

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case Nr : CA&R 206/04

Heard : 11/06/07

Delivered: 29/06/07

In the appeal of:

HAROLD MOSIEA
Appellant

1ST

VINCENT MOSIEA
Appellant

2ND

And

THE STATE

Respondent

JUDGMENT ON APPEAL

Tlaletsi J:

Introduction

[1] This appeal concerns an incident that happened on 29 August 2000, at Van Wyksvlei Municipality in the district of Carnavon. Morné Adams, an employee of the Municipality, locked the office door on 28 August 2000 having made sure that the strongroom, safe and windows were properly closed. On the morning of 29 August 07h55 he reported for duty. He opened the

front door of the municipality building and entered. He was confronted by a male person who poked him on his chest with a firearm. Adams was wearing what he described as a smooth surfaced jacket. In the process, the firearm slid on his jacket and a bullet was discharged and it brushed him on his right side causing a flesh wound. The bullet went through the steel door leading outside. The second person blocked his mouth with an adhesive tape. He also tied his hands on his back and with the extra rope, he tied it around his mouth. He was taken into a nearby toilet inside the building.

[2] Mr Nieuwegeld, the foreman at the municipality entered the building. He had been outside the building when he heard a shot being fired. He moved towards the table calling Adams. Someone grabbed him on his chest from behind and blocked his mouth with his other hand. He noticed that it was an unknown person who had his face covered. He pushed him into a toilet threatening to kill him should he make noise. The other person joined in. They pressed his head onto the toilet seat. They thereafter pushed his head between the toilet pipe and the wall and ordering him not to look back at them.

[3] Ms Tarrien De Kock, the training officer at the municipality arrived at 08h00. She parked her motor

vehicle in front of the office. She entered the office and placed the items she was carrying on the table. As she turned back to offload more, she saw someone standing behind her with a pistol in his hand wearing a balaklava. She was ordered to stand still. He blocked her mouth with his hand and took her to the kitchen. She noticed two other people. The other one had a revolver in his hand with his face covered with a balaclava. The other one had covered his face with a woolen hat. She was pushed towards Adams in the toilet. She also noticed the presence of Nieuwegeld in the same toilet. The three were thereafter taken into the strongroom. The robbers removed money which was in the safe and placed it in a dark coloured sports bag. They also robbed them of their personal belongings such as rings earrings and wristwatches. They demanded cellularphones and Ms de Kock told them that they do not have cellularphones as there was no network coverage in the area. The three robbers locked them in the strong room and left.

- [4]** Hans Goeieman, who was employed as a tractor driver, was waiting on the premises when he heard a shot being fired. He confirmed that he reported this to Nieuwegeld and Ms De Kock before they entered the building. He later saw three men emerging from the building and ran down the street towards the direction of one Hans Adam's house. These three men were also

spotted by two other state witnesses, Sofia Blom and Margret Reent running in the same direction and one of them carrying a dark coloured sports bag.

- [5]** Rolene Adams testified that she noticed a red motor vehicle with two male occupants sitting in the front. This car parked in front of her house which is $\pm$ 50 meters from the municipality building. She then saw them open the rear doors. Three men came running and entered the motor vehicle and it drove fast to the direction of the Copperton/Prieska road. She took down the registration numbers of the motor vehicle which were CC10484. She provided this information to the police.
- [6]** Johan van den Berg, an inspector in the SAPS testified that after receipt of the information and the particulars of the motor vehicle, he was accompanied by one Sers. Nieuwoudt and they drove on the Vosburg/Prieska road. They noticed a cloud of dust on the road and they continued to drive through it. They saw a red Mazda motor vehicle parked outside the road. They saw this vehicle when they were on the main road and it had stopped on the bridge, changing drivers. The motor vehicle matched the description and registration numbers provided to them. Inside the motor vehicle was the two appellants and three other male persons who became their co-accused. They also found, *inter*

alia, the robbed items together with two firearms, a pistol and a revolver, a magazine and rounds of ammunition. They also discovered the balaclavas and the woolen hat. Nieuwoudt and the three other police officers who searched the accused at the police station also testified about what they discovered from them respectively.

- [7]** The appellants and two others ultimately stood trial in the regional court sitting at Carnavon on charges of Housbreaking with intent to commit an offence unknown to the public prosecutor; Robbery with aggravating circumstances as described in sec 1 of Act 51 of 1977; Kidnapping; Contravention of sec 36 read with section 39(1)(h) and 39(2) (a) (iv) and/or sec 39 (2) (b)(i) and 39(3) of Act 75 of 1969 (unlawful possession of 1x7.65 round and 29x 9mm rounds of ammunition); Contravention of Sec 2 read with Sec 1,39 (i) (h) and 39(2) (b)(i) of Act 75 of 1969 (unlawful possession of the two firearms) and Attempted Murder. The four accused pleaded not guilty and in their defence they denied any involvement in the offence. In their plea explanation it was disclosed that the four of them were traveling in a motor vehicle which broke down on the road due to mechanical failures. They left the car next to the road to seek help. They got a lift from one Peterson in the red Mazda motor vehicle. The latter was the fifth accused and he died before the trial

commenced. The accused were legally represented at their trial.

- [8]** The regional court magistrate rejected their versions as false and were all convicted on 8 May 2003. Both appellants were convicted of Housebreaking with intent to Rob and Robbery with Aggravating circumstances as described in Sec 1 of Act 51 of 1977; Kidnapping and Attempted Murder. The other accused who is not before us was in addition, convicted of the charges relating to the possession of ammunition and the firearm. The two appellants were sentenced to seventeen and a half and five years imprisonment respectively and for Attempted Murder to ten years imprisonment. The court ordered that the sentences should run concurrently with the effect that all the accused should serve twenty years imprisonment.
- [9]** The two appellants are now appealing against both their convictions and sentences. In their notice of appeal, the appellants have raised a number of grounds all of which turn to contend that the state had not proved its case beyond reasonable doubt. They state that the trial court erred by finding that they were part of the five robbers who robbed the Municipality and the complainants. In argument, Mr Van Heerden who appeared before us to argue the appeal on their behalf, correctly conceded that there is overwhelming

evidence to show that the two appellants were part of the five people who robbed the Municipality. I am also satisfied that this aspect has been proved beyond any reasonable doubt. To find otherwise would be to defy logic. The following factors support this conclusion. The evidence relating to the commission of the offences was not disputed. The robbed items were found in the motor vehicle in which the appellants were found by the police which was shortly after the robbery and within a short radius of the robbery scene. Furthermore, a magazine with bullets that fitted the 9mm firearm that was used in the commission of the offences was found inside the pocket of one of the co-accused who the appellants alleged that he had been in their company at all times. A letter opener belonging to Ms De Kock was found hidden under the inside lining of the shoe of their co-accused and bank notes were also found concealed inside the other accused's shoe. They made no report to the police about their alleged motor vehicle which they abandoned on the road when they all left to seek assistance. The police also, did not come across any motor vehicle on the road except a donkey cart whose navigator told the police that a red car had just gone past him on the same road. I remain convinced therefore, that there can be no doubt that the appellants constituted two of the five robbers.

[10] The only point relating to the conviction which I find

meritorious, is that the conviction on the Housebreaking and Robbery together with a charge of Kidnapping, amount to a duplication of convictions. With regard to the charge of Kidnapping, the regional magistrate had the following to say:

“Wat betref aanklag 3, die klag van menseroof, was dit myns insiens duidelik dat ‘n deel van die sameswering was dat die werknemers van die Munisipaliteit buite aksie gestel moes word ten einde die rowers die geleentheid te bied om hulle uit die voete te maak, maar of die instapkluis van die begin af deel van die sameswering en die beplanning uitgemaak het, was dit myns insiens deel van die beplanning dat hulle in die betrokke kluis toegesluit moes word na die roof.

Ek is ook tevrede dat die roof reeds afgehandel was alvorens die werknemers totaal van hulle vryheid uitneem was toe hulle in die kluis toegesluit is. Die staat het myns insiens ook daarin ook geslaag om bo redelike twyfel die element van aanklag 3 te bewys.”

[11] In my view, the removal of the three complainants from the toilet and taking them into the strongroom was for the purposes of the robbery of the money which was known to be in the safe. In this strongroom they were also robbed of their personal belongings. Leaving them inside the strongroom after the robbery cannot on its own constitute a separate offence. Likewise, locking the strongroom was merely to ensure that they are able to escape with their loot without hindrance. It is for this reason why they initially left and returned immediately and enquired from them inside the strongroom if they had cellular phones. Therefore, locking them inside the

strongroom was part of the single intention, being the robbery. I am therefore of the view that a conviction on the Kidnapping charge is a duplication and should be set aside. I am mindful of the argument of Mr Barnard (on behalf of the respondent) that it was not necessary to lock the strongroom as these people were already robbed. It may not be necessary but to them it was the safest way to flee without being caught, although their escape was ultimately shortlived. **(See: Du Toit et al: Commentary on the Criminal Procedure Act: Juta at p14-6 to 14-8A and the authorities therein cited).** There is no reason why my conclusion in this regard should not be extended to the other co-accused who are not before us.

[12] The next consideration is the effect of the setting aside of the conviction on the Kidnapping charge on sentence. Mr Van Heerden argued that the sentence of 20 years imprisonment is shockingly inappropriate regard being had to the fact that the second appellant was 23 years old at the time. He submitted that the cumulative effect of the sentences on the appellants calls for reduction. The first appellant's personal circumstances were that he was 32 years old, not married with 5 minor children aged between 3-15 years. He passed grade 12 and was unemployed. He had one previous conviction of assault committed on 31 March 1995 to which he was sentenced to a fine of

R400.00 or 4 months imprisonment. This conviction was not taken into account for the purposes of sentence. He had been awaiting trial for 18 months. The second appellant was 25 years old at the time of sentencing, not married and had one minor child who was 6 months old. He was unemployed and was a first offender.

[13] The aggravating features of the case are that the appellants travelled from Kimberley to a poor rural area where they executed a carefully planned robbery. They gained entrance into the building by damaging the window and apparently with full knowledge, waited for the officials to arrive one by one, and kept them hostage until they accomplished their mission. The robbery itself took some time and they acted patiently. There was an opportunity to reflect on their actions but persisted on their goal. They then locked their victims in the strongroom so that they could get away with ease. They have shown no remorse. Instead, they conjured up an incredible and foolish story as a defence. Their victims were traumatised and it is perhaps only through luck that Adams was not fatally injured. They should not benefit the luck which is not of their own making or initiative.

[14] In my view, their personal circumstances are by far outweighed by the seriousness of the offence as well as

the aggravating features of the case. The rural communities deserve protection against this conduct from city dwellers. The effective sentence of 20 years imprisonment is in my view not shockingly inappropriate. In effect, the appellants are only to serve two and a half years of the ten years for the Attempted Murder. Mr Van Heerden could also not point to any misdirection on the part of the regional magistrate that warranted our interference. I am also of the view that there should not be any differentiation with regard to the sentences of the appellants.

In the result it is ordered as follows:-

- 1. The convictions and sentences of the appellants on counts one, two and six are confirmed.**
- 2. The conviction and sentence of the appellants as well as their co-accused at the trial, Donald Modau and Joseph Mpohatho, on count three are hereby set aside.**
- 3. The order by the regional magistrate that the sentences of the appellants are to run concurrently so that they can serve an effective sentence of twenty years imprisonment is confirmed.**

L P TLALETSI
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

I agree

H LACOCK
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION