

REPUBLIC OF SOUTH AFRICA



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

(1)	REPORTABLE: <u>YES</u> / NO
(2)	OF INTEREST TO OTHER JUDGES: <u>YES</u> / NO
(3)	REVISED: <u>✓</u>
<u>16/08/2013</u> DATE	
<u>[Signature]</u> SIGNATURE	

High Court Reference No: A644/2011
Magistrate's Serial No: 04/2010
Magistrate's Case No: SH52/07

BEFORE THE HON MS JUSTICE JANSE VAN NIEUWENHUIZEN, AJ
AND THE HON MR JUSTICE LAMPRECHT, AJ

In the matter between:

TSEPO STANLEY MOFOKENG
INOCENT BONGANI ZULU
SAMEUL PERSI MAKGOGO

1st APPELLANT
2nd APPELLANT
3rd APPELLANT

versus

THE STATE

RESPONDENT

JUDGMENT

LAMPRECHT, AJ:

Introduction

[1] On 14 April 2009, the three appellants were convicted in the Regional Court, Bela Bela, of one count of robbery with aggravating circumstances. They were each sentenced to fifteen (15) years imprisonment imposed in terms of section 51(2)(a)(i) of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentencing Act). The trial court granted them leave to appeal their convictions, but not their sentences. The three appellants appeared in the same order in the court *a quo* and, for ease of reference they will forthwith be referred to as accused numbers 1, 2 and 3.

[2] Most of the facts are not in dispute, the only real disputes being whether it was proven that the appellants were the persons who committed the robbery; whether they broke open the house in which they were eventually found by the police; and, whether they brought any of the recovered goods and money into that house or had some of the stolen goods on their person.

The facts according to the state

[3] The state led the evidence of a number of state witnesses from whose evidence the following version appears:

3.1 On 6 November 2006, Samuel Siyema was the driver of a cash transit vehicle of Fidelity Cash Management Services. He had one crew member, Steven Moyo.¹ Their duties on this specific day were to collect bank deposits from various clients and to transport them to Absa Bank, Bela Bela, for deposit.

¹ Moyo did not testify.

3.2 After collecting the money from the various pick-up points, they drove to Absa where they parked the vehicle. At approximately 08h45, Siyema alighted, took some of the bags containing bank deposits and proceeded to the bank, closely followed by his crew member who also had some trunks and bags containing deposits.

3.3 Just as he was about to open the door to the bank, he heard someone approach him from behind, and felt a fire arm being pressed against the back of his head, with the person ordering him to lie down. He tried to look at the person, but he was hit on the back of his head with the fire arm. He fell down.

3.4 The unidentified robber then took the moneybags that he carried and his fire arm from his hip and made off with it. Apparently the robbers, who were more than one, also took the trunks and bags that Moyo had before they made off. Siyema did not see any of the robbers at that time, and when he stood up, he saw the person retreating from him only from the back.

3.5 A shot rang out and he saw some people climbing on the back of a Mazda Rustler bakkie. He saw four persons at the back of the bakkie, one had a long assault rifle and one, whom he identified in the dock as accused no 1, had a steel trunk containing money which had been taken from Moyo.

3.6 The robbers succeeded in making off with more than R640, 547.06, which was the amount recovered as will be indicated below. In the mean time,

the owner of Calvin Security, Mr Burger, was contacted per radio by one of his security guards posted at Pick and Pay, close to Absa. The latter informed him that a robbery had been committed in front of Absa and that the robbers were making a getaway in a brown Mazda Rustler bakkie and that there was some shooting taking place.

3.7 Burger and a technician of his got into two different vehicles and sped off in the direction of Pick and Pay. At the crossing of the road to Settlers, he spotted the vehicle passing them in the crossing towards Settlers. They gave chase. He noted three people at the back of the Rustler bakkie, and two in front. The bakkie turned left into the township of Bela Bela in Masemula Street. At a T-junction, the Rustler turned left, and then right again in the first street, Moloto Street. The vehicle stopped on the pavement and the people got off and out of the Rustler. His technician, who gave chase in front, alerted him per radio that they were drawing fire, after which he stopped and his technician drove past. He saw that some of the people were also firing at him, and he could hear shots ringing past him, including fire from an automatic machine gun. He returned fire but, neither him nor his vehicle was hit and, so it would appear, none of the armed gang was hit by his return.

3.8 The five occupants of the Rustler ran away. He gave chase, but lost sight of them. Some ran through different yards and in different streets, but he ran in the direction that he perceived most of them ran to. He was then alerted by a certain man wearing a yellow cap that the people they are looking for were

hiding in a two-roomed house where they apparently broke down the door, and he pointed out the house at 151 Maroka Street.

3.9 According to the owner of the said house, Ms Mohlatedi, she was asleep that time of the morning as she was working nightshift. Her young son was awake though, busy having breakfast because he had a test to write at 12h00. She woke, hearing people saying that the door must be broken down. The one door to her house was then forced open and some men came in.

3.10 She ran to the kitchen and realised that three men had already entered through the door that they forced open. Her child was crying and she was also hysterical from shock. She covered her son's head and she let her head hang down. She could not see the three men well enough to later identify them again. Neither could she see whether they had anything on them or whether they brought anything with them when they entered.

3.11 After a while the police arrived and ordered the men to come out. She was also taken out of the house, and she was not present inside when the police took photographs and attached some things inside her house. She confirmed that she saw some moneybags on the photos that were taken in her absence, in her fridge; on the table; and, in her bedroom on the bed. She does however not know how those things came to be in her house. She does not know whether they came in with the three men, or thereafter, but, what she did know, is that those items were not in her house before the men broke the door and entered her house.

3.12 When the police arrived, they surrounded and besieged the house. They ordered whoever was inside to come out or risk their being taken out with armed force. After a while, all three the accused persons came out, no 1 in front, and surrendered. They were frisked for fire arms. Capt Smit of the police grabbed accused no 1 before he could get away, told him that he is being arrested for armed robbery and frisked him for fire arms. When he could not find any, he asked no 1 where his fire arm was. No 1 then made a report to him and immediately volunteered to make a pointing out. Accused no's 2 and 3 were left in the presence of Superintendent Barnard and other police, while he and accused no 1 then walked in a certain direction indicated by no 1.

3.13 They walked through a number of premises, in the direction of the town and crossed two streets. On the way, at the border fence between house no 151 and another, accused no 1 pointed out a white bag, indicated on photo no 21. Behind house no 145, he pointed out a black bag, indicated on photo 20. Accused no 1 also told him that, in the other yard, just behind the toilet, the other side of the fence, he threw down the fire arm he that had. Smit left accused no 1, who was cuffed, in the presence of other police, climbed over the fence and, in the bushes behind the toilet, he found a cocked 9mm pistol. This was photographed - photo 22. (According to the prosecutor during cross examination of accused no 1,² this particular fire arm was in terms of ballistic examination linked to a discharged cartridge that was found at the scene before

² P 185 of appeal record.

Absa. The particular exhibits are not attached to the appeal record, so we could not determine whether this assertion is true.³⁾

3.14 At that stage, Inspector Nel arrived where he and accused no 1 were. Nel asked him whether he had properly searched the suspect, to which he replied, only superficially for a fire arm. Nel, who has experience of robbers often hiding some of the stolen money and fire arms in funny places such as in the underwear and in their shoes, then conducted a thorough search of accused no 1. According to both Nel and Smit, Nel then found R10, 000.00 (consisting of a bundle of 100 x R100.00 notes) in the accused's shoe, hidden under his foot, but on the sole of the shoe. Nel said that, although accused no 1 must have had considerable difficulty walking with such a big wad of money (approximately 2,5 cm thick) in his shoe, it was not so strange to find it there in the light of his experience, and it is definitely not impossible for a person like accused no 1 to hide it there. He said that accused no 1 appeared almost sheepishly embarrassed (verleë) at having been caught out with the money in his shoe after he earlier managed to escape such close scrutiny by the other police. After accused no 1 gave such a report to Nel and Smit, the R10, 000.00 was attached and treated as part of the stolen property. The R200.00 that was found in his pocket, was however given to another policeman since accused no 1 explained that it belonged to him personally and it was not linked to the stolen property.

³ According to the proceedings at pp140-143 of the appeal record, the ballistic reports were handed in as Exhibit "D" after their contents were admitted as correct by the defence. Exhibit "D", however, is the sketch and photo album prepared by the witness Rabat, and no indication could be found anywhere in the appeal record that the ballistic reports were in fact handed in. Neither were they attached to the appeal record as Exhibits.

3.15 In addition to the two bags pointed out to Smit, inside Mohlatedi's house, other police witnesses found some other bags and a trunk, most of which were still sealed. Some were hidden in the fridge. All these bags and trunk were identified as the bags and trunk that were taken during the robbery. The sealed as well as the opened bags and trunk were checked and balanced by Superintendent Schutte together with the owners and Fidelity Cash Management Services. Most of them balanced correctly with the deposit slips, but one bag (a Green one from Spar), whose seal was broken, was missing exactly R10, 000.00 in R100 notes, most probably the R10, 000.00 that Nel claimed to have found in accused no 1's shoe. There were a few smaller amounts missing from some other bags, but not significant amounts, and the total recovered money totalled to an amount of R640, 547.06.

3.16 Some fire arms, including an R5 automatic assault rifle and two further 9mm pistols, besides the one that was recovered as a result of the pointing out by accused no 1, were also found in the vicinity of the house where the three accused persons were found – they have been found discarded or abandoned *en route* from where the people started running away from the Rustler bakkie. The one 9mm fire arm was later identified by one of Fidelity Cash Management Services' employees as the one that was taken from Siyema, and all the fire arms were forensically tested and found to be fire arms and automatic fire arms as per their description in the charge sheet.

3.17 Thus most, or rather, almost everything that was robbed was recovered, including the fire arm that was taken from Siyema. The three

accused were arrested and charged with robbery with aggravating circumstances, attempted murder and various counts pertaining to the possession of fire arms.

The defence version

[4] Each of the accused persons testified as follows:

4.1 Accused no 1 denies that he was at the scene of the robbery or that he was seen on the back of the Rustler bakkie. He further denies that he had an amount of R10, 000.00 hidden in his shoe, or that he pointed out a fire arm to Smit. According to accused no 1, he travelled from Tembisa to Warmbad (Bela Bela) on the day in question to consult with a traditional doctor. When he arrived in the Bela Bela Township, he first went to a tuck shop to buy candles because the traditional healer uses candles for divination. At that specific moment in time he heard some shots being fired and he saw people starting to run in all directions. He started running himself and, when he came to Mohlatedi's house, he saw the door being opened for him and he ran inside. Mohlatedi, who was also scared, asked him what the shots were all about, to which he replied that he does not know. After a few seconds, accused no's 2 and 3 also came into the house, without saying anything. None of them spoke a word and they all just sat down and waited for the danger to pass. After a while, the police came and ordered them to come out, which they did. He was the first person to leave. He was then rather forcefully arrested. In a cuffed state, he was taken to a certain place and he was also made to jump a fence. Further police arrived and he was questioned and assaulted because they did not want

to believe his version as to why he was in Bela Bela. The money that was photographed next to his foot was placed there by the police and they did not find it on him. He also knew nothing of the fire arm that was photographed. Neither did he know anything about how the bags and trunk containing the robbed money came to be inside the said house. Nor was he ever on the Rustler bakkie that was found by the police.

4.2 According to accused no 2, he was on his way to Nylstroom (Modimolle) on the day in question when, next to the township of Bela Bela his vehicle broke down. He entered the township to find a mechanic, when he heard shots being fired. People were screaming and running away. He followed suit and he saw an open door to a house. He entered and sat on the sofa and covered his head. He sat like that until the police arrived and ordered the occupants of the house to come out. Upon arrival in the house, he found accused no 1, whom he did not know and the owner of the house and her small child. When he opened his eyes on arrival of the police, it was the first time that he also saw accused no 3, whom he did not know, in the house. When he went out, he was arrested, frisked, questioned and assaulted. He does not know why the police did not find his vehicle keys in his pocket, but only an insignificant amount of cash. Whilst in custody he arranged for someone to come and pick up the keys to his vehicle, which was then towed away for repairs. He does not know anything of the Mazda Rustler bakkie. Neither does he know how the bank bags and trunk came to be in the house where they were hiding during the shooting.

4.3 Accused no 3 likewise denies that he was involved in the robbery or on the Mazda Drifter bakkie. On the particular day he was in Bela Bela Township only by chance, because he went there to investigate the possibility to tender and contract for the erection of RDP houses. While walking in the street, he heard shots being fired. He ran back and, also by chance, he came upon the open house of Mohlatedi. He ran inside and, due to his asthmatic condition, he asked for a chair and sat down. He let his head hang between his arms until his breathing could normalise. He found accused no 1, Mohlatedi and the small child in the house. On a leading question when he saw accused no's 1 and 2 for the first time in his life, he replied that he found both of them in the house. He does not know anything about the robbery, the Rustler bakkie, the fire arms or the monies that were recovered from the house and vicinity where they were arrested.

Evaluation of the evidence

[5] The presiding regional magistrate found all state witnesses to have been credible and trivialized the contradictions and discrepancies in their evidence that may be found to exist. He was also very cautious in his evaluation of the evidence of Siyema pertaining to his identification of accused no 1 as one of the people on the back of the Rustler bakkie, and, after mature consideration held that there was good reason for him to accept it. Having considered the merits and demerits of the evidence tendered by the three accused persons and the inherent probabilities and improbabilities in each version,⁴ he held that the state's case had been established

⁴ *S v Singh* 1975 (1) SA 227 (N) at 228.

beyond reasonable doubt and that there existed no reasonable possibility of any of the accused persons' version being true.

[6] In this regard it can be remarked that the inherent improbability of any of the three accused persons' versions being true is so glaring that it cannot be said that there is any reasonable possibility of it being true. In appropriate circumstances, this, in itself, is enough reason to reject an accused person's version.⁵ It is inherently improbable that three people, all from the Witwatersrand area would, by chance and without knowing each other, find themselves in the same township at Bela Bela at the same time, under threat of being caught in the cross-fire of security officers and robbers on the run. It is further improbable that they would, in the end, land in the same house, where the police were tipped off the suspected robbers were hiding out. A further improbability is that robbers on the run would discard almost everything they had robbed, while running at different places, but, mostly in the house (or in the vicinity of the house) where the three accused persons were found. It is moreover improbable that the police would 'plant' some of the robbed moneybags and the trunk in the house where the three accused persons were found, just to get them into trouble.

[7] The possibility of a conspiracy between Siyema, Burger and the police witnesses can safely be ruled out. The minor contradictions and discrepancies between the different accounts seem to point away from such a possibility.

⁵ *S v Van Tellinghen* 1992 (2) SACR 104 (C) at 106. See also *S v Munyai* 1986 (4) SA 712 (V) at 714-6; *S v Jaffer* 1988 (2) SA 84 (C) at 88-9; *S v Sinam* 1990 (2) SACR 308 (EC); and *S v Makobe* 1991 (2) SACR 456 (W) at 460d-c. In all these cases it was held that, although in normal circumstances it would not be admissible for trial courts to evaluate and accept or reject versions in criminal cases on the probabilities alone as in civil cases, for a trial court to overlook inherent probabilities and improbabilities in each version might amount to a misdirection because an accused person's story might be so improbable that there can be no reasonable possibility of it being true.

Furthermore, the question can justly be asked, why would Siyema testify that he only saw accused no 1 on the getaway vehicle. Why would he not also incriminate accused no's 2 and 3? Why would the police witnesses, especially Smit and Nel, incriminate only accused no 1 with the retrieval of one of the fire arms, two bags and a cash amount of R10, 000.00? Why would Smit and Nel conjure up a story that, on face value, sounds improbable, namely that R10, 000.00 was found hidden in accused no 1's shoe? Why wouldn't similar stories be fabricated as far as accused no's 2 and 3 are concerned? These observations and questions underscore the sheer improbability of the defence version being true.

[8] One can also not find any fault with the magistrate's acceptance of Siyema's evidence that he identified accused no 1 as one of the people on the back of the Mazda Rustler bakkie. It appears that all the jurisprudential guidelines in this regard⁶ have been properly observed. His evidence that he never saw accused no 1 in court after his arrest until the time that he gave evidence, stands without having been contradicted by any other evidence. When one takes into account that he was prone to be bending down and not standing upright on the bakkie as it made its getaway at high speed, it does not appear to be improbable that Siyema could have seen the scar on the top of his head. Furthermore, evidence of identification should not be evaluated in isolation, but in the light of all the evidence tendered. Here it can be remarked that, the evidence that accused no 1 was instrumental to the pointing out of a fire arm and two of the robbed moneybags and, that R10, 000.00 was found in his possession, provides for substantial corroboration of Siyema's evidence on identification.

⁶ *S v Mthethwa* 1972 (3) SA 766 (A); *S v Khumalo* 1991 (4) SA 310 (A).

[9] One aspect which weighs heavily against the acceptance of the defence version, is the evidence of Mohlatedi that her house's door was broken open by the three people who came to hide there until the police arrived. She has no motive to falsely place this piece of evidence before court to incriminate any of the accused persons. In fact, she testified that she cannot say whether any of the accused persons were among those that hid in her house. She did not provide any shred of incriminating evidence against any of the accused except for saying that the people that entered her house did so forcefully.

[10] In my view, the trial magistrate rightly rejected the versions of the accused persons as false. Although none of the witnesses have provided direct evidence to link any of the three accused persons to the commission of the robbery itself, especially accused no's 2 and 3, there are ample circumstantial facts that point towards their guilt.

10.1 It is common cause that there had been a robbery at Absa bank in which Siyema and Moyo of Fidelity Cash Management Services were robbed at gunpoint of a large quantity of money containers containing cash to the value of more than R600, 000.00. Although the persons who put the fire arms to the heads of the victims could not be identified, accused no 1 was seen at the back of the getaway bakkie, holding the trunk that had been taken from Moyo.

10.2 All three the accused persons, who, according to them, were totally unknown to each other, were found in the same house, belonging to a stranger.

According to the accepted evidence, they entered the house together, and not independently, after they had broken down the door thereof to seek shelter and sanctuary. This suggests that their version that they did not know each other is false.

10.3 Most of the robbed money containers, some still sealed, were found inside the house, some hidden in the fridge. None of these were there before they entered the house according to Mohlatedi and, although she did not see them bringing the containers into her house, the possibility of them having been placed there by someone else, like the police or other people, seems so improbable that no reasonable fact finder will seriously entertain such possibility to exist.

10.4 In addition, accused no 1 pointed out two further money containers and a 9mm pistol that was reportedly linked to the scene of the robbery at Absa.

10.5 An amount of R10, 000.00, which exactly matched the amount that was missing from one of the containers belonging to Spar, was found in accused no 1's shoe.

10.6 The explanation that the three of them gave for being in the same house, at the same time, without anyone of them knowing the others and without any link whatsoever, appears to have been rightly rejected by the trial magistrate on the sheer improbability thereof. Thus, their exculpatory explanation for being in that house together has been correctly rejected as false

beyond reasonable doubt and, therefore, no other reasonable inference seems possible save that all three of them are linked with the stolen goods retrieved from Mohlatedi's house and in the vicinity thereof.

[11] Whilst it is true that, except for the fact that the three of them had been found in the house together in suspicious circumstances, most of these circumstantial factors are stacked against accused no 1, and not against accused no's 2 and 3, evidence like this cannot be considered in isolation. The fact that accused no's 2 and 3 entered the house together with accused no 1 after the door was broken down, and the fact that most of the recovered containers and money were found in the house, must be considered together with the facts that accused no 1 was seen leaving the scene of robbery with one of the money containers; that he was found in possession of R10, 000.00 (probably the amount missing from the Spar bag that was found in the house); and, that he pointed out two more of the robbed money containers and also a fire arm reportedly linked to the robbery.

"[E]ven two articles of circumstantial evidence - though each taken by itself weigh but as a feather - join them together, you will find them pressing on the delinquent with the weight of a millstone. ... It is of the utmost importance to bear in mind that, where a number of *independent* circumstances point to the same conclusion the probability of the justness of that conclusion is not the *sum* of the simple probabilities of those circumstances, but is the compound result of them."⁷

⁷ *Best Evidence* 5th ed 298. See also Jeremy Bentham *Rationale of Judicial Evidence, Manuscripts* Book V, Ch XV, Sect III at 242-3; *R v De Villiers* 1944 AD 493 at 508-9; *R v Hlongwane* 1959 (3) SA 337 (A); *R v Sibanda* 1963 (4) SA 182 (SR) at 188; *S v Kessel* 1968 (4) SA 224 (A); *S v Ntstele* 1998 (4) SACR 178 (SCA) at 182d-e; *S v Mashiane en Andere* 1998 (2) SACR 664 (NC) at 668-7.

[12] As was remarked in *S v Morgan*:⁸

"In determining the question of the third appellant's complicity, it is not necessary that each such finding or inference or circumstance should establish such complicity beyond reasonable doubt. The cumulative effect of a number of probabilities pointing in the same general direction may be such as to establish the guilt of an accused beyond reasonable doubt."

[13] Although not referring to any case law in this regard, the trial magistrate considered⁹ the circumstantial evidence subject to the trite requirements laid down in *R v Blom*,¹⁰ and held that the inference of guilt of the three accused persons was consistent with all the other proven facts in the matter; and, in addition, that they are such that they exclude every other reasonable inference from them save that the accused persons have been involved in the robbery together. We can find no fault with this conclusion reached by the regional magistrate and, accordingly endorse it.

The role of each of the three accused persons

[14] In the light of a recent decision in the Western Cape High Court, *S v Masingili and Others*,¹¹ I consider it necessary to determine whether the exact role of each of the accused persons in the commission of the robbery need be determined in order to establish whether each of them can be held guilty of robbery with aggravating circumstances. We requested Counsel for the appellants and for the state to specifically address us on whether the *Masingili* decision should be regarded as

⁸ 1993 (2) SACR 134 (A) at 172] *et sec.*

⁹ Pp257, 263 of the appeal record.

¹⁰ 1939 AD 188 at 202-3. See also *S v Sesetse* 1981 (3) SA 353 (A) at 369-70; *S v Mtsweni* 1985 (1) SA 590 (A) at 593-4.

¹¹ 2013 (2) SACR 67 (WCC).

sound in law and, therefore, whether it has enough persuasive force to be followed in this Division.

[15] In *Masingili* four accused persons were convicted in the regional court of robbery with aggravating circumstances. Two of them were held to have committed the actual robbery, using a knife, and the Western Cape High Court therefore had no problem upholding their convictions of robbery with aggravating circumstances and, therefore, the sentences imposed upon them.¹² With regards to the other two accused persons, the High Court however had difficulty in holding that they associated themselves, not only with the commission of the robbery, but also with 'the perpetration of aggravating circumstances',¹³ since one of them was merely a scout and the other one merely drove the getaway vehicle to and from the scene of robbery. The Court held that there was no evidence to show that they had also knowingly associated themselves with the other two appellants' use of a dangerous weapon that would render them guilty of robbery 'with aggravating circumstances' as opposed to 'ordinary' robbery.¹⁴ What gave rise to the Court's difficulty was the definition of 'aggravating circumstances' in section 1(1)(b) of the Criminal Procedure Act,¹⁵ which reads as follows:

"(1) In this Act, unless the context otherwise indicates -

'aggravating circumstances', in relation to -

(a) ...

(b) robbery or attempted robbery, means -

(i) the wielding of a fire-arm or any other dangerous weapon;

¹² Para [20] of the judgment.

¹³ Paras [21]-[27] of the judgment.

¹⁴ It is dubious whether any incident of robbery can, with any measure of conviction, be regarded as 'ordinary'. With or without aggravating circumstances, robbery remains to be regarded as a very serious crime.

¹⁵ Act 51 of 1977.

(ii) the infliction of grievous bodily harm; or,
 (iii) a threat to inflict grievous bodily harm,
 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; ..."16

[16] As it could not be held, so the Court argues, that the two appellants who were not directly involved in the commission of the robbery, actively associated themselves with the use of a knife in the perpetration of the robbery itself, they cannot and should not be blamed for robbery with aggravating circumstances (as opposed to ordinary robbery) simply because the other two appellants, their 'accomplices' used a dangerous weapon in its execution. The definition of 'aggravating circumstances' was felt to be too widely stated in this regard.

[17] The Court then considered the definition of 'aggravating circumstances' in section 1(1)(b) of the Criminal Procedure Act, its history, section 12(1)(a) of the Constitution¹⁷ and a number of reported cases, before holding that the words "an accomplice" that appears in the definition of aggravating circumstances is unconstitutional. It accordingly "declared that the phrase 'or an accomplice' in the definition of 'aggravating circumstances' in s 1(1)(b) of the Criminal Procedure Act 51 of 1977, is inconsistent with the Constitution and therefore invalid". The Court further held that the invalidation of the said phrase shall invalidate the application of the said phrase in all verdicts of criminal courts that were entered after the Constitution came into force. The constitutional invalidation of the phrase was then referred to the

¹⁶ Own italics.

¹⁷ The Constitution of the Republic of South Africa, 1997.

Constitutional Court and, therefore, the hearing of the appellants' appeals was postponed *sine die*, pending the Constitutional Court's decision.

[18] In my view, the *Masingili* decision is flawed in a number of respects.

18.1 Firstly, the Court held¹⁸ that the magistrate could not have convicted the relevant two appellants of robbery with aggravating circumstances based on the doctrine of common purpose. Contrary to the jurisprudence of the Supreme Court of Appeal¹⁹ and the Constitutional Court on the doctrine of common purpose,²⁰ the Court, referring to *S v Malinga and Others*,²¹ held²² that the doctrine of common purpose, "can only be invoked for purposes of proof of causation as one of the elements of a crime. It cannot serve to impute the dolus of one person to another." Therefore, so the Court held, the doctrine of common purpose cannot be invoked to prove intention to commit robbery with aggravating circumstances where the accomplice's only participation was to keep a lookout or drive the getaway car. This is not correct. The doctrine does not find application only in cases where 'causation' is required to be proven. There are various examples in the reported case law where scouts and drivers of getaway vehicles have been charged with and convicted of robbery with aggravating circumstances on grounds of common purpose. See for example *S v Khala*,²³ where the sole basis for appellant's conviction of robbery with aggravating circumstances and

¹⁸ At paras [24]-[25] of the judgment.

¹⁹ E.g., *S v Nkwenja en 'n Ander* 1985 (2) SA 560 (A); *S v Mgedezi and Others* 1989 (1) SA 687 (A).

²⁰ E.g., *Thebus and Another v S* 2003 (6) SA 505 (CC).

²¹ 1963 (1) SA 692 (A) at 694F-H.

²² At para [25] of the judgment.

²³ 1995 (1) SACR 246 (A).

attempted murder was that he was the driver of the getaway vehicle from which the robbers alighted to commit the crimes and in which they escaped with their booty after the fact. The same can be said of the decision in the case where the conviction of the 'people's poet', *Mbuli*,²⁴ of robbery with aggravating circumstances was upheld in the following fashion:²⁵

"The circumstances in which the accused were found, together with one another and with the stolen money and the items that were used in the robbery, in the absence of an alternative explanation, admits of no inference but that they were all parties to a common purpose to rob the bank and that each played some role in furthering that common purpose. Whether or not the appellant was one of the men who actually entered the bank to perpetrate the robbery (of which there is no reliable evidence) is accordingly not material. In my view he was correctly convicted and his appeal against that conviction must fail."

18.2 Secondly, the Court's reliance on *S v Van Wyk*²⁶ and *S v Ngubane*²⁷ in its argument that the convictions of the two appellants could not have been justified on grounds thereof that they "were also accomplices with respect to the perpetration of the aggravating circumstances" because no evidence was led to prove, beyond reasonable doubt, that the two appellants had "subjective foresight of a reasonable possibility ... that aggravating circumstances would be perpetrated by third or fourth appellant", appears to be misplaced. Whilst *Van Wyk* provides for a useful exposition on what *dolus eventualis* is as far as the crime of murder is concerned, and how subjective

²⁴ *S v Mbuli* (422/2001) [2002] ZASCA 78 (7 June 2002).

²⁵ At para 69 of the judgment.

²⁶ 1992 (1) SACR 147 (NmS) at 161b.

²⁷ 1985 (3) SA 677 (A) at 685D-F.

foresight of the eventuality of the intended result (death) ensuing can be proven through inference, it does not deal with subjective foresight that 'aggravating circumstances' might be perpetrated by co-offenders in the case of robbery. *Ngubane* on the other hand, constitutes an investigation into whether *dolus eventualis* excludes *culpa* (negligence); and, whether a person convicted of murder with a knife should have been convicted of murder or of culpable homicide in a case where the prosecutor indicated his willingness to accept a plea of guilty on the competent verdict of culpable homicide where the initial charge was murder. Again, this case has nothing to do with proof that accomplices to robbery (which was committed with aggravating circumstances by the real perpetrators thereof) must have been proven to have had subjective foresight that 'aggravating circumstances would be perpetrated' by the real perpetrators. Unfortunately, the Court did not deal with the fact that the rejection of the relevant two appellants' version of their involvement could not have led to an inference that they knew (or, at least, subjectively foresaw) that, in case of resistance by the victim, the other two appellants would have used force to commit the robbery and, that such force might have included 'aggravating circumstances' in any of the defined forms. In my view, on the evidence as summarised by the Court²⁸ and, on rejection of the appellants' exculpatory versions, an inference would have been justified that all four the appellants knew (or, at least, subjectively foresaw) that the robbery might be committed in circumstances, where a dangerous weapon would be used or, where grievous bodily harm would be inflicted or, that at least a threat of the infliction of grievous bodily harm would be present during

²⁸ At paras [4], [7]-[20] of the judgment.

the commission of the robbery. Any other inference would have required far-fetched speculation such as that the two actual perpetrators were not prepared to use any serious force to succeed in their goal. In any event, this whole exercise could have been avoided if the doctrine of common purpose was correctly identified and applied to the facts before the Court.

18.3 In the third place, the trial magistrate *a quo* in *Masingili* found that substantial and compelling circumstances existed to impose a lesser sentence than the minimum sentence of fifteen (15) years imprisonment prescribed by section 51(2)(a)(i) of the Minimum Sentencing Act. The 'scout' (first appellant) was sentenced to eight (8) years imprisonment of which two (2) years were conditionally suspended, whilst the driver of the getaway vehicle (second appellant) was, like the other two (the real perpetrators - third and fourth appellants) sentenced to ten (10) years imprisonment of which two (2) years were conditionally suspended. There was therefore, in my view, no necessity for the Court of Appeal to deal with the question of whether 'aggravating circumstances' were at all present during the commission of the robbery, since that qualification is only required to determine whether a minimum sentence must be imposed. The 'scout' in any event received a lesser sentence than did the others, whilst the 'driver', in my view, could just as well have been treated on the same footing as the other two. There was no need for the Court of Appeal to determine whether, in the case of the first and second appellants, the 'aggravating circumstances' of the robbery could also be attributed to them, in order to determine whether another sentence should have been imposed. If the Court felt that first and second appellants should

have been treated more leniently in the light of their relatively lesser roles in the robbery, it could have done so without having to tamper with the definition of 'aggravating circumstances' in the Criminal Procedure Act. In other words, there were less invasive means available to the Court of Appeal to deal with the question at hand than by constitutionally invalidating a phrase in legislation that has, hitherto, played a substantive and helpful role in distinguishing between ordinary robbery and more serious robbery as far as sentence is concerned.

18.4 In this regard, it must be noted that the definition of 'aggravating circumstances' in relation to, *inter alia*, robbery had been inserted in the Criminal Procedure Act, mainly to justify the imposition of a heavier sentence than life imprisonment, namely the death penalty, in certain circumstances. Since the death penalty has been abolished, it plays no other role than to justify the imposition of heavier sentences than short term imprisonment in appropriate circumstances, and there appears to be no need to tamper with it in order to escape the possibility of minimum sentences being imposed. Such possibility can be evaded if the lesser roles played by certain accomplices in the commission of such robberies are regarded as 'substantial and compelling circumstances' justifying the imposition of lesser sentences than those called for in terms of section 51(2)(a) of the Minimum Sentencing Act; and, it is not necessary for constitutional invalidation of the definition of 'aggravating circumstances' to achieve such a goal. The question of the constitutionality of the definition was therefore neither moot nor ripe for purposes of judicial consideration.

18.5 Lastly, in my view, the Court of Appeal also lost sight of the fact that, in other cases before this decision saw the light of day, it might have been more difficult (if not impossible) than in the case before it to determine the specific role of appellants in the commission of robbery. What, one may ask, would be the position when, all that links a specific appellant to a specific robbery with aggravating circumstances in a particular case is circumstantial evidence, for example the possession of recently robbed or stolen goods without being able to provide an exculpatory explanation therefor. This is the situation in the matter before us. On the evidence it cannot be said that any of the three accused persons were involved in the actual perpetration (or rather execution) of the robbery or that any of them wielded fire arms during the commission thereof. In the light thereof that Siyema testified that at least one of the people he saw on the back of the Rustler bakkie wielded an assault rifle, and because accused no 1 pointed out a fire arm linked to the robbery, accused no 1 may be said to have known that at least some of the other robbers used fire arms in the commission of the crime. The same can however not be said as far as accused no's 2 and 3 are concerned. The only way in which they can be attributed the consequences of aggravating circumstances having been present during the commission of the robbery, is by inferential reasoning that, because there is enough evidence to infer that they participated in the robbery, and, because the robbery was so carefully planned and executed (almost as if it was a military operation), all of them knew (or must have known) that serious violence or, at least, threats of serious violence would have been employed to effect the robbery.

[19] In my view, therefore, the *Masingili* decision is wrong in law and need not be followed in, at least, this Division, until such time that a higher court (like the Constitutional Court) confirms it - a prospect that I find highly unlikely to happen. Thus, especially because "magistrates' courts are portion not of the hierarchical structure of the Supreme Court but of a country-wide organization of inferior tribunals" and, therefore, that they are bound by decisions from other Divisions in cases where no precedent exists in decisions of the High Court with jurisdiction over their respective areas of jurisdiction,²⁹ I declare that the *Masingili* decision is not binding in the area of jurisdiction of the North and South Gauteng High Courts. It follows that the appellants' appeal against their convictions cannot succeed.

The acquittal of accused no 1 on counts 2 and 3

[20] There is however one more thing that I find a little disconcerting. There appears to have been evidence cogent enough to establish the guilt of accused no 1 on counts 2 and 3, at least in as far as it could be said that he unlawfully possessed a 9mm pistol and some rounds of 9mm ammunition. After all, he is the one who pointed the fire arm out. Yet, he was, like his co-accused, who could not have been convicted on those counts in the light of the *ratio* of the *Mbuli* decision,³⁰ acquitted as far as those allegations are concerned. The trial magistrate appears to have accepted that, because the witness who forwarded the fire arms for forensic or ballistic testing, Constable Rabat, indicated that the particular 9mm pistol bore the serial no 0732P, while the ballistic report that was formally admitted to be correct

²⁹ See HR Hahlo and E Kahn *The South African Legal System and Its Background* (1973) 257. See also *S v Mavuso* 1989 (4) SA 800 (T) where this particular assertion by Hahlo and Kahn was approved of.

³⁰ *S v Mbuli* *supra* footnote 24 at paras [70]-[72] of the judgment.

indicated that the particular fire arm did not bear any serial number, there existed reasonable doubt in whether these counts have been properly proven against accused no 1.³¹

[21] In this regard the magistrate lost sight of the fact that Rabat had established the serial no through an 'etsproses', through which, we know from experience in similar cases, a certain kind of acid is used to determine the serial no of a fire arm of which the serial no had been obliterated.³² It would appear that the magistrate was not aware of what an 'etsproses' exactly entailed, and that, as soon as a serial no of a fire arm has been revealed through etching, it disappears after some time. Unfortunately, Rabat was not asked to explain this. I know that, had this fact been explained to the satisfaction of the court *a quo*, it could not have entertained any doubt as to the evidence pertaining to accused no 1's possession of the fire arm and ammunition mentioned.

[22] This observation is however largely academic since I do not think that accused no 1 should have received a heavier sentence than his co-accused due to the fact that his guilt was established also in relation to his unlawful possession of a fire arm and ammunition; and, secondly, because the state does not have a right to appeal a wrong finding of fact in a criminal matter. Magistrates faced with similar situations in future should however be alive to what has been said above and, when in doubt, they should question the experts who testify before them to ascertain the true facts before concluding that some facts must necessarily lead to doubt and, ultimately, an acquittal. In appropriate cases they might even be required to see to it

³¹ See pp262-3 of the appeal record.

³² See Rabat's evidence at pp153-155 of the appeal record.

that justice is done by calling for evidence to be placed before them in terms of sections 167 or 186 of the Criminal Procedure Act so that they can reach a just decision in every case. This, it was held in *Director of Public Prosecutions, Transvaal v Mtshweni*,³³ is a duty which, in appropriate circumstances, rests on a trial court that, if it is neglected, may lead to its decision being overturned on appeal.³⁴ We could have used the same *ratio* here to set aside the acquittal of accused no 1 on counts 2 and 3 but, firstly, the state did not appeal the case on that basis; and, secondly, the double jeopardy principle enshrined in section 35(3)(m) of the Constitution would in all probability bar a retrial of accused no 1 on these counts (especially since a conviction on those counts would not necessarily have led to a heavier effective sentence being imposed).

Sentence

[23] No leave to appeal was granted in respect of sentence and none of the appellants petitioned for leave to appeal their sentences. In the light of the facts of the matter and the reasoning of the trial magistrate during the sentencing process, I also feel that there is no reasonable prospect that a Court of Appeal would have intervened with the sentences since no substantial or compelling circumstances could have been found to exist justifying a lesser sentence than the ones imposed

³³ [2007] 1 All SA 531 (SCA).

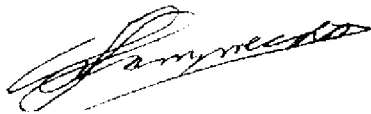
³⁴ At paras [20]-[26] of the judgment the SCA indicated that, whenever a court is of the opinion that evidence (or clarification of evidence) might be required for a just decision of the case before it, the court is mandated to call or recall witnesses under the relevant provisions of the Criminal Procedure Act. In this matter, the SCA set aside an acquittal and authorized a retrial where the presiding judge, in similar circumstances were required to call for proper ballistic evidence before making a finding that was adverse to the prosecution. See also the famous remark by Curlewis JA in *R v Hepworth* 1928 AD 265 at 277: "A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figurehead, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that the justice is done."

on each of the appellants. I therefore do not think it necessary to invoke this Court's inherent powers of review to alter the sentences imposed on each appellant.

The order

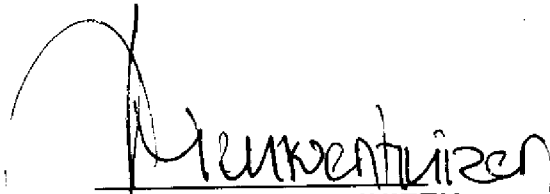
[24] In the light of the above I would propose that an order in the following terms be made:

"That the appeal be dismissed (and the convictions of the appellants on one count of robbery with aggravating circumstances with the resultant sentences of fifteen (15) years imposed in terms of section 51(2)(a)(i) of the Criminal Law Amendment Act 105 of 1997 be upheld)."



**A A LAMPRECHT
ACTING JUDGE OF THE
NORTH GAUTENG HIGH
COURT**

**I agree and it is so
ordered**



**N JV NIEUWENHUIZEN
ACTING JUDGE OF THE
NORTH GAUTENG HIGH
COURT**

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