



Reportable:	YES / <u>NO</u>
Circulate to Judges:	YES / <u>NO</u>
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

APPEAL CASE NO: CAF 09/2022

In the matter between:

SELLO JEREMIAH MABUZA

Appellant

and

THE STATE

Respondent

CRIMINAL APPEAL

DJAJE DJP; PETERSEN J & REDDY AJ

Heard: 2 FEBRUARY 2024

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **09 MAY 2024**

ORDER

I make the following order:

The appeal against conviction is dismissed.

CRIMINAL APPEAL JUDGMENT

DJAJE DJP

- [1] This appeal comes before the Full Court of the Division with leave granted by the Supreme Court of Appeal on conviction only.
- [2] The appellant and his co-accused were arraigned in the Circuit Court of the Division sitting at Temba. They were convicted of two counts of murder, malicious damage to property, contravening section 3 of the Firearms Control Act 60 of 2000 (unlawful possession of firearms), contravening section 90 of the Firearms Control Act 60 of 2000 (possession of ammunition) and contravening section 28 of the Explosives Act 26 of 1956 (unlawful possession of explosives).
- [3] The appellant was sentenced to fifteen (15) years imprisonment on each of the two murder counts; five (5) years imprisonment on

each of the counts of malicious damage to property, the unlawful possession of firearms, the unlawful possession of explosives; and two (2) years imprisonment for the unlawful possession of ammunition. The court *a quo* ordered the sentence on count 2 (murder) to run concurrently with the sentence on count 1 (murder); the sentence on count 4 to run concurrently with the sentence on count 3 (malicious damage to property); and the sentence on counts 7 (unlawful possession of ammunition) and count 8 (unlawful possession of explosives) to run concurrently with the sentence on count 6 (unlawful possession of firearms). The appellant was therefore sentenced to an effective twenty-five (25) years imprisonment.

[4] The State in proving its case called six witnesses to testify; Lieutenant Fanuel Molefe (“Molefe”), Warrant Officer Cornelius Johannes Riaan Calitz (“Calitz”), Mr Andre Prinsloo, Captain Fana Elias Mahlangu (“Mahlangu”), Warrant Officer Peter Sledgehammer Sitebe (“Sitebe”), and Warrant Officer Robinson Sonkile Lesumo.

[5] Molefe a police officer stationed at Garankuwa police station was on duty on **7 August 2008**. He received information about an ATM bombing in Majaneng. He attended the scene where he found some members of South African Police Service (‘SAPS’) including Captain Mahlatsi. At the scene he observed a damaged ABSA ATM, bank notes, a cartridge case of a rifle and a money container. He did not tamper with the scene but waited for the

explosive experts. His evidence was accepted and stood unchallenged.

[6] Calitz was based at the Local Criminal Record Centre in Brits at that time. He attended the scene of the ATM bombing on **7 August 2008**, and a postmortem examination on **12 August 2008**. He compiled a photo album of the scene of the ATM bombing and collected evidence at a second scene where a shootout occurred between members of the SAPS and several suspects.

[7] Prinsloo an explosive expert based at Forensic Science Laboratory Explosives Section of the South African Police Service in Brits, attended the scene of the ATM bombing on **7 August 2008**. He also, with one Captain Pretorius, attended the scene where the shootout occurred at an RDP house. At the bombing scene he observed a badly damaged ATM. At the scene at the RDP house possible explosives were pointed out. He observed that the explosives found at the house were commercial explosives. He also observed four handguns, one pump action rifle, a rifle, and a money counting machine.

[8] Mahlangu a member of the National Intervention Unit, Bon Accord testified that on **7 August 2008** he received information from an informer about a house in Klipgat where firearms were kept. A team proceeded to the said house in Klipgat where they found the wife of Siphon Ngwenya, the deceased on count 1. It was around midnight at that time. They decided to wait for Ngwenya at a

nearby house which was still under construction. Whilst waiting, they received information about an ATM bombing at Majaneng. They were provided with descriptions of the vehicles involved in the ATM bombing but not the full registration details. As they were waiting, two vehicles passed, a white Volkswagen Polo and a white Ford Focus fitting the description of the vehicles from the ATM bombing. These vehicles stopped at an RDP house which was the sixth house from Ngwenya's house. Three men alighted from the Polo carrying bags and entered the RDP house. In the Ford Focus there were two passengers who also entered the house.

- [9] Mahlangu observed the registration number of the Polo and noticed that it was similar to the one that was provided to him earlier. Mahlangu and his colleagues decided to surround the said RDP house. His colleague knocked at the door and shouted 'police'. There was a shot fired from the house and the police returned fire. Several shots were fired from the house and by the police. One person came out of the house with his hands lifted and fell at the door. During the said shoot out, two of the people in the house were shot and killed, one being Siphon Ngwenya. When the shooting stopped, one person from the house shouted that they were no longer shooting, and the police went in. Inside the house the police found several firearms, including 9 millimetre pistols, shot gun, rifle and an AKM which is similar to an AK47 but the ammunition that is used varied in that it used R5 rounds). The appellant and his two co-accused were present in the house.

[10] Sitebe who was also employed at National Intervention Unit, Bon Accord was with Mahlangu. He corroborated the evidence of Mahlangu about going to the house of Siphon Ngwenya and not finding him; waiting for him at a nearby house which was still under construction; and the arrival of the two vehicles which stopped at the sixth house from that of Siphon Ngwenya. He testified that six men alighted carrying things and entered the house. This raised their suspicions, and they moved to enter that house. One of the colleagues knocked and before any answer was forthcoming, a person emerged from the house in possession of a firearm and fired a shot towards the police. The police returned fire. A shootout followed between the police and the occupants of the house. When the shooting ceased, one of the occupants of the house (who is the appellant) threw a wardrobe outside the house and fell to the ground. At that stage his colleagues Mahlangu and one Pilane went into the house.

[11] Admissions were made in terms of section 220 of the Criminal Procedure Act 51 of 1977 in relation to the identity of the deceased, that no further injuries were sustained from the scene of death to the conducting of the postmortem examinations. The ballistic reports for the firearms and ammunition were handed in by consent. The cause of death for the two deceased persons was noted as gunshot wounds to the chest.

[12] The appellant testified in his defence. According to the appellant, as at **7 April 2008** he was employed at the Ford Motor Company and was issued with Ford Ikon motor vehicle. On that day at

around 21h30 he was with Siphon Ngwenya repairing the Toyota Venture motor vehicle of the said Siphon, as he could not repair it during the day. Since he was repairing Ngwenya's vehicle, Ngwenya borrowed the Ford Ikon to collect a disc in Soshanguve. When he was done with the Toyota Venture he phoned to check where Ngwenya was. Ngwenya informed him that he was on his way. When Siphon did not return as indicated, he phoned him again, but Siphon was not responding to his calls. The appellant decided to wait inside the Toyota Venture which he was repairing as it was getting cold, and he fell asleep.

- [13] At around 01h30 in the morning, the appellant received a call from Ngwenya, who informed him that he was on his way back. After fifteen minutes, Ngwenya called him again and told him to go to the entrance of the place Ngwenya was said to be. When Ngwenya arrived, the appellant proceeded to his Ford Ikon. Ngwenya explained that he took that long as something happened. Ngwenya suggested that they travel together, and that he would return his motor vehicle and give him his money the following day. They proceeded to an unknown house where Ngwenya alighted and entered. After a while, Ngwenya returned and instructed the appellant to accompany him to collect his money. The appellant entered the house as requested. In that house he encountered unknown people with some bags. Before Ngwenya could give him his money, there was a knock at the door. It was the police. A shootout ensued, when according to the appellant the first shot was fired from outside. The appellant hid and eventually started pushing a wardrobe towards the entrance door. When he reached

the door, he yelled at the police to stop shooting. He was the second person to leave the house. The first person to leave was already shot by the police. He was then arrested.

[14] The appellant denied any involvement in the ATM bombing or that he was in possession of firearms and explosives. He confirmed that the house where the shooting happened is in the same street as Ngwenya's house, some six houses away. He further confirmed that the place where he had been working on Ngwenya's motor vehicle was about two hundred and fifty (250) to three hundred (300) metres from Ngwenya's house. The appellant explained that he did not discuss the amount of money that Ngwenya would pay him for the repairs to his motor vehicle, as they had a customer-service provider relationship.

[15] The co-accused of the appellant accused testified in their defence and denied any involvement in the ATM bombing. The court *a quo* rejected the evidence of the appellant and that of his co-accused. In rejecting the version of the appellant the court *a quo* found as follows:

"The evidence of accused 1 is highly improbable to say the least. It is highly improbable that he as an astound engineer would repair a motor vehicle at night even into the wee-wee hours of the morning. He trusted Sipho Ngwenya. That is why he allowed him to go with his motor vehicle being the Ford Ikon. Yet, he did not know Sipho's surname. The relationship, being that of a customer and service provider, lasted between three to four months and he paid six to seven visits to Sipho where he worked on Sipho's motor

vehicles. Yet, he wanted to create the impression that he trusted Siphon Ngwenya so much that he could borrow him his vehicle, the vehicle that in actual fact was issued by his employer.

He resides approximately 30 kilometres from where he conducted mechanic work on the Toyota Venture of Siphon Ngwenya. After servicing the brake system of this Toyota Venture, he could have used the Toyota Venture to go home and then return the motor vehicle in the morning seeing that he was supposed to go to work. He was however, quick to react and state that because of a Cosatu strike he was on leave the following day but that did not debar him from going home with the Toyota Venture and return it early the following morning.

What is totally strange is that he waited inside that very Toyota Venture and even fell asleep and he being a family man was prepared to wait for Siphon Ngwenya up until after half past one the following morning or even later because he did not trust Siphon Ngwenya with his car. That was despite the fact that he trusted Siphon Ngwenya with his car between half past nine the previous evening and half past one that following morning which is approximately four hours. He wanted money from Siphon Ngwenya, although he did not fix a price for the work done and behold he trusted that Siphon would have had the required amount of money. What is a bit strange is that he met Siphon in the road which leads to the main road. There is no explanation whatsoever why Siphon who left him, working on his Venture, knowing where he was, would have asked him to walk to 250 to 300 metres along the road that time of the morning to be picked up by Siphon Ngwenya, when Siphon Ngwenya could have so easily picked him up at the place where he left him to work on his Venture knowing that he is there.

What is furthermore strange is that when he got into his car, Siphon Ngwenya did not give him the money there and then. Instead, they drove for some distance and even pass Siphon Ngwenya's house. Being fed up with Siphon because he took so long and even abused his motor vehicle, he did not drop Siphon off when they arrived at the RDP house and went home, he accepted the invitation by Siphon to get into that house. To crown it all, he got into a

house in the presence of four other people whom he did not have any interest with.

On his own version two to three minutes lapsed after they had got into that house and still Siphso did not take out the money and pay him. On his own version there was still no price discussed. Then there was the knock on the window and what happened subsequently. Why he even had to enter into that RDP house in the first place, is mindboggling to say the least.

I have no hesitation whatsoever in rejecting the evidence of accused 1, not only because it is not reasonable possibly true but because I am convinced that it is false beyond any doubt."

[16] The appellant contends that the court *a quo* erred in accepting that the State proved its case against him beyond reasonable doubt. In this regard, the court *a quo* is said to have erred in that the vehicle that was described to Mahlangu as being involved in the ATM bombing was the VW Polo and not the Ford Ikon. As such the submission is that this constitutes a misdirection by the court *a quo* in finding that the appellant was present and formed part of the perpetrators at both scenes. The appellant further contends that he was not identified by Mahlangu as one of the people who alighted from the Ford when it stopped at the second scene, and if he was one of the people who fired shots from the house.

[17] The court *a quo* convicted the appellant on circumstantial evidence as there was no direct evidence implicating the appellant in the commission of the robbery and malicious injury to property charges. The argument by the appellant was there was no money found at the house to prove that he indeed participated in the ATM bombing. Further, that it was not proven that the appellant was one

of the occupants of the Polo vehicle. As such no inference could be drawn that the appellant was part of the perpetrators at the ATM bombing.

[18] The appellant further argued that, on the doctrine of common purpose, the State failed to prove his participation in the planning of the commission of the offence and that he had the requisite *mens rea* to participate in the bombing and associate himself with the actions of the perpetrators in bombing the ATM, being in possession of firearms and explosives and shooting at the police.

[19] It is so that the appellant was convicted of the two counts of murder based on common purpose and the court *a quo's* finding are as follows:

"It was contended on behalf of all the accused that they should be acquitted on the two murder charges, count 1 and 2, because they did not do anything to contribute to the death of the deceased, their friends or acquaintances with whom they were in the same house. The shooting by the police caused the death of the two deceased, so it was argued.

It is trite law that where robbers embark on a mission to rob, armed with firearms, they must foresee the possibility in the event of some resistance that a shootout may occur and that a person or persons might die, be it one of them, somebody else, or one of the police members.

In such an event the robbers can be charged for murder even if one of their own gang members died as a result of the shootout. This is exactly what happened in this case. The accused was aware of the fact that they were

armed and when being informed by the police about their presence, they started shooting at the police, who then also answered with gunfire.

The killing in the shooting process of two of their comrades can be attributed to them. Guilt can be imputed upon them more so because they acted in concert with one another (common purpose).

I am satisfied that all the elements of the crimes of murder have been established beyond reasonable doubt and the accused should be convicted on the two counts of murder.”

[20] In criminal proceedings the State bears the onus to prove the guilt of an accused beyond a reasonable doubt, and the version of an accused cannot be rejected only on the basis that it is improbable. The corollary is that if the accused's persons version is reasonably possibly true, the accused is entitled to an acquittal. **See: S v V 2000(1) SACR 453 (SCA) at 455B.** Equally trite is that the appellant's conviction can only be sustained if, after consideration of all the evidence, his version of events is found to be false. See : **S v Sithole and Others 1999 (1) SACR 585 at 590.**

[21] It is common cause that there were two (2) scenes, one at the ATM bombing and the other where the shootout with the police occurred; and that two (2) people were killed who were in the house at the shooting scene. At the second scene firearms, ammunition, explosives, money, and a money machine were found including 9 millimetre pistols, shot gun, rifle and an AKM which is similar to an AK47. There is no direct evidence against the appellant that he was present at the first scene where the ATM bombing occurred. In addition, there was no complainant who

testified in relation to the bombing of the ATM. In the absence of direct evidence, the next best evidence to be considered is circumstantial evidence.

- [22] The appellant gave his explanation in a piece meal fashion which was not reasonable and probable. The Appellate Court as it was then known, warned about the piece meal approach to evidence in **S v Reddy and Others 1996 (2) SACR 1 (A)** at 8C-D where it said:

“In assessing circumstantial evidence, one needs to be careful not to approach such evidence upon a piece meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in Rex v Blom 1939 AD 188 at 202-203, where reference is made to two cardinal rules of logic which cannot be ignored. These are firstly that the inference sought to be drawn must be consistent with all the proved facts and secondly, the proved facts should be such ‘that they exclude every reasonable inference from them save the one sought to be drawn’.”

- [23] In assessing the participation of the appellant in the commission of the offence at the first scene, the evidence in its totality should be considered. This assessment of the evidence should include the appellant’s explanation (evidence). It is not disputed that the appellant was at the scene where the police found the explosives with firearms and ammunition. Also at that scene was a money counting machine from an ATM and cash including the items as

mentioned above in paragraph 9. The police received information about an ATM bombing and that the vehicle involved was a white Volkswagen Polo with the same description as the one that was seen at the house at the second scene.

- [24] The appellant's explanation was that he had gone to the house at the second scene with Ngwenya (the deceased on count 1) to collect his money after repairing Ngwenya's Toyota Venture. He was however unable to explain how much money he was supposed to receive from Ngwenya for the repair work undertaken and why Ngwenya could not give him the money immediately after he entered the house. The appellant testified that after he worked on Ngwenya's motor vehicle, he waited for him for a long time and even fell asleep in the motor vehicle. However, no explanation was proffered why he could not go to Ngwenya's house which was about two hundred and fifty (250) metres away from where he was working on the motor vehicle to wait for him there, instead of risking his life by sleeping in the motor vehicle. When Ngwenya eventually called him, he failed to ask him why he was not coming to collect him where he was working on the Toyota Venture. He goes walking in the early hours of the morning to meet Ngwenya who is to return his Ford Ikon and pay him for his services rendered. Peculiarly, when they pass Ngwenya's house, the appellant remains quiet and does not ask where they were going. Again, when they arrive at the RDP house, the appellant continues to remain quiet and asks anything from Ngwenya. The ineluctable deduction from this peculiar silence, on the version of the appellant, is that this is a fabrication.

[25] In respect of the first scene where the ATM bombing was perpetrated, the proven facts, correctly found by the court *a quo*, was that there was an ATM bombing and the second vehicle involved, the VW Polo was travelling with the appellant's Ford Ikon and stopped at the same house where the appellant confirms he was at. In addition, the money and ATM money tray was found with explosives at the house where the appellant was. The only reasonable inference to the exclusion of any other inferences which can be drawn from the evidence, is that the appellant was aware of and participated in the commission of the crimes committed at the scene of the ATM bombing. His version was therefore correctly rejected by the court *a quo* as being false beyond a reasonable doubt.

[26] In relation to the second scene where two of the cohorts (the deceased in counts 1 and 2) of the perpetrators were shot and killed and items from the ATM bombing and weapons were found, the court *a quo* applied the doctrine of common purpose. Reference was also made to instances where robbers embark on a mission to rob armed with firearms, having to foresee the possibility in the event of resistance, that a shootout may occur and that a person might die. The Supreme Court of Appeal in **S v Lungile and Another (493/98) [1999] ZASCA 96; [2000] 1 All SA 179 (A)** (30 November 1999) dealt with the issue of murder committed during a robbery and the defence of *mens rea* as raised by the appellant *in casu*, as follows:

[15] The defence of absence of dolus on the part of the First Appellant

On behalf of the first Appellant it was argued that, even if he shared the common purpose of the gang to commit the robbery, the State had not proved that he had the necessary dolus in respect of the murder. Counsel for the State, on the other hand, argued that in participating in the robbery the First Appellant could not but have foreseen the likelihood of resistance by the employees of Scotts, or by the security guards, or the police, or by armed passers-by who became aware of the robbery. Well-knowing that at least two of the gang members were armed with firearms, he must have foreseen that someone might be injured or killed in a confrontation. Nevertheless, he persisted in associating himself with the robbery. In such circumstances our Courts very often draw the inference that an accused foresaw the possibility that a killing might ensue and, because he persisted, reckless of such consequences, he had the necessary mens rea in the form of dolus eventualis (see inter alia S v Mkhwanazi [1998] 2 All SA 53 (A) at 56 b - d per FH Grosskopf JA; see also S v Maritz 1996 (1) SACR 405 (A) at 415 a - f for the general approach).

[16] But this Court has cautioned, on several occasions, that one should not too readily proceed from "ought to have foreseen" to "must have foreseen" and hence to "by necessary inference in fact did foresee" the possible consequences of the conduct inquired into. Dolus being a subjective state of mind, the several thought processes attributed to an accused must be established beyond any reasonable doubt, having due regard to the particular circumstances of the case (see S v Ngubane 1985 (3) SA 677 (A) at 685 A - F; S v Stigling en 'n Ander 1989 (3) SA 720 (A) at 723 C- D; S v Bradshaw 1977 (1) P.H. H 60 (A); S v Sigwahla 1967 (4) SA 566 (A) at 570 A; S v Sephuti 1985 (1) SA 9 (A) at 121; S v Maritz, supra, at 417 b- e; S v Mamba 1990 (1) SACR 227 (A) at 236 j - 327 e).

[17] In the present case, the crucial question therefore is whether the State proved beyond reasonable doubt that the First Appellant in fact did foresee ("inderdaad voorsien het") that the death of a person could result from the

armed robbery in which he participated. In this case, as in many others, the question whether an accused in fact foresaw a particular consequence of his acts can only be answered by way of deductive reasoning. Because such reasoning can be misleading, one must be cautious. Generally speaking, the fact that the First Appellant had prior to the robbery made common cause with his co-robbers to execute the crime, well-knowing that least two of them were armed, would set in motion a logical inferential process leading up to a finding that he did in fact foresee the possibility of a killing during the robbery and that he was reckless as regards that result.

[18] *In my view the inference is inescapable that the First Appellant did foresee the possibility of the death of an employee of Scotts: he knew that at least two of his co-conspirators were armed with firearms; he knew that Scotts is in the main street of Port Elisabeth, and that it is immediately opposite a police station; and he knew that the robbery would take place in broad daylight. He nevertheless participated in the robbery, helping to subdue some of the victims. The State has consequently proved the necessary mens rea in the form of dolus eventualis beyond reasonable doubt.*"

(emphasis added)

[27] In **S v Nkosi 2016 (1) SACR 301 (SCA)** Majiedt JA (as he then was) writing for the Court settled the law on whether or not a robber who is a part of a gang can be held criminally liable when the death of any of his cohorts is brought about by, as in the present case, the police during a shootout. The following was said:

[1] *'Fair is foul and foul is fair' said the three witches in the opening scene of Shakespeare's Macbeth. In the course of an armed robbery gone horribly wrong for the robbers, one of them, Mr Bongani Jabulani Skhosana, was fatally wounded by the robbery victim, Mr Dennis Sikhumbuso Ngobese, who lawfully shot Mr Skhosana in self-defence. The question that arises is whether the appellant, Mr Thabo Macbeth Nkosi, who was part of the gang of armed*

robbers and who was accused number two at the trial, was correctly held criminally liable by the court below, (North Gauteng High Court, Pretoria, Molopa J sitting as court of first instance), for Mr Skhosana's death. What is fair and what is foul in these circumstances with regard to the appellant's culpability for his fellow-robber's death at the hands of the victim, is the vexed question that confronts us.

...

[3] The only issue before us is whether the trial court had correctly convicted the appellant of the murder of his fellow robber...

...

*[5] Enquiries like these are always fact specific...An important consideration is the fact that all three of the robbers who had entered the office (including the appellant) were armed with loaded firearms. In my view the appellant and his cohorts were clearly cognisant of the reasonable likelihood that they may have to use their firearms. And it was equally reasonably foreseeable that one or more of their victims may be armed and would use those arms. It is trite that every case must be decided on its own facts. The law reports are replete with cases where casualties ensue in the course of armed robberies. As Professor Snyman correctly points out, our courts have consistently held accused persons who engage in a wild shootout with others, in the course of an armed robbery, criminally liable on the basis of *dolus eventualis* for the unexpected deaths that may result (C R Snyman, *Criminal Law 5ed* (2008) at 201).*

...

[6] On the common cause and proved facts, the appellant and his fellow robbers reasonably foresaw the likelihood of resistance and a shootout, hence the need to arm themselves with loaded firearms...

*[7] I am mindful of the fact that intent is a subjective state of mind and that 'the several thought processes attributed to an accused must be established beyond any reasonable doubt, having due regard to the particular circumstances of the case' (per Olivier JA in *S v Lungile & another* (493/98) [1999] ZASCA 96; 1999 (2) SACR 597 (SCA) para 16). Equally important is to be cognisant that 'the question whether an accused in fact*

foresaw a particular consequence of his acts can only be answered by way of deductive reasoning. . . [b]ecause such reasoning can be misleading, one must be cautious' (see *S v Lungile and another* para 17). The facts in *Lungile* are more comparable with those in the present instance. In the course of a robbery at a store, a policeman arrived on the scene and exchanged gunfire with one of the robbers (the second appellant) resulting, amongst others, in the death of one of the store's employees. In upholding the conviction of the other robber (the first appellant) on murder and, after setting out the general principles quoted above, Olivier JA held that the inference was inescapable that the first appellant did foresee the possibility of the death of the employee since he knew that at least two of his co-conspirators were armed with firearms, that the store was located in the main street of Port Elizabeth opposite a police station and that the robbery would be committed in broad daylight. The following dictum in *Lungile* (para 17) is apposite:

'Generally speaking, the fact that the first appellant had prior to the robbery made common cause with his co-robbers to execute the crime, well-knowing that at least two of them were armed, would set in motion a logical inferential process leading up to a finding that he did in fact foresee the possibility of a killing during the robbery and that he was reckless as regards that result.' (Compare also: *R v Bergstedt* 1955 (4) SA 186 (A) and *S v Nkombani & another* 1963 (4) SA 877 (A) at 893 F – H.)

...

[10] I have already dealt with the foreseeability element above and nothing much need further be said about it. It would suffice to state that Molimi and other authorities in this court are contrary to the finding in *Mkhwanazi*. And, secondly, as pointed out above, Professor Snyman supports this latter approach (at 201). In the course of that discussion, Professor Snyman refers to the following hypothesis:

'[A]ssume that X1, X2 and X3 decide to commit an armed robbery. They are confronted by the police. A wild shootout between the two groups breaks out. X1 as well as a police official are killed in the shootout. Ballistic tests reveal the surprising fact that X1 was not killed by a bullet fired by a police official, but by a bullet fired by X2, and that the police official was not killed by one of

the robbers, but by a bullet fired by another police official. Can the three robbers be convicted of both murders?

It would seem that the courts answer this question in the affirmative, for the following reasons: X1, X2 and X3 foresaw the possibility that people might be killed in the course of the robbery, and the inference may also be drawn that, by persisting in their plan of action despite this foresight, they reconciled themselves to this possibility. It is submitted that the courts' handling of this type of situation is correct.'

...

[13] In conclusion and to summarise: on the facts of this case the appellant was well aware that the fact of him and his fellow robbers being armed with loaded firearms may result in a shootout or, as it was referred to in Bergstedt and in Dube, that they may encounter 'dangerous resistance'. He reasonably foresaw subjectively that, in the course of encountering such 'dangerous resistance', the firearms may be used with possible fatal consequences. He was thus correctly convicted of murder and the appeal must fail. I can do no better than to end off with the inimitable eloquence of Holmes JA in S v Nkombani above at 896E-F:

'This conclusion, arrived at by reference to reason and the facts, is also consistent with social necessity, that wicked minds which devise and plan such evil deeds may know the risks they run in the matter of forfeiting their own lives.'

[28] The appellant was part of the gang who were in possession of firearms and ammunition after committing a robbery at an ATM. In committing the robbery where there were signs of the presence not only of explosives but firearms, the gang obviously anticipated resistance. At what was clearly the "safe house" where the appellant was in the presence of the armed gang and items from the ATM robbery, it cannot be said that further resistance could not be anticipated. Once the police announced their presence by

knocking at the door, being armed to the teeth, it is only reasonable to expect that there would be resistance which would result in a shootout and the likelihood of death, whether of police officers or of co-perpetrators. The facts of the matter are demonstrative of the fact that the appellant did foresee the possibility of death either of the police or the robbers. The appellant by associating with his co-perpetrators who were in possession of firearms and explosives could only lead to the inference that he did foresee the possibility of a person being injured or killed. Therefore, as correctly found by the court *a quo*, the death of his companions can be attributed to him and his co-accused. The appellant's version was correctly rejected as being false by the court *a quo*.

[29] In respect of the firearm and explosives charges, the approach to such evidence was re-affirmed by the Supreme Court of Appeal in **Leshilo v The State (345/2019) [2020] ZASCA 98 (8 September 2020)**, where it was said:

"[1] The primary issue in this appeal is whether the appellant was in joint possession of a firearm.

[10] There has been some confusion regarding the application of the principles of common purpose and joint possession where firearms are utilised in the course of a robbery or a house breaking. Accused persons are frequently convicted of robbery with aggravating circumstances on the basis of common purpose, even if their role is relatively minor. In the absence of proof of a prior agreement, what has to be shown is that the accused was present together with other persons at the scene of the crime; aware that a crime would take place; and intended to make common purpose with those

committing the crime as evidenced by some act of association with the conduct of the others.(Mgedezi) However, the principles of common purpose do not find application when convicting an accused for the unlawful possession of the firearm used in the same robbery. Instead it is the principles of joint possession that apply.

*[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 1998 (1) SACR 284 (W)* 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.”*

“emphasis added”

[30] There was no direct evidence that the appellant was in possession of a firearm or explosives or that he fired any shots on that fateful day. The proven facts accepted by the court *a quo* and the exposition of the circumstantial evidence and peculiar facts of this matter, from the evidence relevant to the first scene which traverses to the second scene, are such that the appellant was correctly convicted on the firearm, ammunition and explosive charges. The ATM robbery having been successfully executed where explosives and firearms were used and the presence of firearms and explosives at the second scene at the house, proves the requisite requirements for joint possession as espoused in *Nkosi*.

[31] Having considered the submissions on behalf of the appellant and the respondent the appeal against conviction stands to be dismissed.

Order

[32] Consequently, the following order is made:

The appeal against conviction is dismissed.

J T DJAJE

**DEPUTY JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH
AFRICA,NORTH WEST DIVISION
MAHIKENG**

I agree.

A H PETERSEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

I agree.

A REDDY

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

JUDGMENT RESERVED

: 02 FEBRUARY 2024

DATE OF JUDGMENT

: 09 MAY 2024

COUNSEL FOR THE PLAINTIFF : MR T G GONYANE
COUNSEL FOR THE DEFENDANT : ADV P MUNERI