# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 249/05
REPORTABLE

In the matter between:

**RICHARD DITSHELE MOLIMI** **FIRST APPELLANT**
**MOKGOBE ISHMAEL MASHOESHOE** **SECOND APPELLANT**

**and**

**THE STATE** **RESPONDENT**

Coram: Zulman, Van Heerden JJA et Cachalia AJA

Heard: 20 March 2006

Delivered: 29 March 2006

Summary: The 'rules' pertaining to the reception of hearsay evidence under s 3 of the Law of Evidence Amendment Act 45 of 1988 must be followed for reasons of fairness to an accused. But it does not follow that if these rules were not strictly complied with, the trial was unfair –
Robbery and murder on the basis of common purpose doctrine – forseeability – gang robbery with the use of firearms – one gang member taking hostage while fleeing on a frolic of his own. Hostage killed accidentally by bystander. Not foreseeable by other participants in common purpose –
Requirements for proof of unlawful possession of firearms stated – possession by one gang member not to be imputed to another.

**Neutral citation: This judgment may be referred to as *Molimi v The State* [2006] SCA 38 (RSA)**

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## JUDGMENT

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**CACHALIA AJA**

[1] On 30 October 2000 a robbery took place at the Clicks store at Southgate Mall, Johannesburg. Arising therefrom the two appellants were indicted with one other accused (accused 1) in the Johannesburg High Court before Makhoba AJ on charges of robbery,[1] attempted murder, the unlawful possession of fire-arms and ammunition,[2] kidnapping and two counts of murder – seven charges in all.

[2] The undisputed facts are that at approximately 11 am on the day of the incident, a security officer in the employ of Fidelity Guards arrived at Clicks to collect money in accordance with his usual routine. He entered the cash office where the store manager (the first appellant) and a female employee of Clicks were present. They handed to him an amount of money, which he transferred into a container. As he was leaving the store in possession of the container, four armed men entered. Two of them confronted him and ordered him back into the cash office where they instructed him to empty the contents of the container into a black bag, which he did. The intruders then ordered him into a safe in the store together with the first appellant. The female employee had in the meantime fainted.

[3] As the robbers fled with their loot there was an exchange of gunfire between one of the robbers and a Clicks security guard. The robber and the security guard were fatally wounded in the exchange. The robber died on the scene, the security guard later in hospital. The death of the security guard formed the basis of the second count (murder), the first count being robbery.

[4] The gunfire attracted the attention of a bystander in the shopping mall. As the three other robbers ran in his direction towards the exit, they pointed their firearms at him, but did not shoot. He then drew his firearm and shouted at them to drop theirs. They ignored his warning as they ran towards the exit of the mall. He pursued accused 1 who dropped the bag he was carrying and attempted to take refuge in a store near the exit. Once in the store, accused 1

[1] Robbery with aggravating circumstances, as described in s 1 of the Criminal Procedure Act 51 of 1977.
[2] In contravention of ss 2 and 36 read with ss 1 and 39 of the Arms and Ammunition Act 75 of 1969.

turned around to face his pursuer, pointing a firearm at him at the same time. The man reacted by discharging one shot from his firearm in the direction of accused 1. It missed accused 1 but struck an employee in the store instead. In response, accused 1 retreated further into the store, this time taking a young man as hostage with him. While holding the hostage with a firearm pointed at the hostage's head, he ordered the bystander to surrender his firearm. Instead the bystander fired at him. This time the bullet struck the hostage instead, fatally wounding him. Accused 1 then eventually laid down his firearm and surrendered. The taking of the hostage and his subsequent accidental fatal shooting formed the basis of the murder and kidnapping charges in counts 3 and 7. The attempted murder charge (count 4) arose from the injury to the employee who had also accidentally been shot by the bystander.

[5] In the court *a quo* the appellants and accused 1 pleaded not guilty to all seven counts. They obtained legal aid and were each separately represented, but were convicted and sentenced to the following terms of imprisonment on each of the seven counts: count 1 (robbery) 15 years; count 2 (murder of the Clicks security guard) life imprisonment; count 3 (murder of the hostage) 15 years; count 4 (attempted murder of the injured employee) three years; count 5 (unlawful possession of firearms) four years; count 6 (unlawful possession of ammunition) one year, and count 7 (kidnapping of the hostage) three years. They each received effective sentences of life imprisonment. Only the two appellants applied for and were granted leave to appeal against their convictions.

[6] In convicting the appellants the court *a quo* accepted that the state had proved that the first appellant, who as I mentioned earlier, was the Clicks store manager at the time of the incident, had initiated and planned the robbery with the assistance of the second appellant. As an ex-employee of Fidelity Guards the second appellant used to accompany the security officer (referred to in para 2) to collect money from Clicks. He had been familiar with this routine, a fact that was known to the first appellant when he enlisted the

second appellant's assistance for the operation. For his part, the second appellant recruited accused 1 and three others to carry out the robbery.

[7] The evidence disclosed that accused 1 had made a statement to the police on the day of his arrest implicating himself and both appellants. In it he stated that the second appellant had contacted him on his cellphone six days before the robbery. They arranged a meeting with three others where the second appellant informed them that the first appellant had given him a tip-off about money that could be 'taken' from Clicks. Two days later, the statement continued, he met with the first appellant to discuss the detail of the operation. The first appellant told him that when the fidelity guard arrived to collect the money, he would alert him on his (accused 1's) cellphone, first to inform him that the guard had arrived, and again when the guard was leaving. The details were finalised at a subsequent meeting with the first appellant the day before the robbery. The rest of the statement contains details of the cellphone contact between accused 1 and the appellants on the day of the robbery. It also describes how the robbery occurred, which accorded with the eye-witness accounts of the incident.

[8] The first appellant was arrested a day after the robbery, the second appellant two months later. The second appellant also made a statement to the police implicating the first appellant and himself in the robbery. The statement describes how the first appellant contacted him a week before the robbery; the subsequent meeting between them and accused 1; the second appellant's communication, by cellphone, with accused 1 on the morning of the robbery, and the cellphone call from the first appellant to him after the robbery, when the first appellant had expressed his displeasure at the failure of the robbery.

[9] The statements were admitted as part of the evidence after the trial court had conducted hearings on their admissibility. The evidence of certain cellphone records of the three accused, which was not challenged, corroborated the statements. This evidence, together with the fact that the trial court had found the testimony of the three accused during their defence to be

mendacious, was the basis for the convictions of the appellants. Accused 1 was, as it were, caught red-handed at the scene of the robbery.

[10] The appellants challenge their convictions on the following basis. Firstly, it is contended on behalf of the first appellant that the statements made by accused 1 and the second appellant were inadmissible against him, because of their hearsay character. Similarly, the second appellant takes issue with admissibility of the statement by accused 1 against him. In addition he insists that the statement which he made to the police was untrue and not made voluntarily. It should, so it is contended, have therefore been disallowed. Secondly, and in the alternative, the appellants contend that, if the statements were admissible, thereby establishing, against them, a case based on common purpose to rob the Clicks store, the actions of accused 1 in taking a hostage, and the actions of the bystander which resulted in the death of the hostage and injury to an employee (counts 3, 4 and 7) were not forseeable by them as part of the execution of the common purpose. Finally, the appellants contend that, as there had been no evidence that they had possessed firearms and ammunition (counts 5 and 6), their conviction on those counts on the basis of the common purpose doctrine was wrong.

[11] I deal first with the admissibility of the incriminating hearsay statements. The challenge is a narrow one, the contention being that the trial court disregarded the 'rules' governing the admissibility of hearsay evidence under s 3 of the Law of Evidence Amendment Act 45 of 1988[3] (the Act) that

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[3] '(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to –

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

were laid down in the following terms by this court in *S v Ndhlovu and Others*:[4]

'[A]n accused cannot be ambushed by the late or unheralded admission of hearsay evidence. The trial court must be asked clearly and timeously to consider and rule on its admissibility. This cannot be done for the first time at the end of the trial, nor in argument, still less in the court's judgment, nor on appeal. The prosecution, before closing its case, must clearly signal its intention to invoke the provisions of the Act, and, before the State closes its case, the trial Judge must rule on its admissibility, so that the accused can fully appreciate the full evidentiary ambit he or she faces.'

[12] The trial court was not asked, in clear terms, to rule on the admissibility of the extra-curial statements against the appellants. The prosecutor did not, before closing her case, expressly signal her intention to invoke the provisions of the Act and the trial judge made no explicit ruling on their admissibility as against the appellants until handing down his judgment. This much is common cause.

[13] In the relevant passage of *Ndhlovu*,[5] Cameron JA was in my view clearly not laying down an inflexible rule. On the contrary he pointed out that whereas the common law rule, which excludes all hearsay evidence subject to certain recognised exceptions, is excessively rigid and inflexible (and occasionally even absurd), the Act has the virtue of creating 'supple standards

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(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.

(2) The provisions of ss (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of ss (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of para (a) of ss (1) or is admitted by the court in terms of para (c) of that subsection.

(4) For the purposes of this section –

"hearsay evidence" means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;

"party" means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.'

[4] 2002 (6) SA 305 (SCA) para 18.

[5] Referred to above in para 11 of this judgment.

within which courts may consider whether the interests of justice warrant the admission of hearsay notwithstanding the procedural and substantive disadvantages its reception might entail.'[6] In formulating the rule, Cameron JA's overall concern was one of fairness to an accused who is confronted with hearsay evidence. His opening remarks in the passage quoted above thus make clear that the reception of the hearsay evidence must not surprise the accused, coming at a stage in the trial when he or she is unable to deal with it. In a similar vein his closing remarks emphasise that the accused must understand the full evidentiary ambit of the case against him.

[14] The touchstone for the admission of hearsay evidence in terms of the Act is always whether the 'interests of justice' justify it. The real question therefore is not whether the 'rule' formulated by Cameron JA was strictly complied with. Patently it had not been. What this court must ask itself is whether, in the circumstances of this case, the reception of the hearsay evidence was unfair to the appellants and therefore not in the 'interests of justice'.[7]

[15] It is important to examine how the trial court dealt with the admissibility of the two statements in issue. The statements that were attributed to accused 1 and the second appellant were admitted into evidence 'provisionally'. Accused 1's statement was held to be admissible against him on the basis that he denied having made any statement to the police. His version was that the police had written the statement. The words, he said, were theirs, not his. As the voluntariness of the statement was not in issue the court correctly ruled that it was admissible against him. Likewise the second appellant's statement that he had made to the police was ruled admissible against him after the court rejected his version that he had been induced to make the statement as a result of an assault and promises by the police.

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[6] See *S v Ndhlovu* above paras 14-15.
[7] Cf *Key v Attorney General, Cape Provincial Division, and Another* 1996 (2) SACR 113 (CC) para 13 which deals with the admissibility of unconstitutionally obtained evidence.

[16] At the conclusion of the State's case, the only evidence against the appellants were the abovementioned cellphone records that linked the three accused and, in the case of the second appellant, his own statement that had been found to be admissible against him. Their counsel brought applications for their discharge in terms of s 174 of the Criminal Procedure Act 51 of 1977.

[17] It is clear from a perusal of the trial record that *Ndhlovu* loomed large in the proceedings during the 'trial-within-a-trial' of accused 1 and also during the discharge applications by the appellants. Thus, during the 'trial-within-a-trial' to determine the admissibility of the statement that had been made by accused 1 to the police, the question whether counsel for the appellants would cross-examine the various state witnesses arose. It was assumed that they would be entitled to do so after counsel for the second appellant had pertinently informed the court that the effect of the *Ndhlovu* judgment was to render a hearsay statement by accused 1 admissible against the appellants. On this basis the court indicated that counsel for the appellants were entitled to put questions to any witness who would testify on the admissibility of the statements.

[18] During the discharge application counsel for the second appellant accepted that the implication of *Ndhlovu* was that he would have to impugn the evidence of accused 1 if he chose to testify. This was because it had been clear to him that the statement that had been made by accused 1 was admissible against his client. In opposing the discharge application, the prosecutor relied squarely on this case. She however assumed, wrongly, that the holding in *Ndhlovu* related to confessions, whereas quite clearly, it did not. It dealt with the admissibility of extra-curial statements, other than confessions envisaged in s 219 of the Criminal Procedure Act 51 of 1977.[8] In reply counsel for the first appellant confined himself to disputing the admissibility of the statements by accused 1 and the second appellant, which incriminated his client, on the basis that they were confessions. As it is common cause that neither the statement by accused 1, nor that of the second appellant, were

[8] Section 219 of the Criminal Procedure Act states: 'No confession made by any person shall be admissible as evidence against any other person.'

'confessions' within the meaning of s 219, counsel's submission in this regard was wrong. This much was correctly conceded during the appeal. For his part counsel for the second appellant submitted that because the statements were admitted 'provisionally' their status was unclear.

[19] The learned judge refused the application for the discharge of the two appellants. His reasons do not contain any reference to *Ndhlovu.* However this is what he said:

'In the present case…there are statements which I ruled to be admissible. Whether it is provisional or not is immaterial. The fact remains that at this stage of the proceedings, they are part of the record and I have admitted it. These two statements by accused 1 and 3 implicate accused 2.'[9]

[20] Despite it being unclear from the judge's ruling whether the extra-curial statements by accused 1 and the second appellant were admissible against their co-accused, there could have been no doubt in the minds of counsel for the appellants, in the light of what had transpired during the 'trial-within-a-trial' of accused 1 and the discharge application, that the extra-curial statement by accused 1 was not only part of the state case against him, but also against them. They should, if there was doubt, have asked the judge to clarify the position before deciding whether or not their clients would testify in their defence. For the first appellant, he had the added problem that he would have to deal with second appellant's incriminating statement. The second appellant had very little option but to testify in the light of his failure to successfully challenge the admissibility of the statement that he had made.

[21] Despite the overwhelming evidence against accused 1 his testimony was no more than a bare denial of any involvement, by him or the appellants, in the commission of the offences. In respect of the statement that he had allegedly made to the police soon after his arrest, which was ruled admissible against him, he maintained that the police had fabricated it. Understandably he was not cross-examined on this aspect by counsel for either appellant.

[9] Record Vol. 5 p 456-457.

[22] After accused 1 closed his case, the first appellant elected to testify. At this stage, without the incriminating extra-curial statements by his two co-accused, the only evidence against him were the cellphone records referred to earlier. While incriminating, creating a strong suspicion of his complicity in the events of the day, the records would not, in my view, without any further evidence, have created a suffficient basis to convict him. The statements were destructive of his case because they explained the cellphone records. This much was conceded by counsel in argument before us. His election to testify can therefore only be explained in the light of this realisation.

[23] The first appellant was cross-examined by the prosecutor on the statement by accused 1 without any objection to its admissibility against him. So too, the second appellant. In these circumstances it is clear that the appellants were not labouring under any misapprehension regarding the admissibility of the extra-curial statements against them. I must add that there can be no suggestion, nor was there, that the cross-examination of the appellants on the extra-curial statements by their co-accused was unfair.

[24] Having regard to the factors enumerated under s 3(1)(c) of the Act, I have no doubt that the admission of the hearsay evidence contained in the extra-curial statement by accused 1, against the appellants, was in the 'interests of justice.' The statement had been made soon after the accused had been arrested, in circumstances where he had been caught red-handed. His subsequent disavowal of the statement was correctly found to have been untruthful. The evidence of the contents of the statement had been tendered by the state for the purpose of explaining and placing the cellphone records in perspective. Indeed the corroboration of important aspects of the statement by the cellphone records confirmed its probative value. As Goldstein J observed in another context: '(t)he evidence concerned so convincingly completes the mosaic of the State case . . . it would be absurd to disregard it.'[10] The tendering of this evidence against the appellants came as no

[10] Quoted in *S v Ndhlovu* above para 39.

surprise in the sense that they were unable to deal with it. They were able to cross-examine accused 1 if they so wished and to deal with it in the preparation and presentation of their cases. There was no prejudice to them and the fairness of the trial had not been compromised.[11]

[25] Counsel for the appellants conceded, quite properly, that if the statement by accused 1 was admissible against their clients, there would be no basis to challenge their convictions on the first two counts (robbery and murder of the security guard). It is therefore not necessary to deal with whether the statement that was made by the second appellant was properly admitted. Even without this statement his conviction on these counts must stand.

[26] Before I turn to deal with the remaining convictions, comment is warranted on the way in which the prosecutor and the trial judge dealt with the issue of the admissibility of the extra-curial statements. The prosecutor was aware throughout the trial that admissibility of statements, which would be hearsay against the appellants, was crucial to the State case. She was aware of the *Ndhlovu* judgment and brought it to the attention of the trial judge. Yet she inexplicably failed expressly to indicate her intention to invoke the provisions of the Act. Nor did the trial judge rule on the admissibility of the hearsay statements against the appellants, despite *Ndhlovu* having been brought to his attention.

[27] The trial court's admission of the evidence '*provisionally'* was regrettable. The Act allows the admission of hearsay evidence on a provisional basis when 'the person upon whose credibility the probative value of such evidence depends, himself testifies (later) at such proceedings.' If the person does not testify the evidence must be left out of account.[12] However there is no such requirement when the hearsay evidence is required to be admitted in the 'interests of justice'. In such a case, as *Ndhlovu* makes clear, 'the trial Judge must rule on its admissibility so that the accused can

[11] Cf *S v Ramavhale* 1996 (1) SACR 639 (A) at 650i-651g.
[12] Section 3(1)(b) read with s 3(3).

appreciate the full evidentiary ambit he or she faces.'[13] A vague provisional ruling, as was made in this case, is not conducive to such an appreciation and may be prejudicial to an accused.[14] It conflates the admissibility of the evidence with its weight and may leave an accused unfairly in a state of uncertainty.

[28] What was required in this case was a clear request by the prosecutor that she would seek the admission of the statement by accused 1 against the appellants, and the second appellant's statement against the first appellant, in terms of the Act. It was her duty to do so. The trial judge, for his part, was under a duty to make a clear ruling on the admissibility of these statements. The prosecutor's and judge's failure in this respect is regrettable.[15] However, as indicated above, in the circumstances of the present case, it did not render the trial of either appellant unfair.

[29] I turn to deal with counts 3, 4 and 7. The appellants submit that the sequence of events commencing with accused 1 taking a hostage and culminating in the death of the hostage and injury to the employee from the bystander's gunshots was not forseeably part of the common purpose. They should, accordingly, have been acquitted on these counts.

[30] In support of their contention they rely on two cases that were decided in this court. The first is *S v Talane*[16] where the facts briefly were that three robbers, two of whom had firearms, entered a shop, tied up a shopkeeper and his friend and then helped themselves to whatever they were able to take with them. As they left, the shopkeeper and his friend managed to free themselves. The shopkeeper pursued one of the robbers, firing at him. The other robbers fled in another direction. Just as the shopkeeper had stopped firing, having run out of ammunition, his friend called him back. As he turned back, responding to his friend's call, the robber he had been pursuing fired two shots, fatally wounding him. The question on appeal was whether one of

[13] See quotation above para 11.
[14] See *S v Ramavhale* above p 651b-c.
[15] See *S v Ramavhale* loc cit.
[16] 1986 (3) 196 (A) at 207E- 208A.

the other robbers who had fled in a different direction should have been convicted, on the basis of common purpose, for the murder. It was found, on the facts, that once the shopkeeper had emptied his firearm and turned his back on the robber, he had no longer been endeavouring to prevent the robbers from escaping. Accordingly the court held that it would be unfair to hold that the other robber, who was probably far out of danger when the shopkeeper had been shot, could be said to have fallen within the limits of what he would have foreseen and reconciled himself therewith.

[31] The second case relied on is *S v Munonjo en 'n Ander.*[17] The appellants, who were unarmed, had broken into a house intending to steal. They were aware that the occupants were probably armed. One of them had a ligature in case it became necessary to tie them up. One of the two occupants produced a firearm but was disarmed by one of the appellants who then shot both the occupants. Both appellants were convicted of murder. On appeal the appellants blamed each other for what had happened. It had therefore not been possible to determine which of them had fired the fatal shots. The court found that the facts had established that the common purpose extended only to a possible assault of the occupants as they would have had to have tied them up if necessary. They could not, reasoned the court, have subjectively forseen the extraordinary turn of events and the possibility of death. Their appeals on the murder count were accordingly upheld.[18]

[32] The facts in the two cases relied upon are very different from this instance. In *Talane* the shopkeeper had ended the pursuit of the robbers before he had been shot and in *Munonjo* the use of firearms had not been contemplated as the housebreakers were unarmed. In the present matter the robbers were still in the process of fleeing, having exchanged gunfire with inter alia the deceased security guard when the bystander intervened. Nevertheless the principle sought to be extracted from these cases by counsel for the appellants is that if, in the execution of a common purpose,

[17] 1990 (1) SACR 360 (A).
[18] They were however convicted as accessories after the fact of murder.

one of the participants to the common purpose commits an unlawful act, which is so unusual or extraordinary that it falls outside what was foreseeably contemplated by the other participants, they cannot be held liable for that act. On this basis it is submitted that the occurrence that led to the commission of these offences (the bystander's intervention and the hostage taking by accused 1), was so far removed from the actual common purpose, ie robbery with the use of firearms, that it could not have been forseeable by the appellants.

[33] The submission is not novel. It has long been accepted that the operation of the common purpose doctrine does not require each participant to know or foresee in detail the exact manner in which the unlawful consequence occurs.[19] Were it otherwise, it would not be possible to secure a conviction simply on the basis that some event had happened during the execution of the common purpose that all the participants in the common purpose had not more or less planned for. All that is required for the state to secure a conviction on the basis of common purpose is that an accused must foresee the possibility that the acts of the participants may have a particular consequence, such as the death of a person, and reconciles himself to that possibility.[20]

[34] The evidence shows that the first appellant initiated and then planned the robbery in collaboration with the second appellant and accused 1. It was foreseeable that, in the execution of the robbery and during the flight of accused 1 and his fellow robbers, firearms may be used to overcome any resistance that they encountered. They reconciled themselves to this possibility. Their conviction for the murder of the security guard on this basis is therefore uncontroversial.

[35] As uncontentious, in my view, is the conviction for the attempted murder of the employee (count 4). The fact that resistance to the escape

[19] CR Snyman *Criminal Law* 4ed p 262; *R v Shezi* 1948 (2) SA 119 (A) at 128. Cf *S v Munonjo* above at 364a-c where the principle was said to be inapplicable to the facts of that case.
[20] See Snyman above p 265.

arose from the actions of a private citizen is not, as counsel tried to persuade us otherwise, of any consequence. Nor is the fact that, at the time the bystander fired his first shot injuring the employee, he was under no legal duty to stop the fleeing robbers. Once all the participants in the common purpose foresaw the possibility that anybody in the immediate vicinity of the scene could be killed by cross-fire, whether from a law enforcement official or a private citizen, which in the circumstances of this case they must have done, *dolus eventualis* was proved.[21]

[36] But the taking of the hostage by accused 1 falls into a different category. It is probable that at the time he took the hostage, his co-robbers had escaped through the exit of the shopping complex. He was therefore on his own when he took the hostage while seeking refuge from the man who was pursuing him. By taking a hostage he had, in my view, embarked on a frolic of his own. These actions could hardly have been forseeable by the other participants in the common purpose. To hold otherwise, as the court *a quo* did, would render the concept of forseeability so dangerously elastic as to deprive it of any utility. To put it another way, the common purpose doctrine does not require each participant to know or forsee every detail of the way in which the unlawful result is brought about. But neither does it require each participant to anticipate every unlawful act in which each of the participants may conceivably engage in pursuit of the objectives of the common purpose. It is apparent that the unlawful act of hostage taking by accused 1, in the circumstances of this case, was so unusual and so far removed from what was foreseeable in the execution of the common purpose that it cannot be imputed to the appellants. The convictions relating to the kidnapping and murder of the hostage (counts 7 and 3) can therefore not stand.

[37] 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

[21] See *S v Nhlapo* 1981 (2) SA 744 (A) at 751A-B.

decision by this court in *S v Khambule*[22] where it was held that the common intention to possess firearms jointly may be inferred in the circumstances of a particular case. One such case, said the court, was where there was an intention of a gang of robbers to use firearms in the execution of a robbery. In this situation, said the court, the possession of the firearms is advantageous to each of the members of the gang. Therefore, the court reasoned, each member of the gang associates himself or herself with the possession of the firearms by every other gangmember. However in *S v Mbhuli*[23] this court was subsequently unable to agree with this reasoning. Instead it approved of Marais J's reasoning in *S v Nkosi*[24] where he set out the law on this question in the following terms:

'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)[25] between the members of the group to possess all the guns.'

[38] It follows that *Khambule* was overruled by *Mbhuli,* 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.

[22] 2001 (1) SACR 501 (SCA) para 10.
[23] 2003 (1) SACR 97 (SCA) para 71.
[24] 1998 (1) SACR 284 (W) at 286h-i.
[25] Save for the reference to common purpose, the court approved of Marais J's reasoning.

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

1. The appeal by the appellants against their convictions on counts 1, 2 and 4 are dismissed;
2. The appeal by the appellants against their convictions on counts 3, 5, 6 and 7 is upheld. Their convictions and sentences on these counts are set aside.

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**A CACHALIA**
**ACTING JUDGE OF APPEAL**

**CONCUR:**

**ZULMAN JA**
**VAN HEERDEN JA**