

SOUTH AFRICA / JUDGMENT

Sebidi and Others v S (CA 48/22) [2023] ZANWHC 151 (29 August 2023)

[2023] ZANWHC 151

COURT

North West High Court, Mafikeng

BEFORE

Reddy, FMM Reid

CASE / FILE NUMBER

CA 48/22

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION - MAHIKENG

APPEAL

NO: CA 48/22

R/C

CASE NO: 05/2010

Reportable:

NO

Circulate

to Judges: NO

Circulate

to Magistrates: NO

Circulate

to Regional Magistrates: NO

In

the matter between:

NICKI
SEBIDI
1ST APPELLANT
BENNET
KGOGO
2ND APPELLANT
SIMPHIWE
MADLONGWANA
3RD APPELLANT
and
THE
STATE
RESPONDENT

JUDGMENT

REDDY AJ

Introduction

- [1] This appeal comes before this Court by way of leave to appeal granted on petition on 15 September 2021 against the convictions and sentences imposed. The clear distinction between common purpose, joint possession, and the application of circumstantial evidence to the two latter legal principles is what engages this Court in this appeal. The interplay, if any, between these legal concepts arising predominantly from the common cause facts that falls for consideration.
- [2] The appellants were cited as accused 1, 3 and 4 in the Regional Court at Schweizer-Reneke. Accused 2 in the trial court has not appealed the convictions and sentences imposed in the Regional Court. In this appeal, accused 1, 3 and 4 are referred to as the first, second and third appellant respectively, and as "appellants" collectively.
- [3] The State proffered three (3) charges against the three appellants (and accused 2). The charges include robbery with aggravating circumstances read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997 - count 1; a contravention of section 3 read with sections 1, 103, 117, 120(1) (a) read with Schedule 4 Section 121, and section 151 of the Firearms Control Act 60 of 2000 ('the FCA'), and further read with section 250 of the Criminal Procedure Act, 51 of 1977 ('the CPA') - (count 2); and a contravention of section 90 read with sections 1, 103, 117, 120(1) (a) and section 121 read with section Schedule 4 of the FCA and further read with section 250 of the CPA-(count 3.)
- [4] In respect of count 1, the appellants and accused 2 are alleged to have used a firearm to rob Nadi Hesma Le Roux (Le Roux) on 28 August 2009 of various items, including a Samsung Chatterbox Cellphone and cash in the amount of R3200.00. On counts 2 and 3 they are alleged on even date to have had in their possession a 9mm semi-automatic pistol

and 8x9mm cartridges without holding a licence, permit or authorization issued in terms of the FCA to possess same.

- [5] On 24 March 2015, the appellants were convicted on the three charges. On the same day, each were sentenced on count 1, to 15 years imprisonment, with counts 2 and 3 taken together for purpose of sentence and sentenced to 6 years imprisonment. The Regional Magistrate ordered that the sentence imposed in respect of counts 2 and 3 run concurrently with the sentence imposed on count 1. The appellants were therefore sentenced to an effective 15 years imprisonment.
- [6] The appellants were further declared unfit to possess a firearm in terms of section 103(1) of the FCA.

Condonation

- [7] The appellants seek condonation for the late prosecution of the appeal in this Court. This Court is seized with a judicial discretion, which must be exercised on a proper consideration of the facts being fully alive to the attainment of fairness to both sides. See: Civil Procedure in the Superior Court, Harms at B27.6; Melane v Sanlam Insurance Co Ltd 1962 (4) SA 531 (A) at 532 C - F; Grootboom v National Prosecuting Authority, 2014 (2) SA at [36].
- [8] In light of the conclusion reached in this appeal, the prospects of success militate in favor of condoning the lateness of the prosecution of the appeal. Accordingly, the application for condonation is granted.

Background

facts

- [9] On 28 August 2009, Le Roux after completing her duties as a cashier at Thares's bottle store, proceeded on foot to her flat located a block away from her place of employment. Acting out of routine, she opened the security gate which allowed access into the block of flats, allowing the security gate to close mechanically behind her. After entry, as she proceeded to the passage that leads to the staircase that provides the way to the respective flats, she heard the security gate close for a second time, causing her to alter focus and look back.
- [10] As she looked back, her handbag which was hanging on her left shoulder was yanked. She resisted, being cognizant of the fact that the contents of her handbag included her own keys and the keys to the safe at the place of employment. The resistance that she had offered encouraged her assailant to call out to another assailant in his company, to shoot. A firearm was pointed at Le Roux and whilst looking at the pointed firearm, her initial assailant pushed her in the direction of a wall, causing her to lose balance. As she tripped her fall was broken against the wall. At this juncture the handbag was removed and both assailants fled. The force used to dispossess Le Roux of her handbag caused her to sustain a blue mark on the left shoulder.

[11] Le Roux yelled for help. Le Roux's two brothers answered the call. About 8-9 meters away, another employee of the bottle store, whilst still on duty assisting a customer to carry his purchases to his motor vehicle, heard the cries of help from a voice from the block of flats. The individual who screamed for help was not visible. Notwithstanding same, he identified the voice as that of a female. Looking in the direction where the cries emanated from, he observed that three males were running towards the direction of the Engen Garage and getting into a white Opel Astra motor vehicle, at the rear doors of the Opel Astra. None of the three males were facially identifiable, but for the clothing apparel that was donned. One was wearing an orange overall with silver stripes, one who was carrying a bag under his armpit was wearing a blue denim jean and black jacket

and the third was wearing a blue overall. The Opel Astra then sped off in the direction of the Delareyville Road. The police were alerted.

[12] The brothers of Le Roux; Rudi Voges and De Villiers du Plessis assisted to bring Le Roux outside the block of flats where the owner of the bottle store and certain employees had congregated.

[13] Meanwhile, in Delareyville, Detective Officer Viljoen ('Viljoen'), a member of the SAPS was on duty, with his colleague Constable Mojai('Mojai'). Information received via radio control was that a white Opel Astra with Gauteng registration plates was alleged to have been involved in a robbery. Viljoen and his colleague drove in the direction of Schweizer- Reneke. Approximately 20 kilometers from Delareyville en route to Schweizer-Reneke, an Opel Astra matching the description passed at high speed towards the direction of Delareyville.

[14] Reinforcements from the South African Police Service ('SAPS') were contacted to stop the Opel Astra at an identified T-junction at Delareyville and Schweizer-Reneke. According to Viljoen he executed a U-turn, at an estimated distance of 50 - 100 meters away from the Opel Astra and the emergency blue lights and the siren of the unmarked SAPS motor vehicle was activated. The Opel Astra proceeded at high speed with Viljoen in hot pursuit. As pre-arranged members of the SAPS were strategically positioned at the identified T-junction, which prevented the flow of traffic in either direction, the driver of the Opel Astra upon seeing the roadblock veered off the tar road onto a gravel road and into a veld where it eventually came to halt.

[15] With the aid of the spotlights from the SAPS vehicle and handheld torches, Viljoen noticed two persons alight from the Opel Astra. Using the light described, Viljoen focused on the person dressed in an orange overall who was in possession of a firearm in his right hand and pursued him whilst driving. This person was identified as accused 2 in the court a quo. Notwithstanding two commands by Viljoen to stop, accused 2 turned around, holding the firearm in both hands. Viljoen, uncertain whether the firearm had been cocked or was in the process of being cocked, discharged three shots at accused 2's legs. Accused 2 fell and Mojai handcuffed him. Two meters from accused 2 a firearm was recovered with a magazine

containing seven live rounds of ammunition, and one cartridge jammed in the chamber.

- [16] Constable Shadeso ('Shadeso') arrested the first appellant who was found lying in the grass about sixty-three paces from the Opel Astra. Shadeso could not recall the clothing apparel worn by the first appellant. Upon searching the first appellant, nothing was found in his possession. Crucially, only accused 2 and the first appellant were arrested at the scene in the veld.
- [17] When Viljoen returned to the Opel Astra, he observed that all four doors of the motor vehicle were open. The forensic unit of the SAPS were summoned and took control of the scene and attended to the lifting of finger, thumb and palm prints and the securing of exhibits. Fingerprints were lifted from the Opel Astra. More specifically a palm print was lifted from the surface of the right-side boot and a palm print from the rear-view mirror. The evidence loosely refers a thumbprint when the exhibit, clearly depicts a palm print. No issue has been taken that the comparison of the print in question proves that it is of the second appellant.

The approach on appeal to convictions

- [18] It is settled law that a court of appeal will not likely interfere with credibility and factual findings of the trial court. In the absence of an irregularity or misdirection, the court of appeal is bound by such findings, unless it is convinced that the findings are clearly incorrect or unless an examination of the record reveals that those findings are patently wrong. (*S v Francis* 1991 (1) SACR 198 (A) at 204C-E, *S v Mkhohle* 1990 (1) SACR (A) at 100E).

- [19] In *S v Hadebe* 1997 (2) SACR 641 (SCA) at 645 E-F Marais JA stated as follows:

"Before considering these submissions it would be as well to recall yet again that there are well established principles governing the hearing of the appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial Court, its findings are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellant Court to factual findings of the trial court are well known that restatement is unnecessary."

- [20] In *S v Monyane and Others* 2008 (1) SACR 543 at paragraph [15] Ponnan JA stated:

"This court's powers to interfere on appeal with the findings of fact of a trial court are limited... In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct, and it will only be disregarded if the recorded evidence shows them to be clearly wrong."

The charge of robbery with aggravating circumstances

The first and third appellants

- [21] The first and third appellants do not assail their conviction on the charge of robbery with aggravating circumstances. This is unsurprising, considering the fact that the first appellant was arrested along with accused 2 following the high-speed chase. Evidence adduced against the third appellant revealed that he was the lawful owner of the Opel Astra. In addition, his palm print was lifted from the rear-view mirror of the Opel Astra.
- [22] Only the second appellant assails his conviction on the said charge. I therefore turn to consider the evidence adduced against the second appellant and the alibi he has raised.

The fingerprint evidence against the second appellant (the law)

- [23] Fingerprint evidence, when available, is part of the armory at the disposal of the State to discharge its duty of proving the guilt of an accused beyond a reasonable doubt. In *S v Legate* 2001 (2) SACR 179 (SCA) at paragraph [3], Harms JA stated as follows in respect of the probative value of fingerprint evidence (Loosely translated from Afrikaans):

"[3] The value of fingerprints as evidentiary material to link an accused to a crime is well known. Normally it provides not only prima facie evidence but often it is conclusive (see *S v Arendse* 1970 (2) SA 367 (C); *S v van Wyk* 1982 (2) SA 148 (NC)). It is however not always the case. *R v du Plessis* 1944 AD 314 is a case where the accused confronted a long time after his fingerprint was found on a stolen motor vehicle, could dispel the evidentiary value thereof even with evidence which was partially speculative. But as the judgment illustrates by implication, the evidentiary value of fingerprints depends on the evidence as a whole. Also insightful is *R v Nksatlala* 1960 (3) SA 543 (A) (a case where a motorist was robbed of his motor vehicle). One fingerprint was found on an inside window. The eye witnesses testified that the accused was not the one who committed the robbery. The accused did not testify. His appeal against his conviction succeeded. By way of summary Schreiner JA said the following at 551E-G:

"This is in my view a very difficult case. There is no doubt that the presence of the appellant's finger-print on the inside of the window so soon after the robbery operates powerfully against him. And his failure to give evidence must add something to the weight on that side of the balance. Counsel for the Crown very properly stressed the importance of these factors. On the other side, however, there is the very important evidence of the persons present at the robbery, the fact that the trial Court did not, as it seems to me, deal with that evidence satisfactorily, and the fact that the Court accepted too easily the conclusion that the finger-print could not have got onto the window before the robbery. The countervailing considerations had of course to be weighed against each other."

- [24] The palm print, which is classified as fingerprint evidence of the second appellant lifted from the right side of the boot is classified as circumstantial evidence. In *R v Blom* 1939 AD 188 at 202- 203 Watermeyer JA outlined the approach to circumstantial evidence as follows:

"In reasoning by reference in a criminal case there are two cardinal rules of logic which cannot be ignored. The first rule is that the inference sought to be drawn must be consistent with all the proven facts; if it is not so, the inference cannot be drawn. The second rule is that the proven

facts should be such that they exclude every reasonable inference from the proven facts save the one that is sought to be drawn: if these proven facts do not exclude all other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct." See *S v Sesetse* 1981 (3) SA 353 (A) at 369-370.

[25] In *S v Essack* 1996 (2) SACR 1(A) at page 8 C-D the approach to circumstantial evidence was further accentuated with the divide between conjecture and speculation from the proven facts posited as follows:

"Inferences must be carefully distinguished from conjecture or speculation. There can be no inference unless objective facts from which to infer the other facts which is sought to be established. In some cases other facts can be inferred, with as much practical certainty as if they had had been actually observed. In other cases the inference does not go beyond a reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference falls and what is left is mere speculation as conjecture."

[26] In *S v Reddy* 1974 (1) SA 1 (A), it was said that circumstantial evidence must be evaluated on the entire conspectus of the evidence:

"In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration whether it excludes the reasonable possibility that the explanation given by an accused is true."

The alibi evidence raised by the second appellant (the law)

[27] The second appellant belatedly sought to rebut his participation in the robbery for the first time in the defence case. Quintessentially, it was contended that at the time of the occurrence of the robbery, this appellant was at his place of employment. In the heads of argument drafted by Mr Kekana, the presence of the second appellant's thumbprint was explained as follows. "...A car is meant to be mobile and appellant could have been in contact with the boot of the car without being aware of the same either as the malls or in town and therefore, his failure to explain how his fingerprints came to be there should not have been held against him as appears to be the case."

[28] Our jurisprudence is clear; the raising of an alibi defence does not result in what can be described as a reverse onus. The burden of proof or part thereof is not shifted. The State is not exonerated of the duty that it bears to establish the guilt of an accused beyond a reasonable doubt. See: *S v Chabalala* 2003 (1) SACR 134 (SCA) at para 15. In *S v V* 2000 (1) SACR 453 (SCA) at 455 a-b, at paragraph [3] Zulman JA said the following:

"It is trite that there is no obligation upon an accused person, where the State bears the onus, to convince the court. If his version is reasonably possibly true, he is entitled to his acquittal although his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably true but whether one subjectively believes him is not the test."

[29] In *R v Hlongwane* 1959 (3) SA 337 (A) the Court stated the legal position with regard to an alibi as follows:

"The legal position with regard to an alibi is that there is no onus on an accused to establish it and if it might reasonably be true he must be acquitted. *R v Biya* 1952 (4) SA 514 (AD). But it is important to point out that in applying this test, the alibi does not have to be considered in isolation....

The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses. In the *Biya's* case *supra*, Greenberg JA, said at page 521 'if on all the evidence there is a reasonable

possibility that his alibi evidence is true it means that there is the same possibility that he has not committed the crime".

[30] In *S v Shabalala* 1986 (4) SA 734 (A), the trite position applicable to alibi evidence was re-affirmed as follows:

"It is trite law that where an alibi is raised there is no burden on the accused to prove his alibi. The onus rests on the State to prove his alibi is false. The effect of the falseness of an alibi on an accused's case is to place him in a position as if he had never testified at all."

[31] In *S v Liebenberg* 2005 (2) SACR 355 (SCA), the Supreme Court of Appeal elaborated on the approach to be adopted in evaluating evidence of an alibi, which it re-iterated in *Steven Malcom Musiker* (272) [2012] ZASCA 198 (30 November 2012) as follows:

"Once the trial court accepted that the alibi evidence could not be rejected as false, it was not entitled to reject it on the basis that the prosecution had placed before it strong evidence linking the appellant of the offences. The acceptance of the prosecution's evidence could not, by itself alone, be a sufficient basis for rejecting the alibi evidence. Something more was required. The evidence must have been, when considered in its totality, of the nature that proved the alibi evidence to be false."

Discussion: The conviction of the second appellant on the charge of robbery aggravating circumstances

- [32] The only admissible evidence that incriminates the second appellant, is that of the palm print which was lifted from surface of the right side the boot of the Opel Astra. The second appellant did not challenge the evidence adduced by the State that the palm print lifted from the right side of the boot of the Opel Astra was his, save to raise an alibi for the first time in the defence case.
- [33] It is certain that the Opel Astra in colloquial speech was the "getaway vehicle." The Opel Astra, once sighted by Viljoen travelling at high speed, was pursued. Having regard to the evidence, it is further incontestable that the Opel Astra was forensically examined within hours after it was undeniably involved in a robbery. The existence of this evidence must be placed in proper perspective in sequence of its discovery. Fingerprint evidence were uplifted within hours of the robbery and the high- speed chase which positively link the second and third appellants. In the absence of a firm alibi on the part of the second appellant, the probative value of the circumstantial fingerprint evidence is raised. The conviction of the second appellant must therefore be considered against the principles applicable to the implicating fingerprint evidence and

alibi evidence as set out supra. The evidence as presented must be evaluated holistically in determining whether the State crossed the threshold of establishing the second appellant's guilt beyond a reasonable doubt.

- [34] In an endeavor to rebut the alibi evidence of the second appellant, to disprove that he was at his place of employment at the time of the robbery, cross examination of the second appellant elicited material concessions when juxtaposed against the evidence of the state witness, Mr. Felix Patrick Zonda, as follows:

"Now noticed that the prosecutor would mention the word Fidelity Cash Management whilst you testify about Fidelity Security Services what is the difference? - Fidelity Security Services

Yes- Is the mother company.

Yes- And Fidelity Cash Management part and parcel of it it is a number of companies within Fidelity Security Services

I see- The mother company.

Now the mother company do you have all the records of the different entities under the mother company, or do you just go and check for Fidelity Security Services? - All of them are under one head

Yes you are the Human Resources Executive Officer did you go and check for accused QB Gogo where do you go and check for him- Fidelity Security Services

I see. Did you know that there was at a certain a company Fidelity Cash Management Services that was taken over by G4S do you know that?- Yes I do know that.

Now the records of those Fidelity Cash Services that were taken over by G4S what happened to them? - The employees that were transferred were transferred over to G4S

Yes so the records would be G4S is that correct?- That is correct if ever the person was transferred.

Yes Fidelity Cash Management Services were taken over by G4S prior to your starting to work at Fidelity Security Services in 2011 am I correct? _ That is quite correct.

Yes and Fidelity Security Services it was a sub-division of Fidelity Security Services am I correct and then it was taken over by Fidelity Cash Management, sorry your Worship it was taken over by G4S am I correct?- That is quite correct yes.

So you never went to check the records of G4S am I correct- No I never checked that.

This Fidelity Cash Management Services were located at 8 Bolt Baltonia Krugersdorp am I correct- I am not sure.

You are not sure you cannot dispute it. Did you know that during 2009, the Fidelity Cash Management, the branch manager was Newbird-did you know that? - Unfortunately I never worked with (intervention)

With Fidelity Cash Management Services- No never

Yes you see it is still accused 3's version that he was in the employ of Fidelity Cash Management Services at 8 Bolt Street, Baltonia

Krugersdorp and that was where he was on the 28 August 2009 you cannot dispute that I am correct?- I cannot dispute because that is another company.

Yes- It is not Fidelity Security Services

Yes- It is another company that was supposed to be G4S not Fidelity Cash Management

Yes but at, in 2009 it was initially Fidelity Cash Management Services that during August of 2009 was taken over by G4S is that correct and that is prior to you coming to Fidelity Security Services am I correct?- You are quite correct but I cannot confirm because I have got 2006 not 2009 as the time for the take over.

No that is the time he left Fidelity Security Group that is correct he absconded then and he went to work at Fidelity Cash Management

Services you cannot dispute that- I cannot dispute it because it is two different companies.

Yes- The records for Fidelity Cash Management or G4S are not with us I cannot say."

[35] A valiant attempt by the prosecutor to call another witness to close the obvious lacuna in the State case was dismissed by the Regional Magistrate. Predicating on the proven facts, the following are incontestable and can be said to have been proven beyond a reasonable doubt:

- (i) On 28 August 2018, Le Roux was the victim of a robbery, wherein her bag and contents were unlawful removed, with a firearm being used. Le Roux identified two males as being actively involved in the robbery.
- (ii) Three males were seen fleeing from the flats, described with specific clothing apparel, although no facial recognition was possible, even by Le Roux at a subsequent identification parade.
- (iii) All three males entered a white Opel Astra, which proceeded in the direction of Delareyville.
- (iv) Within hours of the robbery, the Opel Astrawas identified and pursued.
- (v) Accused 2 in the court a quo and the first appellant were arrested at the scene.
- (vi) An identifiable palm print was lifted from the surface of the right side of the boot and a palm print from the rear- view mirror inside the Opel Astra.
- (vii) The thumbprint was identified as that of the second appellant.

[36] The second appellant could not provide a plausible innocent explanation for the presence of his left palm print on the Opel Astra. The second appellant further conceded to not knowing the owner of the Opel Astra. Given the undisputed evidence of the fingerprint evidence, the question that needed to be posed was whether the inference of guilt was not the only possible inference to be drawn from the circumstantial evidence. See *R v Blom* 1939 AD 202. This necessitates a two-stage process. Firstly, the inference that this appellant committed the robbery must be consistent with all the proven facts. If this is not so, the latter inference cannot be drawn, which would then signal the end of the enquiry. Surpassing the first leg of the enquiry, the second part of the enquiry requires that the proven facts should be such that they exclude every reasonable inference from them save that it was the second appellant who was the perpetrator. See *Nduna v S* 2011 (2) All SA (SCA) 177 at paragraph [14].

[37] Fleshing out of *Blom*, inferring from the incontestable fingerprint evidence, the inference that the second appellant was one of the perpetrators is sound with the presence of the second appellant's palm print. At the end of the day the second appellant proffered no reasonable explanation for the presence of his palm print on right side of the boot of the Opel Astra. Any contention not supported by a cogent explanation predicated on solid factual evidence is at most speculative and of no persuasive value.

[38] The appeal against the conviction of the second appellant on the charge of robbery with aggravating circumstances accordingly stands to be dismissed.

The conviction of the appellants on the charges of possession of a firearm and ammunition

[39] The charges are specifically outlined as set out in the Firearms Control Act 60 of 2000, which entails that specified jurisdictional facts need to be proved by the prosecution for a trial court to return verdicts of guilty. The legal requirements as to what would constitute a firearm and ammunition are often readily ascertainable. The principles of joint possession and common purpose, however, is routinely a red herring and requires a careful consideration of the peculiar facts of the matter. This appeal enjoins me to revisit these principles which evaded the Regional Magistrate.

[40] Possession consists of two primary elements, the exercise of physical control (corpus) over an article with the intention (animus) to do so. The concept of possession in a criminal context is no different and it is accordingly the exercise of a required degree of control over an object together with the intent to do so. (S v Adams 1986 (4) SA 882 (A) at 890 G - H).

[41] The vexed question of joint possession of a firearm and ammunition and the approach thereto where there is more than one perpetrator was considered in S v Nkosi 1998 (1) SACR 284 (W) as follows:

"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."

[42] In Makhubela v S, Matjeke v S 2017 (2) SACR 665 (CC) the Constitutional Court settled the law relating to joint possession with reference to previously decided cases in the courts below, as follows:

"[45] What remains are the applicants' convictions for the unlawful possession of firearms and ammunition, that is, counts four and five. It is common cause that they did not have any firearms in their possession. They were however convicted of these charges in the trial court on the basis of the doctrine of common purpose.

[46] In convicting the applicants for unlawful possession of firearms and ammunition on the basis of the doctrine of common purpose, the trial court departed from settled jurisprudence. The test for establishing liability for the possession of firearms and ammunition was established in S v Nkosi as follows:

"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." (Footnotes omitted.)

[47] This test has since been cited with approval in numerous judgments of the High Court and the Supreme Court of Appeal. In these Judgments, the courts have found perpetrators guilty of a crime involving the use of firearms on the basis of the doctrine of common purpose, but nevertheless found that the perpetrators could not be found to be guilty of the unlawful possession of firearms on the basis of this doctrine. The test takes into account the fact that the application of the doctrine of common purpose differs in relation to "consequence crimes", such as murder, and in relation to "circumstance

crimes", such as possession. Burchell in *Principles of Criminal Law*, differentiates between the two as follows:

"The common-purpose rule is invoked in the context of consequence crimes in order to overcome prosecutorial problems of proving the normal causal contribution between the conduct of each and every participant and the unlawful consequence. Strictly speaking, the rule has no application in the context of criminal conduct consisting only of circumstances."

[48] Burchell defines unlawful possession of a firearm as an example of a "circumstance crime" in relation to which the principle of common purpose cannot strictly apply in the same manner in which it applies in consequence crimes:

"Unlawful possession of a firearm is punished under section 2 of the Firearms Control Act. Mbuli emphasised that unlawful possession of a firearm is a circumstance (or state of affairs) crime, that possession had to be personal or joint and that it is not enough to establish joint possession that the firearm was possessed by only one member in a criminal group in furtherance of a criminal purpose with others. Nugent JA in Mbuli did not accept the reasoning of the Supreme Court of Appeal in Khambule and emphasised that a common intention to possess a firearm intentionally can only be inferred when the group

had the intention (animus) to exercise possession of the firearm through the actual detentor and the actual detentor had the intention

to hold the firearm on behalf of the group [the test set out in *S v Nkosi*]. This test has been followed in a number of Supreme Court [of Appeal] cases." (Footnotes omitted.)

[49] In *Molimi*, the Supreme Court of Appeal upheld the appellant's convictions in the court a quo of murder and robbery but overturned

their convictions for unlawful possession of firearms and ammunition. The Supreme Court of Appeal said:

"Counts 5 and 6 relate to the unlawful possession of firearms and ammunition. It is common cause that the appellants, at no stage, had physical possession of any firearms themselves. Despite this they were convicted on these counts. The State sought to defend these convictions on the basis of the decision by this court in *S v Khambule* where it was held that the common intention to possess firearms jointly may be inferred in the circumstances of a particular case...It follows that *Khambule* was overruled by *Mbuli*, and is no longer good law. The State's reliance on it is therefore misplaced. Having failed to meet the requirements as stated in *Nkosi*, the State had not established any basis for the conviction of the appellants. The convictions on these counts must therefore also be set aside."

[50] The Supreme Court of Appeal followed a similar approach in *Kwanda* when it held that:

"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."

[51] The Court in *Dinga* endorsed *Mbuli*, applying the test as set out in *Nkosi* and similarly stating expressly that "acquiescence in [the firearm's] use for fulfilling the common purpose of robbery is not sufficient to establish liability as a joint possessor." (Footnotes omitted)

[52] In *Modiba*, the Court applied the principle in *Nkosi* and applied the SCA's reasoning in *Kwanda* as follows:

"With regard to the remaining charges of unlawful possession of a firearm as well as ammunition, there are numerous cases where the question of joint possession of a firearm in the execution of a common purpose was considered ... In this case however, it has not been established as to who physically possessed the firearm. Although I found that the accused for purposes of this judgment, conspired with his companion(s) to commit the various acts of robbery and murder, the State still has an onus to prove that the accused had the necessary mental intention (*animus*) to possess the firearm. . . . What the SCA held in *S v Kwanda* ... is apposite. 'The fact that 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.' (Footnotes omitted.)

[53] The test was further endorsed in *Bolo*:

"*Mbuli* was confirmed to be correct in *S v Kwanda*, in which Theron JA stated that the mere fact that the appellant conspired with his co-perpetrators to commit robbery and was aware that some of them were armed with firearms in order to commit the robbery 'does not lead to the inference that he possessed such firearms jointly with his co-accused'. On the basis of these authorities it appears to me that the magistrate erred in his approach to the issue before him. He decided that because all of the accused knew that one of them possessed a firearm and all were in agreement that it should be used in the robbery, all of them were joint possessors. As with

Mbuli's case, there is no evidence to show who had physical possession of the firearm, so it cannot be established whether the actual possessor had the intention to possess it on behalf of the group. There is also no evidence from which it can be inferred that the members of the group intended to possess the firearm jointly with the unknown physical possessor." (Footnotes omitted.)

[54] In the recent case of Ramoba, the Supreme Court of Appeal once again affirmed this approach:

"The principles of joint possession in relation to the crime of unlawful possession of firearms in instances of robbery committed by a group of people, as in this case are trite. They were aptly explained by Marais J in *S v Nkosi* who, after finding in that case that there was actual physical possession (corpus) of the three guns by the three robbers individually, stated that the only question to be decided was whether there was the necessary mental intention or animus to render their physical possession of the guns, possession by the group as a whole. The learned judge then said that the question of whether the group (and hence the appellant) possessed the guns had to be decided with reference to the issue of whether the State had established, on the facts from which it could be inferred by a court, firstly, that the group had the intention (animus) to exercise possession of the guns through the actual detentor and secondly, the actual detentors had the intention to hold the guns on behalf of the group." (Footnote omitted.)

[43] The following salient principle can be discerned from *Makhubela v S*, *Matjeke v S* in respect of joint possession in the context of the possession of a firearm and ammunition. The mere awareness by an appellant or his acquiescence to the possession of a firearm and ammunition by a member of a group of persons with whom he has committed another crime, within the confines of the doctrine of common purpose, does not suffice to find joint possession of a firearm and ammunition, used in the commission of the other crime. What is required of the State is to establish a mosaic of proof which would result in a court finding, whether by the application of the principles of common purpose or the conventional prerequisites of joint possession, that the conduct of one perpetrator may be imputed to another.

[44] The prosecution may prove possession upon the available evidence at its disposal which could manifest itself as either direct or circumstantial evidence. In the present matter, the prosecution in the Regional Court in arguing for the conviction of the appellants on the charges of possession of a firearm and ammunition, reasoned as follows:

"The complainant testified that a firearm was used that a firearm was recovered with the corroboration that the person from the scene having a firearm is the same if we look at circumstantial clothes and the firearm it is still the person who held the firearm at the time when he was shot. That this firearm in Count 2 with its ammunition in Count 3 was indeed the firearm that was used in this and that in common purpose people committing a robbery accused 1, accused 3 and accused 4 can also be convicted of that firearm under common purpose. It is my submission if all the evidence is considered I will ask the Court to convict all four accused on all

three counts as charged."

[45] In convicting the appellants, the Regional Magistrate, in turn, stated as follows:

"I now revert to count 2 and 3 that is possession of unlicensed firearm as well as possession of unlicensed ammunition. As I have alluded to above that Mrs Le Roux offered resistance but when the person in front of him told another one, shoot and that this person produce a firearm he then sort of give up, give in and they were able to remove her handbag. It means this person who was trying to grab the handbag of Mrs Le Roux know that his companion had a firearm, because when Mrs Le Roux resisted he shouted shoot and this (indistinct) produce a firearm. As I have found with regard to count 1 it seem that this people travel all the way together in the car knowing that they are going to commit an offence, knowing that one of them has got a firearm, we should be using the commission of an offence therefore of course they could not all of them possess it."

[46] It is apparent from the argument by the prosecution in the court a quo and the judgment of the Regional Magistrate that followed, that the legal principles of common purpose and joint possession were conflated. As in most prosecutions of this nature, direct evidence that the group had the intention to exercise possession of the firearm and ammunition through the actual detentor or that the detentor had the intention to retain possession on the behalf of the group, is a rarity.

[47] The existence of the requisite intention is a question of fact and degree and in most cases the outcome will inevitably depend on an inference drawn from other facts found to have been proved. Like any other fact, it can be established by circumstantial evidence, or by combination of direct and circumstantial evidence (*S v Hoosain* 1987 (1) SA 1 (A), *S v Humphreys* 2013 (2) SACR 1 (SCA) at para [13], *R v Blom* 1939 AD 188 (at 202 to 203).

[48] The legal principle of common purpose and joint possession cannot be used interchangeably. It is of no moment that the evidence that forms the jigsaw of proof may result in proof beyond a reasonable doubt of the existence of common purpose in relation to other crimes, other than the unlawful possession of a firearm and ammunition. Proof of common purpose, to commit a crime other than the unlawful possession of a firearm and ammunition does not axiomatically result in proving

the detentor jointly possessing the firearm and ammunition with his co-perpetrators.

[49] The absence of direct evidence left the Regional Magistrate with circumstantial evidence as to the joint possession of the firearm and ammunition. The methodology of the application of the two cardinal rules of logic have been set out and needs no repetition. The crisp issue in the absence of direct evidence, is whether on the facts found to be proved justify an inference by applying the test that the appellants had the requisite intention for the finding of joint possession as evinced in *Nkosi*.

[50] The Regional Magistrate made findings of fact that were unsupported by the evidence. The conclusions that were sought to be drawn, were not conclusions based on the proven facts. Inferences drawn were centred purely on conjecture which was not buttressed by the body of evidence. This was further compounded by the incorrect application of joint possession as alluded to in Nkosi.

[51] The appeal against the conviction of the appellants on counts 2 and 3 accordingly stands to be upheld.

The appeal against sentence

[52] In view of the finding that the conviction of the appellants on counts 2 and 3 should be upheld, the appeal against sentence remains to be considered only in respect of the conviction on the robbery charge (count 1).

[53] The appellants assail the minimum sentence of fifteen (15) years imprisonment on the following grounds as set out in the Notice of Appeal:

"[4] The Honourable trial court erred in how it approached sentencing of the appellants in that they were treated as a group, despite their different personal circumstances and despite it being trite that sentencing should be individualized.

[5] The Honourable trial court erred in failing to take into account that first and third appellant, whose bail application was refused in the district court, has been in custody for six years at the time of sentencing.

[6] The Honourable trial court erred in believing or giving the impression that it has no discretion to deviate from the prescribed sentence as a Regional magistrate court as opposed to the high court which has inherent jurisdiction.

[7] The finding of the Learned Regional Court Magistrate that there were no substantial and compelling circumstances justifying a departure from the prescribed sentence is manifestly and demonstrably wrong and calls for intervention by the appeal court.

[8] The Honourable trial court failed to do a proportionality test as required and imposed the prescribed sentence mechanically."

[54] It is trite that the imposition of sentence is pre-eminently within the discretion of the trial court. An appeal court will be entitled to interfere with the sentence imposed by the trial court only if one or more of the recognized grounds justifying an interference on appeal, has been shown to exist. (See *S v Mtungwa en 'n Ander* 1990 (2) SACR 1 (A)). The grounds on which a court of appeal may interfere with sentence on appeal are that the sentence is:

- (i) disturbingly inappropriate.
- (ii) so badly out of proportion to the magnitude of the offence.
- (iii) sufficiently disparate.

(iv) vitiated by misdirection showing that the trial court exercised its discretion unreasonably.

(v) is otherwise such that no reasonable court would have imposed it.

(See *S v Giannoulis* 1975 (4) SA 867 (A) at 873G-H; *S v Kibido* 1998 (2) SACR 213 (SCA) at 216g-j; *S v Salzwedel & others* 1999 (2) SACR 586 (SCA) para [10].)

[55] In *S v Sadler* (2000) (2) All SA (SCA)13 at paragraph [6] Marais JA, writing for a unanimous court, had occasion to re-state the aforesaid grounds, when he said:

"The approach to be adopted in an appeal such as this is reflected in the following passage in the judgment of Nicholas AJA in *S v Shapiro* 1994

(1) SACR 112 9A) at 119 J-120C:-

It may well be that this Court would have imposed on the accused a heavier sentence than that imposed by the trial judge. But even that be assumed to be the fact that would not in itself justify interference with the sentence. The principle is clear: it is encapsulated in the statement by Holmes JA in *S v Rabie* 1975 (4) SA 855 (A) at 875D-F:

" In every appeal against sentence, whether imposed by a magistrate or judge, the Court hearing the appeal-

1. should be guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial Court', and
2. should be careful not to erode such discretion: hence the further principle. that the sentence should only be altered if the discretion has not been: judicially and properly exercised'.
3. The test under (b) is whether the sentence is vitiated by irregular or misdirection or is disturbingly inappropriate."

[56] In respect of the courts sentencing discretion where a mandatory sentence finds application, the guidance provided in *S v Malgas* 2001 (2) SA 1222 where the following was stated, is instructive:

"[12] The mental process in which courts engage when considering the questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by the legislature or binding judicial precedent, a trial court will consider the particular

circumstances of the case in the light of the well- known triad of factors relevant to sentence and impose what it considers to be just and appropriate sentence. A court excising appellant jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion. an appellant court is of course entitled to consider the question of sentence afresh. In doing so, it

assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellant court is large. However, even in the absence of material misdirection, an appellant court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellant court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate." It must be emphasised that in the latter situation the appellant court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation."

(my emphasis)

[57] Whilst no judgment, can be all encompassing, the Regional Magistrate's judgment on sentence is terse. In respect of the personal circumstances of the appellants the Regional Magistrate encapsulated all three appellants personal .circumstances in the following in nine (9) lines:

"I have taken into account the personal circumstances of all of you as put forward by your respective attorneys. I have taken into account that some of you are still having young children. And I have considered the imperatives of the contusion Section 28 to the fact that when a Court imposes a sentence it must bear in mind the impact sentence may have on young children. I have informed about your marital status as well as dependent you, you have, however the Court must consider whether in those circumstances, can you be regarded as a primary caregiver. However I found that none of you can be regarded as primary caregivers in the true sense of the word as define in state versus M, it is the decision of the (indistinct) Court."

[58] The record of the court a quo reflects that the Regional Magistrate did not embark on a process of determining the individual personal circumstances of each of the appellants in arriving at the conclusion that each of the appellants had not exhibited substantial and compelling circumstances. Each appellant's personal circumstances are unique. The first appellant had previous brushes with the law and had been trial waiting in this matter until September 2011, until sentenced to life imprisonment. The second appellant was on bail. The third appellant was incarcerated since the genesis of the trial which spanned some six (6) years.

[59] Punishment must be individualised, where in the imposition of a prescribed sentence is called for, an offenders individualised personal circumstances must be given due cognisance to determine the presence of substantial and compelling circumstances.

[60] In *Tsiba v S* (CA 44/2022) [2023] ZANWHC 27 (15 March 2023), Petersen J emphasized the importance of sentencing proceedings as follows:

"[26] The author Hiemstra in the publication, *Suid-Afrikaanse Strafproses* (first edition) at page 407, loosely translated, made the following observation regarding sentence, which is apt for the present appeal, both in respect of the conduct of the appellant's legal representative and the prosecutor and the Regional Magistrate:

"The utmost attention is given to the question of guilt or innocence; no faculty, time nor vigour is saved in the process and an intricate system of evidential rules has been developed in the process. However, once the accused has been convicted, sentencing usually follows within minutes. Counsel for the accused points out various circumstances and counsel for the state says nothing."

[27] In the fifth edition of *Suid-Afrikaanse Strafproses* at page 650 by Krieg/er, the following is said (loosely translated):

"Importance of sentencing process - The imposition of sentence is usually the most difficult phase of a criminal case. Unfortunately it is the one subject that jurists are least taught - and consequently know least of. Although it is the most important phase for the accused it is often disposed of so-so. It requires at least the same attention as consideration of the merits; and because it usually requires insight and knowledge which the jurist does not have, the wise sentencing officer will not hesitate to, in appropriate circumstances, avail himself of expert evidence."

[61] The approach to sentence by the Regional Magistrate, particularly in respect of the personal circumstances of the appellants constitutes a material misdirection. This Court on appeal is accordingly at large to consider the sentences afresh.

Sentence de novo on appeal

[62] Notwithstanding the arduous duty that a sentencing court is seized with, the exercising of a sentencing discretion is aimed at the attainment of a balance. The balance is directed at three prominent factors, the crime, the offender, and the interests of the community. The various aims and purposes of punishment are relevant considerations (See: *S v Rabie* 1975 (4) SA 855 (A) 862 A-8). These factors must be considered against the backdrop of the mandated sentence. (See *S v Zinn* 1969 (2) SA 537 (A) at 540G-H). In *S v RO and Another* 2000 (2) SACR 248 (SCA) at paragraph [30] Heher JA stated the following in this regard:

"Sentencing is about achieving the right balance or in more high-flown terms, proportionality. The elements at play are the crime, the offender, the interests of society with different nuance, prevention, retribution, reformation and deterrence, invariably there are overlaps that render the process unscientific, even a proper exercise of a judicial function allows reasonable people to arrive at different conclusions."

[63] Using the blueprint provided in *Zinn* with due regard to the salient approach adumbrated in *Malgas*, I turn to consider the factors that form the triad.

The first appellant's personal circumstances

[64] At the time of sentencing, the first appellant was forty years old, unmarried but the father of two children aged eighteen and twelve years of age. Both of whom were learners, having their primary residence with their mother and grandmother respectively. The grandmother referred to was ill and that there was no one to take care of her. He completed his schooling to the now grade 12 level and was employed as a hairdresser with an uncertain accrued income. Whilst incarcerated he pursued computer courses. The first appellant has been awaiting trial in custody since his arrest on 28 August 2009 until sentenced in another matter in September 2011. This prima facie appears to be just over two years. In addition, he has previous convictions of assault with intent to do grievous bodily harm. On 20 April 1998 the first appellant was convicted on two counts of assault with intent to do grievous bodily harm. Both counts

were taken as one for the purposes of sentence, and this appellant was sentenced to a fine of R1500-00 or 5 months imprisonment which was wholly suspended conditionally. On 19 October 2006 the first appellant was again convicted of assault with intent to do grievous bodily harm. The first appellant was again sentenced to wholly conditionally suspended sentence.

The second appellant's personal circumstances

[65] The second appellant, a first offender, was thirty-seven years old, married with three minor children aged seven, ten and fourteen years. At the time of his arrest, the second appellant was employed at Fidelity Cash Management, earning R16 000 per month whilst his wife was employed as paramedic. Her income was unknown. This appellant completed matric and qualified for a grade A and obtained a Certificate of Security Management. This appellant was on bail whilst on trial. He does not have a criminal record.

The third appellant's personal circumstances

[66] The third appellant was forty years old at the time of arrest. He completed his secondary education thereafter qualifying as a fitter. He is married with four children, two of whom are majors, whilst the remaining two are still learners. At the time of his arrest, he had already been employed at Murray and Roberts for a period of three years and was the sole income earner in the family. The wife of the third appellant is now employed at the municipality on a temporary capacity seized with cleaning duties. He has no criminal record. He has been in custody since his arrest on 8 September 2009 until sentenced on 24 March 2015, which constitutes a period of just over six years as pre-trial awaiting detainee.

The crime

[67] The conspectus of the evidence depicts that the offence was carefully planned. Le Roux was threatened within the confines of what she believed was the safety of her general abode. The ineluctable inference to be drawn was that she was followed. Factually it was found that Le Roux had been dispossessed of her belongings with the aid of a firearm. There is no underscoring the harrowing ordeal that Le Roux and been subjected to, which included her being dispossessed of her monthly income. Not all her belongings were recovered. After the

execution of the robbery, the appellants attempted to make good their escape and were undeterred by the presence of the SAPS, who sought to intervene their escape by positioning a motor vehicle horizontally in their intended path of travel. The appellants circumvented this obstacle only for accused 2 in the court a quo and the first appellant to be arrested after being pursued by members of the SAPS.

The interests of society

[68] In *S v WV* 2013 SACR 204 GNP the following was stated regarding the interests of society :

"It is the kind of sentence which we impose that will drive ordinary members of our society either to have confidence or to lose confidence in the judicial system. The sentences that our court impose when offenses of this nature are committed, should strive to ensure that people are not driven to take the law into their own hands, but rather to scare away would-be offenders."

Time spent awaiting trial in custody

[69] Given the confusion as regards which of the appellants were detained awaiting trial, the address of the prosecutor before sentence is apposite:

"... Some of them mentioned the time awaiting trial if we look first at that your Worship. Accused 1 is not facing this whole time awaiting trial since 2011 he has been a sentenced prisoner. Mr Mokoto said the sentence, but he did not put some information before the Court. Since September 2011 he has been serving a sentence, he is serving a sentence he is not trial awaiting. Accused 2 is not trial awaiting since 2013 on (indistinct) and on, on matters of murder and robbery or murder, rape, and a firearm he has been sentenced to life imprisonment. Accused 3 was never awaiting trial on this matter he is on bail. The only person that was trial awaiting for this matter was accused 4 and my learned friend's address is wrong "

General discussion on sentence

[70] I make a few general observations regarding the appellants' circumstances founded on the appeal record. All three appellants did not show any contrition for their actions. In the face of damning evidence, the appellants persisted with defences which were clearly untrue. The existence of remorse plays a particular role in the determination of whether an offender may be a suitable candidate for rehabilitation and could ultimately contribute to the existence of substantial and compelling circumstances. There can be no greater question than what prompted the commission of the offence, what has since provoked the change of heart, and is there a full appreciation of the consequences of one's actions. This requires of an offender to take the court fully into his or her confidence. This did not occur with any of the appellants. See: *S v Matyityi* (695/09) [2010] ZASCA 127, *S v Seegers* 1970 (2) SA 506 (A).

[71] Like remorse, pre-trial incarceration, is but one of the factors that falls under the epithet: substantial and compelling circumstances. In *Radebe and another v S* 2013 (2) SACR 165 (SCA) Lewis JA addressed the question of pre-trial incarceration as follows:

"[13] In my view there should be no rule of thumb in respect of the calculation of the weight to be given to the period spent by an accused awaiting trial. (See also *S v Seboko* 2009 (2) SACR 573 (NGK) para 22). A mechanical formula to determine the extent to which the proposed sentence should be reduced, by reason of the period of detention prior to conviction, is unhelpful. The circumstances of an individual accused must be assessed in each case in determining the extent to which the sentence proposed should be reduced. (It should be noted that this court left open the question of how to approach the matter in *S v Dlamini* 2012 (2) SACR 1 (SCA) para 41.)

[14] A better approach, in my view, is that the period in detention pre- sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. And accordingly, in determining, in respect of the charge of robbery with aggravating circumstances, whether substantial and compelling circumstances warrant a lesser sentence than that prescribed by the Criminal Law Amendment Act 105 of 1997 (15 years' imprisonment for robbery), the test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one."

[72] The second and third appellants were first offenders. In *S v Muller* [2006] ZAGPHC 51 the Court stated at paragraph [59] that:

"I take account that this accused has no previous convictions and that he is a man in his fifties. However, I must a/so take into account that there is no authority for the proposition that the previous clean record of an accused convicted of offences in Part I of Schedule 2 constitutes, in and of itself, a substantial and compelling circumstance. At most it would be one of the considerations considered for exploring the possibility that, in conjunction with other factors, it may persuade the sentencing court to make such a finding."

[73] Having regard to the individual circumstances of each of the appellants with due regard to the crime and the interests of society, I am satisfied that a sentence of 12 years imprisonment in respect of the first appellant, 15 years imprisonment in respect of the second appellant and 8 years imprisonment in respect of the third appellant would be both fair and appropriate.

The consequential order in terms of the Firearms Control Act 60 of 2000

[74] No issue can be taken with the Regional Magistrate not interfering with the automatic declaration of unfitness to possess a firearm in terms of section 103(1) of the FCA. In *S v Mkhonza* 2010 (1) SACR 602 (KZP), Wallis J (Niles-Duner concurring) considered the consequences of a declaration of unfitness to possess a firearm in terms of sections 103(1) and 103(2) of the FCA. The following was said in this regard:

"[24] ... Whether there is a determination under s 103(2) or a decision not to determine otherwise under s 103(1), the consequences are the same. The registrar must be notified in terms of s 103(3) of the Act and. in terms of s 103(4), the notice must be accompanied by a court

order for the immediate search for and seizure of all competency certificates, licences,

authorisations and permits issued to the relevant person; or firearms in his or her possession and all ammunition in his or her possession. All competency certificates, licences. authorisations and permits cease to be valid from the date of conviction or declaration. as the case may be (s 104(1)(a)). and the person concerned is obliged within 24 hours to surrender such competency certificates. licences.

authorisations and permits. together with all firearms and ammunition in his or her possession, to the nearest police station. They are then entitled in terms of s 104(3) to dispose of the firearm and ammunition through a dealer, but, if they fail to do so within 60 days, they are forfeited to the State and destroyed or disposed of as prescribed.

[25] The fact that these consequences flow from a decision by the court, irrespective of whether the case falls under s 103(1) or s 103(2)(a), is evidenced by the provisions of s 104(6) of the Act. That section reads as follows:

'Subject to s 9(3)(b) and after a period of five years calculated from the date of the decision leading to the status of unfitness to possess a firearm, the person who has become or been declared unfit to possess a firearm may apply for a new competency certificate, licence, authorisation or permit in accordance with the provisions of this Act.'

This section plainly states that in all instances the status of unfitness to possess a firearm flows from a decision."

[75] The utterance by the Regional Magistrate that the third appellant who was the holder of a license to possess a firearm was to "make arrangement what he does with his license because as from now he is not fit to possess a firearm." is not in accordance with the prescripts of the FCA. The duty rests not on an accused what he does with his licence. It was the peremptory duty of the Regional Magistrate to firstly, inform the Registrar of Firearms of his declaration as required by section 103(3) of the FCA, which provides that:

"103(3) A court which has convicted a person of a crime or an offence contemplated in subsection (1), has made a determination contemplated in that subsection or has made a declaration in terms of subsection (2) must notify the Registrar in writing of that conviction, determination or declaration."

(my emphasis)

[76] Secondly, it was the peremptory duty of the Regional Magistrate in conjunction with the notice contemplated in section 103(3) to make an order envisaged in section 103(4) of the FCA, which provides that:

"103(4) Unless a determination that a person is not unfit to possess a firearm has been made in terms of subsection (1), a notice contemplated in subsection (3) must be accompanied by a court order for the immediate search for and seizure of-

- (a) all competency certificates, licences, authorisations and permits issued to the relevant person in terms of this Act;
- (b) all firearms in his or her possession; and
- (c) all ammunition in his or her possession."

[77] I align myself with the approach adopted in the review judgment of *S v Kele and Others* (996/07) [2008] ZAFSHC 13 (6 March 2008). In *Kele* a Magistrate failed to comply with the provisions of section 103 (1), (2) and (3) of the FCA and an order was made that the matter be remitted to the Magistrate to comply with the provisions of section 103 (1), (2) and (3) of the FCA. Mocumie AJ (Beckley J concurring) stated as follows:

"[1] The purpose of the Act, is inter alia, "(T)o 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 ..." See section s2(b) of the Act. The use of illegally obtained firearms is a grave concern in South Africa. Society and different agencies have a role to play in the achievement of the purpose of this Act in order to enhance the Constitutional rights to life and bodily integrity. See ss2(a) of the Act. The judiciary is no exception. Judicial officers should not only adhere because the Act is peremptory. It must be adhered to well aware of the intention of the legislature in its noble endeavour to curb the use of illegal firearms in the broader context of the protection of human rights of all citizens of this country.

[8] It is well known that robbery is committed by the use of dangerous weapons including firearms. That is why the legislature in its own wisdom included it in the list of specified offences.

[9] In my view this is one case in which there should have been compliance with the Act. In my view the section is no different from its predecessor, s12 (1) (b) of the Firearms and Ammunition Act 75 of 1969. Numerous cases in the early 90's addressed this anomaly in a very lucid and analytical exposition of what the provisions entailed and what was expected of any judicial officer under the same circumstances. See *S v Phuroe en Agt Ander Soort Gelyke Sake* 1991 (2) SACR 384 (NC); *S v Flatela* 1991 (2) SACR 395 (NC); *S v Modise* 1992 (1) SACR 358 (0). It is in the light of this background that I am of the view that the Magistrate must hold an enquiry in terms of s103 (2) read with (3) of the Act and make an order in consequence thereof. The Magistrate is referred to two recent decisions which give guidance to hold a proper enquiry in terms of the Act. See *S v Lukwe* 2005 (2) SACR 578 (WLD); *S v Smith* 2006 (1) SACR 307 (WLD). It will not only be prudent or in the interests of justice but also for the sake of good administration of justice to refer this matter to the Magistrate Commission and the Justice College so that this anomaly is brought to the attention of all

Magistrates country wide and a repetition of this oversight does not occur."

[78] As in Kele, there was non-compliance with section 103 (3) and by implication section 103 (4) of the FCA in the present matter. As the Regional Magistrate has failed to comply with sections 103(3) and

(4) of the FCA, an order remitting the matter back to the Regional Magistrate to comply with section 103(3) and 103 (4) as a matter of urgency is necessitated. This is, particularly necessitated as section 103(5) of the FCA provides that:

"103(5) A firearm and any other item seized in terms of subsection (4) must be kept by the South African Police Service or, if appropriate, by the Military Police, until an appeal against the conviction or sentence has been finalised or the time for an appeal has elapsed."

Order

[79] In the result the following order is made:

- (i) The appeal against conviction on count 1 by the second appellant is dismissed.
- (ii) The convictions and sentence on counts 2 and 3 is upheld in respect of all three appellants. The convictions and sentences on counts 2 and 3 are accordingly set aside.
- (iii) The appeal against the sentences imposed on count 1 Is upheld and is replaced with the following sentences:

"Accused 1 (appellant 1): 12 years imprisonment.

Accused 3 (appellant 2): 15 years imprisonment.

Accused 4 (appellant 3): 8 years imprisonment.

The sentences are ante-dated to 24 March 2015.

(iv) The order declaring the appellants unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000 is confirmed.

(v) The matter is remitted to the Regional Magistrate to comply ith the provisions of section 103 (3) and 103(4) of the Firearms Control Act 60 of 2000.

A REDDY

ACTING JUDGGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

I agree.

FMM REID

JUDGE OF THE HIGH COURT,

APPEARANCES

For the Applicant: Mr M V Kekana Attorneys for Applicant Legal Aid attorneys Borekelong House 742 Dr James Moroka Drive Southwing Mmabatho For the Respondent: Adv K J Molefe Attorneys for Respondent: NDPP Megacity Complex East Gallery 3139 Sekame Road Mmabatho Date of hearing: 28 April 2023 Date of judgment: 29 August 2023

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