IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

_____ **19 December 2023**

CASE NO: A424/2014

In the matter between:

MASUKU NJABULO 1st Appellant

MOYO MATTHEWS 2nd Appellant

And

THE STATE Respondent

JUDGMENT

Mdalana-Mayisela J (Moosa J concurring)

[1] The first appellant appeals against the conviction of possession of firearm (count 3) and ammunition (count 4), and the effective sentence of 27 years direct imprisonment imposed upon him by the Regional magistrate, Lenasia on 9 October 2012. The second appellant appeals against the effective sentence of 27 years direct imprisonment imposed upon him. Both appellants were refused leave to appeal against the conviction and sentence by the trial court. The appeal is pursuant to petition having been granted by the High Court on 07 November 2014. The appeal is opposed by the State.

[2] The appellants were charged with two counts of robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977 ("the CPA") read with section 51(2) of the Criminal Law Amendment Act 105 of 1997 ("the CLAA"); unlawful possession of firearm; and unlawful possession of ammunition. They were legally represented throughout the proceedings in the lower court. They pleaded not guilty to all charges. On 5 October 2012 they were convicted on all four charges. On 9 October 2012 they were effectively sentenced to 27 years' direct imprisonment.

[3] The facts giving rise to the conviction and sentence are as follows. On count 1, robbery with aggravating circumstances, the appellants, on 4 July 2008 at Lenasia, robbed David Joseph of a cell phone and cash. On count 2, robbery with aggravating circumstances, the appellants, on the same date and place robbed Nkosinathi Dayimana of his cell phone and R200.00 cash. During the commission of the first robbery, the second appellant was in possession of a firearm which he pointed at David Joseph whilst the first appellant was holding the hands of Joseph's friend, David Xai behind his back. The second appellant instructed Joseph to hand over his cell phone and cash to him, and which he did. The first appellant was in possession of a knife. He searched Xai and took his cell phone. During the commission of the second robbery, appellant 2 pointed a firearm at Nkosinathi whilst appellant 1 had a knife and grabbed Nkosinathi's hands to the back. Appellant 2 took Nkosinathi's R200.00 cash and two cell phones. Appellant 2 hit Nkosinathi with the firearm on the side of his forehead whereby he sustained a wound that left a scar. On 7 July 2008 at Lenasia, the second appellant was found in possession of 9mm Norinco pistol with serial no: 169573, and 12 x 9mm live rounds of ammunition, without being the holder of a licence, permit or authorisation to possess the firearm and ammunition.

Ad conviction

[4] First, I deal with the first appellant's appeal against conviction. The High Court granted the first appellant leave to appeal against the conviction of unlawful possession of firearm and ammunition.

[5] Briefly, the evidence before the trial court led by the State was as follows: Appellant 2 was in physical possession of a firearm during the commission of the two robberies on 4 July 2008. He was also seen carrying a firearm on 7 July 2008. Appellant 1 was in possession of a knife during the commission of the two robberies. Appellant 1 was arrested on 7 July 2008. On the same date he was interviewed by Constable Mokwele at the Police Station. During his interview he informed Constable Mokwele that a firearm that was used during the commission of the two robberies belonged to Gweva who was with him. He later accompanied Constable Mokwele to point out a shack where appellant 2 resided. During the search by the police, a CZ 9mm pistol with 13 rounds were found in that shack beneath a carpet. He confirmed that this was the firearm he referred to. Appellant 1 during his testimony denied the knowledge and possession of a firearm. He also denied the pointing out of a shack.

[6] The trial court accepted the State's evidence and convicted appellant 1 on counts 3 and 4. Appellant 1 has brought this appeal against such conviction on the basis that the trial court erred in finding that he was in joint possession of the firearm and ammunition.

[7] The Supreme Court of Appeal in *Leshilo v The State*[1] in applying the principles of joint possession, held as follows:

> *"[11] the test for joint possession of an illegal firearm and ammunition is well established. The mere fact that the accused participated in a robbery where his co perpetrators possessed firearms does not sustain beyond reasonable doubt the inference that the accused possessed the firearms jointly with them. In S v Nkosi it was held that this is only justifiable if the factual evidence excludes all reasonable inferences other than (a) that the group had the intention to exercise possession through the actual detentor and* (b) *the actual detentor 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.*
>
> *[12] This Court in S v Mbuli pointed out that where the offence is 'possession' of a firearm (or in that case a hand grenade) it is not the principles of common purpose that have application, but rather those relating to joint possession. A conviction of joint possession can only be competent if more than one person possesses the firearm. The Court found that mere knowledge by others that one member of the group*

[1] *345/2019) [2020] ZASCA 98 (8 September 2020)*

possessed a hand grenade, or even acquiesced to its use in the execution of their common purpose to commit a crime, was not sufficient to make them joint possessors thereof. In coming to its conclusion this court overruled its previous decision in S v Khambule, where it was held that the mere intention on one or more members of the group to use a firearm for the benefit of all of them would suffice.

[13] The Constitutional Court, in Makhubela v S, confirmed the reasoning in various cases of this Court and, in particular, that S v Khambule had been correctly overruled by S v Mbuli. As observed by the Constitutional Court there will be few factual scenarios which meet the requirements of joint possession where there has been no actual physical possession. This is due to the difficulty inherent in proving that the possessor had the intention of possessing the firearm on behalf of the entire group, bearing in mind that being aware of, and even acquiescing to, the possession of the firearm by one member of the group, does not translate into a guilty verdict for the others.

[8] The appellants were charged with unlawfully possessing the firearm and ammunition on 7 July 2008, and not during the commission of the two robberies. It is common cause that appellant 1 was not in physical possession of the firearm on 4 and 7 July 2008. What linked him to the firearm was that he informed constable Mokwele that Gweva was in possession of a firearm during the commission of the two robberies. He also pointed out a shack belonging to appellant 2 where the firearm was found, and he confirmed that it was the firearm he referred to.

[9] In applying the principles on joint possession stated in *Leshilo v the State supra*, the trial court had to determine if the factual evidence stated in paragraph [8] above sustains beyond reasonable doubt, the inference that on 7 July 2008 appellant 1 possessed the firearm jointly with appellant 2. In determining this issue, the trial court stated that because appellant 1 had knowledge that appellant 2 was in possession of the firearm during the commission of both robberies and even after, that he pointed out its location and even identified it, the conviction on counts 3 and 4 was justified.

[10] Further, the trial court referred to S v Nkosi[2], S v Khambule[3] and S v Mbuli[4] and stated that "*A regional, originally cases such as Nkhosi case and Khambule case stated it can be done on the basis of common purpose* (sic). *But finally this question was laid to rest when the Highest Court in the country, the Supreme Court of Appeal stated in State v Mbhuli in 2003 (1) SACR on page 7 that more than one person can be convicted for the possession of one firearm*

[2] 1998 (1) SACR 284 (W)
[3] 2001 (1) SACR 501 (SCA)
[4] 2003 (1) SACR 97 (SCA)

on the basis of joint possession. Accordingly each of the accused 1 and accused 2 are then convicted on all four counts".

[11] It is clear from the judgment that the trial court merely referred to *S v Nkosi* and *S v Mbuli* authorities without applying the test for joint possession of the firearm and ammunition in the current matter. In *S v Nkosi supra* the Court held that the inference that the accused possessed the firearms jointly with other accused "*is only justifiable if the factual evidence excludes all reasonable inferences other than (a) that the group had the intention to exercise possession through the actual detentor and* (b) *the actual detentor had the intention to hold the guns on behalf of the group,"* The trial court failed to determine whether (a) appellant 1 had the intention to exercise possession through appellant 2 and (b) appellant 2 had the intention to hold the firearm and ammunition on behalf of appellant 1. The State did not present evidence proving these requirements. On the contrary, the complainants testified that appellant 1 was in possession of a knife that he used to threaten the complainants during the robberies.

[12] Further, the trial court was wrong in concluding that appellant 1 was in joint possession of the firearm and ammunition with appellant 2, merely because he had knowledge that appellant 2 was in possession of the firearm during the robberies, and that he pointed out the shack where it was found and he later identified it. The Supreme Court in *S v Mbuli supra* stated that mere knowledge by others that one member of the group possessed a hand grenade, or even acquiesced to its use in the execution of their common purpose to commit a crime, was not sufficient to make them joint possessors thereof.

[13] I accordingly conclude that the factual evidence in the lower court was not sufficient to sustain beyond reasonable doubt, the inference that on 7 July 2008 appellant 1 possessed the firearm and ammunition jointly with appellant 2. The trial court was wrong in convicting appellant 1 on counts 3 and 4. Consequently, the appeal on conviction should be upheld.

Ad sentence

[14] Appellant 1 had been convicted of two counts of robbery with aggravating circumstances read with section 51(2) and Part II of Schedule 2 of the CLAA. Appellant 2 had been convicted of two counts of robbery with aggravating circumstances read with section 51(2) and Part II of Schedule 2 of the CLAA, unlawful possession of firearm and unlawful possession of ammunition. In terms of section 51(2) the prescribed minimum sentence for robbery with aggravating circumstances and possession of semi-automatic firearm for the first offender is 15 years' imprisonment. Section 51(3) provides that 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.

[15] In determining whether there are substantial and compelling circumstances, a court must be conscious that the legislature has ordained a sentence that should ordinarily be imposed for the crime specified, and that there should be truly convincing reasons for a different response. But it is for the court imposing sentence to decide whether the particular circumstances call for the imposition of a lesser sentence. Such circumstances may include those factors traditionally taken into account in sentencing – mitigating factors - that lessen an accused's moral guilt. It was further held that the specified sentences are not to be departed from lightly and for flimsy reasons.[5]

[16] The trial court found that the personal circumstances of both appellants cumulatively taken were not substantial and compelling. It imposed the minimum sentences on all the relevant counts. It took into account the cumulative effect of the sentences and ordered 10 years of the 15 years' imprisonment imposed for count 2 to run concurrently with 15 years' imprisonment imposed for count 1. It ordered 8 years of the 15 years' imprisonment imposed for count 3 to run concurrently with a sentence imposed for count 1. It also ordered the sentence of 5 years' imprisonment imposed for count 4 to run concurrently with the sentence imposed for count 3. The effective term of imprisonment is 27 years.

[17] Both the appellants are appealing against the sentence. Both appellants contend that the trial court erred in finding that their personal circumstances were not substantial and

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

compelling. Further, they contend that the sentence is disproportionate to the crimes and induces a sense of shock.

[18] First I deal with the personal circumstances of appellant 1. He is a first offender. He was 25 years old. He is single. He has two children aged 5 and 3 years old. His mother is taking care of the children. He has passed grade 12 at school. He was doing part time jobs. He sustained a head injury from a motor vehicle accident. He spent 4 years 4 months in prison awaiting trial. It was submitted on his behalf that a lesser effective term of imprisonment should have been imposed by the trial court considering the time spent in prison awaiting trial.

[19] In my view the trial court was correct in finding that the personal circumstances of appellant 1 cumulatively taken were not substantial and compelling. I agree with counsel for appellant 1 that the period spent in prison awaiting trial should have been given more weight in determining an appropriate effective term of imprisonment. The trial court also should have given proper weight to the fact that the two robberies were committed in Lenasia on the same day. It is on record that appellant 1 was assaulted by the community on the day of his arrest. Further, the nature and value of the items (R70 plus cell phone, and undisclosed cash plus cell phone) taken by the appellants from the complainants and that the cell phone was recovered, should have been given a proper weight.

[20] I turn to deal with the personal circumstances of appellant 2. He has a previous conviction of theft which is more than 10 years old and did not involve an element of violence. He was regarded as a first offender by the trial court. He was 32 years old. He is single. He has two children aged 8 and 4 years old. He was working at the scrapyard as a security guard. He spent 4 years 4 months in prison awaiting trial. I agree with the trial court that his personal circumstances cumulatively taken, are not substantial and compelling. However, more weight should have been attached to the period spent in prison awaiting trial, in determining an appropriate effective sentence.

[21] I note all the aggravating factors mentioned by the trial court including the fact that one of the complainants was assaulted on his face with a firearm by appellant 2. The court also has to take into account the purposes of punishment, which are aimed at rehabilitation, deterrence and retribution. Punishment must fit the crime and criminal

(*R v Motsepe)*[6]. Considering the aforesaid, in my view the effective sentence imposed by the trial court is disproportionate to the crimes. Therefore, this court is entitled to interfere with the sentence.

[22] I have taken into account what the trial court said about the seriousness and prevalence of the offences, their impact on the victims and the interests of society, and I do not intend to repeat same herein. Having considered all the relevant factors in sentencing, including the aims of punishment, in my view, an appropriate effective sentence is the one that follows.

ORDER

[23] In the result the following order is made:

1. Condonation for the late filing of the second appellant's heads of argument is granted.

2. Appellant 1's appeal against the convictions on counts 3 and 4 is upheld, and the conviction on these counts is set aside.

3. Appellant 1's appeal against the sentence is upheld. The sentence of 15 years' imprisonment imposed on count 3 is set aside. The sentence of 5 years imprisonment imposed on count 4 is set aside. The effective sentence of 27 years' imprisonment is set aside and is replaced with the following sentence.

"3.1 Appellant 1 is sentence to 15 years' imprisonment on count 1, ante-dated to 9 October 2012.

3.2 Appellant 1 is sentenced to 15 years' imprisonment on count 2 and this sentence is ordered to run concurrently with the sentence imposed on count 1, ante-dated to 9 October 2012.

3.3 The effective sentence imposed on appellant 1 is 15 years' imprisonment."

4. Appellant 2's appeal against the sentence is upheld. The effective sentence of 27 years' imprisonment is set aside and replaced with the following sentence.

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[6] *1923 TPD 380*

"4.1 Appellant 2 is sentenced to 15 years' imprisonment on count 1, ante-dated to 9 October 2012.

4.2 Appellant 2 is sentenced to 15 years' imprisonment on count 2 and this sentence is ordered to run concurrently with a sentence imposed on count 1, ante-dated to 9 October 2012.

4.3 Appellant 2 is sentenced to 15 years' imprisonment on count 3 and 10 years of this sentence is ordered to run concurrently with a sentence imposed on count 1, ante-dated to 9 October 2012.

4.4 Appellant 2 is sentenced to 5 years' imprisonment on count 4 and this sentenced is ordered to run concurrently with a sentence imposed on count 1, ante-dated to 9 October 2012.

4.5 The effective sentence imposed upon appellant 2 is 20 years imprisonment."

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MMP Mdalana-Mayisela
Judge of the High Court
Gauteng Division, Johannesburg

I agree

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C I Moosa
Judge of the High Court
Gauteng Division, Johannesburg

(**Digitally submitted by uploading on Caselines and emailing to the parties)**

Date of delivery: 19 December 2023

Appearances:

On behalf of the 1st appellant: Adv LL Makoko

Instructed by: Legal Aid SA

On behalf of the 2nd appellant: Adv MP Mlubi

Instructed by: Legal Aid SA

On behalf of the State: Adv EK Moseki

Instructed by: National Prosecuting Authority