

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:

A782/2008

DATE:

7 SEPTEMBER 2007

5 In the matter between:

DONOVAN ADAMS

1ST APPELLANT

EBRAHEM PETERS

2ND APPELLANT

versus

THE STATE

RESPONDENT

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JUDGMENT

CLEAVER, J:

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The appellants were convicted in the Regional Court of Cape Town on 26 October 2004 on three counts: count 1 being that of robbery with aggravating circumstances; count 3 being possession of an unlicensed firearm; and count 4 being in unlawful possession of ammunition.

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On 5 November 2004 both appellants were sentenced to 15 years imprisonment on count 1. Counts 3 and 4 were taken together and in respect of those counts they were sentenced to three years imprisonment. The regional magistrate

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determined that two years of that sentence were to run concurrently with the sentence imposed on count 1, thus an effective terms of 16 years imprisonment.

5 Leave to appeal against the convictions and the sentence was refused, but on petition to this Court the first appellant was granted leave to appeal against the convictions on counts 3 and 4, and on the sentences on all three counts. The second appellant was given leave to appeal against the convictions on
10 counts 3 and 4 only. He did not apply for leave to appeal against the sentences.

It is not necessary to deal with the facts of the case, save to say that on the day in question three accused, that is appellant
15 No 1, appellant No 2 and a third accused, entered the home of Mr and Ms Berry in Milnerton in the afternoon, armed with a firearm and thereupon set about robbing the occupants of various items, including jewellery, a cellphone, watches. In the course of the entry into the home, Ms Berry was pistol-whipped by accused No 3, who at that stage was holding the
20 firearm. The activity in the home that afternoon had alarmed the neighbours who had called a security company. Two members of the security company guarding the area arrived. In the fracas which took place thereafter, accused No 3 was tackled by Mr Berry, who was in turn shot by one of the

security officers, aiming presumably at accused No 3. Accused No 3 himself was shot and one of the security officers were shot.

5 Appellant No 1 was unrepresented at the trial and today appears on his own behalf. Appellant No 2 is represented by counsel.

10 Let me deal first with the appeal by appellant No 1 against the conviction on counts 3 and 4. His case is straightforward. His case is that he did not handle the gun, he was not found to have handled the gun, and that therefore he should not be found guilty of possession of the firearm or unlawful possession of ammunition in that firearm. The law in this regard is set out in the most recent case of S v Molimi and Another SACR 2006(2) page 8. In this case a judgment of the Supreme Court of Appeal, the judgment in S v Mbuli, 2003(1) SACR at page 97 (SCA), is confirmed and the principles applicable are set out in the following terms:-

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“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

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Court that:-

5 (a) the group had the intention, the *animus*, to exercise possession of the guns through the actual detental; and

(b) the actual detentors had the intention to hold the guns on behalf of the group.

10 Only if those requirements are fulfilled can there be a joint possession involving the group as a whole and the detentors or common purpose between the members of the group to possess the guns."

15 Now although the term "common purpose" has been criticised, those are the requirements. In order for appellant No 1 to be found guilty of possession of the firearm and the ammunition, the Court must be satisfied that the inference can be drawn that whoever held the gun, held it on behalf of all three robbers, and that all three robbers had the intention that those who were holding the gun would be holding it on behalf of all three robbers. Now in order to establish whether we can rightfully draw this inference, it is necessary to look at the facts on which the conviction was founded.

The facts are that accused No 2, plus an accomplice, arrived at the home in the early hours of the afternoon clearly in order to establish what the interior of the house looked like. Later that afternoon accused No 3, plus appellant No 1 and appellant No 2 arrived at the house. The house was entered, according to the evidence of Mr and Ms Berry, by appellant No 2, holding a firearm. This firearm was then used to subdue the occupants, who were made to lie on the floor. The undisputed evidence of Ms Berry was that the weapon was then handed at a stage to the third accused, and the third accused pistol-whipped Ms Berry, causing her to lose consciousness and to bleed profusely.

Mr Berry's evidence was to the effect that the weapon had been handled by all three. I must say that that was an issue which was not examined in any detail, and I would be prepared to give appellant No 1 the benefit of the doubt that it had not been clearly established that he held the gun, but that is not the end of the matter for him.

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If the inferences can be drawn to which I have alluded, he would in law be guilty with the other two of possessing the firearm. In my view such inferences can be drawn. The facts are that this robbery was carefully planned; that he was present while the occupants were subdued with the threat of

the firearm being used; that the firearm was then passed to the hands of accused No 3, and that while all this was going on, he was enjoying the benefit of the occupants being threatened by the gun while he and others collected items which were stolen from the occupants. I am satisfied that as far as appellant No 1 is concerned, the conviction MUST STAND.

On behalf of appellant No 2, the submission was made that by charging the appellant with counts 3 and 4, the State had effectively brought about a splitting of charges. As counsel for the State has pointed out, Section 83 of the Criminal Procedure Act requires charges to be brought in this manner if it is unclear as to which offence has been committed. So insofar as splitting is concerned, there is no merit in the point.

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The State has correctly also submitted what should be considered is whether there was a duplication of the charges. In my view, there is no such duplication. The offence of robbery with aggravating circumstances is committed when the threat of violence or violence is used in order to bring about the robbery. If one enters and uses a gun in order to rob, that constitutes aggravating circumstances. The appellants were also charged with the statutory offence of being in possession of an unlicensed firearm and the unlawful possession of ammunition. Those are offences which are totally different

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from the main charge of robbery, and even though they may occur at the same time, the offences remain separate offences and in my view there is no question of any duplication of charges.

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So in respect of the convictions of both appellants on counts 3 and 4 the appeal against the convictions MUST FAIL.

We heard argument from appellant No 2's counsel, which we applied also to appellant No 1, since he was unrepresented. It was submitted that, in the final analysis, the term of imprisonment of 15 years was shockingly inappropriate and this Court should reduce the sentence.

15 Counsel for appellant No 2 pointed to an unusual feature of the judgment, and that is that the regional magistrate recorded, as he is required to do in terms of Act 105 of 1977, that in his view there were substantial and compelling reasons as to why the minimum sentence might not be imposed, and he recorded
20 this as being the fact that the appellants, the accused at that stage, had been in custody for a period of some five years. Notwithstanding this, he made it clear that in the exercise of his discretion he did not consider that the substantial and compelling circumstances justified him in imposing a lesser
25 sentence than the 15 years. His reason for this was the cold-

blooded and callous manner in which the robbery had been planned and executed, the fact that the complainants had been attacked in the sanctity of their home in a most blatant manner and at a time when it would have been known to the appellants that the inhabitants were at home, they burst into them and attacked them in their home, well knowing that they would be there.

The test on appeal has been stated over and over, but perhaps it is as well to remind oneself of the test which an Appeal Court must apply. In this regard I refer to S v Kgosimore, 1999(2) SACR at page 238 (SCA), and I quote from 241 at the letter E:-

“It is trite law that sentence is a matter for the discretion of the Court burdened with the task of imposing the sentence. Various tests have been formulated as to when a Court of appeal may interfere. These include whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence that the Court of appeal would have imposed. All these

formulations, however, are aimed at determining the same thing; *viz* whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true inquiry. (Compare S v Peters, 1987(3) SA 717 (A) at 727G – I.). Either the discretion was properly and reasonably exercised or it was not. If it was, a Court of appeal has no power to interfere; if it was not, it is free to do so.”

And that is the test which we must apply. Counsel for the State has correctly also referred to the judgment of Peters which is quoted above, in which the point is made that minimal differences of the period of the sentence ought not to be taken in account when considering whether a sentence is startlingly inappropriate.

I have a measure of sympathy for the appellants, but in my view a case has not been made out that the regional magistrate did not exercise his discretion correctly and in the circumstances the appeal against the sentences CANNOT SUCCEED.

In the circumstances, the sentences are CONFIRMED.

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CLEAVER, J

I agree.

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for ALLIE, J

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