SUMMARY **CA 123/2003**

PETRUS FELIX THOMAS & 4 OTHERS versus THE STATE

DAMASEB, JP *et* GIBSON, J

23/05/2007

Gang Robbery. Robbers present at the scene for some time before the assault. One of the gang who had been in close association with accused 1 playing pool and talking to accused 2, left moments before the robbery ensued.

When the robbery commenced accused 2 produced a pistol, shut the door and ordered all those present to lie down. Meanwhile accused 1 also had produced a pistol which he waved about to ensure compliance with the order to lie down. Accused 1 ransacked the club for money while another accused, (no. 3) armed with a stick broke down the doors to the locked cashiers room.

In the meantime accused 4 who had also thrown himself down got up but remained at the scene and left with the gang after the robbery. No evidence emerged that accused 4 was subjected to force or threats when he got up:

Held: Court correctly convicted accused 1, 2, 3 & 4 on the doctrine of common purpose.

A further question considered was whether Court was correct in convicting accused 5 of robbery in Count 1. To answer the Court a quo viewed all the evidence in the case and convicted accused on the doctrine of common purpose.

Count 2: Almost a month after the robbery on count 1, 4 men, of whom one was identified subsequently as accused 1, accosted an armed security guard at a Community Centre. They seized the guards weapon – a shotgun and walkie talkie then fled.

The day following this robbery accused 1, 2, 4, and 5 were-arrested in a taxi.

Accused 1 was found with a bag containing a shotgun from the 1st robbery. Also found was a pistol and ammunition.

Court reasoned that it was too much of a coincidence for accused 5 to have been present at the scene of the robbery in count 1 with accused 1 and 2. Again, to have been with the same accused in the taxi at the time of the arrest and, that 1 of those accused happened to be carrying a shotgun stolen in the count 1, and a pistol and ammunition. Further that it was material that prior to their arrest in the taxi, accused 5 had been seen in close proximity, a matter of meters, from accused 1 who was carrying a bag similar to the one he carried the arms in the taxi.

In his evidence Accused 1 denied knowing the other accused including accused 5. He also denied being with them at the scene of the robbery in spite of their being caught on a surveillance camera. Further he denied being present near the Furstenhoff hotel.

Held: The Court a quo correctly drew the inference of guilt. The facts proved as well as the circumstantial evidence was overwhelming. Question whether Court a quo was correct in its approach it was clear that the *modus operandi* in the robbery involved the use of more than one weapon?

The next question raised was whether the Court could convict the accused of the offences of unlawful possession of arms and ammunition on the 3rd of January 2000?

Found: that there is no statutory definition of the word possession in the Arms and Ammunition Act, 7/1996. The definition in the statute merely says possession includes custody. Thus possession must be given the meaning in the Common Law which meaning entails control of something that, as control is capable of being exercised vicariously through another or jointly with another as long as the persons have the same intention regarding the purpose for which control is exercised, the Court correctly convicted accused 1, 2, 4 and 5 of Possession of arms and ammunition seized in the taxi on 3 of January 2000.

CASE NO. CA 123/03

IN THE HIGH COURT OF NAMIBIA

In the matter between:

PETRUS FELIX THOMAS **1ST APPELLANT**

IMMANUEL GABRIEL **2ND APPELLANT**

THOMAS JOSEPTH **3RD APPELLANT**

JAFET EKONIA **4TH APPELLANT**

AKTOFEL NAKANYALA **5TH APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: DAMASEB, JP *et* GIBSON, J

Heard on: 2007.02.05
Delivered on: 2007.05.23

CRIMINAL APPEAL JUDGMENT

GIBSON, J: [1] Five appellants lodged notices of appeal against conviction and sentence by the Regional Magistrates' Court, Mr. Retief. The convictions were 2 for robbery, 3 for unlawful possession of ammunition i.e Counts 4, 8 and 9, contrary to the Arms and Ammunition Act 7 1996, 4 charges of unlawful possession of firearms, i.e Counts 3, 5, 6 and 7.

[2] All the appellants pleaded not guilty to all charges. All were convicted, as charged on Count 1. On Count 2, 2 appellants were convicted, namely, appellant 1 and 2. I will look at the allegation on the 2 counts of robbery first.

[3] Count 1. It is alleged that on 04/12/1999 the 5 Accused robbed Naftali Shikongo and Leonard Nandembo both of whom worked at the Elago Club (hereafter to be referred to as 'the club'). The State further alleges that at the time the 5 Accused were armed with two revolvers and a knife. In the process, they stole N$1,000.00, a shotgun, wrist watch and a machine for detecting counterfeit money.

[4] As regards Count 2, the State alleges that four Accused namely, 1, 2, 4 and 5 armed with a shotgun, robbed Johannes Nghifilwa and stole one shotgun no. 9638980, one Motorola radio and some ammunition. I will refer to the appellants as 'Accused' 1, 2, 3 etc.

[5] In this appeal, only Accused 2, 3 and 5 are represented. Accused 1 and 4 do not appear whereas they had filed Notices of Appeal against both conviction and sentence.

[6] Before I go into the evidence I will touch on an issue that intrudes upon the whole case. The issue arises from the State of the record.

[7] It is common cause that as a result of a point in limine taken by the State in earlier proceedings, i.e on the 29/10/2004 the Court ordered a reconstruction of the record. The Leaned trial magistrate has now filed a report as to what transpired thereafter.

[8] To sum up the position so far, the record has still not been reconstructed. However the reason for the delay does not lie at the door of the Court below. From the report it seems clear that the Learned Regional Magistrate did everything that could possibly be done, by trying to trek down the witnesses who had deposed at the trial. The presiding officer called upon the Police Force and Counsel who had appeared for the State as well as some of the appellants. But none could help. As a result the presiding officer summoned all the accused persons to his office and gave them the notes that he kept during the trial and asked that the accused should read the summary and make any comments or additions they wished to make. The report is accepted as part of the record:

The contents are follows:

''*Appellant 1, Petrus Felix Thomas. As to the evidence of Leonard*

Nandombe, 'I disagree with that and I have nothing to add'. As to the evidence of Thomas Itope; 'I disagree with that and I have nothing to add.

Appellant 2 Immanuel Gabriel; As to the evidence of Leonard Nandombe; 'No comment about this incredible witness evidence'.

As to the evidence of Thomas Itope;

Accused no. 2 doubt this evidence, therefore he cannot agree with it. He cannot recall this witness said anything as it stand in his evidence. He is also of the opinion that no competent court of law would consider such evidence as reliable one. This evidence could be taken from anywhere, thus I wouldn't agree with this evidence''.

Appellant Thomas Jonas. As to the evidence of Leonard Nandombe and Thomas Itope; 'Comment by accused 3, Thomas Annanias Joseph. I the accused person No. 3 hereby certify that I won't agree with either of the state's evidence contained hereof due to the followings;

1. *I was in court personally but I did not heard the witness testified like this.*

2. *This evidence surface after 3 years of searching, I would say are an invented evidence which were simply created by an desperate trial*

magistrate who was requested to present the secondary evidence to the appeal court as a matter of urgency.

3. *This evidence were not collected procedural as directed in the amended court order delivered by the judge president on 29 October 2004.*

4. *No witness whose evidence are missing were traced no any info's from the notes of the state prosecutor or the lawyer to corroborate the supposedly evidence from the magistrate's note.*

5. *This evidence could have been taken from anywhere, it can be reconstructed based on the record of proceedings, it can be also opinion of the magistrate who is desperate to provide something to the appeal court as requested.*

6. *There is absolutely no proof to say that the evidence were collected from the note. The magistrate said sometime ago that he had nothing to add- see attached. One may wonder where was his note all those 4 years when the matter used to be delayed due to the incomplete of the record.*

7. *We were in the High Court of Namibia on the 30th November 2005 supposedly for the appeal hearing. The state could not provide the missing evidence, thus decided to proceed with the incomplete record*

to which the defence objected and postponed the matter for argument preparation. Where were the evidence on 31/11/2005? It is my opinion that there is no reasonable man would consider this evidence to upheld the conviction an sentence in this matter''.

Appellant Jafet Ikonia. As to the evidence of Leonard Nandombe; 'Accused no. 4 have no comment about this evidence, but I do have doubt about the witness due to fact that he was unreliable'. As to the evidence of Thomas Itope; ' No comment'.

Appellant 5 Aktoffel Nakanyala; As to the evidence of Leonard Nandombe; 'I do not agree with that' As to the evidence of Thomas Itope; I have no comment on that your worship. I did no record anything during the trial'. These passages are copied as they appear in the notes of the Presiding Regional Magistrate.

[9] Whereas the Leaned magistrate's notes on the evidence of Leonard Nandembo (page 75 of the record) and Thomas Itope (page 155 of the record) could have been accepted if the defects had been corrected and tendered in accordance with established practice, that is to say made under oath or affidavit form, the summary cannot be admitted.

[10] Regarding the correct procedure to be followed in reconstructing the record, see S v Shekelele 1978 1 SA 993 (T) at 994, R v Notjie 1950 4 SA 725 (E) at 726, which authorities show clearly what should have been done after the record was sent back.

According to the above authorities,

> ‘‘The Clerk of the Criminal Court should obtain the best available secondary evidence and place it before the reviewing Judge with a report, in obtaining such secondary evidence, the Clerk of the Court should approach those of the witnesses whose evidence is defective and others who were present at the trial (as, e.g the magistrate, the prosecutor or the interpreter) to obtain from them, on affidavit, the proof of what the record contained. He should give both the accused and the State an opportunity to pursue what he has asserted to submit their versions for transmission to the reviewing Judge’’.

This passage is well known. I only cited it because the failure to comply with it has rendered the results of a painstaking and laborious task futile. As a result the summary cannot be used for the purpose for which it was intended to be used.

[11] In conclusion this Court will proceed on the record presented but leaving out the summary of the evidence including that of Nandembo and Itope.

[12] Whereas both sides had earlier raised the state of the record as an obstacle impeding progress in the preparation of their heads of argument, after further argument in Court and on a further consideration of the Leaned Regional magistrates report, both Counsel agreed that the summary be left out. Both also agreed that there is enough evidence on record to enable this Court to make a proper and fair adjudication of the issues. The decision makes commendable sense and is in accord with past precedence: Aderito D.C.D Manuel and Another v The State, unreported judgment of this Court, CA 444/98, delivered on the 30/04/2001, per Teek, JP.

[13] As regards Count 1, the facts are that on the evening of the 4th December 1999, patrons at Elago club were playing pool or watching T.V etc when the club door was suddenly closed by a man in a black leather jacket (he was later identified as Accused 2). The man, armed with a revolver, ordered every one to lie down. Another man also in the club, (identified later as Accused 1) started waving a revolver. All the patrons in the club complied with the order save for the barman who remained on his feet. Another man, who had been in the club for sometime and had lain down, got up shortly thereafter. This man who was later identified as Accused 4, was next seen leaving the club with the robbers at the end of the events.

[14] Watching these events from a locked inner room, was the cashier, Mr Shikongo. He said on seeing these events, he pressed the panic button but was interrupted by another man in a leather jacket who smashed the door to the cash room and began to assault him (Mr Shikongo) with a baton while waving a knife. Mr Shikongo managed to escape into the club area but had to lie down with others. The barman who was still defying the order to lie down was shot by Accused 1 and suffered injuries in the stomach area. Further, the bullet that hit the barman also hit Mr. Itope, a visitor at the club, on the elbow.

[15] In regard to count 2, the facts were that on 02/01/2000 Mr Nghifilwa Johannes was on duty as a security guard at the Katutura Community Hall. At about 11.30 pm Mr Ngifilwa was approached by 4 men who asked about the closing time of Liquor stores. As he gave an answer he was suddenly thrown down and his shotgun and Motorola radio were taken away. Of the property stolen, the shotgun was found in a taxi in which Accused 1, 2, 4 and 5 were riding in on the 3rd January 2000. The Motorola radio was

recovered later by Constable Iyambo from a house, pointed out by Accused 2. Also recovered from the house was a pair of green trousers with knee pockets. The security guard, Mr Nigifilwa, described similar trousers as being worn by one of the robbers.

[16] All the accused persons denied taking part in the robberies. The first question therefore is one of identify, and, rolled into this question is the question whether the Learned trial Magistrate was correct in convicting the accused on the basis of common purpose

[17] The State called a number of witnesses and produced a video film from the surveillance camera posted at the Club premises at the time. The witness's evidence was that after the shooting three men proceeded to empty the cash tills as they assaulted someone on the head with an empty till. In addition, the security guard was relieved of his shotgun as the robbers got away.

[18] Accused 1 and 2 were subsequently identified by witnesses at identification parades and on video film. Accused 3, 4 and 5 were also identified from the film by Constable Iyambo. From the video recording, Accused 5 appeared to have been in the club for quite a while before the robbery, he was seen playing snooker and chatting with Accused 1 and 2. However, moments before the door was shut and the robbery started, Accused 5 was seen leaving the club.

[19] In regard to the 5 counts of unlawful possession of fire arms and 2 of ammunition, these items were found on the arrest of Accused 1, 2, 4 and 5 on 03/01/2000 and some, later on a pointing out including by accused 3.

[20] Constable Iyambo explained the circumstances. He said he had a tip off about a robbery at the Furstenhoff Hotel on 03/01/2000. He kept surveillance with other officers. He next saw Accused 1 and 5. Accused 1 sat down near the hotel, and had a white plastic bag with contents in it. Accused 1 placed the bag a few meters from him. Accused 2 also arrived. He was on his own. Both Accused 2 and 5 were walking about, but each on his own. Constable Iyambo then saw Accused 4 entering the drive way of the Furstenhoff Hotel. He then lost sight of him. Some time passed. Then suddenly all four walked away. He next caught up with them in a taxi

headed for Katutura. The taxi had stopped at a Police road block, and Accused were by then in a Police van. The Police Constable at the roadblock pointed at a plastic bag in the taxi. The bag was similar to the one Accused 1 had been carrying near the hotel. He opened it and found a revolver and ammunition. The officer manning the roadblock handed Constable Iyambo a shotgun as part of the contents of the bag. Accused 1 then announced that all the weapons in the bag were his. Constable Iyambo said the sawn off shotgun was identified later as the one stolen from Club Elago.

[21] Accused 3 was arrested much later on and was identified by Constable Iyambo as the man in the video film recording who was seen smashing into the Cashier's room armed with a knife.

[22] All accused persons except accused 1 and 3 denied possession of arms or ammunition. Save for the admission of Accused 1 set out above no other admissions were made. However, Accused 3 made a confession which was ruled admissible in evidence. Also it was through accused 3 that the second shotgun was recovered.

[23] The fact of the robberies was not in issue. The issue was who were the individuals who participated in each robbery and had possession of the various weapons.

[24] The State's argument is that all 5 accused persons were involved in the robbery in Count 1 and that Accused 1, 2 and 5 were involved in Count 2, thus the Court a quo was correct in holding that the accused persons had been acting in common purpose in both instances, so the argument concluded.

[25] The defence have challenged the finding of the Court as well as the reliance on the doctrine of common purpose. The defence maintains that the accused were not involved. In particular, the Defense criticizes the Courts' finding that the accused had possession of the weanpons and ammunition, jointly.

[26] In giving judgment the Leaned Regional Magistrate said, at page 498 of the record,

> ''Club Elago at that stage was fitted with a surveillance camera. The whole crime was therefore recorded on video camera. Not only were some of the witnesses able to identify the accused persons without the help of this video camera, but also that video film was shown in Court, and with

> that assistance, they could make identification of the persons who were responsible for the robbery''.

[27] The Court was careful not to give evidence itself when dealing with the evidence of the video and the identity of persons shown on the video. I quote from the judgment,

> ''When Sergeant Iyambo looked at that video recording for the first time, he could identify Accused number 1 already as Accused no. 1 who was known to him before that robbery. In Court he could also identify the other persons, all five the accused persons (sic)''.

The approach of the Court *a quo* could not be accepted.

[28] The Court was justly satisfied about the correctness of the evidence of identification given by Constable Iyambo and relevant witnesses. The latter had been observers at the scene, i.e. the Club and the Katutura Community Hall. The detailed evidence of Mr. Naftali Shikongo and Mr. Nandembo, relating to accused 1, 2 and 5 though showing some confusion was understandable given the sudden turn of events. The 2 witnesses were however confirmed by other evidence. In addition, as against Accused 3 there was the additional evidence of his confession that the court justly ruled admissible. The account of the robbery at the Club given by accused 3 was consistent with the accounts of the 2 witnesses mentioned above, as well as the interpretation of the video film by Constable Iyambo. The evidence identifying accused 1, 2, 3, 4 and 5 as being present in the Club is overwhelming. I thus agree with the Court's finding regarding the presence of the accused persons above.

[29] Of the identity of the persons, there is no doubt that this case is not one of those cases where the Court has to tread with care before acting on the evidence of identification lest a grave injustice be done by accepting the evidence of someone believable but who turns out to be a mistaken witness: see in Contrast, R v T 1958 2SA 676 (A), R v Shekelele & Another 1953, SA 636.

[30] The question still remaining is whether all the accused acted together and in common purpose to commit the robbery. The states case is overwhelmingly proved concerning Accused 1, 2, 3 and 4. No more needs be said.

[31] Accused 5. The case against him lies in the evidence of his presence at the Club for quite a while before he eventually left. Further, there was evidence that Accused 5 closely associated with Accused 1, with whom he was playing pool, and was seen chatting with Accused 2. Apart from this proved fact, his departure so close to the commencement of the assault and robbery casts a great deal of suspicion about his presence. Could that departure have been the signal to the others to begin? Could it be that he was going out to be a look out? All this evidence of conjecture sounds almost plausible. However the law makes it clear that suspicion alone is never enough. For the suspicion to be turned into a sound basis for a conviction to be made, there has to be a cogent basis entitling the Court to draw the inference as the only reasonable inference that the accused had indeed been part of the crime being committed, with full knowledge.

[32] Counsel for accused no. 5 argued that before the accused could be convicted of the offence on Count 1, the Court had to be satisfied beyond reasonable doubt that the accused was involved in the robbery and that each of the criteria for convicting on common purpose which are set out in S v Mgedezi 1989 1 SA 687 are satisfied; (1) namely, presence and knowledge of the plan to commit the crime, (2) participation and associating with the accused in the acts being done, (3) the intent to achieve the specified goal, or foresight of the consequences likely to result but recklessness as to whether or not these consequences ensued.

[33] In light of the established evidence that accused 5 left before the crime was committed, and given that there is no proved fact that he did anything thereafter following the commission of the crime, the question is, can it not reasonably be inferred from all the circumstances that accused 5 was indeed part of the plan to commit robbery?

[34] In convicting accused 5 the Learned Regional Magistrate, acknowledged

that the case of accused 5 must be looked at with special care. The Court reasoned at page 467,

> ‘‘The Court cannot for one moment on the evidence, come to a conclusion that Accused no. 5’s presence at the Club Elago, where he talked to the other co-accused and his presence at Furstenhoff is just by coincidence. In the absence of any explanation from his side, as to what he was doing at Club Elago and what he was doing at Furstenhoff in the presence of the robbers at Club Elago, and what he was doing in the taxi in the presence of the persons who were involved in the robbery Elago, he must also be convicted of count 1 – that is the robbery at Club Elago’’.

[35] Circumstantial evidence. In evaluating the evidence the Court looked at the conduct of accused 5 both before the commission of the offence and afterwards. Viewing that conduct in common sense, together with the evidence, it found that his presence on the separate occasions, at the club and in the taxi could not be written off as a mere coincidence.

[36] The approach of the Court a quo is reasonable and sound given the circumstances of this particular case and accused’s role. The Learned author of Principles of Evidence, Schwikkard and Van der Merwe 2nd Edition, at page 504, say

> ……."Circumstantial Evidence is not necessarily weaker than direct evidence. In some instances it may even be of more value than direct evidence.": S v Reddy 1996 2 SACR 1 (A), S v Shabalala 1966 2 SA 297 (A) 299.

[37] In S v Reddy, three South African businessman had been on a visit to India where they ordered artifacts for use in religious worship. The artifacts were packed and shipped to Singapore, where the boxes were taken out of the Indian containers and put into a fresh one in Singapore. Police in South Africa received information that the shipment contained mandrax tablets. When the shipment arrived in Durban the Police opened the crates and found considerable quantities of mandrax. After extracting most, Police placed a signal and resealed the container. They set up surveillance. Appellants collected part of the consignment, the police followed and mounted their surveillance. When the signal went off, the Police raided the appellants but the search was premature. The Police withdraw and apologized for misinformation.

[38] However the Police kept watch again. When the signal went off they moved in and the package with mandrax was still unopened. On arrest, appellants denied complicity and knowledge of the presence of the mandrax tablets, but were convicted. The Court looked at the fundamental issues before it and said, at page 8 (c):

> ‘‘In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an Accused is true. The evidence needs to be considered in its totality’’.

[39] The Leaned Acting Judge of appeal referred to the cardinal rules of logic

set out in R v Blom 1939 AD 188 at 202 and, referring to the case of R v De Villiers 1544 AD 493 at page 508, looked at a passage that emphasizes yet again the need to look at the circumstantial evidence, cumulatively. i.e. in its totality. The quotation is set at paragraph 43 of this judgment.

[40] In this case, it is clear in my mind that the Court *a quo* was assessing the evidence as a totality when it rejected the notion of a mere coincidence in the presence of accused 5 at the club moments before the commission of the crime, and his presence in the taxi with the 3 accused persons on the third of January.

[41] Clearly what the Court a quo said is well in line with the principles enunciated above. The question though is would these principles apply in a case involving a number of accused and involving a number of offences? I would not see any obstacle to concluding as the Court did.

[42] The doctrine of common purpose has been held to mean that where two or more people associate in a joint unlawful venture, each will be responsible for any acts of his co-accused which fall within the common design: S v Safatsa and Others 1988 (1) SA 868.

[43] A quotation cited with approval in the Reddy case, at page 8(e) is instructive.

> 'The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the Court, not that each

separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence.

Best on Evidence 10th ed § 297 at 261 puts the matter thus: 'The elements, or links, which compose a chain of presumptive proof, are certain moral and physical coincidences, which individually indicate the principal fact; and the probative force of the whole depends on the *number, weight, independence, and consistency* of those elementary circumstances. A number of circumstances, each individually very slight, may so tally with and confirm each other as to leave no room for doubt of the fact which they tend to establish ... Not to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the weight of a mill-stone".

(44) Further there is authority that holds that the doctrine of common purpose may be applied where a group of persons, pursuant to an agreement join together to attain a certain goal by some unlawful means, and, such agreement need not be express. An agreement may be implied from conduct or words: Snyman Criminal Law 2nd Edition pages 255 and onwards.

[45] Turning then to the particular facts of this case and accused 5. There is evidence that accused 1, 2 and 5 were associating with each other for some

time before the robbery. There is evidence that there were people in the Club- either patrons or workers. From the evidence of the presence of these people, accused 5 would have foreseen that some form of force or violence would be necessary to subdue the people – if a robbery were to succeed it is not unreasonable to assume that some of whom may be induced to have a go. Further the evidence is that accused 1 promptly produced a revolver from his person at the start of robbery, that as accused 1 did so, accused 2 also produced a revolver as he shut the door and ordered everyone inside to lie down. Clearly the spontaneous acts of accused 2 shows that a prior plan existed. Another pointer to the existence of a group agreement was the act of accused 3 who rushed to the cashier's door, attacked him and caused the cashier to flee. Accused 4 unlike the rest of the patrons got up immediately. This clearly shows that specific tasks were assigned to each intruder as part of the plan. The conclusion that Accused 4 was to provide the additional force in case of resistance is reasonable.

(46) There is no evidence that accused 1, 2, 3, 4 and 5 got together at some point in the Club itself. All there is is close association of accused 5 with accused 1 who turned out to be the leader. Can it be said that, that association was a mere innocent encounter? To decide this, one needs to look further into the evidence and examine what accused 1 said of his encounter with accuseds 2, 4 and 5in the taxi on the 3/01/2000. He said, and I quote from page 363 of this Record, '' ..... but I never walked together with Accused no. 5 and I didn't know him. I just came to know him the day I found him in the taxi. I don't even know that place he is mentioning now. Did you also hear him testify that later after you and accused arrived at Furstenhof, you were joined by accused 2 and 4? --- That is what he testified in court, but I was never at that place and I don't know about the other, if they were there or not, but I never went to that place''. It was put to him that he and accused 5 were next joined by accused 2 and 4 at the Furstenhoff Hotel. Accused 1 answered, at page 363 ".....but I

was never at that place and I don’t know about the other (s) if they were there or not, but I never went to that place’’.

(47) Accused no. 5 elected to remain silent in the trial. Also, he did not cross examine Accused 1. The implication is that accused 5 accepted the answers of accused 1. If this evidence is weighed together with the evidence of identification of accused 1 by Constable Iyambo because he knew him before, and is taken with the fact that accused 1, 2, 4 and 5 who were arrested a day after the staging of the robbery in count 2, the conclusion is that the evidence is overwhelming that the State has proved its case.

[48] What the role of accused 5 was is unknown. However accused 5 was well within his rights generally when he elected not to give evidence. But to neglect to come forward with a reasonable explanation in a situation that clearly calls for an answer, and to remain silent when a co-accused was telling an untruth clearly shows a knowing complicity in the illegality of the actions of others.

(49) My view is that the Court a quo was correct in holding that accused 5 was guilty of the robbery. Accused 5 was part and parcel of the common design to commit the offences, to employ such force as was necessary to subdue those present at the scene. Since weapons were used in count 1, accused persons 1, 2, 4 and 5 must have had knowledge of the presence of the arms and ammunition in the white bag in the taxi. The fact that accused 1 had custody of the weapons was a matter of convenience among the group. It is reasonable and just to reach that conclusion because the use of weapons was part of the modus operandi of the group.

[50] The Arms and Ammunition Act describes possession as including custody. The Act does not define the word ‘possess’. Thus the ordinary meaning of the word possession in legal terminology must be applied. The law recognises that possession through another is possible as long as the parties have a common intention for control of the article: for a discussion of the topic see Snyman on Criminal Law 3rd Edition at page 413, and on, S V Binns 1961 2 SA 104 (T).

[51] Thus as I accept the conclusion of the Regional Magistrate that the 4 accused were guilty as charged, i.e. the unlawful possession of the arms and ammunition in counts 3, 4, 5, 6, 7, 8 and 9.

[52] The appeals are dismissed.

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GIBSON, J

I agree

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DAMASEB, JP

ON BEHALF OF THE APPLICANT **ADV HINDA**

INSTRUCTED BY

ON BEHALF OF THE RESPONDENTS **MS JACOBS**

INSTRUCTED BY **Prosecutor-General**