



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

CASE NO: **CA&R23/23**

DATE HEARD: **20 NOVEMBER 2023**

In the matter between:

OLIVIER, SOLOMON

First Appellant

OLIVIER, THABO

Second Appellant

and

THE STATE

Respondent

Quorum: Lever J et Nxumalo, J

JUDGMENT: APPEAL

Per NXUMALO, J

INTRODUCTION

- [1] The appellants in these proceedings were convicted in the Northern Cape Regional Court (Galeshewe) on the following counts: (a) robbery with aggravating circumstances; and (b) kidnapping. Both counts are to be read with the provisions

of section 51(2) of the Criminal Law Amendment Act 105 of 1997.¹ They were subsequently sentenced as follows, on 19 March 2021: Count 1, first appellant was sentenced to 20-years imprisonment and second appellant to 15-years. Count 2, both appellants were sentenced to 5-years imprisonment each. Consequently, both appellants were declared unfit to possess firearms in terms of section 103 (1) of the Firearms Control Act 60 of 2000.

- [2] The appellants thereafter on 05 July 2021, unsuccessfully applied for leave to appeal against both their respective convictions and sentences. They then directed a petition to the Judge President, who granted them leave to appeal both their convictions and sentences on 08 February 2023. The appellants were legally

¹ The said section expressly stipulates as follows:

“Discretionary minimum sentences for certain serious offences

...
(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-

(a) Part II of Schedule 2, in the case of—

(i) a first offender, to imprisonment for a period not less than 15 years;
(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;

(b) Part III of Schedule 2, in the case of—

(i) a first offender, to imprisonment for a period not less than 10 years;
(ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and
(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years;

(c) Part IV of Schedule 2, in the case of—

(i) a first offender, to imprisonment for a period not less than 5 years;
(ii) a second offender of any such offence, to imprisonment for a period not less than 7 years; and
(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years; and

(d) Part V of Schedule 2, in the case of—

(i) a first offender, to imprisonment for a period not less than 3 years;
(ii) a second offender of any such offence, to imprisonment for a period not less than 5 years; and
(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 7 years;

Provided that the maximum term of imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than five years.”

represented in the court *a quo* and remained in custody after their arrest up until their convictions. Before this Court, they were represented by the Legal Aid Board of South Africa, with the necessary special power of attorney to prosecute this appeal on their behalf.

THE GROUNDS OF APPEAL AND RELIEF SOUGHT

- [3] The appeal is directed against the convictions and the resultant sentences. The relief sought by the appellants is the setting aside of the impugned convictions, alternatively that the appeal against the sentences be upheld.
- [4] The grounds of appeal are that the court *a quo* erred as follows: (a) in accepting the single evidence of the complainant in convicting the appellants; (b) in not finding that the count of robbery with aggravating circumstances and the kidnapping count amounts to a duplication of convictions; (c) in not finding that the appellants' versions are reasonably possibly true; and (d) in finding that the State has proven its case beyond reasonable doubt, despite the fact that the firearm of the complainant was not robbed and he was told that he can get his car somewhere between Warrenton and Christiana; (e) in not finding that there are substantial and compelling circumstances to deviate from the prescribed minimum sentences; and (f) in not ordering the sentences in counts 1 and 2, to run concurrently.
- [5] The respondent, for its own part, entreated this Court to dismiss this appeal, on the basis that: (a) the court *a quo* was correct in accepting the impugned evidence of the state witnesses, especially the complainant's version and dismissing the

versions of the appellants as not reasonably possibly true; (b) there is no duplication of charges in respect the charges on which they were convicted; and (c) there is no substantial or compelling circumstances to deviate from the prescribed minimum sentences. In sum, the respondent contended that the version of the appellants on all counts could not be reasonably possibly true, when the evidence is evaluated holistically.

ISSUES FOR DETERMINATION

[6] In the premise, the following issues ought to be determined in this appeal.

Whether the court a quo erred in accepting the single evidence of the complainant in convicting the appellants

[7] The appellants submitted that the evidence of the complainant was not clear and satisfactory in every material respect. The appellants contended that the complainant initially gave a completely different version of how the events unfolded when he opened the case, as opposed to his evidence in the court *a quo*; the appellant's versions in court and to the police differ *inter-alia* as follows: (a) during his evidence-in-chief, he testified that at all material times hereto, he was with one Lerato, and they stopped at some open place for him to relieve himself. As he was doing so, after alighting from his vehicle someone came running towards him; (b) when he saw this person, he reached for his service pistol from the vehicle and breeched it just before he was grabbed by the suspects.²

² p44, line 10 – p46, line 1, Record.

[8] That the foregoing stands in stark contrast with what he said in his statement to the police; *to wit*: that he stopped his vehicle at some intersection, after doing so, some unknown male persons assailed him; one of them pointed a firearm at him and ordered him to stop his motor vehicle at the side of the road;³ he then resisted and wrestled with his assailants; while doing so, the assailants tried to disarm him; a shot went off and hit one of the attackers in the leg.⁴

[9] To the contrary, in his testimony, he stated that four suspects first demanded money from him whilst he was in his vehicle. One of them pointed what appeared to be a firearm at him and instructed him to drive the vehicle and stop somewhere in the veld. Three of the suspects got out of the vehicle. When he noticed that what was pointed at him was not a real firearm, he took his pistol from the vehicle and sought to flee. He was grabbed by someone. He then turned around and shot the person who was holding him. Whilst in his statement, he stated that they told him that he can loosen himself, which he did, during his examination-in-chief, he testified that it was actually one of the suspects who untied his feet.⁵

[10] Whilst he testified that one of the assailants gave his service pistol to Lerato and that when Lerato gave the pistol to him, he realised that the pistol's magazine has been removed.⁶ To the contrary, in his statement, he stated that one of the suspects took and removed the magazine from pistol and gave the latter back to

³ Exhibit C, p594, *ibid*.

⁴ p45, line 23 – p46, line 1, *ibid*.

⁵ p58, line 7, *ibid*.

⁶ p59, line 12 – p60, line 3, *ibid*.

him without the former.⁷ The appellants also pointed out that the complainant admitted to giving an incorrect statement when he initially opened his case.

[11] In the premise, it was submitted for the appellants that the complainant's dishonesty negates his evidence and that his testimony is not clear and satisfactory in every material aspect.

[12] The respondent, for its own part, maintained that the appellant's testimony was sufficiently treated with caution by the court *a quo*. That it was evidently clear from his failure to even recognise his own superior officer, Captain Williams at the station that he was traumatised and emotional after the incident. The second affidavit which he wrote himself was in all material aspects similar to his testimony. This Court notes that the witness actually testified that he was grabbed and pushed to the ground and whilst wrestling for the service pistol, a shot went off and hit one of his assailants in the leg.⁸

[13] It is settled law that in order to succeed on appeal, an appellant must convince the appellate court on adequate grounds that the trial court was wrong in accepting the evidence of an impugned witness. An appellate court will not interfere lightly with the findings of the court *a quo*. It is so simply because the trial court is in a much better position to evaluate the credibility and demeanour of witnesses, whilst

⁷ Exhibit C, p 596, *ibid*.

⁸ p45, line 23 – p46, line 1, *ibid*.

testifying.⁹ Reasonable doubt is not sufficient to justify interference with its findings.¹⁰

- [14] Whilst it is so that to the extent that the complainant was a single witness in the court *a quo*, his evidence should be treated with caution. It is also so that an accused may nevertheless be convicted of any offence on the strength of the evidence of any single competent witness.¹¹ In ***S v Mahlangu and Another 2011 (2) SACR 164 (SCA)***, the following was stated at paragraph 21:

*"The Court can base its finding on the evidence of a single witness, as long as such evidence is substantially satisfactory in every material respect, or if there is corroboration."*¹²

- [15] Despite the fact that there are shortcomings or defects or contradictions in the complainant's various statements, I am satisfied that his ultimate testimony in the court *a quo* was substantially truthful. An appeal does not succeed merely because the testimony of a particular witness is not above any criticism however slender.¹³

- [16] Bearing in mind the advantage which the trial court had of seeing, hearing and appraising the complainant. Also bearing in mind the corroborative evidence and the common material facts in the complainant's previous statements and his

⁹ *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705.

¹⁰ *S v Francis* 1991(1) SACR 198 (A).

¹¹ Section 208 of the Criminal Procedure Act 51 of 1977 ("the CPA").

¹² Emphasis supplied.

¹³ *S v Sauls and Others* 1981 (3) SA 172 (A).

testimony, I am not convinced that the court *a quo* erred in accepting the evidence of the complainant in convicting the appellants. I am fortified in this conclusion because there is corroboration of the material facts, regard being had to the evidence viewed holistically.¹⁴

The next question to be considered is whether the court a quo erred in not finding that the simultaneous conviction of the appellants on counts of robbery with aggravating circumstances and kidnapping amounts to a duplication of convictions

[17] Section 83 of the CPA, expressly permits the State, where it is doubtful which of several offences is constituted by the facts of a case, to charge an accused with the commission of all or any of such offences. The accused may also be charged with different counts in the alternative. Such counts may be tried together. It is however trite that in such a case, an accused may not be convicted of all charges if more than one charge or conviction results from the same criminal act or transaction.

[18] It was submitted for the appellants that regard being had to the complainant's testimony, the charge of kidnapping is part and parcel of the robbery. It was also submitted that regard being had to the wording of the charge sheet, with reference to the charge of kidnapping, it is evident that both offences amount to a single criminal transaction. The appellants contended that the foregoing is evinced by the

¹⁴ *S v Mahalangu (supra)*

fact that the aggravating factors contained in the robbery count; to wit: the taking of the vehicle and pointing of the pistol are also contained in the impugned charge.

[19] The charge sheet's relevant part reads as follows:

*"...accused did unlawfully and intentionally deprive Kingsley Nodoba of his freedom of movement **by means of pointing him with a pistol and taking him to a veld and taking his motor vehicle from him.**"*¹⁵

[20] The respondent, for its own part, submitted that the application of force by tying the feet of the complainant and pointing him with a firearm at the second scene near the shooting range was not a single continuous transaction of robbery that commenced and ended at the first scene. That the former was a separate or discrete incident in terms of which the complainant's freedom of movement was restricted to enable the robbers to get medical attention for the first appellant and to enable others to flee.

[21] That the robbery took place and was completed at the first scene where the shooting took place and the property of the complainant taken. The robbery was therefore no longer in progress when the appellants, together with the complainant and one Lerato drove to a different spot in the veld where the victims and two of the robbers (including the second appellant) were left.¹⁶ That at the said scene one

¹⁵ Emphasis supplied.

¹⁶ The second scene.

of the robbers still had the firearm and the complainant's hands and feet were fastened to make sure he was unable to get away. That the victims spent two to three hours at that particular spot in the veld, before regaining their freedom.¹⁷

[22] It was also submitted for the respondent that the fact that the complainant was deprived of his freedom of movement after the robbery is a clear indication that a new intent was formed to continue with the kidnapping. That by kidnapping the complainant, it gave the robbers enough time to get away from Kimberley and seek medical assistance elsewhere. The fact that the complainant was let go in the end, was probably due to the chaos and panic caused by the injury sustained by the first appellant and the fact that the vehicle was no longer road worthy due to a burst tyre.

[23] Whilst there is indeed no infallible formula to determine whether in any particular case there has been a duplication of convictions, it is so that various tests have been formulated by our courts in this regard. A logical point of departure is to consider the definition of those offences in regard to which a possible duplication might have taken place.¹⁸ Another test is to ask whether two or more acts were performed with the same intent such that it constitutes one continuous criminal transaction. Yet another is to ask whether the evidence necessary to establish one crime involves proving the other.¹⁹

¹⁷ p56, Record.

¹⁸ *S v Whitehead and Others* 2008 (1) SACR 431 (SCA) at para 36.

¹⁹ *S v Maneli* 2008 (3) All SA 155 (SCA) at para 8.

[24] It is so that robbery consists in the theft of property by intentionally using violence or threats of violence to induce submission to the taking of it from another. The essential elements of robbery are theft; violence; submission and intention. Robbery thus, unlike theft, is not a continuing crime. It is complete once a *contrectatio* is effected. Kidnapping on the other hand, consists in unlawfully and intentionally depriving a person of liberty or freedom of movement and/or his custodians of control.²⁰

[25] The following can be deduced from foregoing, regard being had the proven facts and circumstances of this case: (a) the offence of robbery was complete once a *contrectatio* was effected; (b) there (are) different periods and places at which the two offences were discretely committed; (c) the nature of the appellants' actions and the *acta reus* pertaining to both offences are distinguishable; (d) the intentions of the appellants with regard to the said offences are different; and (e) the evidence necessary to establish the former does not involve proving the latter. These are important considerations in assessing whether there has been a duplication of convictions.

[26] I am therefore convinced that the two offences were carried out separately and were not part of one operation carried out at the same time or place. It is for these reasons, that I am satisfied that the court *a quo* correctly convicted the appellants

²⁰ p 758 Jonathan Burchell, Principles of Criminal Law, 3rd Edition.

on separate counts of robbery with aggravating circumstances as well as kidnapping.

Proceeding to the next question for consideration, being whether the court a quo erred in not finding that the appellants' versions are reasonably possibly true

[27] It is so that a court does not have to be convinced that every detail of an accused version is true. If the accused version is reasonably possibly true in substance, the court is obliged to decide the matter on the acceptance of that version. Whilst the appellants conceded that their versions were not free from criticism, it was contended for them that same cannot be said to be so improbable that it cannot be reasonably possibly true.

[28] The appellants' version in sum is that they travelled all the way from Brits and ended camping in the said veld for days, being a rendezvous with some person or persons for an illicit diamond deal.

[29] The respondent, for its own part in the main, contended that even if the appellant's versions were to be true; to wit: that they robbed the complainant and later decided to return his service pistol without the magazine and to abandon his vehicle somewhere between Warrenton and Christiana on the N12, due to a tyre burst. The foregoing does not mean that they did not rob the complainant of his vehicle, pistol and money.

[30] The following is noteworthy and unusual with regard to the appellants' version: (a) none of them mentioned the said diamond deal in their warning statements; (b) none gave any satisfactory explanation as to why they needed money for fuel when they were supposed to have had thousands of rand available for the said deal; (c) they gave different versions of how the shooting came about nor could they explain why the first appellant who was shot, was abandoned next to a bridge instead of being taken to hospital to receive the necessary medical treatment.

[31] In the overall context, I too am of the opinion that regard being had to the facts and circumstances of this case, the appellants' version is so improbable that it cannot reasonably possibly be true. I therefore find that the court *a quo* did not err in its finding in this regard.

The next question to be considered, is whether the court a quo erred in finding that the State has proven its case beyond reasonable doubt

[32] It is trite that in criminal proceedings, it is incumbent on the prosecution to prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough.²¹

[33] It was submitted in sum for the appellants that to the extent that the complainant's service pistol was ultimately returned to him, it evinces that the appellants had no intention to deprive him permanently of same. With regard to the robbery of the

²¹ *S v Shackell* 2001 (4) SA 1 (SCA) at para 30.

motor vehicle, it was contended for the appellants that since the appellants informed him of its whereabouts, same was in fact and law also not robbed. In the premise, it was submitted that the court *a quo* erred in convicting the appellants of robbery of all the items in question.

[34] The respondent, for its own part, in sum maintained that regard being had to the totality of evidence and the probabilities, the appellants' guilt was proven beyond reasonable doubt on both charges.

[35] Section 1 of the Criminal Procedure Act 51 of 1977, for its own part, defines "aggravating circumstances" for the purposes of robbery or attempted robbery as (i) the wielding of a fire-arm or any other dangerous weapon; (ii) the infliction of grievous bodily harm; or (iii) a threat to inflict grievous bodily harm 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.

[36] The appellants' contention that the mere return of the robbed items vitiates the conviction of robbery is flawed on at least three grounds. *First*, the essential elements of robbery were proved beyond reasonable doubt are theft; violence or threats of violence; submission and intention. *Second*, robbery, even though a form of theft, unlike theft, is not a continuing crime. To the extent that robbery is theft accompanied by assault, it is complete once *contrectatio* is effected. It is so since

it involves two *acti rei*, i.e. (a) the taking of the property; and (b) the performance of an act of violence upon the person of another.²²

[37] I am of the opinion that the respondent proved the foregoing essential elements of the offence of robbery beyond reasonable doubt.

Then, the following question to be considered is whether the court a quo erred in not ordering the sentences in counts 2 and 1, to run concurrently

[38] It was submitted for the appellants that the court a quo erred by not ordering that the sentence in count 2 and 1, to run concurrently. It is so that a court may order sentences imposed in respect of various counts to run concurrently. This may however only be done if and only if the evidence shows that the said offences are so inextricably linked in terms of locality, time, protagonists and seminally; the fact that they were committed with one common intent.²³

[39] As it can be deduced above, I am of the opinion that even if the offences in question may have had the same protagonists or committed with one common intent, the fact remains that they were not committed simultaneously. Nor are they inextricably linked in terms of the locality or time. In the premise, I find that the court below did not err in not ordering the said sentences to run concurrently.²⁴

²² *S v Moloto* 1982 (1) SA 844 (A) at 850A; *S v Salmans* [2006] JOL 16343 (C); see also *S v Dlamini* 2012 (2) SACR 1 (SCA) at para 50.

²³ *S v Mokela* 2012 (1) SACR 431 (SCA).

²⁴ *cf S v Dlamini* 2012 (2) SACR 1 (SCA).

The final question for consideration is whether the court a quo erred in not finding that there are substantial and compelling circumstances to deviate from the prescribed minimum sentences.

[40] Having been convicted of robbery with aggravating circumstances and kidnapping, it is trite that the appellants ought to have shown that 'substantial and compelling circumstances' existed which justified the imposition of lesser sentences in terms of section 51(3)(a) of the Act. The general approach is that where a prescribed sentence is imposed, the pertinent question of course is whether the facts and circumstances of the convict are indeed substantial and compelling or not.²⁵ The first appellant presented with the following personal circumstances at the time of the sentencing proceedings: he was 36 years old and unmarried and an unemployed casual worker; he has three children aged 7, 3 and 2 years, respectively; he only completed grade 9; he was sentenced on 19 March 2021, having been in custody since his arrest during August 2019 (he was thus in custody awaiting trial for 1 year and 7 months); he has two previous convictions of robbery and one of assault; and he was on parole during the commission of the current offences.

[41] The second appellant, for his own part, presented with the following personal circumstances: he was 24 years old, unmarried with no children; he lived with his father and sister; his mother passed away during 2019; he left school in grade 7 because of financial constraints; he did casual work when the opportunity

²⁵ *S v PB* 2013 (2) SACR 533(SCA) at 539F-G.

presented itself; he was a first offender; and he was arrested in September 2019 and sentenced on 19 March 2023 and had therefore awaited trial in custody for approximately 3 years and five months.

[42] Whilst the appellants conceded that the offences they are convicted of are serious in nature, they nevertheless enjoined this Court to consider the following factors in mitigation: they were not in possession of the firearm prior to the robbery, same was taken from the complainant and given back to him later; the complainant had not sustained any serious injuries; the firearm was discharged by the complainant himself; the complainant was subsequently informed of the whereabouts of his vehicle.

[43] It is trite in our law that when it comes to sentencing, the Court has to take into account the triad consisting of the crime, the offender and the interests of society, as expounded in **S v Zinn** 1969 (2) SA 537 (A) at 540G-H. The corollary of this is that punishment should not only fit the criminal as well as the crime, but must also be fair to society, whilst being blended with a measure of mercy according to the facts and circumstances of each case.²⁶

[44] Section 51 of Act 105 of 1997 (*'the minimum sentences legislation'*) expressly *inter-alia* provides that a conviction of robbery with aggravating circumstances or motor vehicle "hijacking" attracts a minimum sentence of 15 years, for a first

²⁶ **S v Rabie** 1975(4) SA 855 (A).

offender; 20 years, for a second offender and 25 years, for a third or subsequent offender.

[45] The proper approach of appellate courts regarding sentences imposed in terms of Act 105 of 1997, is whether the facts which were considered by the sentencing court are indeed substantial and compelling or not.²⁷ The determinative test as to whether there are any substantial and compelling circumstances to deviate from minimum sentences was laid down in **S v Malgas**²⁸; to wit:

"If the sentencing court on consideration of the circumstances of a particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime; the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence."

[46] I noted several aggravating circumstances pertaining to the appellants; inter-alia : the appellants travelled all the way from Brits to commit the said offences; they were dressed in dark clothing and balaclavas and hid away in the veld, for days waiting for unsuspecting members of the public to rob; this robbery was accompanied by the assault of the complainant and unlawfully and intentionally depriving him of liberty of movement; the appellants acted with common purpose; the robbery was planned and premeditated; both offences involved a motor vehicle

²⁷ **S v PB** 2013 (2) SACR 533 (SCA).

²⁸ 2001 (2) SA 1222 (SCA) at para 25.

and a firearm; and the complainant sustained some injuries and was traumatised after the events.

[47] It is so that robbery, by its very nature is a more serious crime than the sum total of its parts. The minimum sentences prescribed, according to Act 105 of 1997, for robbery with aggravating circumstances, are a clear indication that the Legislature deemed this a very serious offence. It is punished in terms of Act 105 of 1997, precisely because it jeopardises public security generally and the freedom of the security of person and property in particular.

[48] The risk to life and limb involved in the robbers' traditional reliance upon weapons to induce fear in their victims adds to the society's abhorrence to this type of crime. It is therefore imperative for our communities to be protected from heinous offences such as the one the appellants have been convicted of. Robbers induce a greater sense of fear in the public than the ordinary thief or confidence trickster. They display greater ruthlessness that enables them to callously and openly use violence or terror to induce their victims to submit to the taking of their property.

[49] In ***S v Myute and Others*** 1985 (2) SA 61 (CK) at 62D – F, the following remark was made:

"Magistrates should never lose sight of the fact that robbery is a most serious crime. The offence consists of the two elements of violence and dishonesty."

Normally an individual can avoid situations which lead to violence and the danger of his being assaulted by taking the necessary precautionary measures. Similarly, he can take steps to guard against his property being stolen. It is, however, a different matter when it comes to robbery. The victim cannot take precautions against robbery. In his day-to-day living he visits friends, goes to work and goes shopping. This is usually when robbers strike. Robbers often roam the townships in gangs, attacking innocent people, depriving them of their property and almost invariably injuring the victims, sometimes seriously. The persons robbed are more often than not women or elderly people who cannot defend themselves. It must also be remembered that robbery is always a deliberately planned crime."

[50] In the **S v Gardener and Another**,²⁹ it was aptly stated as follows that:

"[68] True justice can only be meted out by one who is properly informed and objective. Members of the community, no matter how closely involved with the crime, the victim or the criminal, will never possess either sufficient comprehension of or insight into what is relevant, or the objectivity to analyse and reconcile them, as fair sentencing requires. That is why public or private indignation can be no more than one factor in the equation which adds up to a proper sentence and why a court, in loco parentis for society, is responsible for working out the answer."

[51] The interest of the society had to be taken into consideration. It is so that the crimes the appellants have been convicted of are veritable pandemic in this

²⁹ 2011 (1) SACR 570 (SCA).

country, as matters stand. In **S v WV** 2013 (1) SACR 204 (GNP), the Court held the following, which is very apposite in this appeal:

*"It is the kind of sentence which we impose that will drive ordinary members of our society either to have confidence or to lose confidence in the judicial or justice system. **The sentences that our Courts impose when offences of this nature are committed, should strive to ensure that people are not driven to take the law into their own hands, but rather to scare away would-be offenders.**"*³⁰

[52] I have taken the personal circumstances of the appellants into full consideration vis-à-vis the seriousness of the crime. In **S v Vilakazi** 2012 (6) SA 353 (SCA) at para 58 of its judgment, the Penultimate Court said the following:

*"In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided."*³¹

[53] In **S v Malgas**, the following was said:³²

³⁰ Emphasis supplied.

³¹ Emphasis supplied.

³² 2001(1) SACR 496(SCA) at para 25.

*“...those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. **The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances...**”³³*

[54] Regard being had to the seriousness of this crime, I am of the well-considered opinion that the personal circumstances of the appellants by themselves necessarily recede into the background. They seem to be the kind of flimsy grounds that **Malgas** said should be avoided. They are because it is clear that the crime is deserving of a substantial period of imprisonment.

[55] I am of the opinion that given the difference in the personal circumstances of the two appellants, the Court *a quo* clearly was correct in differentiating between the two appellants when sentencing them. I am also of the well-considered opinion that there are no substantial or compelling circumstances prevailing to depart from the minimum sentence contemplated in section 51 (2)(a) of the Criminal Law Amendment Act 105 of 1997.

³³ Emphasis supplied.

ORDER

[56] In the premise, I would issue the following order:

- (a) **The appeal against the convictions and sentences of the appellants are hereby dismissed.**




PP **APS NXUMALO**
Judge of the Northern Division, Kimberley

I concur.




LG LEVER
Judge of the Northern Division, Kimberley

APPEARANCES

Appellants' Legal Representative: Mr H Steynberg, Legal Aid South Africa,
Kimberley

Respondent's Legal Representative: Ms CG Jansen, Office of Director of Public
Prosecutions, Northern Cape, Kimberley