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

High Court Case No: A61/12
DPP Reference No: 9/2/5/1-55/12
Lower Court Case No: SHA 21/11

In the appeal between:

THULANI NGCABO **APPELLANT**

AND

THE STATE **RESPONDENT**

JUDGMENT 26 APRIL 2012

DOLAMO AJ

[1] The Appellant, a 30 year male, who enjoyed legal representation throughout the trial, was convicted in the Wynberg Regional Court on one count of pointing a firearm, one count of attempted murder and one count of robbery with aggravating circumstances as intended in section 1 of Act 51 of 1977. The Appellant was acquitted on another count of robbery as well as another count of pointing a firearm as no evidence was led on these charges. Appellant pleaded not guilty to all the charges. He pleaded in essence that the complainants were mistaken with the identity of the offender. However, during his testimony in

mitigation of sentence, he expressed remorse for his actions and admitted that he had committed the offences of which he had been found guilty. He could not explain why he did not plead guilty initially.

[2] The Appellant was sentenced to one year imprisonment on the first count of pointing a fire arm, five years imprisonment on the second count of attempted murder and twelve years imprisonment on count three of robbery with aggravating circumstances. The court *a quo* ordered that the three sentences run concurrently.

[3] The Appellant applied for and was granted leave to appeal against both his conviction and sentence. His grounds of appeal against conviction were that the court *a quo* erred in accepting the evidence of the witnesses that the Appellant was the person who had attacked them. As regards sentence the Appellant alleged that the court *a quo* misdirected itself by over emphasising the interests of the community and under emphasising his personal circumstances; erred in not fully taking into account the element of mercy that should have been afforded the Appellant; that a sentence of long term imprisonment would hinder his rehabilitation and integration back into society; erred in not properly taking into account the period the Appellant had spent in custody awaiting trial and consequently that the sentences imposed on him were shockingly inappropriate.

[4] The state relied on the evidence of two witnesses to prove its case against the Appellant. The two state witnesses were Ms Dumile and her fiancé Mr Pietersen, the complainants in the matter. The evidence of Ms Dumile in brief was the following: On the 31st day of August 2009 she was at her place of residence, at

B395 Owen Road, Nyanga East. At about 5am she went to the outside toilet. While inside she left the door open. The Appellant, who was well known to the witness, arrived and pointed a fire arm at her. She testified that she knew him very well because he stayed close to her in the same area where she lived. She had known him for a number of years, though her knowledge of him was restricted to seeing and exchanging greetings with him in the streets. He lived next to her friend whom she visited frequently.

[5] At the time of the attack the Appellant was alone and the complainant could see that it was Appellant because the lighting was good. She could see that he was pointing a firearm which was black in colour. On pointing the firearm the Appellant asked her where the money was. The complainant, Ms Dumile screamed and called her boyfriend who was inside their house. She pushed the toilet door closed. The Appellant fled the scene. She never saw him again. She came out of the toilet and ran into the street screaming. She entered one of the houses near her house where the owner opened a door for her. She informed him that she was being robbed at her house.

[6] While she was in this house she heard two gun shots coming from the direction of her house. She then heard her family members and some people who live in the area calling out her name. She left this house and went home, i.e her family's house and not where she was staying. She did so because she was afraid to go back to her house after she received information that her boyfriend had been shot. She only saw her boyfriend when he was brought back from hospital. She did not see the person who shot her boyfriend. When she returned to her own house

she established that somebody had stolen or taken her DVD player as well as their two cell phones. She never recovered these items.

[7] In cross examination she stated that she was terrified when the Appellant pointed a fire arm at her. She was adamant however that she was not looking solely at the firearm, but had also looked at the person holding it. It was the first time she was pointed at with a fire arm. She was scared and shocked. She thought of her safety and the safety of her children, who were left alone in her house. At a question why she left the door open while she was using the toilet she indicated that she did so because she knew that at that time of the morning there was usually no one outside. The Appellant was wearing a fleece jacket, black in colour and a beanie which was not covering his eyes. The whole episode took about a minute and she never had any conversation with her assailant. She also said that the Appellant was a known person in the area and denied that there were more than one 'Thulani' in the neighbourhood.

[8] The second state witness was Mr Pietersen, the next complainant and the first state witness's fiancé. He testified that at the time of the incident he was preparing to go to work. His girlfriend, the previous witness, left the room to go to the toilet. He then heard her screaming. He ran out to see what was happening. Once outside he saw two males standing at the back of his yard. He picked up an empty bottle which he threw in their direction. One ducked and the other one fired at him. It was Appellant who fired at him. Appellant, who was about 5 metres from him came closer, took aim and shot at him. He fell down because he tripped. Appellant then entered the house and took things, but he does not know what he

took. He confirmed that he did see the Appellant entering his shack when he stood up and went over the street to his neigbour.

[9] Three shots were fired at him. He ducked, but one struck him in his right thigh. He saw blood from the wound. The Appellant said nothing to him at the time of the attack. The witness stood up and went to the neighbour's house. Later he went back to his house where people had gathered who came to the scene and he found that there were some items which were taken. These were the two phones and a DVD player. He was then taken to hospital. He also recalled that the Appellant had been wearing a black tracksuit top. He confirmed that the lighting in the area was good and the light in the toilet was also on.

[10] Under cross examination the complainant was quite certain that it was Thulani, the Appellant who shot at him. He knows him. He admitted that Appellant returned to the scene after the shooting while the witness was still there and before he was taken to hospital. The Appellant had removed the black top he had been wearing earlier. The witness denied that he asked the appellant if he knew **who** shot him.

[11] At a question from the court he said that the Appellant came back to the scene to ask what had happened and he informed him that a robbery had just taken place. He told the Appellant that he was robbed by two males. He said he told the Appellant this and did not tell anybody who had shot at him as he was afraid. He ascribed this unusual behaviour to shock and being a little bit dizzy. He however was able to remember what had happened. It was at that point that he

was taken to hospital. The court recalled the first state witness who was asked about the presence of the Appellant at the scene. She said: ' *I never saw him again, your worship, after the incident.*'

[12] The Appellant testified. He admitted knowing the two complainants and said that after the shooting incident he was at the scene. He had heard the sound of gunshots. At that time he was sitting with his friend Marco Polo and Mwisa one street away from where the incident happened. These names, which were nicknames, differed from the names that were put to witnesses by his legal representative in cross examination. He also confirmed that he spoke to Mr Pietersen and asked him what had just happened and that Pietersen informed him that a robbery had just taken place.

[13] Appellant said that he had not slept but had been drinking throughout the night with his two friends. He mentioned that he had in the past had problems with Pietersen, who had previously assaulted his brother. This had led to bad blood between his family and Pietersen, which feud included the first state witness, who allegedly had shouted and swore at his mother. (Information not put to the witnesses.) Other than this alleged feud he could not advance any reason why the state witnesses would both implicate him in the matter. He denied that he had worn a black top on the day in question though he could not remember what he was wearing. He refuted the suggestion by the state that he had in fact returned to the scene of the crime so as to intimidate Pietersen. He reiterated that he went to the scene because he wanted to know what had happened. He did not call any witnesses. .

[14] I agree with the learned Magistrate that it is clear that the only issue in dispute was the identity of the robber. I also agree with the learned Magistrate that it was common cause that the two state witnesses knew the Appellant relatively well. The question therefore is whether in the circumstances of the case they were able to make a reliable identification of the Appellant as the robber.

[15] Whether the witnesses were able to make a reliable identification of the Appellant as the robber would depend on the reliability of their observations. As in **S v Mtetwa** 1972(3) SA 766 AD at 768A, to which the court *a quo* referred, this will depend on factors such as lighting, visibility and the eyesight of the witnesses, proximity of the witnesses, their opportunity for observation both as to time and situation.

[16] The evidence in this matter relating to lighting, opportunity to observe, proximity of the assailant, the fact that the assailant was well known and identified by both state witnesses, all contribute to a reliable identification by the witnesses. There was no suggestion that the witnesses fabricated or may have been mistaken in their identification. I am satisfied that the identification of the Appellant by the witnesses is reliable.

[17] It is evident from the record that the court *a quo* was mindful of the need to approach this type of evidence with caution and was alive to the pitfalls inherent therein. I am satisfied that such cautionary approach as required was indeed brought to bear on the evidence of the two state witnesses and was found to be

reliable as to constitute proof beyond reasonable doubt that the Appellant was the robber. Any residual doubt was removed by the *ex post facto* admissions by the Appellant, during his testimony in mitigation of sentence, that he had committed the offences. I am therefore satisfied that the Appellant was properly identified as the attacker and robber.

[18] The question that remains to be determined is whether the Appellant was improperly convicted on the three counts or whether the convictions on the charges of pointing a firearm, attempted murder, together with robbery with aggravating circumstances do not amount to a duplication of convictions. This aspect was argued before the Magistrate, who decided that the three convictions did not amount to splitting of convictions as the conduct of the Appellant constituted three different offences.

[19] We called for further submissions on this question from the legal representatives of the Appellant and the Respondent. The State responded in writing and *inter alia* referred to Section 83 of the CPA as well as the decision of the Appellate Division in **S v Grobler** 1966 (1) SA 507 and **S v Moloto** 1982 (1) SA 844 (A). In argument before us Ms Sipoyo, who appeared for the State, made reference to two further judgments namely **S v Dempe** 2010 (1) SACR 360 (NCK) and **Dlamini v S** (362/(11) [2012] ZASCA 26 (27 March 2012)

[20] Section 83 of the CPA allows the state to charge an accused person with all the offences which might possibly be proven by the facts at its disposal. It is for the

court in such circumstances to guard against a duplication of convictions in order to afford an accused person a fair trial.

[21] In its submission on this point the state relied on the so-called single intent and the evidence tests, namely whether two or more acts were done with a single intent to constitute one continuous criminal transaction. Another, the evidence test, asks the question whether the evidence necessary to establish one crime involves proving another crime.

[22] These tests do not always yield conclusive proof of a duplication of convictions. The reason, as Du Toit et al puts it, in paragraph 14 – 6 in the Commentary on the Criminal Procedure Act, is because of the variety of offences and the distinctive nature of each set of facts, which makes it impossible to develop a single guiding principle that would apply to all circumstances.

[23] The judgments **S v Whitehead and Others** 2008 (1) SACR 431 and **S v Radebe,** 2006 (2) SACR 604 are both judgments where the various tests have been formulated to determine whether or not there has been a duplication of convictions. In **Whitehead** the SCA specifically stated that these tests are 'simply useful practical guides and in the ultimate instance, if these tests fail to provide a satisfactory answer, the matter is correctly left to common sense, wisdom, experience and a sense of fairness of the court.'

[24] In Dlamini, supra, Cachalia JA (with whom Farlam JA concurred) remarked as follows regarding the difficulty of formulating general principles: ' There is

however no all-embracing formula. The various tests are mere guidelines – 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 common sense, wisdom, experience and sense of fairness to make this determination.'

[25] The facts in Dlamini were briefly as follows: Mrs Burger was at her private residence waiting for her friends, Mrss Usher and Acutt, to join her so that they could drive together in one vehicle to a nearby church. Mrs Usher arrived in her vehicle and was joined by Mrs Burger while they waited for the arrival of Mrs Acutt. The latter arrived in her car and parked on the premises. She walked towards and had reached the vehicle where her friends were waiting when three men, one armed with a fire arm appeared. The armed man pointed the fire arm at all three women and demanded that they hand over their possessions and the keys to both cars. The three women complied and their possessions were taken. The men then made good their getaway in the two vehicles taking with them the three women's personal effects.

[26] Dlamini, who was identified as one of the robbers, was charged with and convicted on three counts of robbery of the items taken from the three women, including the two cars. In urging for the setting aside of two of the robbery convictions, Cachalia JA reasoned as follows:

> " [22] In my view it is clear that the 'single intent' –or in this case the single common intent – of the robbers involved the threat to take property from the three women and the taking of their property in 'one continuous transaction'.

Furthermore, this was accomplished through a single threat of violence directed at the three women simultaneously. This evidence – the violent threat - which was necessary to establish each charge, involved proving the other two charges. So both tests in Maneli were satisfied".

[23] However, even without the application of these tests to this case, to conclude that three offences were committed when in substance only one was – would defy common sense and fairness. Moreover, it would contradict the recent approach of this court in Maneli."

[27] The learned Judge was referring to S v Manelli, 2009 (1) SACR 509.

[28] On the other hand Majiedt JA (with whom Van Heerden and Snyders JJA concurred) concluded that there was a duplication of convictions and that the evidence established three separate counts of robbery and that the Appellant in that case was correctly convicted. He concluded as follows: " To summarise: the evidence plainly established the commission of a separate robbery against each of Mrs Acutt, Mrs Burgess and Mrs Usher. The application of the single intent, continuous transaction test and of the evidence test inexorably leads to this conclusion".

[29] In my view Dlamini, relied upon by the State, is distinguishable on the test from the present matter.

[30] There is no doubt that the Appellant in the present matter went to the complainants' home with the intention to rob them. He armed himself with a fire-arm with the intention to use it to threaten them or to use it to incapacitate any of them, so as to facilitate the taking of their property, should they offer any resistance. He first threatened Ms Dumile by pointing at her with the fire-arm and asking where the money was, but hastily retreated when she raised an alarm. This however did not completely dissuade him to call off his intention to rob, because when Mr Pietersen appeared and attempted to ward him off by throwing a bottle at him, he shot him to incapacitate him. In my view the threatening of Dumile with the fire-arm and the shooting of Pietersen were done with a single intent and as part of a transaction to facilitate the appropriation of their property.

[31] The Appellant in my view was correctly convicted of robbery with aggravating circumstances as intended in Section 1 of the CPA but was incorrectly convicted of the attempted murder and the pointing of a fire-arm. The latter two convictions amounted to a duplication of convictions and ought to be set aside, in fairness to the accused in these circumstances.

[32] I turn my attention to the question of sentence. The Appellant alleged that the learned magistrate committed a number of misdirections, as set out in paragraph 3, supra and that this led to shockingly inappropriate sentences being imposed on the Appellant. Ms Kloppers, who appeared for the Appellant focused mainly on the 12 years imprisonment imposed on the count of robbery with aggravating circumstances. This in my view was a correct approach given that the sentences on the other counts were ordered to run concurrently leaving the

Appellant to serve an effective period of 12 years imprisonment. In any event the 1 year imprisonment for pointing a fire-arm and the 5 years imprisonment on the count of attempted murder will now fall away.

[36] In **S v Pillay** 1977 (4) SA 531 (A) Trollip JA state that:

> "As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercise it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence."

[37] There is no merit in the submission regarding the alleged misdirection by the court *a quo*. In my view the learned Magistrate exercised his discretion properly and judicially to arrive at an appropriate sentence. The personal circumstances of the Appellant, his previous convictions, his struggles with drugs, the imperfect upbringing brought about by his abusive father, were all accorded appropriate weight. In addition the learned Magistrate found that the period Appellant had spent in custody awaiting trial amounted to substantial and compelling circumstances, justifying a departure from the imposition of the minimum prescribed sentence.

[38] The gravity of the offence committed by the Appellant justifies a long term of direct imprisonment. The Appellant prayed on his neighbours. He pounced on them when they least expected such an attack. He armed himself with a dangerous weapon and was not shy to use it at the slightest excuse. He may quite easily have killed Pietersen. Minimum sentence legislation prescribes a minimum period of 15 years imprisonment, but for substantial and compelling circumstances, which the Magistrate did find.

[39] The order I propose is accordingly the following:

1. The appeal succeeds in so far as the convictions on the charges of pointing a fire-arm and attempted murder are set aside;
2. the sentences on the charges of pointing a fire-arm and attempted murder are set aside;
3. the conviction on the charge of robbery with aggravating circumstances is confirmed; and
4. the sentence of 12 years imprisonment on the charge of robbery with aggravating circumstances is confirmed.

MJ DOLAMO AJ

I agree and it is so ordered. The sentence of 12 years imprisonment will commence on the date of sentencing in the court *a quo.*

ET STEYN J