IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN CASE NO. CA&R 102/2011

In the matter between:

SIYABULELA NASE **Appellant**

and

THE STATE **Respondent**

JUDGMENT

Bloem J.

[1] Siyabulela Nase, the appellant herein, was charged in the regional court, East London on one count of the unlawful possession of a firearm in contravention of some of the provisions of the Firearms Control Act, 2000 (Act No. 60 of 2000), one count each of unlawfully pointing a firearm at Sharon Gregory and Babalwa Tyokolo respectively in contravention of some of the provisions of the Firearms Control Act and one count of robbery with aggravating circumstances, as intended in section 1 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) as read with sections 51 (1) and (2) and 52A and 52B of the Criminal Law Amendment Act, 1977 (Act No. 105 of 1977).

Despite his plea of not guilty, the appellant was convicted as charged. He was sentenced to 10 years' imprisonment for unlawfully possessing a 9mm parabellum calibre Norinco pistol, 3 years' imprisonment on each count of unlawfully pointing a firearm and 12 years' imprisonment on the count of robbery with aggravating circumstances. The sentences were ordered to run concurrently "*to the extent that the accused must serve 15 years' imprisonment*". The magistrate refused the appellant's application for leave to appeal against his conviction and sentence. The appellant comes before us on appeal with the leave of this court, such leave having been granted on petition.

[2] The undisputed facts are that on Sunday, 18 March 2007 and at about lunchtime, Ms Gregory and Ms Tyokolo had a firearm pointed at them at Pep Stores in the Southernwood shopping complex at East London. The person who pointed the firearm at them also took a safe key (the key) from Ms Gregory. A few minutes thereafter and not far from Pep Stores, the appellant was confronted by a group of approximately 20 people who was assaulting him and accused him of having robbed Pep Stores. He was then taken to Pep Stores whereafter he was charged with the above offences. The one issue in this appeal is whether or not it was the appellant who pointed a firearm at Ms Gregory and Ms Tyokolo and who took the key from Ms Gregory. If it is found that the state failed to proof beyond reasonable doubt that it was the appellant who was inside Pep Stores before he was assaulted

by the group, then he must be acquitted on all the counts, save for possession of a firearm, as appears from the facts set out hereunder. If it was the appellant who pointed the firearm at them, the next issue is whether or not there had been a duplication of convictions in respect of counts 2 and 3 (pointing of a firearm at Ms Gregory and Ms Tyokolo respectively). The state alleges that it was the appellant who pointed a firearm at Ms Gregory and Ms Tyokolo and that he committed those offences separately from the robbery. The appellant, on the other hand, denied that he was inside Pep Stores before he was assaulted by the group. He contends that if it be found that he was the one who pointed the firearm at Ms Gregory and Ms Tyokolo, he could be convicted of neither pointing a firearm at them nor robbery.

[3] To prove its case against the appellant the state called Ms Gregory who testified that on the day in question she and other members of staff were in the process of closing the store. Ms Gregory went to the storeroom to check whether it was locked. When she was inside the storeroom she was approached by a person who pointed a firearm at her. Because of previous robberies she asked the person whether he wanted the key. When he responded in the positive she handed the key to him. Ms Tyokolo subsequently walked into the storeroom. Ms Gregory did not see what the person did to Ms Tyokolo because the former covered her face. However, she heard Ms Tyokolo screaming loudly. The gunman caused Ms Tyokolo to lie down near Ms Gregory. He then left the storeroom. After a few minutes Ms Gregory heard

someone saying that she and Ms Tyokolo could get up. She was taken to an office. Many policemen then appeared in the store with a male person whose one eye was closed which suggested to her that he was physically beaten. She told the policemen that the person who approached her in the storeroom had taken the key from her. The person with the closed eye was searched and the key was found in his possession. It worked on the safe. Ms Gregory testified that, because she closed her face during the ordeal, she was unable to identify the person who entered the storeroom and pointed the firearm at her.

[4] Captain Mbulelo Pika testified that on 18 March 2007 while he was performing crime prevention duties in a vehicle with inspector Vananda he saw a group of people chasing a person in the vicinity of Pep Stores at the Southernwood shopping mall. When they made enquiries they were informed that the person had allegedly robbed Pep Stores. The two policemen followed the group. They managed to get the person who was being chased. They found a 9mm pistol on his waist. They took him to police station and then to Pep Stores where the staff immediately identified him as the person who was in the store a few minutes earlier. Captain Pika also testified that at Pep Stores he found a key on the person. It was established that the key opened the safe. They took the person to the police station.

[5] Ms Tyokolo testified that she is employed by Pep Stores as an assistant at its Southernwood branch. On Sundays the store closes at 13h00. At about 13h10 on 18 March 2007 there was no customer in

the store and the doors had already been closed. She went to the storeroom. There she was confronted by a person who pointed a firearm at her. He threatened to shoot her if she did not stop screaming. He ordered her to lie down which she did. After some time another employee entered the storeroom and Ms Tyokolo told him that there was a gunmen in the store. Security personnel subsequently arrived. She was told to get up. When she went into the store she saw a policeman with the gunman that she had seen in the storeroom earlier. When the policemen made enquiries she said that he was the person who was in the storeroom a few minutes earlier. She recognised him because his face was not covered when she saw him for the first time in the storeroom. He was still dressed in the black leather jacket which he had on when she saw him in the storeroom. The policemen then took him away.

[6] Warrant officer Banthu Vananda testified that on the day in question he was doing crime prevention duties with captain Pika when they came across a group of people assaulting the appellant. Upon enquiry they were told that the appellant was in possession of a firearm. They searched him and captain Pika found a firearm tucked away in his waist. A key was also found on him. They took him to Pep Stores. Members of security personnel and staff members at Pep Stores identified him as the person who was in the storeroom a few minutes earlier.

[7] The state then called Johan van Jaarsveld, also a member of the

South African Police Service, who testified that he took over the investigation of the alleged offences from captain Pongwana. He took the firearm that was allegedly found on the appellant to court and showed that the serial number thereof was found under the handle grips of the firearm. It was a 9mm Norinco pistol which was in working order.

[8] The state then called captain Xolisi Pongwana who was the initial investigating officer of the alleged offences. He testified that during April 2007 the docket was lost at court and another one had to be reconstructed. He sent the firearm for the necessary ballistics tests on 20 April 2007. There was no link between the firearm and the appellant. The state then closed its case.

[9] The appellant testified that he was at his father's flat at Southernwood when his friend, Bafo Hanisi, arrived. They were walking to a shop in a nearby shopping mall to play pool. The appellant testified that he was walking on crutches. He saw people running towards them from different directions. One person bumped him as a result of which he fell. One person in the group said about the appellant "*this is him, this is one of them*". The group then assaulted the appellant without asking questions. Mr Hanisi did not run away. He stood aside. He was not assaulted. The appellant testified that Mr Hanisi phoned the police who arrived on the scene shortly thereafter. The appellant was loaded into the police van without being searched. He accordingly denied that a firearm and a key were found on him. The policemen

initially took him to the police van, thereafter to Pep Stores and ultimately to the police station.

[10] Except for a few contradictions Mr Hanisi's evidence generally corroborated the appellant's evidence.

[11] Norman Gibson is an orthopaedic surgeon who treated the appellant from September 2006 following a motor vehicle accident during which he sustained a right closed ankle fracture. On 28 September 2006 he underwent an internal fixation operation after which his right leg was placed in a plaster of paris for approximately six weeks. Dr Gibson was satisfied with the appellant's recovery. During a follow up consultation in November 2006 the appellant was told to progress from partial to full weight bearing. He was requested to return on 9 January 2007. There is no record that he returned during January 2007. Dr Gibson testified that the plaster of paris was in all probability removed at the beginning of November 2006 and that no cast was re-applied by him or his team. The appellant returned either during May or August 2007 when his ankle appeared clinically and radio logically satisfactory although there was tenderness on the outside of the ankle. Dr Gibson testified that the plate in the appellant's ankle had not yet been removed although the bone had already knitted. Despite the appellant walking with a limp it should not affect his ability to walk. He would also be able to run in the case of emergencies.

[12] It is against the above evidence that I am required to determine the above issues. Regarding the first issue, whether or not it was the

appellant who was at Pep Stores before he was assaulted, Mr Solani, counsel for the appellant, submitted that the magistrate erred when he found that the state proved beyond reasonable doubt that it was the appellant who was at Pep Stores. Mr Els, counsel for the state, submitted that the magistrate correctly found that it was the appellant who was at Pep Stores prior to him having been assaulted. Mr Solani submitted that the magistrate could not have come to that conclusion because there was, what he termed, a "*material contradiction*" between Ms Gregory and captain Pika, the policeman who found the key on the appellant. Ms Gregory testified that when she entered the store and saw the person with the swollen eye she told the policemen that the intruder had taken the key. The appellant was then searched and the key was found on him. Captain Pika, on the other hand, testified that at the place where the group surrounded the appellant, the latter was searched and a firearm was found on him. He also found the key on the appellant. Captain Pika's evidence was corroborated in that regard by the evidence of inspector Vananda. There is obviously a discrepancy on this aspect between the evidence of Ms Gregory on the one hand and that of captain Pika and inspector Vananda on the other hand. What is important is that the evidence of all three witnesses is that the key was found in the appellant's possession. The contradiction is, in the light thereof, immaterial. The magistrate also dealt with this contradiction on the basis that it was immaterial. Not every contradiction is material or fatal. This is certainly one of those less important contradictions.

[13] Having dealt with the insignificant contradiction, the remaining evidence shows that immediately after the person had left Pep Stores, a group of people descended upon him and assaulted him. When the policemen enquired they were informed that the person had robbed Pep Stores. When that person was searched a firearm and a key were found on him. The key worked on the safe at Pep Stores. Against the background of the totality of the evidence, the appellant's denial that he was at Pep Stores immediately before being assaulted by the group must be rejected as false, as the magistrate correctly found. His version that he was at the wrong place at the wrong time is so improbable that it must be rejected. In this regard it is pointed out that, on his version, although he walked with Mr Hanisi, the crowd singled him out despite the fact that he was allegedly on crutches, visible to all. Mr Hanisi, on the other hand, had no impediments and simply stood aside while the appellant was being assaulted. It is furthermore highly improbable that, upon their arrival, the policemen would not have spoken to Mr Hanisi despite the fact that he made a call to the police when he saw that the appellant was being assaulted. Instead of arresting the group who assaulted the appellant without reason, the policemen arrested the appellant.

[14] Against the finding that it was the appellant who was in Pep Stores before his encounter with the group, the next enquiry is what offence(s) he committed while inside Pep Stores. The state's evidence is that he was in possession of a 9mm Norinco pistol. He

does not hold a licence, permit or authorisation to possess that firearm. He was accordingly correctly convicted on count 1 in terms of the Firearms Control Act.

[15] Regarding count 4, robbery with aggravating circumstances, Ms Gregory's evidence is that the appellant pointed a firearm at her. Because of her previous experience (namely, that she had been a victim of about 8 robberies at Pep Stores when robbers were interested in the key of the safe to empty the contents thereof), she enquired from the appellant whether he was looking for the key. After his response she handed the key to him. After the appellant had made a threat to Ms Tyokolo he left Pep Stores with the key in his possession. Against the above factual background, can it be said that the appellant robbed Pep Stores or Ms Gregory?

[16] Robbery consists in the theft of property by intentionally using violence or threat of violence to induce a person to submit to the taking of the property.[1] That definition encapsulates two unlawful acts, the one being the taking of property and the other the perpetrating or uttering of a violent act upon or violent threat to a person.[2] There can be no doubt that, when the appellant pointed a firearm at Ms Gregory he performed a violent act upon her. That violent act constitutes the one unlawful act required for the commission of robbery. The other unlawful act consists of "*die ontneming en toe-eiening van die*

[1] J Burchell Principles of Criminal Law 4 ed (2013) at 706
[2] *S v Dlamini* 2012 (2) SACR 1 (SCA) at 13c - d

slagoffer se goed".[3]

[17] There can be no doubt that, when the appellant entered Pep Stores, he intended to rob it. In other words, the intention was to unlawfully deprive Pep Stores of the goods sold to the public or money derived from the sale of those goods or both. The key would have made it possible for the appellant to open the safe and remove the contents thereof, in all probability money. There is no evidence that the appellant left Pep Stores with goods or money. What he left with was the key. So, although the appellant left Pep Stores with the key, the above facts do not, in my view, show that he took any item ordinarily sold by Pep Stores or the contents of the safe. In other words, although the state proved that the appellant had the necessary *mens rea*, the *actus reus* was absent. In my view, when he took the key from Ms Gregory it was with the intention to assist him to complete the second unlawful act required for robbery, namely "*die ontneming en toe-eiening van die slagoffer se goed*", that is, the items ordinarily sold by Pep Stores or the contents of the safe.

[18] Since the state failed to prove that the appellant took goods or money from Pep Stores, it failed to prove that the appellant committed the offence of robbery. Had he taken the said goods or money he would have been convicted of robbery. The facts show that he made himself guilty of attempting to rob Pep Stores. In the circumstances, the magistrate erred when he convicted the appellant of robbery with

[3] *S v Moloto* 1982 (1) SA 844 (A) at 850B

aggravating circumstances. He should have been convicted of attempted robbery with aggravating circumstances.

[19] What remains are the two counts of pointing a firearm at Ms Gregory and Ms Tyokolo respectively in respect whereof Mr Solani submitted that there was a duplication of charges with the count of (attempted) robbery. The starting point would be the definitions of those two offences in regard to which a possible duplication might have taken place. Pointing a firearm is a statutory offence. It is an offence to point any firearm, an antique firearm or an airgun, whether or not it is loaded or capable of being discharged, at any other person, without good reason to do so; or anything which is likely to lead a person to believe that it is a firearm, an antique firearm or an airgun at any other person, without good reason to do so. To secure a conviction of pointing a firearm the state has to show that the accused unlawfully and intentionally pointed at another person a firearm or anything leading that person to believe it is a firearm. I have already referred to the definition of robbery. In its simplest form, robbery is theft accompanied by an assault or a threat thereof.[4]

[20] Over the years various tests have been developed and applied to determine whether or not there is a duplication of convictions. In the "evidence test" the enquiry is whether the evidence necessary to establish the commission of one offence involves the commission of another offence. If the evidence which is necessary to establish the

[4] *S v Benjamin en 'n ander* 1980 (1) SA 950 (A) at 958H

one charge also establishes the other charge, there is only one offence. In terms of the "intention test", if there are two acts, each of which would constitute an independent offence, but only one intent, if both acts are necessary to realise this intent, there is only one offence. In *S v Whitehead and others*[5] it was held at paragraph 35 of the majority judgment that there is no infallible formula to determine whether or not, in a particular case, there has been a duplication of convictions. The above tests, it was held, are not rules of law nor are they exhaustive. They are simply useful practical guides and in the ultimate instance, if these tests fail to provide a satisfactory answer, the matter is correctly left to the common sense, wisdom, experience and sense of fairness to the court. The test is whether, taking a common sense view of matters in the light of fairness to the accused, a single offence or more than one has been committed.[6]

[21] In my view the appellant pointed the firearm at Ms Gregory with the intention to induce her to submission to enable him to unlawfully commit theft of the above goods or monies from Pep Stores. Without that violent act he would not have been convicted of robbery or attempted robbery. In other words, the pointing of the firearm at Ms Gregory was necessary for the commission of the offence of robbery or attempted robbery. In my view it would be a duplication of that charge if he is separately convicted of pointing a firearm at Ms Gregory. After all, when he pointed the firearm at her, he had a single

[5] 2008 (1) SACR 431 (SCA)
[6] *S v BN* 2014 (2) SACR 23 (SCA) at 26c

intent, namely to rob Pep Stores. He could not have had the intention to rob Pep Stores and at the same time the intention to point a firearm at her.

[22] In the circumstances, the magistrate erred when he convicted the appellant of having pointed a firearm at Ms Gregory. The situation in respect of Ms Tyokolo is slightly different. At the time when the appellant pointed the firearm at her he had already taken the key from Ms Gregory. The robbery was not complete at the time when he pointed the firearm Ms Tyokolo because the appellant had, at that stage or thereafter, not taken any goods or money from Pep Stores. Something must have disturbed him between the time that he left the storeroom and the time that he exited Pep Stores, causing him not to take any item or money from Pep Stores. As in the case of Ms Gregory, when the appellant pointed the firearm at Ms Tyokolo, he did so with the intention to induce her to submission to enable him to take goods or money from Pep Stores. In the circumstances, the magistrate should accordingly not have convicted the appellant of pointing a firearm at Ms Tyokolo.

[23] In all the circumstances, the appellant was correctly convicted of unlawfully possessing a firearm. He should not have been convicted of pointing a firearm at either Ms Gregory or Ms Tyokolo. Lastly, he should not have been convicted of robbery with aggravating circumstances but of attempted robbery with aggravating circumstances.

[24] Regarding sentence, the appellant's personal circumstances are that, as at March 2010, he was 30 years of age, a bachelor and has two children whose ages are not on record and who live with their respective mothers. He had secured employment at a security company shortly before he was convicted and sentenced during March 2010. The appellant is a first offender, the present offences having been committed when he was 27 years of age.

[25] Both offences are serious. A person convicted of possession of a firearm in contravention of section 3 of the Firearms Control Act may be sentenced to a maximum period of imprisonment of 15 years.[7] It is accordingly clear that the legislature intended that severe sentences be imposed on persons who unlawfully possess firearms. The attempted robbery has aggravated circumstances in that the appellant wielded a firearm which he pointed at Ms Gregory and Ms Tyokolo when he intended to rob Pep Stores. Furthermore he threatened to shoot Ms Tyokolo if she did not keep quiet.[8]

[26] We live in a society which is subjected to constant crime – some of them being serious crimes like unlawful possession of a firearm and robbery or attempted robbery. In this case the magistrate found that robbery is prevalent in the jurisdiction of that court and in the country. That finding cannot be faulted. Some of these robberies are committed with unlicensed firearms, as was the position in this case. Society expects of the courts to act against those who commit such

[7] Section 121 as read with Schedule 4 of the Firearms Control Act
[8] The definition of "aggravating circumstances" in section 1(1)(b) of the Criminal Procedure Act includes the wielding of a firearm and threat to inflict grievous bodily harm

serious crimes. The magistrate found, correctly so in my view, that the (attempted) robbery was very well planned because the appellant waited for the right time to enter the store and ambush two members of staff in the storeroom.

[27] The appellant was sentenced to 10 years' imprisonment for unlawful possession a firearm. In my view it cannot be said that, regard being had to the circumstances of this case, the magistrate misdirected himself when he imposed the above sentence. That sentence should accordingly be confirmed. The magistrate sentenced the appellant to 12 years' imprisonment on the count of robbery with aggravating circumstances. That conviction should, for the reasons set out above, be set aside, and be replaced with attempted robbery with aggravating circumstances. There is sufficient evidence before this court to impose a new sentence in respect of attempted robbery with aggravating circumstances and that there is no need to refer this matter back to the magistrate to impose sentence afresh on that count. I have taken the appellant's personal circumstances into account, more particularly that he was a first offender and had secured employment shortly before his conviction and sentence in the court *a quo*. I have also taken into account that attempted robbery with aggravating circumstances is a serious offence. However, the fact remains that the appellant was not convicted of robbery with aggravating circumstances but of an attempt to commit that offence. I have also taken into account that Pep Stores did not suffer any loss in

the sense that no item or money was stolen from it. However, I have taken into account that both Ms Gregory and Ms Tyokolo were subjected to a traumatic experience, to the extent that Ms Gregory's services were terminated at Pep Stores on medical grounds, a direct consequence of the attempted robbery. In an attempt to balance the appellant's personal circumstances, the seriousness of the offence and the interest of society, I have decided that the appellant should be sentenced to 8 years' imprisonment on the count of attempted robbery with aggravated circumstances. The sentence in respect of attempted robbery should run concurrently with the sentence in respect of the unlawful possession of a firearm.

[28] I have given some thought to the provisions of the Criminal Law Amendment Act. I am of the view that that Act does not apply to attempted robbery with aggravating circumstances because that offence, as opposed to robbery with aggravating circumstances, is not mentioned in Schedule 2 thereof.[9]

[29] In the result, I make the following order:

29.1. The appellant's appeal against his conviction and sentence on count 1 (unlawful possession of a firearm) is dismissed, such conviction and sentence being confirmed.

29.2. The appellant's appeal against his conviction and sentence on counts 2 and 3 (pointing a firearm at Sharon Gregory and

[9] *S v Moyo* 2013 JDR 1820 (GSJ). Compare *S v Ncube* 2014 JDR 0961 (GSJ) where Monama J found at paragraph 16 that the offence of attempted robbery with aggravating circumstances falls within Part IV of Schedule 2 of the Criminal Law Amendment Act. With respect, Part IV of Schedule 2 does not refer to attempted robbery with aggravating circumstances. It refers to robbery with aggravating circumstances.

Babalwa Tyokolo) is upheld, those convictions and sentences being set aside.

29.3. The appellant's appeal against his conviction and sentence on count 4 (robbery with aggravating circumstances) is upheld, the conviction and sentence being set aside and replaced with the following:

> "The accused is convicted of attempted robbery with aggravating circumstances and sentenced to 8 years' imprisonment."

29.4. The sentence of 8 years' imprisonment on count 4 is to run concurrently with the sentence of 10 years' imprisonment on count 1, antedated to 3 March 2010.

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G H BLOEM
Judge of the High Court

LOWE, J

I agree

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M J LOWE
Judge of the High Court

For the appellant:	Mr T M Solani of the Grahamstown Justice Centre
For the respondent :	Adv D Els of the Office of the Director of Public Prosecutions, Grahamstown
Date heard:	21 October 2015
Date of delivery of the judgment :	3 November 2015