

SOUTH AFRICA / JUDGMENT

Nomtoto v S (CA&R04/2017) [2017] ZAECHGC 97 (1 September 2017)

[2017] ZAECHGC 97

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Beshe, Conjwa

CASE / FILE NUMBER

CA&R04/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CASE

NO.: CA&R04/2017

In

the matter between:

LUYANDA
NOMTOTO
Applicant
And
THE
STATE
Respondent

JUDGMENT

BESHE J:

- [1] This is an appeal in respect of two of the five counts appellant was convicted of. Leave to appeal was initially refused by the court a quo against all five convictions. It was however granted on petition to this court in respect of counts four and five, being one count each of unlawful possession of a firearm and ammunition respectively.
- [2] In respect of counts one and three appellant was convicted of three instances of robbery with aggravating circumstances.

- [3] The basis upon which the convictions are assailed, as I understand the argument is the following:

There is no evidence that appellant had a firearm or ammunition in his possession during the robbery. Possession of a firearm/s by his accomplices cannot be imputed to him because the doctrine of common purpose does not extend to possessory charges.

- [4] The appeal is conceded by the respondent on the basis that there is no evidence that the appellant was in possession of a firearm and ammunition.
- [5] None of the parties made any reference to the evidence that was adduced during the trial in this regard.
- [6] The convictions are a sequel to an incident that took place during the early hours of the 17 January 2016 at Kilowatt Tavern, Kwetyana Location, Newlands Administrative Area within the East London Regional Division. Although the evidence revealed that the crimes were perpetrated by a group of approximately four (4) men, appellant was the only person who was arrested and subsequently stood trial in connection with the incident.
- [7] Mr Mbovane who was the barman at the Kilowatt Tavern testified that a firearm (a handgun) was pointed at him by one of appellant's companions. Mr Qotya who was the disc jockey at the tavern confirmed that one of the robbers pointed a firearm at the barman. He also testified that he observed three men carrying firearms as he tried to make a dash for the door.
- [8] Messrs Mbovane and Qotya also testified about shots having been fired as the robbers were leaving.
- [9] Mr Zweni also testified to have seen at least two firearms and having been struck at the back of his head. In a bid to avoid being shot at, he lay down on his own accord. He lay / fell on his back. One of the assailants kicked him insisting that he should not look at them. When one of the men pointed a firearm at him as he was lying down, appellant intervened by asking his companion not to kill Zweni.
- [10] Constable Goniwe visited the scene of crime upon learning of the robbery at about 02h00. She observed what appeared to be a spent cartridge from a 9mm firearm inside the tavern. Next to the tavern gate she observed what appeared to be a spent cartridge that is used in an R5 assault rifle as well as another small cartridge.
- [11] It is indeed so that none of the witnesses fingered appellant as having had a firearm in his physical possession.
- [12] In his judgment the Magistrate in the court a quo gave the following reasons as constituting the basis for convicting appellant of unlawful possession of a firearm and ammunition[1]:

“The court is further satisfied that this was a well-planned robbery, everyone knew what was going to happen. Everyone knew that there were firearms to be handled when the robbery was committed. Sergeant Goniwe picked up a number of spent cartridges belonging to a 9mm and R5 firearms. And therefore the court is further satisfied that the accused had made common grounds with those who had firearms, and also guilty on those counts of illegal possession of firearms.”

[13] It may well be a misnomer to speak of the execution of a common purpose when it comes to the unlawful possession of a firearm, rather than joint possession. This is a point that was made by the Supreme Court of Appeal in *S v Mbuli*[2] where the court had this to say:

*“[71] What is prohibited by both those sections is the existence of a state of affairs (i.e. having possession of an armament, or a firearm, as the case may be) and a conviction will be competent only if that state of affairs is shown to exist. That state of affairs will exist simultaneously in respect of more than one person if they have common (or joint) possession of the offending article. Their contravention of the relevant section in those circumstances does not arise from an application of the principles applicable to common purpose (which is concerned with liability for joint activity) but rather from an application of ordinary principles relating to joint possession. Common purpose, and joint possession, both require that the parties concerned share a common state of mind but the nature of that state of mind will differ in each case. Perhaps Olivier JA had in mind the principles of joint possession, rather than the doctrine of common purpose, when he said in *S v Khambule* 2001 (1) SACR 501 (SCA) at para [10] that there is no reason in principle why a common intention to possess firearms jointly could not be established by inference, but I do not agree with the further suggestion that a mere intention on the part of the group to use the weapons for the benefit of all of them will suffice for a conviction. In my respectful view Marais J set out the correct legal position (apart from a misplaced reference to common purpose) when he said the following in *S v Nkosi* 1998 (1) SACR 284 (W) at 286 h-i:*

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

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

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

Similarly in *S v Kwanda*[3] the SCA per Theron JA as she then was stated as follows:

*“[5] The fact, that the appellant conspired with his co-accused to commit robbery, and even assuming that he was aware that some of his co-accused possessed firearms for the purpose of committing the robbery, does not lead to the inference that he possessed such firearms jointly with his co-accused. In *S v Nkosi*, Marais J said that such an inference is only justified where ‘the state has established facts from which it can properly be inferred by a Court that: (a) the group had the intention (animus) to exercise*

possession of the guns through the actual detentor and (b) the actual detentors had the intention to hold the guns on behalf of the group'. Nugent JA, in S v Mbuli, referred to the above quoted passage from Nkosi and commented that Marais J had 'set out the correct legal position'. In Mbuli the appellant and his two co-accused were charged with and convicted of being in possession of a hand grenade that had been found in their vehicle shortly after they had robbed a bank (this is the only charge of relevance to this matter). Nugent JA found that the evidence did not establish that the appellant and his co-accused had possessed the hand grenade jointly and that it was possible that the hand grenade had been possessed by only one of them. Nugent JA concluded with these words:

'I do not agree that the only reasonable inference from the evidence is that the accused possessed the hand grenade jointly. It is equally possible that, like the pistols, the hand grenade was possessed by only one of the accused. Mere knowledge by the others that he was in possession of a hand grenade, and even acquiescence by them in its use for fulfilling their common purpose to commit robbery, is not sufficient to make them joint possessors for purposes of the Act. The evidence does not establish which of the accused was in possession of the hand grenade and on that charge, in my view, they were entitled to be acquitted.'

[6] Adopting the reasoning in Nkosi and Mbuli, and even if the appellant was aware that Mahlenche was in possession of the firearm, such knowledge is not sufficient to establish that he had the intention to jointly possess the firearm with Mahlenche. In this matter there are no facts from which it can be inferred that the appellant had the necessary intention to exercise possession of the firearm through Mahlenche or that the latter had the intention to hold the firearm on behalf of the appellant."

[14] The question to ask therefore is whether the state in casu had established facts from which it can properly be inferred that

(i) Appellant and his companions had the intention to exercise possession of the firearms through those who had them (the actual detentors) and

(ii) Whether the holders of the firearms had the intention to hold the guns on behalf of the group who had gone to commit the robbery at Kilowatt Tavern.

[15] I have already pointed out that there is no evidence that appellant was in physical possession of a firearm. None of the witnesses

testified to that effect. In all probability however, appellant was aware that some of his accomplices had firearms in their possession.

In all probability he reconciled himself with the realisation that they were going to be used during the robbery. Be that as it may, in the absence of any evidence that the appellant intended to exercise possession of the firearm/s through his accomplices, and that they in turn intended holding the firearm/s on behalf of the group, on the authority of the decisions referred to above, there is no evidence from which joint possession of the firearm/s can properly be inferred. The appeal must therefore succeed.

[16] Accordingly it is ordered that convictions in respect of counts four and five being unlawful possession of a firearm and ammunition

respectively be and are hereby set aside.

NG BESHE

JUDGE OF THE HIGH COURT

CONJWA AJ

I agree.

N CONJWA

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

For the Appellant :

Mr Mgangatho

Instructed by :

MGANGATHO ATTORNEYS

GRAHAMSTOWN

Tel.: 046 – 622 3062

Ref.: Mr A Mgangatho

For the Respondent : Adv: D Els

Instructed by :

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Tel.: 046 – 602 3000

Ref.: Mr Els

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Date Reserved : 30 August 2017

Date Delivered : 1 September 2017

[1] Page 170 – 171 of record.

[2] 2003 (1) SACR 97 at page 114 – 115 [71].

[3] 2013 (1) SACR 137 SCA at 139 – 140 [5] – [6].

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