence was right or wrong, but whether the sentencing court exercised its discretion properly and judicially. If the discretion was exercised improperly, the appeal court will interfere with the sentence imposed.[3]

[56] COUNTS 2 AND 3– ROBBERY AND MURDER

From the reading of the record and having considered the judgment of the trial court on sentence, it is clear that the court in imposing fifteen years

[3] S v Malgas 2001 (1) SACR 469 (SCA)

imprisonment, had taken into account all the relevant factors and arrived at an appropriate sentence under the circumstances. The court did not over-emphasise any of the factors over the others and it took account of the object of sentencing.

The robbery on count two is one as intended in terms of section 1 of the Criminal Procedure Act. The provisions of the Criminal Law Amendment Act 105 of 1997, with specific reference to section 51(2) dictates that notwithstanding any other law but subject to subsection (3) and (6), an accused who has been convicted of a Part two of Schedule 2 offence, which includes robbery with aggravating circumstances, shall in the case of a first offender be sentenced to a period of imprisonment for a period of not less than 15 years.

[57] The murder on the other hand is read with the provisions of section 51(1) of The Criminal Law Amendment Act which prescribes imprisonment for life, unless the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in these subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.

[58] Violent offences such as robbery and murder have reached alarming proportions. As a result, communities live in constant fear and they look upon the courts for protection. This court does not consider that the personal circumstances of the appellants bring sufficient balance as against the cold-hearted, heinous and brutal murder of the deceased. The aggravating features as appear from the facts cannot be ignored. Although the deceased alighted from his vehicle and approached first appellant, it was clear that the deceased was unarmed. Therefore, he posed no danger to any of the appellants. That notwithstanding, the appellants had no regard or empathy for

the deceased. Their conduct is reprehensible as they were armed with a firearm to overcome any form of resistance.

[59] The effects of intake of liquor and drugs is a factor to always be considered when imposing sentence. It is so that first appellant's mental faculties were impaired to some extent. However, it is without a doubt that he was rightly convicted as having had the necessary culpability at the time of the commission of the offence. He had not presented any evidence in this regard as he pleaded *alibi* as a defence. That notwithstanding, the court must look at the evidence holistically to determine mitigating circumstances. Most importantly though, it is the circumstances of the case that will determine whether the intake thereof is a mitigating factor. It has clearly not been shown that intoxication actually impaired first appellant's mental faculties.

[60] This was a violent crime committed cunningly and with premeditation. By the time first appellant called Moamogoe, it had already been agreed that Moamogoe would be the driver when they go "spinning" as he was familiar with the Northern suburbs, which area was identified for the said "spinning". What is even more disturbing is the fact that none of the appellants have shown any remorse for their actions. This simply means they do not appreciate the seriousness and callousness of their actions, neither do they appreciate the consequences of those actions.

[61] There is no basis for interfering with the sentence imposed on the appellants regarding the robbery and murder. The attack on the sentencing court is unfounded. In cases of serious crime, it is permissible for the personal circumstances of the offender to recede into the background. After careful consideration of the trial court's reasons on sentence, it cannot be said that there was material misdirection in the exercise of its judicial discretion. The sentencing court correctly found that there is no weighty justification for a

deviation from the minimum term of imprisonment prescribed in respect of both count.

[61] COUNTS 4 AND 5 UNLAWFUL POSSESSION OF FIREARM AND AMMUNITION

FIRST APPELLANT

As already stated above, his personal circumstances, the nature and seriousness of the offences were taken into account. It follows therefore that, the appeal on sentence stands fail.

SECOND AND THIRD APPELLANTS

The appeal by second and third appellants in respect of unlawful possession of firearm and ammunition is upheld in respect of both conviction and sentence. The order of the trial court is set aside.

[62] ORDER

In the result the following order is made:

i. The appeal against conviction and sentence in respect of all the appellants on the counts of robbery with aggravating circumstances in count 2 and murder in count 3 is dismissed.
ii. The appeal on conviction and sentence in respect of first appellant for the unlawful possession of firearm and ammunition is dismissed.

iii. The appeal against conviction and sentence in respect of second and third appellants for the unlawful possession of firearm and ammunition is upheld. The order of the trial court is set aside.

These sentences shall be effective from the date upon which the trial court initially convicted and sentenced the appellant on 24 March 2012.

MOLELEKI AJ
ACTING JUDGE OF THE HIGH COURT

MONAMA J
JUDGE OF THE HIGH COURT

I agree

STRYDOM J
JUDGE OF THE HIGH COURT

Appearing for the Respondent: Adv. L Ngodwana

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Instructed by Legal Aid SA

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