THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

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CASE NO: 422/2001

In the matter between :

MZWAKE MBULI Appellant

and

THE STATE Respondent

Before:	**MARAIS, ZULMAN & NUGENT JJA**
Heard:	**23 MAY 2002**
Delivered:	**7 JUNE 2002**
Summary:	**Robbery - whether evidence establishing guilt of appellant - unlawful possession of hand grenade - whether joint possession established.**

J U D G M E N T

NUGENT JA

NUGENT JA:

[1] First National Bank has a banking outlet (it was referred to in the evidence as an "agency") in a shopping centre in the Pretoria suburb of Waverley. (For convenience I will refer to the outlet as "the bank"). Within minutes of opening for business on the morning of 28 October 1997 the bank was robbed of R15 039.82. The amount might have been larger but for the fact that the bank's stock of money for the conduct of business on that day had yet to be delivered at the time the robbery occurred.

[2] At least three men participated in the robbery. (The evidence does not exclude the possibility that one or more accomplices remained outside the bank while the robbery was committed). One of the three men who committed the robbery was wearing a blue overall, at least two had handguns, and one also had a hand grenade. The money that was stolen, some of which

was in canvas bags with the name of the bank printed on them, was placed in a blue canvas bag and the robbers fled.

[3] Shortly after the robbery two police officers stopped the appellant's motor vehicle in the vicinity of the bank. The appellant was driving the vehicle and two men were in the vehicle with him. The blue canvas bag containing money that had been stolen from the bank was in the vehicle, as were two pistols. One belonged to the appellant; the other to one of the passengers. One of the police officers (the other had died by the time the matter came to trial) said that a third pistol, a blue overall, and a hand grenade were also in the vehicle. He said that all the pistols were fitted with magazines and their hammers were cocked, and that the two passengers had holsters clipped to their belts. None of the appellants volunteered any explanation to the police for the presence of the items in the vehicle.

[4] The three men were arrested and arraigned before a regional magistrate and two assessors with the commission of various offences. They were all convicted of robbery and of the unlawful possession of a hand grenade in contravention of s. 32(1)(c) of the Arms and Ammunition Act 75 of 1969. They were each sentenced to thirteen years' imprisonment on the charge of robbery of which three years were conditionally suspended, and to five years' imprisonment for possession of the hand grenade of which two years were conditionally suspended. (One of the accused was also convicted of unlawful possession of a firearm and ammunition but that is not relevant to this appeal).

[5] The appellant and his co-accused appealed to the High Court at Pretoria against the convictions and sentences. Their appeals were dismissed (Van Der Walt J, Jordaan AJ concurring) but the court *a quo* granted them leave to appeal to this Court.

[6] The appellant appeared as accused 1 at the trial. His two co-accused were Mr Happy Skwambane (accused 2) and Mr Ben Masiso (accused 3). For convenience I will refer to them collectively as the accused. Skwambane and Masiso failed to prosecute their appeals and were not represented before us. Accordingly the only appeal that is before us is that of the appellant.

The Circumstances Surrounding the Robbery

[7] The premises from which the bank conducted its business were situated at ground level at one extreme of the Waverley shopping centre. The premises were divided internally by a wooden counter and a glass partition. Customers transacted business from the front section of the premises (referred to in the evidence as the banking hall) and the bank tellers operated from the rear section behind the partition. A set of doors at one end of the partition provided access from the front section to the rear section of the premises. The

locks of the interleading doors were electronically operated by the tellers. A camera mounted in the front section of the premises was capable of photographing the inside of the premises but only if it was activated by one or other of the tellers.

[8] Three people were employed at the bank at the time of the robbery. Mr Isaac Mosadi and Ms Cathleen van Staden were tellers and Mr Alfred Ramela was a cleaner. An amount of R25 623.85 (partly in banknotes and partly in coins) was on the premises (it was the balance from the previous day's business). Most of the coins were in bags, some of which were sealed, in an open safe behind the tellers, and the banknotes were in the tellers' tills. The other money required for the day's business had yet to arrive.

[9] At 09h00 Ramela opened the front doors of the premises for the start of the business day and he went outside to fetch water in a bucket. When he

returned he noticed a person standing alongside the automatic teller machine that was situated outside the bank alongside the front door. Ramela thought nothing of it and he entered the premises but he immediately became aware that there was a person behind him pressing an object against his back and instructing him to open the doors that provided access to the tellers.

[10] Mosadi was then behind the counter attending to his first customer. The other teller, van Staden, had just provided change to a customer and was sitting at the computer extracting a bank statement. Mosadi noticed Ramela standing at the interleading door, with an armed man behind him, asking for the door to be opened. At the same time another man approached the counter opposite Mosadi and displayed a hand grenade that he was holding in his hand. Realising that an armed robbery was taking place Mosadi activated the lock to admit the robbers. Neither of the tellers thought to activate the camera.

[11] Ms Madri-Nel van der Linden had just received change from Van Staden and was waiting for her bank statement when she heard people enter the bank. She turned round and saw a man in a blue overall with a handgun in his hand, and another man carrying a blue bag and a hand grenade. Moments later a third man entered the bank. By then the interleading doors were open and the first two men had entered the tellers' area. The third man started shepherding the customers through the interleading doors. Van der Linden described the third man as being tall and neatly dressed in long trousers and a jacket.

[12] The customer who was being attended to by Mosadi was Mr Josia Woest. Woest had just handed a cheque to Mosadi when he became aware that two men had entered the bank, one of whom had a handgun and the other a hand grenade. Moments later he became aware of a third man behind him who instructed him to remain quiet or he would be killed.

[13] The observations made by the various witnesses do not quite coincide on matters of detail but that is to be expected. In some respects the various witnesses might have been mistaken as to what they saw, and in other respects they might not have seen what was seen by others. What is clear, however, when the evidence of all the witnesses is taken together, is that three men entered the bank to perpetrate the robbery. One was dressed in a blue overall and had a handgun. One had a blue bag and a hand grenade (evidence of what was seen later establishes that he also had a handgun). These two men entered the tellers' area where one of them asked Mosadi where the money was. When he was told that the money had not yet arrived the two men scooped coins from the safe and banknotes from the tellers' tills into the bag and then they fled. The third man played a less active role but the three fled together.

[14] The evidence also establishes that immediately after the robbers left the bank one of them separated from the other two. Mrs Ilona Adendorff, who worked in a shop adjacent to the bank, was returning from depositing refuse in an alley alongside the bank when she encountered two men who came running round the corner from the entrance to the bank and collided with her. She had only moments to see them but recollected that one of them was dressed in a blue overall. The two men continued towards the alley and scrambled over the wall separating the shopping centre from an adjoining shopping centre.

[15] That only two of the men were together as they clambered over the wall is confirmed by the evidence of Mr Lodewyk Muller. Muller was walking on the other side of the wall with his nephew, Mr Juda Plekkenpot, when he saw a blue bag come flying over the wall and land on the ground. The bag was open and he saw that it contained bank bags and he heard the clinking of coins. The bag was followed immediately by two men who clambered over

the wall. When Plekkenpot called on the two men to stop they both pointed firearms at Muller and Plekkenpot and told them to turn and walk away otherwise they would be shot. Muller and Plekkenpot did as they were told and went into a nearby house where they telephoned the police.

[16] Meanwhile at the bank Mosadi and others had raised the alarm. From the record of the money that had been on the premises when the bank opened for business it was established that R15 039,82 was stolen.

[17] Inspector Brits and Sergeant Venter (by the time the matter came to trial Venter had died) were patrolling in a marked police vehicle in the vicinity of the bank. Venter was driving and Brits was in the passenger seat. At 09h14 they received a radio report that an armed robbery was in progress at the bank. (That the robbery was 'in progress' was not strictly accurate because by then the robbery must already have occurred). They immediately drove towards

the bank. As they approached an intersection immediately before the shopping centre Brits observed a blue BMW with darkened windows approaching along the cross-street. The vehicle stopped at the intersection and then turned into the street in which the police were travelling but in the opposite direction. Because the windows were darkened Brits could not see who was in the vehicle but as a precaution he made a note of the vehicle's registration number on the pad that he had in front of him and they proceeded to the bank.

[18] Inspector Theunissen and Sergeant Blom were also patrolling the area in an unmarked Opel vehicle and they too heard the report on the radio. They proceeded to the bank where they met up with Brits and Venter who had arrived before them.

[19] What occurred when the police arrived at the bank is not entirely clear but that is not significant. It is sufficient to say that Brits and Venter received a brief report of what had occurred, and also encountered Ramela, who said that he would be able to identify the robbers. Brits and Venter immediately left in the vehicle, with Ramela, to see if they could apprehend the culprits. Theunissen and Blom set off in another direction for the same purpose.

[20] Brits, Venter and Ramela drove around to the rear of the shopping centre. They were driving towards an intersection a few blocks from the shopping centre when Brits noticed the BMW (the vehicle he had seen earlier) passing through the intersection ahead of them in the cross street. At that stage the police vehicle was about 200m from the intersection. After the BMW had passed through the intersection it executed a U-turn and drove back along the cross street passing again through the intersection. This aroused suspicion and the police car turned at the intersection to follow the BMW. By

then the police had decided to stop the BMW and Brits informed radio control of their intention and requested assistance.

[21] Brits said that when they started to follow the BMW it immediately accelerated. He said that at the next intersection the BMW failed to stop at the stop street, turned south, and again accelerated but was hindered by traffic. At the next intersection it again failed to stop, but at the intersection thereafter the traffic compelled it to stop. The police car drew up alongside the BMW and motioned to the driver to pull over. The BMW crossed over the intersection and drew up at the side of the road.

[22] The BMW was owned by the appellant. He was driving it at the time it was stopped and Skwambane and Masiso were in the vehicle with him. Where they were seated is a matter of dispute. Brits said that Masiso was in the front passenger seat and Skwambane was in the rear seat but Brits might

have been mistaken because the accused all said that it was the other way round.

[23] Brits left the police vehicle with his pistol in his hand and he ordered the occupants out of the BMW. Brits said that the appellant alighted from his vehicle and said: "I am Mzwake Mbuli, the peoples' poet, and I am working for the government. You cannot treat me like this". The appellant then handed to him what appeared to be a visiting card. Brits said that by then Venter had also left the police vehicle and he (Brits) went to the other side of the BMW and ordered the other two occupants out. He told them to place their hands on the roof of the vehicle and then he searched them. He said that they both had holsters clipped to their belts. Brits said that after he had searched Skwambane and Masiso he ordered all the accused to lie on the ground with their hands on their heads, which they did. Other police vehicles then began to arrive. Brits said that after reinforcements had arrived he asked

the appellant to accompany him and Venter while they searched the BMW and he then conducted a search of the vehicle in the appellant's presence.

[24] I will deal later in this judgment with the account given by the accused of how they came to be in the vicinity of the bank but it is as well at this stage to outline their evidence relating to what occurred after the police started following them and before the BMW was searched. The accused denied that they sped away from the police and denied that they disobeyed stop signs. The appellant said that after the police had pulled them over he climbed from his vehicle and was confronted by Venter (not Brits) to whom he said, before handing over his visiting card, that he was the peoples' poet and that the policemen must not shoot. The accused all said that Skwambane and Masiso, but not the appellant, were made to lie on the ground. Skwambane and Masiso said that they were both searched, but they denied that holsters were found in their possession. All the accused said that after Skwambane and

Masiso had been searched the accused were all placed in separate police vans. That occurred, according to the accused, before the BMW was searched.

[25] Brits, on the other hand, said that the appellant was in attendance when the BMW was searched. Brits said that his search revealed, *inter alia,* the following: On the floor at the foot of the back seat was a blue overall and a jersey. He lifted the blue overall and saw a 9mm Luger pistol on the floor. He then lifted the jersey and found that it was wrapped around a hand grenade. On the floor at the foot of the front passenger seat was the blue bag that had been used in the robbery. The flap was closed but the zip was unfastened. Inside the bag were bank bags filled with coins, and banknotes. Alongside the bag was a rusted 9mm Star pistol. Under the driver's seat was a folded newspaper and under the newspaper was a 9mm CZ85 pistol. Magazines were fitted to all the pistols and the hammer of each of them was cocked.

[26] The CZ85 and the Luger belonged to the appellant and Masiso respectively and they were licenced to possess them. It is not disputed that the appellant's CZ85 was under the driver's seat. Masiso said that he left his Luger, in its holster, on the rear seat of the BMW when he got out. The jersey in which the hand grenade was alleged to have been wrapped also belonged to Masiso.

[27] During the course of the trial there was some attempt to suggest that the hand grenade, the Star pistol and the overall - in contradistinction to the bag with the money - were somehow planted in the BMW after it was stopped. That suggestion was not persisted in during argument before us, and correctly so. For the police (or anybody else for that matter) to have planted the items in the BMW after it had been stopped would have implied a conspiracy so complex and convoluted that it simply could not have occurred. Because that suggestion was not pursued I need say no more about it. That the items were

in the BMW at the time it was stopped is clearly established and the only question in that regard is precisely where in the vehicle they were.

[28] A police photographer arrived on the scene at 10h20 (which must have been at least half an hour after the BMW was stopped). By then the Star pistol, the overall, the hand grenade and two of the holsters were no longer where Brits said that he found them (though Brits said that he was not responsible for moving them). Photographs taken at the scene show two holsters, the Star pistol and the Luger pistol (the Luger is partially in one of the holsters) lying on what appears to be a windbreaker on the front passenger seat of the BMW. The blue overall appears to be on the floor midway between the two front seats (that photograph is rather unclear). The blue bag containing the money is on the edge of the front passenger seat and part of the CZ85 pistol (probably in its holster) is shown protruding from under the driver's seat. The hand grenade is on top of a brown jersey on the back seat.

Other photographs of the various items spread out on the ground show that three holsters were at the scene.

[29] Amongst the police officers who arrived at the scene was a fingerprint expert and an explosives expert. The explosives expert removed the hand grenade and subsequently established that it was filled with explosive. I will deal later with the evidence of the fingerprint expert.

[30] Meanwhile Theunnissen and Blom had also been searching for the culprits. Coincidentally they came across Muller and Plekkenpot who had by then telephoned the police and were standing alongside the road. The police officers asked them if they had seen anything suspicious and they reported what they had seen. Muller and Plekkenpot were asked to accompany the police and the search proceeded. A little later the police heard a report on the radio that Brits and Venter were following a BMW and had requested

assistance. By the time Theunissen and Blom met up with Brits and Venter the BMW had been stopped, other police vehicles had arrived on the scene, and the accused were in the police vans. While Muller was on the scene he was approached by a police officer who asked him whether the men he had seen were amongst the accused. Two of the vans (in which Skwambane and Masiso respectively were being held) were opened and Muller identified them as the men he had seen.

[31] In due course Brits took the bag containing the money back to the bank. The bag was found to contain nine bags of coins, loose coins amounting to R525, and R10 910 in banknotes. The total amount was R13 818 (which was R1 221.85 less than the amount that was stolen).

[32] Later that day the accused were driven to the offices of the murder and robbery unit. The appellant was searched and R1 850 (nine R200 notes and a

R50 note) was found folded in his pocket. The accused were given an opportunity to contact their legal advisers and they were asked whether they wished to make statements. All the accused declined to do so.

The Evidence of Ramela

[33] I will deal separately with the evidence of Ramela, who was with Brits and Venter in the police car when the BMW was stopped. On the same day Ramela told the police what he had seen and this was reduced to writing and confirmed by him. Dealing with what occurred after the BMW was stopped Ramela said the following in his statement:

> "Die bestuurder het self uit die voertuig geklim ek het onmiddelik die man erken aan sy gesig. Die ander twee passasiers het ook uit geklim en ek het hulle ook onmiddelik uitgeken as die persone wat die bank beroof het."

[34] Ramela gave evidence on behalf of the State. He was asked by the prosecutor to describe the men whom he saw in the bank, which he did, and he

went on to say that they were unknown to him. Later he was led on what he had seen at the time the accused were arrested and the following interchange occurred:

> [Prosecutor): Net om by u duidelikheid te kry, meneer, die ander persone wat na die bestuurder uitgeklim het, het u hulle gesigte gesien?
>
> [Ramela]: Ja, ek het hulle gesigte gesien, maar nie so mooi nie.
>
> [Prosecutor]: Goed en toe u hulle gesigte sien, was hulle vir u bekende persone?
>
> [Ramela]: Nee, ek ken hulle glad nie. Dit is my eerste keer om hulle te sien.

[35] The prosecutor promptly informed the court that he intended to prove that Ramela had made a previous inconsistent statement (being the written statement that I referred to earlier) so as to discredit his evidence. In my view the prosecutor acted precipitately in doing so. The evidence given by Ramela, which was given through an interpreter, was capable of meaning that he was unacquainted with the two men in the car, rather than that it was literally the first time he had seen them, and that ambiguity ought to have been clarified

before it was sought to brand him as a perjurer. That he meant the former is supported by the fact that later in his evidence he confirmed that his earlier statement was true. In my view there were no proper grounds for finding that Ramela's evidence was inconsistent with his earlier statement and for his evidence to be discredited.

[36] The prosecutor nevertheless put to Ramela the portion of his earlier statement that I have quoted and Ramela acknowledged that he had made it. At no stage was it suggested to Ramela that his evidence was in conflict with the statement nor was he asked to explain the alleged inconsistency. Ramela was then asked whether what he had told the police was true and he confirmed that it was. Upon completion of his evidence in chief the magistrate told Ramela to stand down from the witness box and instructed his assessors to ignore all of Ramela’s evidence on the grounds that he was an untrustworthy witness. The procedure the magistrate followed was clearly incorrect.

However, after an objection by the appellant's counsel the magistrate withdrew his instruction to the assessors and permitted Ramela to be cross examined.

[37] Even if Ramela had contradicted his earlier statement (which in my view he did not) it would not follow that the remainder of his evidence necessarily fell to be rejected. No doubt a court will be cautious before accepting the remaining evidence of a witness who has made conflicting statements on oath but whether it does so will depend upon the particular circumstances. In *S v Millar* 1972 (1) SA 427 (R,AD) at 428H - 429B Beadle CJ said the following in similar circumstances:

> "Mr Grossman, who appears for the appellant, has argued that in these circumstances the evidence of the appellant's sister should be rejected in its entirety, as, once a prosecutor has impeached the evidence of one of his own witnesses, that evidence, if successfully impeached, cannot be relied on in any respect. For this rather startling proposition Mr. Grossman relies on O'Dowd, *The Law of Evidence in South Africa*, p. 74, and *dicta* in certain cases. Neither O'Dowd in his work on evidence, nor any of the *dicta* quoted, however, go the length of saying that never in any circumstances can any of the evidence given by a witness who has had his

> evidence impeached be relied on by the court. It would be surprising if there was any authority which went as far as this.
>
> It is a well accepted rule of evidence that the mere fact that a witness is a liar does not mean that all his evidence must be disbelieved - liars tell the truth sometimes. As far as this particular matter is concerned, not only must each case be examined in relation to its own particular circumstances, but every individual item of evidence which the court is asked to accept or reject must be so examined. The court must consider on the probabilities whether each item of evidence is credible or whether it is not"

[38] Although, in my view, Ramela's evidence did not properly fall to be discredited there is a real possibility that the debacle surrounding his evidence might have induced the appellant's counsel (who was not counsel who represented him in this appeal) not to fully cross-examine Ramela in the justified belief that neither the State nor the court intended to place reliance upon any of his evidence. To avoid possible injustice to the appellant I have accordingly placed no reliance upon Ramela's evidence on any material point.

The Identification Parade

[39] The day after the robbery an identification parade was held at the Adriaan Vlok police station. The parade was held under the supervision of Captain Hanekom. It was one of five unrelated identification parades that were held at the police station that day. Twelve men were placed on the parade. They included the three accused and nine men who happened to be in the police cells.

[40] The witnesses were required to remain together in a room which was out of sight of the parade room under the supervision of Inspector van Zyl and they were instructed not to discuss the matter amongst themselves. At the allotted time each witness was escorted individually to the parade room by Sergeant Pasha. Once the witness had viewed the men on the parade he or she was escorted by Inspector Theunissen to another room where the witnesses

remained together under the supervision of Sergeant Blom until the parade was over.

[41] Van Staden, Mosadi, Plekkenpot, Muller, Van der Linden and Adendorff attended the parade. Each was taken into the parade room and asked to select the person or persons, if he or they were on the parade, who had robbed the bank. Van Staden and Mosadi were not able to identify anyone. Plekkenpot identified a person who is known not to have committed the crime. Muller identified Skwambane and a person who is known not to have committed the crime. Van der Linden identified the appellant, Skwambane, and a person who is known not to have committed the crime. Adendorff identified Skwambane but said that she was not sure whether she was correct.

[42] Over the years courts have drawn attention to circumstances that might place the probity of identification parades in doubt. So, for example, it has been said that the accused person should not be so distinctive from the others that a witness might tend to identify him on extraneous grounds; the parade should not be conducted in circumstances that allow for prior discussion amongst the witnesses; and the police officers who are investigating the crime should avoid being involved in the conduct of the parade (see the cases cited in Hoffmann & Zeffert *The South African Law of Evidence* 4th ed 615 - 617).

[43] In the present case the trial court was of the view that "weinig gewig" (scant weight) could be attached to the outcome of the identification parade in view of the "omvattende en geregverdigde kritiek wat bykans elke faset van die uitkenningsparade raak." Precisely what those criticisms were and how they were thought to have affected the probity of the parade was not discussed in the judgment.

[44] There were indeed features of the parade that call for comment. The most significant relates to the appellant's height. The appellant was described variously in the evidence as being 6 foot 3 inches or 6 foot 4 inches tall and it is apparent from the photographs taken at the parade that he was taller than any of the other men on the parade. The appellant's attorney, who attended the parade, objected to it continuing in those circumstances. Hanekom consulted with the investigating officer, who was in the yard of the police station. The investigating officer instructed Hanekom to proceed, which he did after making a note of the objection. The appellant was instructed to slump against the wall of the parade room so as to minimise the effect of his disparate height.

[45] When considering this aspect of the parade it must be borne in mind that Van der Linden was the only witness who identified the appellant. She

was indeed expecting to see a tall man on the parade (that is how she described one of the men she saw in the bank) but she also had another potential aid to identification. On the morning of the parade she saw a newspaper account of the robbery that was accompanied by a photograph of the appellant. Van der Linden insisted that she identified the appellant from her recollection of what she had seen the previous day but these two features must inevitably raise doubt as to the reliability of her identification, particularly because there is also some doubt as to her veracity on a related issue. I have accordingly placed no reliance on Van der Linden's evidence relating to the identification parade. None of this, however, is material to the identification evidence of the other two witnesses.

[46] The appellant's counsel submitted that it was irregular for the investigating officer to be at the police station while the identification parade was held, and moreover to consult with Hanekom. It was also irregular, he

submitted, for Theunissen and Blom (who were present when the accused were arrested) to assist in the conduct of the parade. While it might have been preferable for them not to be there I do not think their presence, by itself, can be said to raise doubt as to the probity of the parade. The reason that it is generally undesirable for police officers who have knowledge of the crime to participate in an identification parade is the potential that witnesses might be influenced. In this case Theunissen and Blom saw the witnesses only after they had completed their identification and there is no suggestion that the investigating officer saw them at all. Moreover the two relevant witnesses, who were patently honest, both said that no influence was brought to bear upon them by anybody else. The mere presence of the police officers, in the particular circumstances, was an insufficient ground upon which to doubt the probity of the identification evidence.

[47] There was also a suggestion that the accused were not permitted to change their positions on the parade after each witness had viewed them. The fact that their positions were not changed is clear, but the evidence does not establish that the accused requested permission to do so.

[48] In my view the trial court's criticism of the identification parade was unduly generalized and severe. There were by no means irregularities affecting "nearly every facet" of the parade, and such irregularities as there were had no material bearing upon the identification made by Muller and Adendorff. I see no good reason to simply discard the evidence that they identified Skwambane though the weight to be attached to that evidence is limited. It will be recalled that Muller identified Skwambane in the police van and his later identification at the parade adds little to that. Adendorff, on the other hand, said quite frankly that she was not sure whether she was correct.

While limited in its value it is nevertheless evidence that should be placed in the scales.

The Fingerprint Evidence

[49] The fingerprint expert who arrived on the scene after the BMW was stopped was Sergeant Range. He examined the vehicle for fingerprints (why he thought it necessary to do so is by no means clear) and, not surprisingly, found those of Skwambane and Masiso. He said that he also examined various surfaces at the bank but could find no clear fingerprints. Later, at his offices, he examined the firearms but could find no fingerprints. He provided various contradictory explanations for not having examined the hand grenade.

[50] Range was an unsatisfactory witness but in my view nothing material turns on his evidence. There was some suggestion in argument before us that

fingerprints might indeed have been found by Range and that his findings have been concealed. In my view there are no grounds to believe that that might have occurred. For that to have occurred would again imply a bizarre conspiracy for which there is not only no support but it would be in conflict with the remainder of the evidence.

The Account Given by the Accused

[51] The accused all gave evidence which largely coincides. They accounted for their presence in Waverley at the time they were arrested by an incident that occurred approximately a year earlier. On that occasion, according to the appellant, shots were fired at him by unknown men in an attempt upon his life. The appellant attributed the attack to the fact that he has knowledge (so he alleges) concerning drug dealing by persons in high

government office. (The appellant did not disclose the nature of his alleged knowledge.)

[52] At the time relevant to this appeal Skwambane and Masiso were both taxi owners who lived in Soweto. They were well known to each other and they had also known the appellant for some years. From time to time they assisted the appellant (who is a popular oral poet) by undertaking security functions when he gave public performances.

[53] Masiso said that on the evening of 27 October 1997 he received a call on his cell phone from an unknown person who identified himself as Mr David Dlamini. Dlamini said that he was in possession of information concerning the earlier attempt on the appellant's life and that Masiso and the appellant should meet Dlamini at a specified place in Pretoria at 09h15 the following day. Masiso asked Dlamini why he had not contacted the appellant

to which Dlamini replied that he had attempted to telephone the appellant but had received no reply. Masiso undertook to discuss the matter with the appellant and asked where he could contact Dlamini. Dlamini said that he was using a public telephone, which made it impossible to contact him, but said that he would telephone Masiso again. Masiso said that he then went to the appellant's house in Mondeor, Johannesburg, where he conveyed to the appellant what Dlamini had told him and the appellant agreed to the meeting. Masiso said that Dlamini telephoned again and the meeting was confirmed.

[54] Skwambane said that the following morning before 07h00 he happened to visit Masiso. Masiso related to him what had occurred the previous evening and Skwambane decided that he would accompany the appellant and Masiso to Pretoria because he had nothing else to do. At about 07h00 the appellant arrived in his BMW and the three men set off for their assignation, with Masiso providing the directions. According to the accused there was no

conversation during the course of the journey relating to its purpose, nor did they stop along the way, nor did they receive any telephone calls.

[55] The accused said that they arrived at the appointed place, which was near to a petrol station about a block from the bank, at about 09h15 and they sat waiting in the vehicle. Skwambane was in the front passenger seat and Masiso was in the rear passenger seat. After a few minutes (given variously as two to five minutes) an unknown man materialised alongside the vehicle and said to Skwambane that he was David Dlamini. The appellant said that he was listening to the radio and looking ahead of him when this occurred. He did not see the man arrive but heard a voice and turned to see only the man's midriff against the window on the passenger's side but did not hear what was said. The next moment the man had vanished : the appellant could not say whether when he departed the man walked or ran.. Skwambane, who was in the front passenger seat, said that after introducing himself Dlamini passed a

blue bag through the window and said that the information was in the bag and he promptly ran away. The entire transaction, he said, took only a few seconds.

[56] The accused said that Masiso told the appellant to start the vehicle and follow after Dlamini (it seems that by then he had disappeared from sight) which the appellant did. They had been driving around for about eight to ten minutes in search of Dlamini when the police stopped them in the manner that I have described. By then, according to the accused, none of them had opened the bag and they were oblivious of its contents. Skwambane said that because of what Dlamini had said he thought it must contain documents or photographs but he didn't think to look.

Assessment of the Evidence

[57] It is trite that the State bears the onus of establishing the guilt of the appellant beyond reasonable doubt, and the converse is that he is entitled to be acquitted if there is a reasonable possibility that he might be innocent (*R v Difford* 1937 AD 370 at 373, 383). In *S v Van der Meyden* 1999 (2) SA 79 (W), which was adopted and affirmed by this Court in *S v van Aswegen* 2001(2) SACR 97 (SCA), I had occasion to reiterate that in whichever form the test is applied it must be satisfied upon a consideration of all the evidence. Just as a court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt so too does it not look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true. In similar vein the following was said in *Moshephi and Others v R* (1980-1984) LAC 57 at 59 F-H, which was

cited with approval in *S v Hadebe & Others* 1998 (1) SACR 422 (SCA) at 426 f-h:

> "The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees."

[58] It will be apparent from the evidence outlined above that on the charge of robbery the fate of each of the accused is inextricably linked to that of the others. If the evidence establishes that any one of them participated in the robbery it follows that the evidence given by all of them must necessarily be false.

[59] The evidence implicating the accused falls into three categories. First, and most damning, is the fact that they were found in possession of the money, and implements that were used in the robbery. Secondly, Muller identified Skwambane and Masiso as the men he had seen fleeing with the money within what was probably no more than about half an hour after he saw them (the fact that he again identified Skwambane at the identification parade the following day does not seem to me to add to that evidence). Thirdly, Adendorff identified Skwambane as one of the men whom she saw fleeing from the bank (albeit that she was not sure that she was correct).

[60] Set against that is the exculpatory evidence of the accused, as well as what were said to be various improbabilities. I will deal with the latter at the outset. Firstly, it was submitted that it is improbable that a person of the appellant's standing would choose to rob a bank. That, however, is no more than a *priori* reasoning that ultimately must yield to the established facts.

[61] Secondly, it was submitted that it is most improbable that the appellant, who is a well known figure, would have set about robbing a bank, particularly one which had a camera mounted on the wall, undisguised and using his own vehicle. Thirdly, it was submitted that it is improbable that people who had just robbed a bank would have remained in the area once the hue and cry had been raised. Fourthly, it was pointed out that some of the money was missing from the bag, which suggested that someone other than the accused had had access to it. These are indeed considerations that need to be kept in mind when weighing the evidence but by themselves they are far from decisive. For some of them, at least, possible explanations readily come to mind. For example, there is no reason to assume that the robbers were aware that a camera was mounted in the bank. Nor is there reason to assume that the appellant would fear being recognised in a small banking agency in a residential suburb of Pretoria. Nor, indeed, should it be assumed that the

appellant himself was one of those who entered the bank - the appellant might just as well have been waiting in the BMW to drive the actual perpetrators away (the only evidence that he did enter the bank is that of Van der Linden and I have already pointed at that it might be unreliable). That, in turn, might explain why the accused were still circling the area, perhaps in search of another accomplice, when they were observed by the police. As for the missing money, it might well have fallen from the bag as the robbers fled (the bag was open when it was thrown over the wall) or it could even have been misappropriated at the scene before the bag was returned to the bank, or it might equally have been part of the money that was found on the appellant. All this, however, is no more than speculation. What is more important are the established facts, which in my view make out an overwhelming case against the appellant.

[62] In order for the evidence of the accused to be true there would need to have been a conspiracy amongst at least the robbers and the shadowy Dlamini (if he was not himself one of the robbers) to place the money and the implements in the appellant's possession. Speculation was rife, both in the trial court and before us, as to what the conspirators' motive might have been. Two possibilities were ultimately suggested both of which are extreme. One was that the conspirators wished to falsely incriminate the appellant (possibly so as to damage his credibility because of the information that he allegedly had). The other was that the conspirators sought to facilitate their own getaway by dumping the incriminating evidence on the unsuspecting appellant (intending to collect it from him somewhere and sometime once the coast was clear).

[63] In my view one needs only to reflect for a moment upon what such a conspiracy (for either motive) would necessarily need to entail in order to

reject the possibility that it might have occurred. For one thing, the execution of such a plan would have required precision of timing. (There can be no suggestion that the robbers awaited the arrival of the accused before committing the robbery : the robbery commenced within minutes of the bank opening at 09h00 whereas the accused said that they arrived at 09h15). The conspirators could have had no assurance that the appellant would arrive at precisely 09h15. To suggest that they would have set about robbing a bank on the assumption that the appellant would indeed arrive from Johannesburg at precisely that time stretches credulity beyond its extreme. It was also suggested that the conspirators might have been willing to commit the robbery and then wait until the appellant arrived but in my view that is equally incredible. Apart from the question of timing, the very idea that conspirators were willing to run the risk of detection, or of arrest, or even of being killed, merely to implicate the appellant in the commission of a crime, is in my view

equally improbable. So too is it improbable that robbers would resort to such a complex and convoluted scheme merely to make their getaway.

[64] Apart from the improbability of this central pillar of the evidence of the accused, their evidence at every other turn is just as improbable. It is at the outset improbable that the appellant would have embarked upon the venture without any attempt at all to find out more about the shadowy Dlamini and the information that he wished to divulge. (One must not overlook the fact that there was a second conversation with Dlamini, which allowed for further enquiries to be made.) It is also improbable that the accused would have undertaken this unusual journey (for over two hours) and never once have discussed its purpose amongst themselves. It is improbable that none of the accused would have become aware of the approach of the shadowy Dlamini, that the appellant himself would not have been acutely aware of his approach and his departure, and that he would not have listened intently to what was

said, and that Dlamini would simply have disappeared like a phantom. It is even more improbable that the accused would have gone chasing after Dlamini (when he had already disappeared) without at once unzipping the bag to see what it contained, which would have taken no time at all. After all, Skwambane had been told that the information they had come to collect was inside the bag. It is also improbable that Skwambane would have thought that the bag contained no more than documents when in fact it contained, *inter alia,* nine bags of coins.

[65] But improbabilities apart, the evidence of the accused is irreconcilable with other established facts. I refer particularly to the undisputed fact that a blue overall, a hand grenade and a Star pistol (in addition to the CZ85 and the Luger) were in the vehicle at the time it was stopped, and the indisputable fact that a holster (other than the holsters of the appellant and Masiso) must also have been in the vehicle. For the accused's evidence to be true these items

must, unbeknown to them, have all been inside the bag, for apart from the accused's participation in the robbery, there is no other possible explanation for their presence on the scene. The question, then, is whether it is possible that they were indeed in the bag. On the face of it that would be in conflict with the evidence of Brits but it was submitted on behalf of the appellant that that need not be so and that they might have been removed from the bag by someone, unbeknown to Brits, before he searched the BMW. It was pointed out that Brits searched the BMW only after the arrival of reinforcements, which provided the possibility for some other police officer to have opened the bag and removed some of the contents without the knowledge of Brits.

[66] There is no evidence to suggest that that might have occurred. Furthermore, apart from the fact that there was no reason for any of the other police officers to search the vehicle, that possibility would require that one of the police officers took the overall and the hand grenade from

the bag and placed them on the floor at the foot of the rear seat for no apparent reason. Moreover, it would require that the person concerned was not content merely to place the hand grenade on the floor but that he first wrapped it in Masiso's jersey. That would be inconsistent with mere inadvertence on the police officer's part and would suggest deliberation, for which there is no apparent explanation.

[67] However, there is one further item that would still remain unexplained, which is the holster that Brits said was found on Skwambane. That evidence is irreconcilable with the evidence of Skwambane, and if it is true it is destructive of the evidence of the accused. If a holster was indeed found on Skwambane the inference is inescapable that he also had a firearm. The only firearm that could be is the Star pistol, which would exclude the possibility that it was in the bag when the vehicle was stopped. In the absence of some explanation the inference would be irresistible that it was one of the firearms

used in the robbery, and that the other items found by Brits were similarly not in the bag at the time the BMW was stopped. I can see no reason to disbelieve the evidence of Brits on that issue. It is an undisputable fact that the holster was on the scene at the time the photographs were taken and there is no apparent explanation for its presence other than the explanation given by Brits. It might be suggested that the holster, too, was in the blue bag and was removed by the unknown police officer, but if that were so, Brits would surely have said that it was found in the vehicle together with the other items. There is no apparent reason why he should have lied on that issue and said instead that it was found on Skwambane for its presence in the vehicle would have been just as incriminating, bearing in mind that at the time he gave his evidence Brits was not aware of the explanation that was subsequently given by the accused. The trial court believed the evidence of Brits and I see nothing in the record to cast doubt upon that credibility finding. In my view

the evidence establishes that the holster was indeed found on Skwambane and that alone is destructive of the evidence of the accused.

[68] There are thus a number of separate grounds upon which, in my view, the evidence of the accused could rightly be rejected, but my conclusion is more broadly based. What needs to be asked is whether it is reasonably possible that there was indeed a conspiracy of the kind suggested by the evidence of the accused, and that events occurred as the accused would have it, and that Brits was lying in relation to the discovery of the holsters and the manner in which the BMW sped away when it was followed, and that unbeknown to Brits another police officer removed the Star pistol and the hand grenade and the overall and the holster from the bag before the BMW was searched, and that Muller was mistaken when he identified Skwambane and Masiso at the time they were arrested, and that Adendorff was mistaken when she identified Skwambane the following day. If the evidence of the

accused is true all those propositions would also need to be true. In my view it is not reasonably possible that all these propositions might be true and I have no hesitation in rejecting the evidence of the accused.

[69] The circumstances in which the accused were found, together with one another and with the stolen money and the items that were used in the robbery, in the absence of an alternative explanation, admits of no inference but that they were all parties to a common purpose to rob the bank and that each played some role in furthering that common purpose. Whether or not the appellant was one of the men who actually entered the bank to perpetrate the robbery (of which there is no reliable evidence) is accordingly not material. In my view he was correctly convicted and his appeal against that conviction must fail.

The Conviction for Possession of the Hand Grenade.

[70] The accused were all convicted of contravening s. 32(1)(c) of the Arms and Ammunition Act, which provides that, subject to certain provisions that are not now relevant :

> " … no person shall, except on behalf of the State or under the authority of an in accordance with a permit issued by the Minister in his discretion … have in his possession any armament, including … any explosive or incendiary device or any part thereof …"

A similar prohibition in relation to firearms is contained in s. 2 of the Act.

[**71]** What is prohibited by both those sections is the existence of a state of affairs (i.e. having possession of an armament, or a firearm, as the case may be) and a conviction will be competent only if that state of affairs is shown to exist. That state of affairs will exist simultaneously in respect of more than one person if they have common (or joint) possession of the offending article.

Their contravention of the relevant section in those circumstances does not arise from an application of the principles applicable to common purpose (which is concerned with liability for joint activity) but rather from an application of ordinary principles relating to joint possession. Common purpose, and joint possession, both require that the parties concerned share a common state of mind but the nature of that state of mind will differ in each case. Perhaps Olivier JA had in mind the principles of joint possession, rather than the doctrine of common purpose, when he said in *S v Khambule* 2001 (1) SACR 501 (SCA) at par. 10 that that there is no reason in principle why a common intention to possess firearms jointly could not be established by inference, but I do not agree with the further suggestion that a mere intention on the part of the group to use the weapons for the benefit of all of them will suffice for a conviction. In my respectful view Marais J set out the correct legal position (apart from a misplaced reference to common purpose) when he said the following in *S v Nkosi* 1998 (1) SACR 284 (W) at 286 h-i:

> "The issues which arise in deciding whether the group (and hence the appellant) possessed the guns must be decided with reference to the answer to the question whether the State has established facts from which it can properly be inferred by a Court that:
>
> (a) the group had the intention (*animus*) to exercise possession of the guns through the actual detentor and
> (b) the actual detentors had the intention to hold the guns on behalf of the group.
>
> Only if both requirements are fulfilled can there be joint possession involving the group as a whole and the detentors, or common purpose between the members of the group to possess all the guns."

[72] In the present case the trial court found, as a matter of inference, that those requirements had been fulfilled in respect of all the accused in relation to the hand grenade. Although the correctness of that finding was placed in issue when the accused appealed, it was not dealt with expressly by the court *a quo*. 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.

[73] Earlier in this judgment I drew attention to the fact that the only appeal that is before us is that of the appellant. The appeals of Skwambane and Masiso have lapsed but they are capable of being revived. It would be potentially prejudicial if we were reinstate their appeals *mero motu* in order to set aside their convictions on this charge (assuming that it was competent for us to do so) and I propose instead to direct the Registrar of this Court to refer this judgment to the Legal Aid Board with a request that appropriate steps be taken to bring their appeals before this court, at least in relation to this charge.

The Appeal Against Sentence

[74] When sentencing the appellant the magistrate said that he had taken into account the fact that the appellant had been in prison from the time of his arrest. It was submitted on behalf of the appellant that in truth the magistrate could not have done so. I do not think that inference is justified. No other misdirections were relied upon in support of the appeal against sentence and I do not see any. In my view the sentence was also not so severe as to suggest that the magistrate failed properly to exercise his discretion. In my view there are no proper grounds upon which to interfere with the sentence.

Conclusion

[**75]** Accordingly the following order is made:

1. The conviction of the appellant on the charge of contravening s. 32(1)(c) of the Arms and Ammunition Act 75 of 1969, and the sentence imposed in respect of that conviction, are set aside.

2. Save as set out in 1 above the appellant's appeal is dismissed.

3. The Registrar is directed to forward a copy of this judgment to the Legal Aid Board, together with a request to the Legal Aid Board to take such steps as might be necessary to bring before this Court appeals by Skwambane and Masiso against their convictions for contravening s. 32(1)(c) of the Arms and Ammunition Act 75 of 1969.

NUGENT JA

MARAIS JA)
CONCUR
ZULMAN JA)