

SOUTH AFRICA / JUDGMENT

Fourie and Others v S (A257/2023) [2024] ZAGPPHC 1287; [2025] 2 All SA 205 (GP) (6 December 2024)

[2024] ZAGPPHC 1287

COURT

North Gauteng High Court, Pretoria

BEFORE

Moshwana, Molopa-Sethosa, Strydom

CASE / FILE NUMBER

A257/2023

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FLYNOTES:

CRIMINAL – Sentence –
Compensation –
Cash in transit robbery –
Defence is that of lack of involvement in secret planning and
execution of robbery –
Overwhelming evidence that appellants
conspired to assist those who actually committed robbery –
Wrongly convicted
of possession of firearms and ammunition –
Section 300 order set aside in its entirety for want of validity –
Effective sentence of 30 years is replaced with 25 years’
imprisonment – Criminal Procedure Act 51 of 1977, s 300.
REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
Case
Number: A257/2023
(1)
REPORTABLE: YES
(2)
OF INTEREST TO OTHER JUDGES: YES
(3)
REVISED: NO

DATE:	6/12/24
	SIGNATURE
	In
the matter between:	HENRICO FOURIE First Appellant FANNIE MORRIS MBUYANI Second Appellant JOSIAS LUCAS MASEKO Third Appellant LAZARUS NTLATLENG Fourth Appellant and THE STATE Respondent
Delivered:	This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date and for hand-down is deemed to be 6 December 2024.
Summary:	Appeals against conviction and sentence. When to apply the doctrine of common purpose in order to secure a conviction. Evidence of a co-accused – reliable when taken together with other corroboratory objective evidence. Proof beyond reasonable doubt required and not beyond doubt. The evidence of the accused person must be reasonably and possibly true in order to be favoured. Robbery has taken place, the arraigned accused persons denied involvement. Evidence of section 204 witnesses taken together with the evidence of an expert witness proved beyond reasonable doubt that the appellants were involved. Conviction and sentence in respect of counts 4 and 5 in respect of all the appellants is set aside. Section 300 of the Criminal Procedure Act 77 of 1951 (CPA) order was incompetent and ought to be set aside. When is it appropriate for a Court of appeal to interfere with sentence imposed by a Court below? The sentence to be imposed on count 3 would amount to double punishment contrary to the common law rule. On application of the Constitution, the sentence is already imposed in count 1. Held: (1) The appeal against conviction in respect of counts 4 and 5 is upheld

and in respect of counts 1, 2 and 3 is dismissed in respect of all accused. (2) The effective sentence of 30 years is altered and interfered with and is replaced with 25 years' effective imprisonment. (3) The order in terms of section 300 of the CPA is set aside.

JUDGMENT

Moshoana J (Molopa-Sethosa J and Strydom AJ)

Introduction

1. It is not often that a Court judgment has, as a prologue, a statement from a binding authority of the higher Court. Usually such binding authority is an epilogue to the Court's judgment instead. However, in view of this Court's finding herein, it behoves me to, at this early stage refer to just such a statement: The Constitutional Court in *Bogaards v S (Bogaards)*[1] aptly stated the legal position as follows:

"[41] Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed[2]. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it" [own emphasis].

This statement must be understood against the backdrop of the latest South African Police Services (SAPS) crime statistics for the first quarter of the year – April to June 2023, wherein the police recorded 60 cases of cash-in-transit heists (CIT) in just three months.[3] Undoubtedly, these statistics have blood-curdling effect.[4]

2. The above statement was stated with such sagacity and shall be a beacon for this Court when it considers the effective sentence of 30 years imposed by the Court a quo under tutelage of my learned brother, Bam J.
3. Having said that, before us serves an opposed appeal seeking to set aside convictions and sentences imposed on the four appellants. Six accused persons were arraigned before the Court below. However, before us are four appellants, namely; Mr. Henrico Fourie (Fourie); Mr. Fannie Morris Mbuyani (Mbuyani); Mr. Josias Lucas Maseko (Maseko); and Mr. Lazarus Ntlatleng (Ntlatleng). The appellants come before us with the leave of the Supreme Court of Appeal. Fourie; Mbuyani; and Maseko were granted special leave to appeal their convictions and sentences in respect of all the counts. Ntlatleng was only granted leave to appeal against count 4 (Contravention of section 4 of the Fire Arms Control Act, Act 60 of 2000 unlawful possession of prohibited firearms) and 5 (Contravention of section 90 of the Fire Arms Control Act unlawful possession of ammunition) as well as sentences imposed on him and

the compensation order.

4. In the Court a quo, the appellants each faced the following five counts:

4.1. Count 1 related to robbery with aggravating circumstances committed on 7 January 2020 on the N4 Freeway.

4.2. Count 2 related to contravention of section 22(2) of the Explosives Act 15 of 2003 in that explosives were used to damage or destroy the vehicle transporting cash in the region of R25 million.

4.3. Count 3 related to contravention of section 16(2)(a) of the Riotous Assemblies Act 17 of 1956 in that the accused conspired to rob SBV Security and/or its employees, alternatively incitement to commit a crime in contravention of section 18(2) of the Riotous Assemblies Act.

4.4. Count 4 related to contravention of section 4 of the Fire Arms Control Act 60 of 2000; unlawful possession of prohibited firearms.

4.5. Count 5 related to contravention of section 90 of the Fire Arms Control Act; unlawful possession of ammunition.

5. All the appellants pleaded not guilty before Bam J whereafter, a lengthy trial ensued. A record running into some 3 389 pages was placed before us. Ultimately on 14 July 2022, Bam J returned a guilty finding against the appellants in respect of all counts.

6. On 21 July 2022, Bam J imposed the following sentences on all the appellants.

4.1 Count 1: 25 years' imprisonment;

4.2 Count 2: 10 years' imprisonment;

4.3 Count 3: 5 years' imprisonment;

4.4 Count 4: 15 years' imprisonment;

4.5 Count 5: 5 years' imprisonment.

7. Additionally, Bam J invoked the provisions of section 300 of the Criminal Procedures Act (CPA)[5] and ordered the appellants to compensate the SBV Security jointly and severally, the one paying the others to be absolved, in the amount of R24 850 000.00.

Pertinent background facts to the present appeal

8. For the purposes of this judgment, it is unnecessary to regurgitate facts pertinent to the occurrence of the robbery itself. In the main, the attack by the appellants is their alleged involvement in the robbery. With regard to the relevant facts, this Court defers to the lengthy judgment of Bam J and liberally draws some of the salient facts therefrom.

9. Briefly, the salient facts in this appeal are that SBV Services (Pty) Ltd (“SBV”) is a legal entity responsible for processing and transporting bulk cash to various banks from retail clients. The collected cash is transported by means of an armoured vehicle. The daily deployment of SBV employees to various stations is managed by the so-called Trinity Roadshow and Dynamic Routes Management (DRM) computer applications. Each morning, Fourie, who was employed as a Head of Department SBV Logistics, Watloo Cash Centre, after Mr. Reinhart de Koker (de Koker), a Senior Protection Officer, had allocated service points for the SBV runs, will allocate warm bodies to execute the run. All the route planning for the run are done electronically and are loaded on a DRM computer system. On every occasion (run), four employees are deployed per armoured vehicle. One will be a driver, another a rifleman, and two crew members. The driver and the rifleman occupy the front section of the vehicle. The two crew members would occupy the rear component of the vehicle. Fourie, Mbuyani and one Bekithemba Patrick Mbanjwa (Mbanjwa) had conspired to rob SBV of the cash in transit (CIT). As part of the conspiracy, Fourie would manually deploy the driver and the rifleman to run number 19 with vehicle number BB157. The deployed driver, on 3 and 7 January 2020, was one David Tolo (Tolo) who was recruited to be part of the secret plan. Tolo became a section 204 witness at the trial before Bam J. The deployed rifleman was Ntlatleng (the 4th appellant). Tolo and Ntlatleng were also employees of SBV. Various preparatory meetings were held in order to execute the secretly

planned robbery. The robbery was initially planned to take place on 27 December 2019, however it failed because there were no explosives

available. Next, it was planned to be staged on 3 January 2020, however, having been foiled by the alleged presence of the police on the day, the robbery was postponed to the 7th of January

2020. It is common cause that, on 7 January 2020, the cash in transit vehicle belonging to (SBV) was robbed. Shortly after the robbery, the appellants were arrested. Fourie’s lamentations regarding the manner in which his arrest was effected, for the sake of brevity, will not be repeated. It is unnecessary to detail the lament. All the appellants vociferously took issue with the fact that the chain of evidence was broken in that certain evidentiary materials were not placed in proper seal bags and that they were not properly recorded in SAP 13. Likewise, they all also took issue with the involvement of private individuals in the investigations.

10. Three of the accused persons, namely Tolo, Jonas Lehola (Lehola) and Thembu Sibusiso Masilela (Masilela), turned state witnesses and by virtue of section 204 of the CPA, were exonerated. However, during the trial a quo, Lehola made a volte face and was declared a hostile witness and was availed for cross-examination by the State. His testimony at the trial was confined to the so-called burner[6] phone, which was allegedly instrumental in the robbery. He discarded and later retrieved a damaged burner phone. His initial version was that he received the burner phone from Fourie with an instruction to destroy it. During trial he recanted and testified that he encountered the burner phone on Fourie’s table and out of his own initiative offered to discard it. Since he was in a hurry to visit the social workers in

Hammanskraal he decided to effect the discarding en route. Allegedly, he was assaulted by one Ms Leonie Verster (Verster) in an attempt to coerce him into admitting that the damaged burner phone belonged to Fourie. Despite the assault, he did not succumb to the coercion.

11. It became common cause during the trial that some of the evidentiary material collected by the members of the SAPS were presented to one Mr. Francois Samuel Moller (Moller), a Digital Forensic Investigator and Data Analyst employed by SBV. It also became common cause that certain known procedures were not complied with regarding the handling of that evidentiary material, hence the vociferous objections by the Appellants referred to supra.
12. A total of 23 witnesses were presented by the State to prove its case. At the close of the State's case a section 174 of the CPA discharge was unsuccessfully applied for by the appellants before us. All the appellants testified in their own defences and called witnesses in support of their respective defences. On 14 July 2022, Bam J rendered a very lengthy ex tempore judgment where he returned the guilty verdict. On 21 July 2022, Bam J passed the sentences alluded to above, additionally he absolved Tolo and Masilela on the strength of section

204 of the CPA and made an order in terms of section 300 of the CPA. He also refused the oral applications for leave to appeal brought, on that day, on behalf of Maseko and Ntlatleng.

Analysis

of whether the accused were afforded a fair trial a quo?

13. Before this Court engages with the merits of this appeal, it is apposite to dispose of the Appellants' contention that the manner in which Bam J conducted the hearing a quo infringed on their rights to a fair trial per section 35 of the Constitution of the Republic of South Africa, 1996 (The Constitution). Barely two days before the hearing of the appeal, Mr Witz, who appeared on behalf of Fourie, raised a question of bias on the part of the learned Bam J. State's counsel, Mr Mashuga, sought to be indulged so that he can augment his submissions on the belated bias issue. The indulgence was duly granted.
14. Further objections to Bam J's management of the hearing a quo were: that Bam J irregularly refused a section 174 application; that he irregularly refused to entertain a trial within a trial and that he admitted evidence which was unconstitutionally obtained in contravention of section 35 of the Constitution. Section 322(1) of the CPA specifically provides that no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such an irregularity. As a point of departure, this Court is unable to identify any failure of justice in this instance. A failure of justice occurs when there is a miscarriage of justice[7]. A miscarriage of justice manifests itself in an instance where an innocent person is tried and convicted of a crime he or she did not commit[8].
15. In Adams[9] Lord Phillips pertinently stated that:

“A new fact will show that a miscarriage of justice has occurred when it so undermines the evidence against the defendant that no conviction could possibly be based upon it. This is a matter to which the test of satisfaction beyond reasonable doubt can readily be applied. This test will not guarantee that all those who are entitled to compensation are in fact innocent. It will, however, ensure that when innocent defendants are convicted on evidence which is subsequently discredited, they are not precluded from obtaining compensation because they cannot prove their innocence beyond reasonable doubt.[10].

In the absence of a failure of justice, which would have rendered the proceedings unfair, this Court is not empowered to set aside or alter the conviction on the basis of an irregularity.

Bias

16. Before us, Mr Witz, (who argued this point on behalf of all the appellants) laboriously nit-picked through the entire transcript to highlight the instances where Bam J called the parties before him to order, to support the inference of bias he sought this Court to draw. Emphasis was placed on occasions where Bam J interrupted cross examination to warn counsel against duplication of questions put to the witnesses. It was also alleged that, as a result of Bam J's warning that he would hold the attorney for one of the accused in contempt of court, the accused's right to fair representation, as well was infringed upon. Bam J's conduct, so it was alleged, created a reasonable apprehension of bias.
17. The contention that, by, for instance, refusing counsel to complete cross examination where such question had already been put (and answered) during cross examination by other (or the same) Accused's counsel, Bam J denied the Appellants the right to adduce and challenge evidence within the contemplation of subsection (3)(i), is difficult to believe. It is, with respect, as preposterous as it is unmeritorious. The transcript reveals that Bam J allowed rigorous cross-examination of all the witnesses of the State. Tolo, for example, was cross-examined for six days. Where he interrupted, or disallowed, cross examination, Bam J was not expressing bias – he was performing his function as a presiding officer by curtailing the unnecessary lengthening of the trial due to unnecessary or repetitive questioning of the witnesses. It was not done due to bias. All the Appellants adduced their own evidence and called witnesses in support of their respective defences, without any impediment by Bam J.
18. Section 317 of the CPA provides that if an accused is of the view that any of the proceedings in connection with or during his trial before the High Court are irregular or not according to law, he or she may during the trial or within 14 days after conviction, with a possible condonation upon showing good cause, apply for a special entry stating in what respect the proceedings are alleged to be irregular. The appellants before us failed to do so after their convictions. Despite all the complaints, belatedly hoisted on appeal, the appellants failed to seek a recusal of Bam J. Accordingly, in our considered view, reliance on *SAP SE v Systems Applications Consultants (Pty) Ltd t/a Securinfo* and another (*SAP SE*)[11] judgment is misplaced. In *SAP SE* an application for recusal was launched and refused.

Refusal of the Section 174 applications

19. Did Bam J's refusal of the section 174 discharge application, without hearing submissions, constitute a failure of justice? To our mind, it did not.
20. The operation of section 174 largely depends on the opinion of the Court in an instance where there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge. Once the Court forms that opinion, it may return the verdict of not guilty. In an instance where the Court does not form an opinion, the accused person has a choice not to testify.[12] That being the case, there is no window of opportunity for a failure of justice. This is not the case where it could be said that an Accused person may be convicted on the basis of self-incrimination.[13]

Legal submissions by the Accused's counsel may seek to persuade a judge, however the judge, having heard the State's case, may form such opinion, with or without legal submissions. What section 174 contemplates is a speedy resolution of the trial and not a no trial. If a judge, ultimately acquits the Accused, the refusal of the section 174 application would have only caused a lengthy trial, as opposed to denial of a fair trial. A fair trial is one where all the parties are afforded an opportunity to state their respective cases.

Refusal to order a trial within a trial

21. The next alleged irregularity is that of refusal to commission a trial within a trial. A trial within a trial is no magic wand. It is just a term of art. It simply remains a trial. By definition a trial is a formal examination of evidence by a judge in order to decide guilt in a case of criminal proceedings. Ordinarily, a trial within a trial is held where, for instance confessions or entrapment situations contemplated in section 252A(3)(a) of the CPA, are involved. The one sought by the appellants before Bam J was of a different nature. Effectively, the accused sought to prevent an expert witness from testifying simply because it was contended that at the ultimate end his evidence would be found to be inadmissible due to the provisions of Protection of Private Information Act (POPIA).[14] Bam J, correctly in our view, ruled that he will listen to the evidence in the normal course and, if he finds it inadmissible,

he will disregard it. A trial within a trial would have been an unnecessary duplication of the same evidence and would have been a waste of time. Accused persons are entitled to a speedy trial. Whether decided within the format of a trial within a trial or at the end of the trial itself, the same question would have presented itself to Bam J, namely; is the evidence of Moller admissible or not? The ultimate question remains that of the fairness of a trial and the detriment to the administration of justice. There can be no failure of justice, particularly in an instance where the right to cross-examination is availed and used on such a witness.

22. Bam J ultimately did not exclude the evidence of the expert witness. We agree that the evidence was not inadmissible. The Appellants'

contention that section 26 of the POPIA was contravened by Moller, fails to take heed of the exceptions in section 27 of POPIA. We will not in this judgment laboriously reference the text of these two sections. It suffices to state that the contention was bad in law. Section 35(5) states that

evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice. Section 35(5) envisages a two-step process. The learned Van Zyl DJP, aptly stated the law as follows:

“First, the evidence sought to be excluded must have been obtained in a manner that infringed on a right guaranteed by the Bill of Rights. If it is found that the impugned evidence was so obtained, the second step is to determine whether admission of the evidence will render the trial unfair. The section does not provide for automatic exclusion of evidence that was obtained in violation of a protected right[15].

It must be borne in mind that the determination of whether the admission of the evidence would be detrimental to the administration of justice requires a value judgment. The concept of ‘fairness’ is elastic and incapable of any firm definition[16]. The section envisages fairness or detriment to the administration of justice as a barometer.

23. Fourie’s gripe is that the searches and seizures happened without a warrant. It is not in issue that many of the exhibits, which included mobile phones and sim cards, were obtained without a search warrant. In *S v Gumede (Gumede)*[17], the Supreme Court of Appeal dealing with a firearm found during an unlawful search stated the following:

“The firearm was obtained by means of search which, because of its illegality, violated the appellant’s right to privacy. But the fact that the evidence of a firearm was obtained in that manner did not, in my view, affect the fairness of the trial. This is so because the firearm is real evidence that the police probably would have found if they had entered the premises lawfully in terms of a search warrant and without breaching the appellant’s right to privacy. The existence of a firearm would have been revealed independently of the infringement of the appellant’s right to privacy. Consequently, the fact that the evidence of a firearm was unfairly obtained did not necessarily result in unfairness in the actual trial”[18]

24. Similarly, the fact that the phones and sim cards as real evidence were obtained without a warrant does not in itself suggest unfairness of the trial. On this point, Fourie placed much store on the decision of the Supreme Court of Appeal in *Bamba v S (Bamba)*[19]. Sadly, for Fourie, Bamba is distinguishable from the facts of this case. To illustrate the distinction, the learned Mocumie AJA, as she then was, stated the following:

“[10] On the facts of this case this evidence was crucial in establishing the guilt of the accused beyond a reasonable doubt. In this regard, the trial court erroneously concluded that it was common cause that ‘the fired bullet as well as the fired cartridge found at the scene were linked to and proved to have been fired by a firearm which had been issued to the accused by the South African Police’. The court a quo simply stated that ‘a spent bullet head and cartridge that were allegedly found in the vicinity of the shooting, were handed to the investigating officer. Ballistic evidence linked the bullet head and cartridge to the appellant’s firearm.’ It did not, however, consider the reliability of the evidence to prove that these were the same exhibits which were subjected to ballistic testing....[14] Applying the test [R v Blom[20]test] to the facts of this case, in the absence of the ballistic evidence linking the appellant’s

firearm to the bullet head and fired cartridge allegedly found at the scene, in substance, the inference that the trial court sought to draw was not the only inference to be drawn from the /proven facts.” [Own emphasis]

25. In casu, Bam J did not apply inferential reasoning. The evidence of Moller, which emanated from the instruments examined by him, fit hand-in-glove with the testimony of Tolo and Masilela and, in some respects, that of Fourie. The evidence of Moller was, in the interests of the administration of justice, admissible. Exclusion of his evidence would have been to the detriment of the administration of justice. Bam J was entitled to exercise value judgment on the admissibility of the evidence of Moller. His *raison d'être* to apply value judgment is unassailable on appeal.
26. During argument, Mr Witz pinned his colours to the mast by submitting that the constitutional right allegedly violated is the right guaranteed in section 14 of the Constitution which provides that everyone has the right to privacy, which includes the right to have,
 - (a) their person or home searched; (b) their property searched; (c) their possession seized; or (d) the privacy of their communications infringed. As indicated earlier, the reach of section 35(5) is not to automatically exclude the evidence simply on the basis that it violated a constitutional right.
27. In *Ndlovu and another v S*[21], the appeal Court hearing an appeal from the Magistrate Court was faced with almost similar facts. The appellants were passengers in a Mercedes Benz which was robbed. They were stopped and taken to their place of residence where their homes were searched and items like USBs were seized. These seized items were linked to the robbery at the airport. When assessing the evidence of the State, those items together with other proven facts were taken into account by that Court.
28. It must be emphasised that POPIA was enacted in recognition of section 14 of the Constitution. Therefore, on application of the subsidiarity principle[22], the appellants have no right to direct reliance on section 14 with regard to any information accessed by Moller – their relief lies within POPIA. Section 6(1)(c) of POPIA excludes information relating to investigations and prosecution of lawful activities. Furthermore, on the available evidence, Fourie consented to the search, and, as a result, the provisions of section 22(a) of the CPA find application. In the circumstances, this Court concludes that the appellants were not subjected to an unfair trial. No failure of justice is present or palpable at all. The legal objections, raised belatedly, fall to be rejected. I now turn to the merits of the appeal.

Analysis

of the appeals against conviction

29. With respect to the convictions, the general defence of all the appellants is that of lack of involvement in the secret planning and the execution of the robbery.

30. Generally, a Court of appeal should not interfere with the factual findings of the trial Court unless convinced that the trial Court was wrong[23]. It must be borne in mind that the State's duty is not to prove its case beyond all doubt.[24] The question whether the evidence of an accused person is reasonably possibly true, involves the weighing of probabilities and all the circumstances[25].

The Robbery convictions

31. As indicated at the dawn of this judgment the that fact a robbery, involving weapons and explosives, happened, is common cause. The Court a quo on the basis of the legal construct of common purpose convicted Fourie, Mbuyani and Maseko (trio) who had not been present at the scene of the robbery. Tolo and Masilela testified at length, that the trio were part of the secret plan. Whilst it is true that their testimonies were contradictory in some, immaterial, respects, Counsel for Fourie makes a mountain out of a mole hill by submitting that, for instance, Tolo's evidence should have been rejected a quo, as he had submitted four written statements. We disagree. Tolo's evidence was consistent in all material respect: he was approached by Fourie with the plan to commit a crime of robbery. Fourie informed him that Mbuyani will discuss the plan with him. Indeed, according to Tolo, he and Mbuyani met at Silverton. In our view, this evidence of Tolo places Fourie in the picture despite his bare denial. For instance, he denied ever being responsible to place employees on runs. However, he was unable to explain the coincidence which saw Tolo and Ntlatleng being allocated driver and rifleman duties respectively for 3 and 7 January 2020. (The 3rd of January was the date of the foiled robbery whilst the 7th was the day of the robbery.). Although Fourie admitted that Lehola came to his office on the day when Lehola saw a burner phone on the table, which burner he took, he baldly denied that Lehola took a phone from his table. It is improbable for Lehola to see a burner phone on the table and for Fourie to deny its existence, in the circumstances where he does not deny that Lehola came to his office on the day he was arrested. The evidence that Lehola saw and offered to discard a burner phone on that day remained unchallenged. According to his version, Lehola came to seek permission to go to Hammanskraal, which

permission Fourie gave. Significantly, Lehola testified and was not challenged, that on the day he visited Fourie's office, he saw a broken phone on Fourie's desk. Lehola's version in a written sworn statement, which he recanted during trial, was that after alerting Fourie of the police presence, he gave him that broken phone to go and throw away. When Lehola was shown a photograph of a phone, he confirmed that it is the same phone he took from the desk of Fourie and it was the same phone he had retrieved from where he had thrown it. Although Fourie denies that the phone was ever in his office, the uncontested evidence of Lehola places the phone in his possession. There is no doubt that the phone that was photographed and ultimately handed to Moller for analysis is the same phone that Lehola saw on the table of Fourie. The evidence of denial of the knowledge of the phone cannot be reasonably possibly true. Fourie's rejection of knowledge of the phone is false and was correctly rejected. This Court understands why Fourie sought to distance himself from the burner phone. It is because based on the incontrovertible

testimony of Moller, Fourie had used that phone to communicate with his co-accused and it was linked to locations that link him and or his company vehicles. On the strength of such evidence, it must follow that Fourie was part of the planned robbery and his supposedly exculpatory testimony is not reasonably possibly true. This Court, on application of the legal construct of common purpose, concludes that Fourie was correctly convicted of robbery. He clearly was the brain behind the undisputed robbery. His appeal on the conviction of the robbery charge must fail.

32. With regard to Mbuyani, other than raising technical defences, it is clear when regard is had to the evidence of the State witnesses that he was correctly convicted of the crime of robbery. He was part of the planning. He recruited Tolo and was placed at the various secret planning meetings. Ntlatleng was present at the robbery and was not granted leave to appeal his conviction on the robbery charge.
33. Similarly, Maseko on the strength of the evidence of the State was correctly convicted of robbery.
34. There exists no basis in law to interfere with the factual findings made by Bam J. In *Cupido v S*[26] pointedly, the SCA cautioned that the appeal Court should be slow to interfere with the findings of the Court below with regard to the acceptability of the testimony of a single witness. The erudite Tokota AJA writing for the majority reasoned thus:

“[23] Relying on S v Mthethwa (Mthethwa) the trial court said: ‘after considering the above factors and the guiding principles set out in S v Mthethwa I accept that not only was Mr Brown honest in his identification of Cupido but that was also reliable’. It is trite that the

factual findings of a trial court are presumed to be correct. Therefore, a party seeking interference therewith must demonstrate that there was a misdirection on the part of a trial judge which can be clearly identified in order to justify interference with the findings on appeal, [27]... The trial court was alive to the fact that it was dealing with the evidence of a single witness and properly applied the cautionary rules. Consequently, I hold the view that the credibility findings of the trial court were justified in that regard...”

35. For all the above reasons, convictions on the charge of robbery, on the strength of the legal construct of common purpose were correct regard being had to the solid evidence presented by the State.

Convictions on Contravention of section 22(2) of the Explosives Act

37. Section 22(2) of the Explosives Act (EXA)[28] provides that any person who intentionally delivers, places, discharges, detonates or initiates explosives with intent to cause

death or serious bodily injury to any other person or to damage or destroy any place, facility or system is guilty of an offence.

38. On the available evidence, a planned robbery of December 2019 failed because explosives could not be found. Clearly, an intention was formed by all the appellants as part of the planned robbery to use explosives. There is clear evidence that the robbery would not have been successful without the use of explosives.
39. The argument that this charge is a duplicate to count 1 is invalid and cannot be upheld. Count 1 is a common law offence, whilst count 2 is a statutory offence. Again, on application of the legal construct of the common purpose, the appellants were correctly convicted. The appeal of the relevant appellants falls to be dismissed in respect of this charge.

Convictions on Contravention of section 18(2)(a) of the Riotous Assemblies Act [count 3].

40. The basis of this charge is that the appellants conspired to rob the SBV. The appellants were not found guilty of the alternative charge of incitement to commit a crime in contravention of section 18(2)(a) of the Riotous Assembly Act (Riotous)[29].
41. Section 18(2)(a) of the Riotous provides that:

“(2) any person who-

- (a) Conspires with any other person to aid or procure the commission of or commit
- (b) ...

Any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.”

42. This section makes it an offence to in secret plan to aid or procure the commission of, or to commit, any offence. In other words, the elements of this statutory offence are (a) conspire; (b) to aid or procure the commission of or commit; (c) any offence. The dictionary meaning of the word ‘aid’ when used as a noun is help or a source of help or assistance. The dictionary meaning of the word ‘procure’, when used as a verb, is to obtain something especially with care or effort. Therefore, for this statutory offence to be complete, a person must, with intention of course, secretly agree to help or assist or provide help to enable another person to commit an offence.
43. The evidence of the State is overwhelming that the appellants conspired to assist or provide help to those who actually committed the robbery, it being a common law offence. All the appellants indeed secretly agreed to assist and or provide help to the persons who would carry out the robbery. In this section, two persons are contemplated. The first one is the helper in whatever form (ideas) or a provider of help. The second is the one who commits the crime with that secret help (actor). For instance, when Fourie deployed Tolo and Ntlatleng as a driver and rifleman respectively, he was aiding or providing help so that the robbery should happen. His calls through a burner phone was part of aiding and procuring. Those present in the secret planning meetings provided help with ideas such as which car should ram the truck or where to obtain explosives and other instruments to commit the

robbery. There was an argument before us which was not pursued anymore after a question from the bench around double conviction in respect of these count 3 and count 1.

44. It was argued that, as the Appellants have all been convicted of robbery, conviction on the basis of conspiracy per Riotous Act,

amounted to duplication of convictions. Reliance was placed on the decision of the SCA in *Nongogo v The State (Nongogo)*[30]. In *Nongogo*, the state conceded, and the Court of appeal concluded, that the appellant should have been convicted of either murder or conspiracy

to commit murder, but not both. Before us, the State does not make such a concession. In *Nongogo* the accused was charged with murder and conspiracy to commit murder. The distinction in this matter is that the appellants were charged with a common law offence and a statutory offence. There was uncontested evidence that the secret plan to commit robbery was formed around December 2019 and it failed twice. Such meets the requirements of the statutory offence contemplated in section 18(2)(a) of the Riotous Act.

45. Therefore, unlike what was envisioned in *S v Fraser (Fraser)*[31] (which received an imprimatur in *Nongogo*), in casu two different offences are contemplated as opposed to one. The one is a common law offence whilst the other is a statutory offence. This section would cover instances where the planned robbery was foiled. At the time it was foiled, it was already secretly planned to happen. Accordingly, in our view the appellants are indeed guilty of both the robbery, as well as the contravention of section 18(2)(a) of Riotous Act. The appellants were the aiders or helpers on the one hand and the actors on the other. They become aiders in the absence of the application of the legal construct of common purpose and become actors on the application of the legal construct of common purpose. Their roles vis a vis the respective offences stand distinct from each other. A conviction on both counts therefore does not amount to double conviction.
46. However, when it comes to punishment, there is no distinction between aider and actor anymore. In terms of this section 18(2) of the Riotous Act, the aider must receive the same punishment as if he had been the actor. Being one and the same person, the possibility of double punishment arises. In due course, I shall deal with the issue of punishment in respect of this charge.

Convictions on the Unlawful possession of prohibited firearms and ammunition, contravention of sections 4 and 90 of the Fire Arms Control Act

47. The above relates to counts 4 and 5. It is common cause that Fourie, Mbuyani and Maseko were not present at the scene of the robbery. Accordingly, there was no evidence from the State to prove possession of prohibited firearms or ammunition. Faced with such dearth of evidence, the learned Bam J called into aid the legal construct of common purpose to support a conviction on these charges.
48. In his written judgment, he set out his reasoning as follows:

“27 It is so that Accused 1, 2, and 4 were not physically present at the scene of the robbery. That is not the point. The principle of common purpose in our law is quite clear. It is not necessary for any accomplice who conspired to commit a crime to be at the exact place, or the precise place, at the time, where and when the crime is committed. The mere fact that such a conspirator was not present at the spot where the robbery was committed, is no excuse. In this case the accused were linked by evidence starting with conspiracy until after the robbery was committed.

49. We, with all due respect, disagree with Bam J in this regard. The main element of the statutory offences involved herein is the unlawful possession. It is apparent to us that the learned Bam J did not give consideration to a binding authority of *Leshilo v The State* (Leshilo)[32] when he indiscriminately applied the common purpose legal construct to all the charges. Nowhere in his judgment is it apparent that counts 4 and 5 were painted by him with a different brush.

50. The Court in *Leshilo* stated the law as follows:

“[12] This Court in S v Mbuli[33] pointed out that where the offence is ‘possession’ of firearm (or in that case a hand grenade) it is not the principle 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 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[34], where it was held that the mere intention of 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[35] 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 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.”

51. The complication in casu is that Fourie, Mbuyani and Maseko were not even part of the group that executed the robbery using firearms. They were convicted for possession by osmosis as it were. It may be so that in the secret planning meetings possession of firearms and ammunition may have been mentioned and the trio acquiesced thereto. However, that acquiescence does not translate into a guilty verdict with regard to possession of firearms and ammunition.

52. This is a typical case of a failure of justice. Accordingly, in our view, Fourie, Mbuyani and Maseko were wrongly convicted of counts 4 and 5 and their appeal in this regard ought to be upheld.

53. Ntlatleng stands on a slightly different footing: He was present at the scene. However, there was no evidence that on 7 January 2020, he was in joint possession of the unlawful firearm and ammunition. On his uncontested evidence, he was pointed at by Mbanjwa with a firearm. It may well have been so that as part of the secret plan an unlawful firearm and ammunition will be used and that he will be pointed at by such a firearm. However, as the Constitutional Court observed in the absence of physical possession it is impossible to prove intention to possess or acquiescence for that matter. Ultimately, this Court reaches a firm conclusion that all the appellants before us were wrongly convicted of counts 4 and 5. Accordingly their appeal in this regard ought to be upheld, and the conviction in respect of these counts is liable to be set aside by this Court.
54. The argument by the State counsel that joint possession may be proven by circumstantial evidence on application of the *R v Blom*[36] test is rejected. It cannot be inferred that an accused person was in possession when he or she was not at the scene of the robbery. Even if this Court were to infer that they did possess firearms and ammunition wherever they were, that possession will not be linked to the robbery.

Findings on convictions

55. In summation, it is our view that all the appellants were correctly convicted of count 1, 2 and 3. To that end, their appeal in this regard must therefore be dismissed, and the convictions in respect of counts 1, 2 and 3 ought to be confirmed by this Court.
56. With regard to count 4 and 5, the appellants were wrongly convicted. To that end their appeal in this regard ought to be upheld; and the conviction in respect of count 4 and 5 ought to be set aside.

Analysis

of Sentences

57. It is trite that sentencing remains pre-eminently within the discretion of the sentencing court. In *Mokela v The State* 2012 (1) SACR 431 (SCA) para [9], Bosiello JA stated the following:

‘This salutary principle implies that the appeal court does not enjoy *carte blanche* to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served. The limited circumstances under which an appeal court can interfere with the sentence imposed by a sentencing court have been distilled and set out in many judgments of this Court. See *S v Salzwedel* 1999 (2) SACR 586 (SCA) at 591F-G; *S v Pieters* 1987

(3) SA 717 (A) at 727F-H; *S v Malgas* 2001

(1) SACR 469 (SCA) para [12]; *Director of Public Prosecutions v Mngoma* 2010

(1) SACR 427 (SCA) para [11]; and *S v Le Roux & others* 2010 (2) SACR 11 (SCA) at 26b-d.’

Evidently, sentencing must attach due weight to the gravity of the crimes for which the appellants have been convicted of. The seriousness of the crimes must weigh heavily in deciding upon appropriate sentences.

57. Counsel for the State conceded that the 30 years' effective sentence imposed was "stiff", though he justified it by stating that having regard to the aggravating factors, such as the seriousness and the prevalence of the offence, the sentence cannot be said to be inappropriate. However, the concession that the sentences imposed were "stiff" was well made. As indicated at the dawn of this judgment, this Court is entitled to interfere with a sentence imposed by the trial Court where the sentences induce the sense of shock.
58. Whilst we accept that sentencing is the terrain of the trial Court and should rarely be interfered with, it appears to have been the sole intention of the learned Bam J to set an example with the appellants at the altar of retribution and deterrence. Such an approach ignores other elements of punishment as set out in *S v Zinn (Zinn)*[37].
59. With regard to count 1, the Criminal Law Amendment Act, Act 105 of 1997 ("The Act") prescribes a minimum sentence of 15 years for robbery with aggravating circumstances for a first offender, – except if substantial and compelling circumstances are found to be present. We agree with a submission by the State that a common law discretion remains for a judge to go above the minimum sentences. However, in this instance imposing a further 10 years sentence induces a sense of shock and offends the sense of justice taking into account that an element of clemency and mercy forms part of sentencing[38]. With regard to count 2, the sentence of 10 years is clearly blended with the element of mercy. Section 29(1)(a) of EXA provides that any person convicted of contravention or failure to comply with section 22(2) is liable to imprisonment for a period not exceeding 25 years. The outer limit is 25 years and the learned Bam J imposed a sentence 15 years less. Thus there is no basis in law to interfere with such a sentence. With regard to count 3, a period of five (5) years was imposed. There is no explanation why the sentence of five years was imposed[39]. Viewed in isolation, this sentence is indeed blended with an element of clemency and mercy because section 18(2) prescribes the same sentence as that of robbery. On application of the prescribed minimum sentence then 15 years was in the offing. Having imposed 25 years to the robbers, does it follow that Bam J ought to have imposed 25 years on this count as well? Decidedly not.
60. As we have alluded to supra, whilst it is possible to be convicted on both a robbery charge and a charge under Riotous Act, it would be impermissible to, as a result impose double punishment. For the sake of posterity, it is prudent to explain the provisions of section 18(2) of Riotous with regard to punishment. If the accused is convicted of conspiring to aid and procure, he will be punished as if he actually

committed the crime himself. By way of an example, if accused A commits robbery and it is established that accused B aided or was

part of the secret planning to help or provide help to commit robbery, if A is sentenced to 15 years for the robbery, then B will

also be sentenced to 15 years for the aiding or procuring through a secret planning.

61. Typically, this appears to be the legal construct of common purpose employed not to secure a conviction but to secure punishment. It is apparent that the legislature did not contemplate a situation, which has occurred in this matter, where the aider and the actor is the same person. At common law, the rule against double punishment provides that an offender should not be punished twice for the same criminal conduct[40]. This common law rule promotes the spirit, purport and objects of the Bill of Rights and in line with section 39(2) this rule ought to be developed in this regard. Clearly this rule dovetails, in our view, with Section 35(3)(n) of the Constitution. As indicated earlier what is involved here is not double conviction but double punishment in the circumstances where the aider and the actor is the same person. Additionally, to our minds, it seems incongruent with the principles in *Zinn* to paint the accused persons with the same brush in so far as punishment is concerned. To our minds the appropriate thing to do is to apply the common law rule and not impose a separate punishment but defer to the punishment already imposed in the robbery count.
62. We are not called upon to decide the constitutionality of this portion of section 18(2), which seeks to apply the legal construct of common purpose on punishment, However, as with the situation of joint possession, we take a view that common purpose cannot be employed on punishment. However, en passant considering that this legislation was passed some 68 years ago and it predates constitutional democracy, it is perhaps time for the legislature to revisit this section particularly in an instance where the aider and the actor is the same person.
63. The Constitutional Court in *Thebus and another v The State (Thebus)*[41] acknowledged that the doctrine of common purpose is a set of rules of the common law that regulates the attribution of criminal liability to a person who undertakes jointly with another person or persons the commission of crime. Clearly the doctrine aims at attributing criminal liability (conviction) as opposed to punishment. In South African shores this doctrine of common purpose has its traces from the Transkeian Penal Code of 1886[42]. Section 78 thereof provided that:

“If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by anyone of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been known to be a probable consequences of the prosecution of such common purpose.”
64. Clearly the attention is on the commission as opposed to the punishment. The first South African case to have applied the doctrine is that of *R v Peer Khan & Lallo (Lallo)*[43]. The erudite Innes J had the following to say, which perhaps influenced section 18(2) of the Riotous:

“It [our law] calls a person who aids, abets, counsels or assists in a crime a socius criminis – an accomplice or partner in crime. And being so, he is under Roman Dutch law as guilty, and liable to as much punishment, as if he had been the actual perpetrator of the deed. Now it is clear that in our criminal courts men are convicted for being socii criminis without being specially charged in the indictment as such.”

65. The above legal position as espoused by Innes J emanated from the Roman Dutch law principle of *al den principal* (as its principal) which simply provided that any person who counselled or gave assistance to another became punishable.[44] Singh in her dissertation criticizes Thebus and concludes thus:

“Those that undergo punishment do so due to the conduct of others over which those being punished have no control. Such a violation of the right to be presumed innocent most certainly in the application of the doctrine of common purpose remains inescapable.”

66. Singh continues to argue that the passing of the constitutional muster of the doctrine in Thebus was a lost opportunity by the South Africa’s highest court to bring some parity into our law for those who fall within its far-reaching scope. Perhaps there is merits in that but this is not the case for that because there is no constitutional challenge raised before us. We shall instead, in formulating our sentence regarding count 3, guard against the impermissible double sentencing of the Appellants.

Findings on sentencing:

67. That said, we take a view that the following sentences shall not lead to a failure of justice:
68. Count 1 and 3 to be taken together for purposes of sentence, and the appellants to respectively be sentenced to 20 years' imprisonment;
69. Count 2 the appellants respectively to be sentenced to 10 years' imprisonment. 5 years' imprisonment of the sentence in count 2 to run concurrently with the sentence in count 1 and 3. The effective sentence to be 25 years' imprisonment.
70. In terms of section 282 of the Criminal Procedure Act, the sentence to be ante dated to 21 July 2022.
71. Owing to the fact that the convictions in relation to count 4 and 5 are to be aside, the 20 years' sentence imposed by Bam J falls away.

The section 300 compensation order.

72. In considering an appeal on this order, the first port of entry shall be the provisions of section 300 of the CPA. The section provides:

“Court may award compensation where offence causes damage or loss of property

- (1) Where a person is convicted by superior court ... of an offence which has caused damage to or loss of property (including money) belonging to some other person, the court may, upon the application of the injured person or of the prosecutor acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss.
- (2) For the purposes of determining the amount of the compensation or the liability of the convicted person therefor, the court may refer to the evidence and the proceedings at the trial or hear further evidence either upon affidavit or orally....” [Own emphasis]
73. Ordinarily, a party who suffered a patrimonial loss has a delictual claim against the person who caused the patrimonial loss. That party may institute a civil action in a court of law with competent jurisdiction and sue for and prove damages suffered. In line with section 34 of the Constitution, the person so sued has a right to have a dispute settled by application of law in a fair manner. Section 300 of the CPA clearly discounts the procedure of pleadings that would ordinarily take place in a civil trial. It is indeed a truncated process.
74. One aspect of concern is that, if the claim had become prescribed and unenforceable in law, the accused person will be denied the opportunity to raise such a defence.
75. There could also be a debate as to when does a cause of action arise. Does it arise after conviction or when the loss occurred? Regard being had to the text of the section the right to apply for compensation is bestowed once conviction happens, whilst in a civil claim a cause of action arises when all the elements that constitute a claim in law are available.
76. Fairness dictates that the defendant in a civil action must be afforded an audi alteram partem right. When regard is had to section 300(2), it is clear that audi alteram partem is envisioned in this process. A further indication that audi alteram partem is envisaged manifestly arise from section 300(4), which, in my view, anticipates a set-off[45] defence. In order to satisfy itself that a deduction is possible, a Court must hear evidence from the accused person. In this regard, it is clear that the learned judge only heard the complainant and did not receive or call for any evidence from the appellants. Section 39(2) of the Constitution enjoins a Court when interpreting any legislation to promote the spirit, purport and objects of the Bill of rights. Section 34 enjoins that where resolution of any dispute is by application of law, such must be decided in a fair public hearing before a Court. Undoubtedly, the dispute over compensation requires at the minimum application of the law (section 300 of the CPA). Thus, the appellants are entitled to a fair hearing. Having not heard their side of the story, it cannot be said that the appellants received a fair hearing with regard the section 300 of the CPA compensation award.
77. Furthermore, there was no clear and direct evidence from Mostert as to the exact amount that was lost. It ought to be remembered that the Court ought to award for the loss and not a speculated loss. Counsel for Fourie was stopped when he attempted to place an interpretation of section 300 in so far as pension benefits are concerned. He was entitled to probe this issue because Mostert gave testimony that threatened the Appellant’s pension benefits. The refusal to hear the side of the Appellant in this regard, was a denial and a

failure of justice.

78. It may well be so that section 300 does not anticipate a procedure similar to a civil trial, however, it would be unthinkable to afford a party in criminal proceedings less procedural rights as would have been afforded to him in a civil forum. Section 173 of the Constitution endows the High Court with inherent powers to protect and regulate its own process and to develop the common law, taking into account the interests of justice. Certainly, it would have been in the interests of justice to provide the appellants with their *audi alteram partem* right in the hearing of the application for compensation of the loss. Above all section 35(3)(i) of the Constitution guarantees every accused person a right to a fair trial which includes the right to adduce and challenge evidence. There can be no doubt that in relation to section 300 proceedings, which occurred intra criminal proceedings, the appellants were not afforded a right to (a) adduce evidence and (b) to properly challenge evidence, since (as evident from Bam J's written judgment) Mr Gerber was 'stopped in midstride'. In our view, the stopping of Mr Gerber on the pension issue was a serious misdirection. Section 37A of the Pensions Fund Act (PFA)[46] specifically provides that no benefit or right to such benefit shall be capable of being reduced or subjected to any form of execution

under a judgment or order of a court of law. In terms of section 37A(2) of the PFA, the set-off of any debt against a benefit shall

for the purposes of subsection (1) be construed as a reduction of the benefit. Any deduction on the benefit may be made by the Fund in accordance with section 37D of the PFA.

79. Any order issued in contravention of the law is a nullity even if not challenged on appeal. Bam J's order, having been made contrary to section 34 of the Constitution, in this regard is accordingly invalid and not sustainable in law.
80. Furthermore, on a fundamentally practical level, Bam J's finding in this regard is flawed: The charge sheet alleged that R25 000 000.00 was stolen. There was some vague evidence that R850 000.00 was recovered in the truck. Accepting for a moment that these bald

averments constitute proof, on pure application of arithmetic if the amount recovered is discounted then the loss would have been

R24 150 000.00 – not R24 850 000.00 as was ordered. As a Court of appeal we are not empowered to award the true amount that was lost *mero motu*.^[47] This Court is not a Court that convicted the appellants of an offence which caused the loss. We are emboldened in our finding in this regard in noting that Hartle J, sitting with Tokota J, in the matter of *S v Tshefu* (Tshefu),^[48] also set aside a compensation order in the circumstances where there was apparent failure of *audi alteram partem*. Correctly, in my view, the learned Hartle J held that *audi alteram partem* principle applies just as strongly under section 300 enquiry as it does in a civil law suit.^[49] In *S v Rensburg* (Rensburg)^[50] it was held that the usual assessment of the amount of compensation applies in section 300 cases just as in civil cases^[51].

1.1.1

Conclusion

81. In summary, the appeal against the convictions in respect of count 1, 2 and 3 ought to be dismissed in respect of all appellants.
82. The appeal in respect of count 4 and 5 ought to be upheld and the convictions and the sentences in this regard ought to be set aside.
83. The appeal against sentence in respect of count 1 and 3 ought to be upheld; whilst the appeal against sentence in respect of count 2 ought to be dismissed.
84. The order in terms of section 300 ought to be set aside in its entirety for want of validity.

In the result, the following order is made:

1. The appeal against conviction on counts 1, 2 and 3 is dismissed in respect of all appellants.
2. The appeal against conviction on count 4 and 5 is upheld in respect of all appellants.
3. The appeal against the order in terms of section 300 of the Act is upheld in respect of all appellants.
4. The appeal against sentence in respect of counts 1 and 3 is upheld, and the sentence of 25 years' imprisonment in respect of count 1, and 10 years' imprisonment in respect of count 3 is set aside in respect of all appellants, and is substituted with the following order:

"1. Counts 1 and 3 are taken together for purposes of sentence, and the accused are respectively sentenced to 20 years' imprisonment;

2. Count 2 the accused are respectively sentenced to 10 years' imprisonment. 5 years of the sentence in count 2 shall run concurrently with the sentence in counts 1 and 3. The effective sentence is 25 years' imprisonment.

3. The order in terms of section 300 of the CPA is set aside.

4. In terms of section 282 of the Criminal Procedure Act, the sentence is ante dated to 21 July 2022".

GN MOSHOANA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

LM MOLOPA-SETHOSA

(I agree and it is so ordered)

K STRYDOM

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For 1st Appellant: Mr M Witz For 2nd and 3rd Appellants: Mr J Lazarus For 4th Appellant Mr A Steenkamp For the State: Mr M Mashuga Date of the hearing: 15 April 2024 Date of judgment: 06 December 2024

[1] 2013 (1) SACR 1 (CC) para 41.

[2] See *S v Anderson* 1964

(3) SA 494 (AD).

[3] Police Recorded Crime Statistics Report, First Quarter of 2023 – 2024 Financial Year (April 2023 to June 2023) at page 8, https://www.saps.gov.za/services/downloads/april_june_2023_24_quarter1_presentation.pdf.

[4] This of course speaks to one of the Zinn triad of public interest.

[5] Act 77 of 1951 as amended.

[6] This turns out to be a Nokia 3310 handset phone

[7] See also *S v Jaipaul* [2005] ZACC 1; 2005

(1) SACR 215 (CC) at para 39 and *S v Carter* 2007

(2) SACR 415 (SCA) at para 29 – 34 in so far as what failure of justice means.

[8] See *R (on the application of Adams) v Secretary of State for Justice*

[2011] UKSC 18 (Adams)

[9] *Op cit.*

[10] Para 55 Lord Phillips judgment.

[11]

[2024] ZASCA 26 (20 March 2024)

[12] See *S v Luvhenga* 1996

(2) SACR 453 (W) and *S v Agliotti* 2011

(2) SACR 437 (GSJ).

[13] See *S v Lubaxa* 2001

(2) SACR 703 (SCA).

[14] Act 4 of 2013 as amended

- [15] See *Ndlovu and others v S* (Ndlovu)
- [2021] 1 All SA 538 (ECG) and *Merilyn Kader* Admissibility of evidence found unlawfully 13 April 2021 Legal Editor at LexisNexis
- [16] See *Numsa v Vetsak Co-Operative Ltd and others* [1996] ZASCA 69; [1996] 3 All SA 311 (A).
- [17] 2017
- (1) SACR 253 (SCA)
- [18] At para 32 *Gumede*.
- [19] (2008/14) ZASCA 219 (11 December 2014)
- [20] 1939 AD 188.
- [21] (A41/2021) [2021] ZAGPJHC 799 (14 October 2021)
- [22] See *Electoral Commission of South Africa v Democratic Alliance and others* [2021] 4 All SA 52 (SCA)
- [23] *S v Hadebe and others* 1997
- (2) SACR 641 (A) at 645D – F and *Malebo v S* (A226/2014)
- [2015] ZAFSH 61 (19 March 2015) at para 10.
- [24] See *S v Pallo and others* 1999
- (2) SACR 558 (SCA).
- [25] *Michael Jantjies v S* (Jantjies). (532/2022) [2024] ZASCA 3 at para 13 - 14.
- [26] (1257/2022) [2024] ZASCA 3 (16 January 2024).
- [27] *HAL obo MML v MEC for Health, Free State* 2022
- (3) SA 571 (SCA) para 87.
- [28] Act 15 of 2003 as amended.
- [29] Act 17 of 1956 as amended
- [30] (852/20)
- [2021] ZASCA 166 (03 December 2021)
- [31] 2005
- (1) SACR 455 (SCA)
- [32] (345/2019) [2020] ZASCA 98 (8 September 2020)
- [33] 2003

(1) SACR 97 (CA).

[34] 2001

(1) SACR 501 (SCA).

[35] 2017

(2) SACR 665 (CC).

[36] 1939 AD 288.

[37] 1969 (2) SA 537 (A).

[38] See *S v Rabie* 1974

(4) 855 (AD).

[39] In *S v Malgas* [2001] 3 All SA 220 (A) it was held that where the legislature prescribes a sentence a Court should not ignore that.

[40] *People v McFarland* 58 Cal. 2d 748, 376 P.2d 449 (1962) where the defendant was accused of unlawfully entering a hospital under construction and stealing therefrom an air compressor. The defendant was convicted and punished for burglary (unlawful entry) and grand theft (unlawful taking). The court, although applying a statute, concluded that the statute prohibits the defendant from being punished for more than one of the offences because burglary and grand theft constitutes parts of a continuous course of criminal conduct motivated by one intent and objective. [Own emphasis].

[41]

(2003) AHRLR 230 (SACC 2003)

[42] Code 24 of 1886.

[43] 1908 TS 798.

[44] For a fuller discussion of the principle see LLM dissertation by Nesira Singh: *Doctrine of Common Purpose: A brief historical perspective; the common purpose doctrine defined and a focus on withdrawal from common purpose* December 2016 University of Kwazulu Natal Pietermaritzburg.

[45] “Set-off” herein understood as a common law right allowing parties (each of which being both a creditor and a debtor)

that have debts owing to each other to set them off.

[46] Act 24 of 1956 as amended

[47] See *De Villiers v S* 2023

(2) SACR 221 (SCA) at para 13

[48] 2020

(1) SACR 525 (ECB)

[49] S v Maelane 1978

(3) SA 528 (T) and S v Msiza 1979

(4) SA473 (T)

[50] 1974 (2) SA 243 (T).

[51] See also S v Majola [2005] JOL13633 (E).

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