

SOUTH AFRICA / JUDGMENT

Ntuli and Another v S (A485/2012) [2017] ZAGPJHC 294; [2018] 1 All SA 780 (GJ) (10 August 2017)

[2017] ZAGPJHC 294

COURT

South Gauteng High Court, Johannesburg

BEFORE

B Spilg, R E Monama, CK Matshitse

CASE / FILE NUMBER

A485/2012

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

Source record

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG
CASE
NO: A485/2012
REPORTABLE
OF
INTEREST TO OTHER JUDGES
REVISED
10/8/2017
In the matter

between: MBALENTLE
NTULI First
Appellant
LERATONG
NTHUTHANG Second
Appellant
and
THE
STATE Respondent

JUDGMENT

SPILG J:

INTRODUCTION

1. The appellants, who were accused 2 and 3 in the court a quo, together with Mr Genge (accused 1), were convicted in the Regional Court of one count of robbery with aggravating circumstances arising from a housebreak (count 1), four counts of the unlawful possession of firearms (counts 2 to 5) and three counts of attempted murder (counts 6 to 8).
2. The first appellant, Mr Ntuli, was sentenced to an effective twenty years imprisonment; fifteen years in respect of the robbery, five years in respect of all the firearm possession charges which were treated together (counts 2 to 5), and which were ordered to run concurrently with count 1, and five years in respect of the attempted murder charges (counts 6 and
- 7) which were to be served consecutively with count 1.

The second appellant, Mr Nthuthang, was sentenced to an effective twenty five years imprisonment. The increased sentence was due to his previous conviction, which resulted in the imposition of a twenty year sentence for the robbery by reason of the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997. The sentence imposed on him for the other offences was the same as for Ntuli.

3. The trial court granted accused 1 leave to appeal on all counts but refused leave in respect of the present appellants. The first appellant's petition which came before judges Ranchod and Vally was dismissed. The second appellant's petition came before judges Mailula and Coetzee who granted him leave to appeal only in respect of the convictions on counts 2 and 3 as well as the sentences imposed for those counts and counts 4 and 5 (in other words the counts relating to the possession of the firearms).

The second appellant never pursued this appeal.

4. Only one of the firearms was recovered on the person of an accused. The magistrate however found that the other firearms had been found in close proximity to where one or the other of the accused had been apprehended.

The magistrate also found that the unlicensed firearms to which counts 2 and 3 related had been used by one or other of the accused during the course of the robbery or during the subsequent shoot-out with the police who came upon the scene. The firearms referred to in counts 4 and 5 belonged to the complainant and which had been forcibly taken from him during the robbery.

5. The first accused successfully prosecuted his appeal before Monama J and Fischer AJ (at the time). The decision was used as a springboard by the appellant's before us to petition the Supreme Court of Appeal.

The petition was not placed before us. It is therefore unknown whether the SCA was aware that the second appellant had failed to prosecute his limited appeal or if any explanation for his failure to do so was provided. The SCA granted the appellants special leave to appeal to the full court against the whole of the convictions and the sentences imposed.

See ss 17(1) (a) (i), 17(2) (b) and 17(6) (a) read with the definition of "full court" in s 1 of the Superior Courts Act 10 of 2013.

6. We have assumed that the SCA was informed of the second appellant's failure to prosecute his appeal in respect of counts 2 and 3. Accordingly nothing turns on this.

SECOND APPELLANT'S APPLICATION FOR THE RECUSAL OF MONAMA J

7. The appeals were only forwarded at a late stage to Monama J. As soon as the senior judge became aware that Monama J was sitting an email was sent to the parties requesting whether there was any objection to him presiding in view of the fact that he had sat in the successful appeal of accused no 1. It is accepted that second appellant's legal representative did not give the email to his counsel in time. Accordingly an application for Monama J's recusal by the second appellant was allowed to be made from the bar.
8. The application was opposed both by Adv Gcaba for the State and by Adv Ndlovu on behalf of the first appellant. Adv Ndlovu advised that his client wanted the appeal to be disposed of there and then. He contended that there would be financial prejudice as his client would have to incur further costs of a postponement which, it was common cause, would be inevitable if Monama J was to be recused.
9. Adv. Shapiro who represented the second appellant applied for the recusal of Monama J on two grounds; firstly that the judge had presided in the appeal of the second appellant's co-accused. The second ground was that at that hearing the second appellant's appeal was struck from the roll after what Adv Shapiro described as an ill-tempered attitude adopted by Fischer AJ who had sat with Monama J. It was only when Adv Shapiro was asked to explain why the alleged conduct of Fischer AJ affected Monama J sitting in the present matter that this ground was amplified to allege that judge Monama had also adopted an ill-tempered attitude.
10. Although Adv Shapiro did not persist with the first ground he expressly said that it was not abandoned. As to the second ground, it was contended that the second appellant perceived Monama J to have been biased by refusing to hear his appeal at the time it was enrolled together with that of accused 1. Adv Shapiro relied on *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 9; 1999 (4) SA 147 (CC) (1999 (7) BCLR 725 ("the SARFU case").

11. The court enquired from Adv Shapiro whether his client was aware that the earlier appeal court in which Monama J presided had upheld the appeal and acquitted his co-accused with the result that he, the second appellant, was then able to approach the SCA armed with this judgment. As a consequence the SCA had extended the limited ground on which the second appellant's appeal was originally allowed into a comprehensive appeal against the entire judgment and sentence.

In short, it was evident that had the second appellant's appeal not been struck from the roll on the previous occasion then at best for him, only the conviction in relation to the unlawful possession of the firearm would have been considered by the full bench in which Monama J had presided.

12. Adv Shapiro answered that he had not explained this to his client. Monama J accepted that the exchanges with counsel had been robust, but reminded Adv Shapiro that the appeal had been struck from the roll in order to protect the interests of the second appellant because his papers were not in order. Counsel did not suggest that there was any other reason for striking the matter from the roll.
13. During the exchanges regarding the recusal it was necessary to bring Adv Shapiro to order because of the manner in which he sought to engage particular members of the court. The court adjourning for ten minutes so that Adv Shapiro could reflect on the way in which he chose to address members of the court and, if he wished, have played back the recording of the earlier exchanges.

Counsel was advised that if he failed to address any member of the court in a more appropriate manner then he might be exposing himself to contempt proceedings *ex facie curiae*.

14. On resuming, the court accepted Adv Shapiro's apology. It was however of concern that the issue regarding an apprehension of bias by reason of the exchanges between the bench and Adv Shapiro on the previous occasion may have had more to do with the manner in which counsel believed he could engage a court and his perception, and that of his client, with regard to whether the nature of the exchanges were robust as opposed to ill-tempered and whether such exchanges were directed at the second appellant himself or to lack of merit in trying to argue a case where his legal representative had not complied with the rules.
15. It is evident that Adv Shapiro was aware only of the broad ratio in *Sarfu* as opposed to an understanding of factors that must be weighed in order to determine whether an individual's subjective suspicion of bias will amount to a reasonable apprehension of bias sufficient to justify a recusal as explained in paras 36 and 38 of the case.
16. It appears necessary to remind practitioners of the following extracts from the judgment which clearly set out the objective nature of the test;

'In applying the test for recusal, Courts have recognised a presumption that judicial officers are impartial in adjudicating disputes. This is based on the recognition that legal training and experience prepare Judges for the often difficult task of fairly determining

where the truth may lie in a welter of contradictory evidence.' (At para 40)

'The test should be applied on the assumption that a reasonable litigant would take these considerations into account. A presumption in favour of Judges' impartiality must therefore be taken into account in deciding whether such a reasonable litigant would have a reasonable apprehension that the judicial officer was or might be biased.' (at para 41)

'Absolute neutrality on the part of a judicial officer can hardly if ever be achieved. This consideration was elegantly described as follows by Cardozo J:

'There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognise and cannot name, have been tugging at them - inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs. . . . In this mental background every problem finds it[s] setting. We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own.

. . .

Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the [person], whether [she or he] be litigant or Judge.'

It is appropriate for Judges to bring their own life experience to the adjudication process. As it was put by Cory J in *R v S (RD)*:

'It is obvious that good Judges will have a wealth of personal and professional experience, that they will apply with sensitivity and compassion to the cases that they must hear. The sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important perspective to the difficult task of judging.'

Similar considerations were expressed in their concurring judgment by L'Heureux-Dube J and MacLachlin J:

'[Judges] will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the Bench. In fact, such a transformation would deny society the benefit of the valuable knowledge gained by the Judiciary while they were members of the Bar. As well, it would preclude the achievement of a diversity of backgrounds in the Judiciary. The reasonable person does not expect that Judges will function as neutral ciphers; however, the reasonable person does demand that Judges achieve impartiality in their judging.

It is apparent, and a reasonable person would expect, that triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, Judges must rely on their background knowledge in fulfilling their adjudicative function.'

(at para 42)

17. Practitioners should bear in mind that it is insufficient to contend that their client perceives or apprehends that the court, or one of its member's, is biased. In para 48 of the SARFU judgment the Constitutional Court summarised its position :

'The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.'

18. In the present case counsel confirmed that he had not informed his client of the true reason for Monama J and Fischer AJ not proceeding to hear his appeal. In my view it is inconceivable that the second appellant, if apprised of the true facts and circumstances, would not have appreciated that the reason for the court striking the appeal off the roll on the previous occasion in fact counted in his favour.
19. Reference may also be had to the subsequent case of *S v Basson* 2007 (3) SA 582 (CC) at para 33 where the Constitutional Court mentioned that a judge is not a silent umpire citing *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd* 1976 (2) SA 565 (A) at 570E – F. In *Basson* attention was drawn to the considerations applicable where a recusal is sought of a judge of first instance. This also appears apposite in cases where an appeal court hears a condonation application brought before it for the first time which concerns a failure to comply with the rules relating to appeals.
20. That leaves the question of whether a judge who presided in an appeal of one accused ought to sit in a later appeal brought by another co-accused. The issue appears to be capable of consideration only on a case by case basis, having regard inter alia to the basis for the findings, whether credibility may have been taken into consideration whether directly or indirectly, and possibly the nature of exchanges between counsel and the bench. Naturally different considerations would have applied if the appeal had been unsuccessful.

21. In the present case Monama J was one of the presiding judges at the previous set down of the second appellant's and Mr Genge's appeal. He was the other co-accused who was convicted by the magistrate. There is nothing in the judgment of Fisher AJ with whom Monama J concurred, when upholding Genge's appeal to create any inference in respect of the court's attitude towards the merits of the case vis a vis the second appellant.

The robbery occurred at a home in Anderson street. The court upheld Genge's appeal on the grounds that he was found at premises

which were in Lily street which was the street behind that at which the robbery occurred, that the two properties were separated by a spiked wall, that it was easy for anyone to enter and exit out of the gate of the Lily street premises, that no evidence linking

Genge to the crime was found in his possession, that he did not resist arrest and that his evidence was to the effect that when he heard the shooting he ran into the Lily street property in order to take cover. The court also found that the identification by one of the policemen who claimed that Genge was at the scene of the incident during the shoot-out with them could not be relied upon. The court therefore held that the circumstantial evidence was insufficient to displace the accused's version of how he came to be found inside the Lily street property- a version which was found to be reasonably possibly true.

22. The only reference in the judgment to the second appellant was in neutral terms and prefaced by a statement that one of the policemen, a Sgt Cowie, claimed to have witnessed both Genge and the second appellant fleeing the scene and that other policemen had testified as to where they had allegedly apprehended the first and second appellants. However the court made no findings in regard to these claims or in relation to any other evidence concerning the second appellant, save for the finding, relevant to Genge's appeal, that Sgt Cowie's identification of Genge was unreliable.
23. It is for these several reasons including the grounds on which his co-appellant opposed the application, that the application for Monama J's recusal was dismissed.

THE GROUNDS OF APPEAL- FIRST APPELLANT

24. The events relating to the incident are straight forward. The undisputed evidence is that the complainant's daughter was locking the front security gate when she saw two armed men following her father's motor car as it entered the driveway. She informed her mother and they ran upstairs from where the complainant's wife contacted both the security company and the police. They also saw a white Volkswagen motor car push open the gates and drive onto the property. The three robbers forced the complainant to open up. They were all armed. The complainant told his family to co-operate with them. The family obeyed the robbers' orders not to look at them. The robbers demanded Rolex watches, money, laptops, flat screen television sets and, importantly for the purposes of this case, firearms.

The complainant handed over the weapon in his possession, which was the Z88 9mm Parabellum semi-automatic firearm referred to in count 5. He was also compelled to open the safe and hand over to them a Rossi .38 special revolver that was kept there. This is the firearm referred to in count 4 of the charge sheet.

25. The complainant described the robbers as experienced professionals who worked as a team under one recognised leader who issued instructions.
26. Despite co-operating with the robbers the one robber who was only identifies as wearing a pink top took his firearm and struck the complainant over the head with it and also hit him in the eye. The eye injury resulted in temporary loss of vision and although the wound has healed the complainant will be required to take drops for the rest of his life to prevent the risk of glaucoma.
27. Once the robbers had taken what they wanted, which had an estimated value of R130 000, they proceeded to exit the house. As the first robber walked out of the front door the police, who had already arrived on the scene, ordered him to put up his hands. A shoot-out then ensued. The other two robbers who were then still at the front door came out of the house with one or more of them shooting in the direction of the police as they ran. The robbers did not attempt to make their getaway in the white Volkswagen which was still in the driveway. However two of them were seen jumping over the fence.
28. Adv Ndlovu submitted that the trial court could not have found that the State had proved its case beyond a reasonable doubt because the complainant was unable to identify the first appellant. He also submitted that the only identification of his client was by a police officer who came on the scene just after the three suspects were observed exiting the house but he could not identify any of them by their facial characteristics, only that the first to exit was short and wore a pink t-shirt while the other two were tall and wore darkish clothing and that two of the robbers were observed jumping over the perimeter fence during the shoot-out.

It was furthermore submitted that the first appellant had provided an alibi: He claimed to be walking down the street when he came to a cordon that the police had set up and was then arrested.

29. The first appellant faces insuperable difficulties with this version. It was put by his counsel[1] to one of the state witnesses that the first appellant did not dispute where the police had found him but that he had hidden to

avoid being shot at when he heard the shooting. However the two police officers who had apprehended the first appellant testified

that he was found hiding among the shrubs inside the complainant's property by tracker dogs which had been brought in. This was some time after the incident. Moreover on the undisputed evidence, the police had cordoned off the area which would have precluded anyone claiming to have stumbled inside the complainant's house by accident, and for that matter it would have

precluded anyone being able to exit the house after the two robbers had jumped over the fence. Furthermore it is beyond comprehension that the police would detain someone who was trying to gain access into the cordoned off area. Their interest would only be directed to anyone trying to exit the area they had cordoned off.

Equally telling is that right next to where the police claimed to have found the first appellant they retrieved a firearm and a set of keys for the motor car the robbers had been driving. The motor car was still on the premises near to where the first appellant had concealed himself. It was not in dispute that the car was the one in which the robbers had entered the premises. It also makes perfect sense for one of the robbers to have chosen to conceal himself near this car until the coast was clear.

30. The magistrate furthermore made credibility findings regarding the veracity of the police officer's evidence and that of the first appellant. We cannot fault these findings which took full account of certain anomalies that were correctly found not to materially affect the critical parts of their testimony. The issue of physical identification is irrelevant where the unassailable evidence identifies where the first appellant was found. He could only have been on the complainant's property because he was one of the robbers. No other inference is possible and the first appellant's version is not reasonably possibly true. See *S v van der Meyden* 1999

(1) SACR 447 (W) at 448F-G. In my view the magistrate's findings are unassailable in this regard.

THE GROUNDS OF APPEAL- SECOND APPELLANT

31. The second appellant's counsel contended that the same considerations which weighed in favour of Genge in his successful appeal applied to his client and that the magistrate could not have found the identification of his client satisfactorily proven because they were so-called "dock" identifications and that the policemen were all poor witnesses.

32. Firstly it is incorrect to construe the judgment in Genge's appeal as having application to the second appellant. The second appellant was identified during the shoot-out because of the distinctive pink coloured garment he wore. It stuck out like a sore thumb. The policemen were consistent in their evidence that the person who wore a pink coloured top went into the next-door property and that they arrested him when the tracker dogs located him trying to hide behind the garage. They were also consistent in their evidence that a firearm was found in his possession. Altogether five policemen identified the second appellant by reference to the distinctive colour of his shirt. The fact that they could not identify his facial characteristics, or that the garment was a shirt or a t-shirt is irrelevant in the circumstances of the present case. In the one witness statement that the appellants had introduced into evidence it was clearly stated that one of the robbers who fired a few rounds at them wore a pink shirt and

that this person ("who was wearing a pink shirt") was arrested after being found by the tracker dogs.

33. At no stage was it put to any State witness that the second appellant was not wearing a pink coloured top. The furthest the defence went was to challenge the nature of the garment, not its colour. It was only under cross-examination that the second appellant claimed that he was wearing a cream-white shirt and volunteered that he could not remember the exact type of shirt that he was wearing.
34. The second appellant also faces the difficulty that he claimed to have been apprehended by the police while walking in the street whereas his counsel[2] had put to the police witnesses that the second appellant did not dispute where he had been apprehended and similarly explained that the second appellant had hidden to avoid being shot at.
35. The second appellant's version was rightly rejected by the magistrate.

ATTEMPTED MURDER

36. Both appellants were convicted of the attempted murder of three police officers. The basis of the convictions is that at least two of the robbers fired at the policemen while in the process of fleeing the complainant's house.
37. The second appellant was identified by the distinctive colour of his top as being one of the robbers who fired at the police. It is therefore unnecessary to resort to the doctrine of common purpose. He fired at the complainants who were the three policemen identified in counts 6 to 8. None of the appellants raised the possibility of a splitting of charges. Aside from the fact that it would be unwise to deal with the issue without argument nothing turns on this since the magistrate treated the attempted murder counts as one for the purposes of sentence.
38. The position of the first appellant is somewhat different. Firstly the State could not prove that the first appellant had actually shot at the police. Secondly the charge sheet did not rely on common purpose.
39. The magistrate found that the robbers fired the shots in order to avoid arrest. Although the magistrate did not expressly make a finding as to which accused had fired the shots, it is evident that he relied on common purpose to cover the situation of any accused who had not personally fired at the police.
40. In this regard the magistrate cannot be faulted. The evidence reveals that the robbers had participated in a well organised joint operation which they had agreed upon in order to rob the complainant, each participated in the robbery and each carried his own firearm. They came in one vehicle and must have foreseen the possibility of having to overcome any resistance or evade arrest in pursuit of their common purpose to rob the complainant.
41. On the assumption that the first appellant did not himself fire at the police the fact that he actively participated in the robbery and used the cover of the shootout to conceal himself near the vehicle they had been using and retain the car keys and a firearm close by together with the other mentioned facts were sufficient to have satisfied the court that shooting at the

police was in furtherance of the robbers' common purpose. The evidence before the court therefore comprised both a prior agreement to rob with each robber carrying his own firearm, which agreement would have included "a wide and general design"[3] to evade arrest by using their firearms in a manner where the killing of the policemen was foreseen and that each reconciled himself to that possibility, and also that the first appellant actively associated with the shooting by using the cover it afforded to

conceal himself in order to later escape when the opportunity arose, instead of surrendering himself to the authorities.[4] See generally *S v Mgedzi* 1989

- (1) SA 687 (A) at 705I – 706C, *S v Nhlapo and another* 1981(2) SA 745 (A) at 750H-751F and *S v Lungile and another* 1999 SACR 586 (SCA) at para 17 where the court said:

'Generally speaking, the fact that the first appellant had prior to the robbery made common cause with his co-robbers to execute the crime, well-knowing that at least two of them were armed, would set in motion a logical inferential process leading up to a finding that he did in fact foresee the possibility of a killing during the robbery and that he was reckless as regards that result.'

See more recently *S v Nkosi* 2016

- (1) SACR 301 (SCA) where Majiedt JA said at para 13;

'In conclusion and to summarise: on the facts of this case the appellant was well aware that the fact of him and his fellow robbers being armed with loaded firearms may result in a shoot-out or, as it was referred to in *Bergstedt* and in *Dube*, that they may encounter 'dangerous resistance'. He reasonably foresaw subjectively that, in the course of encountering such 'dangerous resistance', the firearms may be used with possible fatal consequences.'

42. A further issue however arises in the second appellant's case. The charge sheet did not state that the prosecution would rely on the doctrine of common purpose, nor does it appear that the prosecution mentioned it by the time the appellants were asked to plead.

43. In *S v Ndaba* 2003 (1) SACR 364 (W) at para 102 Labe J found that an allegation of common purpose had to be made in the indictment, or at least in the summary of

substantial facts furnished. The court relied on *S v Mpetha and Others*

- (1) 1981 (3) SA 803 (C) at 806G - 810B and *S v National High Command* 1964 (3) SA 462 (T) at 464A.

44. *Mpetha* was concerned with the adequacy of a reply to particulars requested to a summary of facts which, in the court's view, did not single out one of the accused and inform precisely of his degree of participation in the events outlined in the summary. The court considered that the accused :

‘... are all lumped together as having done everything. Yet the third set of particulars to the indictment clearly indicates that not all the accused were present at or participated in the meeting described in the summary. This raises a conflict between the summary and the particulars which is embarrassing to anyone who has to prepare a defence.’ [5]

The court then stated at 809G:

‘It has been held that where a conspiracy is alleged the accused are entitled to particulars of the facts on which the State relies in alleging that each of them was a party to a conspiracy - see *S v National High Command and Others* 1964 (1) SA 1 (T) at 2A. This seems to me only fair. So, too, where a common purpose is alleged, it seems to me only just and fair that the State should, in respect of each accused, give particulars of the facts upon which reliance is placed in order to establish the common purpose.’

It is evident that the gravamen of the case is that where several accused are charged with criminal conduct then on being requested for particulars the State should indicate whether it relies on the individual acts of each accused or whether it relies on common

purpose[6]. It however does not appear that the court was concerned with whether an indictment must expressly state that the prosecution will rely on common purpose, particularly bearing in mind that, as indicated earlier, common purpose may arise not only by way of prior agreement but also by way of active association. In *Mpetha* the court was solely concerned with whether the particulars supplied by the State were adequate on the basis of what was fair and just[7]

45. *Mpetha* relied on *National High Command* (1). In that case objection was taken to the indictment, which related to charges under what was commonly known as the Suppression of Communism Act (Act 44 of 1950). The charge sheet alleged a conspiracy and the objection related to the failure to supply adequate particularity regarding how the accused were alleged to have entered into the conspiracy.[8] The court considered that without amending the particulars the indictment would be defective for lack of particularity. [9]

Once again the court was not concerned with whether common purpose had to be expressly pleaded. In fact in the subsequent decision, of *National High Command* (2)(which is the case referred to in *Ndaba*), the court was concerned only with the adequacy of particulars supplied in respect of the agreement which the State alleged constituted the conspiracy.[10] In the course of its judgment the court at 463H mentioned the case of *S v Alexander* 1964

(1) SA 249 (C) which appears to be more in point. In that case the court said, at 252A, that whether an accused had been sufficiently advised of the extent of his 'participation in a criminal course of conduct' as being “one of degree, depending upon the circumstances of each case, and which ultimately reduces itself into one of fairness to the accused.”

46. The headnote to *Alexander* appears to be a fair summation of the essence of the judgment. It reads at 249F-G:

“It is not essential for the State to allege in an indictment in so many words that the accused acted in concert or with a common purpose or in a criminal course of conduct. It will be sufficient if the State alleges in its indictment sufficient particulars to show that the accused in doing what they are alleged to have done became associated with one another in an unlawful purpose or scheme and that the series of acts done by them was done in connection with and in the furtherance of that unlawful purpose.”

47. It is evident from the charge sheet that the State was relying on common purpose. The evidence led was to that effect and the appellants, who were represented by counsel, never argued that the attempted murder charges were based exclusively on individual culpability. Counsel certainly understood that the case his clients had to meet was one based on common purpose.
48. Moreover a failure to allege common purpose cannot per se be fatal. As appears from the judgment in *Ndaba*, provided there is no prejudice to the accused the State can amend the charge sheet in terms of s 86(1) of the CPA after all the evidence has been led.[11]
49. Absent a refusal by the trial court to grant an amendment in terms of s 86(4) and absent trial prejudice the validity of proceedings are unaffected by the failure to bring an amendment to a defective charge sheet under s86(1). [12]
50. The Constitutional Court explained the import of s 86(4) in *Moloi v Minister of Justice and Constitutional Development* 2010 (2) SACR 78 (CC) and said at para 19 that:

‘Section 86(4) on the other hand provides that even if the charge is not amended, the proceedings based on the defective charge may nevertheless remain valid. However, the question is whether s 86(4) may be invoked if the accused may be prejudiced by an amendment not having been made. Pre-constitutional judicial authority suggests not. Whether the accused may be so prejudiced is dependent upon the facts of each case. What is cardinal, however, is that prejudice, actual or potential, will always exist unless it can be established that the defence or response of the accused person would have remained exactly the same had the State amended the charge.’
51. In *S v Maqubela and Another* 2014
 - (1) SACR 378 (WCC) Murphy J mero motu amended an indictment. The basis for doing so supports the proposition that an indictment is not fatally defective if there is a failure to allege common purpose. It obviously is good practice to do so as it obviates the risk of prejudice in cases which are more akin to conspiracies where not all the accused may have participated in each stage of the criminal acts relied upon.
52. Accordingly, while the grounds for culpability differ, both appellants were correctly convicted of the attempted murder charges.

UNLAWFUL POSSESSION OF FIREARMS

53. The magistrate convicted each appellant of the unlawful possession of four firearms.

54. The factual background was that each of the three robbers possessed their own firearms when they committed the robbery. At least two of them, which must have included the second appellant, but not necessarily the first appellant (see above), fired shots at the police while fleeing the scene.
55. The evidence was that the police retrieved a 9mm Parabellum CZ model 75 semi-automatic pistol from the person of the second appellant when he was apprehended in the next door property. The forensic report confirmed that the serial number of this firearm had been filed off. This is the firearm to which count 2 relates.
56. Count 3 relates to a 9mm Parabellum SIG P225 semi-automatic pistol which was found by the police together with another firearm that had been hidden under a dustbin in the neighbour's yard where the second appellant had been apprehended. The serial number had also been filed off this weapon as confirmed by the forensic report.
57. When the tracker dogs located the first appellant in the shrubs of the complainant's property the police found right next to where he was hiding a Rossi .38 special revolver. Its serial number confirmed that it was one of the firearms stolen from the complainant. This is the firearm to which count 4 relates.
58. Count 5 relates to a 9mm Parabellum Z88 semi-automatic pistol. The serial number on this firearm confirmed that it was the other firearm which had been stolen from the complainant. It is also the other firearm recovered from under the dustbin in the neighbour's property.
59. The magistrate found that each appellant had the common purpose to possess the four firearms.
60. Section 3 (1) of the Firearms Control Act 60 of 2000 provides that;
'No person may possess a firearm unless he or she holds for that firearm-
 - (a) a licence, permit or authorisation issued in terms of this Act; or
 - (b) a licence, permit, authorisation or registration certificate contemplated in item 1, 2, 3, 4, 4A or 5 of Schedule 1.'

The term "possess" for the purposes of s 3(1) can include joint possession of a weapon by one of the perpetrators of a crime on behalf of another. However as stated by Joffe J in *S v Motsema* 2012

(2) SACR 96 (GSJ) at para 29:

'1. There is no rule of law to the effect that, when an armed robbery is committed by two or more persons with a common purpose to commit the armed robbery, joint possession of the weapons used in the robbery is to be inferred.

2. Joint possession of the weapons can only be inferred if the facts proved leave no room for any reasonable inference other than that:

- (a) each participant in the common purpose to rob, who had physical control of a weapon, intended not merely to use it, but also to possess it, both for himself and also on behalf of one or more other participants; and
- (b) each alleged joint possessor, who did not himself have physical control of a weapon, intended that one or more of the weapons should not merely be used, but should also be possessed by another participant on his behalf.

61. In that case the conclusion reached by the court at para 30 is instructive:

‘In the present matter the evidence clearly pointed to a common purpose between the appellant and the deceased robber to commit an armed robbery of the Colt bakkie from Manson, each robbery using a pistol in furtherance of the common purpose. The common purpose also extended to the use of their respective pistols to make good their escape from the police.’

62. In the recent case of *Ramoba v The State* (1301/2016) ZASCA 74 (1 June 2017) one of the appellants claimed that there was no evidence that he was in possession of a firearm at any stage during the course of a cash in transit robbery committed by him and at least two others. The issue of unlawful possession related to three firearms that were retrieved from the scene. The first was a service revolver that had been robbed from one of the occupants of the security vehicle that was attacked while the other two firearms were high velocity assault rifles carried by two of the gang members which were used in shooting at the security vehicle during the initial robbery, and used by them both to hijack a vehicle in order to flee the scene and also in a shoot-out with the police. The revolver was recovered from where one of the robbers had concealed it in the hijacked vehicle. Although only one assault rifle appears to have been recovered, the court accepted that when the robbers were walking in single file after they had abandoned the hijacked motor vehicle the appellant was in the middle carrying the money bag while the robber in the lead and the one in the rear each carried assault rifles, the one robber using it to fire at the police when confronted.

63. The SCA held at para 15 that there could be no conviction based on joint possession in respect of the revolver because:

‘There is no evidence that shows who actually put the Norinco pistol inside the Isuzu bakkie. Importantly, there is no evidence showing whether or not the appellant was aware of its presence inside the Isuzu bakkie. Accordingly, there are no facts from which it can be inferred that the appellant had the intention to possess the Norinco pistol through the actual detentor thereof, who is in any case unknown, and whether or not the person who put it inside the Isuzu bakkie intended holding it on behalf of the group, including the appellant.’

64. With regard to the two assault rifles the SCA held at para 19 that there were two grounds for holding the appellant to have been correctly convicted of possession. Mbha JA said:

‘There is thus undisputed direct evidence to the effect that at the time Mr Abu was robbed of his Isuzu bakkie, the appellant was in possession of one of the automatic rifles that were used in the entire episode. It is so that when the appellant and the other two males were seen walking in a

row away from the bakkie, he was not carrying any firearm but was only carrying a money container. The only reasonable inference that can be drawn from the proven facts is that the suspects, along the way, had taken turns carrying the rifles. Further, I do not have the slightest doubt that at the time they were seen walking in a line, the two suspects who were armed were protecting the appellant who was unarmed and was carrying the stolen loot. The fully automatic weapons were clearly possessed by the robbers for themselves and for each other. I am accordingly satisfied that the appellant was correctly convicted on both counts 12 and 13 on the basis of joint possession.'

The second ground is relevant for present purposes.

65. The purpose of the Firearms Control Act is found in s 2 which provides that:

'The purpose of this Act is to-

- (a) enhance the constitutional rights to life and bodily integrity;
- (b) prevent the proliferation of illegally possessed firearms and, by providing for the removal of those firearms from society and by improving control over legally possessed firearms, to prevent crime involving the use of firearms;
- (c) enable the State to remove illegally possessed firearms from society, to control the supply, possession, safe storage, transfer and use of firearms and to detect and punish the negligent or criminal use of firearms;
- (d) establish a comprehensive and effective system of firearm control and management; and
- (e) ensure the efficient monitoring and enforcement of legislation pertaining to the control of firearms.'

Reference may also be had to the preamble which reads:

'WHEREAS every person has the right to life and the right to security of the person, which includes, among other things, the right to be free from all forms of violence from either public or private sources;

AND WHEREAS the adequate protection of such rights is fundamental to the well-being and social and economic development of every person;

AND WHEREAS the increased availability and abuse of firearms and ammunition has contributed significantly to the high levels of violent crime in our society;

AND WHEREAS the Constitution places a duty on the State to respect, protect, promote and fulfil the rights in the Bill of Rights;'

66. The Act provides a comprehensive system for the licensing of firearms, permitting only the licenced holder to lawfully possess the specific weapon in question. In turn the weapon must be identified by reference to the manufacturer's serial number[13]. It is through the process of licencing that the objective of controlling the possession of firearms is sought to

be achieved. It therefore follows that the Act is primarily concerned with those who acquire a firearm without licensing it, irrespective of whether the acquisition is by agreement or through theft.

67. It must therefore follow that the Act contemplates the situation of more than one person deciding to rob another of a firearm. It cannot just be the person who physically holds the firearm for the benefit of the group of robbers who is culpable if it is the robbers' intention that he holds for their benefit as well, either to use or to on-sell. After all it would be absurd to suggest that they must each hold onto some part of the firearm to satisfy the requirement of joint possession.

68. In my respectful view case law clearly understood the type of situation where one of the objectives of robbers is to steal a firearm for their mutual benefit. While only one of them could have physical possession of the weapon, to quote Marais J in *S v Nkosi* 1998 (1) SACR 284 (W) at 286h-l;

"(a) the group had the intention (animus) to exercise possession of the guns through the actual detentor and

(b) the actual detentor had the intention to hold the guns on behalf of the group."[14]

69. In my respectful view, unlike the case in *Ramoba* where the purpose of the robbery was to steal money from a security vehicle and the taking of the guard's firearm might have been an independent act by one of the robbers, the evidence in the present case is clear: The appellants and their co-robber expressly required the complainant to hand over for their joint benefit any firearms that were on the property together with money and other valuables. It is therefore irrelevant that one of the complainant's firearms was found where the first appellant had been hiding while the other was found under the dustbin where the second appellant had placed it. The magistrate cannot be faulted for finding both appellant's guilty in respect of counts 4 and 5 based on the fact that the appellants went to rob the complainant of any firearms found on the property.

70. The other situation envisaged by the Act and as explained by the case law referred to earlier is that the purpose of the Act would be defeated every time a co-accused threw away the firearm used in the commission of an offence since, absent positive identification, it would not be possible to prove which of the accused in fact had been holding the firearm in question.

71. *Adv Gcaba* for the State correctly pointed out that the issue cannot be decided on principles of common purpose and pointed out that the forensic report also noted that two of the firearms recovered had their serial numbers erased. One of the firearms was found on the person of the second appellant while the other was hidden under the dustbin. It is evident that each firearm was used in the commission of the robbery and also used in attempting to evade apprehension by the police.

72. The evidence of the complainant that the robbers worked as a well drilled team and that the first appellant took advantage of the second appellant firing at the police to conceal himself while having the car keys and one of the stolen firearms close by is akin to the situation in Ramoba .
73. It is also evident that the first appellant had a firearm in his possession when he committed the robbery but that it was not in his possession when he was apprehended, only the complainant's revolver was found close to his place of hiding, although two of the firearms with which the robbers had been armed with initially were recovered where they had been concealed on the neighbour's property.

Accordingly the robbers by design alternated in possessing the firearms which were used in the commission of the robbery. The fact that the forensic report identified the two recovered firearms as having been used in the shootout (as evidenced by the cartridge cases found at the scene) therefore links the possession by one of the robbers of these two firearms to the shoot-out. The appellants were therefore correctly convicted on counts 2 and 5, albeit for somewhat different reasons to those found by the magistrate.

SENTENCE

74. The first appellants contended that the magistrate should have found substantial and compelling circumstances present and that the sentences imposed induce a sense of shock and are startlingly inappropriate. The second appellant contended that the sentences should not have run concurrently.
75. It will be recalled that a court is obliged to have regard to all relevant factors in order to determine whether on balance substantial and compelling circumstances are present. See *S v Radebe and Another* 2013
- (2) SACR 165 (SCA) at para 14. See also *S v Dlamini* 2012
- (2) SACR 1 (SCA) and *S v Vilakazi* 2009
- (1) SACR 552 (SCA).
76. It is evident that the magistrate had regard to the totality of factors. This was a home invasion carried out not by an individual but by a gang. They assaulted the complainant which resulted in an eye injury that requires permanent conservative treatment and they had no compunction in engaging in a shootout with the police. In my respectful view the magistrate did not err in finding that substantial and compelling reasons were absent.
77. That being so, the provisions of s 51 of the Criminal Procedure Amendment Act 105 of 1997 apply. In the case of a first offender the custodial sentence for robbery with aggravating circumstances is 15 years while it is 20 years for a second offender. The second appellant was a second offender.

78. The magistrate furthermore cannot be faulted in treating the attempted murder convictions in relation to police officers who were engaged in their duty to apprehend the appellants as justifying concurrent sentences.[15]

ORDER

79. . In the premises both the first and second appellants' appeal in respect of conviction and sentence are dismissed.

B SPILG J

I agree

R E MONAMA J

CK MATSHITSE AJ

DATE OF HEARING: 5 May 2017

DATE OF JUDGMENT: 10 August 2017

For the First Appellant: Adv W B Ndlovu

Ngobeni Attorneys Fordsburg

For the Second Appellant: Adv P I Shapiro

Shapiro Attorneys Johannesburg

For the Respondent: Adv M L Gcaba

The Director of Public Prosecutions

Johannesburg

[1] Page 101 of the record

[2] Who was not counsel representing him in this appeal

[3] Criminal Law (6th ed) CR Snyman at 260

[4] Ibid

[5] At 809B-C

[6] At 810A

[7] At 809H

[8] At 2B and G

[9] At 3C

[10] At 464B

[11] At

[12] Section 86(1) and (4) read: (1) Where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between any averment in a charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is necessary, both in that part thereof where the defect, variance, omission, insertion or error occurs and in any other part thereof which it may become necessary to amend. (2) ... (3) ... (4) The fact that a charge is not amended as provided in this section, shall not, unless the court refuses to allow the amendment, affect the validity of the proceedings thereunder.

[12] Section 86(1) and (4) read:

(1) Where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between any averment in a charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is necessary, both in that part thereof where the defect, variance, omission, insertion or error occurs and in any other part thereof which it may become necessary to amend.

(2) ...

(3) ...

(4) The fact that a charge is not amended as provided in this section, shall not, unless the court refuses to allow the amendment, affect the validity of the proceedings thereunder.

[13] See ss 3, 4(1)(f)(iv) and 23 of the Act

[14] Nkosi was approved in *S v Mbuli* 2003(1) ACR 97 (SCA). In *Moptsema Joffe J* synthesised both in the manner set out earlier.

[15] Compare the increased sentence where a law enforcement officer is murdered while performing his or her functions- see sub-para

(b)(i) of Part I of sch 2 under the heading Murder read with s 51 of the Criminal Law Amendment Act

Source & reproduction note

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

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPJHC/2017/294.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/ntuli-and-another-v-s-unknown-topic-agpjhc-2017>

Prepared on 23 October 2026 · Esheria