

SOUTH AFRICA / JUDGMENT

Gxasheka and Others v S (A58/22)

[2024] ZAWCHC 34 (9 February 2024)

[2024] ZAWCHC 34**COURT**

Western Cape High Court, Cape Town

BEFORE

DM Thulare, L Nuku

CASE / FILE NUMBER

A58/22

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****(WESTERN****CAPE DIVISION, CAPE TOWN)****CASE****NO: A58/22****In****the matter between****PHELO****GXASHEKA****1st****APPELLANT****NDUMISO****MZAWAZIWA****2nd****APPELLANT****NONDODA****GONIWE****3rd****APPELLANT**

MAWETHU
MKHANGELWA

4th

APPELLANT

VS

THE

STATE

RESPONDENT

Date

of Hearing: 04 August 2023

Date

of Judgment: 09 February 2024 (to be delivered via email
to the respective counsel)

CORAM: NUKU J; THULARE J

JUDGMENT

THULARE J

[1] This is an opposed appeal against both conviction and sentence. In the Regional Court all the appellants were accused 2 to 5

respectively. Accused 1, Mziwedinga Putase (Putase) did not appeal. All accused were convicted of count one: conspiracy to commit robbery with aggravating circumstances; only Putase and 1st appellant were convicted of count two: housebreaking with intent to steal and theft; all accused were acquitted of count three: unlawful possession of a prohibited firearm; all accused were convicted of the alternative to court three: unlawful possession of firearms and all accused were convicted of count four: unlawful possession of ammunition. Appellant 1 was accused 2 and having set out that background it is now convenient to refer to those who lodged the appeal as appellants without creating any confusion. On count one all four appellants were sentenced to 10 years imprisonment of which 2 years were suspended for 5 years on condition that appellants were not convicted of any crime of which dishonesty and or violence against another person was an element or the conspiracy thereto committed during the period of suspension. On count 2 appellant 1 was sentenced to 4 years imprisonment. On the alternative to count 3, appellant 1 and 3 were sentenced to 15 years imprisonment of which 6 years were suspended for 5 years on condition that appellants were not convicted of any crime where the use or abuse of a firearm was an element, committed during the period of suspension. Appellant 2 and 4 were sentenced to 15 years imprisonment of which 7 years were suspended on condition that they were not convicted of any crime of which the use or abuse of a firearm was an element, committed during the period of

suspension. On count 4 all were sentenced to 3 years imprisonment. All the sentenced imposed in respect of counts 1, 2 and 4 were

ordered to run concurrently with the sentences imposed on the alternative to count 3.

- [2] In respect of count 1, it was submitted that the State did not prove its case beyond reasonable doubt that the appellants were “umbrellaed” as conspirators and co-conspirators in planning and/or conspiring to commit an offence of robbery. It was submitted that Ndini, a section 204 witness promised benefits by the police if he testified against the appellants, was unreliable, inconsistent, lacked credibility and that his evidence was unsustainable to secure a version that all the appellants knew about the arrangements by Ndini and accused Putase. In respect of count 2, it was submitted that it was probable that it was unknown to 1st appellant that the vehicle in which he was a passenger was stolen. It was submitted that the State did not prove beyond reasonable doubt that the appellants were in possession of the firearms and ammunition, individually and jointly. In respect of sentence it was argued that another court would consider trial- awaiting incarceration as substantial and compelling circumstances. It was submitted that the sentences were harsh and that the seriousness of the offences was overemphasized and that the personal circumstances of the appellants were desperate and required individualized sentences.

ON CONVICTION

- [3] Arietta Evelina Williams (Williams) was a sergeant in the SAPS with 13 years’ experience and was a member of the Flying Squad and was on duty on 4 September 2014. The unit received information of a possible armed robbery in Ceres, whilst in Cape Town at about 14H00. The information included that a Silver Etude stolen and reported on a Harare Cas, a bakkie and five African males would be involved. She could not remember if a Jetta was also involved. The whole shift, led by Warrant Officer Samuels attended to the information and travelled to Ceres. Other members of the unit were Warrant Officer Botha, Sergeant Michaels, then Constables Efta, Mbewu and van der Bergh. Williams travelled with Efta and Mbewu in an unmarked Silver Golf 5, and there were two or three other vehicles used by the others. Williams was in uniform. Williams saw the Silver Etude at the corner of Voortrekker and a side road, Lyle. Mbewu gave the description of the vehicle, a Silver Grey Etude and the registration number over the radio and everyone there heard the reply that the Etude was identified as stolen. The driver of the police vehicle put up the blue lights, sirens and instructed the driver of the Etude to stop. As soon as the blue lights and siren went on and the driver was instructed to stop the left passenger door opened, a man jumped out from the left back seat of the Etude whilst it was still moving although slowly and casually started walking and the Etude drove on. The Etude did not stop when instructed to do so. The car just rolled slowly. Williams jumped out of the Golf and followed the man who jumped out whilst Efta and Mbewu proceeded to the Etude. The Etude eventually came to a stop. It did not speed off.
- [4] There were no people in the side street, Lyle, at the time. Ceres is a small town. Williams never lost sight of the man. She instructed the man to lie down, which the man did. She did not chase the man as the man obeyed her instructions to lie down. She did not find any firearm on the man. She handcuffed him and walked with him towards the corner of Lyle

and Pretoria road where Efta and Mbewu were with the stolen vehicle and two suspects. The man she arrested identified himself as Ndumiso Mzawaziwa with the 1st address as 1[...] S[...] Street, Nduli, Ceres and another address as 1[...]8 H[...] Street Mitchells Plain. The time of arrest was 16H15. When she arrived back at the Etude the two suspects there were already in handcuffs. She was informed by Efta and Ndeo that they searched the vehicle and found a firearm with a magazine and two rounds of ammunition. In court Williams could not identify the man she arrested or the two arrested by Efta and Ndeo because of the lapse of time. She testified three years after the arrest. According to her, she arrested a person every two to three days. It is a lot of people and she could not remember everybody.

- [5] Andry Efta was a constable also in uniform on the day. She was the driver of one of about three vehicles in a police convoy with a total of about seven members. She tested the Etude when they saw it. She also saw the other police vehicle in their convoy using blue lights and a siren to stop the bakkie whilst still in Voortrekker street when she was about to turn left. After the man alighted from the Etude, and Williams alighted from the car she was driving, the Etude accelerated and turned from Lyle into Pretorius street and they pulled the Etude off by boxing it in between two vehicles. Efta followed the Etude whilst the other vehicle called as back-up overtook and blocked the Etude. There were two people inside the Etude. She went to the driver's side and Mbewu went to the passenger's side. She instructed the driver to switch off the vehicle. The driver gave her his names and surname, which were Mziwedinga Putase. These were the names of accused 1 in the trial at the court a quo who did not appeal.
- [6] The driver was calm and co-operated. She ordered the driver out of the car. The driver seemed not to understand her and she then took the key out of the ignition of the Etude, opened the driver's door and took the driver out of the vehicle and placed him on the ground. When the driver got out of the vehicle she instructed him to lie on the ground and read him his rights. She informed the driver that he was driving a stolen vehicle and arrested the driver for possession of a stolen vehicle. She asked him whose vehicle was it and the driver said the passenger was the owner of the Etude. She could see Mbewu on the passenger's side and Mbewu was dealing with the passenger in front. Mbewu told her that he found a firearm on the passenger. Mbewu arrested the passenger. When Mbewu shouted that he found a firearm on the passenger, Efta took Putase to the other side where Mbewu was so that she could be able to assist Mbewu if he needed assistance. She saw the firearm that Mbewu found, when she moved to the other side. It was already on the ground on the pavement next to where the passenger also lay on the ground. Other members of the police assisted Mbewu.
- [7] Jerome Michaels was a sergeant in the SAPS and was one of the members of the flying squad who received information about a possible robbery and drove to Ceres. At Ceres Warrant Officer Samuels briefed them, which included being on a lookout for a grey Mazda Etude and a white Isuzu bakkie. They were given the registration number of the Etude but not of the bakkie. He noticed both vehicles in the main road in Ceres. The vehicles were driving

from the side of the location into town. The Etude was driving in front, followed by the bakkie. The bakkie had no canopy. He was in a marked police car, a Ford Focus with two other members, Warrant Officers Samuels and Botha. They were following the bakkie and he noticed two men standing in the back of the bakkie, wearing blue work-suit jackets. The two men were standing with their backs towards the car following the bakkie. They were about to pull the two vehicles over when the vehicles split into two different directions. The one vehicle turned and the other drove straight. The men at the back of the bakkie jumped off and also went in different directions. Samuels did not go after the vehicles, but went for the men who jumped off the bakkie. The other police vehicles went after the two vehicles. Samuels parked the vehicle and in that moment they lost sight of the two men. They went back to the vehicle and drove up and down town for about five minutes. They saw the two men again walking on the road that drives out of Ceres central business district towards the prison.

- [8] The men were walking out of town by the side of the road on the pavement. In that area on the left of the road there was the tar road, a barrier, the pavement and a fence. The men were walking on the pavement, the one walking half a metre in front of the other and they still had the same clothing. Samuels stopped the vehicle and they got out of the vehicle with their firearms drawn as they did not know if the men were armed. He was with Samuels and Warrant Officer Botha. When the man walking in front noticed the police, he took his left hand to the front of his pants underneath his jacket, pulled something out and threw that thing to the left on to the grass. Michaels could see that it was a metal object that was thrown on to the grass. He immediately instructed both men to go to the ground. The two men complied. Botha approached the man who threw the object. Michaels approached the man who walked behind and searched him. He felt an object tucked at the back of the man's pants under the jacket. When Michaels lifted the jacket he saw that the object was a firearm, a 9mm pistol which had a magazine and ammunition inside. He arrested the suspect and explained him his rights. He explained to the suspect that he was arrested for possession of an unlicensed firearm and that anything he said may be written down and be used against him in court. He put the suspect at the back of the car and put the firearm in the boot. Michaels was not sure who picked up the object that was thrown, but that object was a firearm. He saw it on the scene and at the police station as well. The person Michaels arrested identified himself as Odwa Dini from Khayelitsha. The serial number of the firearm had been removed. He sealed the firearm that he found when he searched Dini and handed it in as an exhibit in the SAPS 13. He wrote the serial numbers personally.
- [9] Leonard Corney lived with his family in Khayelitsha. On 3 September 2014 he went to sleep having locked up. He placed the keys of his vehicle, a Mazda Etude, on top of the room divider where the television was, when he went to sleep. He had a bad dream, woke up and went to the toilet at around past four in the morning. He saw a stranger in his house, in the dining room who was pulling something on the tv. The screen of the tv was already removed and was missing. The person went out of the house and ran away. Corney's wife cried out coming out of the room. Corney went to put on his pants. At that time there were

renovations done to the house. Corney noticed that the window was open, but not broken. The window had been closed when they went to sleep. It appeared to Corney that the window handle was not properly pulled down when closed. The person got in through the window. The key to the door was on the door. The person unlocked the door when he ran out. Corney's car, a Mazda Etude was missing. The car had in its boot tiles which he had bought for renovations. Corney identified the Mazda Etude that was recovered by the police in Ceres as his vehicle. The radio of the vehicle was missing when he received it back from the police. He never recovered his tv and tiles. The police did not search for any fingerprints on the scene.

- [10] Patrick Pangu was a sergeant in the SAPS attached to the high jacking task team in the provincial office stationed at Macassar. In 2014 he worked at Bellville. On 2 September 2014 he received information from an informer about a planned robbery of a bottle store in Ceres at Jumbo Cash n' Carry. The report was that there would be vehicles and firearms used. The vehicles which were to be used in the robbery were a VW Jetta, a Mazda Etude and a white double cab bakkie. He was in communication with the informer from 2 to 4 September. He was informed that the owner of the bottle store intended to be robbed was always carrying a firearm and the plan included shooting him during the robbery. He was also informed of the date of the intended robbery. At the time Pangu was working at the vehicle theft unit, and because the information involved the use of firearms and alleged an armed robbery, he informed his commander, Colonel Hanana. He was also there in Ceres on the day of the robbery. He was not told the names of those involved in the planned robbery, but got to know the names during interrogation of one of those arrested, after the arrest.
- [11] On 4 September the intended day of the robbery he was in Ceres with Hanana in a vehicle. Hanana arranged the whole operation. There were also other units. The flying squad was there. He kept observation in town for the movements of the vehicles mentioned. He saw the three vehicles drive in the main road through Ceres down to Nduli, the nearby township. He did not follow the vehicles to the township but other units did and reported back. He saw when the Jetta came back into town, driving past Jumbo Cash n' Carry. The Jetta was full especially at the back, with some sitting on top of the others. They were opposite Jumbo Cash n' Carry keeping watch and saw that when the occupants of the Jetta drove past, all the occupants were looking at Jumbo. The Jetta drove past again and drove back to the township. He and Hanana left Jumbo and went to park near a surgery in town. The surgery is on the way from the township. The three vehicles came back into town, following each other. The vehicles were followed by the other units. He and Hanana also joined the convoy and followed behind the other units. When they got back to Jumbo, by the time they parked there were people arrested and lying down already. He did not arrest anyone. He only saw the Etude and the Jetta, and not the bakkie, when they arrived. He did not know what happened to the bakkie. The Jumbo was in the main road. The Jetta was directly

opposite Jumbo and the Etude was a little bit further ahead. He saw two others who were arrested when the two were already at the back of the bakkie. After the arrest he spoke to all those arrested, including Ndini who gave him information.

[12] The State applied to have the proceedings held behind closed doors and that the identity of the witness he withheld as envisaged in section 153(1) and (2) of the Criminal Procedure Act, 1977 (Act 51 of

1977) (the CPA). The application was opposed and the investigating

officer, Captain Alfred Benjamin Barker was called in support of the application. Barker testified that the witness was under a witness protection programme as his life was in danger, and that of his family. The witness was scared to be identified by person who attend court and in the public gallery as he feared for his life. The witness was not only a witness in protection for this case, but also in another which involved the murder of a policeman. Barker had personally received threats with regard to the matter involving the accused and also received information about the threat to the life of the witness intended to be called. If the witness testified in open court in front of members of the public, the witness may testify under fear and may not give the testimony he would give if he was not under pressure. The witness had been an accused and had turned into a State witness. Witnesses in protection ultimately go back into the public, as it is not a luxury and difficult to be in the programme. No evidence was tendered by the appellants and after arguments the application was granted.

[13] Odwa Dini (Dini) was a witness called in terms of section 204 of the CPA by the State. He was accordingly warned by the court before he was sworn in. He knew and was friends with Putase. Putase was a taxi driver and Dini was unemployed when they first met. Together they previously robbed a fish and chips shop in Cape Town, a small tavern in Nyanga and two Somali-owned shops in Mfuleni. During the robberies, Dini used a toy-gun whilst Putase used a real gun which Putase said he bought from Nyanga. Dini got a call from Putase to meet in Site C in Khayelitsha, not far from the taxi rank. The meeting was also attended by 3rd appellant, who Dini knew as Shoes, and another person called Dumisani. Dini only came to know 3rd appellant's real name after they were arrested. At the meeting Dumisani told them that Poepa from Mitchell's Plain had a job for them, which was a business robbery. They then drove to Mitchell's Plain where they met Poepa, 2nd appellant. 2nd appellant told them that there were two places in Ceres to be robbed. It was a money-lending business and a liquor store. They then exchanged cellphone numbers. Dini exchanged numbers with 3rd appellant and Putase exchanged numbers with 2nd appellant. The meeting ended and they dispersed.

[14] 3rd appellant called Dini and they spoke on the phone. On one of the calls, on a Wednesday, 3rd appellant asked Dini if the job was still to be done. Dini referred 3rd appellant to Putase, but 3rd appellant did not have Putase's number. Dini then told 3rd appellant that he, Dini, will personally enquire from Putase. Putase confirmed that the job was still to be done, and that he, Putase, had invited other people into the group, being Mawetu and Mwande.

Mawetu was 4th appellant. The Thursday morning Putase came to pick Dini up from Macassar to site C in Khayelitsha. Putase was driving a single cab bakkie and was with 4th appellant. Dini knew 4th appellant as Wyza. Before that day he knew the name Wyza but not the person. Putase explained to Dini that he, Putase, had worked with 4th appellant for a long time and that 4th appellant had a fast car which was to be used as a getaway car. In site C they met 5th appellant and another person who was unknown to Dini. That person drove a white twin cab bakkie. All of them drove from site C to Ikwezi at 4th appellant's place. At his place, 4th appellant took out a Z88 firearm. 3rd appellant also took out a small firearm. Putase had a small firearm, a 76.5. Dini had previously seen the Z88 that 4th appellant had, on Putase. The description of the firearms that Putase had, Z88 and 76.5 as given, was how Putase described them to Dini. 4th appellant put these firearms under a cushion on the couch. Putase had lost 2nd appellant's number so they had to wait for 2nd appellant to call. When 2nd appellant did not call, they drove to Mitchell's Plain where they had previously met 2nd to look for him. They were there already when he called and they met. They all drove back to 4th appellant's place.

[15] At his place, 4th appellant took the firearms from the cushion and put them in a plastic. 4th appellant took the plastic containing the firearms and hid them underneath the bakkie of the driver unknown to Dini, on the spare wheel. They all drove to Harare to pick up Blacks, who is 1st appellant. 4th appellant was driving the Jetta. On the way 4th appellant put petrol in the Jetta. Dini and 3rd appellant were inside the Jetta. They then drove to Green Point. The bakkie drove behind the Jetta. 1st appellant also got into the Jetta. In the bakkie it was Putase, the driver and 2nd appellant. 4th appellant had told Dini that 1st appellant had stolen a vehicle. The trip to Green Point was to fetch that stolen vehicle, a Mazda Etude, from where it was hidden. At Green Point, 1st appellant and Putase got into the Etude. 1st appellant was driving. The convoy of three vehicles left for Ceres. It was the Etude, the Jetta and the bakkie. Putase called 4th appellant to report that the Etude did not have enough petrol. The Etude and the Jetta went into the garage while the bakkie proceeded but waited at the robots. Petrol was put only in the Etude as the Jetta was earlier filled. The vehicles left for Ceres. On the way to Ceres, 1st appellant drove badly and had to be changed as a driver. Putase had to drive the Etude further.

[16] At Ceres 2nd appellant showed them the places to be robbed. He pointed the places out. While all remained in the vehicles. The first was Ceres Financial Corporation and the second was a liquor business. After the pointing out the convoy left for Nduli, at 2nd appellant's shack. There was a discussion about the places, and the decision was to rob the Ceres Financial Corporation. 2nd appellant told them that the place had a lot of money. 2nd appellant told them that when he previously robbed the place, he got R75 000-00. The driver of the bakkie fetched the firearms from where they were hidden. 3rd appellant took his firearm. 4th appellant gave the Z88 to Dini and 1st appellant got the 76.5. The Z88 he received was loaded. Dini and 3rd appellant got at the back of the bakkie. The bakkie had no canopy. 2nd appellant got into that bakkie inside the cab with the driver. Dini did not know the driver. 4th appellant drove alone in the Jetta. Putase drove the Etude. 1st appellant was a

passenger in the Etude. Dini was wearing a pair of jeans and a grey top of an overall work suit. 3rd appellant also had an overall work suit on. The three vehicles left Nduli on their way to the town of Ceres where they were to rob Ceres Financial Corporation. The plan discussed for the robbery was that Dini and 3rd appellant would get inside and point a gun at the owner. The driver of the bakkie would return to Nduli. Putase and 1st appellant would pick Dini and 3rd appellant from the door of the place of the robbery and they would drive out of Ceres. The driver of the bakkie came with 4th appellant that day, and was always there and part of the plan. The driver of the bakkie escaped arrest and appellant 4 told Dini that he believed that driver he was the police informer. Whilst already at Ceres, Putase and 3rd appellant spoke about buying fruit juices in Ceres.

- [17] Dini and 3rd appellant alighted from the bakkie and started walking towards the targeted business. When they left the bakkie, 1st appellant was still in the bakkie. They saw 4th appellant, who was driving the Jetta, being arrested by the police. It was as Dini and 3rd appellant were about to get into the gate of the centre and as 4th appellant was parking on the opposite side. Dini and 3rd appellant then walked past, and did not enter into, the targeted business. They did not run but just walked away. Dini thought the police did not see him and 3rd appellant as the police did not come to them at that time. They went to the back of a big shop, hid and waited there. They hid because they saw 4th appellant who was with them being arrested and also because they had firearms on them. Dini was aware that the firearms they had with them were stolen. The police drove past and did not see Dini and 3rd appellant. After a while, 3rd appellant suggested that they throw away the firearms in their possession. Dini told him that he, Dini, could not throw the firearm away because it did not belong to him. 3rd appellant also kept his and did not throw it away. Dini had the firearm on his waist. 3rd appellant had his firearm in a small bag which he carried. They then started walking together towards Nduli outside Ceres on the R46 road. As they were walking the driver of the bakkie called 3rd appellant and asked where was Dini and 3rd appellant and 3rd appellant told the driver of the bakkie. Not long thereafter the police vehicle stopped next to where Dini and 3rd appellant were walking. The police got out of their vehicles and pointed their firearms at Dini and 3rd appellant. The police instructed the two to lift their hands up and go down. Dini knelt down.
- [18] 3rd appellant was in front of Dini at the time with his back towards Dini. 3rd appellant took out his firearm from his bag and threw it away. The gun had a silver part on it and had a magazine, which was what he saw when 4th appellant earlier removed the magazine and the bullets and placed both back whilst they were still in Kwezi. The police arrested both of them and took them to the police station. At the police station Dini noted that all of them were arrested except the driver of the bakkie and the bakkie was not recovered. Dini gave a statement to the police and also did a pointing out. In his first statement, Dini was not completely truthful because he was afraid of 4th appellant. He had heard what type of person was 4th appellant. In the initial statement he had said 2nd appellant gave him the gun. He was afraid to say 4th appellant was the one who gave him the gun. He was not scared of the other accused as he did not hear stories about them. He did not change his

statement only because he became a 204 witness. When he was initially approached to become a 204 witness around September 2014, he declined. He only agreed around March 2015. It was the investigating officer, Barker, who approached him whilst he was in custody, in prison in Ceres. Barker told Dini that it was Dini's first arrest and that if he was willing to testify as a witness against the other accused and testified the right thing Dini will be freed and will have no criminal record. Dini disputed that Putase and 2nd appellant were only in Ceres to buy fruit juices that day. The fruit juice narrative was a made up story they had all agreed to say when they come to court. They were all held in one cell at the time, including Dini. At the police station upon arrest, however, all others were put in the same cell but Dini was held separately and he did not know why.

- [19] Dini knew Putase but not 2nd appellant before the day that they discussed the Ceres robbery in Mitchell's Plain. Dini did not know where 2nd appellant was arrested. Dini knew 1st appellant as Blacks, when they met on the day of the incident when 1st appellant introduced himself. He did not know 1st appellant before that day. Dini was not licenced to have a Z88 pistol, the firearm that he had and was not trained in shooting a firearm. Both Dini and 1st appellant were given firearms in Nduli inside a shack. Dini applied for bail, which application was dismissed. 1st appellant was not there when the initial discussions took place in Mitchell's Plain. 1st appellant was there from the moment he was fetched on the day of the planned robbery. 4th appellant told Dini that 1st appellant had a stolen vehicle which he hid, before they fetched 1st appellant. At the police station, the police confirmed that the Etude was a stolen vehicle. Dini was lined up as a suspect in an

identification parade that was held in connection with robberies that happened in Nyanga and Mfuleni. He was pointed out twice. Dini heard allegations that the firearm found on him was linked to a shooting scene in Mfuleni. The ID parade was before Barker had approached him to become a State witness. The ID parade was done after Dini agreed to be a state witness but before he gave a statement. The appellants were some of those who were on the parade as suspects. Dini, Putase, 1st appellant, 2nd appellant and 4th appellant were pointed out. Dini was already denied bail at the time. Dini only came to know the names of the appellants after their arrest and as they also attended court together as co-accused.

- [20] Mwanda Patrick Mbewu (Mbewu) was Sergeant in the SAPS attached to the vehicle identification section of the Cape Town Central Police station and was working for the Flying Squad at the time of the incident. He was doing crime prevention with Williams and Efta in Ceres when they were told about vehicles allegedly involved in going to do an armed robbery. He was told to go to Ceres and was not told the reason. What he knew was that Samuels and Botha, other members of the Flying Squad also came to Ceres. He did not know whether they drove together or not but they were not in the vehicle that he drove that day. The vehicle was a Mazda Etude, which they spotted as it met the description given. They were following the Etude when a passenger alighted from its back. Williams got out and followed the passenger that lighted whilst Mbewu tried stopping the Etude using the siren and the blue lights. The Etude turned into another street and stopped. There were two

people in the Etude, both in the front seats, the one driving. Mbewu and Efta drew their firearms, told the occupants of the Etude that they were police officers, and instructed the occupants to get out. Mbewu went to the passenger. The passenger got out and stood next to the vehicle. The passenger door was open. There were no other people around at the time. Mbewu instructed the passenger to lift up his hands in the air and stand next to the vehicle and the passenger complied. Mbewu searched the passenger and found a firearm on the passenger's right pocket of the blue jeans. Mbewu personally removed the firearm from the passenger's pocket and looked at it. It was a Black 9mm firearm. Mbewu saw that the numbers on the firearm were grinded off. Mbewu asked the passenger what was he doing with that firearm and the passenger said the driver of the Etude gave him the firearm. The driver heard this and responded, saying: "I did not give you the firearm".

Mbewu arrested the passenger and ordered him to lie on the ground. The passenger was not cuffed at the time and Mbewu did not put a firearm next to the passenger. Mbewu put the firearm in his own pocket. Mbewu searched the vehicle. Mbewu denied that he found the firearm in the vehicle and not on the passenger. Mbewu's communication with the passenger and the response of the driver was in isiXhosa. The firearm was later put into a forensic bag. The forearm had two rounds of ammunition. The forensic bag was marked, sealed and handed in the SAP13 register in Ceres. The passenger gave his name to Mbewu as Phelo Gxasheka, 1st appellant. Other police officers arrived on that scene. They all left to go to the police station in Ceres where Mbewu made wrote his statement. After the cross-examination of Mbewu, by Mr Mpiti on behalf of 3rd appellant, Mr Mpiti withdrew as attorney of record.

[21] Danie Botha (Botha) was a Warrant Officer in the SAPS and was also a member of the Flying Squad based in Maitland. He was part of about 8 members of the Unit that went to Ceres based on information of an alleged robbery about to take place. He was with Warrant Officer Hans in a marked police vehicle. Hans was the driver. The information included a Mazda Etude and a white Isuzu bakkie that were involved, which they were on the lookout for. He spotted the vehicles coming from the township of Nduli towards the town of Ceres. The vehicles were following each other. The third vehicle of interest which was involved in the convoy was a Jetta. Botha saw two men at the back of the bakkie, both wearing work-suit overalls, one of which he could read the letters RSS. That convoy turned from the main road into a side street. Botha saw when his colleagues, Mbewu and Efta, pulled off the Etude. Hans stopped quickly to ask if Mbewu and Efta needed assistance, and when the two indicated the situation was under control, Botha and Hans went to look for the bakkie. Because of the stop they briefly lost the bakkie. They were driving on the main road out of Ceres towards Nduli when they spotted two males walking on the left side of the road towards Nduli. Botha saw the letters RSS on one of the overalls and realized that the two matched the ones he had seen earlier at the back of the bakkie. There was another police vehicle as well at that time, four police officers in total. The police stopped near the two men. Hans and Botha approached the man with the overall with RSS letters whilst the police officers in the other vehicle attended to the other man. Botha saw the man he was approaching when he

drew a firearm from the front of his pants around his waist and threw it on the ground, not even a metre away. Hans ordered him to lie down and Botha cuffed him. Hans picked up the firearm. It was a 9mm short pistol. The serial number was filed off. Hans arrested that man. The man was 3rd appellant. The other two police officers on the scene were Michaels and Samuels. They were not far and Botha saw that they arrested another suspect. Botha saw the firearm which the officers said was found on the person of the suspect they arrested. The police took the two suspects to Ceres SAPS where the paper work was done. Botha saw when the two firearms were made safe, bullets removed, sealed and put in forensic bags in front of the suspects. There were 5 live rounds in the firearm which Hans found. Botha wrote the serial numbers of the bags in his statement.

[22] At the close of the State case the appellants applied for a discharge in terms of section 174 of the CPA, which was dismissed. Putase testified in his defence. 1st appellant also testified and closed his case without calling any witnesses. 1st appellant testified that he was known as Blacks. He knew Putase as a photographer and had known him for about 5 months before his arrest. He did not know Dini and first saw Dini at the police station on the day of the incident. On that morning 1st appellant had met Putase in Harare, Khayelitsha. Putase told 1st appellant that he was on his way to Ceres to buy juice. 1st appellant did not know Ceres and wanted to know it, and got into Putase's vehicle, the Etude, to go with him. Putase drove

different vehicles and had taxis at the rank, and 1st appellant did not ask Putase anything about the vehicle and did not know that it was a stolen vehicle. He had never met any person at Site C, Promenade Mall, Mitchells' Plain or Nduli to conspire to plan a robbery. 1st appellant did not know the other co-accused. It was only 1st appellant and Putase in the vehicle when they drove to Ceres. 1st appellant had never been to Ceres before and had never been to Nduli. He heard about Nduli for the first time from the police after his arrest. 1st appellant sat at the front passenger's seat whilst Putase was driving. They got into Ceres, turned into a road and then there were police vehicles. The police stopped them and they were pointed with firearms by the police whilst he was still seated in the vehicle. The police man who testified came and took 1st appellant out of the vehicle and made 1st appellant lie on the ground next to the Etude. 1st appellant was never directed to put his hands in the air and he did not do so. 1st appellant disputed that he was searched by Mbewu as he was searched by a police official who was not an African person. When he was searched whilst on the ground, nothing was found on 1st appellant.

[23] 1st appellant only saw the firearm when it was shown to him as he lay on the ground. It was not found on him. He did not know if the firearm was found in the Etude. Only a phone and Zambuck were found on his person. The police confiscated his phone. He did not

remember telling the police that the firearm was given to him by the driver of the Etude. 1st appellant was arrested and taken to the police station. 1st appellant and Putase were taken to the police station in different vehicles. At the police station they were detained in the same cell. After some time other co-accused were brought into the same cell. 1st appellant denied being part of a conspiracy to commit robbery, or being part of a convoy from Nduli to Ceres. He disputed that 2nd appellant was in the Etude before 2nd appellant alighted immediately prior to the police

stopping the Etude. 1st appellant knew that Putase was going to meet with 2nd appellant in town in Ceres. He however admitted stopping at a garage because he wanted airtime, and that 4th appellant was there at the garage although he could not say if 4th appellant was in a Jetta as he did not see what 4th appellant was driving. He saw when 4th appellant spoke to Putase at the garage. He knew 4th appellant before that day.

[24] 2nd appellant testified that he lived in Nduli and worked in Phillipi. He was in Ceres on the day of his arrest when Putase called him. Putase had previously called 2nd appellant and informed 2nd appellant that he got 2nd appellant's cell numbers from an acquaintance who was a taxi driver and that the taxi driver said 2nd appellant could assist with getting fruit juice in Ceres. Putase had explained to 2nd appellant that he ran a shop and wanted fruit juice. 2nd appellant had a cousin who worked where juice is made. His cousin would get some juice and would look for buyers and 2nd appellant would assist them in getting buyers including from Cape Town. The first call was about three days before the arrest. 2nd never met Putase before that day of arrest. The day before he was arrested Putase called 2nd appellant to ascertain whether there was juice available, which 2nd appellant confirmed. On the day of the arrest Putase told 2nd appellant that he was coming to Ceres for that purpose and they agreed to meet in Nduli. 2nd appellant waited for Putase near a clinic in the open space at the entrance to Nduli. Putase took long and 2nd appellant called him. 2nd appellant was asked to describe what he was wearing and he gave the description. Not long thereafter two police vehicles arrived, the police alighted, pointed their big guns at him and ordered 2nd appellant to lie down. He was afraid and shocked, and went down. He was handcuffed and taken to the police station. He only spoke to a female officer at the police station and not on the scene of arrest. He was handcuffed by a male officer. 2nd appellant saw his co-accused for the first time at the police station. He disputed being arrested in Ceres. He knew nothing about an Etude, was never inside nor alighted from it. The police never told him why he was being arrested in Nduli. It was only at the police station where he was told that he was arrested because Dini was found in possession of a firearm which Dini alleged was given by 2nd appellant. 2nd appellant did not know Dini and saw him for the first time at the police station after the arrest. 2nd appellant did not know his co-accused.

[25] 3rd and 4th appellant elected to remain silent and did not call any witnesses. In *S v Nkohle* 1990 (1) SACR 95 (A) at 100 it was said:

"It need hardly be stressed that where a trial court's findings on credibility are in issue on appeal, as in this matter, then, unless there has been a misdirection on fact, the presumption is that the conclusion is correct, the appellate court will only reverse it if convinced that it is wrong."

[26] The police, through Pangu, received information that there was a white Isuzu bakkie, a Mazda Etude and a Jetta that will drive into Ceres on 4 September 2014. The occupants were armed and intended to rob a business in Ceres in the central business district. The police did not want to wait for the robbery, as the situation may be uncontrollable. The police considered that once a robbery was in progress they would not be able to control the situation. They took a decision to intercept the planned robbery, and to arrest the

perpetrators and take the firearms. The police units kept watch and lookout on 4 September 2014 for a white Isuzu bakkie, a Jetta and a Mazda Etude. Pangu and Botha are some of the members of the police who testified took positions and waited for the vehicles whose description they were given. Pangu saw the vehicles enter Ceres and driving to Nduli. He also saw when the Jetta returned alone into Ceres. He saw the occupants observe a business and saw the vehicle return to Nduli. He and Botha saw the vehicles approach from Nduli towards Ceres. The police had a good look at the vehicles as they drove in. Botha saw the two men at the back of the bakkie wearing blue overall tops, the one overall top was written RSS. When the suspected vehicles entered town in a convoy, some of the members of the police drove in behind the suspected vehicles and followed. In the convoy of the suspected vehicles the bakkie was in front, followed by the Etude and the Jetta. There were a couple of vehicles between three marked police vehicles that joined, and the suspected vehicles.

[27] Williams arrested 2nd appellant after he alighted from the Etude. Efta arrested Putase who was the driver of the Etude, which was stolen from Corney the night before the foiled robbery. Mbewu arrested 1st appellant who was a passenger in the Etude. 1st appellant had a firearm on his person when Mbewu searched him. Botha arrested 3rd appellant after 3rd appellant threw a firearm down when Botha approached him. Michaels arrested Dini who had a firearm in his possession as Dini and 3rd appellant attempted to walk out of Ceres to Nduli. According to Dini, he and 3rd appellant decided to walk past and not enter the business after they had witnessed 4th appellant, who was driving the Jetta, being arrested just before they were to enter the business premises where they were going to commit an armed robbery. These are the self-standing facts which should also be considered, including in the evaluation of the evidence of Dini, the 204 witness. These self-standing facts provide both corroborative and sufficient evidence in material respects, by police, to the evidence of Dini. The evidence placed the appellants in circumstances which support the heart of a conspiracy to commit robbery with aggravating circumstances. These facts add to the probative value of the evidence of Dini, and taken together, against the background of no answer from 3rd and 4th appellant and that the evidence of the 1st and 2nd appellant is beyond reasonable doubt false, sufficed for the State to discharge the onus to prove its case beyond reasonable doubt.

[28] Dini set out how each and every one of the appellants got involved and at which stage of the process. Dini and Putase had previously

committed armed robberies together. Putase called Dini to come to Site C and when Dini arrived, Putase was with 3rd appellant. All of them went to Mitchell's Plain where they met 2nd appellant who informed them about two places to rob in Ceres. Dini and 3rd appellant exchanged numbers on that day. A few days later 3rd appellant enquired from Dini if the job was still on. Dini enquired from Putase who confirmed. Putase also informed Dini that 4th appellant would also join in. On the day of the incident Putase and 4th appellant fetched Dini. Dini was told that 4th appellant had a fast vehicle which was to be used as a get-away car. It was the Jetta. They met 2nd appellant who was with the driver of the Isuzu bakkie. They all went to 4th appellant's home. 4th

appellant took out a Z88 pistol which Dini knew, having seen it with Putase. 3rd appellant had a small firearm and Putase had a 7.65. They picked up 1st appellant and they drove to 2nd appellant's home in Nduli. This is where the robbery was discussed. 4th appellant was to drive the get-away vehicle. Dini and 3rd appellant were to drive at the back of the bakkie and were the ones to actually carry out the robbery in the business. Section 204 is provided by court criminal procedure to facilitate the pursuit of the truth. It did not appear to me that the use of Dini by the State was for purposes extraneous to the pursuit of the truth. The trial court approached the evidence of Dini with the requisite caution as an accomplice and a single witness in some respects. I am unable to conclude that the magistrate was wrong in convicting the appellants.

ON SENTENCE

[29] 1st appellant had no previous convictions. 2nd appellant had a previous conviction of housebreaking with intent to steal and theft in 2002 and he was unconditionally discharged and warned to appear before a magistrate when called upon to do so. He also had a previous conviction of theft in 2006 and was sentenced to 18 months imprisonment wholly suspended for 5 years on condition he was not convicted of theft or attempted theft committed during period of suspension. He was also sentenced to 18 months correctional supervision with 16 hours of community service for every month of the sentence and was declared unfit to possess a firearm. 3rd appellant had one previous conviction of robbery and was sentenced to 10 years imprisonment in 2005. 4th appellant had no previous convictions. 1st appellant was 31 years old and unmarried but had two minor child aged 12 and 9. The children resided with his mother the whereabouts of the mother of the children was unknown. He suffered headaches and high blood pressure but was not on medication. He left school in grade 11. He completed an IT diploma in

2010. He worked at Two Oceans Aquarium in the Waterfront since 2008. He was in administration doing records of clients that booked excursions and earned R750 per week. His mother was sickly and old and was the only breadwinner with also a twin sister to support. He had been in custody since his arrest. He worked as a shopkeeper in Pollsmoor prison and also cleans the section. He did not get paid but got tobacco. He did not use alcohol or drugs. His uncle passed away in 2019. His grandmother was at the time in hospital with Corona. The appellant asked that his period in custody be taken into consideration and that part of his sentence be suspended.

[30] 2nd appellant was 31 years of age. He lived in Ceres and went up to grade 11. He had one child of 8 years who lived with his mother. He worked for a relative and earned R3000-00 per month. He supported his child and gave R1500 per month. His previous conviction

was more than 5 years. The appellant told the court that he was remorseful and took responsibility for the crimes he committed. He was already 6 years and six months in custody and was not the sole reason for the delay. He was on medication for a chronic illness. 3rd appellant was 46 years old and passed standard 6 at school. He was married for 19 years. He had two girl children, 16 and 6 years old respectively. The children lived with his wife who was

struggling as she was unemployed. The wife received grants for the children. The wife completed standard 8 at school. He was a businessman who sold clothing door to door. And made R2500 per month on average. He was almost 7 years in prison awaiting trial. He had body pains especially his back, feet and hands as prison was very cold. He sustained injuries in an accident years ago, and the cold conditions in prison exacerbated his condition, moreso because he did not receive proper medication in prison. The court was asked to consider taking all the convictions as one for purposes of sentence or suspend some of the sentences or alternatively make them run concurrently. Although it was different offences, it was one continuous action. The robbery did not take place and nobody was injured. 4th appellant was 41 years old and not married but had two children aged 12 and 17, with different mothers. His daughter was awaiting her matric results. He supported his daughter but had no contact with his son who lived with the mother in the Eastern Cape. The son's mother was an alcoholic. The daughter's mother had a chronic illness and could not work but received the R350 Covid relief fund. 4th appellant passed matric in 1997. He enrolled for a diploma in electrical engineering but only secured an N1 and N2 because of limited funds. He was self-employed, farming with pigs and goats and a take-away business ran from home. He made about R3000 per month. It was established that he had a chronic illness in 2015. He struggled with constipation and needed a high fibre diet which the prison could not provide. He had been in custody since his arrest. The robbery did not take place, nobody was injured and he was a first offender.

[31] The idea to rob was not a spur of the moment. It was conceived between Putase and 2nd appellant. The necessary tools were put together. A fast car, the Jetta, was sought with an equally capable driver, 4th appellant. The Etude was stolen, which was the vehicle that was used by those who kept watch and whose role was to assist in getting away. A stolen vehicle is easily disposable and makes it more difficult to trace suspects who used it even if it is traced and found after a robbery. The requisite executioners were recruited, who were daring in such circumstances and according to Dini, heartless with no pity to rob and if need be shoot to kill, to wit, 3rd appellant and Dini himself. Another equally useful person was brought in, 1st appellant, who was also known in their circles of committing robberies. A Z88 firearm which Dini recognized as the one Putase used previously in robberies with Dini, was made available by 4th appellant, 3rd appellant had a firearm and Putase also contributed another firearm, a 7.65. 2nd appellant lived in Ceres and knew the places very well. According to Dini 2nd appellant had reported that he had previously robbed the targeted business and knew that there was large amounts of cash at the premises. No one was injured because of the good intelligence and operational output of the SAPS who intercepted and foiled the planned robbery. Slow as the tide may turn, the turbulent tide of serious and violent crime is turning against criminals, as members of the public gain the confidence in some of the members of the police and report criminal and planned criminal acts, resulting in convictions and sentencing of those who thought South Africa's freedom includes freedom to commit serious and violent crime.

- [32] The appellants individually and collectively dragged out the court process. They were arrested on 4 September 2014 and pleaded guilty on 30 August 2016. Much of the delays between 2016 and February 2021, the period of six and a half years, were self-inflicted by the appellants themselves. An accused person is well within their right to plead not guilty and challenge the State case. However they cannot be heard to complain when the consequence of their choice may be that they cannot be credited for prospects of rehabilitation when sentence is considered, a credit which may readily be due to someone who pleaded guilty and showed remorse once caught. It is worth noting that Chapter V of the Correctional Services Act, 1998 (Act No. 111 of
- 1998) (the CSA) did not have provisions that speak to the promotion of the social responsibility and human development of detainees not yet sentenced, which is one of the specific programmes in order to meet the purpose of our correctional system, which is to contribute to the maintenance and protecting a just, peaceful and safe society. Section 36 in Chapter IV of the CSA reminds one that the implementation of a sentence of imprisonment has the objective of enabling the sentenced prisoner to lead a socially responsible and crime-free life in the future. Whilst there are general principles of being in prison, there are also those that are specific to sentenced prisoners and this includes participation in the assessment process and the design and implementation of any developmental plan or programme aimed at achieving the objective as indicated in section 36 [section 37(1)(a) of the CSA] and for the prisoner to perform any labour which is related to any development programme or which generally is designed to foster habits of industry, unless the medical officer or psychologist certifies in writing that he or she is physically or mentally unfit to perform such labour [section 37(1)(b) of the CSA]. These comments are necessary to disabuse any mind of the perception that being in custody pre-sentence and after sentence is the same. A sentenced prisoner is subject to assessment [section 38(1)] and in the case of a sentence of 24 months or more, the manner in which the sentence should be served must be planned in the light of this assessment and any comments by the sentencing court [section 38(2)]. In respect of serious offences like the present, where appellants conspired to commit robbery with aggravating circumstances and had even conspired to kill if resisted, a sentencing court has reason to hold that such person require the maximum benefit of a full assessment, sentence plan from a full range of programmes and activities, subject to the review of such plans and the progress made and if necessary to amend the plan as envisaged in section 42. In the exercise of its judicial discretion on an appropriate sentence, against the obvious need of the appellants for correction, the sentencing court cannot be faulted for the approach to the period in custody where the appellants were not yet sentenced, as part of its overall consideration of rehabilitation as a sentencing objective. What stood out was that the appellant deserved long terms of imprisonment. The sentences of the appellants were individualized according to their previous convictions, personal circumstances, their role in the commission of the crimes and the seriousness of the offences.

[33] For these reasons I find that the sentences were appropriate and I would make the following order:

The appeal against both conviction and sentence in respect of all four appellants is dismissed.

DM THULARE

JUDGE OF THE HIGH COURT

I agree.

L NUKU

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