THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 1301/2016

In the matter between:

SOLLY RAMOBA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Ramoba v The State* (1301/2016) ZASCA 74 (1 June 2017)

Coram: Shongwe ADP and Mbha and Van Der Merwe JJA and Molemela and Coppin AJJA

Heard: 2 May 2017

Delivered: 1 June 2017

Summary: Criminal Law and Procedure: appeal against conviction and sentence: principles of joint possession of firearms applied: appeal against conviction for unlawful possession of firearms upheld in part: cumulative effect of sentence appropriate.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Tolmay and Fabricius JJ sitting as court of appeal):

1 The appeal against conviction on count 11 is upheld.

2 The appeal against conviction on counts 12 and 13 is dismissed.

3 The sentence imposed by the trial court on the appellant on 21 July 2004 is set aside in its entirety, and substituted with the following:

'(a) On counts 1, 2 and 7 of robbery committed with aggravating circumstances, the appellant is sentenced to 15 years' imprisonment on each count.

(b) On counts 3, 4, 5, 6, 8 and 9 of attempted murder, the appellant is sentenced to eight years' imprisonment on each count.

(c) On counts 12 and 13 of illegal possession of automatic firearms, the appellant is sentenced to 15 years' imprisonment on each count.

(d) The sentences imposed in respect of counts 1, 2 and 7 shall run concurrently with each other.

(e) The sentences imposed in respect of counts 3, 4, 5, 6 and 8 shall run concurrently with the sentence imposed on count 9; and

(f) The sentences imposed on counts 12 and 13 shall run concurrently – however 10 years of the effective sentence of 15 years' imprisonment shall run concurrently with the sentence imposed on count 1.The appellant will thus serve five years' imprisonment in respect of both counts 12 and 13. Effectively, the appellant is sentenced to a term of 28 years' imprisonment.'

4. The sentences are antedated to 21 July 2004.

JUDGMENT

Mbha JA (Shongwe ADP and Van Der Merwe JA and Molemela and Coppin AJJA concurring):

[1] The appellant was accused No 1 of three accused, who appeared before the regional court, Tzaneen (the trial court) on three counts of robbery committed with aggravating circumstances (counts 1, 2 and 7), one count of attempted robbery committed with aggravating circumstances (count 5), six counts of attempted murder (counts 3, 4, 6, 8, 9 and 10), and three counts of unlawful possession of automatic and semi-automatic firearms (counts 11, 12 and 13). At the conclusion of the trial proceedings on 21 July 2004, the appellant and accused No 2 were convicted on all the counts save for count 10. Accused No 3 was discharged at the close of the State's case in terms of s 174 of the Criminal Procedure Act 51 of 1977 (the Act).

[2] The appellant and accused No 2 were sentenced as follows: on counts 1, 2 and 7 to 15 years' imprisonment on each count; on counts 3, 4, 5, 6, 8 and 9 to eight years' imprisonment on each count and on counts 11, 12 and 13 to 15 years' imprisonment on each count. In order to ameliorate the cumulative effect of the sentence of 138 years' imprisonment, the trial court ordered that the sentences imposed in respect of certain counts would run concurrently with the others. The appellant and his co-accused were thus sentenced to an effective term of 52 years' imprisonment.

[3] Aggrieved by the conviction and sentence imposed by the trial court, the appellant appealed to the Gauteng Division of the high court, Pretoria. The matter served before Tolmay and Fabricius JJ (the court a quo) who, on 11 March 2008, dismissed the appeal against both conviction and sentence. On 4 August 2015 this court granted the appellant special leave which was limited to conviction and sentence in respect of counts 11, 12 and 13, and to a consideration of the cumulative effect of a sentence of 52 years' imprisonment.

[4] The issue to be decided in this appeal on conviction, is whether there was sufficient evidence to sustain a conviction based on joint possession of firearms on counts 11,12 and 13 as the court a quo found. Count 11 relates to the unlawful possession of a Norinco semi-automatic 9 mm pistol with serial number 462313 (the Norinco pistol), whilst counts 12 and 13 relate to the unlawful possession of an R4 and R5 automatic machine guns (the rifles), respectively. The appellant contends that as there was no evidence to the effect that he was seen at any stage with a firearm in his

hands, the conviction on these counts should be set aside. The appellant contends further that the court a quo was wrong in its application of the principles relating to joint possession and by relying on the decision of *S v Khambule*[1] as a basis to uphold the conviction. Before considering the principles of joint possession and its applicability to this case, it is apposite to first consider the evidence that was placed before the trial court. The background facts, which are common cause, are summarised hereunder.

[5] On 6 January 2003 a robbery – with aggravating circumstances – took place when a security vehicle collecting and transporting money from various businesses at Oasis Mall in Tzaneen, was robbed. The security vehicle, which was occupied by Mr Lebepe and Mr Hlungwane at the time, was shot at during the robbery. This robbery was carried out by a gang consisting of at least three males who were travelling in a silver coloured Volkswagen Golf sedan. Two of the men were carrying rifles whilst the third male had a handgun. Three money containers containing a large amount of cash were taken from the security van and Mr Hlungwane was shot at and injured. In consequence he later lost his hand. Mr Lebepe was also robbed of his service firearm, the Norinco pistol. These events form the basis of counts 1 to 4.

[6] Shortly after the robbery of the security vehicle, the same assailants attempted to rob Mr Christo Antonie Fochville of his Volkswagen motor vehicle. Clearly, the assailants were looking for a getaway vehicle as their Golf motor vehicle, used during the robbery of the security vehicle, had stalled. During this attempted robbery, Mr Fochville was shot at and sustained a gunshot wound to his chest. But he managed to drive away from the

[1] *S v Khambule* 2001 (1) SACR 501 (SCA).

assailants. These events formed the basis of counts 5 and 6 to wit, the attempted robbery and attempted murder of Mr Fochville. After the failed attempt to rob Mr Fochville of his car, Mr Aboo Abu and his children happened to be driving in the vicinity in his Isuzu double cab bakkie (the Isuzu bakkie). The same assailants stopped him and robbed him of his vehicle. The Isuzu bakkie was later found abandoned in a farming area called Agatha approximately 10 kilometres outside of Tzaneen. This event formed the basis of count 7. I shall return to this aspect as the evidence led in respect of this count is relevant to the determination of this appeal.

[7] As the counts pertaining to the unlawful possession of firearms form the subject matter of the appeal against conviction, I consider it prudent to set out the evidence that was led in this respect in a fair amount of detail. Inspector Trevor John Vorster testified that he was in the company of two other police officers, Piet Pieters and Conrad Scheepers. After receiving information of a robbery that took place at Oasis Mall, they drove to the scene. While on their way they received further information on the police radio about the whereabouts of the assailants who were involved in the robbery. Through the information received on the radio, they were able to drive to the exact spot where the robbers were. They immediately noticed the Isuzu bakkie which was parked on a farm road. Inspector Vorster said they parked their vehicle approximately 25-30 metres from the Isuzu bakkie and then observed three men who were walking away from the parked bakkie. He observed that the men were walking in a row. The first man in the row, who was wearing a blue overall top, was in possession of a long firearm, the man who was walking in the middle and who was wearing a checkered jacket was

carrying a money container, and the man at the end of the row, who was wearing a yellowish long sleeved shirt, was armed with a long firearm and holding a money container as well. When the three suspects saw the policemen they started to run. The man in the middle and the last one in the row, both threw away the money containers they were carrying. At the same time, the last man in the row took aim at the police with the long firearm he was carrying and fired several shots at them. Inspector Vorster said he returned fire and pursued the suspects along a foot path. Whilst pursuing the suspects, he noticed some movements in the long grass and he observed a yellowish shirt. He then screamed at the person to come out from under the bush in the long grass and placed him under arrest. He identified this person as the suspect who was at the end of the row who shot at them with a long firearm. He recovered an R4 rifle next to where he arrested this suspect, who appeared as accused No 2 at the trial.

[8] After the arrest of accused No 2, the police went searching for the other suspects. Inspector Vorster and Captain Botha were both called by a domestic worker who informed them that she had heard something in the garage. Upon approaching this garage, the appellant emerged suddenly from the garage with his hands in the air. Inspector Vorster testified that he recognised the appellant as the person who was walking in the middle between the other two suspects and who was holding a money container. No weapon was found in the appellant's possession. After Inspector Vorster had arrested the appellant, he took him back to where the Isuzu bakkie was, where other members of the police had gathered.

[9] Inspector Vorster then searched the Isuzu bakkie where he found the Norinco pistol stuck between the two front seats of the vehicle. It is common cause that this was the firearm that was robbed from Mr Lebepe during the robbery of the security vehicle.

[10] Inspector Scheepers corroborated the evidence of Inspector Vorster in every material respect, in particular the sequence of movements when the appellant and the two suspects walked away from the Isuzu bakkie, their manner of clothing and what each suspect was carrying at the time. Importantly, Inspector Scheepers was involved in chasing after the suspect who was walking in front of the other two and who was wearing a blue overall top. He witnessed Captain Botha firing a shot at this suspect, who then dropped his long firearm as he ran. This later turned out to be an R5 rifle forming the basis of count 13 against the accused.

[11] 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*[2] 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

[2] *S v Nkosi* 1998 (1) SACR 284 (W).

(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. Marais J applied the principles set out in *R v Blom*[3] for drawing an inference from proven facts, namely:

'1. The inference sought to be drawn must be consistent with all proved facts. If it is not, then the inference cannot be drawn.

2. The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'

[12] In convicting the appellant for (unlawful) joint possession of the Norinco pistol and the R4 and R5 rifles, the court a quo relied on *S v Khambule*[4] where it was held, incorrectly in my view, that there was no reason why in appropriate situations and if the doctrine of common purpose was applied, the common intention to possess the firearms jointly could not be inferred. The court a quo then concluded that if it was the intention of the members of the group to use firearms in the execution of a robbery or murder to the advantage of them all, they associated themselves with the possession of firearms. Possession of the firearms accordingly had to be taken by one or more members of the gang and on behalf of and to the advantage of the group. In *S v Khambule* it was reasoned thus: the only and sole inference that can be drawn from the proven or established fact of common purpose, is that there was joint possession of firearms used in the commission of the robbery.

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[3] *R v Blom* 1939 AD 188 at 202.
[4] *S v Khambule* 2001 (1) SACR 501 (SCA).

[13] *S v Khambule* was correctly critised in *S v Mbuli*[5] where Nugent JA, stated that while he agreed that there is no reason in principle why a common intention to possess firearms jointly could not be established by inference, he could not agree with the further suggestion that a mere intention on the part of the group to use the weapons for the benefit of them all would suffice for a conviction for unlawful joint possession of firearms. He then concluded that on the facts of that case, it could not be said that the only reasonable inference from the evidence was that the accused possessed the hand grenade jointly. Importantly, Nugent JA said that mere knowledge by the others that one of their own was in possession of a hand grenade and even acquiescence by them in its use for fulfilling their common purpose to commit robbery, was not sufficient to make them joint possessors of the hand grenade. As there was no evidence which showed which of the accused there was in possession of the hand grenade, Nugent JA set aside that appellant's conviction of unlawful possession of a hand grenade.

[14] Having set out the principles of joint possession, I now turn to the conviction of the appellant in relation to the three firearms. I start with count 11 dealing with the illegal possession of the Norinco pistol. It is common cause that neither Mr Lebepe nor Mr Hlungwane could identify the person who robbed Mr Lebepe of that firearm. The evidence merely shows that the security vehicle was attacked by three males who had alighted from a Volkswagen Golf motor vehicle, two of whom were carrying long firearms, while the third one only had a handgun. It is so that the Norinco pistol was conveyed in Mr Abu's Isuzu bakkie up to the point where this vehicle was abandoned by the appellant and his co-accused. It is also important to note that, according to Mr Isak

[5] *S v Mbuli* 2003 (1) SACR 97 (SCA) at 115A-D.

Johannes Meyer, who testified for the State and whose evidence I will deal with in fuller detail shortly, there were four assailants who robbed Mr Abu of his Isuzu bakkie. It appears that this fourth person managed to evade arrest. Inspector Vorster's undisputed testimony is to the effect that upon searching the Isuzu bakkie, he discovered the Norinco pistol stuck (and presumably hidden away) between the two front seats inside the vehicle.

[15] There is no evidence that shows who actually put the Norinco pistol inside the Isuzu bakkie. Importantly, there is no evidence showing whether or not the appellant was aware of its presence inside the Isuzu bakkie. Accordingly, there are no facts from which it can be inferred that the appellant had the intention to possess the Norinco pistol through the actual detentor thereof, who is in any case unknown, and whether or not the person who put it inside the Isuzu bakkie intended holding it on behalf of the group, including the appellant. In the circumstances, the appellant's conviction on count 11 on the basis of the principles of joint possession is unsustainable and falls to be set aside.

[16] I now turn to consider the appellant's conviction on counts 12 and 13. Mr Isak Johannes Meyer, a member of the community and who, in my view, was an independent witness, testified about the incident when Mr Abu was robbed of his Isuzu bakkie. He said he was in his office when he heard gunshots emanating from the Oasis Mall. He then got into his car with a colleague, Mr Leon van Veenhuizen, and they decided to go and investigate. As he was driving to the mall in Maritz Street, Tzaneen, he found himself driving behind Mr Abu's Isuzu bakkie. As the Isuzu bakkie reduced

speed at a speed hump, it was stopped by a male person who appeared to be talking on a cellular phone. This man pulled the driver out of the Isuzu bakkie. At the same time two males approached the Isuzu bakkie from the left. One of the males was carrying two money containers and a long firearm which was hanging over one of his shoulders. The second male was only carrying a long firearm. These two men got into the Isuzu bakkie. A fourth male appeared who, after he had dragged Mr Abu's children out of the Isuzu bakkie, also got in and the assailants drove away in the Isuzu bakkie.

[17] Mr Meyer testified that he drove at a safe distance behind the Isuzu bakkie until it stopped at a farming area in Agatha. He observed as the four suspects got out of the vehicle. Members of the SAPS arrived shortly thereafter and there was an exchange of gunfire between them and the suspects. Thereafter the police chased after the suspects. Later he saw the first suspect (accused No 2) being arrested and lying on the ground. Later on Inspector Vorster arrived with the second suspect who he had arrested. Mr Meyer said he immediately recognised this person as one of the two men who had approached Mr Abu's Isuzu bakkie when it was robbed and that he was the one who was carrying two money containers and a long firearm. I deem it apposite to quote Mr Meyer's testimony in this regard. He stated as follows:

' . . . . Daar het een verdagte op die grond gelê wat hulle alreeds geboei gehad het op daardie stadium. En daar het twee geldtrommels gelê aan die linkerkant van die pad . . . *Ongeveer 'n paar minute later het inspekteur Vorster met n tweede verdagte aangekom wat ek herken het as die ou wat met die geldtrommels in die bakkie geklim het*.'(My emphasis.)

It is common cause that the second suspect that was arrested by Inspector Vorster and brought back to the Isuzu bakkie, was the appellant.

[18] Significantly, Mr Meyer's testimony that he witnessed the appellant carrying either an R4 or R5 rifle and two money containers when he entered the Isuzu vehicle when it was hijacked, was neither disputed nor challenged. Mr Lekgodi, appearing for the appellant in the trial court, did not even cross-examine Mr Meyer. In those circumstances, Mr Meyer's testimony can be accepted as factually correct.

[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. I am accordingly satisfied that the appellant was correctly convicted on both counts 12 and 13 on the basis of joint possession. The appeal against conviction on these counts must accordingly, fail.

[20] I now consider the appeal against sentence. This appeal is limited to the issue whether or not the cumulative effect of the imposed sentence of 52 years' imprisonment warrants interference on appeal.

[21] It is trite law that a court of appeal may only interfere with the sentence imposed where it induces a sense of shock or is tainted by misdirection. In *S v Salzwedel & others*[6] it was held that:

'An appeal court is entitled to interfere with a sentence imposed by a trial court in a case where the sentence is "disturbingly inappropriate" or totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparate, or vitiated by misdirections of a nature which shows that the trial court did not exercise its direction reasonably .'

[22] Ex facie the record, the trial court took into account the personal circumstances of the appellant, the nature and seriousness of the offences that the appellant had been convicted of, and the interests of society. The trial court also held that there was a duty upon the court to protect the community and to punish serious offences as in this case. Importantly, it considered the applicability of the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997 in respect of counts 1, 2, 7, 11, 12 and 13 and came to the conclusion that there were no substantial and compelling circumstances justifying a deviation from the prescribed minimum sentences.

[23] Whilst the trial court's reasoning and approach to the individual sentences cannot be faulted, an effective sentence of 52 years' imprisonment is shockingly inappropriate and warrants interference by this court. My reasons for this conclusion are as follows.

[24] The appellant was 33 years of age at the time of sentencing, entailing that he will be 85 years old when he has completed his sentence. It is generally accepted that a

[6] *S v Salzwedel & others* 1999 (2) SACR 586 (SCA) at 591F-G.

sentence designed to surpass the natural lifespan of an offender, which might happen in this case, ought not to be imposed.

[25] Although the appellant was convicted of a number of serious offences, properly viewed, these were all part of a singular event, namely, the robbery of the security vehicle at Oasis Mall in Tzaneen. The remainder of the offences, without attempting to minimize their seriousness in any way, were all sequels to this robbery. It is so that after the silver coloured Golf motor vehicle which was used by the robbers stalled, they went about looking for an alternative get-away vehicle, hence the subsequent attempted robbery of Mr Fochville's vehicle and the robbery of Mr Abu's Isuzu bakkie respectively.

[26] All of the stolen items, specifically the Isuzu bakkie, the cash inside the money containers, and Mr Lebepe's Norinco pistol, were all recovered whilst still intact. No loss whatsoever was suffered flowing from the incidents that gave rise to this case.

[27] As the appellant's conviction on count 11 has to be set aside, I consider it appropriate that the sentence that was imposed on this count, should have an effect on the re-determination of the effective sentence to be imposed.

[28] I accordingly make the following order.

1 The appeal against conviction on count 11 is upheld.

2 The appeal against conviction on counts 12 and 13 is dismissed.

3 The sentence imposed by the trial court on the appellant on 21 July 2004 is set aside in its entirety, and substituted with the following:

'(a) On counts 1, 2 and 7 of robbery committed with aggravating circumstances, the appellant is sentenced to 15 years' imprisonment on each count.

(b) On counts 3, 4, 5, 6, 8 and 9 of attempted murder, the appellant is sentenced to eight years' imprisonment on each count.

(c) On counts 12 and 13 of illegal possession of automatic firearms, the appellant is sentenced to 15 years' imprisonment on each count.

(d) The sentences imposed in respect of counts 1, 2 and 7 shall run concurrently with each other.

(e) The sentences imposed in respect of counts 3, 4, 5, 6 and 8 shall run concurrently with the sentence imposed in count 9; and

(f) The sentences imposed on counts 12 and 13 shall run concurrently – however 10 years of the effective sentence of 15 years' imprisonment shall run concurrently with the sentence imposed on count 1.The appellant will thus serve five years' imprisonment in respect of both counts 12 and 13. Effectively, the appellant is sentenced to a term of 28 years' imprisonment.'

4. The sentences are antedated to 21 July 2004.

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B H Mbha

Judge of Appeal

APPEARANCES:

For the Appellant:	J M Mojuto
	Instructed by Pretoria Justice Centre
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For the Respondent:	P W Coetzer
	Instructed by Director of Public Prosecutions, Pretoria
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