



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: A101/2016

In the matter between:

NTLANTLA MOKETE MAHLANGU

Appellant

and

THE STATE

Respondent

CORAM: RAMPAL, *Jet* MHLAMBI, AJ

HEARD ON: 1 AUGUST 2016

JUDGMENT BY: MHLAMBI, AJ

DELIVERED ON: 29 SEPTEMBER 2016

MHLAMBI, AJ

- [1] The appellant successfully petitioned this court for leave to appeal against both his conviction and sentence which was delivered on

9 November 2012 in the Regional Court at Vrede on the following counts:

- a) robbery with aggravating circumstances and sentenced to fifteen years imprisonment;
- b) kidnapping and sentenced to one year imprisonment. The sentences on both counts were to run concurrently;
- c) possession of an unlicensed firearm and sentenced to three years imprisonment;
- d) unlawful possession of ammunition and sentenced to six months imprisonment. The sentences on both counts were to run concurrently.

Therefore, the effective sentence imposed on the appellant was 18 years imprisonment.

- [2] As regards the conviction, the main ground of appeal is that the court a quo preferred and accepted the state's version of the events which led to his conviction and rejected his version as not being reasonably possibly true. The appellant was one of two accused who stood arraigned, convicted on the charges preferred against them. He was tried as accused number 1. His co-accused was not before u son appeal. He was legally represented during the trial. He pleaded not guilty and his plea explanation was to the effect that his actions were not unlawful as he acted under compulsion of accused number two.

- [3] The state based its evidence on the testimony of the complainant and the policeman who effected the arrest of both the accused. The complainant testified that she was on duty on that day the two accused entered the store. They said they wanted to buy electricity. The appellant gave her the electricity card which did not work when she inserted it into electricity coupon dispensing machine. He went outside saying he was going to phone his house to ascertain the meter number but came back and reported that there was no response from his house.
- [4] Accused number two told the appellant to close the door. The appellant did so. He, accused 2 took out a firearm, cocked it and put it back into the holster clipped to his body belt. He walked around and took his position behind the counter where she stood. The appellant stood by the door. Then accused 2 demanded the password. After some initial resistance she pressed the correct password and established that the remaining electricity was worth more than a thousand rands. He told her to switch the machine off as he was going to take it. As she was scared by this time, she obliged and helped him to disconnect the machine. He told the appellant to take the machine and the appellant took it and put it on the rear seat of their vehicle outside.
- [5] On his return, the appellant stood at the door once more. Accused number two started to take the cash. He ordered her to follow them to the storeroom in which she was locked up. Accused number two threatened to shoot her if she screamed. They left and she heard the car being driven away.

- [6] During cross-examination she answered that the appellant told accused 2 not to take the money but to restrict himself to what the latter had said they should do. According to her, the appellant was an active participant in the events on that day.
- [7] Constable Mokoena testified that he was stationed at the Memel SAPS. On 13 August 2009 he was on patrol duty with constable Kraai. Having received information they drove in the direction of Vrede and stopped a BMW, charcoal in colour without registration number plates at the back. They introduced themselves and requested the driver's permission to search the motor vehicle. It was granted. A 9mm Luger firearm was found under the driver's seat. A computer, electricity coupon and many other things were found in the vehicle's boot. On searching both the accused, money and airtime were found on them. Both did not give an explanation for the firearm nor the goods found in the boot. Neither the appellant nor accused 2 asked them for any help. They arrested the suspects. During cross-examination the constable denied that the firearm was found under the passenger's seat.
- [8] The facts surrounding the robbery and the kidnapping were not in dispute. The appellant made formal admissions in terms of section 220 of the Criminal Procedure Act 51/1977 and admitted the correctness of the contents of the photo album and the statement in terms of section 212(4) of Act 51/1977 indicating that the firearm was a semi-automatic weapon and, together with the 9 parabellum ammunition, were in a working condition. The state case was then closed.

- [9] The appellant's version is that on 13 August 2009 he and the second accused went to New Castle to visit relatives. They drove in his BMW motor vehicle. On their return they stopped at a cash store at Memel. He was the driver. He alighted, went to the ATM adjacent to the cash store, withdrew some money and saw accused number 2 getting out of the car and going into the cash store. He also went into the store to buy an electricity card or electricity. There was a problem with the serial numbers and he went outside to phone. When he returned, accused number 2 was brandishing a firearm and told him to close the door. He pointed the firearm at him and the complainant, ordered him to unplug the computer wires and to take the computer to the motor vehicle which was parked in front of the store. He did and on his return accused number 2 asked the complaint where the money was and took the air time vouchers. As they went out, accused number 2 locked the complaint in a storeroom or similar room. He did not participate in the kidnapping and locking up of the complaint in that storeroom.
- [10] After the robbery, they drove off. He was afraid and did not know what to do as accused 2 had the firearm in his possession until they were pulled over by the police. Accused 2 hid the firearm under the passenger seat. He knew nothing about the firearm even though he made a formal admission that it belonged to his late father and was inherited by his brother Gift Kubeka. Before the incident, his brother had used the car for some weeks, which could explain how the firearm got into the vehicle. He was so scared that he was unable to tell the police, upon his arrest, that at all material time he was threatened by accused 2 with the

firearm. Secondly, after the arrest, they would be locked up in the cells.

- [11] On being asked by his counsel why he never ran away when he had the chance at the time he took the computer to the car, he said the complainant was already scared and accused 2 was aggressive. In reply to the same question during cross – examination he said that he was afraid and thought about the complainant. When pressed for an answer as why he did not seek assistance from someone to assist the complainant while he had the chance, he said he did not think about that.
- [12] It also unfolded during cross-examination that despite his fear and belief that the presence of the police would bring everything to light, he failed to take them into his confidence by instantly telling them his side of the story. On being pressed for an answer as to how everything would come to light if he did not say anything, he indicated that he was afraid because they were already arrested and were to be locked up in the police cells. He disclosed his story for the first time in court as his previous attorney had advised him to remain silent. This is strange as the attorney was not present during the arrest.
- [13] In argument the appellant's counsel conceded that some aspects of the appellant's actions could probably be frowned upon especially his failure to run away or jump into his car and drive away when he had the opportunity to do so. However, he submitted that it was the appellant's first time to be in such a situation, overcome by fear and particularly accused number

two's threats and conduct made him incapable to consider other options.

- [14] In its rejection of the appellant's version, and correctly so, the court a quo stated the following:

"Dan blyk dit dat die roof plaasvind in die winkel terwyl beskuldigde nou daar magteloos toekyk, hy kry geleentheid om weg te hardloop en weg te jaag en polisie te gaan roep of hulp te gaan soek deur hy dra die gesteelde items na die voertuig toe en hy gaan plaas dit in sy voertuig hy kom soos 'n skaap terug en hy gaan maar weer na beskuldigde 1 (sic) waar hy met die vuurwapen staan, hy kan nie werklikwaar verduidelik hoekom tree hy so op nie terwyl hy geleentheid het om weg te kom en hulp te kry. Hy kan ook nie verklaar hoekom hy so bang is vir beskuldigde 2 ewe skielik nie in die lig dat hy beskuldigde 2 baie goed ken en hy ook nie 'n geweldadige person is nie.....Hy kry later kans om 'n waarskuwingverklaring te maak, vir die polisie te vertel wat gebeur het, alhoewel hy 'n reg het om te swyg kan 'n mens aanvaar dat 'n prsoon in daardie omstandighede vir die polisie sal sê maar mense hou my asseblief aan ek is bang vir hierdie person hy is die person wat die roof gepleeg het, dit is 'n verskrilike voorval wat plaasgevind het dit moet uit jou uitborrel maar beskuldigde besluit om sy swygreg en verkies om nie vir die polisie te sê van hierdie voorval nie. Ook vir sy eerste prokureur sê hy niks van hierdie dwang van beskuldigde 2 nie. Hierdie hele verontskuldigende verklaring van beskuldigde 1 is so inherent onwaarskynlik dat dit so kon gebeur het dat dit verwerp word".

- [15] In the heads of argument and oral address, appellant's counsel submitted that the appellant's actions could not be deemed to have been voluntary because of *vis compulsiva* or relative force

and that his conduct was, therefore, justified as he acted out of necessity. This argument cannot be entertained as it is hopelessly untenable.

In my view the appellant's version was without substance and was rightfully rejected. The conviction was proper and should, therefore, be upheld.

[16] The effective sentence of eighteen years imprisonment was assailed on the grounds that it was shockingly inappropriate in the given circumstances and that the interests of society were outweighed by the appellant's personal circumstances. In passing sentence, the court a quo was mindful of the consideration of the appellant's personal circumstances to determine the mitigatory effect thereof whereafter it would consider the existence of substantial and compelling circumstances which would justify the imposition of a lesser sentence. The appellant was thirty years old, engaged to his fiancée with whom they have two minor children. He was a first offender and was reasonably employed earning a net salary of one thousand rands per month. He assisted his mother with whom he stayed.

[17] In **S v Matyityi** 2011 (1) SACR 40 (SCA) the court held that the prescribed minimum sentences are to be imposed unless there are truly convincing reasons to deviate from them. Such deviation should not be done for flimsy reasons. It is incumbent upon a court in every case to assess whether the prescribed minimum sentence is indeed proportionate to the particular offence before it imposes it. In my view it cannot be said that the court a quo

exercised its discretion improperly or unreasonably. I am also not persuaded that the sentence is shockingly disproportionate to the nature of the offences so that it can be typified as gross and thus constitutionally offensive: **S v Vilakazi** 2009 (1) SACR 552 SCA.

[18] The appeal against the conviction and sentence is dismissed.

J.J MHLAMBI, AJ

I concur

M.H.RAMPAI J

On behalf of the appellant: Adv. R Van Wyk
Instructed by: B.M Jones
Honey Attorneys
BLOEMFONTEIN

On behalf of the respondent: Adv. C Steyn
Instructed by:
The Director of Public Prosecutions
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