

SOUTH AFRICA / JUDGMENT

Lebelo and Another v S (A646/2011) [2012] ZAGPPHC 226 (4 October 2012)

[2012] ZAGPPHC 226**COURT**

North Gauteng High Court, Pretoria

BEFORE

Van der Byl, P M Mabuse

CASE / FILE NUMBER

A646/2011

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NOT REPORTABLE

IN THE NORTH GAUTENG HIGH COURT,

PRETORIA (REPUBLIC OF SOUTH AFRICA)

CASENO.A646/2011

DATE:04/10/2012

In the appeal of:-

THABO LEBELO First Appellant

THEMBA NDLAZI Second Appellant

and

THE STATE Respondent

JUDGMENT

Van der Byl AJ:-Introduction

[1] The two Appellants were charged, as Accused Nos 2 and 3, together with another accused, as Accused No. 1, in the regional court sitting in Pretoria on nine charges of robbery with aggravating circumstances (counts 1 to 8 and 18) and nine counts of the contravention of the Arms and Ammunition Act, 1969 (Act 75 of 1969) ('the Arms and Ammunition Act') (counts 9 to 17), relating to an armed robbery of Nedbank at its Pretoria branch and of some of its employees and clients on 7 April 1997.

(I will for the sake of convenience refer to the Appellants as Accused No. 2 and Accused No. 3 and, where applicable, to their co-accused as Accused No. 1)

- [2] The trial commenced on 22 June 1999 when the then three Accused pleaded not guilty on all the charges and indicated that they elected to exercise their right to silence.
- [3] After the matter was postponed on two occasions the trial eventually proceeded on 3 September 1999.
- [4] The court adjourned for lunch after the State and the defence, Accused Nos 1 and 2 having elected not to give evidence and Accused

No. 3 having testified in his defence, had closed their respective cases and the legal representative acting on behalf of Accused No. 1 had delivered his address on the merits.

- [5] During the lunch hour the three Accused, however, some how managed to escape.
- [6] After Accused No. 2, who was at the time represented by a certain Mr. Mahlangu, was re-arrested during 2004, the proceedings against Accused No. 2 were separated from the proceedings against Accused Nos. 1 and 3 in terms of section 159(3) of the Criminal Procedure Act, 1977 ("the CPA"), and postponed to 5 August 2004 so as to afford Mr. Mahlangu an opportunity to address the court on the merits.
- [7] However, before the trial could proceed on 5 August 2004 Accused No. 2 again escaped, but was soon thereafter, together with Accused No. 3, re-arrested.
- [8] After the case was on various occasions postponed in order, as I will indicate below, to reconstruct the record, the trial eventually

proceeded on 4 February 2011 on which occasion Accused Nos 2 and 3 were convicted on counts 1,2,5 and 7 and Accused No. 2 on count 11 and Accused No. 3 on count 13.

- [9] These counts were the following, namely:-

Count 1, a count of Robbery with Aggravating Circumstances in that upon or about 7 April 1997 and at or near Pretoria the Accused did unlawfully and intentionally assault Deon van Deventer, Francina van Aarde, Sarah Kruger and Eunice van Niekerk and did then and there with force take from their possession an amount of R864 608,58 in cash and a videotape, the property of Nedbank, the aggravating circumstances being that firearms were used.

Count 2, also a count of Robbery with Aggravating Circumstances in that upon or about the same date and at or near the same place as in count 1 the Accused did unlawfully and intentionally assault Jan Mtsweni and did then and there with force take from his possession a wallet containing credit cards and an amount of R20, his property or in his lawful possession, the aggravating circumstances being that firearms were used.

Count 5, also a count of Robbery with Aggravating Circumstances in that upon or about the same date and at or near the same place as in count 2 the Accused did unlawfully and intentionally assault one Andries Maswanganye and did then and there with force take from his possession a bundle of keys, his property or in his lawful possession, the aggravating circumstances being that firearms were used.

Count 7, also a count of Robbery with Aggravating Circumstances in that upon or about the same date and at or near the same place in count 5 the Accused did unlawfully and intentionally assault one Elize Kleinschmidt and did then and there with force take from her possession a wrist watch, her property or in her lawful possession, the aggravating circumstances being that firearms were used.

Count 11 being a contravention of section 2 of the Arms and Ammunition Act, in that Accused No. 2 upon or about the same date and at or near the same place as in count 7 did unlawfully and intentionally possess a firearm, to wit a 7,65 mm pistol.

Count 13, being a contravention of section 2 of the Arms and Ammunition Act, in that Accused No. 3 upon or about the same date and at or near the same place as in count 11 did unlawfully and intentionally possess a firearm, to wit a ,45 revolver.

[10] On 14 April 2011 -

- (a) the Accused were sentenced on each of counts 1, 2, 5 and 7 to 10 years imprisonment in respect of which it was ordered that counts 1 and 2 and counts 5 and 7 should run concurrently so that the Accused were each to serve an effective sentence of 20 years;
- (b) the two Accused were in respect of counts 11 and 13 each sentenced, respectively, to 3 years imprisonment.

[11] Before dealing with the evidence on which the two Accused were convicted and sentenced, I need to refer to the history which

preceded their respective convictions.

The history which preceded the convictions of the two Accused

[12] Accused No. 2 (who was then represented by a certain Mr. Mahlangu) was re-arrested during 2004.

[13] It was then discovered that the charge sheet and the whole record of the proceedings, except for Exhibits A to J, were missing.

[14] On 15 June 2004 the magistrate then, with the assistance of notes kept by him in the course of the trial, prepared a reconstructed

version of the record of the proceedings.

- [15] Ex facie the record, as so reconstructed, the prosecutor and Mr. Mahlangu agreed that the reconstruction was in order.
- [16] The proceedings against Accused No. 2 were then separated from the proceedings against Accused Nos. 1 and 3 in terms of section 159(3) of the CPA and postponed to 5 August 2004 so as to afford Mr. Mahlangu an opportunity to address the court on the merits.
- [17] However, before the trial could proceed on 5 August 2004 Accused No. 2 again escaped, but was soon thereafter, together with Accused No. 3, re-arrested.
- [18] They were then represented by a certain Mr. Matsheng.
- [19] It was then discovered that the record of the proceedings, as reconstructed on 15 June 2004, was, to the dismay of the parties,
like the original record also missing.
- [20] The magistrate, thereupon, again with the assistance of the same notes used in reconstructing the previous reconstructed version,
prepared a further reconstructed version on 12 March 2008.
- [21] The correctness of this reconstructed version was, however, then disputed by Accused Nos. 2 and 3, particularly, in relation to the evidence of three witnesses, namely, Sergeant Kinnear, Sergeant Vos and Mr Madala Willie Tlou (incorrectly referred to as Klowe in the reconstructed record). On this occasion an affidavit by Mr. Mahlangu was handed in which he disputed that he agreed to the correctness of the reconstruction effected on 15 June 2004.
- [22] The case was then postponed to 13 May 2008 so as to effect a further attempt to reconstruct the record, but the case seems to have eventually been postponed to 10 December 2008.
- [23] On 10 December 2008 Mr. Sibiya appeared on behalf of Accused Nos. 2 and 3 on the occasion of which the magistrate indicated that there was in the meantime a break in into his office and that all his notes and the exhibits in this case were stolen, but that fortunately he still had the previous reconstructed version of the proceedings.
- [24] The trial was thereafter eventually postponed to 17 March 2009 since Mr. Sibiya had briefed Mr. Pistorius who was then not available.
- [25] On 17 March 2009, because of the dispute on the correctness of the reconstructed record relating to the evidence of the aforesaid three witnesses, as recorded in the reconstructed version of the record, Sergeant Kinnear was, obviously in accordance with the guidelines laid down in, inter alia, *S v Matthys* 1985(1) SA 209 (C), called in order to, particularly, comment on the correctness or otherwise of the reconstructed version of his evidence as given at the trial on 3 September 1999.
- [26] Mr Kinnear, thereupon, confirmed the correctness of the reconstructed version.

[27] Mr Pistorius then, as will be indicated in detail below, commenced cross-examining the witness.

[28] The case was then postponed to 25 June 2009 for further reconstruction of the record, inter alia, to trace the witnesses Vos

and Tlou, but it appeared on that day that Sergeant Vos was, ex facie the reconstructed record, not traceable and that Mr. Tlou was sick.

[29] On 3 August 2009, being the date to which the case was postponed for the evidence of Mr. Tlou, it, however, appeared that Mr. Tlou was shot and subsequently died on 2 November 2008, whereupon, the contents of his police statement was read into the record.

[30] After the matter was postponed on two more occasions the trial proceeded on 4 February 2011.

The evidence which was, according to the latest reconstructed version of the proceedings, adduced in respect of the charges on which the Accused were convicted

[31] In respect of count 1 the evidence of six employees of the Bank indisputably showed that on the day in question approximately eight robbers of whom some or all were armed with firearms, entered the Bank, demanded money and ordered the employees and various clients who were at the time in the Bank to lie down and robbed the Bank at gunpoint of R864 608,58 in cash. In the process one of the employees was grabbed by her hair by one of the robbers and dragged to the video recorder from which the video tape was removed and taken away.

[32] In respect of count 2 the complainant, Mr. Jan Motsweni, who was at the time a security officer at Nedbank, testified that he saw a person who entered the Bank who produced a firearm which he pointed at him and ordered him to lie down. Whilst he was lying down he was kicked and his wallet containing his credit card and R20 was taken from him. He was unable to identify the person who assaulted and robbed him of his property.

[33] In respect of count 5 the complainant, Mr. Willem Schultz, testified that on the day in question at about 15h20 he was in the Bank busy depositing money in an amount of R21 190. Whilst standing at the counter where the cashier was busy counting the money with his back to the door he heard a shuffle behind him, but before he could look around to the door someone pushed a firearm against his neck and ordered him to look in front of him. The person asked him whether he had any money with him. He denied having had any money with him. All persons in the Bank were then ordered to lie down. As he took too long to lie down he was kicked in his back. His wallet, containing his credit cards and small change, was then removed from his pocket. The money which the cashier was counting was taken from the cashier. The following day he identified his wallet and his credit cards at the offices of the Murder and Robbery Unit.

- [34] In respect of count 7 the complainant, Ms. Elizabeth Kleinschmidt, testified that on the day in question she was at the Bank in connection with a motor vehicle loan. Whilst sitting in the reception area she saw two persons entering the Bank. She then heard one shouting that all should lie down. As she was lying down they came to her and ordered her to get up. One produced a firearm. She was then taken to an office. After a while one came back to her and attempted to remove her watch from her arm. He did not succeed and ordered her to take it off from her arm. She obeyed and he then took the watch. On 22 April 1997 she identified her watch at the offices of the Murder and Robbery Unit.
- [35] Mr Willie Tlou testified that on 7 April 1997 at approximately 15h25 he was at the Bank to deposit moneys for his wife. When he got to the door of the Bank he found it to be closed, but he heard a commotion inside the Bank. He then moved back to his vehicle, a Volkswagen Kombi, which was parked some 10 metres from the Bank. Whilst at his vehicle he saw seven or eight black males leaving the Bank. One had a blue bag with him and something covered in a dust jacket. Some of these males moved to a vehicle which was parked some 20 metres from his vehicle and drove away after they got into the vehicle. The rest of the group moved to a vehicle parked across the street. A police vehicle arrived and he pointed that vehicle out to them which was at that stage being boarded by some of the members of the group. The police vehicle, thereupon, followed the vehicle. He later again saw the vehicle together with the police vehicle standing in a crossing some distance from the Bank.
- [36] Sergeant Elwyn Kinnear testified that he was at the time stationed at the flying squad of the SAPS. On 7 April 1997 at about 15h26 he, whilst on duty with Sergeant Vos, received a radio report of a robbery that was in progress at Nedbank. They immediately drove to Nedbank in Mitchell Street. As they drove into the parking area he noticed a blue Volkswagen Kombi parked in front of the Bank. They immediately confronted a person standing at the Kombi (who, incidentally, was the witness Tlou) who pointed them at a white Jetta vehicle parked at the corner of Mitchell and Zeiller Street. He saw three black males who were busy boarding the vehicle. They then followed the vehicle, initially, with two vehicles between them whilst they called for reinforcements. When there were eventually no vehicles between them he realized that the driver must have noticed them as he then started to give chase. As he switched the blue lights and siren on the vehicle attempted to drive into a one way street against oncoming traffic and was forced to stop. Having ordered the occupants by way of a loudspeaker to alight from the vehicle he noticed the one occupant sitting at the back on the right cocking a firearm. He again ordered them to alight from the vehicle with their arms in the air. Accused No. 1 was sitting at the back on the left, Accused No. 3 was the driver whilst Accused No. 2 was sitting at the back on the right. The fourth person was in the front in the passenger seat. They eventually alighted from the vehicle and were handcuffed by him and Sergeant Vos.
- [37] After reinforcements arrived he went back to the vehicle. On the floor opposite the left front passenger he saw a ,38 revolver as depicted on photos 14, 15, 16,17 and 18 of Exhibit G. At the back opposite the left passenger seat he saw another ,38 revolver as depicted on photos

24, 25, 26 and 27 of Exhibit G. On the right passenger seat at the back he saw a cocked pistol as depicted on photos 28, 29, 30, 31 and 32 of Exhibit G. At the driver's seat on the floor he found one 9mm round as depicted on photo 13 of Exhibit G. Between the two front seats he found another 9mm round as depicted on photos 10 and 12 of Exhibit G. In the cubbyhole he found a men's watch as depicted on photo 11 of Exhibit G. In possession of Accused No. 2 he found a bundle of keys. In possession of Accused No. 3 he found an identification document. In possession of Accused No. 1 Sergeant Vos found a wallet as well as a ladies watch (which was later identified by Ms. Elizabeth Kleinschmidt, the complainant in count 7). It would appear that he also found a wallet in the possession of the fourth person containing the bank cards of Mr. Schultz, the complainant in count 5. In a cubbyhole underneath the steering column they found another firearm. None of these persons gave any explanation in relation to their presence in the vehicle.

- [38] Sergeant Vos confirmed in his evidence that he accompanied Sergeant Kinnear on this day in the police vehicle concerned and that they eventually gave chase after the vehicle in which the four suspects were travelling. He, furthermore, testified that he searched the fourth person and found a wallet containing the credit cards of Mr. Schultz (who is the complainant in count 5) and the keys of a Volkswagen in his possession. In Accused No. 1's possession he found a ladies' watch (which was later identified by the witness Ms. Kleinschmidt (who is the complainant in count 7).
- [39] The complainants in the other counts were not called as witnesses and the Accused were discharged on those charges.

The Accuseds' case

- [40] At the end of the State's case Accused Nos. 1 and 2 elected not to give any evidence in their defence whilst Accused No. 3 elected to give evidence under oath.
- [41] Accused No. 3 confirmed in his evidence that he was arrested in the vehicle concerned of which he was the owner. According to him he did not know the occupants of his vehicle. He stopped at the panelbeaters in Mitchell Street when he was approached by the three persons who asked him for a lift to a taxi rank in Bloed Street and offered to pay him R10. All they had with them was a plastic bag containing chicken and cold drinks. Whilst driving he was stopped by a police vehicle. He denied that there were any firearms in his vehicle and that he attempted to give chase. He also denied that he at any stage escaped from the cells.

Findings by the magistrate

- [42] The magistrate held that, because of the attitude of the defence on the reconstruction of the record, he would disregard the evidence of Sergeant Vos and Mr. Tlou.
- [43] In so far as the State failed to adduce any evidence on counts 3, 4, 6 and 8 the magistrate held that the Accused should be acquitted on those charges.

- [44] The magistrate, in my view correctly, rejected the evidence of Accused No. 3 as being improbable in various respects. This finding has not been challenged on appeal and I do not regard it necessary to dwell any further on this finding.
- [45] In taking into consideration the fact that various items robbed from, particularly, the complainants in counts 5 and 7, the magistrate concluded that, in the absence of any exculpatory explanation in relation to the presence of those items in the vehicle, the vehicle and its occupants were connected with the robbery which had shortly before taken place in the Bank and that the State has proved its case on counts 1,2,5 and 7 beyond all reasonable doubt.
- [46] In relation to counts 9 to16, the magistrate held -
- (a) that according to the undisputed evidence of Sergeant Kinnear he saw Accused No. 2 whilst sitting at the back of the vehicle cocking a firearm and that a cocked firearm was later found on the floor of the vehicle where he was sitting was the firearm specified in count 11;
 - (b) that the only reasonable inference drawn from the evidence is that the firearm found in the cubbyhole under the steering column is the firearm specified in count 13 which could only have been placed there by Accused No. 3.

Grounds of appeal

- [47] The two Accused now appeal, with leave of the magistrate concerned, against both their convictions and the sentences imposed upon them.
- [48] As is apparent from an Amended Notice of Appeal filed on 13 June 2012, it is contended -
- (a) that the magistrate erred by convicting the two Accused on counts 1,2,5 and 7 by holding that the State proved these charges against them beyond a reasonable doubt (para 1 of the Notice);
 - (b) that the magistrate erred by in effect holding that the State proved counts 11 and 13 against Accused Nos. 2 and 3, respectively (paras 2 and 3 of the Notice);
 - (c) that the magistrate erred by convicting the two Accused on various charges of robbery and by so doing erred by duplicating the convictions when the facts of the case suggested one continuous criminal act (para 4 of the Notice);
 - (d) that the magistrate erred by relying on the reconstruction of the record and more particularly placing reliance on the single evidence of Sergeant Kinnear (para 5 of the Notice);
 - (e) that the magistrate erred by making factual findings in the light of the incorrect reconstruction of the record as it was disputed by the Accused as accepted by the magistrate (para 6 of the Notice);

- (f) that the magistrate erred by disallowing the legal representative of the Accused to cross-examine the Sergeant Kinnear at the time he was recalled (para 7 of the Notice);
- (g) that the magistrate erred, in particular given, particularly the fact that no evidence or reliable evidence existed upon reconstruction of the record which linked the Accused to the actual commission of the robbery (paras 8 and 10 of the Notice);
- (h) that the magistrate erred in particular to reject the evidence of Accused No. 3 (para 9 of the Notice);
- (i) that the magistrate erred by making adverse findings on circumstantial evidence which were not supported by the evidence upon

reconstruction of the record(para 11 of the Notice).

[49] As is apparent from the foregoing, it is difficult to establish, because of the lack of any reasons advanced, as to why it is contended that the magistrate erred in the majority of the contentions raised in the Notice which actually renders the Notice to be invalid (See: Himunchol v Moharom 1947 (4) SA 778 (N) at 781; Harvey v Brown 1964 (3) SA 381 (E) at 383D; Tzouras v SA Wimpy (Pty) Ltd 1978 (3) SA 204 (W), 205E; Kilian v Geregsbode, Uitenhage 1980

(1) SA 808 (A) at 815B; Molebatsi v Federated Timbers (Pty) Ltd 1996

(3) SA 92 (B), 941; Songomo v Minister of Law and Order 1996 (4) SA 384 (OK), 3851).

[50] If regard is, however, had to the Heads of Argument filed and the submissions made at the hearing of this appeal on behalf of the Accused, it would appear as if the appeal were limited to the following, namely -

- (a) that the magistrate erred, as is contended in para 7 of the Notice, in disallowing the legal representative of the Accused to

cross-examine Sergeant Kinnear, in the words of counsel, de novo]

- (b) that the magistrate erred in holding that Sergeant Vos was untraceable ;
- (c) that the magistrate erred in holding that the only evidence enabling him to come to a decision was the evidence of Sergeant Kinnear whilst, so it is contended the evidence of Sergeant Vos was in dire contrast and in material contradiction of the evidence of Sergeant Kinnear;
- (d) that the magistrate erred in holding that the Accused were guilty of the various charges of robbery since the perpetrators of the robbery entered the Bank with a single intent and that was to rob.

Evaluation of grounds of appeal as elaborated upon in Heads of Argument and submissions made on behalf of the Accused

- [51] Before considering these contentions, I deem it necessary to highlight the following which emerged from the evidence, if considered in context, namely -
- (a) that the evidence indisputably showed that a gang of armed robbers consisting of seven or eight male persons entered the Bank on the day in question at about 15h20 with the obvious and common intent to rob the Bank and indeed robbed the Bank by manhandling its employees, at gunpoint of an amount of R864 608,58 in cash;
 - (b) that at the same time clients of the Bank who happened to be in the Bank at the time were also robbed of their personal property by individual members of the gang;
 - (c) that the occupants, consisting of Accused Nos. 2 and 3, together with a person who was charged as Accused No. 1 and a fourth person, of a vehicle that was seen driving away from the Bank was almost minutes after the robbery stopped and arrested by members of the flying squad;
 - (d) that, apart from four firearms found in the vehicle, certain items robbed from at least two complainants who were in the Bank at the time were found in the vehicle.
- [52] In the absence of any reasonable or acceptable explanation by any of the Accused as to how these items and the firearms came to be in the car, the inescapable and only reasonable inference to be drawn is that they formed part of the gang of robbers involved in the robbery in the Bank.
- [53] Against this background there is, in my view, no substantiation or relevance in the contention that the magistrate erred in having held that Sergeant Vos was untraceable (which in any event is a fact which seems to have been uncontested) and that, in so far as there may be contradictions between the evidence of Sergeant Vos and Sergeant Kinnear, such contradictions do not in any way detract from the evidence that firearms and some of the items robbed earlier in the Bank were found in the vehicle. Having read the evidence of these two witnesses I, in any event, fail to see any material contradictions in their evidence.
- [54] In view of the foregoing, the only grounds of appeal which call for consideration is the question -
- (a) whether the magistrate erred in allegedly disallowing the legal representative to de novo cross-examine Sergeant Kinnear at the time of the reconstruction of the record;
 - (b) whether the conviction of the Accused on the four charges of robbery constitutes a duplication of convictions.
- [55] I deal seriatim with these contentions.

Cross-examination of Sergeant Kinnear

- [56] Mr Pistorius who appeared on behalf of the Accused indicated that he wished to cross-examine the witness de novo, but that the magistrate, contrary to the decisions in *S v Catsoulus* 1974(4) SA 371 (T) and *SvMatthys* 1985(1) SA 209 (C), disallowed him to do so.
- [57] The magistrate denies that he, although he enquired about the line of cross-examination, disallowed Mr. Pistorius to cross-examine the witness.
- [58] As is apparent from the record pp. 128 to 140 Mr. Pistorius indeed cross-examined the witness exhaustively.
- [59] Except for the occasion on which the magistrate asked him whether he was busy to revisit the trial and whether the purpose at that stage was merely to determine for reconstruction purposes what was testified at the trial by the witness, Mr. Pistorius obviously proceeded on his line of questioning.
- [60] In this regard the following is recorded at the end of his cross-examination:
- "Agbare met respek, mag ek my kliente nader vir 'n oomblik? Ja agbare, dankie. Ek het instruksies dat hulle my kliente tevrede is dat die kruisverhoor wat ek onderneem het namens hulle behoorlik hulle opdragte weerspieel, so ek het dus nie verdere vrae nie.?"
- [61] On a reading of the record of proceedings it would seem that Mr. Pistorius' submissions appear to be nothing more than sheer opportunism.
- [62] In any event Mr. Pistorius interpretation of the decision in the *Catsoulus* case, supra is in my view clearly wrong if regard is had to the following passage from the judgment at 373G:
- "Die posisie in die onderhawige deelsverhoorde strafsak skyn my dan te wees: dat die verhoor tot op die stadium wat dit reeds bereik het, 'n behoorlike, geldige verhoor was en daar dus nog rede nog regsbevoegdheid bestaan om die gedeeltelike verhoor nietig te verklaar; dat dit die administratiewe taak van die landdros en/of die klerk van die hofis om 'n oorkonde van die afgelope verhoor opnuut saam te stel op enige wyse wat billik en so betroubaar moontlik is; dat dit 'n administratiewe ondersoek en aksie behels en niks met die verhoor as sodanig te doen het nie; dat by die hervatting van die verhoor nadat die oorkonde ten beste herstel is, is die landdros uit hoofde van art. 210 van die Strafproseswet, 56 van 1955, geregtig om die klaarterug te roep as getuie, aan horn sv herstelde getuienis voor te lê en te vra of dit strook met die getuienis wat h v aanvanklik by die verhoor afgele het. Die klaer as getuie sal dan onderhewig wees aan kruisverhoor deur die verdediging beide oor sv antwoorde op die landdros se vrae oor die korrektheid van die oorkonde en oor die inhoud van sv getuienis teen die beskuldigde. Daarna kan die verhoor sy gewone loop neem. (My emphasis)".
- [63] It is obvious from this quotation that the intention is at that stage of the proceedings to test the correctness of the reconstructed

version of the witness' evidence and not that a cross-examiner be allowed carte blanche to cross-examine the witness concerned afresh.

[64] In my view there is accordingly no merit in the submission made in this regard on behalf of the Accused.

Duplication of convictions

[65] Our Courts have repeatedly held that there are two tests to be applied whether an undue splitting of charges occurred.

[66] In *R v Johannes* 1925 TPD 782 at 786 Curlewis JP expressed himself in this regard as follows:

it seems to me that the Court can safely lay down that under certain circumstances both those tests, or the one, or the other, maybe

applied, namely, the test of whether two acts are done with a single intent and constitute one continuous criminal transaction, and the test as to whether the evidence necessary to establish one crime involves proving another crime. It depends entirely on the circumstances of each particular case".

See also: *S v Prins en Andere* 1977 (3) SA 807 (A) at 81 AC; *S v Moloto* 1982 (1) SA 844 (A)

[67] In *S v Grobler* 1966(1) SA 507 (A) it was held (at 512) that whether one or more offences have in particular circumstances been committed depends on the definition of the respective offences.

[68] We have been referred by Mr. Pistorius to the judgment in *S v Maneli* 2009(1) SACR 509 (SCA) in which the Court was faced with a case where the appellant was convicted of two counts of robbery in circumstances where five men arrived at the farm of the complainant where they approached him in his office where one of them produced a gun and asked for his money whereafter he was robbed of his money and he and his gardener were tied up. From there the robbers walked over to the homestead where they assaulted the persons there and stole further items. The Court held {at 512b) that the complainant "was probably tied up, not only to induce submission to the taking of the money he kept in his office but also to induce submission to the taking of goods from his house" and that insofar as the goods taken from the house are concerned the assaults on the people found in the house were committed with the same object in mind\

[69] Except for the fact that the facts in that matter are in my view distinguishable from the facts in this matter in the sense that the robbers obviously entered the Bank with the intention to rob the Bank and in the process, incidentally, decided to also rob the clients who happened to be in the Bank at that stage, a view different from the one expressed in the *Maneli* case, *supra*, is to be found in the case of *S v Dhlamini* 2012(2) SACR 1 (SCA).

[70] In the Dhlamini case, supra, the appellant was convicted, amongst other offences, of three charges of robbery. According to the evidence the three complainants were attacked and robbed at gunpoint by three men, one of which was the appellant,. At the time two of them were sitting in a vehicle as a third one was approaching the vehicle as they had an arrangement to go to a church meeting. The three men demanded that they hand over their possessions which they did. The three charges related to the robbery of each of these complainants. In the Court's majority judgment its was held (at 15c, para [51 J) that there was a separate intent by the three robbers to rob each of the women which intent was executed separately in respect of each woman.

[71] I am in respectful agreement with the reasoning in this decision.

[72] This is exactly what happened in this case. The gang, having acted in circumstances where they all associated themselves with the acts perpetrated by their individual gang members, obviously intended to rob, not only the Bank, but also the individual clients in the Bank at the time by threatening each of them with a firearm and having subdued each of them, taken their property. I find it difficult to comprehend, as indicated by the learned Judges, how the taking by force of the property on one complainant can be regarded as a robbery of another complainant. To hold otherwise would be contrary, as held in *s v Whitehead and Others* 2008(1) SACR 431 (SCA) at 443e, para [35], to one's common sense, experience and sense of fairness.

[73] I am accordingly satisfied that the respective convictions do not constitute a duplication of convictions.

[74] In the result I am unpersuaded that the magistrate in any respect erred in convicting the Accused.

[75] This brings me to the question of sentence. Sentence

[76] It is trite that, as, inter alia, held in *S v Rabie* 1975 (4) SA 855 (A) at 857D-F that in every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -

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(a) should be guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial Court'; and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been judicially and properly exercised".

[77] As indicated in *S v Shapiro* 1994 (1) SACR 112 (A) at 119J-120c, the test under

(b) above is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.

- [78] The word "misdirection" was interpreted in this context by Trollip JA in *S v Pillay* 1977 (4) SA 531 (A) at 535D as an error committed by the Court in determining or applying the facts for assessing the appropriate sentence and that such misdirection must in addition 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 exercised it improperly or unreasonably.
- [79] The offences of which the Accused were convicted are, no doubt, extremely serious and brutal offences which obviously call for the imposition of a long term of imprisonment.
- [80] Our Courts have as long back as in 1997 expressed their concern on the high levels of violence and serious crimes in this country to such an extent that it indicated that "it seems proper that, in sentencing especially such crimes, the emphasis should be on retribution and deterrence. . . . Retribution may even be decisive" (see: *S v Mhlakaza* 1997 (1) SACR 515 (SCA) at 519c).
- [81] In having considered the magistrate's considerations in sentencing the Accused, there are in my view two areas of some concern, namely -
- (a) the fact that the magistrate elected to take counts 1 and 2 and counts 5 and 7 together for purposes of sentence; and
- (b) the extent in which the magistrate considered the period during which the Accused were detained awaiting trial.
- [82] In relation to the first area of concern, I find it difficult to understand why the magistrate elected to take, on the one hand, counts 1 and 2 and, on the other hand, counts 5 and 7, together for purposes of sentence, bearing in mind, particularly, the fact that count 1 relates to the Accuseds' main aim when they entered the Bank and that counts 2, 5 and 7 in essence relate to the so-called individual robberies that occurred whilst the robbery of the Bank was in progress. In my view counts 2, 5 and 7 should, from a logical point of view, rather have been taken together for purposes of sentence.
- [83] In relation to the second area of concern, it would seem that the magistrate was, having indicated that the case took a long time to be finalized for which they were solely responsible, not really prepared to take the period of their detention into consideration. It is true, as indicated by the magistrate, that their case would have been finalized on 3 September 1999 had they not escaped. The matter was, however, delayed for a long time during the time it took to have the record reconstructed after it had gone missing on at least two occasions. I do not think that they can be blamed for the records having gone missing. It was during the process during which the record was reconstructed that they were detained since about more or less June 2004 to 4 April 2011, ie., a period of about seven years. In my view this is a factor that should have been taken into consideration (*S v Vilakazi* 2009(1) SACR 552 (SCA) at 574h) and that we can for this reason interfere in the sentences imposed.
- [84] For the reasons set out in this judgment the following order is made:-

1. THAT the Appellants' appeal against their conviction be dismissed.
2. THAT the appeal against the sentences imposed be upheld.
3. THAT the sentences imposed be replaced with the following sentences:-
 1. On count 1, Accused Nos. 2 and 3 are each sentenced to ten years imprisonment.
 2. On counts 2, 5 and 7, taken together for purposes of sentence, Accused Nos. 2 and 3 are each sentenced to ten years imprisonment.
 3. On count 11, Accused No. 2 is sentenced to three years imprisonment.
 4. On count 13, Accused No. 3, is sentenced to three years imprisonment.
 5. It is ordered that five years of the imprisonment imposed on counts 2, 5 and 7 shall be served concurrently with the ten years imprisonment imposed on count 1 resulting in the two Accused being imposed an effective sentence of 18 years imprisonment".
4. THAT the sentence of 18 years referred to in paragraph 3 of this order be antedated to 4 April 2011.

PC VAN DER BYL

ACTING JUDGE OF THE HIGH COURT

I agree

P M MABUSE

JUDGE OF THE HIGH COURT

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DATE OF HEARING: 21 September 2012

JUDGMENT

DELIVERED ON: 4 October 2012

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