



IN THE HIGH COURT OF SOUTH AFRICA

/MF

(GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE: YES <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES <u>NO</u>
(3)	REVISED.

MJ 23/3/18

Appeal Case No: **A698/2016**

Court *a quo* Case No: **SH 726/10**

Date of Hearing: 12 February 2018

Date of Judgment: 23 March 2018

In the appeal between:

PHINEAS RAMOSHABA

Appellant

and

THE STATE

Respondent

JUDGMENT

DIEDERICKS (AJ)

- [1] The Appellant (Accused 3 in the trial) was charged in the Regional Court, Benoni, on charges of robbery with aggravating circumstances,

contravention of Section 3 of the Firearms Control Act, Act 60 of 2000 (possession of an unlicensed firearm) and a further Count 3, i.e. contravention of Section 90 of the Firearms Control Act, Act 60 of 2000 (possession of ammunition).

- [2] On the 11th of March 2013 Appellant was convicted on Counts 1 and 2 and sentenced to 15 (fifteen) years imprisonment on Count 1 and 10 (ten) years imprisonment on Count 2.
- [3] Following his petition to the Judge President of the Gauteng High Court, Appellant was, on 19th August 2016, granted leave to appeal against the conviction and sentence on Count 2.
- [4] At the outset and when starting his argument, counsel for Appellant pointed out that on the 8th of September 2015 the appeal against conviction in respect of Count 2 of the Appellant's Co-Accused, Accused 1, 2 and 4 was upheld in the High Court, Gauteng.
- [5] The judgment in that case, case number A162/2015 was then made available to me to peruse. That was a judgment by my brother Fourie (J) with which my sister Hassim (AJ) agreed. Notwithstanding the contents of the judgment of my brother Fourie and the conclusions drawn therein, I have perused the papers and listened to the arguments.

- [6] The central issue to be decided is whether it was proven beyond reasonable doubt that all the Appellants had the intention to exercise joint possession of the firearm in question.
- [7] The salient facts of this case is briefly that on the day in question the Appellants entered a hardware shop where one of them pointed a firearm at a customer demanding the keys of her car. The other Appellants were busy assaulting people inside the shop and forcing them into a storeroom. Various items were then taken, whereafter the Appellants left in the motor vehicle of the customer who was pointed with a firearm.
- [8] The Appellants were followed by another motor vehicle driven by a member of a security company. The Appellants then decided to abandon their motor vehicle in an attempt to run away, but they were arrested shortly thereafter. A firearm was then found on the pavement next to the Appellant's stolen getaway motor vehicle. This was a 9-mm Parabellum semi-automatic pistol with ammunition. The fingerprints of the Second Accused were found on the abandoned motor vehicle nearby the position where the firearm was retrieved. The Appellant was Accused No. 3 in the Court *a quo*.
- [9] The Magistrate concluded as follows with regard to joint possession of the firearm:

"From their evidence it is quite clear that a firearm was found on the scene. It appears that most likely that specific firearm was used by Accused 2 as his fingerprint was found on the left front door of the Sentra. This is, however, an incident where it is quite clear that all participants of the robbery knew that one of them was in possession of this said firearm and they all agreed to that. The possession of the said firearm can therefore be allocated to all participants of the said property."

- [10] On appeal it was argued on behalf of the Appellant that joint possession was not proven and that the Magistrate has misdirected himself in this regard. During argument I was referred to case law dealing predominantly with **common purpose**. Both Appellant and Respondent relied on the same case law dealing predominantly with common purpose, the case law are as follows:

***S v Mzwempi*, 2011(2) SACR 237 (ECM), *S. v. Mgedezi & Others*, 2011(2) SACR 237 (ECM), also *S. v. Mgedezi & Others*, 1989(1) SA 686 (A) and *S. v. Safatsa & Others*, 1988(1) SA 868.**

- [11] None of the parties referred to the case of ***S. v. Nkosi*, 1998(1) SACR 284 (W)** or to the case of ***S. v. Mbule*, 2003(1) SACR 97 (SCA)**.

- [12] In ***S. v. Nkosi*, 1998(1) SACR 284 (W)** at 286 H to L Marais J said the following with regard to the intention to exercise point possession:

"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 be 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 possess all the guns."

[13] This *dictum* (except for the reference to common purpose), was approved by the Supreme Court of Appeal in **S. v. Mbule**, 2003(1) SACR 97 (SCA) at 115 b-c where Nugent JA indicated that in his view Marais J had correctly set out the legal position. However, Nugent JA after pointing out that a mere intention on the part of a group to use weapons for the benefit of all of them will not suffice for a conviction. He also said the following in this regard:

"[72] In the present case the Trial Court found as a matter of inference that those requirements had been fulfilled in

respect of all the accused in relation to the hand grenade. Although the correctness of that finding was placed in issue when the accused appealed, it was not dealt with expressly by the Court a quo. I do not agree that the only reasonable inference from the evidence is that the accused possessed the hand grenade jointly. It is equally possible that, like the pistols, the hand grenade was possessed by only one of the accused. Mere knowledge by the others that he was in possession of a hand grenade and even acquiescence by them in its use for fulfilling their common purpose to commit robbery is not sufficient to make them joint possessors for purposes of the Act. The evidence does not establish which of the accused was in possession of the hand grenade and that charge, in my view, they were entitled to be acquitted."

[14] In the present matter the Court a quo found as a matter of inference that all the requirements referred to above have been fulfilled. I cannot agree with this conclusion. The fact that the fingerprints of the Second Accused were found on the left front door of the motor car does not justify the only reasonable inference that he is therefore the person who possessed the firearm. It could have been anyone of the other Accused who possessed the firearm.

[15] Furthermore, the possibility that the firearm was possessed by only one of them does not justify the inference that they all had as a group the intention

to exercise possession of the firearm through the actual possession of one of them. Mere knowledge, as pointed out by JA NUGENT by the others that one of them was in possession of a firearm is not sufficient to make them all joint possessors.

[16] For these reasons I am of the view that the Magistrate might have misdirected himself in this regard and therefore the appeal should succeed.

[17] Under the circumstances, I make the following order:

1. The appeal in respect of Count 2 (unlawful possession of a firearm) is upheld and the conviction and sentence of the Appellant on Count 2 only are hereby set aside.


P.M. MABUSE
JUDGE OF THE GAUTENG DIVISION, PRETORIA

I agree


F. DIEDERICS
ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

Advocate for Appellant: **Adv JP van der Westhuizen**

Advocate for Respondent: **Adv M Botha**