**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Cases CCT 216/15 and 221/16

CCT 216/15

In the matter between:

**GEORGE SIPHO MAKHUBELA** Applicant

and

**THE STATE** Respondent

CCT 221/16

In the matter between:

**THABO ELEKIA MATJEKE** Applicant

and

**THE STATE** Respondent

**Neutral citation:** *Makhubela v The State; Matjeke v The State* [2017] ZACC 36

**Coram:** Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J

**Judgment:** Mhlantla J (unanimous)

**Decided on:** 29 September 2017

**Summary:** Extra-curial admissions of an accused are inadmissible against a co-accused — sufficient independent evidence to warrant conviction — conviction and sentence of the murder and robbery counts confirmed

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## ORDER

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On appeal from the Full Court of the High Court of South Africa, North West Division, Mahikeng:

The following order is made:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeals are partially upheld.
4. The order of the High Court of South Africa, North West Division, Mahikeng is set aside only to the extent set out below:

   "(a) The appeal by the applicants against their convictions on counts 4 and 5 is upheld.

   (b) Their convictions and sentences on these counts are set aside."

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## JUDGMENT

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MHLANTLA J (Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mojapelo AJ, Pretorius AJ and Zondo J concurring):

*Introduction*

[1] The two applicants, Mr Thabo Matjeke (Matjeke) and Mr George Makhubela (Makhubela) seek leave to appeal against an order of the High Court of South Africa, North West Division, Mahikeng (Full Court). The Full Court dismissed their appeal against their convictions and sentences. The applicants, who were accused number one and three respectively in the trial court, and their five co-accused,[1] were convicted of the murder of a police officer, robbery with aggravating circumstances and unlawful possession of firearms and ammunition. These convictions were based on the doctrine of common purpose. They were sentenced to life imprisonment for murder, 15 years' imprisonment for robbery and six years' imprisonment for possession of firearms and ammunition.[2] The issues for determination before this Court are whether leave to appeal should be granted and whether the convictions of the applicants based on the doctrine of common purpose can be sustained.

[2] Although the two applications were lodged in this Court on different occasions, the circumstances of the applicants' cases relate to the same incident and they were tried together in the trial court. The same sentences were imposed and the grounds of appeal are similar. Therefore, it is appropriate to prepare one judgment dealing with both applications. It is necessary at this stage to outline the background.

*Factual background*

[3] On 3 August 2002, Warrant Officer Dingaan Makuna (deceased) arrived at his home with his service pistol tucked in his waist. He was subsequently shot three times by intruders in the presence of his daughter. It was alleged that the applicants were

[1] In the trial court the accused were; Thabo Matjeke (accused 1); Boswell Mhlongo (accused 2); George Makhubela (accused 3); Alfred Nkosi (accused 4); Thembekile Molaudzi (accused 5); Samuel Sampie Khanye; (accused 7); and Mr Victor Moyo (accused 8). During the proceedings, accused 6, referred to as "Mphume", failed to attend court proceedings and subsequently disappeared. The remaining co-accused successfully appealed to this Court against their sentences and convictions in: *S v Khanye* [2017] ZACC 29 (*Khanye*); *S v Molaudzi* [2015] ZACC 20; 2015 (8) BCLR 904 (CC) (*Molaudzi*); and *S v Mhlongo*; *S v Nkosi* [2015] ZACC 19; 2015 (8) BCLR 887 (CC) (*Mhlongo*).

[2] *Matjeke and Others v S* [2013] ZANWHC 95 (*Matjeke*) at para 1.

part of a group of men who had shot the deceased and planned to steal his bakkie. The deceased was taken to hospital where he died later that night. His pistol was never found.

[4] Following this incident, Messrs Matjeke and Makhubela and their five co-accused were arrested and charged with murder, robbery with aggravating circumstances and unlawful possession of firearms and ammunition. After their arrest, some of the accused made extra-curial statements to the investigating officer and to the magistrate. Matjeke and another accused also pointed out the house of the deceased and the tavern where they had gathered before going to the deceased's house.

*Litigation history*

*Trial Court*

[5] At the commencement of the trial, all the accused pleaded not guilty to the charges. During the trial, the State sought to rely on the extra-curial statements to prove the guilt of the accused. The accused challenged the admissibility of these statements and alleged that the statements were not made freely and voluntarily. They alleged that the police had assaulted them, and also promised to give them money and release them on bail if they made the statements. Accordingly, they averred that the statements were made under duress and were thus inadmissible.

[6] As a result, a trial-within-a-trial was held to determine the admissibility of the extra-curial statements. The State adduced evidence relating to the manner in which these statements were taken and whether certain statements had been made freely and voluntarily or whether the accused were under duress by virtue of assaults and promised money by the investigating officer. At the conclusion of the trial-within-a-trial, the trial court relied on *Ndhlovu*,[3] where the Supreme Court of Appeal held that

[3] *S v Ndhlovu and Others* [2002] ZASCA 70; 2002 (6) SA 305 (SCA).

such statements were admissible in terms of the section 3(1)(c) of the Law of Evidence Amendment Act (Evidence Amendment Act)[4] to uphold the probative value of the previously admitted statements. Section 3(1)(c) of the Evidence Amendment Act allows a court to exercise its discretion in admitting hearsay evidence when it deems it to be in the interests of justice to do so, taking into account various factors.[5] The trial court concluded that the extra-curial statements by the accused and the pointing out of the deceased's home by Matjeke and another co-accused were admissible. These statements then became part of the evidential material before the trial court. The details of the statement of each applicant as well as his testimony are set out below.

*Matjeke*

[7] In his extra-curial statement, Matjeke stated that on the day of the incident, he, together with Makhubela, Mhlongo, Molaudzi and Moyo, had travelled from Soshanguve to Mothotlung after being requested by Khanye to visit him. They travelled in a Toyota Cressida motor vehicle owned by Mhlongo. Molaudzi and

[4] 45 of 1988.

[5] Section 3(1) of the Evidence Amendment Act reads as follows:

> "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
>
> (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."

Moyo carried firearms. After arriving at Tshipa's tavern in Mothutlung, Khanye told them about a person who wanted them to steal a bakkie and that he had spotted a vehicle that could be stolen. At some stage, they drove past the deceased's house, and, at Moyo's suggestion, stopped further down that street. Moyo, who was armed, walked to the house with Makhubela, Molaudzi, Khanye and Mphume (the accused who disappeared). Matjeke remained behind in the vehicle. After two shots were fired, his co-accused ran back to the car.[6]

[8] Matjeke also pointed out the house of the deceased to the police. He further said that when the other men came back to the vehicle from the deceased's house, Molaudzi had a third firearm.[7]

[9] Matjeke testified on two different occasions. During his first oral testimony, he stated that towards the end of July 2002, he, together with Makhubela and Mhlongo, had gone to Tshipa's tavern in Mothotlung where they found Khanye with three men. They all attended a party until 03h00. At some stage Matjeke, together with Makhubela and Mhlongo went to Stinkwater, while Khanye and his three companions went to Mothotlung. He testified that he had never been to Mothotlung and furthermore, that he had not been at the scene of the crime during the incident.[8] He thereafter closed his case.

[10] Later on during the proceedings, Matjeke applied to re-open his case so that he could testify again in order to "tell the truth". The trial court upheld the application. In his second testimony, Matjeke changed his earlier version. He confirmed the contents of his extra-curial statement. He further testified that after he heard two shots had been fired, the five men fled from the scene and returned to the vehicle. Mhlongo, on the instruction of Moyo, had driven very fast away from the scene.

[6] *Matjeke* above n 2 at para 5.

[7] Id at para 4-5.

[8] Id at para 10.

Matjeke further testified that he had enquired about the incident from Mhlongo, who had told him that they were "just doing some job". He heard Moyo requesting Khanye to produce the firearm so that he could inspect it. He also heard Mphume confronting Moyo for shooting the deceased. Moyo thereupon responded that the deceased also had a firearm and would have shot them. Matjeke testified that he had been instructed by Mhlongo and Khanye to fabricate his version. Thus, his original testimony was false.[9]

[11] The extra-curial statements of Khanye and Makhubela also implicated Matjeke. Khanye stated that in August 2002, Matjeke and Mhlongo had sought his assistance to "acquire" an old Isuzu bakkie. They gave him their telephone numbers to contact them if he should come across a vehicle that they could hijack. Some days later, Khanye saw a bakkie in a yard in Mothotlung and he telephoned them. Matjeke, Mhlongo and Makhubela met Khanye at Tshipa's tavern. Matjeke and Mhlongo had firearms. They travelled in Mhlongo's vehicle and Khanye led them to the place where he had seen the bakkie. However, the bakkie was no longer there. Thereafter, Khanye was dropped off at his home and he did not know what happened thereafter.[10]

*Makhubela*

[12] Makhubela made an exculpatory statement to an investigating officer. He stated that on the day of the incident, he travelled with Matjeke and Mhlongo to Mothotlung, where they found Khanye with three unknown men. They all travelled in a Toyota Cressida driven by Mhlongo. Somewhere along the road, the driver, Mhlongo, stopped the car and Matjeke, Mhlongo and Kanye alighted from the vehicle and went away. The three strangers stood next to the car while he remained in the vehicle and sat in the driver's seat. After about ten minutes, his co-accused came back running. They got into the car and drove off at high speed.

[9] *Matjeke* above n 2 at paras 12-3.

[10] Id at para 7.

[13] In his oral evidence, Makhubela steadfastly denied having been involved in the commission of these offences. He admitted that on the day of the incident he had been with the other accused and that they had proceeded to Mothotlung. He testified that, when the car stopped, some of the accused alighted. As they were leaving, he noticed that they had firearms in their possession. These persons proceeded towards a certain house. He also got out of the vehicle to relieve himself whilst waiting for them. He then heard two gunshots. Makhubela stated that he did not make any enquiry about the shooting because he was scared. He further testified that he had heard Khanye and Moyo stating that they needed a vehicle to go to Pietersburg. That was the first time he had heard of any discussion about the acquisition of a vehicle.

[14] Makhubela contended that his statement was exculpatory and not a confession. He admitted being in the vehicle with the co-accused but had not participated in the commission of the offences. He had consumed alcohol and merely alighted from the vehicle to relieve himself. He conceded that he had lied during his bail proceedings because his co-accused had threatened him. According to him, there was no direct evidence linking him to the planning and commission of the offences. Furthermore, there was no evidence that proved that he had entered the premises of the deceased or known that the deceased had been shot.

[15] As already indicated, these statements were admitted against their makers and their co-accused. The trial court held that all the accused had a common purpose to commit the robbery in the premises of the deceased. When the accused went to Mothotlung and saw the other accused alighting from the vehicle, they were aware of the fact that the other accused were armed and that, if anything did not go according to plan, the firearms would be used. The trial court then concluded that, as far as the murder charge was concerned, they were all liable for the commission of the offence of murder. It further concluded that all the accused were guilty of unlawful possession of firearms and possession of ammunition. Even though some of the accused were not found in possession of a firearm, the Court reasoned that, because

firearms were possessed on their behalf, they could still be found guilty. The trial court accordingly convicted them on these charges.

[16] Regarding sentence, the trial court concluded that the accused were not youthful offenders, the crime had been pre-meditated and the victim had been shot several times. It concluded that there were no substantial or compelling circumstances that would justify the imposition of a lesser sentence. It thus imposed the prescribed minimum sentences for murder and robbery with aggravating circumstances. The sentences imposed for attempted robbery, unlawful possession of firearms and possession of ammunition were ordered to run concurrently with the life sentences imposed for murder.

*Full Court*

[17] An appeal against the convictions and sentences came before a Full Court. The issue on appeal related to the admissibility of the extra-curial statements. The Full Court concluded that the statements were not hearsay evidence but were evidence envisaged in section 3(1)(b) of the Evidence Amendment Act and as a result became "automatically admissible", because the accused confirmed portions of the statements in their oral testimony. The Full Court noted that the evidence of an accused who testified against a co-accused should be treated on the same basis as that of an accomplice and with caution. It did not accept the explanation of the accused that they were not involved in the plan to rob especially since they were in the company of the perpetrators. Regarding sentence, the Full Court held that the trial court exercised its discretion properly and concluded that there was no reason to justify an interference with the sentence imposed. In the result, the Full Court dismissed the appeals against convictions and sentences.

*Supreme Court of Appeal*

[18] The applicants' applications for leave to appeal were dismissed by the Supreme Court of Appeal.

*In this Court*

*Condonation*

[19] Matjeke's petition to the Supreme Court of Appeal was refused on 3 August 2013, yet he lodged his application to this Court on 19 September 2016. The application is thus out of time by three years. In his explanation for the delay, he states that he has been in prison since 2002 and has no legal knowledge. Due to financial constraints, he cannot afford to engage a legal representative. A fellow prisoner, who was studying law, assisted him in drafting and submitting his application.

[20] Makhubela's petition to the Supreme Court of Appeal was dismissed on 6 August 2013 whilst his application to this Court was lodged on 11 November 2015. His application, which should have been lodged in this Court by 28 August 2013, is late by more than two years. He explains that he has been incarcerated since 2002 and has no legal knowledge. He had previously approached the Legal Aid Board of South Africa for assistance and legal representation but never received a response. Eventually, a fellow inmate, who had obtained an LLB degree whilst in prison, assisted him to prepare his application.

[21] An applicant seeking condonation for the late filing of his or her application has to provide a full explanation for the non-compliance with the Court's Rules. This includes a reasonable explanation for the delay before this Court can grant condonation.[11] On the face of it, the explanation for the delay provided by both applicants is not satisfactory. However, it must be borne in mind that they are sentenced prisoners and that it is not easy for them to access the services of a legal

[11] *Grootboom v National Prosecuting Authority* [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC) states as follows at para 23:

> "It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation of the non-compliance with the rules . . . . Of great significance, the explanation must be reasonable enough to excuse the default."

representative. Makhubela even attempted to seek assistance from the Legal Aid Board but without success.

[22] Another factor to be considered is whether it will be in the interests of justice to grant condonation.[12] Notwithstanding the paucity of the explanation for the delay, I am of the view that it will be in the interests of justice to grant condonation. This is so because, in *Mhlongo*,[13] Matjeke and Makhubela's co-accused were granted condonation by this Court based on similar reasons. Finally, the State will not suffer any prejudice if condonation is granted. Condonation is therefore granted.

*Leave to appeal*

[23] This Court, in *Mhlongo*,[14] granted leave to appeal to two people who had been convicted of murder in respect of the same incident that is the subject of the present applications.[15] In *Molaudzi*, this Court granted leave to a third accused convicted in the trial,[16] and this Court granted leave to a fourth accused in *Khanye*.[17] The four appeals were upheld and the accused in question were released from prison. Matjeke and Makhubela are their co-accused. Therefore, it is in the interests of justice that leave to appeal be granted and that this Court entertain their cases.

[24] In addition, this matter concerns the proper application of the doctrine of common purpose. The doctrine of common purpose involves the attribution of criminal liability to a person who undertakes jointly with another person or persons to commit a crime, even though only one of the parties to the undertaking may have

[12] See *The Head of Department, Department of Education, Limpopo Province v Settlers Agricultural High School* [2003] ZACC 15; 2003 (11) BCLR 1212 (CC) at para 11 and *S v Mercer* [2003] ZACC 22; 2004 (2) SA 598 (CC); 2004 (2) BCLR 109 (CC) at para 4.

[13] *Mhlongo* above n 1 at para 15.

[14] Id at para 17.

[15] Id.

[16] *Molaudzi* above n 1 at para 48.

[17] *Khanye* above n 1 at para 2.

committed the criminal conduct itself.[18] Its effect is therefore far-reaching, and implicates the constitutional rights of freedom of the person and the right to a fair trial, including the right to be presumed innocent.[19]

*The appeal*

[25] These applications were considered and decided without oral argument. The parties were directed to deliver written submissions. Makhubela was not legally represented. This Court therefore requested the Johannesburg Society of Advocates to nominate counsel who would assist him, consider the record of proceedings and thereafter file written submissions on his behalf. Advocate Lawrence Hodes SC of the Johannesburg Bar kindly agreed to assist. This Court is grateful to Advocate Hodes for his assistance and for the Bar's continued provision of pro bono assistance in deserving cases. The State opposed the application and filed its written submissions.

*Submissions*

*Makhubela*

[26] Makhubela challenges the admissibility of the statements that were used as evidence against him. He places reliance on *Mhlongo*. He submits that, if the extra-curial admissions of his co-accused are not utilised to implicate him, then the only remaining evidence is his own oral testimony and his exculpatory pre-trial statement. There, he stated that he had played no role in the planning and commission of the offences. He submits that his convictions and sentences ought to be set aside.

[27] On the other hand, the State submits that other evidence exists that implicates Makhubela notwithstanding his exculpating assertions: the fact that he was in the company of the robbers from the outset, travelled with them to the scene and was

[18] See *S v Thebus* [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) (*Thebus*) at para 18.

[19] Id at para 8.

aware of the firearms in the possession of the other accused. The State therefore submits that Makhubela was correctly convicted.

*Matjeke*

[28] Matjeke did not rely on *Mhlongo*. However, he still challenged the admissibility of the statements made by him and the pointing out. His circumstances are similar to Makhubela's situation. Therefore, the principle enunciated in *Mhlongo* will be considered when evaluating his case. He submits that his statements and the pointing out were not made freely and voluntarily. Furthermore, he submits that the State did not prove the truthfulness of the statements and the pointing out. He further disputes the allegation that he spoke to the investigating officer with the intention of making a confession.

[29] It is apposite at this stage to provide a brief discussion of this Court's decision in *Mhlongo*. That case concerned two co-accused of Matjeke and Makhubela. They were Boswell Mhlongo and Alfred Nkosi. Extra-curial statements made by the accused in the present case had incriminated Mhlongo and Nkosi who argued that the admission of extra-curial statements by an accused against a co-accused violated the Constitution. This Court confirmed the common law position that admissions tendered by an accused against his or her co-accused are not admissible.[20] The Court went on to state that section 219A of the Criminal Procedure Act expressly provides that an admission can be admitted only against its maker and is silent regarding other persons.[21] Therefore, this Court held that the section did not contemplate extra-curial admissions being tendered as evidence against another person.[22] The Court held that extra-curial confessions and admissions by an accused are inadmissible against a co-accused and therefore, the admissions by the applicant's co-accused cannot be used against him.

[20] *Mhlongo* above n 1 at para 30.

[21] 51 of 1977.

[22] See *Mhlongo* above n 1 at para 30. See also *S v Litako and Others* [2014] ZASCA 54; 2015 (3) SA 287 (SCA) at para 54.

[30] This Court restored the common law position that extra-curial statements made by an accused are not admissible against a co-accused. It also said that the only exception at common law was—

> "if the statement constitutes an 'executive statement' by an accused, it may be admissible against a co-accused if it was made in furtherance of a common purpose or conspiracy. There must be other evidence (*aliunde*) to establish the existence of a common purpose before the statements can be taken into account."[23]

[31] In *Mhlongo*, this Court found that the State conceded that the extra-curial statements made by the accused were not "executive"[24] in nature and would therefore not fall under the exception.[25]

[32] When applying the principles enunciated in *Mhlongo* to the facts in these two applications, it follows that this Court has to determine these applications without any reference to the statements by Matjeke and Makhubela's co-accused where they implicated them. In doing so, it must have regard to the circumstances surrounding the commission of the offences, and Matjeke and Makhubela's statements as well as their oral evidence and determine whether there is sufficient evidence outside the extra-curial statements made by their co-accused to warrant their convictions in accordance with the doctrine of common purpose.

[23] *Mhlongo* above n 1at para 39.

[24] Hoffmann and Zeffertt *The South African Law of Evidence* 4 ed (Butterworths, Durban 1988) at 190, explains this by distinguishing between two types of statements that relate to common purpose. These are "executive statements" and "narrative statements". The former are made in furtherance of a common purpose and are admissible evidence against a co-accused while the latter constitute an account or an admission of a past event. Narrative statements are not admissible against a co-accused because admissions in general are not vicariously admissible but may be admissible against the person making them. In other words, in order to be admissible, the statement needs to form part of the acts done in the commission of the crime.

[25] *Mhlongo* above n 1at para 40.

*Statements by the applicants*

*Matjeke*

[33] Matjeke, in his statement, placed himself at the scene of the crime. He stated that he was with his co-accused who were carrying weapons. They had been requested to steal a bakkie and drove near the deceased's house. Matjeke's co-accused alighted from the vehicle, and went inside the deceased's house. They later came back running, carrying an additional firearm. Matjeke confirmed all of this under oath during the trial.

*Makhubela*

[34] Makhubela also placed himself at the scene of the crime with his co-accused, who according to him, had firearms in their possession. His co-accused went inside the deceased's house and he remained in the car. He heard shots being fired. His co-accused returned and started arguing about why the other had shot the deceased and the response was that the deceased had a firearm and would have retaliated. Thereafter they left the scene together.

*Application of the doctrine of common purpose*

[35] The operation of the doctrine of common purpose does not require each participant to know or foresee in detail the exact manner in which the unlawful act and consequence will occur.[26] The doctrine of common purpose in our law is clear.

[36] In *Mgedezi*, the Supreme Court of Appeal stated:

> "In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates. Thirdly, he must have intended to have common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of

[26] *S v Molimi* [2006] ZASCA 43 (*Molimi*) at para 33.

> association with the conduct of others. Fifthly, he must have had the requisite *mens rea*."[27]

[37] In *Thebus*, this Court reiterated the principle of common purpose and explained what the "requisite *mens rea*" entails if the prosecution relies on this doctrine. The Court stated:

> "If the prosecution relies on common purpose, it must prove beyond a reasonable doubt that each accused had the requisite *mens rea* concerning the unlawful outcome at the time the offence was committed. That means that he or she must have intended that criminal result or must have foreseen the possibility of the criminal result ensuing and nonetheless actively associated himself or herself reckless as to whether the result was to ensue."[28]

[38] Finally, in *Dewnath* it was held:

> "The most critical requirement of active association is to curb too wide a liability. Current jurisprudence, premised on a proper application of *S v Mgedezi*, makes it clear that (i) there must be a close proximity in fact between the conduct considered to be active association and the result; and (ii) such active association must be significant and not a limited participation removed from the actual execution of the crime."[29]

[39] In this matter, Matjeke and Makhubela admit to being part of the group but deny any involvement in the commission of the offences and on that basis submit that they could not be associated with the murder on the evening of 3 August 2002. In my view, this submission is without merit. This conclusion is supported by Makhubela's conduct and what transpired once they left Matjeke's home. On the day of the incident, Matjeke spent the afternoon with Makhubela. They also left with their co-accused in the same car and travelled together to Mothotlung. They spent time at the

[27] *S* v *Mgedezi* 1989 (1) SA 687(A) (*Mgedezi*) at 705I-6C.

[28] *Thebus* above n 18 at para 49.

[29] *Dewnath v S* [2014] ZASCA 57 at para 15.

same tavern upon their arrival. Finally, they placed themselves at the scene of the crime with their co-accused who, they knew, had firearms. Therefore, the fact that Matjeke and Makhubela were at the scene of the crime was no chance event and suggests that it wascoordinated.

[40] Moreover, there is no evidence that Matjeke and Makhubela were at any stage coerced to travel and remain with the group. If they had not known about the plan or had not intended to be involved in any manner, then they should have enquired from their co-accused what their intentions were when they parked the vehicle at a distance from the scene of the fatal shooting. Or, at least, they should have raised questions once they became aware that their co-accused had been carrying firearms and when the armed men had alighted and proceeded to the house. In that case, they should have distanced themselves from their co-accused. They did not do so but remained at the scene with the other accused waiting for the armed robbers to return. After hearing the gunshots, they did not question the actions of their co-accused, nor did they flee or disassociate themselves from them in any way. Upon their return, they did not ask why the vehicle had to be driven at a very high speed from the scene or where the extra firearm had come from. They claim they merely boarded the vehicle and waited for their co-accused to return. Instead, they cooperated with their co-accused. The fact that they were not under duress and had every chance to object or leave suggests that they had an understanding with their co-accused to participate in criminal activity. So it is reasonable to infer that Matjeke and Makhubela, far from being caught up unawares in illicit conduct, had an intention to commit a crime with their co-accused.

[41] Having regard to the facts, it is evident that Matjeke and Makhubela's cases are distinguishable from those of their co-accused, that is, Mhlongo, Nkosi, Molaudzi, Moyo and Khanye, whose appeals this Court has upheld. Unlike in those cases, the State was able to provide sufficient evidence linking Matjeke and Makhubela to the commission of the crimes. This consisted principally in their own admission, under oath during the trial, that they were knowingly at the scene of the murder, plus the trial

court's rightful rejection of their implausible self-exculpations. Mhlongo, Nkosi, Molaudzi, Moyo and Khanye were all convicted on the sole strength of, first, their proximity to the crime scene; and, second, the incriminating references to them in their co-accused's extra-curial statements.

[42] Matjeke and Makhubela's position here is different. Their own pre-trial statements implicated them closely in the events. Those statements the trial court ruled admissible. Their contention that the only evidence against them is inadmissible is without merit. There is sufficient evidence against them to show that they had participated in the robbery under a common purpose with those who actually committed the robbery.

[43] The evidence shows that the requirements for a conviction on the basis of common purpose set out in the Supreme Court of Appeal's judgment in *Mgedezi*, quoted above, have been met in relation to the charge of armed robbery.[30] It is clear that the applicants were present at the scene of the crime and were aware of the armed robbery. They, therefore, made common cause with those committing the armed robbery. The applicants manifested their sharing of a common purpose with the perpetrators of the armed robbery by performing an act of association with the conduct of the others in the form of travelling with them to and away from the scene of the crime, and they had the requisite *mens rea* to commit the armed robbery. It follows that their convictions in respect of the robbery charge must stand.

[44] The same applies in the case of the murder charge. On the issue of *mens rea* in the case of the murder charge, the requirement that they must have had the requisite *mens rea* as set out in *Thebus* above has been met.[31] The applicants may not have intended the criminal result of murder, but they must have "foreseen the possibility of

[30] *Mgedezi* above n 27 at 705I-6C.

[31] *Thebus* above n 18 at para 49.

the criminal result [of murder] ensuing".[32] This is by virtue of the fact that the other perpetrators were carrying firearms, which they must have known would be used if the plan went awry, yet they nonetheless actively associated themselves with the criminal acts. It follows that their convictions in respect of the murder charge must also stand. The appeal against these convictions therefore fails.

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

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

> "The issues which arise in deciding whether the group (and hence the appellant) possessed the guns must be decided with reference to the answer to the question whether the State has established facts from which it can properly be inferred by a Court that: (a) the group had the intention (*animus*) to exercise possession of the guns through the actual detentor and (b) the actual detentors had the intention to hold the guns on behalf of the group. Only if both requirements are fulfilled can there be joint possession involving the group as a whole and the detentors, or common purpose between the members of the group to possess all the guns."[33]

[47] This test has since been cited with approval in numerous judgments of the High Court and the Supreme Court of Appeal. In these judgments, the courts have found perpetrators guilty of a crime involving the use of firearms on the basis of the doctrine of common purpose, but nevertheless found that the perpetrators could not be found to

[32] See above [37].

[33] *S v Nkosi* 1998 (1) SACR 284 (W) at 286H-I. .

be guilty of the unlawful possession of firearms on the basis of this doctrine.[34] The test takes into account the fact that the application of the doctrine of common purpose differs in relation to "consequence crimes", such as murder, and in relation to "circumstance crimes", such as possession. Burchell in *Principles of Criminal Law*, differentiates between the two as follows:

> "The common-purpose rule is invoked in the context of consequence crimes in order to overcome prosecutorial problems of proving the normal causal contribution between the conduct of each and every participant and the unlawful consequence. Strictly speaking, the rule has no application in the context of criminal conduct consisting only of circumstances."[35]

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

> "Unlawful possession of a firearm is punished under section 2 of the Firearms Control Act. *Mbuli* emphasised that unlawful possession of a firearm is a circumstance (or state of affairs) crime, that possession had to be personal or joint and that it is not enough to establish joint possession that the firearm was possessed by only one member in a criminal group in furtherance of a criminal purpose with others. Nugent JA in *Mbuli* did not accept the reasoning of the Supreme Court of Appeal in *Khambule* and emphasised that a common intention to possess a firearm intentionally can only be inferred when the group had the intention (*animus*) to exercise possession of the firearm through the actual detentor and the actual detentor had the intention to hold the firearm on behalf of the group [the test set out in *S v Nkosi*]. This test has been followed in a number of Supreme Court [of Appeal] cases."[36]

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[34] See: *S v Ramoba* [2017] ZASCA 74 (*Ramoba*); *S v Ngwane* [2015] ZAGPJHC 166; *Bolo v S* [2014] ZAECGHC 99 (*Bolo*); *S v Modiba* [2013] ZAGPJHC 14 (*Modiba); S v Dingaan* [2012] ZAECGHC 42 (*Dingaan*); *Kwanda v S* [2011] ZASCA 50 (*Kwanda*); *S v Mbuli* [2002] ZASCA 78 (*Mbuli); Molimi* above n 26.

[35] Burchell *Principles of Criminal Law* 5 ed (Juta & Co Ltd, Cape Town 2016) at 483.

[36] Id at 484.

[49] In *Molimi*, the Supreme Court of Appeal upheld the appellant's convictions in the court *a quo* of murder and robbery, but overturned their convictions for unlawful possession of firearms and ammunition. The Supreme Court of Appeal said:

> "Counts 5 and 6 relate to the unlawful possession of firearms and ammunition. It is common cause that the appellants, at no stage, had physical possession of any firearms themselves. Despite this they were convicted on these counts. The State sought to defend these convictions on the basis of the decision by this court in *S v Khambule* where it was held that the common intention to possess firearms jointly may be inferred in the circumstances of a particular case. . . . It follows that *Khambule* was overruled by *Mbuli*, and is no longer good law. The State's reliance on it is therefore misplaced. Having failed to meet the requirements as stated in *Nkosi*, the State had not established any basis for the conviction of the appellants. The convictions on these counts must therefore also be set aside."[37]

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

> "The fact that the appellant conspired with his co-accused to commit robbery, and even assuming that he was aware that some of his co-accused possessed firearms for the purpose of committing the robbery, does not lead to the inference that he possessed such firearms jointly with his co-accused."[38]

[51] The Court in *Dingaan* endorsed *Mbuli*, applying the test as set out in *Nkosi* and similarly stating expressly that "acquiescence in [the firearm's] use for fulfilling the common purpose of robbery is not sufficient to establish liability as a joint possessor."[39]

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

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[37] *Molimi* above n 26 at paras 37-8.

[38] *Kwanda* above n 34 at para 5.

[39] *Dingaan* above n 34 at para 5. See also *Mbuli* above n 34.

"With regard to the remaining charges of unlawful possession of a firearm as well as ammunition, there are numerous cases where the question of joint possession of a firearm in the execution of a common purpose was considered . . . . In this case however, it has not been established as to who physically possessed the firearm. Although I found that the accused for purposes of this judgment, conspired with his companion(s) to commit the various acts of robbery and murder, the State still has an onus to prove that the accused had the necessary mental intention (*animus*) to possess the firearm. . . . What the SCA held in *S v Kwanda* . . . is apposite. 'The fact that appellant conspired with his co-accused to commit robbery, and even assuming that he was aware that some of his co-accused possessed firearms for the purpose of committing the robbery, does not lead to the inference that he possessed such firearms jointly with his co-accused.'"[40]

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

"*Mbuli* was confirmed to be correct in *S v Kwanda*, in which Theron JA stated that the mere fact that the appellant conspired with his co-perpetrators to commit robbery and was aware that some of them were armed with firearms in order to commit the robbery 'does not lead to the inference that he possessed such firearms jointly with his co-accused'. On the basis of these authorities it appears to me that the magistrate erred in his approach to the issue before him. He decided that because all of the accused knew that one of them possessed a firearm and all were in agreement that it should be used in the robbery, all of them were joint possessors. As with *Mbuli*'s case, there is no evidence to show who had physical possession of the firearm, so it cannot be established whether the actual possessor had the intention to possess it on behalf of the group. There is also no evidence from which it can be inferred that the members of the group intended to possess the firearm jointly with the unknown physical possessor."[41] (Footnote omitted.)

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

[40] *Modiba* above n 34 at paras 51-3.

[41] *Bolo* above n 34 at paras 15-6.

> "The principles of joint possession in relation to the crime of unlawful possession of firearms in instances of robbery committed by a group of people, as in this case are trite. They were aptly explained by Marais J in *S v Nkosi* who, after finding in that case that there was actual physical possession (*corpus*) of the three guns by the three robbers individually, stated that the only question to be decided was whether there was the necessary mental intention or animus to render their physical possession of the guns, possession by the group as a whole. The learned judge then said that the question of whether the group (and hence the appellant) possessed the guns had to be decided with reference to the issue of whether the State had established, on the facts from which it could be inferred by a court, firstly, that the group had the intention (*animus*) to exercise possession of the guns through the actual detentor and secondly, the actual detentors had the intention to hold the guns on behalf of the group."[42] (Footnote omitted.)

[55] These cases show that there would be very few factual scenarios which meet the requirements to establish joint possession set out in *Nkosi*. This is because of the difficulty inherent in proving that the possessor had the intention of possessing a firearm on behalf of a group. It is clear that, according to established precedent, awareness alone is not sufficient to establish intention of jointly possessing a firearm or the intention of holding a firearm on behalf of another in our law.

[56] When applying *Nkosi* to the facts of the case at hand, there is no evidence from which it can be inferred that the applicants had the intention to exercise possession of the firearms through the perpetrators who had firearms in their possession, or that those persons had the intention to hold the firearms on behalf of all of the co-accused. It follows that the fact that Matjeke and Makhubela conspired with others to commit armed robbery, even if they were aware that some of their co-accused possessed firearms, does not lead to the conclusion beyond reasonable doubt that they possessed the firearms jointly with their co-accused.

[42] *Ramoba* above n 34 at para 11.

[57] There is thus insufficient factual basis to sustain the conviction of unlawful possession of firearms and ammunition on the basis of the doctrine of common purpose. The trial court therefore erred in finding Makhubela and Matjeke guilty on these counts. It follows that the convictions in respect of the unlawful possession of the firearms and ammunition cannot stand and must be set aside. The appeal against these convictions (counts 4 and 5) therefore succeeds, though given the life sentences meted out for murder, this has no practical effect on the applicants' incarceration.

*Order*

[58] In the result, the following order is made:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeals are partially upheld.
4. The order of the Full Court of the High Court of South Africa, North West Division, Mahikeng is set aside only to the extent set out below:

   "(a) The appeal by the applicants against their convictions on counts 4 and 5 is upheld.

   (b) Their convictions and sentences on these counts are set aside."

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| For George Sipho Makhubela: | L Hodes SC at the request of the Court from the Johannesburg Bar |
| For the State: | U Mokone, Director of Public Prosecutions, Mmabatho |