

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A130/09

In the matter between:-

ITUMELENG ISAAC MOTLOHI First Appellant (Accused 2 *a quo*)

CHABASEMABETSE LEAKA Second Appellant (Accused 3 *a quo*)

and

THE STATE

Respondent

CORAM: RAMPAL, J *et* JORDAAN, J *et* MOLOI, J

HEARD ON: 16 NOVEMBER 2009

JUDGMENT BY: RAMPAL, J

DELIVERED ON: 10 DECEMBER 2009

[1] These are appeal proceedings. There are two appellants involved. They were tried with three others in this court. In the court *a quo* the first appellant was accused no. 2 and the second appellant accused no. 3. Their co-accused, in other words, accused no. 1, 4 and 5, are not before us. About them I shall probably say very little. They were acquitted on all the charges.

- [2] The appellants were each convicted on all the seven charges and effectively sentenced to life imprisonment, among others. They now come to us on appeal, with the leave of the court *a quo*, against all the convictions and sentences.
- [3] They faced seven charges, namely: robbery with aggravating circumstances; two counts of murder; two counts of attempted murder; unlawful possession of firearms and unlawful possession of ammunition. To all these charges they pleaded not guilty before my retired brother Beckley J in the Virginia Circuit Court on 16 July 2004.
- [4] Notwithstanding such plea, each of them was convicted as charged on 5 August 2004. The next day, on 6 August 2004, they were sentenced as follows:

In respect of the first charge: robbery with aggravating circumstances – 15 (fifteen) years imprisonment;

In respect of the second charge: murder – life imprisonment;

In respect of the third charge: murder – life imprisonment;

In respect of the fourth charge: attempted murder – 12 (twelve) years imprisonment;

In respect of the fifth charge: attempted murder – 12 (twelve) years imprisonment;

In respect of the sixth charge: unlicensed possession of a firearms and in respect of the seventh charge: unlawful possession of ammunition which were taken together as one – 8 (eight) years imprisonment.

[5] The appellants were aggrieved by the convictions as well as the sentences. Both of them applied and were granted leave to appeal on 16 September 2005 by the court *a quo* – hence this appeal.

[6] A summary of the material facts which formed common cause or which were not seriously disputed, appears to be necessary. There were two security guards in the employ of Mini Price Store, a supermarket at a suburban shopping centre at Reitzpark in Welkom. They were armed with shot guns issued to them by their employer, a security service provider, for the purposes of rendering protective services to the supermarket.

[7] In the evening of Monday, 16 June 2003, the supermarket was attacked, the security guards dispossessed of their

firearms and the shop-owner shot in the ensuing confrontation with an armed group of robbers. They demanded money. Two policemen rushed to the supermarket. On their arrival they too were attacked. One policeman was shot. They returned fire. In the process one member of the armed gang of robbers was fatally wounded. The others looted the shop and escaped, apparently in a white BMW sedan. Later that same evening the shop-owner died. The cause of his death was indicated as a gunshot wound in the head and that of the robber's death as a gunshot wound in the lungs. The wounded police officer was taken to the hospital. He survived.

- [8] Various goods, as itemised in the annexure to the indictment, were stolen during the armed robbery. The total loot was worth R15 609,39. The first three accused, including the appellants, were arrested five days later, on Saturday 21 June 2003, to be precise. Some of the stolen goods were later recovered from some of the suspects or accused. The very next day, on Sunday 22 June 2003, accused no. 4 was arrested at the road block while driving a white BMW sedan and accused no. 5 was arrested on the same day. In his room at Bambanani Gold Mine, a firearm whose serial

number had been filed off was found by the police. Though he was charged with the rest of the suspects, the first seven charges were not applicable to him. There were only two charges brought against him, namely unlawful possession of a firearm and ammunition – the eighth and the ninth charge. The firearm was described as a semi-automatic pistol, 7.65 mm calibre. This then completes the historical background of this appeal. I now turn to the merits thereof.

[9] The cardinal issue in the appeal is whether the evidence, as a whole, established beyond reasonable doubt that the appellants were among the perpetrators of the crimes we are concerned with.

[10] On behalf of the appellants, Mr. Pretorius contended that the court *a quo* erred in finding that the evidence showed beyond reasonable doubt that they were indeed involved in the incident. He, therefore, submitted that they were entitled to have been acquitted.

[11] Ms Claassens, counsel for the respondent, differed. She contended that the court *a quo* correctly rejected the versions of the appellants as false and improbable. She

submitted that, on the strength of the evidence as a whole, the identity of each of the appellants as the co-perpetrators was established beyond reasonable doubt.

[12] As regards the first appellant, the respondent chiefly relied on the testimonies of the following witnesses to prove the identity of the first respondent as one of the perpetrators: Mr. Roberto Menino, Mr. Carlos Menino, Inspector David Dlamini and Captain Motsamai Mabeleng.

[13] The witness, Mr. Carlos Menino, testified that the shopkeeper had a men's wristwatch and that he used to wear it every day and that the particular watch went missing after the incident. On 21 June 2003, Captain Mabeleng showed him a number of items. Among them was a Casio men's wristwatch. The two brothers identified the Casio watch as that of the late Jose dos Santos de Esencaio.

[14] The evidence of Inspector Dlamini was that he was present at the time the first appellant was arrested and that he was wearing the watch in question. His evidence was corroborated by the investigating officer, Captain Mabeleng.

[15] The first appellant admitted that he was wearing the particular watch as the two police witnesses had testified, but he specifically denied that it belonged to the shopkeeper as the two civilian witnesses had alleged. He specifically averred that the watch was his.

[16] It appears necessary to consider some aspects of the indirect evidence tendered against the first appellant and to ascertain what it was that was so improbable about his alibi as to justify his conviction by the court *a quo*. About him, in particular, Beckley J said:

“Dieselfde onwaarskynlikhede geld ook ten opsigte van beskuldigde 2. In beskuldigde 2 se geval is daar die bykomende onwaarskynlikheid dat hy uitgewys word as ‘n betrokke en dan daarna gevind word in besit van ‘n horlosie wat soortgelyk is – indien nie identies nie – aan die horlosie wat gemis is tydens die rooftog. Daarbenewens die feit dat hy gepoog het om die horlosie te versteek op ‘n stadium nadat hy gearresteer is.”

[17] The evidence showed that a certain woman, whose name was never disclosed, anonymously contacted the investigating officer about the armed robbery we are here

concerned with. Her report led the police to a character known in these proceedings simply as Mojela. Through him, the first appellant was identified as one of the possible suspects. He was tracked down in his house somewhere in Thabong. Captain Mabeleng and his police investigation team searched the house but find nothing incriminating. The captain saw that the first appellant was wearing a watch. He inspected the watch but disregarded it because, as a Casio watch, it did not interest him. He was on the lookout for a different type of wristwatch, an Orient watch belonging to Mr. Roberto Menino, which was stolen during the armed robbery. At that time the captain was still unaware that the murdered shopkeeper was also robbed of his wrist watch, *viz* a Casio.

- [18] Subsequent to his arrest, the first appellant was taken to the police unit office for interrogation. There were two other suspects as well at the time. With the three suspects in the office were Inspector Dlamini and Captain Mabeleng. The former's evidence was that he saw the first appellant concealing something; that he quickly searched him; that he discovered a golden Casio watch in his underwear and that he showed the watch, which the first appellant claimed to be his, to Captain Mabeleng then and there. Later on the same

day, Saturday 21 June 2003, Captain Mabeleng met Mr. Roberto Menino and showed him the Casio watch which was earlier found in the possession of the first appellant. The same watch the first appellant averred was his, the witness identified it as the watch of the late Jose dos Santos de Escencao.

[19] At the trial Mr. Carlos Menino also identified the Casio as the watch of his murdered partner and co-owner of the supermarket. His younger brother, Mr. Roberto Menino, again identified the watch likewise in court. This was not the sum total of the evidence pertaining to the identity of the first appellant as one of the perpetrators.

[20] The police identification parade was held. Mr. Roberto Menino was the only eyewitness invited to the parade. He identified the first appellant as one of the perpetrators. This was the direct evidence adduced against the first appellant by an eyewitness. The witness recognised him as the robber who really gave him a great deal of agony during the robbery episode.

[21] The version of the first appellant was narrated by the first appellant himself. He said that on Monday, 16 June 2003, he was not in Welkom where he ordinarily resided but at Bothaville where he had gone to purchase maize. He was hosted in a shack by an acquaintance by the name of Naledi. He returned to Welkom on Friday, 20 June 2003. He was arrested during that very same night. The exact whereabouts of Naledi were unknown to him as on the day he was testifying. He recognised the Casio watch as his own property which he had bought in town in Welkom in 2001 for R499,00. The evidence of Inspector Dlamini, that he had that watch in his possession the day he was arrested, was true. However, he denied that the watch was found hidden in his underpants. He maintained that he was normally wearing it on his arm.

[22] The court *a quo* rejected as false and improbable the first appellant's version. But his counsel, Mr. Pretorius, contended that the first appellant's version was wrongly rejected and that that of the Menino brothers and the police witnesses wrongly accepted. In developing his argument further he submitted that there was no direct evidence other than that of a single and unsatisfactory witness which

connected the first appellant with the incident. The indirect evidence adduced by the State, he submitted, did not justify the drawing the inference that the first appellant was involved in the incident. Ms Claassens contended that the evidence as a whole justified the conclusion that the first appellant was involved. Therefore she submitted that the court *a quo* did not commit any material misdirection to justify any interference with its judgment.

[23] In his analysis of the evidence Beckley J made a general observation about all the accused, including the first appellant, of course. He phrased the wholesale rejection of their alibis as follows:

“Byvoorbaat kan ek sê dat daar geeneen van die beskuldigdes is wie se getuienis beïndruk het as synde die van ‘n getuie en wie se getuienis redelik moontlik waar is nie. Daar is talle aspekte wat onwaarskynlik is...”

[24] The court *a quo* dismissed the version of the first appellant. It found that his evidence concerning the alibi defence and indeed his evidence concerning his claim of ownership of the Casio watch were not reasonably and possibly true. The first

appellant emphatically denied that he participated in the robbery and that the watch was stolen from the fatally wounded shopkeeper. Although he persisted that he was the rightful owner of the watch, his conduct was not consistent with that of a lawful and innocent owner, in my view. His abortive attempt to conceal the watch, which the police hardly suspected to be stolen, alerted the police that something was not right. The place where the watch was discovered was not only very suspicious, but very destructive to his claim that he owned it. The peculiar conduct of the first appellant strongly militated against his claim that the watch was his lawful property.

- [25] It is important to note that the first appellant did not deny the evidence of Captain Mabeleng that he first saw the Casio watch in the first appellant's house. It seems to me that if the police wanted to give false evidence about the first appellant's conduct in relation to the watch, they would have located such conduct in the house of the first appellant where they first met him. It is improbable that they would have shelved such incriminating conduct and delayed it until the first appellant was later in their office. Something must have happened in the police office which spurred the police

to seize the Casio watch from the first appellant which they did not do much earlier in his own house. I am not convinced that the finding of the court *a quo* on the ownership of the watch can be disturbed.

[26] The two brothers, namely: Roberto Menino and Carlos Menino readily identified the watch as the property of the late shopkeeper which was discovered missing after the robbery. The evidence of Carlos Menino was that his late business partner used to wear his Casio watch everyday. He added that on two occasions he, at the request of his partner, repaired the Casio watch. He gave a satisfactory description of the watch, but he also made reasonable concession in favour of the first appellant in connection with the watch. The court *a quo* found that the first appellant's possession of the watch very similar to that of the late shopkeeper was an incriminating evidence. It surely was.

[27] Although the pointing out of the first appellant by Roberto Menino both at the parade and at the trial appeared to have been doubtful – any such doubt as to the actual involvement of the first appellant or any doubt as to the identification of the watch – was effectively removed and adequately

compensated by the highly incriminating conduct of the first appellant, as previously outlined. That conduct, in my view, fortified the direct evidence of Roberto Menino, that the first appellant was the robber that actually pushed him around on the scene and the indirect evidence by the two brothers that the Casio watch belonged to their deceased business associate.

[28] If we accept, as the court *a quo* did, and I strongly believe that we must, that the Casio watch we are here dealing with, in truth and in reality, belonged to the deceased shopkeeper, then the doctrine of recent possession kicks in and operates adversely against the first appellant. The doctrine means that when a person is found in possession of recently stolen property, he is deemed in law to have acquired such recent possession through direct participation in the actual stealing thereof, unless he can give a reasonably innocent explanation.

[29] In **S v PARROW** 1973 (1) SA 603 (AD) Holmes JA at 604 B – C eloquently said the following about the aforesaid doctrine:

“I pause here to refer briefly to the so-called doctrine of recent possession of stolen property. In so far as here relevant, it usually takes this form: On proof of possession by the accused of recently stolen property, the Court may (not must) convict him of theft in the absence of an innocent explanation which might reasonably be true. This is an epigrammatic way of saying that the Court should think its way through the totality of the facts of each particular case, and must acquit the accused unless it can infer, as the only reasonable inference, that he stole the property.”

- [30] I pause to point out that in **S v RAMA** 1966 (2) SA 395 (AD) at 400 C – E per Rumpff JA, the court was grappling with the issue of a stolen watch, as we are in the instant case. It is significant to mention that in that case the appellant was convicted on the strength of possession of a stolen watch, which was found in his possession 14 days after the thieving. Here, unlike there, the first appellant was found in possession of a watch stolen merely five days earlier. Before he gave a vague and false explanation, he tried to hide it in a bid to cover up his unlawful possession. All these factors strengthened the force of the presumption that he recently acquired the watch through his actual participation in

the recent stealing and not through lawful and honourable means.

[31] At the end of the analysis of the evidence against the first appellant the court *a quo* came to the following conclusion:

“Wat betref die uitwysing, het dit geblyk uit getuienis van Roberto tydens kruisondervraging dat hy onseker was toe hy die uitwysing gemaak het, en dat hy self in die hof onseker was oor die identiteit van beskuldigde 2. Dit volg derhalwe na my mening dat daar ‘n redelike twyfel by die hof bestaan rakende die betrokkenheid van beskuldigde 2.”

[32] The finding that there was a reasonable doubt regarding the involvement of the first appellant was not borne out by proven evidence, direct and circumstantial, which showed beyond reasonable doubt that the first appellant was indeed involved. The finding did not really tally with the preceding trend of reasoning by the court *a quo*. This was borne out by the summary of the verdict. At p. 404: 24 – 405: 4 the court *a quo* correctly, albeit contrary to its earlier finding, concluded:

“Wat betref beskuldigdes 2 en 3, meen ek dat dit bo redelike twyfel bewys is dat hulle deel was van die rooftog en die misdrywe wat daarmee verband hou, en dat hulle bygevolg skuldig is aan al die ten laste gelegde misdrywe.”

[33] At par. 2.2 of the supplementary heads of argument, filed on behalf of the appellant, Mr. Pretorius contended that since Beckley J himself had found that there existed reasonable doubt concerning the involvement of the first appellant, the proper verdict should have been an acquittal and not conviction. I am not so persuaded. During argument before us, Mr. Pretorius did not forcefully pursue this issue with any conviction. His lame attitude suggested that he realised and tacitly acknowledged that the court *a quo* erroneously made a finding it did not mean to make.

[34] The findings of the court *a quo* that, the first appellant took the police to a certain spot near Lehakwe School, where the police, on their second visit, recovered the shotguns with the aid of another suspect; that exhibit 3 was correctly identified by two witnesses as the watch of the deceased shopkeeper; that the first appellant was found in possession thereof a few days after the robbery; that the first appellant was caught red-handed while trying to conceal the watch; that his version

was improbable and not reasonably and possibly true, are findings which I, on appeal, cannot hold to be wrong. I would, therefore, not interfere with the conviction in this regard in respect of all the seven charges.

[35] As regards the second appellant, the respondent's version was narrated by five witnesses. With the exception of Ms Dorothea Londt, four of them were the same witnesses who had adduced evidence against the first appellant.

[36] The second appellant also pleaded not guilty in respect of all the charges and raised the same defence of an alibi as the first appellant. Once again the issue was the identity of the second appellant as one of the perpetrators. Here there was virtually no direct evidence against the second appellant. The prosecution adduced circumstantial evidence which revolved around a certain cellotape roll and a few bank bags.

[37] The prosecution evidence was that the police were led to the second appellant's dwelling at Moeletsi Hostel in Thabong, Welkom by a certain Mr. Mojela. Captain Mabeleng's evidence was that through the curtainless window of the house he noticed a male with a coat on. The coat-man would simply not open the door, although he was repeatedly

requested to do so. Inspector Dlamini had to break the window in order to open the door from inside for his colleagues. The police searched the house and found one unoccupied bedroom. The police searched the house and found the coat-man hiding in a bed in another bedroom. There was a couple sleeping in the same bed.

[38] The coat-man turned out to be the second appellant and the rightful occupant of an empty bedroom with no curtains. They searched the bedroom and found bank bags containing money to the tune of R72,01. In addition, they also found a cellotape roll. On the price tag of the cellotape the words “Mini Price Store” were printed. The cellotape and the bags were in a pot. Besides the pot there was also a concertina in the same locker.

[39] The second appellant was then arrested. On the way to the offices of the serious and violent crimes unit, he spilled the beans. The police and the second appellant turned back to Thabong. On the strength of the information he gave to the police investigation team, the third suspect, accused no. 1, was arrested. The latter led the police investigation team to a spot in the vicinity of Lehakwe School where the two

shotguns, stolen from the aforesaid supermarket, were recovered. The next day accused no. 4 was arrested at a police road block. He was driving a white BMW sedan. Still on the same day accused no. 5 was arrested. He was found among taxi passengers. In his room at Bambanani Gold Mine a firearm was found in his locker.

[40] The witness, Mr. Carlos Menino, identified the cellotape by means of the price tag with the name of the supermarket and the red flag as the roll used in the supermarket for various binding or wrapping purposes. The particular roll was not for sale although the same type of cellotape was stocked on the shelves for sale. He also identified the bank plastic bags by means of the systematic manner in which the money was sorted as money stolen from the supermarket during the robbery. His evidence was corroborated by Ms Dorothea Londt in many material respects.

[41] The second appellant denied any involvement in the Reitzpark robbery. His version was that he was home at Moeletsi Hostel throughout the day on Monday, 16 June 2003. He averred that he only left his dwelling at or about 18h00 to buy bread and that he was back home a few

minutes later. The cash found in the bank plastic bags was his money. It consisted of the proceeds of the recent stokvel party he had hosted. The cellotape roll was his. He averred that he had sent a certain lady, Ms Matshidiso Mofokeng, who worked in the suburb concerned, to buy him a cellotape. She bought the cellotape, on his behalf, from Mini Price Store in December 2002. The lady was his girlfriend.

[42] Personally he had never bought anything from the same supermarket. He required a cellotape to fix his concertina from time to time. As for the particular cellotape, he never used it because he discovered that it was not the right type he preferred. He denied he tried to hide himself from the police; that he refused to open the door; that the police had to break a window to gain entry into his house or that he implicated accused 1, accused 4 and accused 5.

[43] He admitted that Captain Mabeleng visited him at the correctional facility. He averred that the Captain offered him money provided he became a state witness. He rejected the offer. The late Lebohang Clement Leaka, a member of the gang of robbers who was fatally wounded and instantly died

on the scene during the cross fire, was his biological brother, he admitted.

[44] The court *a quo* adopted the correct approach.

“Daar moet eerstens die vraag afgevra word of die getuienis van die beskuldigdes – gesien teen die agtergrond van die Staat se getuienis – redelik moontlik waar is al dan nie. Indien enige van die beskuldigdes se getuienis redelik moontlik waar is, gegewe dat elkeen se getuienis neerkom op ‘n alibi, is sodanige beskuldigde geregtig op sy vrypraak. Indien die beskuldigde se weergawe nie redelik moontlik waar is nie, moet daar dan oorweeg word of die getuienis van die Staat voldoende is om sy skuld op elk van die individuele klagtes bo redelike twyfel te bewys.”

[45] No onus rests on the accused to establish his alibi. He must be acquitted if his alibi might be reasonably true. See **S v MHLONGO** 1991 (2) SACR 207 (AD) at 210 d - e per Eksteen JA.

[46] The court *a quo* rejected the second appellant’s alibi. It found that his version was not reasonably and possibly true. It then enumerated a number of improbabilities inherent in

his version. Mr. Pretorius argued that the circumstantial evidence adduced against the second appellant did not justify, as the only reasonable inference, the drawing of the inference drawn by the court *a quo* that the second appellant was indeed involved in the incident during which Mini Price Store was robbed and two persons perished. Accordingly he submitted that the second appellant was incorrectly convicted.

[47] Firstly, the court *a quo* found it unthinkable that the police would shortly before the commencement of the trial, have approached a man who has all along persistently proclaimed his innocence and emphatically denied any knowledge of the incident to become a state witness. Initially the second appellant denied, via his legal representative, that the police ever dangled a carrot to entice him to become a state witness. However, during his cross-examination he admitted, contrary to such previous denial, that investigating officer did, in fact, visit him and even promised him a reward. The significance of this aspect is twofold. It does not only depict the second appellant, as untrustworthy witness, but above that, his admission of the visit plus the offer supports

the argument that he most probably co-operated with the police and gave them vital clues about the incident.

[48] Secondly, in developing his submission that the court *a quo* had misdirected itself in convicting the second appellant, Mr. Pretorius submitted that the finding by the trial court that the respondent had failed to prove beyond reasonable doubt that accused 1, accused 4 and accused 5 were involved in the aforesaid incident and accordingly acquitted them, served as clear support for the submission that the second appellant too was equally entitled to have been acquitted. The court *a quo* found that it was improbable that the police would, but for the useful information provided by the second appellant, have been able to arrest the further suspects. In my view the finding was perfectly valid.

[49] Thirdly, the submission was flawed. Beckley J made it clear in his critique of the investigating officer that there was more than just a mere suspicion as far as accused 1, accused 4 and accused 5 were concerned, particularly accused no. 1. All of them were implicated by the second appellant. Of the three, accused no. 1 was the most highly implicated. He took the police to a furrow in the vicinity of Lehakwe School,

just as the second appellant had earlier done. There, in the furrow, two shotguns were found. Such guns turned out to be highly incriminating evidence. They were the same shotguns that were stolen from the security guards at the supermarket during the robbery. The evidence against accused no. 1 was formidable. It is crystally clear to me, therefore, that accused 1, accused 4 and accused 5 were acquitted on procedural grounds and not substantive grounds. However, the procedural irregularities which led the three off the hook, were not applicable to the second appellant, hence he was convicted and they were acquitted.

[50] Fourthly, the overwhelming circumstantial evidence against the first appellant had adverse impact on the second appellant. Firstly, the two knew each other. Secondly, in their respective possessions incriminating goods which served as connective tissue between them and the scene, were found. The circumstantial evidence objectively implicated the second appellant in a big way. The only reasonable and legitimate inference that could be drawn from the following pieces of circumstantial evidence is that he was undoubtedly involved: for instance his earlier pointing out of the same furrow which accused 1 also later pointed out; his

subsequent pointing out of accused 1; the recovery of the shotguns through accused no. 1 in the same furrow that he had earlier pointed out; the ultimate recovery of the guns and their positive link to the supermarket; his candid admission that the robber instantly killed on the scene was his sibling; his possession of the partially used cellotape, which he admittedly did not use and certainly did not buy as a second hand; the bank plastic bags containing money sorted and packed in a systematic manner compliant with the bank requirements; his admission that he was illiterate and therefore could not probably have sorted and packed the notes and the coins in such a particular and systematic method; his abortive attempt to hide in a room in the same bed with an innocent couple; his false claim that he opened the door for the police and his false claim that the window of his house was broken after his arrest by criminal elements and not the police.

- [51] The inference that he was involved was the one and only exclusive and legitimate conclusion. There can be no other reasonable and conceivable inference as more compelling on such proven objective facts collectively considered together with the rest of the evidence. As I see it, the

principles and basic rules of logic pertaining to inferential reasoning as set out in **REX v BLOM** 1939 AD 188 on 202 – 203 and **S v MTSHWENI** 1985 (1) SA 590 (AD) were correctly complied with by Beckley J. I am satisfied that the evidence as a whole furnishes sufficient proof of the second appellant's guilt – **REX v DE VILLIERS** 1944 AD 493 on p. 508 – 509. I am therefore inclined to confirm the convictions in this regard as well.

[52] Ms Claassens' submission that there was no misdirection, let alone material misdirection, to warrant any interference, was correct. In the absence of any misdirection we have no reason to interfere. The alibi of the second appellant was, in my view, properly considered in the context of the entire factual matrix and correctly found to be wanting – **S v THEBUS AND ANOTHER** 2002 (2) SACR 566 (SCA).

[53] Finally, I turn to the issue of sentence. Mr. Pretorius submitted that he could hardly argue with any conviction that the court *a quo* inappropriately exercised its sentencing discretion in imposing the sentence on the appellants.

[54] Ms Claassens supported the sentences imposed on the appellants in respect of the first five charges. But submitted that the court *a quo* committed a misdirection in respect of the last two charges, namely, charge 6 and 7 seeing that the sentence of 8 (eight) years imprisonment for unlawful possession of either ammunition or firearm exceeded the provisions of section 39(2)(b)(i) of Act 75 of 1969 which prescribes a sentence of R12 000,00 fine or 3 (three) years imprisonment for a first offender. Both appellants were first offenders. As regards the sixth and seventh charges, I am persuaded that the court *a quo* indeed committed a misdirection in sentencing the appellants as it did.

[55] I deem it unnecessary to recite the mitigating factors or the aggravating factors relevant to the first or the second appellant respectively. As regards the first to the fifth charges there is no real issue anymore between the parties. I am satisfied that each of them was sentenced in a balanced manner. I would therefore confirm those sentences.

[56] As far as it is practically possible a separate sentence must be imposed in respect of each separate charge. Where two charges have been taken together as one, the lumping up of

the charges and treating them as one for the purposes of sentence, can create certain problems on appeal, for instance, if the appeal succeeds in respect of one charge but fails in respect of the other.

[57] In the light of the foregoing misdirection, we are therefore entitled to interfere. The penal jurisdiction of the court *a quo* was limited. The sentence of 8 (eight) years imprisonment the court *a quo* imposed, exceeds the prescribed statutory limit by 5 (five) years. The two charges should ideally not have been taken as one for the purposes of sentence. It seems to me that a sentence of two years imprisonment in respect of possession of unlawful firearm and 1 (one) year imprisonment in respect of unlawful possession of ammunition would be an appropriate punishment for each of the appellants.

[58] In the circumstances the following order:

58.1 The convictions of the first appellant and the second appellant in respect of the first, second, third, fourth and fifth charges are confirmed.

58.2 The sentences imposed on the first appellant and the second appellant in respect of the aforesaid five charges are also confirmed.

58.3 The sentences of 8 (eight) imprisonment imposed on each of the appellants in respect of the sixth and the seventh charges are set aside.

58.4 It is substituted therefore, the sentence of 2 (two) years imprisonment and 1 (one) year imprisonment for the unlawful possession of firearms and ammunition in respect of the sixth and the seventh charges respectively.

58.5 I direct that all the sentences must run concurrently.

M.H. RAMPAL, J

I concur.

A.F. JORDAAN, J

I concur.

K.J. MOLOI, J

On behalf of the appellants:

Mr. K. Pretorius
Instructed by:
The Justice Centre
BLOEMFONTEIN

On behalf of respondent:

Ms B G Claassens
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

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