

IN THE REPUBLIC OF SOUTH AFRICA



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

CASE NO: A111/16

23/2/2017

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
(4)	Signature:  Date: 23/02/17.

JAMES THABO MAYA

(Accused 2 in court a quo) **APPELLANT**

and

THE STATE

RESPONDENT

JUDGMENT

KHUMALO J

INTRODUCTION

[1] With leave granted by the Deputy Judge President (Ledwaba DJP), in the absence of Nicholls J, Appellant is appealing against his conviction and sentence by Nicholls J in the Local Division of the Vereeniging Circuit District. He was initially arraigned in the district with two other accused before Mbha J as Accused 3 on the following charges:

- [1.1] Murder ("Count 1")
- [1.2] Attempted Murder ("Count 2");
- [1.3] Robbery with Aggravating Circumstances ("Count 3");
- [1.4] Sexual Assault ("Count 4");
- [1.5] Attempted Murder, alternatively, Malicious damage to property ("Count 5")
- [1.6] Robbery with Aggravating Circumstances ("Count 6");
- [1.7] Illegal Possession of Firearms ("Count 7");

[1.8] Illegal Possession of Ammunition ("Count 8").

[2] Upon the accused pleading to the charges at the commencement of the trial, one of Appellant's co-accused who was identified as Accused 1 in the case, was declared a state patient and his trial separated from that of the Appellant and Accused 2. The latter's trial proceeded before Nicholls J and an assessor. Accused 2 became Accused 1 and Appellant Accused 2.

[3] At the end of the trial Nicholls J acquitted Accused 1 on all charges. Whilst Appellant was convicted on all 8 counts and sentenced as follows:

- [3.1] Count 1, Murder, life Imprisonment;
- [3.2] Count 2, Attempted murder, 5 years imprisonment;
- [3.3] Count 3, Robbery with aggravating circumstances, 15 years imprisonment;
- [3.4] Count 4, Sexual Assault, 8 years imprisonment;
- [3.5] Count 5, Malicious damage to property, 3 years imprisonment;
- [3.6] Count 6, Robbery with aggravating circumstances; 15 years imprisonment;
- [3.7] Count 7, Possession of a Firearm, 3 years imprisonment;
- [3.8] Count 8, Possession of Ammunition), 18 months imprisonment.

[4] The sentences imposed on count 2 to 8 were to run concurrently with the sentence of life Imprisonment imposed on count 1, the murder charge.

[5] The conviction and sentence of the Appellant follows an incident that took place on the evening of 17 February at Plot 29 Voortrekker Road, De Deur, the residence of the Langas. The Langas and their extended family were attacked and robbed and several shots were fired. Mr Langa senior was fatally wounded, Tshidiso Motswane ("Tshidiso") was shot on his left thigh. Mr Langa's son, Molea ("Molea") and their cousins Potlako and Tshepo Motswane ("Potlako") ("Tshepo") were threatened and assaulted and Molea's wife Caroline Sello ("Sello") sexually assaulted. They were robbed of cash, cellphones and various household items. Appellant and his co-accused were a few months after the incident identified as the assailants at an identification parade by Molea, Sello, Tshepo and an employee of the Langas, namely Eric Mnisi ("Mnisi"). The parade was held on 17 June 2009 after Appellant's arrest on 29 May 2009.

[6] Appellant was duly represented during the trial. He pleaded not guilty to all the charges. He did not tender a statement in explanation of his Plea, opting to exercise his right to remain silent. He was convicted on the evidence of Molea, Sello and their cousins who were in the bedroom inside the main house when the robbery took place together with that of Mnisi who arrived at the plot whilst the robbery was still under way. They all testified as to the involvement of the Appellant.

[7] The appeal is therefore centered mainly on the issue of identification. Appellant is challenging his conviction on the ground that his identification by the four key state witnesses, Molea, Sello, Potlako and Tshepo, was flawed, in that the testimony could not be relied upon as:

[7.1] The Appellant was unknown to them.

[7.2] They had little time to observe the features of the said suspect when they were robbed and shots fired.

[7.3] They were engaged in a highly mobile and fragile situation with shots fired.

[7.4] The alleged suspect had dreadlocks during the incidents, Appellant had no dreadlocks soon thereafter at the identification parade.

[7.5] They were ordered to lie down before they could see the person they thought was the Appellant whilst Sello was lying on the bed her face covered with her hands before she could see the person she thought was the Appellant.

[7.6] Sello and Molea did not have a receptive memory and could not even identify the Appellant by any specific feature. Each one of them also made a mistake at the identification parade pointing out a person who was not a suspect.

and the sentence imposed upon him shockingly inappropriate.

[8] The following evidence was led by Molea, Sello, Potlako, Tshepo, Tshidiso and Mnisi an employee of the Langas. Tshidiso lived on the plot with the Langas in a room that is situated outside the main residence. He testified that he heard shots and came out of his room to investigate. He was shot at and injured on his leg. He retreated back into his room and phoned his grandfather who reported the matter to the police. Mnisi testified that he arrived at the plot at about 20h00, at the same time as the robbery was going on. As he was driving through the gate the windscreen of his car was shattered apparently by a gunshot. He stopped the vehicle and saw Appellant pointing a long firearm at his vehicle. He was coming from the direction of the house. Him and Mr Hillary Shumba ("Shumba") who was a passenger in his car bent down inside the vehicle. They heard more shots and then Appellant opened the door of the vehicle and demanded guns and cellphones. They gave Appellant their cellphones. Appellant then turned and stood in front of Mnisi. At that time he heard a noise coming from the house and saw Accused 1 walking behind Sello carrying her baby and pointing a gun at her. Sello shouted at him to give the assailants the money. They came and stood next to the vehicle. Appellant ordered him and Shumba to come out of the vehicle and lie down. He told them the money was in the dash board. Accused 1 took the money but proceeded to search him and found more money in his pants. That infuriated Appellant who suggested that he be killed for lying. Accused 1 persuaded him not to do it. Accused 1 left and Appellant remained behind with him. He identified both Appellant and Accused 1 at the identification parade. According to him he could see Appellant because his car lights remained lit when he drove through the gate. He only switched them off when Accused was approaching him.

[9] The other group Molea, Sello, Potlako and Tshepo all testified to the fact that when the incident occurred, they were in Caroline and Molea's bedroom watching TV. Molea and the 7 months pregnant Sello were sitting on the bed with their 18 month old daughter sitting between them. Potlako and Tshepo were sitting on the floor at the foot of the bed. The TV

was placed a short distance from them at the bottom of the bed on the chest of drawers. According to their testimony, three assailants came into the bedroom. The first to come in was carrying a pistol. He was later identified as Accused 1. He was followed later by another assailant carrying a rifle whom they identified as the Appellant. A third assailant walked in carrying a pistol, he could not be identified. When Accused 1 entered the room he demanded money, cellphones and jewellery. He fired a shot at the floor where Potlako and Tshepo were sitting. Appellant came into the room and also demanded money and cellphones. Molea was also assaulted by the Appellant and Sello struck on the stomach with the butt of his rifle. They were made to lie on the floor face down. Sello remained on the bed with her daughter clinging on to her. Sello testified that Accused 2 sexually assaulted her by pulling down her pants and putting the rifle into her vagina. Guns were demanded, and from Molea and Sello car keys. At various stages Sello and Molea were taken out of the room to fetch car keys. There was contradiction on their statement as to who was taken out first. At that time Langa senior came out into the passage to see what the commotion was about and he was shot in front of Molea and died.

[10] Sello further testified that after being taken out of the room to fetch car keys of the various cars that were demanded, she was taken outside at gunpoint by Accused 1 who was also holding her baby. At that stage Mnisi was driving into the plot with Shumba coming back from town. Mnisi was coming back from his earlier trip to cash a cheque. She shouted at Mnisi to hand over the money. Appellant and Accused 1 took the money and Mnisi and Shumba were made to lie face down on the ground. Mnisi said when the police arrived on the scene Accused 1 whistled to warn the others some of whom were loading their belongings onto a bakkie and they started to flee. Mr Shumba confirmed that the car was shot at and that he was a passenger but he could not identify any of the assailants.

[11] The court *a quo* held an inspection *in loco* at the plot. Outside in the yard Mnisi pointed out various points including where his car was parked at the second gate when the windscreen was shot at. He also pointed out the lighting outside which consisted of three light bulbs mounted on trees next to the gate. They were mounted lights in the garden. The branch closest to the gate had been cut down according to Mnisi and the light that was there has therefore been removed. The light mounted above the door on the side was also pointed out. Inside Sello pointed out the bedroom where they were watching television and where she had been taken to fetch the car keys. She also pointed where she has been taken out of the house to where Mnisi's car was parked. Later that night the two counsels for the state and defence attended at the property at 20h00 to check the visibility at night. It was agreed that (1) visibility inside the bedroom was extremely good (2) Outside, there is only one light switch for all the exterior lights (3) visibility outside where Mnisi's car was parked was disputed because the exact lighting situation could not be constructed the court could not make a finding in that regard. A Constable Mkhwanazi who took photos of the place on that date after the incident testified that visibility was good outside, however she still had to use her torch when taking pictures of the vehicles.

[12] The Appellant testified in his own defence. He denied he was ever present on the plot. His testimony was that he lives in Lenasia South. At the time the incident is alleged to have taken place he was building extensions to his home. He was arrested in May 2009 and was familiar with De Deur.

[13] Accused 1 also denied any involvement in the incident. He indicated that he stays and works in Germiston and has never been to Vereeniging or know De Deur. He was arrested at the Germiston Court when he went to attend a court hearing of a relative charged with an unrelated offence. Two men approached him when he was leaving court. They asked him what he was running away from. He denied running away from anything and produced his identity document. He was then approached by two men including the investigation officer constable Ngoma ("Ngoma") who told him that he has been pointed out by the CID.

[14] Accused 1 was actually pointed out at the Germiston court by Potlako whom Ngoma had brought along to attend court in an unrelated matter to see if he could identify a suspect, one Shavani, whose fingerprints were found on the scene. Accused 1 was sitting in the public gallery when he caught the attention of Potlako. Potlako was not able to identify anyone from the suspects that appeared in court that day but for Accused 1. Mnisi also subsequently identified Accused 1 at an identification parade. Potlako did not attend the identification parade.

[15] The essence of Appellant's contention about his identification is that it was flawed since the witnesses who pointed him out were involved in a highly mobile and fragile situation with shots fired. He was unknown to them and they had little time to observe the features of the said suspects when they were robbed and shots fired.

[16] 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. In *S v Van Der Meyden* 1999 (2) SA 79 (WLD) at 80H-81C it was held that

"The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, *R v Difford* 1937 AD 370 especially at 373, 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. (*my emphasis*)

[17] Identity is a highly contentious issue and should be treated with a considerable measure of caution, especially where there is nothing more to corroborate the evidence of identification or substantiate the possible involvement of the identified Accused. The issue to be determined in that context would be whether the State has acquitted itself of the *onus* resting on it to prove the guilt of the appellant beyond reasonable doubt. The exercise of caution when determining the adequacy of identification evidence, was enunciated by Holmes J in *S v Mthethwa* 1972(3) SA 766 (A) at 768 C stating that:

"It is not enough for the identifying witness to be honest, the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight, the proximity of the witness, his opportunity for observation, both as to time and situation, the extent of his prior knowledge of the accused, the mobility of the scene, corroboration, suggestibility; the accused's face, voice, build, gait, and dress, the result of the identification parades, if any, and of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not

individually decisive, but must be weighed one against the other, in the light of totality of the evidence and the probabilities." (my emphasis)

[18] It is further recognized that on the question of identification, the confidence and sincerity of the witness are not enough; see in *S v Mehlape* 1963 (2) SA 29 (A) where Williamson JA stated that:

"The often patent honesty, sincerity and conviction of an identifying witness remain, however, ever a snare to the judicial officer who does not constantly remind himself of the necessity of dissipating any danger of error in such evidence."

[19] That understanding is clearly outlined and approved in *S v Miggel* 2007(1) SA 675 © at 678e citing *S v Mlati* 1984 (4) 629 (a) at 632H-I, where the court stated that **"a witness' honesty and own conviction as to the correctness of his or her identification can never be allowed to take the place of an independent enquiry into the reliability of the identification itself."**

[20] The trial court was very much alive of the challenge of having to determine the adequacy of the victims' identification evidence, the only link of both Accused 1 and the Appellant to the crime, there being no other independent corroborative evidence. The reliability of their observation had to be put to the test. Therefore carefully considering the pitfalls of subjective identification, the trial court painstakingly weighed the pertinent factors to be taken into account in the case of both Accused, conducting a comprehensive assessment of the evidence.

[21] It found the identification of Accused 1 by Mnisi and Potlako inadmissible. Potlako and Tshepo who were with Molea and Sello in their bedroom when the assailants came in, could not provide reliable direct identification evidence of Accused 1 whom they alleged was the first assailant to come into the bedroom. Notwithstanding their proximity to Accused 1, the room well lit, the exchanges between them and there being enough opportunity to observe the Accused, none of them could provide a cogent description of Accused 1's distinguishable facial features except to say that he was wearing a cap with a hoody, a beige drymac and all-star shoes. Potlako alleged to have observed Accused 1 for 12 minutes. He could only describe him as having small eyes, lips that are dark like those of a smoker and wrinkles on his forehead, nothing distinct. Accused 1 was said to have shot at the floor near where Potlako and Tshidi were sitting. He then took away their cellphones. Potlako was not called to attend the identification parade. Sello, Molea and Tshidi failed to identify Accused 1 at an identification parade. The court regarded both incidents as negative factors. Therefore the only evidence that was left, likely to directly implicate Accused 1 was his separate identification by Mnisi and Potlako.

[22] Mnisi who had testified that he saw Accused 1 walking behind Sello carrying a baby, identified Accused 1 at the ID parade. He said Accused 1 demanded money from him after Sello had told him to give it to them. Although he told Accused 1 the money was in the dash board, Accused 1 searched him and found more money in his pants. Appellant who was infuriated because of the money found in Mnisi's pants, suggested that he be killed for lying but Accused 1 persuaded Appellant not to do so. According to Mnisi he could see Accused 1 because his vehicle lights were on until he switched them off when Appellant was approaching his vehicle. For the reason that visibility outside the house remained an issue,

there being one switch that operates all the lights with things reconstructed and Constable Mkhwanazi (who took photographs on the night of the incident) having testified that even though the light outside was sufficient she nonetheless had to use a torch to take photographs of the vehicle, the trial court did not accept that the illumination outside was enough for Mnisi to be able to see. Mnisi had also said he was made to lie face down on the floor, which was regarded by the trial court to have further impaired his ability to observe Accused 1. A decision I agree with since counsel for both state and defence agreed after their *inspection in loco* that as the lighting outside has been tempered with, the exact illumination on the date of the incident could not be reconstructed. The court did not make a finding in that regard. As a result Accused 1's allegation of innocence remained reasonably possibly true. So, taking all these factors into consideration the court a quo fairly gave Accused 1 the benefit of doubt with regard to the reliability of his identification and acquitted him.

[23] In Appellant's instance, all the complainants who were in the bedroom identified him at the identification parade including Mnisi. Molea took 30 seconds, Tshepo 10 seconds, Sello 18 seconds. It is their version that Appellant is the second assailant who came into the bedroom holding a rifle. Sello said she saw him through her fingers even though she had her hands covering her face. She was struck on the stomach by Appellant. He also pulled off her pants and assaulted her with the butt of the rifle on her private parts. Appellant also held her child and took her out of the bedroom at gunpoint to get the car keys from the other room. She had looked at Appellant when he assaulted her with the gun and whilst he touched her baby when she was crying. She observed him for approximately 8 minutes when they were in the bedroom. She mentioned that Appellant had a small scar on the side of one of his ears. Appellant's counsel denied to Sello that Appellant has the scar. Tshepo and Potlaki also testified to Appellant's presence in the bedroom, taking Molea's wallet and mentioned the scar. Furthermore, all the witnesses from the bedroom mentioned that he had dreadlocks. Even though he appeared at the identification parade without the dreadlocks or beard the witnesses were able to point him out. It turned out that 2 days before the parade the Appellant had shaved his dreadlocks and beard off. Mnisi who took 15 minutes to identify the Appellant at the parade also mentioned to have noticed Appellant's dreadlocks during his encounter with him. He said he had his headlights on when he drove into the yard and the Appellant was standing in front of the car. He switched the lights off when the windscreen was shattered by gunshots. He also said Appellant opened the door and told him and Shumba to get out.

[24] The scar and the dreadlocks are the two distinguishing features by which the Appellant was identifiable. To counter the identification by the dreadlocks, the Appellant alleged to have grown dreadlocks only in March 2009. The court took into consideration that he could not remember the significance of remembering that particular date. The Appellant in his application for leave took issue with the lower court taking into consideration that he shaved off his dreadlocks two days before the parade. The complainants had alleged to have been robbed by somebody who had dreadlocks. For that reason that issue had to be considered to determine the veracity of the allegations. It therefore matters that the Appellant indeed had dreadlocks on his arrest which he shaved off just before the identification parade. It is also significant that notwithstanding the Appellant appearing without dreadlocks at the identification parade the witnesses were still able to identify him.

[25] Appellant's challenge of the state witnesses' ability to see the scar behind the Appellant's ear despite him having dreadlocks that was raised on leave to appeal was not raised during trial. Therefore the resolution of that question is not supposed to be an issue of appeal. However for finality the contention is considered. The court has as a result taken into account that Sello had, in her evidence in chief, mentioned that Appellant had "dreadlocks, shorter dreadlocks"; see p 92 line 2-3 of the record. Potlako and Tshidi as well. It would therefore have been possible to see the scar. When Sello mentioned the scar, Appellant's counsel denied that Appellant has a scar, even after Counsel has had an opportunity to inspect the Appellant's ears during an adjournment. Appellant's counsel actually put it to Sello and likewise to Tshepo that such a scar does not exist. At the time Appellant did not try to refute his counsel's denial even when the denial was repeated by his counsel after he has been inspected by him. Appellant's counsel confirmed the existence of the scar only after he had inspected Appellant's ear for the second time, in the presence of the state's counsels. This indicates the insincerity of the contention.

[26] The argument therefore by the Appellant in his appeal that the witnesses did not have a receptive memory and could not even identify the Appellant by any specific feature has no merit. Besides, Sello repeatedly mentioned during her evidence that because of what Appellant did to her she will not forget his face.

[27] Appellant alleges further that Sello and Molea also made a mistake at the identification parade pointing out 1 other person who was not a suspect. I fail to see how that advances the Appellant's contention on the reliability of his identification by the two witnesses. There is sufficient evidence that implicates him to the commission of offences beyond reasonable doubt, which is what matters.

[28] Appellant's final contention on his identification is that Molea junior was ordered to lie down before he could see the person he thought was the Appellant whilst Sello was lying on the bed her face covered with her hands before she could see the person she thought was the Appellant. This contention is also devoid of any truth as it was the state witnesses' evidence that the Appellant entered the bedroom after the first assailant and demanded money and cellphones. He was answered by Molea who informed him that cellphones have already been taken. He then hit Molea with an open hand. Molea had also told Appellant that he has money in his pants. Appellant then took out the wallet from the pants, whereupon Appellant ordered them to lie down. So there was an exchange between Molea and Appellant before he was ordered to lie down which he alleges, gave him an opportunity to observe the Appellant before he could lie down. According to all the complainants in the bedroom, Sello and Molea were taken out of the bedroom by Accused 1 and Appellant several times to get the car keys. They allege also that Appellant touched the child when she was crying. Hence there were more instances for Molea and Sello to observe the Appellant. Sello had a further opportunity when Appellant took off her pants and assaulted her with a rifle. This further contention by Appellant also lacks any merit.

[29] The identification evidence against the Appellant therefore, sufficiently formed the factual matrix for his conviction. A very dim view should be cast on Appellant and his counsel for failing to independently confirm that Appellant has a scar, especially his counsel's persistence with the denial after he had inspected Appellant's ear. They also failed to offer an

explanation when they later conceded as to why they denied that previously. It is also significant that Appellant cut his dreadlocks two days before the identification parade was held. His conduct indicate an attempt to conceal his involvement, which nevertheless. In the light of the totality of the evidence, his version that he was not involved is not reasonably possible. The trial court had correctly found that the state had proven his guilt beyond reasonable doubt.

[30] Appellant further challenges the sentence imposed upon him on the ground that it is shockingly inappropriate and therefore seeks the appeal court's interference.

[31] The general principle is that sentencing is within the trial court's province subject to interference only if the court has failed to exercise the discretion properly and judiciously; see *S v Rabie 1975 (4) SA 855 (A)* at 857D-F. The power of the appeal court's interference only arises if the trial court's sentence is vitiated by irregularity or misdirection, in the absence thereof the test often applied is whether the sentence appears to be disturbingly inappropriate; see *S v Narker and Another 1975 (1) SA 583 (A.D.)* at p. 585C.

[32] It is trite that the purpose of sentence is deterrence, retribution, rehabilitation and prevention. Also that in determining the appropriate sentence to impose, a court should take cognizance of the Zian triad that constitutes the three aspects upon which an appropriate sentence is established, that is the offender, the offence/s committed and the interest of society; see *S v Zinn 1969 (20 SA 537 (A))*. In all three aspects their nature and the surrounding circumstances play a vital role in determining the appropriate sentence.

[33] A sentence is therefore shockingly inappropriate if it does not accord with the circumstances of the commission of the crime, the personal characteristics of the Accused and does not protect the interest of society. It is therefore for the Appellant to convince the court that the sentence appealed falls short on these elements and therefore shockingly inappropriate.

[34] According to the record, for purposes of sentencing it was submitted on behalf of Appellant that he has no previous conviction and has been in custody for 2 years before his sentencing. He is a family man with 5 children and supported his wife, mother and children prior his arrest. His father passed away when he was 10 years old. He has a standard 7 education and 35 years of age. He therefore could not be regarded as youthful.

[35] In Appellant's heads of argumens he has also indicated that the sentence is shockingly appropriate because by the time he is considered for parole which would be 25 years from date of conviction he will be 59 years old, an old man. He did not benefit much from the crime and some of the stolen items could not be moved. Lastly that he is the only one taking the rap for the offences when about 7 others are free.

[36] The Appellant had not only terrified, assaulted, robbed and wounded his victims but mercilessly killed an unarmed deceased when there was no threat posed to him and his accomplices. The victims were very scared and had all submitted to Appellant and his co-

assailants' demands, there was no reason for the use of guns or any kind of violence. Worse cruel is that notwithstanding being persuaded and pleaded to by his co perpetrators not to kill or rape, he went ahead to sexually assault the highly pregnant Sello and heartlessly murdered the deceased, showing that he is an unreasonable and a cold- blooded killer. The character he has shown when committing this crimes outstrips the compelling weight his personal circumstances might have carried for sentencing.

[37] The victims were in the sanctity of their home where their safety and privacy was violated by the Appellants and his co- assailants. They had to move as a result of those crimes that were committed against them that day. The sentence imposed should carry a preventative measure against the recurrence of such crimes in the interest of society. Since guarding each and every family and citizen to ensure their safety and security is not feasible, the least that can be done is for the courts to ensure that appropriate sentences that would discourage likeminded persons to commit such crime are imposed.

[38] The nature of the offence committed on count 1 brought the matter within the purview of s 51 of the Criminal Law Amendment Act 105 of 1997 ("the Act"), as amended, whereupon the legislature had ordained certain sentences in these type of crimes because of their seriousness and prevalence in our society. The ordained minimum sentences are to be imposed even when the offender is a first offender. The scourge of such crimes in our society have reached an alarming proportion that the legislature deemed it fit to interfere. Therefore the offender does not start on a clean slate on which the court can inscribe its own sentence but from a premise that a murder committed during a robbery with aggravating circumstances attracts the imposition of a life sentence, unless substantial and compelling circumstances are found to exist. Courts have been warned not to lose sight that the primary concern of the legislature is to make sure that deterrence and retribution come to the fore as these crimes are regarded to be more against the interest of society and therefore obliged to impose these sentences unless there are truly convincing reasons from departing from them; see *S v Matyityi* [2011] 2 All SA 424 (SCA).

[39] Appellant could have avoided the killing of the deceased had he listened to his co-assailants. He displayed a degree of inhumaneness, aggressiveness and a total disregard for life. There was no explanation why he found it necessary to kill the deceased. So even though I do not agree with the court a quo that the murder was premeditated and /or planned, however, due to the fact that it was committed during a violent robbery, taking into consideration all the other factors I have already mentioned, I find no substantial and compelling circumstances that justifies a lesser effective sentence. The sentence of life imprisonment is not shockingly inappropriate but proportionate with the character of the Appellant, the crimes he has committed, the circumstances of the commission of the crimes and the society's interest.

[40] Courts have, in many instances where life imprisonment is imposed, weighed the gravity or harshness of the sentence by referring to the age of an offender and adding the number of years he will have to spend in custody before he is released or eligible for parole to find it shockingly inappropriate. Basing the reason barely on age notwithstanding the heinousness of the crime committed is unfair and discriminatory. I do not agree with counsel's proposition. Even though Appellant's counsel did not refer the court to any authority that will

find favour with his proposition in that regard. I have considered the recent matter of *Mvubu v S* 2016 (518/2016) 2016 ZASCA 184 (29 November 2016). Accused were convicted of five counts of attempted murder and four counts of robbery with aggravating circumstances, flowing from what is commonly known as a 'cash-in-transit heist'. The trial court imposed sentences equalling 205 years imprisonment for the crimes committed by the Accused. They were to serve effectively 95 years in prison considered cumulatively, which sentence agreeably was over the top. The sentence was reduced to 45 years on appeal to the full court. On further appeal to the SCA, since there were no misdirection levelled against the trial court, the court had to consider on the basis of the sentence being shockingly inappropriate if there was such a disparity between what it could have imposed and what the trial court imposed, the crucial issue being whether the appellate court is able to arrive at a definite view as to what sentence it would have imposed. It went on to state that:

"It has been accepted that life imprisonment is the most severe sentence that can be imposed, and it is the sentence that has to be imposed if an offender needs to be removed from society. The sentence of 45 years' imprisonment that was imposed on appeal would have the effect that the appellant, who was around 28 years old at the time of the incident, would be some 80 years of age at the time of his release. It is improper to take into consideration any possibility of parole in determining a suitable and proper sentence. Thus, despite the aggravating circumstances I have mentioned, the sentence imposed by the full court is effectively one of life imprisonment and that is shockingly inappropriate. I am of the view that the effective term of imprisonment in this instance should be 30 years. I am reinforced in that view by counsel for both the appellant and the State agreeing that such a sentence is appropriate."

[41] Although I agree with the court for discouraging the tendency to take into consideration the possibility of parole to determine an appropriate sentence, age seem to have played a significant role in persuading the court to impose a lesser sentence. The accused had committed heinous crimes as it has also found. They shot at the policemen, one of them now a paraplegic, the security guards who were trapped inside the money van that had overturned were shot at and robbed of the firearms, robbing and shooting members of the public, brazenly blocking the national road to execute the robbery. They were not letting anything stand on their way. That Appellant was 28 years old should not have played such a strong persuasive role and must have been the least of factors considered where such abrasiveness was displayed when committing the serious crimes. The character of the offender as revealed by the circumstances surrounding the commission of the crime, the seriousness of the crimes committed and the harmonious existence of society should be paramount to the decision of the court as it was in *casu*.

Under the circumstances, I propose the following order:

1. Appellant's appeal against his conviction and sentence is dismissed


N V KHUMALO J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I concur and it is so ordered



WRC PRINSLOO J

JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

I concur



J R MURPHY J
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

For the Appellant: **ADV S MOENG**
Pretoria Justice Centre
Tel: 012 401-9200
Fax: 012 103-8837

For the Respondent: **ADV A P WILSENACH**
Director of Public Prosecutions
Gauteng Division, PRETORIA.

Date heard: 16 September 2016

Date delivered: 23/02/17