

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: AR827/16

In the matter between:

**MHLENGI MWELI
HLUKWENZA DLADLA
MHLENGI GOODMAN SHEZI
ZWELI ERIC NTSHABA
MLINDENI MBHELE**

**First Appellant
Second Appellant
Third Appellant
Fourth Appellant
Fifth Appellant**

and

The State

Respondent

JUDGMENT

GOVINDASAMY AJ:

[1] The five appellants were convicted of one count of robbery with aggravating circumstances read with the provisions of sections 51(2), 52(2), 52(A) and 52(B) of the Criminal Law Amendment Act 105 of 1997 further read with Part II of Schedule 2 of the said Act, by the Regional Magistrate sitting at Nongoma.

[2] With the leave of the court *a quo*, the appellants appeal against their conviction and sentence.

[3] It is not in dispute that the bottle store managed by the complainant, Sizakele Nozipho Dlamini ('Dlamini'), was robbed on 07 July 2014 at 10h40. A bag containing the sum of R53 000 was taken, together with liquor, cell phones, a laptop and a further sum of R2 000.

[4] What is in dispute is whether the five appellants were the perpetrators of the robbery. In this regard, the fifth appellant placed in issue his identity and the question is whether the single witness, Dlamini properly identified him. All the appellants denied their involvement in the offence.

[5] It is common cause that Dlamini's evidence, if accepted as true, would render the fifth appellant guilty of robbery with aggravating circumstances and his conduct would fall within the provisions of the minimum sentencing legislation. This appeal consequently, among other issues, is whether Dlamini's evidence was rightfully accepted by the trial court.

[6] The thrust of the argument by Ms *Maraís*, who appeared for the appellants, is that Dlamini is a single witness to the robbery and her evidence must be treated with caution. Dlamini's evidence was criticised on the basis that she was not in good position to adequately observe the fifth appellant because:

- (a) from the onset of her ordeal the complainant was grabbed, pushed into a motor vehicle and strangled;
- (b) thereafter she was hit with both a firearm and an open hand and again grabbed;
- (c) by the time she reached the gate of the shop, she was so confused that she could not see who came to open the gate;
- (d) she was again grabbed and hit with an open hand and a firearm on the head.

Ms *Marais* further submitted that because an identification parade was not held, it is doubtful whether the fifth appellant was properly identified.

[7] I do not propose to deal with each of the points of criticism advanced against Dlamini's evidence. It will suffice to refer at random to some of her evidence in order to illustrate their nature and substance (or lack of it) as follows:

- (a) In her evidence-in-chief, Dlamini stated it was in broad daylight when she came face to face with the fifth appellant. She spoke to the fifth appellant after he enquired 'where petrol was sold'. The fifth appellant followed her as she got back to her vehicle. The other appellants who were with him, came closer.
- (b) She said that the appellants did not hide their faces. She was able to identify one of them, the fifth appellant, because he took her out of the motor vehicle, kept on beating her and he also hit her with a firearm.
- (c) She could not see the others, because they were far from her.
- (d) She identified the fifth appellant as dark in complexion, with red eyes and traditional incisions (scars) on his face. He had a firearm on him. Two of the others also had firearms.

[8] Under cross-examination, Dlamini admitted that she may not have told the police that she was assaulted and that the appellants had firearms because she was shocked and confused. She insisted however that she was able to identify the fifth appellant.

[9] The omission in her statement to the police that she was assaulted and that the fifth appellant had a gun and so did two of the other appellants, assumes little importance when considering that the fifth appellant was in direct contact with her when he enquired about the sale of petrol. At that stage she was not assaulted or strangled. When the fifth appellant followed her to her vehicle, she again came into

contact with him. It was only then that he grabbed her, pushed her into the vehicle, strangled her and pointed the firearm at her. Above all, the fifth appellant was with her all the time until he and the other appellants left the liquor store. Clearly her observation of the fifth appellant was not fleeting in nature.

[10] She conceded that she could not see whether Zanele or Cebile opened the door of the shop because she was confused. This however does not mean that she could not identify the fifth appellant.

[11] She was honest when she testified that she could not identify the other appellants. She could quite easily have said that she that she could identify them because they were unmasked.

[12] In my view the trial court delivered a careful and well-reasoned judgment. It is apparent from both the terms of the judgment and the evidence of the judgment, that the court was at all times aware, when considering Dlamini's evidence, that she was a single witness to the robbery and that her evidence had to be treated with caution, taking into account the dangers inherent in such evidence. It was indeed alive to the shortcomings in her evidence and the criticisms directed at her evidence.

[13] I agree with the learned Regional Magistrate that it is not fatal to the state case, if an identification parade was not held. On the contrary, the evidence of Dlamini is clear, she identified the fifth appellant because of his red eyes, dark complexion and his distinctive facial marks. She was in contact with him for a considerable period of time, in broad daylight. Noteworthy, none of the other appellants were identified with the same facial features and marks of the fifth appellant. In this regard I am mindful of the words of Holmes JA in *S v Mthethwa* 1972 (3) SA 766 (A) at 768A-C

'Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. 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 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 the totality of the evidence, and the probabilities. . . .'

[14] The fifth appellant was correctly identified, in my mind, by Dlamini during the robbery and the property which was stolen from the liquor store was equally identified by her. If anything, the fifth appellant is guilty beyond a reasonable doubt. His explanation as to how he found himself in Zondo's taxi was rightly rejected by the Court a quo, as false. The version of Zondo, despite some of its inconsistencies, was correctly accepted by the Court of quo, especially in light of the evidence by Dlamini and the police.

[15] What is in dispute, therefore is whether, on the circumstantial evidence, all five appellants robbed the bottle store at Nhlungwane in Ulundi on 07 July 2014.

[16] The following facts are not in dispute and are common cause:

- (a) On 7 July 2014 at about 12h45, a white Mazda 323 motor vehicle, with registration No CM05GWGP was stopped by the police along the N11, Ngogo area, Newcastle.
- (b) The first witness, Nkosinomusa Zondo ('Zondo'), drove the motor vehicle in which the five appellants were passengers, when they were on their way to Johannesburg.
- (c) The motor vehicle was searched after it had been stopped by the police.
- (d) All the occupants of the vehicle, including Zondo, were searched by the police.

- (c) All five appellants, including Zondo, were arrested by the police and were taken to Ngogo Police Station.
- (d) The fifth appellant was identified with facial incisions, known in isiZulu as *isiNxabo*.
- (e) The five appellants were staying at the Benoni Hostel in Johannesburg, Gauteng.
- (f) The second witness, Dlamini, was robbed on the day in question and the property recovered by the police was identified by her.

[17] The version of the appellants is that of a mere denial. In their testimony each of them had the following to say:

- (a) First appellant (Accused 2 in the Court a quo) denied that on 7 July 2014 he robbed Dlamini at the liquor store in Ulundi. He told the court that on the day he was at his sister's house at KwaGrace area, Ncome. He slept there overnight as he had attended a funeral. He does not know Dlamini, nor does he know Zondo in this case. He was hitchhiking and hitched a lift with Zondo's vehicle at Ncome. He was going to Johannesburg. He denied Zondo's version that he and the other appellants hired Zondo's taxi, from Johannesburg to Ulundi, in order to see a traditional healer.
- (b) Second appellant (Accused 3 in the Court a quo) testified that on the day in question he left his home at Washbank in the family car, which was driven by his brother Amos. Both were travelling to Johannesburg. On the way to Newcastle their motor vehicle broke down. He therefore had to hitch a lift a lift to Johannesburg from the motor vehicle driven by Zondo. When he boarded Zondo's vehicle he found three people inside, including the Zondo.
- (c) Third appellant (Accused 4 in the Court a quo) testified that on 7 July 2014 he left Nongoma in the company of fourth appellant (Accused 5 in the Court a quo) to board a vehicle, belonging to his employer, at Vryheid as they were going to Johannesburg. When his employer's vehicle failed to fetch them, they hitched a ride to Ngogo, in Newcastle

where they boarded Zondo's vehicle, which was proceeding to Johannesburg. After driving for a short distance, Zondo's vehicle was stopped by the police who ordered them to get out of the vehicle and to lie down, whereafter they were searched. Thereafter they were taken to the police station at Ngogo.

- (d) Fourth appellant (Accused 5 in the Court a quo), told the court that he was with the third appellant (Accused 4) when they hitchhiked from Vryheid to Ngogo on their way to Johannesburg. At Ngogo, they hitched a lift with Zondo. They found First Appellant (Accused 2), Second Appellant (Accused 3) and Fifth Appellant (Accused 6) in Zondo's vehicle.
- (e) After driving for a short while the police stopped Zondo's vehicle, whereafter they were ordered to get out the vehicle. The vehicle was searched and they were beaten up by the police. They were then taken to the police station at Ngogo in the police van. They were not given any reasons.
- (f) Fifth appellant (Accused 6 in the Court a quo) said that he was with appellants 1, 2, 3 and 4 in the motor vehicle driven by Zondo when he was arrested at Ngogo, in Newcastle. At the time of his arrest he did not know the other appellants. After the motor vehicle had been stopped by the police, they were made to lie down on the ground outside the vehicle and the police officers searched them.
- (g) Thereafter he left his home in Ladysmith and was hitchhiking to Johannesburg. At Dundee, the motor vehicle driven by Zondo stopped for him. He boarded it and found the first appellant inside the vehicle. Along the road to Newcastle they found the second appellant who was hitchhiking. The vehicle stopped and he boarded it. When they reached Ngogo crossroads, the third and fourth appellants boarded the vehicle.
- (h) Zondo travelled for a short distance and overtook a police van. Shortly thereafter Zondo's vehicle was then stopped by the police who were driving in the same police van. Zondo got out of the vehicle and spoke to the police. They were never informed that property was found in the boot of the vehicle. The police officers assaulted them. At Ngogo police

station, they heard that some property was recovered from Zondo's vehicle.

[18] It is of fundamental importance to a proper evaluation of the appellants' defence, to reflect upon the evidence of the first state witness, Nkosinomusa Zondo, as it provides a factual background to the present appeal, even though he was not an eyewitness to the robbery.

[19] Essentially, Zondo's evidence was to the following effect:

- (a) He is a meter taxi driver. On 6 July 2014, he was at KwaThema Hostel, in Springs, Johannesburg where he resides when he was approached by one Mchunu, who also resides at the same hostel. He knows Mchunu who told him that there are people who want to go to Ulundi. He agreed to transport them provided they pay him.
- (b) He and Mchunu left to Benoni in his taxi, a white Mazda 323 with registration number CM05GWGP to go and see the people who wanted to hire his services. The taxi belonged to one Mbatha, his employer.
- (c) He later met all the appellants in a house in Benoni. It was the first time that he saw them that day. They spoke about him taking them to Ulundi.
- (d) Although he has never been to Ulundi before, he agreed a price of R3 000 with them because they said it was not that far.
- (e) On the way to Ulundi, with all five appellants in the vehicle, they told him that they were going to see a traditional healer. They brought along two bags used for carrying clothing. They did not pay him there and then.
- (f) On 7th July 2014, in the morning, they arrived in Ulundi. He left them at a place, up a hill, on a gravel road and they took the bags with them.

- (g) They returned with the two bags. Thereafter he drove to a Shell Garage where he wanted to fill petrol. At the garage, they put the two bags in the boot of the vehicle and they asked him for the speaker of the radio which they took away with them.
- (h) He did not know what they were doing as he was busy with the petrol attendant. When they returned with the speaker, he lifted it up and found that it was heavy. At one stage because he suspected something 'fishy', he opened the bags and found bottles of liquor in them. He believed that they were stolen.
- (i) He was scared and did not do anything. Thereafter they proceeded back to Johannesburg.
- (j) On the way, he passed a police van. One of the appellants, before he passed the police van, asked Zondo to turn but he did not listen. He was stopped by the police in police van.
- (k) He produced his driver's license. The white Mazda 323 taxi was searched. In the bags, the police found liquor, a laptop and cell phones.
- (l) They were all arrested by the police officers from Ngogo and taken to Newcastle where they were detained and appeared in Court, the next morning.
- (m) Subsequently, they were taken to Ulundi, where they were interrogated by the police officers from Ulundi. He told them about the speaker and that something was inside the speaker.
- (n) After spending a night in the police cells at Ulundi, he was taken back to Newcastle, to the pound, where his taxi was kept. After recovering the speaker from the taxi, the police found money and three firearms inside the speaker.
- (o) He was not paid for the trip.

[20] Under cross-examination by the legal representative for the second appellant, Zondo denied that:

- (a) he picked up Mlindeni Mbhele, fifth appellant, as a hitch-hiker in Dundee (he said that he had never been to Dundee);
- (b) he picked up Mhlengi Mweli, first appellant, who hitched a lift with him at Ncome; and
- (c) he picked up, Mhlengi Goodman Shezi, third appellant, at Newcastle.

He also disputed that from Mahlabathini to Johannesburg, one will have to pass, Ncome, Dundee and Newcastle.

[21] Under cross-examination by Mr Mbehle, for the fourth and fifth appellants, Zondo said that:

- (a) he was paid for the trip;
- (b) he received R3 000 for the trip, from fourth appellant, plus petrol money;
- (c) although he resides in Johannesburg, he comes from the Msinga area;
- (d) he met Mchunu in Johannesburg but he doesn't know where he comes from;
- (e) all the accused know Mchunu;
- (f) there is a problem with his written statements made to the police, in that some of the things mentioned in his police statement are problematic as they 'were not said by him';
- (g) the appellants were involved in the robbery; and
- (h) he denied picking up the third and fourth appellants at Newcastle, before Majuba Village, on the way back to Johannesburg.

[22] It was submitted by Ms *Marais* that Zondo's evidence should be treated with caution. He was a suspect who drove the motor vehicle when he, together with the appellants, was arrested by the police; stolen property was found in his vehicle. He

was Accused 1 in the Court a quo, but was absolved from prosecution when the trial commenced.

[23] There are clearly certain unsatisfactory features in Zondo's evidence which emerged during his cross-examination. There was a conflict in his evidence as to whether he was paid for the trip. He was extremely vague as to whether the appellants were seated inside the house in Benoni before they left for Johannesburg. His version as to why the appellants wanted the speaker from his taxi is nonsensical. It is also strange why he did not immediately tell the police that there was property concealed in the speaker when the police found other stolen property in the motor vehicle.

[24] Whilst there are some contradictions in the evidence of Zondo, they should not be over-emphasised in that they are not material contradictions, when considering his evidence as a whole.

[25] It is necessary, I believe, to consider Zondo's evidence, in the light of the evidence of Dlamini and that of the police officers in order to determine whether any corroboration may be found for Zondo's evidence. It is fitting to refer to *S v Gentle* 2005 (1) SACR 420 (SCA) para 18 where the Court said:

'It must be emphasised immediately that by corroboration is meant other evidence which supports the evidence of the complainant, and which renders the evidence of the accused less probable, *on the issues in dispute* (cf *R v W* 1949 (3) SA 772 (A) at A 778-9). If the evidence of the complainant differs in significant detail from the evidence of other State witnesses, the Court must critically examine the differences with a view to establishing whether the complainant's evidence is reliable. But the fact that the complainant's evidence accords with the evidence of other State witnesses on issues not in dispute does not provide corroboration.'

[26] The Regional Magistrate correctly found that Zondo's evidence to the effect that the fifth appellant alighted from the vehicle, is corroborated by Dlamini, who identified him as the one of those that robbed the liquor store. Furthermore, Zondo testified that he had dropped off the other appellants, near the liquor store. Dlamini, corroborated his evidence when she said that although she could not identify each one of the robbers, she saw others with the fifth appellant during the robbery.

[27] Zondo also testified that the speaker from his vehicle was removed. When it was returned to him, it felt heavy and it appeared that things were placed inside the speaker. His evidence is corroborated by the police in that at the car pound and in his presence and of other policemen, three firearms were found inside the speaker. Noteworthy, Dlamini in her evidence said that 'these people including the fifth appellant were carrying firearms.'

[28] I believe that the Court a quo was correct in accepting the evidence of Zondo which is both probable and in most respects corroborated and not contradicted by the evidence of Dlamini and the police officers.

[29] Returning to a consideration of the appellants' defence of non-involvement in the robbery, it is important to record the common cause facts or those facts that are not in dispute:

- (a) Zondo was a taxi driver.
- (b) Zondo was in the vicinity of the crime scene at the time of the robbery was committed at about 11:00.
- (c) The Appellants were found in the motor vehicle, driven by Zondo, when they were arrested by the police from Ncome.
- (d) Zondo was arrested with the appellants a few hours after the robbery.
- (e) Zondo's motor vehicle was searched.
- (f) A laptop, various cell phones, liquor, the sum of R53 000 and three firearms, were found in the vehicle.

[30] The appellants' version of how they found themselves in Zondo's motor vehicle when the police stopped the vehicle is strikingly different to Zondo's version. I agree with the reasoning of the Court a quo that it is bizarre that five people, some of whom are complete strangers to each other and who came from different places in KwaZulu-Natal, namely, two of them are from Nongoma, one is from KwaGrace at Ncome, one is from Washbank and the last one is from Ladysmith, found themselves as hitchhikers in Zondo's vehicle and coincidentally all of them were heading to one place, namely, Benoni Hostel, in Johannesburg. I find their version to be too much of a coincidence and is thus a fabrication, designed in order to justify how they all happened to be in one motor vehicle at the time when they were stopped by the police.

[31] The appellants' version is tainted with further improbabilities. They testified that:

- (a) after Zondo's vehicle was stopped on the road, the police started beating them up;
- (b) the police then ordered them to get into the police van, without any explanation to why they had to do so; and
- (c) when Zondo's vehicle was searched, the property that was found in the vehicle was not shown to them.

[32] The evidence of the third appellant (Accused 2) exposed their web of lies, when he testified that the police told them that they had robbed a certain place in Ulundi. When it was pointed out to him that this could not be possible as the police from Ncome were not aware at this stage of any robbery at Ulundi.

[33] I agree with the Court a quo that it is difficult to believe that the police officers did not show the appellants the property they found in Zondo's vehicle, and that the police officers did not explain to them that they were arrested for being in possession of suspected stolen property. The appellants' version is highly improbable.

[34] When the police officers asked the appellants to identify which of the nine cell phones belonged to each appellant, no one was able to do so. The only vague explanation from the appellants was that the cell phones belonged to them. The police were not satisfied with the answers they got from the appellants. Thereafter they were arrested and charged with the offence of possession of suspected stolen property.

[35] If Zondo's evidence is to be rejected, then logically he and the police officers conspired to trap the appellants when they were stopped in Newcastle. This is far-fetched, as it will mean that the police in Ulundi were also involved in the conspiracy to trap the appellants and implicate them in a robbery in Ulundi.

[36] On a balance, I am satisfied that the Court a quo was correct in preferring the evidence of Zondo and the police as opposed to the evidence of the appellants, especially in regard to how they found themselves in Zondo's motor vehicle and how the spoils from the robbery came to be in the vehicle. I am of the view that the Court a quo correctly rejected their version as false beyond a reasonable doubt.

[37] As is clearly established by the evidence the property and money were found in the motor vehicle driven by Zondo a few hours after the robbery, when the police stopped the vehicle, which points to the circumstantial nature of the evidence. Where the case against the Appellants is based upon circumstantial evidence, then the doctrine of 'recent possession' will be applicable. In *S v Skweyiya* 1984 (4) SA 712 (A) at 715 C–E, the following general principles were enunciated, with regard to the doctrine of recent possession:

- (a) The property must have been recently stolen.
- (b) The nature of the stolen property must be of the type which is usually and can easily and rapidly be disposed of.
- (c) Anything beyond a relatively short period will usually not be recent.

- (d) The Court has to determine whether the property is one which could easily pass from hand to hand, and whether the lapse of time is so short as to lead to the probability that the particular property has not yet passed out of the hand of the original thief.

[38] It is not in dispute that the property was stolen from the liquor store and that they are of the type which is usually and can easily and rapidly be disposed of. It is also not in dispute that the time between the robbery and the recovery of the stolen property was less than a few hours. I am in agreement with the submissions by Mr *van Heerden*, on behalf of the Respondent that the stolen property did not pass out of the hands of the appellants when they were stopped by the police.

[39] Assuming for one moment that Dlamini did not properly identify the fifth appellant who committed the robbery, then the evidence against all the appellants is circumstantial which Mr *van Heerden* in his Heads of Argument submitted is sometimes described as a network of facts around the accused, it may come to nothing or it may be absolutely convincing. In other words, the Court has to determine whether on the evidence as it stands, it could be said that the appellants were guilty of committing the robbery, beyond a reasonable doubt.

[40] The question therefore is whether the inference that the appellants committed the robbery is the only reasonable inference to be drawn with the necessary degree of certainty. In *R v Blom* 1939 AD 188 at 203, Watermeyer JA held that 'the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn.' The proved facts in the Court a quo do not exclude the inference that the appellants were guilty of stealing the property found in the vehicle driven by Zondo. The probabilities strongly suggest that they participated in the actual robbery. Dlamini saw more than one person, she identified positively the fifth appellant but not the others. Zondo testified that he drove all of them from Johannesburg to Ulundi and refuted their version that he picked them up at various points on the road between Ncome and Newcastle, when he was on his way to Johannesburg, returning from Ulundi. In my mind, the Court a quo, correctly rejected

the explanation by the appellants that they hitched a lift with Zondo. Counsel for the appellants correctly, in my view, did not criticise the finding of the Court a quo in this regard.

[41] From the evidence, as a whole, the only other inference to be drawn, is that Zondo was the one that committed the robbery in Ulundi and that the appellants were innocently implicated in the robbery, when they hitched a lift with Zondo. But this possibility, attractive as it seems, does not fit in with the evidence implicating the fifth appellant who was positively identified by Dlamini during the robbery. His version that he hitched a lift was correctly rejected by the Court a quo. By the same token, the version of the other appellants, which is similar to the story of the fifth appellant, was also rightfully rejected. It is a strange co-incidence that all the appellants were hitching a lift at various points on the N11, unknown to each other except for the fourth and fifth appellants, and they were all going to the same place, namely, Benoni in Johannesburg. This version cannot be reasonably possibly true in light of the totality of the evidence.

[42] What is equally striking is the failure by each of the appellants, when asked by the police, to identify the other cell phones which were found in the vehicle. They were reluctant to do so even though they claimed that the cell phones belonged to them. If they identified their cell phones, then this would have at least given some credibility to their version. The weight of the circumstantial evidence against them is unshakable and their failure to proffer any reasonable explanation for how the stolen property came to be in their possession soon after the robbery, leads to the inexorable conclusion that the appellants robbed Dlamini at the liquor store in Ulundi.

[43] In the result I agree with the findings of the learned Regional Magistrate that, on the evidence, the only reasonable inference is that the appellants perpetrated the robbery in question, in that, firstly, this inference is consistent with all the proved facts, and secondly, the proved facts exclude every other reasonable inference from them except that the appellants who are the perpetrators of the robbery.

[44] I now turn to the appeal against convictions.

[45] The appellants were convicted of robbery with aggravating circumstances which falls within Part II of Schedule 2 of Criminal Law Amendment Act, 1997. Therefore the Court a quo would have been obliged to impose a minimum sentence of 15 years' imprisonment unless the trial court found substantial and compelling circumstances to justify a departure from the prescribed minimum sentence.

[46] It is trite that sentencing is pre-eminently in the discretion of the trial court and an appeal court will not likely interfere in such a discretion, unless such a discretion was not exercised judicially. In this regard, the words of the Supreme Court of Appeal in *S v Barnard* 2004 (1) SACR 191 (SCA) para 9 are apt:

'It is trite that sentence is a matter best left to the discretion of the sentencing court. A Court sitting on appeal on sentence should always guard against eroding the trial court's discretion in this regard, and should interfere only where the discretion was not exercised judicially and properly. A misdirection that would justify interference by an appeal Court should not be trivial but should be of such a nature, degree or seriousness that it shows that the Court did not exercise its discretion at all or exercised it improperly or unreasonably'

[47] The Court a quo took into account the triad of factors set out in *S v Zinn* 1969 (2) SA 537 (A), namely, the personal circumstances of each of the appellants, the offence for which the appellants were convicted, and the interests of the community. In my view the Court a quo gave sufficient weight to each of these factors in determining whether there were substantial and compelling circumstances to depart from the prescribed minimum sentence.

[48] In a detailed judgment on sentence, the learned Magistrate outlined the personal circumstances of each of the appellants and notably that each one of them were first offenders. It was argued on their behalf that the appellants were driven by

youthfulness to commit the offence in question and that the Court a quo should deviate from the minimum sentence.

[49] In *S v Muller & another* 2012 (2) SACR 545 (SCA), Leach JA said at para 7 that:

'It hardly needs to be emphasised that armed robberies of this nature are a plague in this country and a bane to society. By their very nature, they are severe offences deserving of heavy punishment. It is not without significance that, although the Criminal Law Amendment Act 105 of 1997 was introduced after the incidents in question, under that Act offences of this nature now attract a prescribed minimum sentence of 15 years' imprisonment.'

[50] The aggravating factors which were taken into account by the Court a quo was that the Appellants were armed with firearms which they used to overcome any resistance. The Appellants showed no remorse and the brazenness and callousness of their attack on the complainant in broad day light is disturbing, to say the least. The Appellants displayed no respect for the property and that the robbery was meticulously planned by them.

[51] As far as the commission of the offence of robbery with aggravating circumstances is concerned, it has to be said that the offence has become so common, especially in and around not only our large cities and towns but also in our rural areas that innocent men and women go about their business everyday with great fear and anxiety. The brutal acts of robbers cause enormous damage to our country and cast a dark shadow over the confidence of a community in policing, prosecution and administration of justice.¹

[52] In *S v Malgas* 2001 (1) SACR 469 (SCA) para 25, Marais JA made it plain that the courts:

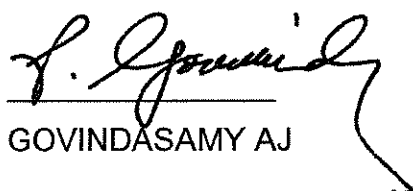
¹ *S v Khambule* 2001 (1) SACR 501 (SCA).

'...are to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed.'

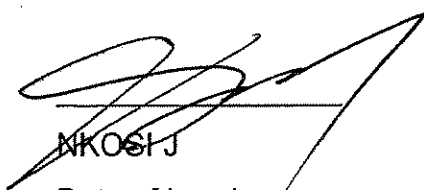
[53] I am of the view that the learned Magistrate was correct in finding that there were no substantial and compelling circumstances, in that the aggravating factors outweighed the mitigating factors.

[54] The sentence imposed by the learned Regional Magistrate suffers none of the defects and must accordingly stand.

[54] In the result the appeal against conviction and sentence is dismissed.


GOVINDASAMY AJ

I Agree,


NKOSI J

Date of hearing : 19 September 2017
Date delivered : 27 October 2017

Appearances:

For the Appellant : Adv L Marais
Instructed by : Justice Centre
Pietermaritzburg

For the Respondent : Adv F van Heerden
Instructed by : The Director of Public Prosecutions
Pietermaritzburg