

SOUTH AFRICA / JUDGMENT

Bolo v S (CA&R352/13) [2014] ZAECHGC 99 (6 November 2014)

[2014] ZAECHGC 99

COURT

Eastern Cape High Court, Grahamstown

BEFORE

C Plasket, R Brooks

CASE / FILE NUMBER

CA&R352/13

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

Case

no: CA &R352/13

Date

heard: 5/11/14

Date

delivered: 6/11/14

Not

reportable

In

the matter between:

VUSUMZI

BOLO

Appellant

and

THE

STATE

Respondent

Arms

and ammunition – unlawful possession of semi-automatic firearm

and eight rounds of ammunition – joint possession

–

whether joint possession proved.

JUDGMENT

PLASKET J:

- [1] At about 20h00 on 17 September 2008, a robbery occurred at a shop called the Groentemark in Alexandria. Within an hour, five men were arrested by the police. They were charged with and convicted of the following offences in the Regional Court, Port Elizabeth: robbery with aggravating circumstances; six counts of kidnapping; the unlawful possession of a semi-automatic firearm; and unlawful

possession of eight rounds of ammunition.

- [2] The appellant was accused 1 in the trial. He was sentenced to an effective term of imprisonment of 17 years. He was refused leave to appeal by the magistrate. On petition to the Judge President of this court, leave to appeal was only granted against his convictions in respect of the unlawful possession of the firearm and the ammunition – counts 8 and 9.

The

facts

- [3] The robbers arrived at the Groentemark in a white Mazda car. Three of them, one of whom was armed with a firearm, entered the shop. A fourth man stood guard outside while a fifth man remained in the car.
- [4] Three employees working in the shop were tied up and taken to a store room. Shortly thereafter, three customers entered the shop. They were also tied up and taken to the store room. The robbers loaded their loot into the car and left. They stole goods to the value of approximately R50 000, including R4 000 in cash.
- [5] About an hour later, a white Mazda car in which the five accused were travelling was stopped by the police near the Motherwell turn-off of the road from Grahamstown to Port Elizabeth, about 70 kilometres from Alexandria. (The road from Alexandria to Port Elizabeth joins the Grahamstown to Port Elizabeth road.)
- [6] The police found all of the property that had been stolen from the Groentemark in the car, as well as a firearm in the cubby-hole and another on the back seat.
- [7] The firearm found in the cubby-hole did not have a firing pin and so was not functional. In the trial, all of the accused were acquitted of the charge of unlawfully possessing this firearm, the magistrate finding that there was no basis to conclude that any of them were aware of it being in the cubby-hole.

- [8] All of the accused, including the appellant, were convicted of unlawfully possessing the firearm found on the back seat of the car and of the eight rounds of ammunition that were in it. Whether the magistrate was correct in this respect is the only issue that requires decision in this appeal.
- [9] The magistrate's reasoning was this. The evidence established that only one firearm was used in the robbery. In all likelihood, that firearm was the one found on the back seat of the car because it is probable that the robbers would have used a functional firearm with ammunition, rather than one that did not function. The firearm found on the back seat was found next to a bag containing some of the loot from the Groentemark. From these facts, he concluded:

'In my view all five accused knew about the fire-arm and that it would be used in execution of the robbery. This follows inevitably from the fact that this was clearly an organised robbery, perpetrated by persons who came from Port Elizabeth and it would be naïve and extreme to think that they would commit an organised robbery without knowing that a fire-arm would be used.

I am therefore convinced beyond reasonable doubt, that they not only knew about the fire-arm that would be possessed by one of the robbers, but that the one robber who possessed it, possessed it on behalf of all the robbers. Therefore all five robbers were in co-possession of the fire-arm.'

On the basis of the same reasoning, they were also guilty of the joint possession of the ammunition.

Analysis

- [10] In my view, the magistrate was, without doubt, correct in finding that the functioning firearm (with its ammunition) was the one that was used in the robbery and that all of the robbers, including the appellant, were aware that it would be used by one of them in the robbery. These findings support his conclusion that the robbers acted in the furtherance of a common purpose when they committed the robbery.
- [11] The magistrate's findings do not, however, answer the different question that has to be answered, namely whether the five accused, including the appellant, were joint possessors of the firearm and the ammunition.
- [12] In *S v Nkosi*[1] the appellant had taken part in a robbery. His three co-perpetrators had all been armed with firearms and the court accepted that he had known that they were armed. Marais J set out the approach to be adopted in determining whether the appellant was in joint possession of the firearms with his co-perpetrators as follows:[2]

'The issues which arise in deciding whether the group (and hence the appellant) possessed the guns must be decided with reference to the answer to the question whether the State has established facts from which it can properly be inferred by a Court that:

- (a) the group had the intention (animus) to exercise possession of the guns through the actual detentor and
- (b) the actual detentors had the intention to hold the guns on behalf of the group.

Only if both requirements are fulfilled can there be joint possession involving the group as a whole and the detentors, or common purpose between the members of the group to possess all the guns.'

[13] In *S v Mbuli*,^[3] a case concerning whether a robber was in joint possession, with others, of a hand grenade, this statement of the law was held,

subject to one reservation, to be correct. Nugent JA held however, that the reference to common purpose in this context was 'misplaced'

because the concepts of common purpose and joint possession differ. With reference to the sections of the Arms and Ammunition Act 75 of 1969 that was then in force and which criminalised the unlawful possession of armaments, including explosives, and firearms, he stated:

'What is prohibited by both these sections is the existence of a state of affairs (ie having possession of an armament, or a firearm, as the case may be) and a conviction will be competent only if that state of affairs is shown to exist. That state of affairs will exist simultaneously in respect of more than one person if they have common (or joint) possession of the offending article. Their contravention of the relevant section in these circumstances does not arise from an application of the principles applicable to common purpose (which is concerned with liability for joint activity) but rather from an application of ordinary principles relating to joint possession. Common purpose, and joint possession, both require that the parties concerned share a common state of mind but the nature of that state of mind will differ in each case.'

[14] The facts of *Mbuli* were similar to the facts of this case. Three men, having committed a robbery, were stopped by the police who found the loot, firearms in the possession of two of them and a hand grenade that was not in the physical possession of any of them. One of the issues on appeal was whether the appellant was a joint possessor, with his co-perpetrators, of the hand grenade. In applying the law, as set out in *Nkosi*, to the facts, Nugent JA said:^[4]

'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 on that charge, in my view, they are entitled to be acquitted.'

[15] *Mbuli* was confirmed to be correct in *S v Kwanda*,^[5] in which Theron JA stated that the mere fact that the appellant conspired with his co-perpetrators to commit robbery and was aware

that some of them were armed with firearms in order to commit the robbery ‘does not lead to the inference that he possessed such firearms jointly with his co-accused’.

[16] On the basis of these authorities it appears to me that the magistrate erred in his approach to the issue before him. He decided

that because all of the accused knew that one of them possessed a firearm and all were in agreement that it should be used in the

robbery, all of them were joint possessors. As with Mbuli’s case, there is no evidence to show who had physical possession of the firearm, so it cannot be established whether the actual possessor had the intention to possess it on behalf of the group. There is also no evidence from which it can be inferred that the members of the group intended to possess the firearm jointly with the unknown physical possessor.

[17] That being so, the convictions in respect of counts 8 and 9 must be set aside. The appellant’s co-accused have not, it would appear, appealed. As they stand to benefit from this judgment, it is necessary to ensure that it is brought to their attention. I intend requesting the Grahamstown Justice Centre to take steps to inform them of this judgment and advise them of their rights.

The order

[18] I make the following order.

- (a) The appeal succeeds.
- (b) The court below’s order convicting the appellant of counts 8 and 9 is set aside and replaced with an order acquitting the appellant of counts 8 and 9.
- (c) The Grahamstown Justice Centre is requested to inform the appellant’s co-accused of this judgment.

C Plasket

Judge of the High Court

I agree.

R Brooks

Acting Judge of the High Court

APPEARANCES

Appellant:

Respondent:

[1] S v Nkosi 1998

(1) SA 284 (W).

[2] At 286h-i.

[3] S v Mbuli 2003

(1) SACR 97 (SCA) para 71.

[4] Para 72.

[5] S v Kwanda 2013

(1) SACR 137 (SCA).

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2014/99.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/bolo-v-s-unknown-topic-aecghc-2014--6a3ea5153b1caa912980c4fa>

Prepared on 9 October 2026 · Esheria