IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A257/2016
COURT *A QUO* CASE NO: 14/3423/2006

29/11/2016

In the matter between:

PETER MAPHAKELA Appellant

and

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

24/11/16 DATE

SIGNATURE

THE STATE Respondent

JUDGMENT

DAVIS, AJ:

[1] **INTRODUCTION AND APPELLATE JURISDICTION**:

1.1 On an ill-fated night in September 2005 and at a house in a suburb in Pretoria a family of 5 were held up at gunpoint at the family residence and robbed of a large number of items. Of the group, one was arrested on the scene and two others were later identified. These three were the accused in a criminal trial before the Regional Court for the Regional Division of Gauteng held at Pretoria.

1.2 The accused were found guilty of various charges, corresponding with their complicity in the crimes. The Appellant was found guilty on four counts of robbery and sentenced to 15 years in respect of each count. In addition he was also found guilty of illegally being in possession of a firearm and ammunition and sentenced to 7 years and 1 year respectively for these crimes. All these sentences were ordered to run concurrently.

1.3 In addition, the Appellant was found guilty of four counts of kidnapping and sentenced to 5 years in respect of each count, the sentences to run concurrently with each other (but not concurrently with the sentences imposed in respect of the other counts referred to above).

1.4 Leave to appeal was refused by the learned magistrate and by two judges of this division but special leave was granted to a full court of this division by the Supreme Court of Appeal against the convictions and sentences in respect of the charges of kidnapping (counts 2, 4, 6 and 8).

[2] A summary of the evidence as given by the various witnesses constitute the following:

2.1 On the night in question the first complainant and his wife arrived at home at approximately 00:30.

2.2 The first complainant stopped the vehicle outside the security gate and both he and his wife alighted. He assisted his wife into the house as she was walking by aid of crutches. After 10 minutes inside the house the first complainant exited to unlock the gate to bring the vehicle inside which he had done. He was thereafter approached by four men when he was about to lock the gate. He was taken back into the house at gunpoint. The family members that were present in the house were the first complainant's wife, his sister, his mother and his 83 year old grandmother.

2.3 When he was ordered into the house, the first complainant and his wife and sister were told to stay in the lounge and they were guarded by accused no. 3. The first complainant's grandmother was then collected from the separate portion of the house where she stayed and also brought to the lounge.

2.4 All four perpetrators, including the Appellant, were armed. They switched on all the lights of the house in particular that of the lounge and the entrance lights and turned the television to maximum volume. The family members were kept in the lounge for approximately 1½ hours and from time to time the various perpetrators came into the lounge and threatened the family members, *inter alia* by holding the guns with wet pillows against the

heads of the family members (ostensibly to muffle any shot which may be fired).

2.5 During the course of the above various items were collected in the house. The perpetrators appeared to know the house, know the existence of a tracking device in one of the vehicles and to now of the existence and location of a safe. Various items including new linen, goblets, ornaments, a firearm and jewellery were taken.

2.6 The robbery was interrupted by the arrival of the police which led to the perpetrators scattering. The family rushed outside to meet the police who then entered the house and found the Appellant hiding under a dining-room table. The other accused were subsequently arrested and identified.

[3] **THE ISSUE ON APPEAL**:

3.1 The issue on appeal and in respect of which leave to appeal had indeed been granted, was whether the convictions on the kidnapping charges amounted to a duplication of convictions or the so-called splitting of charges.

3.2 The Appellant relied heavily on the judgment in **S v Grobler en 'n Ander** 1966 (1) SA 507 for the argument that the prosecution is not barred from putting charges that might constitute a duplication of convictions but that the trial court has to guard against convicting an

accused on charges that constitute a duplication of convictions. The rule is to prevent a duplication of convictions in instances in which the accused's criminal conduct reveals only one offence which could be contained in a single comprehensive charge.

3.3 Such a duplication of convictions as referred to above may seriously prejudice an accused in that he might receive a heavier sentence than one which he would or should have received if a duplication of convictions had not occurred. Further prejudice may occur if the accused is sentenced in a subsequent case and that sentence is influenced by the number of previous convictions which would then include the duplications of convictions. In the seminal work Hiemstra's **Criminal Procedure** in the commentary on Section 83 of the Criminal Procedure Act, No. 51 of 1977, the *"test for splitting"* is stated as follows:

> *"There is no universally valid criterion for determining whether there is splitting. In* ***S v Davids*** *1998 (2) SACR 313 (C) the topic is discussed afresh and the most important decisions are usefully summarised. The courts over the course of time developed two practical aids (****S v Benjamin en 'n Ander*** *1980 (1) SA 950 (A) at 956E-H:*
>
> *(i) If the evidence which is necessary to establish one charge also establishes the other charge, there is only one offence. If one charge does not contain the same elements as the other, there are two offences (****R v***

Gordon *1909 EDC 254 at 268 and 269). This can be called 'the same evidence test'.*

*(ii) If there are two acts, each of which would constitute an independent offence, but only one intent and both acts are necessary to realise this intent, there is only one offence (**R v Sabuyi** 1905 TS 170). There is a continuous criminal transaction. This test is referred to as 'the single intent test'".*

3.3 In **R v Johannes** 1925 TPD 782 Curlewis JP stated that the one or the other of these tests may be applied, depending on the circumstances of each particular case. The single intent test was also referred to with approval in **S v Dlamini** 2012 (2) SACR 1 (SCA) where the following has also been stated:

> *"There is, however, no all-embracing formula. The various tests are more guidelines and they are not rules of law, nor are they exhaustive. Their application may yield a clear result but if not, a court must apply its commonsense, wisdom, experience and sense of fairness to make a determination."*

3.4 In the charge sheets relating to the charges of kidnapping the charges were formulated as follows:"

> *"In that on or about 17 September 2006 and at or near ... the accused did unlawfully and intentionally deprive* [a family member] *of her freedom of movement by means of holding*

the complainant hostage at gunpoint and/or by preventing the complainant from leaving the room."

3.5 During the debate on this issue the obvious and commonsense approach was put to counsel for the Respondent along the lines that an armed robber would not allow his victim to roam freely, go and make tea, discuss mundane issues with the neighbour or consider leaving the premises to go shopping. The obvious intent of an armed robber would be to detain the property owner so as to enable the robber to deprive such property owner of his possessions.

3.6 Although the elements of kidnapping (being the unlawful and intentional deprivation of a person's freedom of movement) are different from the elements of robbery (being the unlawful and intentional use of violence to take property from someone else or the threats of violence to induce the possessor of the property to submit to the taking of the property) it is clear that for robbery to be committed there must be a causal link between the violence and the taking of the property. See **R v Moerane** 1962 (4) SA 105 (T) at 106D, **R v Pachai** 1962 (4) SA 246 (T), **S v Marais** 1969 (4) SA 532 (NC) at 533A.

3.7 In the present case, the threats of violence constituting the robbery were occasioned by threatening the family members and detaining them in the lounge of the residence. The clear intent was not to

kidnap them or to simply point firearms as provided for in Section 120(6) of the Firearms Control Act, No. 60 of 2000, but to enable the perpetrators to dispossess the family. The sole intent of detention was to commit a robbery and therefore the second of the two tests referred to in **S v Benjamin** *supra*, has been satisfied.

3.8 I find that in the circumstances, the above test is the correct one to be applied to the facts of this case and that the conviction of the Appellant on the charges of kidnapping amounts to a duplication of convictions (and a "*splitting of charges*").

[4] **ORDER**:

In the premises I propose that the appeal be upheld and that the convictions of kidnapping in respect of charges 2, 4, 6 and 8 and the sentences imposed in respect thereof be set aside.

N DAVIS
ACTING JUDGE OF THE HIGH COURT

I Agree.

S P MOTHLE
JUDGE OF THE HIGH COURT

I agree and it is so ordered.

E M MOLAHLEHI
ACTING JUDGE OF THE HIGH COURT

Counsel for Appellant:	Adv F van As Pretoria Justice Centre
Counsel for Respondent:	Adv S Scheepers
Date heard:	28 October 2016
Date of judgment:	25 November 2016