THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 362/11

In the matter between Reportable

MUSA DLAMINI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Dlamini v S* (362/11) [2012] ZASCA 26 (27 March 2012)

Coram: FARLAM, VAN HEERDEN, CACHALIA, SNYDERS and MAJIEDT JJA

Heard: **17 FEBRUARY 2012**

Delivered: **27 MARCH 2012**

Summary: Duplication of convictions – armed robbery involving three robbers acting with a common purpose to rob three people on a single occasion. Accused charged with three offences – correctly convicted as evidence established three separate robberies – no duplication of convictions.

ORDER

On appeal from: KwaZulu-Natal High Court, Pietermaritzburg (Ntshangase J and Gorven AJ sitting as court of appeal):

1. The appeal against the convictions on counts 2 and 3 is dismissed.
2. The appeal against the sentence is upheld.
3. The order of the court below on sentence is set aside and substituted with the following:

   'The appeal against sentence is upheld and the order of the trial magistrate is set aside and the following order is substituted in its place:

   "(a) The accused is sentenced to fifteen years' imprisonment on each of counts 1 and 2 and to ten years' imprisonment on count 3;

   (b) The accused is sentenced to three years' imprisonment on count 4;

   (c) The accused is sentenced to one year's imprisonment on count 5;

   (d) The sentences on counts 2 and 3 are ordered to run concurrently with the sentence on count 1 and the sentence on count 5 is ordered to run concurrently with that on count 4;

   (e) One year of the three years on count 4 is ordered to run concurrently with the sentence on count 1.

   (f) In terms of s 12 of the Arms and Ammunition Act 75 of 1969, the accused is declared unfit to possess a firearm.

   (g) The effective sentence to be served is seventeen years' imprisonment."'

JUDGMENT

CACHALIA JA (FARLAM JA concurring):

[1] This appeal, from the KwaZulu-Natal High Court, is aimed at securing the reduction of an effective sentence of 43 years' imprisonment that was imposed on the appellant on three counts of robbery arising from an incident on 26 April 2002, and two unrelated charges for the unlawful possession of a firearm and ammunition.

[2] Although this court, on petition, granted the appellant leave to appeal only against his sentence – and Mr *Kemp*, who appeared on his behalf, drew his heads of argument on this basis – Ms *A Watt*, counsel for the state, in her written submissions, requested us to consider the 'fact that there was a duplication of convictions' for the three robbery charges. In support of this submission, and relying on *dicta* of Wessels JA in *S v Grobler & another*[1] she contended that the three charges arose from actions committed with a 'single intent' in a 'continuous transaction'. There was, she submitted, in substance only one offence of robbery – not three – which this court ought to consider when deciding on an appropriate sentence. Ms *Watt* accordingly supported the appellant's appeal for the sentence to be reduced. So, at the court's invitation, Mr *Kemp* applied to amend his grounds of appeal to include duplication of the robbery convictions, and was granted leave to proceed on this basis.

[1] *S v Grobler & another* 1966 (1) SA 507 (A) at 523A-524B.

[3] The appellant, Mr Musa Dlamini, was indicted in the Pinetown Regional Court on six counts: three of robbery arising from the incident on 26 April 2002, one of theft and two for the unlawful possession of an unlicensed firearm and ammunition. The theft charge – not related to the robbery – concerned a motor vehicle that was allegedly stolen in 1999. The police discovered the firearm and ammunition, which were the subject of the remaining charges, in Mr Dlamini's possession three days after the robbery. There was, however, no evidence linking this firearm and the ammunition to the robbery.

[4] The regional magistrate convicted Mr Dlamini on all counts and found that the robbery occurred in the manner described below.

[5] At about 19h00 on 23 April 2002, Mrs Janet Burgess was at her private residence in Pinetown waiting for her friends, Mrs Ingrid Usher and Mrs Gale Acutt, to arrive. They had arranged to drive together to a church nearby.

[6] Mrs Usher arrived, first in a Volvo motor-vehicle. As she drove into the driveway of Mrs Burgess's house, Mrs Burgess emerged from her house, locked her front door and turned on the lights illuminating the driveway in front of the garage. She walked a few steps to Mrs Usher's vehicle and asked her whether it would be convenient for all of them to travel to their destination in the Volvo. Mrs Usher agreed and Mrs Burgess then got into the car next to her.

[7] Soon Mrs Acutt also arrived there in her Toyota motor-vehicle and parked in the driveway a short distance from the Volvo. She alighted from her vehicle and began walking towards the Volvo, which had its headlights on and was facing the entrance gate ready to depart.

[8] At that point three men clad in blue overalls appeared in the driveway. They moved swiftly towards the Volvo. Mr Dlamini was among them. One of the men pointed a firearm at Mrs Acutt, who had reached the Volvo and was preparing to open the rear passenger door to join her friends. The men demanded that the women hand over their possessions. Mrs Acutt tried to steer clear of the armed man by moving towards the back of the vehicle. At the same time she dropped her car keys next to the back wheel in an attempt to conceal them from the intruders.

[9] Mrs Burgess stepped out of the car as one of the two unarmed robbers – later identified as Mr Dlamini – moved quickly towards her demanding that she give him all her possessions. She complied by handing over her handbag and house keys to him.

[10] The robbers also commanded the women to hand over the keys of both cars. Again, they obeyed. The men then got into the two cars and drove off quickly, taking with them the personal effects of the three women including their handbags, prescription glasses, cellular phones, cash and a video camera. The incident lasted only a few minutes.

[11] The three charges of robbery were for the items taken from the three women, including the two vehicles belonging to Mrs Acutt and Mrs Usher. Mr Dlamini was the only person charged with these offences. His evidence that he was not present at the scene of the robbery was false and was properly rejected by the magistrate. The high court correctly confirmed this finding.

[12] Mr Dlamini's conviction for the unrelated firearm and ammunition offences was also upheld by the high court. However, the high court set aside his conviction for the theft of the motor vehicle in 1999 because of insufficient evidence.

The Magistrate's Judgment on Sentence

[13] The magistrate sentenced Mr Dlamini to 15 years' imprisonment each for the robbery of Mrs Acutt's and Mrs Usher's vehicles as well as their personal effects, and to ten years for robbing Mrs Burgess. Section 51(2) of the Criminal Law Amendment Act 105 of 1997 read with Part ll of Schedule 2 is the sentencing regime applicable to these offences. It requires a minimum sentence of 15 years' imprisonment to be imposed on a first time offender, where there were aggravating circumstances during a robbery or where the offence involved the taking of a motor vehicle. Section 1 of the Criminal Procedure Act 51 of 1977 includes within its definition of aggravating circumstances the wielding of a firearm and the threat to inflict grievous bodily harm. Both conditions were present during the robbery. This being so, the magistrate did not explain why he imposed a sentence of 10 years instead of 15 years, for the count relating to the robbery of Mrs Burgess, but nothing turns on this.

[14] On the firearm and ammunition charges Mr Dlamini was sentenced to three years' imprisonment (three years for the firearm and one year for the ammunition, which were ordered to run concurrently) and to two years for the theft of the motor vehicle in 1999. Together with the three robbery counts he was sentenced to serve a total of 45 years' imprisonment.

[15] Mr Dlamini's legal representative asked the court to order that the sentences run concurrently 'as (they) were committed at the same time'. The prosecutor on the other hand asked for the maximum sentence for each of the robbery counts to be served consecutively because of the gravity of Mr Dlamini's conduct. This submission was surprising in the light of her concession that he was 'an ideal candidate for rehabilitation'. Nevertheless she accepted that the 'maximum sentence' may be considered too excessive and therefore asked for a sentence of 'nothing less than 30 years'. The magistrate had no regard to these submissions. His judgment is replete with misdirections the effect of which I shall consider later.

[16] But first I must consider the issue that was raised at the beginning of this judgment – whether Mr Dlamini's conviction for three counts of robbery instead of just one count offended the rule against duplication of convictions. The purpose of the rule is to avoid a person being convicted and sentenced more than once for what is in substance a single offence, which could have been embodied in a composite charge.[2] It forms part of the constitutional right to a fair trial.[3]

[17] Although s 83 of the Criminal Procedure Act 51 of 1977 permits prosecutors to charge a person with more than one offence when it is doubtful which of several offences may have been committed, it remains the court's duty to be vigilant that no duplication occurs.[4] This is to avoid prejudice to an accused: not only is there the likelihood that the accused may be punished more severely if convicted for multiple offences instead of just one, but these offences become part of the offender's criminal record. The prejudice is evidently more serious in cases where compulsory minimum sentences apply.

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[2] *S v Grobler & another* 1966 (1) SA 507 (A) at 523B-524A; See generally E Du Toit, FJ De Jager, A Paizes, A Skeen and S Van Der Merwe *Commentary on the Criminal Procedure Act* Ch 14 at 5-8B.
[3] *S v Whitehead & others* 2008 (1) SACR 431 (SCA) para 10.
[4] *S v Whitehead & others* 2008 (1) SACR 431 (SCA) para 33.

[18] In this regard s 51(2) of the Criminal Law Amendment Act 105 of 1977, which is applicable here, requires a court to impose a harsher sentence in the case of second or third and subsequent offenders. The effect on the appellant is that he not only has a less flattering criminal record, but if he re-offends a court would be obliged to treat him as a triple-offender if he is again found guilty of robbery, and to apply a minimum sentence of 25 years' imprisonment unless the circumstances justify a lesser sentence.

[19] Our courts have applied different tests to decide whether duplication has occurred. In *S v Maneli*[5] Streicher JA explained:

'One such test is to ask whether two or more acts were done with a single intent and constitute one continuous criminal transaction. Another is to ask whether the evidence necessary to establish one crime involves proving another crime.'

[20] There is however no all-embracing formula. The various tests are mere guidelines – they are not rules of law, nor are they exhaustive. Their application may yield a clear result, but if not a court must apply its common sense, wisdom, experience and sense of fairness to make this determination.[6]

[21] Robbery consists of the theft of property by intentionally using violence or threats of violence to induce submission to its taking.[7] It is thus a crime involving two unlawful acts – taking property and performing a violent act upon a person.[8] Mr Dlamini committed no violent act himself. He took Mrs Burgess's property

[5] *S v Maneli* 2009 (1) SACR 509 (SCA) para 8.
[6] *S v Whitehead & others* 2008 (1) SACR 431 (SCA) para 35.
[7] *S v Maneli* 2009 (1) SACR 509 (SCA) para 6; J R L Milton *South African Criminal Law and Procedure* Vol II *Common Law Crimes* 1 ed at 642-643.
[8] Burchell J *Principles of Criminal Law* 3 ed (2005) at 218.

from her after one of his co-robbers threatened the three women at one and the same time with a firearm. His liability for the robbery of the three women could thus only have arisen from a common purpose, which the state neither alleged nor sought to prove. The evidence did not establish any prior agreement to commit the crime. But it did prove that the three men, including Mr Dlamini, actively associated themselves with the commission of the crime against each of the three women with the requisite fault element. So the finding that Mr Dlamini was liable for the robbery of the three women was correct, albeit that the charge sheet may have been deficient in failing to specify a common purpose to commit the crime.

[22] In my view it is clear that the 'single intent' – or in this case the single common intent – of the robbers involved the threat to take property from the three women and the taking of their property in 'one continuous transaction'. Furthermore, this was accomplished through a single threat of violence directed at the three women simultaneously. This evidence – the violent threat – which was necessary to establish each charge involved proving the other two charges. So both tests in *Maneli* were satisfied.

[23] However, even without the application of these tests to this case, to conclude that three offences were committed – when in substance only one was – would defy common sense and fairness. Moreover, it would contradict the recent approach of this court in *Maneli.*

[24] The facts in *Maneli* were these: Several robbers went to a farm. They first stole money from an office and shortly afterwards also stole electronic equipment from a homestead nearby. To achieve their purpose they incapacitated the owner of the farm and assaulted one of his gardeners in the office. They then went to

the homestead and tied up a visitor to the farm and a domestic employee. The robbers were charged with two offences, the robbery of the farmer's cash from the office and the electronic equipment from the visitor, and were convicted in a lower court on this basis. On appeal, it was held that because the assaults on the farmer and the visitor were done with the same object in mind – to steal the property from the office and the homestead – only one offence was committed. The court said that 'the theft of the money from the office and from the house by the use of violence to induce submission was done with a single intent and constituted one continuous transaction'.[9] There was thus, it held, a duplication of convictions.

[25] One of the differences between *Maneli's* case and the present one is that there the property of a single person was taken, whereas here three women had their property removed by force. That is not a material difference because ownership of property stolen is not an element of the crime of robbery. The case for a duplication of convictions is even stronger in the present case because the property was taken from the three women through a single threat of violence at the same time and at the same place, which was not the case in *Maneli* where the theft involved two physical acts of violence on two separate occasions.

[26] During the hearing Ms *Watt* informed us that the practice of the Director of Public Prosecutions is to charge offenders in cases such as this with a single offence, not multiple crimes. That approach is sensible and the facts of this case demonstrate this.

[9] *Ibid* para 8.

[27] Mr Dlamini's conduct could comfortably have been brought within the ambit of one charge.[10] He therefore ought to have been charged with only one count of robbery committed with a common purpose – and to have been punished on this basis. Moreover, the learned magistrate failed in his duty to consider whether there had been a duplication of convictions. Had he done so he would doubtless have come to another conclusion and imposed a significantly lesser sentence that was proportionate to the crime.

[28] I now turn to examine the magistrate's approach to sentence. The record shows that Mr Dlamini's legal representative placed his personal circumstances before the magistrate in mitigation on 28 February 2003. These were scant and hardly touched upon the important questions always relevant to sentencing – the offender's motive for committing the crime and his prospects for rehabilitation. They revealed that he was 22 at the time of the robbery, but was still at school doing Grade 11. He had no parents, having lost his mother in 1984 and his father in 2000. However, he had two children – a six-year old and a baby of just seven months. At the time of his arrest on 26 April 2002 he was living with his aunt. He had no prior history of offending. The record also shows that the Mr Dlamini spent approximately ten months in custody before he was sentenced. The learned magistrate considered none of this evidence relevant in his determination of sentence. As mentioned earlier he misdirected himself completely on this aspect.

[29] First, he appears to have misunderstood how to apply the minimum sentence regime to these offences. 'Sentences, relating to these offences have been prescribed by the legislature, not by the court' he wrote. 'And', he continued: 'if the courts do not comply with the laws made by parliament, then the courts might as well close down because they are not complying with the

[10] Cf *S v Grobler & another* 1966 (1) SA 507 (A) at 523E-524A.

rules and laws of the lawmakers'. Moreover, he concluded, 'if an offence is of such a serious nature, one does not have to worry about the personal circumstances of the accused like that he is a first offender and so on because the interest of society require that it be dealt with commensurately' (sic).

[30] The magistrate's reasoning suggests that he was not aware of this court's judgment in *S v Malgas*[11] that was handed down two years earlier. It dealt with the effect of the minimum sentence dispensation and concluded that while the minimum sentence prescribed by the legislature should *ordinarily* be imposed the sentencing court retained its discretion to impose a lighter sentence if there was weighty justification for doing so.[12] In this regard the court made clear that all factors traditionally taken into account in sentencing (whether or not they diminish moral guilt) continue to be relevant.

[31] The second misdirection was that he punished Mr Dlamini for the participation of his co-robbers in the commission of these crimes. Of course, the fact that a robber acts with others when committing a crime is an aggravating factor of which a court must take account. But it is not permissible to make an accused 'shoulder the blame', as the magistrate put it, because the other robbers were not made to account for their part in the crime. An offender can be punished only for his own criminal conduct and the conduct of co-perpetrators that is imputed to him – nothing more.

[32] Thirdly, the magistrate surmised that the crime had been carefully planned, which is an aggravating factor. But this was pure speculation. There was no evidence whatsoever to suggest that this crime was planned, and it was

[11] *S v Malgas* 2001 (2) SA 1222 (SCA).
[12] Para 25B.

certainly not an inference that could safely have been drawn from the circumstances under which the robbery took place.

[33] Finally, and assuming that there was no duplication of convictions, the magistrate's most serious misdirection was his failure to consider the cumulative effect of the sentences. Only the sentences imposed on the firearm and ammunition counts were ordered to run concurrently, the effect of which was to reduce the total sentence to be served by just one year. All the other sentences, including the theft of the motor vehicle, were ordered to run consecutively. The total of 45 years' imprisonment was a sentence of 15 years more than even the state thought it could legitimately ask for. It seems that the magistrate's unexplained premise for ordering the sentences to run consecutively was his erroneous assumption that the minimum sentence regime required this. So even if Mr Dlamini had committed three offences, they were perpetrated 'at the same time and place, and in a single unbroken sequence'.[13] Here too common sense and fairness suggest that he ought to have been punished as if only one offence was committed.

The Judgment of the High Court

[34] As I have mentioned the high court set aside Mr Dlamini's conviction for the unrelated motor vehicle theft in 1999, but confirmed the convictions for the three counts of robbery as well as the firearms and ammunition charges. So the two year sentence for the theft fell away leaving an effective sentence of 43 years' imprisonment, which it also upheld.

[35] The high court (Gorven AJ, Ntshangase J concurring) dealt cursorily with Dlamini's appeal against his sentence and concluded:

[13] *Fourie v S* 2001 (4) All SA 365 (A).

'[I]n the light of all the relevant circumstances of the matter and taking into account the relative youth of the appellant as well as the fact that this was a first offence and weighing it against the manner in which the offence was committed, indicating that this was a slick and professional operation, and weighing it also in the light of the legislature's indication of the seriousness of the offence in the eyes of the community, I cannot find that the magistrate imposed a sentence any different from the one which I myself would have imposed. There is therefore no basis on which to find that this court is at large to intervene and impose its own sentence.'

[36] In approaching the issue in this manner the high court seems to have laboured under the same misapprehension as the magistrate did – that the minimum sentence regime required these sentences to be served consecutively. What also weighed with the high court was, as the magistrate similarly found, that this 'was a slick and professional operation' justifying the severest sentence. As I indicated earlier, there was simply no evidence, circumstantial or otherwise, to support this inference. Ms *Watt*, who appeared for the state in this appeal, to her credit did not seek to defend this flawed reasoning.

[37] I turn to consider the appropriate sentence. The robbery was a serious crime aggravated by the fact that Mr Dlamini acted in concert with two others. The three women who were going about their normal business went through a terrifying experience – one that they would no doubt fear could happen to them again. Only one of the two cars and some of the items taken during the robbery were recovered.

[38] However, Mr Dlamini directed no physical violence against any of the victims. His conduct went no further than taking Mrs Burgess's possessions, albeit that this was induced under the threat of violence by one of his co-robbers.

[39] It is unfortunate that Mr Dlamini's legal representative placed so little evidence in mitigation of sentence before the trial court. On the face of it the fact that the appellant had lost both his parents – his mother when he was only 13 – must have had some bearing on what happened to him. Also the court was told nothing of the circumstances of how he came to father two children and whether he was fulfilling any responsibility for them. Importantly, no evidence was led regarding his schooling, save for the fact that he was in Grade 11, which may have assisted the court in considering his prospects for rehabilitation. In short no substantial and compelling circumstances were placed before the court to justify the imposition of a lesser sentence. Fifteen years' imprisonment is therefore a proper sentence for his role in the robbery notwithstanding the wrong approach by both the magistrate and the high court.

[40] The effective sentence of three years' imprisonment for the firearm and ammunition charges is in and of itself not unduly harsh. Mr *Kemp* did not suggest that it was. So taken together with the fifteen years' for the robbery the sentence he ought to serve is eighteen years.

[41] This brings me to the ten months Mr Dlamini spent in custody before he was sentenced which, as I have mentioned, neither the magistrate not the high court took into account in deciding the appropriate sentence. It is trite that the period an accused is held in custody while awaiting completion of his trial should be taken into account when deciding on the appropriate sentence.[14] This is done by making the period of imprisonment actually imposed shorter than it would otherwise have been. However, the courts have not spoken clearly on how to

[14] *See* generally Terblanche *Sentencing in South Africa* p 205 and the cases there cited.

calculate this period. One approach has been to do an inexact subtraction;[15] another is to deduct the period actually spent;[16] yet another is to treat the time spent in custody at the very least as equivalent to the time served without remission[17]and a fourth more adventurous method is to treat the period as equivalent to about twice the length because of the harsher conditions that awaiting-trial prisoners are subjected to in comparison with the conditions of sentenced prisoners.[18]

[42] As we have not had the benefit of argument on what the correct approach should be I refrain from saying anything further on this question – particularly in the case of prison conditions – as this would depend on the facts. Suffice to say that the courts have spoken clearly that an appellant is entitled to the benefit of the period of his incarceration. In Mr Dlamini's case this was ten months, which equates roughly to a year in custody. I would deduct this period from the overall

[15] *S v Njikelana* 2003 (2) SACR 166 (C) where the court subtracted three years' imprisonment for 35 months spent in custody; In *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 60 a minimum sentence of 15 years' imprisonment was reduced by two years because the accused had spent 'just over two years' in custody.

[16] In *S v Hawthorne and another* 1980 (1) SA 521 (A) at 523F-G read with 525H the court deducted the exact period of one year spent in custody from the sentence imposed by a provincial division.

[17] *S v Brophy* 2007(2) 56 SACR (W) para 18. This is a decision of the full court of the Johannesburg High Court. It agreed with the dictum in *S v Stephen* 1994 (2) SACR 163 (W) at 168f where the court, following Canadian authority, approved the statement that 'Imprisonment whilst awaiting trial is the equivalent of twice that length.' In *Brophy* the court reduced a sentence of 24 years' imprisonment, which would have been appropriate, to 16 years for a period of four years and four months in custody in respect of one accused and to 18 years' imprisonment in respect of the other accused for two years and four months in custody. In *S v Egglestone* 2009 (1) SACR 244 (SCA) para 33, Farlam JA in a minority judgment said that he would hesitate to give general approval to the statement in *Stephen* though he thought that the circumstances of the particular case warranted its application.

[18] *S v Brophy* para 18.

sentence of 18 years' imprisonment, which it otherwise would have been, and impose an effective sentence of 17 years' imprisonment.

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A CACHALIA
JUDGE OF APPEAL

MAJIEDT JA (VAN HEERDEN AND SNYDERS JJA concurring):

[43] I have read the judgment of Cachalia JA. I disagree with his conclusion that there was a duplication of convictions on counts 1, 2 and 3. I, however, agree with him that the appeal against sentence should be upheld for the reasons enunciated in paras 28 to 42 above, in particular paras 33 and 36, as far as the concurrency of the sentences on counts 1, 2 and 3 is concerned.

[44] The facts are fully detailed in the judgment of Cachalia JA. It is, however, necessary that I expand on some of the facts and place others in proper context.

[45] A useful point to start with is the charge sheet. Counts 1, 2 and 3 are germane to the appeal and I shall, in the interest of brevity, refer to them collectively as 'the charges'. There were three complainants on the charges. In count 1 the appellant was charged with 'robbery with firearms', understood by all concerned at the trial to mean robbery with aggravating circumstances where a firearm was used. The State alleged that Mrs Acutt was unlawfully, intentionally and by force divested of a Toyota Corolla motor vehicle, a video camera, a cellphone, two pairs of sunglasses, one pair of prescription glasses and a

handbag containing cosmetics. In count 2 the charge was one of robbery with aggravating circumstances in respect of Mrs Burgess. The State averred that Mrs Burgess had been robbed of a Volvo motor vehicle, a pair of prescription sunglasses, a pair of prescription reading glasses, various tapes and a pair of sandals. Count 3 was also one of robbery with aggravating circumstances in respect of Mrs Usher who was allegedly robbed of a handbag containing a purse, a cellular phone, a cheque book, cash, a cosmetics bag, two pairs of reading glasses and one pair of sunglasses. Counts 2 and 3 were wrongly framed inasmuch as Mrs Usher, and not Mrs Burgess, had been robbed of the Volvo and the other items listed above. It appears that the State had erroneously switched the lists of stolen items around in this regard.

[46] As stated, the appeal was before us only on sentence – the appellant sought leave on petition only against the sentence, which was granted. Counsel argued the duplication of convictions aspect without the advantage of prior preparation and research, in the circumstances explained by Cachalia JA.

[47] According to the evidence, one of the three robbers had a firearm which he pointed at all three complainants. Mrs Usher was in her car (the Volvo) in the driver's seat, Mrs Burgess was seated in the front passenger seat and Mrs Acutt was approaching the Volvo from the rear to occupy the seat behind the driver, when the firearm was pointed at them. This constituted the main threat to the complainants, although other threats and demands were also uttered and addressed to them individually and as a group. The complainants testified that one robber (identified by Mrs Burgess at an identification parade as the appellant) first approached Mrs Burgess and demanded her handbag and other possessions. The other robber approached Mrs Acutt to demand the keys of her Toyota Corolla, while the one with the firearm continued pointing it at Mrs Usher. Mrs Usher vacated the driver's seat, walked towards the rear of the Volvo and

handed over her car keys to one of the robbers when this was demanded of her. The robbers eventually drove off with both vehicles and with various belongings of the complainants in their possession.

[48] Against this factual background, together with the facts set out by Cachalia JA, what falls to be decided is whether there has been a duplication of convictions on the charges. For the reasons that follow, I am of the view that the evidence established three separate counts of robbery and that the appellant had been correctly convicted. In my view, *S v Maneli,*[19] relied upon by Cachalia JA, is distinguishable on the facts. But before I set out my reasons for differing on these aspects, it is necessary to restate the general legal principles regarding robbery.

[49] Cachalia JA cites the definition of robbery as set out in *Maneli*[20] which, in turn, emanates from Prof Milton's work.[21] That definition accords broadly with those advanced by Prof Snyman[22] and by Prof de Wet.[23] As Cachalia JA states, robbery comprises two unlawful acts, one the taking of property and the other the perpetrating or uttering of a violent act upon or violent threats to a person.[24] While the definition and the essential elements of the offence are straightforward, the application thereof to factual situations is not, as this case demonstrates. Prof Milton correctly observes that '[t]his duality lends a measure of complexity to the analysis and application of the elements of the crime that has ensured a continuing quality of ambiguous uncertainty about the crime, which sometimes leads to strange anomalies'.[25]

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[19] *S v Maneli* 2009 (1) SACR 509 (SCA).
[20] *S v Maneli* para 6.
[21] J R L Milton *South African Criminal Law and Procedure* 3 ed (1996) at 642.
[22] C R Snyman *Criminal Law* 5 ed (2008) at 517.
[23] De Wet and Swanepoel *Strafreg* 4 ed (1985) at 373.
[24] Cf *S v Moloto* 1982 (1) SA 844 (A) at 850B.
[25] Milton at 643.

[50] Two further elements of the offence bear emphasis. Firstly, there must be a causal link between the violence perpetrated and the taking of the property.[26] Secondly, robbery, unlike theft, is not a continuing crime – the offence of robbery is complete once *contrectatio* is effected.[27] These are important considerations in assessing whether there has been a duplication of convictions. I hasten to point out that the observation that robbery is not a continuing crime must not be confused with the factual matrix (as in *Maneli)* where two or more acts are done with a single intent, constituting one continuous transaction. In the first instance a robbery would be completed once property has been taken from the victim as a result of violence or threats directed at him or her. Where violence is directed at a person after the goods had been taken, our courts have held that it is not the offence of robbery that is committed.[28] In the second instance, on the other hand, a single intent to take property by means of violence towards persons at separate locations in one continuous transaction can, in appropriate circumstances, constitute one robbery. This was the case in *Maneli,*[29] which I turn to discuss next.

[51] My brother Cachalia JA has already expounded the facts and findings in *Maneli*. The present matter differs in my view materially from *Maneli* on the facts in the following respects: firstly, all three women were threatened separately and together and their property taken from them individually, separate from the others. Unlawful threats of violence and the taking of property were thus perpetrated separately in relation to each of the women. In *Maneli* various people were threatened and violent acts were directed at various people, but only the complainant's (Mr Maske's) property was stolen. That property was in the complainant's possession and under his control, thus only one robbery was committed. The threats and violence against the persons present there,

[26] Snyman at 518; Milton at 648.
[27] Milton at 647.
[28] Milton at 647 and cases cited at footnote 63.
[29] And see further *Ex parte Minister van Justisie: In re S v Seekoei* 1984 (4) SA 690 (A).

including the complainant, facilitated the theft of the complainant's property. The second difference is to be found in the intent requirement. In *Maneli* there was a single intent, namely to deprive the complainant of his property through violence. That single intent was executed in one continuous transaction, at the complainant's office and at his house. As the appellant in the present matter denied involvement in the incident, his subjective intention could not be investigated during the trial. As his conviction is dependent upon him having had the requisite intention, it has to be inferred from his actions and those of his accomplices insofar as he associated himself with their actions, as testified to by the three victims. That evidence reveals:

(a) A threat with a firearm by one of the perpetrators (I refer to him as the second perpetrator for ease of reference) aimed and directed at all three women;

(b) That threat, together with threatening and demanding utterances by all the perpetrators, facilitated the removal of property from all three women;

(c) The appellant took a handbag and other possessions from Mrs Burgess;

(d) The inference that the appellant had the intention to rob Mrs Burgess lies in his own action of taking her property from her, threatening her and associating himself with the second perpetrator's threat towards her. That completes the crime of robbery of Mrs Burgess;

(e) The third perpetrator (reference again for convenience) took the handbag, the Toyota motor vehicle and its keys from Mrs Acutt whilst threatening her and associating himself with the threat by the second perpetrator towards her. Thus the third perpetrator's actions fulfilled all the elements of the crime of robbery towards Mrs Acutt;

(f) Because the appellant made common purpose with the second and third perpetrators, as correctly pointed out by Cachalia JA in para 21 above, he is also guilty of the robbery committed by the third perpetrator against Mrs Acutt although he personally took no action against her;

(g) The same reasoning, applied to the robbery of Mrs Usher, leads to the conclusion that the appellant is also guilty of the robbery committed against her.
(h) This illustrates that it is not possible to conclude, from the events testified to by the three victims, that the appellant had 'a single intent'.

In the present matter there was a separate intent by the three robbers to rob each of the three women. That separate intent in respect of each woman was executed separately in respect of each woman.

[52] One might ask rhetorically: if the three women had been raped by the appellant, can it ever be argued that there was only one offence of rape? Reverting to robbery: if violent acts are performed on a number of persons, but property is taken from only one of them, then there is only one robbery, and several assaults, as was the case in *Maneli*. If violence is directed at only one person, but property is taken from several persons, including the one against whom violence was directed, then there is one robbery and several thefts. But where violence or threats are perpetrated against three persons and property taken from all three as a result of such violence or threats, there are three robberies. The point can be made by simply asking – who was robbed by the appellant? If it was only one robbery, the inevitable consequence must be that only one of the women was robbed of all of the property, despite the fact that it was taken from the possession of the others. The next logical question would be – who is the woman that was robbed? The difficulty in answering these questions does not arise when they are posed in respect of *Maneli*. There Mr Maske, the complainant, was robbed of all of the property, as it was in his possession or under his control. The presence of others against whom violence was directed in the course of the robbery, was merely incidental to the robbery of the complainant, although the accused in *Maneli* could legitimately have been charged with the assault of the other persons. In the present matter, however,

property was taken from the possession and control of each of the women separately, through the use of threats of violence.

[53] It is difficult to comprehend how, for example, the taking by force of Mrs Acutt's property could constitute a robbery of Mrs Burgess, and vice versa. A similar difficulty arises with the finding that the appropriation of Mrs Usher's property by force constitutes a robbery of Mrs Acutt or Mrs Burgess. Snyman defines robbery as the 'theft of property' by intentionally and unlawfully using violence or threats to take the property from someone else.[30] So, one of the elements of robbery is theft. All the requirements of theft also apply to robbery. Theft is in turn defined as appropriation of corporeal, movable property which, inter alia, 'belongs to, and is in the possession of another'.[31] So, in the case of robbery, the fact that the perpetrator takes property belonging to and in possession of three different persons clearly constitutes three counts of robbery. In *Maneli,* on the other hand, property belonging to and in the possession of only one person was appropriated.

[54] The single intent and continuous transaction test, as applied to an enquiry regarding the improper duplication of convictions, has already been discussed above. Another test is the enquiry whether the evidence necessary to establish one crime involves proving another crime.[32] As is the case with the single intent test, above, this second test also compels one to the ineluctable conclusion that there were three separate robberies. If the State had led the evidence of one complainant only in relation to the property she had been forcibly deprived of, all the elements of the crime of robbery would have been proved. This is true of all three complainants.

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[30] Snyman at 517.
[31] Snyman at 483.
[32] *S v Maneli* para 8 and cases cited there.

[55] A brief consideration of the principles regarding duplication of convictions is apposite. Section 83 of the Criminal Procedure Act 51 of 1977 enables the State to draft charges as widely as it may deem necessary, to the extent that it may technically amount to a duplication of charges. That the law permits. But what is not permitted is duplication of convictions in order to safeguard an accused against being convicted twice in the same case for the same offence. As stated by Cachalia JA, where the application of the two tests to determine whether there has been a duplication of convictions yields no clear result, a court is called upon to apply its common sense, wisdom, experience and sense of fairness to reach a decision.[33] As demonstrated above, on the evidence and in applying the two tests, three separate offences were committed. To hold otherwise would be to distort a fundamental legal principle, leading to anomalous results. As Wessels JA said in *S v Grobler en 'n ander:*[34]

'The test or combination of tests to be applied are those which are on a common sense view best calculated to achieve the object of the rule.'

The rule is primarily aimed at fairness. This, however, embodies fairness to both the accused and the State. Harms DP put it thus in the context of the Constitution's fair trial provisions in s 35:

'Fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment, but also requires fairness to the public as represented by the State'.[35]

The rule cannot be applied where it would lead to manifest unfairness to the State, as would be the case, in my view, were Cachalia JA's views to be upheld. To borrow again from Wessels JA in *S v Grobler en 'n ander:*[36]

'The main purpose and social function of criminal proceedings are to establish the guilt of an accused person in respect of criminal conduct so that he may be punished according to law for that conduct.'

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[33] *S v Whitehead & others* 2008 (1) SACR 431 (SCA) para 35; *S v Dos Santos & another* 2010 (2) SACR 382 (SCA) para 44.
[34] *S v Grobler en 'n ander* 1966 (1) SA 507 (A) at 523F.
[35] See: *National Director of Public Prosecutions v King* 2010 (2) SACR 146 (SCA) para 5.
[36] At 522F-G.

The practice of the DPP, referred to by Cachalia JA in para 26, is ill conceived as s 83 of the Act specifically permits a broader approach to be followed in the formulation of charges. But once evidence is heard a court should be mindful of the rules regarding the duplication of convictions. The manner in which charges had been formulated in the present matter constitutes the proper approach.

[56] To summarise: the evidence plainly established the commission of a separate robbery against each of Mrs Acutt, Mrs Burgess and Mrs Usher. The application of the single intent, continuous transaction test and of the evidence test inexorably leads to this conclusion.

[57] In the premises, I would dismiss the appeal against conviction on counts 2 and 3. I would, however, for the reasons set out above, uphold the appeal against sentence. In the result, the following order is made:

1. The appeal against the convictions on counts 2 and 3 is dismissed.
2. The appeal against the sentence is upheld.
3. The order of the court below on sentence is set aside and substituted with the following:

   'The appeal against sentence is upheld and the order of the trial magistrate is set aside and the following order is substituted in its place:

   "(a) The accused is sentenced to fifteen years' imprisonment on each of counts 1 and 2 and to ten years' imprisonment on count 3;

   (b) The accused is sentenced to three years' imprisonment on count 4;

   (c) The accused is sentenced to one year's imprisonment on count 5;

(d) The sentences on counts 2 and 3 are ordered to run concurrently with the sentence on count 1 and the sentence on count 5 is ordered to run concurrently with that on count 4;

(e) One year of the three years on count 4 is ordered to run concurrently with the sentence on count 1.

(f) In terms of s 12 of the Arms and Ammunition Act 75 of 1969, the accused is declared unfit to possess a firearm.

(g) The effective sentence to be served is seventeen years' imprisonment."'

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S A MAJIEDT

JUDGE OF APPEAL

APPEARANCES

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