IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Before:
The Hon Mr Justice P A L Gamble
The Hon Mr Justice M J Dolamo
The Hon Mr Justice L G Nuku

Case No: A59/2022

In the matter between:

XOLA NAKUMBA Appellant

and

THE STATE Respondent

Date of hearing : *17 July 2023*
Date of Judgment : *10 November 2023 (Delivered electronically)*

J U D G M E N T

NUKU J (GAMBLE and DOLAMO JJ concurring):

Introduction

[1] The appellant, together with his four co-accused, appeared in this court, before Langa AJ (**trial court**), each facing eleven charges, namely robbery with aggravating circumstances (**count 1**), murder (**count 2**), unlawful possession of a firearm in

contravention of s 3 of the Firearms Control Act 60 of 2000 (**Firearms Control Act**) (**count 3**), two counts of unlawful possession of ammunition in contravention of s 90 of the Firearms Control Act (**counts 4 and 9**), money laundering as contemplated in section 4 of the Prevention of Organised Crime Act 121 of 1998 (**POCA**) (**count 5**), acquisition, possession, or use of unlawful proceeds of unlawful activities as contemplated in section 6 of POCA (**count 6**), attempted robbery with aggravating circumstances (**count 7**), possession of a prohibited firearm in contravention of section 4 of the Firearms Control Act (**count 8**), possession of a dangerous weapon in contravention of section 2 (1) of the repealed Dangerous Weapons Act, 71 of 1968 (**repealed Dangerous Weapons Act**) (**count 10**), failure to give satisfactory account of possession of car- breaking or housebreaking implements as contemplated in section 82 of the General Law Third Amendment Act, 129 of 1993 (**General Law Third Amendment Act**) (**count 11**) and malicious injury to property (**count 12**).

[2] The charges arose out of two incidents that occurred in Strandfontein, Mitchells Plain and Cavendish Square, Claremont on 20 September 2016 and 21 September 2016, respectively. In the first incident, Mr Grant Llewellyn Fredericks was shot dead and robbed of his motor vehicle, a red Volkswagen Polo with registration letters and numbers [redacted] (**stolen vehicle**). In the second incident, an attempt was made to rob Trigg Jewellers, a jewellery store in Cavendish Square, Claremont (**Trigg Jewellers**).

[3] The trial court found no evidence of appellant's involvement in the first incident and he was accordingly acquitted on counts 1 to 4. He was convicted in respect of the remainder of the charges and sentenced to five (**5**) years' imprisonment in respect of counts 5 and 6 that were taken together for the purpose of sentence, ten (**10**) years' imprisonment in respect of count 7, six (**6**) years' imprisonment in respect of count 8, two (**2**) years' imprisonment in respect of count 9 that was ordered to run concurrently with the sentence imposed in respect of count 8, and three (**3**) years' imprisonment in respect of counts 10 to 12 that were taken together for the purposes of sentence and also ordered to run concurrently with the sentence imposed in respect of count 7. Effectively, the appellant was sentenced to undergo imprisonment for a period of twenty one (**21**) years.

[4] This appeal, with the leave of the trial court, is against the appellant's conviction on counts 5, 6, 10 to 12 as well as sentence. The trial court refused leave in respect of appellant's conviction on counts 7 to 9.

[5] Two main issues arise for determination in this appeal. The first is whether the evidence adduced by the state was sufficient to sustain the convictions under consideration in this appeal. The second is whether the sentence imposed by the trial court was appropriate. It is necessary to set out the relevant facts before considering these issues.

Factual Background

[6] The trial court gave a detailed account of the evidence led during trial and I summarise here only the evidence relevant to the counts under consideration in this appeal. The appellant and his co-accused were arrested after their failed attempt to rob Trigg Jewellers. What happened at Trigg Jewellers was captured on a video recording camera, the video footage of which was presented in court as part of the state's evidence against the appellant and his co-accused.

[7] In brief, the video footage shows the following: Mr Mongameli Dyani (**Mr Dyani**), who was accused number 5 during the trial approached the entrance to Trigg Jewellers pretending to be a customer. Ms Natasha Theresa Greef (**Ms Greeff**), an employee at Trigg, opened the gate to let Mr Dyani in. The appellant and Mr Themba Jilaji (**Mr Jilaji**), who was accused number 4 during the trial, who were not far off behind Mr Dyani also tried to enter the store but could not as Ms Greeff had closed the gate which had been left open by Mr Dyani. The appellant and Mr Jilaji walked away from Trigg Jewellers, and as they were doing so Mr Siphokuhle Bulana (**Mr Bulana**), who was accused number 2 during the trial, came rushing behind them and forced his way inside the store. Once inside, he chased Ms Greeff around the store and at some point, took out a screwdriver that he used to break a cabinet where jewellery is kept. The appellant and Mr Jilaji turned around and tried once more to enter the store, without any success. An alarm as well as some smoke dispensing device were activated causing Mr Dyani and Mr Bulana to run out of the store.

[8] In the meantime, Sergeant Brandon George (**Sergeant George**), who had been patrolling the Claremont area and who had received information about the stolen vehicle saw it parked on the side of the road near the corner of Warwick and Osborne streets in Claremont. Inside the stolen vehicle was one occupant, Mr Zingisile Kleinhans (**Mr Kleinhans**) who was accused number 1 during the trial. Sergeant George noticed that both number plates of the stolen vehicle had been removed and the number plate at the back had been replaced with a number plate belonging to another vehicle.

[9] Sergeant George called for backup, and not long thereafter they surrounded the stolen vehicle. Mr Kleinhans jumped out and tried to flee but was soon apprehended. He was taken back to the stolen vehicle that was searched in his presence and a five-pound hammer was found in the boot.

[10] As the police were still busy with Mr Kleinhans, they noticed a group of four men who appeared to have been running towards the stolen vehicle. These four men were, the appellant, Mr Bulana, Mr Jilaji and Mr Dyani. On seeing that the police had surrounded the stolen vehicle, the four men changed direction and continued running. Some of the security personnel of Cavendish Square were chasing the four men and the police joined in and also gave chase.

[11] One of the police officers who gave chase was Sergeant Akhona Gura (**Sergeant Gura**). He is the one who ultimately apprehended the appellant. Before apprehending the appellant, he saw the appellant throwing an object away as he was running. After

apprehending the appellant, Sergeant Gura went back to the object that the appellant had thrown away and he (Sergeant Gura) discovered that this was a firearm.

[12] The police also apprehended Mr Jilaji, who had thrown away a lap top bag prior to him being apprehended. Mr Jilaji, after he was apprehended, was taken back to the laptop bag that he had thrown away, and upon opening it, the police found a black toy gun as well as a five-pound hammer inside it.

[13] Mr Dyani, in the process of running away from the police ran through workshop of Mr Desmond Wilfred van Oord (**Mr van Oord**) where Mr Van Oordt had parked his motor vehicle, a Jeep Patriot with registration letters and numbers [redacted] (**Jeep**). As Mr Dyani jumped over a wall, he landed on the bonnet of the Jeep as a result of which there was some damage thereto. Having summarised the evidence relevant to the charges under consideration in this appeal, I now turn to consider whether the evidence adduced by the state was sufficient to sustain the convictions. I consider first counts 5 and 6 as they are closely related.

Counts 5 and 6

[14] It is helpful to set out the charges before considering whether the convictions are sustainable on the evidence presented. Count 5, which in essence relates to the removal and replacement of the number plates of the stolen vehicle is framed as follows:

> 'the state alleges that the accused are guilty of the contravention of Section 4 read with Section 1 and 8 of the Prevention of Organized Crime Act, 121 of 1998 [Money Laundering] in that on or about 20 September 2016 to 21 September 2016 and at or near

Strandfontein and Claremont Mall, in the districts of Mitchells Plain and Wynberg, the accused, who knew or ought reasonably to have known that property was or formed part of the proceeds of unlawful activities, entered into agreements or engaged in arrangements or transactions whether such agreement, arrangement or transaction is legally enforceable or not with persons unknown to the State in connection with that property or performed any other act in connection with such property whether performed independently or in concert with other persons unknown to the State, which had or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere to avoid prosecution; or to remove or diminish any property acquired directly or indirectly, as a result of the commission of an offence by **removing the number plates and licence disc of the Volkswagen Polo** they had robbed on 20 September 2016 at Milano Way, Strandfontein and **using the said vehicle in the execution of the attempted robbery** on 21 September 2016 at Cavendish Square, Claremont.' (own emphasis)

[15] Count 6, which relates to the acquisition, use or possession of the stolen vehicle reads:

'the state alleges that the accused are guilty of the contravention of Section 6 read with Section 1 and 8 of the Prevention of Organized Crime Act, 121 of 1998 [Acquisition, Possession or Use of the Proceeds of Unlawful activities] in that on or about 20 September 2016 to 21 September 2016 and at or near Strandfontein and Claremont Mall, in the districts of Mitchells Plain and Wynberg, **the accused acquired; used, or had in their possession a red Volkswagen Polo with registration number** [redacted] **of which the number plates and licence disc had been removed** and knew or ought reasonably to have known that it is or formed part of the proceeds of unlawful activities of another person.' (own emphasis)

[16] It was submitted on behalf of the appellant that the state led no evidence to sustain the convictions in respect of both counts 5 and 6. The nub of the submission is that the

appellant, having been acquitted in respect of the robbery of the stolen vehicle, the state led no evidence that he was either involved in the removal of the number plates and registration papers of the stollen vehicle or in its acquisition and that he had possession thereof or had used it knowing that it constituted proceeds of crime.

[17] It was contended on behalf of the state that there was circumstantial evidence implicating the appellant in the commission of the offences in count 5 and 6. This evidence included, it was submitted, (a) the video evidence pointing to the presence of the appellant and some of his co-accused at or near Trigg Jewellers on 19 September 2016, (b) the robbery of the stolen vehicle a day later, on 20 September 2016, and (c) the attempted robbery at Trigg Jewelers on 21 September 2016. It was submitted that the aforesaid evidence constitutes proof of an agreement or arrangement for the robbery of the stolen vehicle to be used as a getaway vehicle after the robbery of Trigg Jewellers. Reference was also made to the cellphone communication between Mr Kleinhans and Mr Jilaji between 20 and 21 September 2016 as support for the submission that the appellant and all four of his co-accused were acting together in a coordinated fashion. From this evidence, it was further submitted, that the appellant was part of the planning and execution of the Trigg Jewellers robbery, and must have taken part or known about the acquisition, use and possession of the stolen vehicle, as well as the removal and replacement of number plates and registration documents of the stolen vehicle.

[18] During the course of argument, Mr Isaacs, who appeared for the state was requested to clarify whether the appellant, in count 5, had been charged under s 4 (a) or

4 (b) of POCA. This was because it was not clear in respect of which of these subsections the appellant had been charged. His response, after some reluctance, was that the appellant had been charged under the provisions of s 4(b) of POCA. When the court took him through the elements of the offence contemplated in s 4 (b) of POCA, he was constrained to concede that there is insufficient evidence from which a reasonable inference could be drawn that the appellant knew about the removal and replacement of the number plates as well as the removal of the registration documents of the stolen vehicle. He also made a similar concession in respect of count 6, that there is insufficient evidence from which a reasonable inference could be drawn that the appellant acquired, or used or was in possession of the stolen vehicle.

[19] The above concessions were well made because there was no evidence that the appellant was party to the removal and falsification of the stolen vehicles' registration papers and number plates. There was also no evidence to suggest that he knew that the registration papers and number plates were either removed or falsified. His presence at or near Trigg Jewellers on 19 and 21 September 2016, as well as the fact that they were running towards the stolen vehicle when their robbery attempt failed are insufficient for the purposes of drawing an inference that he committed the offences in counts 5 and 6. The appeal therefore should succeed in respect of these counts. Next, I consider count 10.

Count 10

[20] This charge is based on the repealed Dangerous Weapons Act that had already been repealed at the time of the alleged commission of the offence. The Dangerous Weapons Act 15 of 2013 (**Dangerous Weapons Act**) repealed the repealed Dangerous Weapons Act effectively from 21 October 2013.

[21] This charge arose from the possession by Mr Jilaji of a toy gun that was found in his lap top bag. The Dangerous Weapons Act contains no provisions similar to the repealed Dangerous Weapons Act that criminalizes the possession of a toy gun. That being the case, nothing more needs to be said about this charge except to say that the conviction is unsustainable. I turn next to count 11.

Count 11

[22] This charge relates to the possession a screwdriver by Mr Bulana, a five-pound hammer that was found in the boot of the stolen vehicle, as well as another five-pound hammer found in Mr Jilaji's lap top bag.

[23] Initially, it was submitted on behalf of the respondent that the appellant's conviction on this count is based on circumstantial evidence as well as the doctrine of common purpose. It was, however, correctly conceded that the state's reliance on circumstantial evidence as well as the doctrine of common purpose are unsustainable and that ultimately the conviction is unsound.

[24] On the evidence presented, the appellant was not in possession of any of the objects referred to in the indictment and was never called upon to give an account of his possession thereof, which account was found to be unsatisfactory. It must follow that that the appellant could not be convicted of an offence contemplated in section 82 of the General Law Third Amendment Act which reads:

> 'Any person who possesses any implement or object in respect of which there is a reasonable suspicion that it was used or is intended to be used to commit house-breaking, or to break open a motor vehicle or to gain unlawful entry into a motor vehicle, and who is unable to give a satisfactory account of such possession, shall be guilty of an offence…'

It follows therefore that the appeal must succeed in respect of this count. Lastly on the convictions I turn to consider count 12.

Count 12

[25] Count 12 relates to an incident where Mr Dyani jumped over a wall and landed on the bonnet of the Jeep as he was running away from the police. As with count 11, the state initially submitted that the appellant's conviction on this count is based on circumstantial evidence as well as the doctrine of common purpose. Similarly, it was, however, correctly conceded that the state's reliance on circumstantial evidence as well as the doctrine of common purpose are unsustainable and that ultimately the conviction is unsound.

[26] The appellant was nowhere near the Jeep and could never have had any intention to damage same. That he was not only charged but also convicted is difficult to understand. The judgment also does not set out the reasons why the appellant was

convicted on this count. What appears from the record is that the trial court evaluated the evidence relating to murder, robbery as well as attempted robbery charges and found the appellant guilty only of the attempted robbery. Thereafter, without any indication that it had considered the elements of the offences relating to malicious injury to property as well as the offences relating to the contravention of POCA, repealed Dangerous Weapons Act and the General Law Third Amendment Act, proceeded to state,

> 'once again, the circumstantial evidence in this instance also supports the conclusion that the accused were acting together in common purpose in the commission of the crimes. I, therefore, find that they are all guilty of all the counts relating to the Claremont incident…'

Clearly, the conviction in respect of this count is unsustainable and the appeal therefore should succeed. To consider next is the appropriateness of the sentence imposed.

Sentence

[27] The 5 years' imprisonment imposed in respect of counts 5 and 6 falls away as a result of the appellant's acquittal on these charges. The 3 years' imprisonment imposed in respect of counts 10 to 12 was ordered to run concurrently with 10 years' imprisonment imposed in respect of count 7. Therefore, the acquittal of the appellant on counts 10 to 12 has no effect on the sentence. What remains for consideration is the appropriateness of the sentence imposed in respect of counts 7 to 9.

[28] No argument was presented why this court should interfere with the sentence imposed in respect of count 9, presumably because the sentence in respect of that count was ordered to run concurrently with the sentence imposed in respect of count 8. In

respect of count 9, it was merely submitted that the sentence is startlingly inappropriate and induces a sense of shock without more.

[29] There was a lot of focus on the sentence imposed in count 7. The gist of the argument is that the state failed to prove the presence of aggravating circumstances as defined in s 1 of the Criminal Procedure Act 51 of 1977 (**Criminal Procedure Act**) beyond a reasonable doubt and that the trial court misdirected itself in failing to appreciate such failure. This submission proceeded on the basis that what the state was required to prove was that one of the assailants wielded a dangerous weapon, to wit a screwdriver, in such a manner that his conduct manifested a threat to the victims.

[30] Proceeding from the basis referred to above, counsel for the appellant referred to the evidence of Ms Candice Le Roux (**Ms Le Roux**), and Ms Greeff that they never felt threatened by the presence of the screwdriver which they regarded as having been intended to break open the cabinet where jewellery was stored. Based on this evidence it was submitted that the trial court misdirected in finding that the staff members at Trigg Jewellers were threatened by the presence of the screwdriver.

[31] It was submitted on behalf of the state that the screwdriver was used not only to break open the cabinet where the jewellery was kept but was also used to threaten Ms Greef. This submission was supported by reference to a video recording showing Mr Bulana chasing Ms Greef with a screwdriver in hand.

[32] The video recording referred to above was not part of the record and by direction of the presiding judge, the parties were directed to provide the members of the court with same. This was, indeed, provided and as such forms part of the material that we have had regard to in evaluating whether the presence of aggravating circumstances was proven. Before doing so, however, it is necessary to have regard to the indictment.

[33] The indictment, in so far as it concerns the presence of aggravating circumstances reads:

> '... aggravating circumstances as defined in Section 1 of Act 51 of 1977 are present in that on the occasion when the offence was committed, whether before or during or after the commission of the offence, the accused and/ or their accomplices **used a screwdriver to threaten** the said Natasha Greef and/ or Candice Le Loux and/ or Eric Van Diemen.' (own emphasis).

[34] Section 1 (1) (b) of the Criminal Procedure Act defines 'aggravating circumstances' in relation to robbery or attempted robbery and reads:

> 'In this Act, unless the context otherwise indicates 'aggravating circumstances', in relation to robbery or attempted robbery, means (i) **the wielding of a fire-arm or any other dangerous weapon**; (ii) **the infliction of grievous bodily harm**; or (iii) **a threat to inflict grievous bodily harm**, by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence.' (own emphasis)

[35] The trial court, in its judgment on sentence, stated the following regarding the presence of aggravating circumstances,

'... it is common cause that the attempted robbery involved a screwdriver which was in the possession of accused 2. Although argument was made on behalf of the accused that this weapon was meant only to open the glass cabinets, there is no doubt in my mind that the staff members at Trigg Jewellery Store were threatened by this weapon, which was clearly wielded by one of the accused....'

[36] What is clear from the above is that the trial court conflated the requirements of section 1 (1) (b) (i) (the wielding of a fire-arm or a dangerous weapon) and 1 (1) (b) (iii) (the threat to inflict grievous bodily harm) of the Criminal Procedure Act. This conflation appears to be due, in part, to the manner in which the charge was framed and in part, possibly to how the matter was argued.

[37] As to the manner in which the charge sheet was framed, the operative part merely reads 'used a screwdriver to threaten' without going far enough to encompass 'a threat to inflict grievous bodily harm' as contemplated in section 1 (1) (b) (iii) of the Criminal Procedure Act. On this formulation of the charge, excluding as it does, a threat to inflict grievous bodily harm, it is doubtful if the state could ever prove the existence of aggravating circumstances as contemplated in section 1 (1) (b) (ii) of the Criminal Procedure Act. This is because it is not every threat that will constitute aggravating circumstances but only if such threat relates to the infliction of grievous bodily harm.

[38] In order to obviate the conundrum created by the manner of formulation of the charge, it appears that the matter was then argued as if the state relied in section 1 (1) (b) (i) of the Criminal Procedure Act, namely, the wielding of the screwdriver. As stated above, even counsel for the appellant appears to have approached the matter on the

basis that the presence of the aggravating circumstance relied on by the state related to the wielding of a screwdriver. The state, however, is bound by the contents of the indictment unless and until duly amended. It is not open to the state to argue the case on a basis that is at odds with its case as set out in the indictment.

[39] The above, however, are not the only problems that the state has with the presence of aggravating circumstances. The evidence relating to the use of the screwdriver on the day of the attempted robbery does not suggest that it was used to threaten either Ms Le Roux or Ms Greef. Although Mr Bulana can be seen on the video footage chasing Ms Greef around the shop and at times holding her hand, all that time the screwdriver remained tucked away under his pants. It was only after he had let go of Ms Greeff, who at that stage was some few paces away from him, that he took out the screwdriver, pointed it momentarily in the direction of Ms Greeff and proceeded immediately to smash the jewellery cabinet. The evidence, thus, did not prove that the screwdriver was used to threaten Ms Greeff let alone threaten to cause her grievous bodily harm. That the trial court misdirected itself regarding the presence of aggravating circumstances warrants this court's interference with the sentence in respect of count 7.

[40] The evidence referred to above reveals that the appellant and his co-accused took time planning the robbery of Trigg Jewellers. Some of them were at the store two days before the attempted robbery in what could only have been a scouting exercise. Counsel for the appellant attempted to minimize this robbery arguing that properly considered, it was nothing more than theft. There is, however, no merit whatsoever in that submission.

[41] As already stated, Mr Bulana chased Ms Greeff around the shop and that could only have been directed at causing her to give in to Mr Bulana doing whatever he wanted to do, including taking some jewellery. Had the robbery succeeded, it would not only have been on the basis of the deception by Mr Dyani but also the conduct of Mr Bulana, which conduct as already stated, was meant to cause Ms Greeff to give in.

[42] Robbery is and remains a serious offence. It is also an offence that is prevalent and as such the courts are enjoined to send out a clear message that self-help in the form of robbery cannot be tolerated. It is also clear from the evidence that the planning of this attempted robbery included the use of firearms when necessary. That there was no actual use of firearms, however, must redound for the benefit of the appellant.

[43] The personal circumstances of the appellant as they appear on the record are that he is a first offender, he was 23 years old at the time of the commission of the offences. He grew up without his mother and had to leave school after completing Grade 10 to earn an income so as to contribute to the upkeep of his family. Relevant also is the time that the appellant has spent awaiting trial as he has been in custody since his arrest on 21 September 2016.

[44] Having regard to the appellant's personal circumstances, the interest of society as well as the seriousness of the crime of robbery I am of the view that a sentence of imprisonment for a period of seven (7) years is an appropriate sentence.

Conclusion

[45] In conclusion, on the first issue for determination, the evidence adduced by the state was not sufficient to sustain the convictions under consideration in this appeal. The appeal therefore succeeds in respect of counts 5,6 and 10 to 12. The convictions in respect of counts 5, 6 and 10 to 12 are set aside, and the appellant is found not guilty and acquitted. The result is also that the sentences imposed in respect of these offences are set aside.

[46] On the second issue, namely, the appropriateness of the sentence, the trial court misdirected itself when it found the presence of aggravating circumstances and as such the appeal against sentence imposed in count 7 succeeds. The sentence imposed is set aside and replaced with a sentence of seven (7) years imprisonment that is antedated to the date trial court imposed the sentence.

Order

[47] In the result, I propose the following order:

47.1 The appeal against conviction in respect of counts 5,6 and 10 to 12 succeeds. The convictions are set aside, and the appellant is found not guilty on counts 5,6 and 10 to 12.

47.2 The sentences imposed in respect of counts 5,6 and 10 to 12 are set aside.

47.3 The appeal succeeds only in respect of the sentence imposed on count 7.

47.4 The sentence imposed on count 7 is set aside and substituted with the following sentence:

> **The appellant is sentenced to undergo imprisonment for a period of seven (7) years.**

47.5 The sentence on count 7 is antedated to 11 July 2019.

L G Nuku
Judge of the High Court

I agree, and it is so ordered:

P A L Gamble
Judge of the High Court

I agree:

M J Dolamo
Judge of the High Court

Appearances:

For the appellant	:	Advocate J van der Berg
Instructed by	:	Van Niekerk Groenewoud & Van Zyl Inc (ref: B. Viljoen)
For the state	:	Advocate A E Isaacs
Instructed by	:	Office of the Director of Public Prosecutions