THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 345/2019

In the matter between:

MOSHIDI DANNY LESHILO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Leshilo v The State* (345/2019) [2020] ZASCA 98 (8 September 2020)

Coram: DAMBUZA, VAN DER MERWE, NICHOLLS JJA and LEDWABA and GOOSEN AJJA

Heard: Matter disposed of without oral hearing in terms of s 19*(a)* of the Superior Courts Act 10 of 2013.

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 8 September 2020.

Summary: Joint possession of illegal firearm and ammunition – principles of common purpose not applicable – requirements of joint possession not proved beyond reasonable doubt – no evidence that accused intended to possess firearm through physical possessor.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Khumalo J and Holland-Mutter AJ sitting as court of appeal):

1 Condonation for the late filing of the appellant's heads of argument is granted.

2 The appeal is upheld in respect of count 2 and count 3 and the convictions on these counts are set aside.

3 The appeal in respect of sentence is upheld. The sentence of 15 years imprisonment is set aside and is replaced with the following sentence:

'The appellant is sentenced to 5 years imprisonment on count 1, ante-dated to 11 June 2014'.

JUDGMENT

Nicholls JA (Dambuza and Van Der Merwe JJA and Ledwaba and Goosen AJJA concurring):

[1] The primary issue in this appeal is whether the appellant was in joint possession of a firearm. The appellant, who was accused 1 in the trial court, was charged with three counts. The first count was house breaking with the intent to rob, and robbery with

aggravating circumstances. A firearm was used in the commission of the offence. The second and third counts were the unlawful possession of the firearm and the unlawful possession of ammunition, respectively.

[2] On 11 June 2014, the regional court, Pretoria convicted the appellant of the lesser offence of house breaking with the intent to commit an unknown offence, in respect of count 1. He was also convicted on counts 2 and 3. For the purposes of sentencing the three counts were taken together and a sentence of 15 years imprisonment was imposed. The appellant's co-accused, who was accused 2 in the trial court, was acquitted on all counts on the basis that the state had not proved his identity as one of the perpetrators, beyond reasonable doubt.

[3] The regional court granted leave to appeal against sentence and conviction. On 12 October 2017 the High Court, Gauteng Division dismissed the appeal in its entirety. Special leave was granted by this Court both on conviction and sentence. The appellant appeals against his conviction only in respect of counts 2 and 3, and the globular sentence of 15 years.

[4] The facts briefly set out are as follows. The complaint, Mr Mahlangu and his partner, Ms Maraba, ran an informal spaza shop from their home in Mamelodi East. When they went to sleep on the night of 27 August 2013, they left a cash sum of R1 700 on the table. In the early hours of the morning of 28 August 2013, at approximately 3h00, two men entered their home while they were asleep with their child.

[5] According to Mr Mahlangu the first assailant to enter the house was accused 2 who pointed a firearm at him. He recognised him as one of the customers who would buy airtime from their spaza shop from time to time. This identification the trial court held was insufficient to ground a conviction. Mr Mahlangu jumped out of bed, threw a blanket over the first intruder and wrestled with him to get hold of the firearm. In the ensuing struggle a shot went off. This prompted the first assailant to flee. By this stage another intruder, the appellant, had entered the room. Mr Mahlangu pointed the firearm

at him and it appears there was a scuffle over the firearm. At no stage did the appellant possess the firearm.

[6] The gunshot and the screams of Ms Maraba had awoken the neighbours. Mr Nkosi, the next-door neighbour, went outside, thinking the attack was in his yard, but then rushed to the next-door house where Ms Maraba opened the security door for him. He saw the appellant in a skirmish with Mr Mahlangu. The firearm was lying on the floor. He managed to apprehend the appellant as he was trying to exit the security doors. He also picked up a cell phone which had been dropped in the commotion. Mr Nkosi then went outside and handed the appellant over to members of the community who had gathered in the yard while he went into his house to fetch his cell phone and call the police. When he returned, he found that the community had assaulted the appellant and tied him to the gate pole from his waist.

[7] Ms Maraba confirmed Mr Mahlangu's evidence that the appellant came into the room after the first assailant had entered and pointed a firearm at them. After the first assailant fled leaving the firearm in the possession of Mr Mahlangu, the appellant had a skirmish with her husband over the firearm and then tried to also run away. He was apprehended by Mr Nkosi at the door and taken outside

[8] When the police arrived the appellant was handed over to them, together with the firearm, the cell phone found in Mr Mahlangu's house and a bullet that had penetrated Mr Nkosi's home. At some stage the R1 700 disappeared from the table at Mr Mahlangu's home. None of the witnesses saw it being taken.

[9] It is not disputed that the appellant gained entry to the premises by removing a piece of corrugated iron from the structure, with the intention to commit a criminal act. The only issue for determination on conviction is whether the appellant should have been found guilty of possession of an unlawful firearm and ammunition. A finding in the appellant's favour would impact on the combined sentence of 15 years for all three offences.

[10] There has been some confusion regarding the application of the principles of common purpose and joint possession where firearms are utilised in the course of a robbery or a house breaking. Accused persons are frequently convicted of robbery with aggravating circumstances on the basis of common purpose, even if their role is relatively minor. In the absence of proof of a prior agreement, what has to be shown is that the accused was present together with other persons at the scene of the crime; aware that a crime would take place; and intended to make common purpose with those committing the crime as evidenced by some act of association with the conduct of the others.[1] However, the principles of common purpose do not find application when convicting an accused for the unlawful possession of the firearm used in the same robbery. Instead it is the principles of joint possession that apply.

[11] The test for joint possession of an illegal firearm and ammunition is well established. The mere fact that the accused participated in a robbery where his co-perpetrators possessed firearms does not sustain beyond reasonable doubt, the inference that the accused possessed the firearms jointly with them. In *S v Nkosi* it was held that this is only justifiable if the factual evidence excludes all reasonable inferences other than (a) that the group had the intention to exercise possession through the actual detentor and (b) the actual detentor 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.[2]

[12] This Court in *S v Mbuli*[3] pointed out that where the offence is 'possession' of a firearm (or in that case a hand grenade) it is not the principles of common purpose that have application, but rather those relating to joint possession. A conviction of joint possession can only be competent if more than one person possesses the firearm. The court found that mere knowledge by others that one member of the group possessed a hand grenade, or even acquiesced to its use in the execution of their common purpose to commit a crime, was not sufficient to make them joint possessors thereof. In coming

[1] *S v Mgedzi* 1989(1) SA 687 (A) at 705-706.
[2] *S v Nkosi* 1998 (1) SACR 284 (W).
[3] *S v Mbul*i 2003 (1) SACR 97 (SCA).

to its conclusion this Court overruled its previous decision in *S v Khambule*[4], where it was held that the mere intention on one or more members of the group to use a firearm for the benefit of all of them would suffice.

[13] The Constitutional Court, in *Makhubela v S*[5], confirmed the reasoning in various cases of this Court and, in particular, that *S v Khambule* had been correctly overruled by *S v Mbuli*.[6] As observed by the Constitutional Court[7] there will be few factual scenarios which meet the requirements of joint possession where there has been no actual physical possession. This is due to the difficulty inherent in proving that the possessor had the intention of possessing the firearm on behalf of the entire group, bearing in mind that being aware of, and even acquiescing to, the possession of the firearm by one member of the group, does not translate into a guilty verdict for the others.

[14] In this case the regional court found the appellant guilty on counts 2 and 3 on the basis that he must have known that the first intruder had possession of a firearm and acted in concert with him. The full court correctly held that the doctrine of common purpose was not applicable but found the appellant guilty on the basis of joint possession. Relying on a decision of that division, *S v Motsema*,[8] the full court found that because the appellant entered after the first intruder had 'bridged' his firearm this was an indication of his intention to benefit from the possession of the firearm and the first intruder's intention to possess and use the firearm for the benefit of the appellant. Therefore, so it was held, the state had proved that the appellant intended to possess the firearm through the first intruder.

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[4] *S v Khambule* 2001 (1) SACR 501 (SCA).
[5] *Makhubela v S, Matjeke v S* [2017] ZACC 36; 2017(2) SACR 665 (CC).
[6] *S v Molimi and Another* [2006] ZASCA 43; 2006 (2) SACR 8 SCA para 38 which stated that *Khambule* was overruled by *Mbuli*; see *Ramoba v S* [2017] ZASCA 74; 2017 (2) SACR 353 (SCA) para 11 wherein Mbha JA said 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 are trite, the only question being whether there was necessary intention or animus to render the physical possession of the guns to the group as a whole.
[7] *Makhubela v S* para 55.
[8] *S v Motsema* 2012(2) SACR 96 (GS) para 23 where it was held that the common purpose to disarm the security guards embraced the intention on the part of each member of the group that the individual robbers who were to take possession of the guards' weapons did so on behalf of the entire group.

[15] The reasoning of the full court cannot be supported. In this instance an intention to possess the firearm on the part of the appellant is not the only inference to be drawn from the established facts. It is common cause that the first intruder was the one who possessed the firearm and that the appellant was unarmed. Even accepting that the appellant knew that his co-perpetrator possessed the firearm and knew that he would use it in the execution of a common purpose to commit the housebreaking, he cannot be considered a joint possessor, on the principles set out in the cases above. Knowledge of the firearm, and even acquiescence to its use for fulfilling the common purpose of robbery, is insufficient to establish guilt as a joint possessor. There is no evidence from which it can be said that the only reasonable inference to be drawn is that the appellant intended to possess the firearm jointly with the physical possessor. Accordingly, the appeal on conviction in respect of counts 2 and 3 should succeed.

[16] This necessitates a consideration of the sentence of 15 years. Globular sentences for multiple convictions are generally to be discouraged. They pose difficulties on appeal if one or more convictions are set aside, as in the present matter. The interests of justice are better served when both the accused and society know and understand exactly what sentence is being imposed for each particular offence.

[17] The lesser offence of house breaking of which the appellant has been convicted is subject to a prescribed minimum sentence in certain circumstances. Section 51(2)*(c)*(i) of the Criminal Amendment Act 105 of 1997 prescribes a minimum sentence of 5 years imprisonment for a first offender “if the accused had with him or her at the time a firearm, which was intended for use as such, in the commission of such offence.” Having found that the appellant was, at no time, in possession of the firearm, the provisions of s 51(2)*(c)*(i) are not applicable.

[18] It was submitted that consideration should be given to the fact that the appellant was 20 years old at the time of the offence, was a first offender and spent 10 months in custody awaiting trial. In addition, Mr Mahlangu was not badly injured, only suffering a

small cut to his finger and only a single shot was fired during the struggle for possession of the firearm.

[19] These mitigating factors should be seen in context and weighed against the aggravating factors. It must have been a terrifying ordeal for Mr Mahlangu and Ms Maraba to wake up in the early hours of the morning with a gun pointed to their heads. Their child was present. It was only due to Mr Mahlangu's quick thinking that the intruders were disarmed. Their takings from the spaza shop were never returned. Home invasions, especially where a firearm is used are to be decried in the strongest terms. They inevitably have profound psychological effects and cause feelings of extreme vulnerability. All South Africans are entitled to feel safe in the sanctity of their homes. This is a basic human right whether one's home is a corrugated iron structure, like that of Mr Mahlangu and Ms Maraba, or a palatial mansion.

[20] On the facts of this case a sentence of five years in respect of count 1 is entirely appropriate. This is so, even though the minimum sentencing regime is not applicable.

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

1 Condonation for the late filing of the appellant's heads of argument is granted.

2 The appeal is upheld in respect of counts 2 and count 3 and the convictions on these counts is set aside.

3 The appeal in respect of sentence is upheld. The sentence of 15 years imprisonment is set aside and is replaced with the following sentence:

'The appellant is sentenced to 5 years imprisonment on count 1, ante-dated to 11 June 2014'.

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C H NICHOLLS

JUDGE OF APPEAL

APPEARANCES:

Prepared by:	S Kruger.
Instructed by:	Justice Centre, Pretoria
	Justice Centre, Bloemfontein
Prepared by:	M Jansen van Vuuren
Instructed by:	The Director of Public Prosecution, Pretoria
	The Director of Public Prosecution, Bloemfontein