THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case No: 20288/14

In the matters between:

LUKAS VUSI MAHLAMUZA **FIRST APPELLANT**

SIBONGILE EMILY NKABINDE **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Mahlamuza and another v State* (20288/14) [2014] ZASCA 213 (1 December 2014).

Coram: Brand and Willis JJA and Meyer AJA

Heard: **26 November 2014**

Delivered: **1 December 2014**

Summary: Duplication of convictions – same set of proven facts giving rise to separate conviction of robbery with aggravating circumstances and two convictions of attempted murder – failure by State to establish (a) violence used against victims exceeded bounds of robbery and (b) further intention to kill – conviction on two counts of attempted murder thus unwarranted.

ORDER

On appeal from North Gauteng High Court, Pretoria (Smit and Bosielo JJ concurring, sitting as court of appeal):

(a) The appeal by the appellants against their convictions on counts 2 and 3 is upheld. Their convictions and sentences on these counts are set aside.

(b) The appeal by the appellants against their sentences on count 1 is dismissed.

JUDGMENT

Meyer AJA (Brand and Willis JJA concurring):

[1] Arising from an incident that occurred on 3 September 2000 at the farm Vlakplaas in the district of Delmas (the farm) where an elderly married couple, Mr PC and Mrs HMG Neethling, resided, the two appellants (and one co-accused) were convicted in the regional court, Delmas of robbing the couple with aggravating circumstances (count 1) and of attempting to murder Mr Neethling (count 2) and Mrs Neethling (count 3). They were found to have acted with a common purpose in committing the crimes. In addition, the first appellant was convicted of attempting to murder a police officer, Inspector Smook, who arrived at the farm and gave chase to some of the suspects (count 5).

[2] The trial court sentenced the first appellant, Mr Lucas Vusi Mahlamuza, to an effective period of 48 years' imprisonment: 20 years on count 1; 10 years on count 2; 8 years on count 3; and 10 years on count 5. The second appellant, Ms Sibongile Emily Nkabinde, was sentenced to an effective period of 33 years' imprisonment: 15 years on count 1; 10 years on count 2; and 8 years on count 3. The trial court did not order the serving of any of the sentences to run concurrently.

[3] The appellants appealed unsuccessfully to the North Gauteng High Court against their convictions and sentences. The high court, however, granted them leave to appeal to this court against their convictions on counts 2 and 3 and the sentences imposed upon them on counts 1, 2 and 3. The appellants contend that the proven facts as found by the trial court did not establish the commission by them of the two separate crimes of attempted murder relating to Mr and Mrs Neethling. The separate convictions of robbery with aggravating circumstances and of attempted murder, so it is contended, amount to an impermissible duplication or splitting of convictions.

[4] The same set of proven and accepted facts gave rise to these separate convictions. Late in the afternoon on Saturday, 2 September 2000, the day before the incident giving rise to the charges and convictions, a group of four men and two women arrived at the farm and four of them (two men and two women), including the appellants, went to the house of Mr and Mrs Neethling (the house). One of the women pretended to order birthday cakes from Mrs Neethling, who baked for an income. Before leaving one of the men asked to use the telephone, but Mrs Neethling told him that it was out of order.

[5] The following morning, Sunday, 3 September 2000, the same group of people arrived at the farm and again the same four went to the house. They appeared as if they were coming from church and indeed one of them said so and was carrying a Bible. This time they pretended to be interested in furniture that Mr Neethling had made (he was a cabinet maker) and he promptly acceded to the request to view his furniture.

[6] When they entered the storeroom where the furniture was kept, the man who carried the Bible produced a revolver and pointed it at or in the direction of Mr Neethling, saying he was going to shoot him. At close range (at most two metres) he fired a shot but it missed Mr Neethling. He then hit Mr Neethling on the head with the butt of the revolver. Mr Neethling fell over. He was tied up by two of the persons involved (a man and a woman) who also fiercely kicked him in the ribs. The woman searched him and found a revolver, which she handed over to the man who co-perpetrated the assault. Mr Neethling was pulled to the door of the storeroom where the two of them proceeded to tie him up. Mr Neethling testified that he was at

that stage thoroughly (‘deeglik’) tied up and unable to move. The group left the storeroom, leaving Mr Neethling behind. The first appellant and one of the other men returned to him after a while. They dragged him from the storeroom to the bathroom inside the house where he was further tied up with one of his own ties. He was left in the bathroom with the door closed until he was freed by one of his employees, Mr Aaron Masilela (Masilela), about half an hour later. While he was lying in the bathroom he heard his wife being assaulted and a commotion in the house as goods were carried out.

[7] During the time when Mr Neethling remained in the storeroom the first appellant ordered Mrs Neethling to open the kitchen door. She complied out of fear that her husband would otherwise be harmed. She had heard the gunshot. The first and second appellants entered the house. The first appellant pushed and slapped Mrs Neethling while he demanded firearms and money. They ordered Mrs Neethling to the bedroom where they removed her jewellery from her person and emptied her handbag. While the first appellant emptied a safe in the bedroom the second appellant assaulted Mrs Neethling by kicking her and mostly slapping her on the head. Insisting that there had to be more money in the house as Mrs Neethling was baking cakes for an income, the second appellant continued with the assault. The first appellant took a knife out of the safe and caressing the blade said to Mrs Neethling that he was going to kill her that day. They pushed Mrs Neethling to her workroom where she was thrown to the ground, tied up with her husband’s ties and further assaulted by the second appellant. The appellants left her in her workroom where she remained until she too was freed by Masilela. She heard her husband being dragged into the bathroom and also the ransacking of the house.

[8] Because Masilela, who also resided on the farm, noticed people running into the house, he notified the police of a burglary at the farm. When two police officers, Insp Smook and Cst Edward Tom, arrived, the group of people took to their heels. One of them was shot dead when Insp Smook returned fire on him. In trying to evade arrest the first appellant also fired a gunshot at Insp Smook that missed him. This accounts for the first appellant’s further conviction of attempted murder (count 5). Goods that were taken from the house and storeroom were found outside the house.

[9] Mr and Mrs Neethling were admitted to hospital. The evidence does not disclose when they were admitted, but only that they were discharged on 5 June 2000. Mr Neethling was 77 years old at the time. He sustained two lacerations on his head and one beneath his eye, which were sutured. He also sustained multiple bruises to other parts of his body. Mrs Neethling was 64 years old. The trial court observed that she was a thin and petite elderly lady. She testified that most of the injuries she had sustained were to her head and face. No medical evidence relating to the nature of her injuries was presented to the trial court. All that can be seen from the photographs that were formally admitted is that her injuries were superficial and in the nature of bruises.

[10] In *S v Moloto* 1982 (1) SA 844 (A) it was held that where attempted murder is committed in connection with a robbery the State is entitled, according to the circumstances, to charge the accused with robbery and with attempted murder and the court is entitled to find him guilty on the two separate offences provided that the robber used excessive violence that exceeded the limits and bounds of robbery (which is violence that puts the life of the victim in danger) and it was proved beyond reasonable doubt that the accused also had the intention to kill and not merely to use force aimed at temporarily incapacitating the victim.

[11] In this regard Rumpf HR said the following in *Moloto*:[1]

'. . . Die probleem in ons moderne reg is om vas te stel wanneer geweldpleging teenoor die slagoffer by roof sy perke of grense oorskry om as buitensporige geweld (*vis major, excessive force*) oor te gaan om die handelingselement by poging tot moord of die dood-veroorsakende handeling by moord te word. Myns insiens is 'n praktiese benadering om die aanranding van buitengewone geweld by roof vas te stel die toepassing van 'n objektiewe maatstaf, nl of die persoonlike veiligheid (die lewe) van die slagoffer in gevaar gestel word. . . . Sodra 'n rower teenoor sy slagoffer geweld aanwend wat die lewe van sy slagoffer in gevaar stel, wend hy buitensporige geweld aan wat die grense en perke van roof

[1] 1982 (1) SA 844 at 853A-F. 'The problem in our modern law is to determine when violence against the victim of robbery exceeds its limits or bounds in order to, as excessive force (*vis major, excessive force*), become the unlawful act of attempted murder or the death causing act of murder. In my view a practical approach to determine the use of excessive force with robbery is the application of an objective measure, namely whether the personal safety (the life) of the victim is being placed in danger. As soon as a robber uses violence against his victim that puts the life of the victim in danger, he uses excessive force that exceeds the limits and boundaries of robbery. With reference to the nature and degree of the excessive force and the circumstances of the given case a determination will be made whether the robber also had the intention to kill his victim. If so then the robber is guilty of robbery as well as attempted murder depending on the circumstances.' (My translation.)

oorskry. Daar sal aan die hand van die aard en graad van die buitensporige geweld asook die omstandighede van die betrokke geval beoordeel moet word of die rower ook die opset gehad het om sy slagoffer te dood. Indien wel dan is die rower skuldig aan roof sowel as moord of poging tot moord na gelang van die omstandighede.'

[12] The trial court's finding and that of the high court to the effect that the acts of violence committed against Mr and Mrs Neethling in robbing them exceeded the limits or bounds of the robbery is unsustained on the facts. Apart from hitting Mr Neethling with the butt of a revolver at the beginning stages of the robbery, the injuries sustained by Mr and Mrs Neethling were inflicted without the use of dangerous instruments or weapons. None of the injuries sustained were shown to be potentially fatal or even severe. On the contrary, the evidence established that they sustained relatively minor injuries only. It can, therefore, not be concluded that the violence committed against them endangered their lives so as to qualify as excessive force that exceeds the bounds of robbery.

[13] The totality of the evidence also did not prove beyond a reasonable doubt, contrary to the findings of the courts below, that the appellants had the further intention (either directly or by way of dolus eventualis) to kill Mr or Mrs Neethling. The evidence established that the violence used against them was perpetrated only with the intent of depriving them of their belongings, by inducing them to submit to the deprivation and to overcome any resistance they might have offered.

[14] The gunshot was fired at close range, but it missed Mr Neethling. There is no evidence relating to the area of his body at which the revolver was aimed. Mr Neethling conceded that given the short distance between him and his assailant at the time when the gunshot was fired he ought to have been hit had that indeed been the intention to hit him. It is also significant that Mr Neethling was not shot at again. The reasonable inference to be drawn is that the gunshot was fired with the intention to intimidate and to induce Mr Neethling's cooperation. The assault upon him ended once he had been thoroughly tied up and made unable to move. The nature of the injuries sustained by him does not support an inference that the acts of violence committed against him before he was immobilised were committed with an intention to kill him.

[15] Although the first appellant was armed with a firearm and later on also with a knife, those dangerous weapons were not used to injure Mrs Neethling. Instead, the appellants resorted to lesser forms of assault, which inflicted relatively minor injuries to Mrs Neethling. She was intermittently pushed, slapped and kicked during the time that the appellants persistently demanded firearms and money, and more money, from her. The violence against her ended after she had been tied up and left alone in her workroom. Mrs Neethling conceded that the appellants could easily have used the dangerous weapons to kill her if that was what they intended.

[16] All the acts of violence used against Mr and Mrs Neethling formed part of the robbery. The ineluctable inference to be drawn is that the killing of Mr or Mrs Neethling was not desired nor was the possibility of killing them foreseen. It follows that the convictions of the appellants on the charges of attempted murder relating to Mr and Mrs Neethling (counts 2 and 3) and the sentences on these counts must be set aside.

[17] I now turn to the sentences imposed upon the appellants pursuant to their convictions of robbery with aggravating circumstances (count 1). In sentencing the appellants on this count the trial court imposed the minimum sentences prescribed by s 51(2) of the Criminal Law Amendment Act 105 of 1997. The first appellant, who was a second offender, was sentenced to imprisonment for a period of 20 years and the second appellant, who was a first offender, to a period of 15 years. The trial court's finding that there existed no substantial and compelling circumstances which justified the imposition of lesser sentences than the minimum prescribed ones was not challenged before us and is in my opinion unassailable. The appeal by the appellants against their sentences on counts 1, 2 and 3 is premised on the appeal against their convictions on counts 2 and 3 not succeeding. In that event, so they contend, the trial court erred in not ordering their individual sentences in respect of counts 2 and 3 to run concurrently with their sentences in respect of count 1. This contention has no further relevance.

[18] The first appellant also contends that the trial court erred in not ordering his sentences in respect of counts 1 and 5 to run concurrently. In this regard it is argued that the trial court failed to have regard to the cumulative effect of the two sentences: 20 years' imprisonment on the charge of robbery with aggravating circumstances

(count 1) and 10 years' imprisonment on the attempted murder relating to Insp Smook (count 5). There is no merit in this contention. In sentencing the first appellant the trial court exercised its discretion judicially and the cumulative effect of the two sentences does not induce a sense of shock (see *S v De Jager*).[2] All the relevant factors and circumstances were well considered and duly taken into account by the trial court. The first appellant has a previous conviction of robbery with aggravating circumstances for which he was sentenced to 10 years' imprisonment. This time he committed a violent robbery in which injuries were inflicted upon elderly people. An attempt at murdering a police officer is a very serious offence. Life imprisonment is prescribed for the completed offence. Interference with the imposed sentences is not warranted.

[19] In the result the following order is made:

(a) The appeal by the appellants against their convictions on counts 2 and 3 is upheld. Their convictions and sentences on these counts are set aside.

(b) The appeal by the appellants against their sentences on count 1 is dismissed.

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PA Meyer

Acting Judge of Appeal

[2] *S v De Jager* 1965 (2) SA 616 (A) at 628H-629B.

APPEARANCES

For Appellants	V Z Nel Instructed by: Legal Aid South Africa, Pretoria C/O Legal Aid South Africa, Bloemfontein
For Respondents	P Vorster Instructed by: Director of Public Prosecutions, Pretoria C/O Director of Public Prosecutions, Bloemfontein