

SOUTH AFRICA / JUDGMENT

# Zulu v S (AR44/18) [2021]

## ZAKZPHC 9 (3 February 2021)

[2021] ZAKZPHC 9

## COURT

Kwazulu-Natal High Court, Pietermaritzburg

## BEFORE

Chetty, Chilli

## CASE / FILE NUMBER

AR44/18

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IN THE HIGH COURT OF  
SOUTH AFRICA KWAZULU-NATAL DIVISION, PIETERMARITZBURG  
CASE NO. AR447/18

## In the matter between:

KUMBULANI  
ERIC ZULU  
APPELLANT  
and  
THE  
STATE  
RESPONDENT  
This judgment  
was handed down electronically by circulation to the parties'  
representatives by email, and released to SAFLII.  
The date and time  
for hand down is deemed to be 12h00 on 3 February 2021  
ORDER  
The

following order is issued:

- (a) The appeal against the conviction respect of counts 4, 5, 6 (possession of unlicensed firearms) and 7 (possession of ammunition), is upheld.
- (b) The conviction and sentences imposed on 11 April 2016 in respect of counts 4, 5, 6 and 7 are hereby set aside.

## JUDGMENT

Chetty J (Chilli J concurring):

[1] The appellant was indicted together with five others on three counts of robbery with aggravating circumstances where firearms and violence were used in the commission of the offences. During the commission of the offences, the perpetrators deprived their victims of cash, airtime vouchers and various cell phones. The accused were also charged with three counts of possession of unlicensed firearms in terms of the Firearms Control Act 60 of 2000, together with a further count pertaining to the unlawful possession of 19 live rounds of ammunition. The three firearms in question were found inside a VW Polo with registration, [...] ('the Polo') being the vehicle in which the appellant and his co-accused were travelling at the time of their arrest.

[2] At the conclusion of the trial, accused six, who was the driver of the Polo, was found not guilty and discharged. The appellant and his co-accused were found guilty on three counts of robbery with

aggravating circumstances; three counts of possession of unlicensed firearms and one count of unlawful possession of ammunition. In respect of the robberies, all the accused were sentenced to ten years' imprisonment. In respect of counts 4, 5 and 6 pertaining to the possession of unlicensed firearms, the appellant and his co-accused were sentenced to five years' imprisonment

on each count, with the sentences to run concurrently. In respect of count 7 pertaining to the unlawful possession of ammunition, the appellant and his co-accused were sentenced to two years' imprisonment. The appellant was sentenced to an effective period of 17 years' imprisonment.

[3] The appellant applied for leave to appeal against his convictions and sentence, which application was dismissed by the trial magistrate. He then petitioned this court for leave to appeal against the

convictions and sentence in respect of counts 1 to 7. On 21 August 2018 the petition was refused. Undeterred, the appellant

then applied for special leave to the Supreme Court of Appeal ('the SCA'). On 29 November 2019 the SCA upheld the appeal and set aside the decision of this court dismissing the petition.[1] The SCA granted leave to appeal in respect of counts 4, 5, 6 and 7. The matter accordingly comes before us on appeal in respect of those counts alone. [4] The facts of the matter are relatively straightforward. The appellant was legally represented at his trial and pleaded not guilty to the charges against him. The evidence of the various State witnesses was to the effect that on 19 February 2015 the appellant together with three other males entered the business premises of Ms Nazreen Ali, known as Hawkers Paradise, and after pretending to be legitimate customers one of the accused pulled out a firearm and pointed it at her head, demanding a cell phone. The perpetrators then left with an amount of R1 400 in cash as well as R400 in airtime vouchers. According to the owner of the business, the robbers fled when an employee, Mr John Blessing Mbasu, also known as Lameek Musa, came to her rescue. He managed to flee out of the shop and summon assistance from others nearby. However, they were unable to confront the robbers, who were armed. The State also led evidence that Lameek Musa and Nhlakanipho Tshowuphile were accosted at gunpoint on 19 February 2015 and robbed of their cell phones. All of the complainants testified that they had subsequently been contacted by the police who informed them that the perpetrators of the robbery had been arrested. They had been asked to identify the items stolen at the police station. All of the complainants gave evidence pointing out the respective accused who had participated in

the robbery, and those who were carrying firearms at the time. The appellant was accused two in the trial court.

[5] The State lead evidence of the various police officers who apprehended the accused, including the appellant, along the N2 Highway on 19 February 2015. The evidence of the police officers was to the effect that they were on patrol duty in the vicinity of the Gateway Interchange and the M41 off-ramp when they received information that a robbery had taken place in the area of Blackburn village, and that the suspects had fled in a blue VW Polo with registration ND388263. Inspector Govender testified that he was in his patrol car on the highway when he observed the Polo travelling passed them at a high speed. He recognised this as the vehicle that they were meant to be looking out for, and engaged his siren and set off in pursuit of the vehicle. When the driver of the vehicle failed to pull over, Inspector Govender fired at the tyres of the vehicle, bringing it to a halt on the side of the highway. He, together with his colleague Inspector Naicker approached the stationary vehicle with the occupants inside. Accused six was the driver of the Polo. The appellant was seated in the back seat, behind the driver. All of the occupants were pulled out of the vehicle by the officers and made to lie on the ground, where they were handcuffed and placed under arrest on suspicion of being involved in the robberies. During this time, the arresting officers were joined by other colleagues from the metro police, who had been called as backup.

[6] All of the police officers who testified were consistent in their evidence that once the occupants of the Polo had been removed from the vehicle, they were searched before being handcuffed. The police officers testified that they observed the firearms inside the vehicle.

One firearm was found in the passenger seat in the front of the vehicle, which Inspector Govender described as a silver and black pistol. In the back seat, on the left, was a black revolver and directly behind the driver's seat, was a black pistol. Inspector Govender also testified that there was a blue bag inside the vehicle, which he said was filled with money, made up of coins and notes. He also stated that it included airtime vouchers and a single live round of ammunition. It is not entirely clear whether the bag was found on the floor inside the vehicle or on the seat. Once

the suspects had been placed under arrest, an officer from the forensic department of the SAPS attended the scene and took fingerprints, from the vehicle and the firearms, obtaining DNA swabs and photographs of the scene. Inspector Govender confirmed that the silver and black pistol found on the passenger side of the front vehicle contained six live rounds, and that five live rounds were found in the revolver and seven live rounds in the remaining pistol, found in the rear. A total of 18 live rounds were found in the three

firearms, with another round of ammunition found in the bag. None of the suspects gave any explanation for the money or the firearms and ammunition found in the vehicle. The suspects were taken to the Greenwood Park police station where they were formally charged. The firearms, ammunition, cell phones and money recovered at the scene were recorded as police exhibits in the SAP13.

[7] This appeal is confined to the appellant's conviction on the counts of possession of firearms and ammunition. In a rather terse judgment, the trial court was satisfied that the appellant and his co-accused had been properly identified as having robbed the three complainants on 19 February 2015 at gunpoint and threatened them with violence. It found that the evidence of the complainants and the police officers was credible and reliable, and could not be criticised. The court rejected the version of the appellant that he was innocently walking along the N2 Highway, and while

hitchhiking after spending the day at the Sibiya casino, was offered a ride by the driver of the Polo. The appellant's evidence was that there were three other occupants in the motor vehicle at the time. These other occupants too, by some coincidence, also happened to be hitchhiking on the N2 when they were offered a lift by the vehicle driven by accused six, which happened to be heading to KwaMashu, being the destination where all of the occupants were going. The appellant testified that he suddenly heard gunshots after which the vehicle was brought to a halt and all the occupants, including the driver and himself, were pulled out of the vehicle by the police. They were handcuffed and made to lie on the ground. The appellant as well as his co-accused denied any knowledge of the firearms which were found inside the vehicle in which they were travelling.

[8] The trial court was correct in dismissing the claim by the appellant and his coaccused that they were innocent passengers in the Polo, who all happened to be in the vehicle at the wrong time. The court correctly rejected their versions as a fabrication and properly convicted accused one to five of robbery. However, the court went further and concluded

that the mere presence of the firearms in the Polo was a sufficient basis for convicting the appellant and his co-accused on the counts of unlawful possession of firearms and ammunition. The trial court said the following in its judgement:

‘Insofar as counts 4, 5, 6 and 7 are concerned, they involve the unlawful possession of firearms. There were three firearms that were actually found in this car and all these firearms were actually connected to the passengers in the car and not the driver. So the State is asking the Court to draw an inference that they all possessed the firearm and that would be a reasonable inference bearing in mind that these same people were involved and seen with firearms the same people during the robbery, so even if the one had the firearm the other also possessed . . . [indistinct]

The Court finds therefore that all five accused before court have been incriminated and proved to have been involved in the commission of the robberies which are count 1, count 2, count 3 and therefore the Court finds the five accused before court GUILTY ON ALL COUNTS AS PLEADED.’

[9] As the SCA pointed out in paragraph 8 of its judgment setting aside the refusal of the petition, it was on the basis of the aforementioned reasoning that the appellant contends that the trial court wrongly convicted him on counts 4, 5, 6 and 7 relying on the doctrine of joint possession. In dealing with this aspect, the SCA said the following:

‘As at the time of the appellant’s conviction, the legal position pertaining to the doctrine of joint possession had already been clarified as follows in *S v Kwanda*:

‘The fact that the appellant conspired with his co-accused to commit robbery, and even assuming that he was aware that some of his

co-accused possessed firearms for the purpose of committing the robbery, does not lead to the inference that he possessed such

firearms jointly with his co-accused. In *S v Nkosi*, Marais J said that such an inference is only justified where “the state has established facts from which it can properly be inferred by a Court that: (a) the group had the intention (*animus*) to exercise possession of the guns through the actual detentor and

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

*“I do not agree that the only reasonable inference from the evidence is that the accused possessed the hand grenade jointly. It is equally possible that, like the pistols, the hand grenade was possessed by only one of the accused. Mere knowledge by the others that he was in possession of a hand grenade, and even acquiescence by them in its use for fulfilling their common purpose to commit robbery, is not sufficient*

*to make them joint possessors for purposes of the Act. The evidence does not establish which of the accused was in possession of the hand grenade and on that charge, in my view, they were entitled to be acquitted”.’ (footnotes omitted)*

- [10] I endorse the views expressed by the SCA that the trial court was perhaps unaware of the judgments referred to in the paragraphs quoted above in relation to the doctrine of joint possession. The trial court, having been satisfied that there was sufficient evidence to convict the appellant of his participation on three counts of robbery, simply accepted that because the appellant was part of the group of robbers and an occupant in the vehicle in which his co-accused were travelling, he must be guilty of possession of the three firearms and ammunition. It is clear from the evidence that there were six occupants, including the driver, at the time of their arrest. It is also not in dispute that none of the firearms were found in the actual physical possession of any of the occupants.
- [11] There is no evidence on record to indicate that the appellant physically possessed any of the firearms during the course of the robberies, or while he was an occupant in the Polo. While the police witnesses gave evidence that the forensic department had been called out to the scene and took DNA swabs from the firearms, there is no indication as to what became of this forensic exercise. One of the officers who testified clearly stated that once the suspects had been taken out of the vehicle, none of the officers touched or contaminated any of the evidence including the firearms.
- [12] There is no evidence on record linking the appellant to the actual possession of any firearm recovered at the scene. At best for the State, Inspector Govender testified that he removed the appellant from the rear seat of the Polo. However, there is no evidence from Inspector Govender that in doing so he immediately noticed the firearm where the appellant had been sitting. One would assume that it would have been entirely consistent for the officer to have said that, on removing the appellant from the car, he found that the appellant had been sitting on the firearm or that it was in the immediate vicinity of where the appellant had been seated in the vehicle. None of the police witnesses were able to shed any further light on the appellant's possession of any of the firearms.
- [13] The foundation of the trial court's conviction of the appellant on counts 4, 5, 6 and 7 was joint possession, in other words, that the only inference to be drawn from the presence of the three firearms inside the car was that all of the accused at some point had jointly possessed the firearms. The trial court regrettably did not explain the basis for that conclusion. The test for joint possession of an illegal firearm and ammunition was set out in *S v Nkosi* 1998 (1) SACR 284 (W) 286H-I where the court stated that it must be possible to properly infer from the established facts 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 . . . to possess all the guns.’

[14] In *Leshilo v S* (345/2019) [2020] ZASCA 98 (8 September 2020), para 11, the court held that ‘[t]he mere fact that the accused participated in a robbery where his coperpetrators possessed firearms does not sustain beyond reasonable doubt, the inference that the accused possessed the firearms jointly with them’.

[15] As stated earlier, three firearms were found in a vehicle with six occupants. The magistrate failed to provide any reasoning leading to the conclusion that the appellant was guilty of possession of all three of the firearms, let alone any one of them. Where an accused has not been found in actual physical possession of a firearm, and where the State relies on joint possession, the legal requirements for a conviction have been clearly established. The Constitutional Court, in *S v Makhubela & another* 2017 (2) SACR 665 (CC), para 46, endorsed the test in *S v Nkosi*, which I have referred to above. In *Nkosi*, it was common cause that there was physical possession of three guns by the three robbers individually. The only question 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’.[2]

[16] It bears repeating that only if the State has established that the group had the intention to exercise possession through one or more of the group and those who had possession did so on behalf of the group, would the requirements for a conviction be established. In *S v Ramoba* 2017 (2) SACR 353 (SCA), the appellant had been convicted of three counts of unlawful possession of firearms; the first count was in respect of a pistol and the other two counts were in respect of two rifles. On appeal, the court held that, in respect of the pistol, there was no evidence as to who put it inside the vehicle (in which it was found) and no evidence as to whether the appellant was aware that it was inside the vehicle. The court held that there was no evidence to establish joint possession of the pistol; it stated:

‘. . . 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.’[3]

However, the court found that there was sufficient evidence regarding the charge of joint possession of the rifles. The court reasoned as follows, in para 19:

‘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.’

[17] See also *S v Molimi & another* [2006] ZASCA 43; 2006 (2) SACR 8 (SCA) and *S v Kwanda* 2013 (1) SACR 137 (SCA). The Court in *S v Makhubela*, para 49, referred to *S v Molimi*, stating the following:

‘In *Molimi*, the Supreme Court of Appeal upheld the appellants’ 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.” (footnotes omitted)

It would appear that the trial court in the present matter followed the line of reasoning in *S v Khambule* 2001 (1) SACR 501 (SCA), which is no longer sound.

[18] Applying the test established in *S v Nkosi* and endorsed in the above cases, I am of the view that, since the firearms were only observed once all the suspects had been taken out of the vehicle, there is no evidence from which it can be inferred that the appellant had the intention to exercise possession over any of the firearms, particularly as there is no evidence before the court as to who the ‘actual detentor’[4] was.

[19] At important point to make in this regard is that unlawful possession is a

‘circumstance crime’, not a ‘consequence crime’, and the doctrine of common purpose does not apply to the crime of unlawful possession. This is explained in *S v Makhubela & another* 2017 (2) SACR 665 (CC), as follows:

‘. . . 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.”[5] (emphasis added).*

[20] The trial court failed to apply its mind to the well-established test set out in *S v Nkosi* in order to conclude that joint possession was the only inference that could be drawn from the facts. The fact that the appellant was properly convicted of robbery does not automatically translate into a conviction on the counts of possession of firearms and ammunition. Much more is required. In the result, the convictions on counts 4, 5, 6 and 7 are not in order.

[21] I therefore make the following order :

- (a) The appeal against the conviction respect of counts 4, 5, 6 (possession of unlicensed firearms) and 7 (possession of ammunition), is upheld.
- (b) The conviction and sentences imposed on 11 April 2016 in respect of counts 4, 5, 6 and 7 are hereby set aside.

CHETTY J Appearances: For the appellant: L Barnard Instructed by: Advocates' Chambers Tel:

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Instructed by: Director of Public Prosecution, Pietermaritzburg Date of hearing: 29 January 2021 Date of

## Judgment

03 February 2021 (electronically)

- [1] *Zulu v The State* (529/19) [2019] ZASCA 166 (29 November 2019).
- [2] *S v Nkosi* 1998 (1) SACR 284 (W) 286G.
- [3] *S v Ramoba* 2017 (2) SACR 353 (SCA) para 15.
- [4] *S v Nkosi* (above) 286H.
- [5] *S v Makhubela & another* 2017 (2) SACR 665 (CC), para 47.

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