

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Appeal number: A 103//2022

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED

Date: 23 May 2023

In the matter between:

D[...] S[...]

APPELLANT

And

THE STATE

JUDGMENT

KHWINANA AJ

Introduction

[1] Mr D[...] S[...] is appealing against a conviction for robbery with aggravating circumstances. Leave to appeal was granted against both the conviction and a 15-year sentence imposed on him by Oberholzer Regional Magistrate Thelma Simpson on 1 June 2021. The sentence was imposed in terms of section 51(2) of the Criminal Law Amendment Act 105 of 1997.

[2] The appeal came before this Court on 24th February 2023. Attorney Botha for

the appellant and Advocate Nethononda for the State filed heads of argument. The matter proceeded on a virtual platform. Counsel were requested to file supplementary heads of argument on sentence.

[3] The incident in question occurred on 3rd May 2019 at a taxi rank in Carletonville CBD, when Mr D[...] S[...] is alleged to have unlawfully and intentionally assaulted Mr Tsitsi Abraham Mogorosi and with force took his wallet containing R 700.00 and a Capitec card. The alleged aggravating circumstances were that the complainant sustained grievous bodily harm.

The evidence

[4] The complainant testified that the incident took place after he had knocked off from work that evening around 17h30. While waiting for a taxi, three men approached him, one stood on his left and the other on his right side whilst the appellant was in front of him. The appellant grabbed him on his crotch, punched him on his crotch and also 'hit' him with his knee several times. He bent down. After they left, the complainant searched his pockets, a cheap phone was there, but he found his wallet was missing, which contained R700 cash, a Capitec card and some loose change. The wallet had been removed from the front left pocket of his trousers, by the appellant.

[5] The complainant explained that he pursued his assailants on foot and found them at 'Choppies' where the game of dice is played. He says he pointed at the appellant and asked for his wallet. The appellant then told him that he can go where he wants and do whatever he wants. The complainant then proceeded to the police station to report the incident. He explained to the police that the man that robbed him was known as D[...] and he has gold front teeth. The complainant stated that the police officer apparently knew the appellant and one of the police officers knew his cellular numbers. On the suggestion of one of the police officers, the complainant called the appellant, told him that he was at the police station but that he was not laying a charge against him and wanted his wallet and card. He asked him to come to the police station, but D[...] refused saying 'he is hot', in other words that the police

were looking for him.

[6] However, the appellant suggested that they meet at KFC. The police officers accompanied the complainant, and they met up with the appellant in the company of his girlfriend near a filling station. The appellant produced his wallet which still had his Capitec card and the sum of R 300.00 in cash. The appellant informed the complainant that he had already used some of the money. The police proceeded to take the appellant to the police station. The appellant pleaded with the complainant to withdraw the case, saying that he was going to pay him the next day but the complainant refused.

[7] It was not the first time that the complainant had seen the appellant. He testified that he had previously seen him robbing another man at Choppies. He had asked the appellant's name from a person who had also witnessed the incident and was told it is D[...] who is well known at the taxi rank.

[8] The complainant testified that he went to the hospital for medical attention. He was admitted and saw a doctor the following day. He was booked off sick for a week. He says he was given Panado pills as his crotch was still painful when he touched it.

[9] Under cross-examination, the defence put the following version to the complainant. That afternoon, the appellant had been playing dice at the taxi rank with a person called Tshepo and were on their way to KFC to buy food when they met the complainant, who was drunk talking to a lady at the rank. Tshepo asked the complainant for a cigarette, which he supplied and Tshepo then grabbed his belt and took his wallet. The complainant denied the version mentioning that he does not smoke. According to the appellant, it was some 40 minutes later when the complainant came to the dice game and asked about Tshepo, and when told that the complainant would be opening a case against them, he told the complainant he should go where he wants to. Concerned the appellant's report to the police would affect him, the appellant went to look for Tshepo and found him at the Jazz Bar and Tshepo gave him the wallet, which had about R320 in it. He then received a call from the police station. He explained where he was, met the complainant and the police and returned the

wallet.

[10] Constable Bongumusa Emanuel Tango, the second State witness, testified that he was on duty at the police station on 3 May 2019 when the complainant arrived to report the incident. He says the complainant assured the police that he would be able to point out the perpetrator. He accompanied the complainant when looking for the appellant whom they located near the filling station. He confirmed that the complainant retrieved his wallet from the appellant after a search, during which the appellant was also 'searching'. He confirmed that the Capitec card was recovered together with R300.00 cash. He arrested the appellant and took him to the police station. He testified that on the way back to the police station, he heard the appellant pleading with the complainant that he should not open a case and that he was willing to pay back the money. Under cross-examination, it was put to him – in accordance with the complainant's testimony – that there was no search and that the wallet had been returned to the appellant. Under questioning from the Court, the witness testified that the appellant was alone when the wallet was returned, and that upon finding the appellant, the complainant had first alighted the vehicle and approached him whereafter the witness had followed. They were accompanied by a Constable Dlutu.

[11] Constable Jermsi Michael Dlutu was the third State witness. He testified that he was on duty in the charge office on 3 March 2019 when the complainant came to the police station to open a robbery case. He assisted the complainant in doing so and took his statement. The complainant had indicated that the name of the person who had robbed him is D[...] and that he had already confronted the appellant to return his assets but he had refused. Constable Dlutu testified that he called people he knew who would know the whereabouts of the appellant but he was told that he had already left for the township. He accompanied the complainant and Constable Tango to look for the appellant and they came across him near the filling station. He was walking with his girlfriend. Constable Dlutu says that they called him closer to the vehicle and questioned him from the vehicle. In an exchange between the appellant and the complainant – who was sitting in the back seat – the appellant returned the wallet and D[...] explained that they had sent R300 to the mother of his girlfriend at the hospital. They took the appellant back to the police station. Under cross-examination

Constable Dlutu confirmed that during the exchange between the complainant and the appellant, the appellant apologised and the appellant returned the wallet himself. Further he clarified that the appellant had initially been alone and was only subsequently joined by his girlfriend. Cross-examination also focused on discrepancies between his testimony and his statement, given to a Constable Kgarajane, the investigating officer. The particular focus was testimony that the witness had called persons who would know the whereabouts of the appellant whereas the statement indicated that he had called the appellant himself. The witness confirmed that he had given a statement to Constable Kgarajane but that the statement had not been read back to him before he signed it. At the end of his testimony, the witness volunteered that he had been approached by a man in a vehicle saying he had been sent by D[...] who wanted to talk to him suggesting that he would be paid in respect of arranged testimony. The appellant denied any knowledge of this and the Magistrate suggested that the witness report the matter to his superiors. Before the State closed its case, Constable Dlutu was recalled to clarify the circumstances in which he was called to testify. The State closed its case without calling further witnesses.

[12] The defence case opened with evidence from Constable Stephen Thabo Kgarajane, who testified that the complainant gave his statement at the police station in SeSotho, that the witness wrote it down in English and that it was read back to him. The defence proceeded to call the appellant. The appellant testified that on 3 May 2019, he was at a game of dice at the taxi rank. At about 16h30 he was with Tshepo 'on the road to KFC' when Tshepo approached the complainant for a cigarette. He testified that Tshepo had told him that he was going to speak to one of his clients. Tshepo sells caps, wallets, and bags. He saw Tshepo holding the complainant by his belt and removing his wallet. He says he was five steps away from them and did not hear the conversation. He did not know the complainant.

[13] He says Tshepo came back to him, and they went back to their game of dice. They did not go to KFC as there was a long queue. About 40 minutes later, the complainant came to the dice game and asked him about the person who had robbed him. He says the complainant referred to him by name and said that he was going to open a case against them. The appellant told him that he did not steal the

wallet. He then went to look for Tshepo who he found at the Jazz Bar and told him that the complainant had come looking for his wallet. He then returned to the dice game. Thereafter he received a call from a police officer who told him that the complainant had come to lay charges against them and that he should return the wallet. After informing the police officer that he had not taken the wallet, the police officer told him that he should go to his friend who had taken the wallet. He went back to Tshepo at the Jazz Bar and informed him that he had received a call from the police officer. He was angry. Tshepo then 'gave it back' to him. He says he then received a further call from the police officer asking whether he had the wallet and he confirmed that he did. He arranged to meet the police officer at KFC. He then met them at the filling station and returned the wallet.

[14] Under cross examination, he testified that it was on Constable Kgarajane's advice that the complainant opened a case against him and he was told that the money was short. He said he told Constable Kgarajane to look for Tshepo as he did not know about the money. On questioning, he speculated that the complainant's motive to accuse him rather than Tshepo emanates from the fact that someone at the taxi rank called him a robber. He reiterated that Constable Dlutu was the police officer who had called him on the phone. When asked if he would be calling Tshepo as a witness, he indicated that he would not have a problem if he was called and indicated that he could assist in locating him for purposes of serving a subpoena. He testified that he is well known at the dice game and is a hawker. The appellant attempted to locate Tshepo to testify with the State's assistance and that of his father. Two men named Tshepo arrived at Court on different dates but they were not the Tshepo that the appellant was referring to. The appellant's father testified briefly explaining his efforts to locate Tshepo. He said he had in fact located a person he believed to be Tshepo, who had told him that he would only come to Court if a police officer fetched him and that Constable Kgarajane had informed him not to come to court or get involved. Notwithstanding a further postponement to enable Tshepo to be located and subpoenaed, his evidence was not procured.

The Magistrate's decision and the grounds of appeal

[15] In convicting the appellant, the Magistrate evaluated the evidence and

considered various applicable law including section 208 of the Criminal Procedure Act 51 of 1977 ("the CPA") which governs convicting persons on the single evidence of any competent witness. Ultimately, the Magistrate accepted the evidence of the complainant and rejected the evidence of the appellant as false and fabricated. In doing so, consideration was given, amongst other things, to contradictions in the appellant's evidence and improbabilities regarding the alleged motive for falsely implicating the appellant which emerged during his cross examination. On 12 May 2023, the Magistrate convicted the appellant of robbery finding that there were aggravating circumstances, specifically that grievous bodily harm was caused to the complainant. On 1 June 2021, the Magistrate sentenced the appellant to 15 years' imprisonment being the sentence contemplated by section 51(2) of the Criminal Law Amendment Act 105 of 1997.

[16] The Magistrate refused the appellant's application for leave to appeal on 26 August 2021 but leave to appeal was granted in respect of both conviction and sentence after the appellant petitioned this Court. In the main, the grounds of appeal are set out in very general terms being that the Court erred in concluding that the State proved its case beyond reasonable doubt, that there were no improbabilities in the State version and that the State witnesses gave evidence in a satisfactory manner, accepting the evidence of the State witnesses and rejecting that of the appellant and holding against the appellant contradictions between his own evidence and the version put to the witnesses during cross-examination. The Court is also said to have erred in failing to properly analyse or evaluate the evidence of State witnesses as it was contradictory in material respects, properly considering the improbabilities inherent in the State's version, being mainly single witness evidence and attaching too much weight on the injuries sustained by the complainant.

[17] During argument, Mr Botha, indicated that he could not responsibly advance submissions impugning a conviction for robbery, but did not have instructions to abandon the appeal against conviction. Accordingly, I deal with this aspect briefly below. In doing so, I assume, without deciding, that the breadth of the appeal grounds is not fatal to the appeal. Mr Botha submitted, nevertheless, that the evidence did not sustain the finding, at conviction stage, that there were aggravating circumstances present. In turn, he submitted that this must result in the sentence being considered

afresh and substantially reduced. During the course of argument, Mr Nethononda conceded that the State failed to prove aggravating circumstances and accordingly, in his submission, the issue for determination by this Court is the appropriate sentence for robbery in the circumstances of this case.

Conviction

[18] Robbery is the theft of property by intentionally and unlawfully using violence or threats of violence to take property from someone else. The elements of robbery that need to be proved for the successful conviction of robbery are theft of property, through the use of violence or threats of violence, unlawfulness and intent.¹

[19] In *S v Shackell*² the Supreme Court of Appeal held:

“It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. Of course, it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.”

[20] In the matter of *R v Difford*,³ the then Appellate Division held:

“It is equally clear that no onus rests on the accused to convince the Court of the truth of any explanation he gives. If he gives an explanation, even if that

¹ *Minister of Justice and Constitutional Development and Another v Masingili and Another* 2014 (1) SACR 437 (CC) (*Masingili*) at 34.

² 2001 (4) SA 1 (SCA) at 30.

³ 1937 AD 370 at 373.

explanation be improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.”

[21] In the matter of *S v Van der Meyden*⁴ the Court held:

“The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he or she is entitled to be acquitted if it is reasonably possible that he or she might be innocent (see, for example, *R v Difford* 1937 AD 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test ('the proper test') when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other. In whichever form the test is expressed, it must be satisfied upon consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.”

And further at p450:

“The process of reasoning which is appropriate to the application of the proper test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or acquit) must account for all the evidence. Some of it might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or

⁴ 1999 (1) SACR 447 (W) at p448.

unreliable, but none of it may simply be ignored.”

[22] In this case, there is single witness evidence on certain material issues. In terms of section 208 of the CPA the Court may convict on the evidence of a single witness, subject to the necessary caution.⁵

[23] The appellant’s defence entails that the complainant falsely implicated him. In *S v Ipeleng*⁶, the Court held that –

“It is dangerous to convict an accused person on the basis that he cannot advance any reasons why the State witnesses would falsely implicate him. The accused has no onus to provide any such explanation. The true reason why a State witness seeks to give the testimony he does is often unknown to the accused and sometimes unknowable. Many factors influence prosecution witnesses in insidious ways. They often seek to curry favour with their supervisors; they sometimes need to placate and impress police officers, and on other occasions they nurse secret ambitions and grudges unknown to the accused. It is for these reasons that the Courts have repeatedly warned against the danger of the approach which asks: ‘Why should the State witnesses have falsely implicated the accused?’”

[24] The prosecution must prove the alleged aggravating circumstances prior to conviction to ensure fairness at sentencing stage.⁷ In view of Mr Nethononda’s concession (see para 17 above), there is no need to refer in detail to the law relating to proof of aggravating circumstances, specifically grievous bodily harm,⁸ for

⁵ Section 208 is entitled ‘Conviction may follow on evidence of single witness’ and provides: ‘An accused may be convicted of any offence on the single evidence of any competent witness.’ It is trite that when the court considers the evidence of a single witness, the evidence needs to be approached with caution. *S v Webber* 1971(3) SA 754 (A); *S v Sauls and others* 1981(3) 172 (A) at 180E-G.

⁶ 1993 (2) SACR 185 (T) at p189.

⁷ *Masingili*, supra n 2 at 33 with reference to *S v Legoa* 2003(1) SACR 13 (SCA).

⁸ Section 1(1)(b) of the CPA defines aggravating circumstances in relation to robbery or attempted robbery, as follows: “(i) the wielding of a fire-arm or any other dangerous weapon;

(ii) the infliction of grievous bodily harm; or

(iii) a threat to inflict grievous bodily harm,

purposes of invoking the minimum sentencing legislation.

[25] In my view, the court *a quo* did not misdirect itself or err in any material way in respect of most of the matters raised in the application for leave to appeal, referred to in paragraph 16 above. The Magistrate considered the evidence in its totality. The complainant's evidence was carefully and cautiously considered, including insofar as single witness testimony was advanced, and the Magistrate was duly mindful of difficulties and contradictions in the State evidence, specifically that of the police officers. The Magistrate carefully considered the evidence of the appellant including contradictions in the specific testimony and the versions advanced during cross examination of State witnesses. In my view, the Magistrate's decision to accept the complainant's evidence and reject the appellant's version as false beyond a reasonable doubt was arrived at after due evaluation of all the evidence. I agree with the conclusion that the appellant committed robbery. Indeed, one has to commend the police for swiftly responding to the matter.

[26] As mentioned above, Mr Nethononda conceded, however, that the State failed to prove aggravating circumstances, specifically grievous bodily harm.⁹ The concession was responsibly made having regard to the limited evidence on the issue when the appellant was convicted, case law dealing with proof of grievous bodily harm and, on the facts of this case, the absence of any medical evidence.¹⁰ While the appellant must have intended to harm the complainant by injuring him on his crotch, a very sensitive area, there was no evidence upon which the conclusion could be drawn that grievous bodily harm was either inflicted or threatened. Rather, the evidence shows that in the aftermath of the events, the complainant followed the appellant, attended the police station and pursued the appellant, with the police, to his arrest. The complainant explained that he attended and was admitted to hospital for a day, continued to experience pain, was prescribed Panado and was booked off for a week. However, in context, medical and further explanatory evidence about the

by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence.”

⁹ As appears from paragraph 16, one of the grounds of appeal is that the Magistrate placed too much emphasis on the injuries sustained by the complainant.

nature and extent of the injuries should have been produced to sustain any conclusion on the criminal standard that the bodily harm was grievous. On the evidence produced, the Court is left to speculate and in this regard is in no better position than a layperson.

[27] Accordingly, I conclude that the Magistrate should have concluded, at conviction stage, that the appellant should be convicted of robbery, and erred only to the extent that it was found that there were aggravating circumstances. There is no reason to interfere in the finding that the appellant is unfit to keep a firearm and this finding stands.

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¹⁰ Eg *Masingili* supra n 2 and *S v Rabako* 2010 (1) SACR 310 (O) at 10, which held: "...in order to determine whether the injuries in a particular case are serious, one has to have regard to the actual injuries sustained, the instrument or object used, the number of the wounds - if any - inflicted, their nature, their position on the body, their seriousness and the results which flowed from their infliction. It must be remembered that an injury can be serious without there, necessarily, being an open wound. In order to determine this, the judicial officer will be guided by medical evidence. It is therefore advisable that in all such cases - where a finding in relation to infliction of grievous bodily harm is considered

- medical evidence should be presented".

Sentence

[28] The petition was granted against both the conviction and sentence even though the special power of attorney and the notice of appeal refers only to the conviction. The sentence that has been imposed cannot stand as it was imposed as a minimum sentence in terms of section 51(2) of Act 105 of 1997 applicable to robbery with aggravating circumstances (15 years). A fresh sentence must be imposed. The legislation does not apply to 'mere' robbery and in context is, in any

event, disturbingly inappropriate.¹¹ In arriving at a sentence, the Court requested counsel to submit a supplementary note on sentence, which they have done. We have also had regard to the submissions advanced in the court *a quo*, the evidence and information placed before the Magistrate and the Magistrate's own findings when concluding that there were no substantial and compelling circumstances present to justify a departure from the prescribed minimum sentence of 15 years.¹²

[29] During the proceedings before the Magistrate, Mr Lejaha called the appellant's father to testify on sentence. The appellant's father testified that the appellant is his last-born son, born on 20th March 1995. He explained that the appellant's mother is suffering from asthma, high blood pressure and a heart problem. He requested leniency when sentencing the appellant. He says the mother of the appellant cries when spoken to about the appellant and is worried that she might not be alive when he comes back. He does not believe that the appellant's mother will live to see the year 2022/3. The witness explained that the appellant's own child is in Parys and is an only child. He does not know if the child is receiving a grant. The appellant's father explained further that the appellant is the only son who is supposed to remain with the household. He is not well and is on medication. He says he has a gunshot wound on his head. He pleaded for mercy and leniency. During cross-examination, he conceded that the appellant is to blame for some of his mother's suffering. He accepted too that the appellant was, at the time of sentencing, serving a sentence of 36 months in respect of another matter, but was not familiar with its detail. He explained that he was unable to continue funding his son's education after Grade 11 due to lack of funds. He does not know where his son gets money to play dice games.

[30] The appellant's previous convictions were placed before the Magistrate. They go back to 8 May 2014 when the appellant was convicted of contravening a provision

¹¹ *S v Moosajee* [1999] ZASCA 16; [1999] 2 All SA 353 (A) at 8; *S v Sadler* [2000] ZASCA 13; [2000] 2 All SA 121 (A) at 6.

¹² Applying *S v Malgas* 2001 (1) SA 1222 (SCA) at 25. Also relevant is *S v Vilakazi* 2009(1) SACR 552(SCA) and, in respect of differences in the degree of seriousness of crimes delineated in the minimum sentencing legislation, *S v Mahomotsa* 2002 (2) SACR 435 (SCA) at 18.

of the Stock Theft Act 57 of 1959 (fined R 1500 or five months' imprisonment) and include a second conviction on 30 May 2014 for theft (with the same punishment) and a third conviction on 11 July 2016 for assault with intent to do grievous bodily harm (fined R4500 or six-months' imprisonment plus a further 12 months' imprisonment suspended for five years on condition that he is not again convicted of the same crime. The fourth previous conviction was on 28 August 2017 for theft (fined R3000 or six months' imprisonment suspended for five years on condition that he is not convicted of theft) and finally, a conviction on 11 March 2020 for robbery when sentenced to three years' imprisonment. The appellant has previously been declared unfit to possess a firearm.

[31] This Court must now impose a sentence, having regard, cumulatively, to the triad of considerations referred to in *S v Zinn*¹³: the crime, the offender and the interests of society. In doing so I have considered the case law referred to by the Magistrate,¹⁴ comparative case law referred to by the parties¹⁵ and other relevant case law.¹⁶

[32] I consider the following statement of Schreiner JA in *R v Karg* ¹⁷of guidance in this case:

¹³ *S v Zinn* 1969 (2) SA 537 (A).

¹⁴ Including *S v Rabie* 1975(4) SA 855 at 862G: ("Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances."); *S v Tonga* 1993(1) SACR 365 (V) at 370H ("A criminal court primarily seeks to establish and maintain peaceful coexistence amongst the members of society within a territory offering protection to life, limb and property whilst dispensing justice"); *S v Burger* 1975 (4) SA 877 (A) at 881H ("Society. Man should be free to live out his life peacefully and unmolested. Society requires recognition of this right and requires that persons who might be inclined to emulate the offence of the accused, should be punished and deterred by his appropriate sentence".)

¹⁵ *S v Isaacs and Another* 2007 (1) SACR 43 (C); *S v Zulu* 2013 JDR 0647 (GNP); *S v Madlebe* 2016 JDR 1576 (GP).

¹⁶ Eg *S v Bodibe* [2021] JOL 51537 (GP) (Regarding the trite principle that a sentencing court must consider the objectives of punishment, being deterrence (general and specific), prevention, rehabilitation and retribution.)

¹⁷ 1961(1) SA 231 (A) at 236A-C.

“While the deterrent effect of punishment has remained as important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing. But the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment.”

[33] Also relevant is the following holding in *S v Mabunda*¹⁸:

“As much as it is necessary both to punish the appellant and attempt to deter others from similar crimes, the effective sentence is one that is likely to break rather than to rehabilitate him. It would be wrong to sacrifice the appellant on the altar of deterrence. As was recently reaffirmed by this court, mercy and not a sledgehammer is the concomitant of justice.”

[34] The offence the appellant has been found guilty of is a serious offence. It is a violation of human rights to the core. It reduces one’s being in an appalling way. In *S v Kotze*¹⁹ the Court described robbery as a low, mean and cowardly crime. The appellant robbed the complainant and took his assets without any just cause. He was on his way home from work at the time and in a place where he should feel safe. The appellant inflicted pain on him to ensure that he could take his assets. The complainant was hurt in a sensitive part of the body, was hospitalised and given Panado for pain. It must, however, also be considered in this case, that the appellant returned the wallet to the complainant with some of the money he took and I have found that the State did not establish that there was grievous bodily harm. The value of the goods, while not trifling, was not high. Also relevant is that the appellant spent

¹⁸ 2013 (2) SACR 161 (SCA) at para 9.

¹⁹ 1986(4) SA 241 (C) at 249E.

some 2 years in custody before sentence awaiting trial and sentencing.²⁰

[35] As Mr Lejaha submitted, there are personal circumstances relevant to the appellant that warrant some mercy, but they are not unique. When sentenced, he was 26 years old (24 when he committed the offence) and he was unmarried with a young child only 4 years old. The mother of the child was not working and the appellant's contribution, albeit only through odd jobs, matters in circumstances where the child is at school going age. The appellant's own mother suffers from ill-health. On the other hand, as the Magistrate emphasised, the appellant failed, in the end, to accept responsibility for the crime or demonstrate remorse, and his history of crime is troubling. He has been through the system too many times. While the history of crime is relevant, it is trite that the sentence must always fit the crime and be proportionate as held in *S v Beja*.²¹ Nevertheless, in this case, a material consideration is whether the appellant can be expected to offend again.²²

[36] The Magistrate paid due regard to the interests of society, noting that robbery and robbery with aggravating circumstances are prominent in the Court's area of jurisdiction. The absence of respect for society and its members, and society's wish to be free from crime was considered. It is understandably so that members of society in Oberholzer look to the criminal justice system for protection and that public spaces in that area are not safe. The appellant attacked the complainant in the afternoon at a taxi rank. It is concerning that members of the community cannot walk or work freely in taxi ranks where one would expect that not only will there be taxi owners, drivers and commuters but hawkers too. This Court frowns at the behaviour of the appellant and it is imperative that the sentence imposed deters both the appellant and other would-be offenders. The community must be protected from the persons such as the appellant. The impact of robbery on our community must not be understated. In the

²⁰ The appellant was arrested on 3 May 2019 and was on bail for a brief period during the period leading to sentence on 1 June 2021 (between 26 November 2019 and 20 January 2021).

²¹ 2003(1) SACR 168 (SE) at 170: "It is trite that the sentence must always fit the crime and the fact that the person to be punished had a long list of previous convictions of a similar nature, while it may be an important factor, could never serve to extend the period of sentence so that it is disproportionate to the seriousness of the crime for which such a person must be punished."

²² *S v Vilakazi*, supra, at 58.

matter of *Mxolisi and Another v S*²³ (a case where aggravating circumstances were present) the Court held:

“There can be no doubt that the offence of robbery with aggravating circumstances is omnipresent countrywide. It is the type of offence which pesters the people of our democracy like a malignancy. Members of the public need to be forever vigilant of persons like the appellants, who without sparing a thought for the wellbeing, bodily integrity or dignity of others, with premeditation engage in such violent and dishonest conduct for selfish financial gain.”

[37] The arrest in the present matter was done within a short period and that was of great assistance to the complainant as he was able to retrieve some of his assets. The police, specifically Constable Jeromsi M. Dlutu and Constable Bongumusa E. Thango are to be commended. The complainant too was brave, if temerarious, in following the appellant. What transcended his act was the reaction of the police when he went to report the incident at the police station. A clear message must be sent to the appellant and any other would-be offenders that crime need not go undetected and shall not be condoned. Community members must be able to commute in public spaces without the trepidation of the appellant or anyone else.

[38] In light of the above, I have concluded that a five-year sentence should be imposed. Counsel for the appellant submitted that in terms of section 282 of the Criminal Procedure Act, any new custodial sentence ought to be antedated to the date of the initial sentence, namely 1st June 2021. I agree.

[57] In the result, the following order is made:

1. The appeal is upheld.
2. The conviction of robbery with aggravating circumstances is set aside and substituted with a conviction of robbery.

²³ (A74/2017) [2018] ZAGPJHC 65 (29 March 2018) at 45.

3. The sentence of fifteen years' imprisonment is set aside and substituted with a sentence of five years imprisonment which is antedated to the date of sentencing being 1 June 2021.

ENB KHWINANA
ACTING JUDGE OF GAUTENG HIGH COURT

I concur.

COWEN
JUDGE OF GAUTENG HIGH COURT COURT

APPEARANCES:

FOR APPELLANT:

ATTORNEY M G BOTHA

FOR RESPONDENT:

ADVOCATE MJ NETHONONDA

Date of hearing: 24 February 2023

Date of judgment: 23 May 2023