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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: A082/2022

SS21/2017

DPP REF NO: JPV 2017/044

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

JUDGE KUNY

9 September 2024

In the matter between

SIBUSISO JOB MNISI

Appellant 1

PRINCE RAPHAEL DUBE

Appellant 2

MANAKA FRANS MATHABATHA

Appellant 3

and

THE STATE

JUDGMENT

KUNY J:

1. On 7 March 2016, in an extraordinarily brazen robbery, money comprising bank notes said to be worth approximately R22 million, was stolen from the apron of the runway at OR Tambo International Airport (“ORT”), before it could be loaded onto flight SA234. Following upon the robbery a national task team, comprising 42 members of the South African Police Services, was convened to investigate the crime and attempt to apprehend the perpetrators.

2. This is an appeal, with the leave of the court *a quo* granted on 3 July 2019, against the conviction and sentence of the appellants arising out of the aforesaid robbery. The appellants, respectively cited as accused 1, 2 and 4 at the trial are:

2.1. Sibusiso Job Mnisi (Appellant 1), a 39 year old male residing at [...], L[...] Street, Elandsfontein,

2.2. Prince Raphael Dube (Appellant 2), a 44 year old male residing at [...] S[...] J[...] St, Norkem Park,

2.3. Frans Mathabatha Manaka (Appellant 3 - (Accused 4)), a 26 year old male residing at 3[...] M[...] Section, Tembisa.

2.4. At the start of the proceedings, charges were withdrawn against accused 5 and at the end of the proceedings, accused 3, Simon Thokgedi Thokwane, was acquitted of the charges against him.

3. The appellants were charged with the following:

3.1. Count 1: Theft of a Toyota Double Cab registration number T[...]

belonging to Venditi.

3.2. Count 2: Contravention of section 68(1) alternatively, section 68(3) of the South African Police Services Act 68 of 1995 (False Representation).

3.3. Counts 3: Robbery of 27 bags containing cash with aggravating circumstances as defined in Section 1 of Act 51 of 1977 read with Section 52 (2) of Act 105 of 1997 (referred herein as “with aggravating circumstances”).

3.4. Alternative to Count 3: contravening section 18(2)(a) of the Riotous Assemblies Act, No 17 of 1956 - Conspiracy to Commit Robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977, read with section 51(2) of Act 105 of 1997.

3.5. Counts 4 - 8: Robbery of cell phones with aggravating circumstances as defined in Section 1 of Act 51 of 1977 read with Section 52 (2) of Act 105 of 1997.

4. The alternative charge to count 3 (in terms of the Riotous Assemblies Act) was introduced by way of an amendment to the indictment at the start of the trial. The amended indictment was not included in the appeal record. However, it was clarified to this court in submissions made by counsel after the appeal was argued, that this alternative charge had in fact been put to the appellants and pleaded to. Section 18(2) provides as follows:

Attempt, conspiracy and inducing another person to commit offence

18(1)

(2) Any person who -

(a) conspires with any other person to aid or procure the commission of or to commit; or

(b) incites, instigates, commands, or procures any other person to commit,

any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

5. The indictment alleges as follows:

5.1. In respect of count 1 it was alleged that on or about 31 December 2016, at or near Orleans, Kya Sands, Johannesburg North, the appellants did unlawfully and intentionally steal a motor vehicle, to wit a Toyota double cab, registration number T[...], the property of and in the lawful possession of George Venditi.

5.2. In respect of count 2 it was alleged that on or about 7 March 2017, at or near ORT in the district of Ekurhuleni, the appellants did unlawfully and intentionally pretend to be members of the SAPS by representing themselves as such to the employees of ORT, while wearing police uniforms and driving a motor vehicle fitted with a blue light and marked as a police vehicle. Alternatively, it was alleged that they carried out activities that led the employees to believe or infer that such activities were carried out in terms of the provisions of the Act or under the patronage of the SAPS.

5.3. In respect of count 3 it was alleged that on or about 7 March 2017 the appellants did unlawfully and intentionally assault employees at ORT and did there and then, with force and violence, take 27 bags containing millions in cash, the property of Standard Bank, and therefore did rob the bank of same.

5.4. In respect of counts 4 to 8 it was alleged that the appellants did unlawfully and intentionally assault certain persons and did there and then, with force and violence, take cellular phones from them being their property in lawful possession, and therefore did rob them of the same.

6. The appellants were convicted on 22 November 2018 as follows:

6.1. Appellant 1 was found guilty of a contravention of Section 18(2)(a) of the Riotous Assemblies Act, 17 of 1956, on the basis of a conspiracy to commit robbery, with aggravating circumstances.

6.2. Appellant 2 was found guilty on all counts as follows:

6.2.1. Count 1 - theft.

6.2.2. Count 2 - contravention of Section 68(1) of the South African Police Service Act 68 of 1995, false representation.

6.2.3. Count 3 - robbery with aggravating circumstances.

6.2.4. Count 4 - robbery with aggravating circumstances.

6.3. Appellant 3 was found guilty on count 3 and 4 as follows:

6.3.1. Count 3 - robbery with aggravating circumstances.

6.3.2. Count 4 - robbery with aggravating circumstances.

7. The appellants were sentenced on 3 December 2018 as follows:

7.1. Appellant 1 was sentenced to 15 years imprisonment.

7.2. Appellant 2 was sentenced to:

7.2.1. Count 1 - ten years imprisonment.

7.2.2. Count 2 - five years imprisonment.

7.2.3. Count 3 - 15 years imprisonment.

7.2.4. Count 4 - 15 years imprisonment.

The sentences in counts 2 - 4 were ordered to run concurrently resulting in an effective prison term of 25 years.

8. Appellant 3 was sentenced to:

8.1. Count 3 - 15 years

8.2. Count 4 - 15 years.

The court ordered the ten years of the prison sentence in respect of count 4 to run concurrently with the prison sentence on count 3 resulting in an effective term of 20 years imprisonment.

COMMISSION OF ROBBERY AT ORT ON 7 MARCH 2017

9. The way in which the robbery occurred was described in the evidence of three state witnesses, namely Makheda, Ndwandwe and Mungu.

Fulufelo Dalton Makheda

10. Mr Makheda, an erstwhile employee of Reshebile Protection Services, was performing duties as a security guard on 7 March 2017 at the Northgate 1 at ORT. He was with five other co-employees.

11. At approximately 19h20 he heard a police siren going off outside the gate. Two vehicles approached the gate. One vehicle appeared to be a SAPS Toyota double cab vehicle, in which two individuals dressed as police officers were seated. The second vehicle was a private vehicle which had a blue light flashing inside the vehicle.

12. Access at Northgate 1 is granted to the airline sector of the airport only to SAPS, ACSA and Port-health vehicles. The following occurred:

12.1. The driver of the alleged police vehicle told Makheda that they were there on a police special operation.

12.2. After the boom at the gate, there is a search bay where vehicles are stopped by an “arrester-plate” and checked before they enter the airport premises.

12.3. The occupants of vehicles usually alight before entering the premises. However, in this case, the occupants remained seated in their vehicles.

12.4. Makheda decided to inform his supervisor of the situation. He was stationed at the exit side a short distance away.

12.5. When he approached, he found a man in full police uniform standing in the guard room next to his supervisor. An ACSA permit card was hanging from his neck.

12.6. His supervisor enquired from the man about his permit card. At this stage a second person, also dressed as a policeman, approached and produced a firearm. He instructed them to lie on the floor.¹

12.7. One of the assailants demanded a key to the gate and Makheda handed it over to him. Makheda was instructed to retract the arrester-plate. He was then taken back to the guard house where his colleagues were being guarded by other assailants who were not in police uniforms. They were armed and their faces were covered by balaclavas.

12.8. Makheda and his colleagues were threatened and instructed to surrender their cell phones. They complied, save for Bavu, whose cell phone, being charged at the time, was not handed over. They were warned that they would be killed if they tried to do anything.

¹ Photographs shown to the Makheda who confirmed that they reflected events that he described in his evidence. However, they were not included in the appeal record

12.9. Their supervisor was called over to the people guarding them and Makheda heard one of the robbers saying, “*Let us go, let us go, let us go*”.

12.10. Makheda was not able to identify any of the robbers that held them up. He later heard that there had been a robbery at the airport.

Ntokozo Siyabonga Ndwandwe

13. Ndwandwe was employed by Guard Force as a vault supervisor. During March 2017 he was based at ORT, Charlie 8, inside the Guard Force building. His duties were to receive and dispatch goods.

14. He reported for duty on 7 March 2017 at 10h30 and was due to finish work at 19h00. He was on duty with Whitey Twala, Dale Peterson and appellant 3, who was employed by Guard Force as a vault supervisor. Ndwandwe also worked with appellant 1 who was a maintenance repairman employed at ORT.

15. Ndwandwe gave evidence about an airway bill identified as A781. He testified that it was used to identify goods, using a number and a code (Exhib B).² The airway bill related to 27 bags of banknotes that were to be transported to London.

16. Ndwandwe identified a site report handed in as Exhib C1 and C2.³ This document was in two parts and is filled in and signed when a container is packed and made ready for dispatch.

17. Appellant 3 and one Nkuna were required to fill in the site report because they were the ones who were packing the goods into the container. Ndwandwe completed and signed the form at appellant 3’s request at 19h05.

18. Ndwandwe was present when a container with the banknotes in it was removed from Charlie 8. The containers are placed outside the company building and are loaded onto a transport car (dolly) for removal to the aircraft. This task was assigned to

² Vol 6, page 528

appellant 3 who was also responsible to screen the goods and check that they were as reflected on the waybill. Xumalo arrived to take the containers to flight SA234.

19. Employees of Guard Force are not permitted to carry their personal cell phones into the work premises. However, they carry company cell phones. Employees are searched when they arrive at work to ensure that no personal cell phones are brought onto company premises.

Tshepo George Mungu

20. Mungu was an SAA employee who was responsible for the conveyance of documents relating to cargo that is transported from the warehouse for loading onto aircraft.

21. On the day in question, at 19h20, Mungu proceeded to flight SA234's parking bay, where he observed a police bakkie and sedan with a blue light. He observed approximately 10 containers that were supposed to be transported on flight SA234.

22. Whilst they were standing there, two policemen in uniform alighted, as did further persons also dressed in police uniforms. They opened a specific container, took out approximately 4 orange bags and loaded them onto their bakkie. There were a lot of containers with goods waiting to be loaded onto the aircraft. However, the persons referred to above appeared to know exactly what they were looking for. Whilst this was taking place, a Swissport supervisor arrived and radioed his office to report that the containers had been opened and that their contents were being removed.

23. Mungu went to Alpha 1. When he returned to Alpha 6 he found the place was full of police officers. The two vehicles he had seen earlier with the persons who had removed the bags from the container had left.

Fraser Sithole

³ These exhibits could not be found in the appeal record

24. He was employed by Guard Force as a vault manager. Appellant 3 reported to him. Appellant 1 was employed to do maintenance. Appellant 3 was conversant in English and he also wrote everything in English.

25. On 7 March 2017 appellant 1 clocked into work at 7:54 and out at 16:17. Appellant 1 had access to Charlie 8, but not to the vault. Appellant 3 had access to the vault.

TRIAL-WITHIN-A-TRIAL

26. The state gave notice that it intended to lead evidence of confession statements allegedly made by all the appellants implicating themselves in the robbery at ORT

APPELLANT 1

27. Appellant 1 challenged the admissibility of his confession statement on the basis that he had not been informed of his constitutional rights and had been coerced into making the confession by being assaulted.

28. Officer Tsoai testified that on 17 March 2017 he had taken a warning statement from appellant 1. When he did so, he informed appellant 1 of his rights. Appellant 1 did not report to him that he had been assaulted.

29. Captain Mahlangu testified that he was called by Brigadier Moukangwe to assist with an interview of appellant 1. He was not involved in the investigation. He interviewed appellant 1 at Delmas SAPS on 18 March 2023. Mahlangu testified that he explained appellant 1's constitutional rights to him before proceeding to take his statement.

30. It was put to both Captain Mahlangu and Officer Tsoai that appellant 1 had been assaulted by police officers and forced to make a confession. Tsoai denied these allegations and Mahlangu testified that appellant 1 did not complain of an assault or show any visible injuries.

31. Appellant 1 closed his case in the trial-within-a-trial without testifying. The court

ruled that appellant 1's confession statement was admissible. It read as follows:⁴

"Sibusiso Job state that:

(1)

During the year 2016 between September and OctoberY. Forgotten to me I was at my place of residence at number [...] L[...] Street Elandsfontein. It was about plus or minus 09:00 in the morning. I received a call from my colleague Oupa who is a security guard at OR Thambo International. If I remember very well it was on [a] weekend. My colleague['s] contact details that he used to call me was 0[...].

(2)

During our conversation over the cell phone, he requested to come and collect me to Bapsfontein which is in Gauteng. I agreed as I used to visit him sometimes. About 30 minutes [later] he arrived at my place of residence and I got into the vehicle, [a] Toyota Corolla white in colour, registration unknown to me. It was followed by a white Nissan bakkie. Inside the bakkie there were two occupants including the driver.

(3)

My colleague was alone inside his vehicle and when he drove off he mentioned to me that the white Nissan bakkie that [was] following us is known to him and those occupant[s] wanted to speak to me. We drove until Bapsfontein. We stopped both vehicles at a certain bush and we came out from the vehicle and we meet those people known by my colleague. My colleague introduced me to them and also introduced them to me as Mr Mkhize and Uncle. Mr Mkhize then informed me that they are planning to rob the container at OR International Airport where I am working. It worries me because I was not informed [of] my role

⁴ The statement was read into the record and is reconstructed from the written statement that appears as Exhibit J, Vol 10, p1004. At least one page is missing as the statement jumps from paragraph 3 (p1004) to paragraph 5 (page 1005)

in the planning of the robbery but I just thought maybe they were looking for the backup. I also agreed to be part of the robbery. Thee (sic) were tasking (sic) given to Oupa Sithole as he was having access to get inside the place where they packed money to the YY.

(5)

container in the airport. The first tasking was that Oupa must calculate how many pieces are loaded into the container. We then adjourned our first meeting and we agreed that he will phone us for another follow-up meeting.

(6)

I cannot remember dates and time but there was follow-ups which was done at the same venue. After they contacted Oupa we used to go to the meeting place and give them updates about the tasking. This happened several times.

(7)

During mid-February my colleague Oupa was dismissed at work for firearm competency. After he was dismissed then he asked me to help so that the plan can proceed. I got a challenges (sic) of accessing the packing of the money where Oupa was working and I confronted Frans Manaka who is an admin clerk and got access to get into this packaging area. I told Frans about the deal and he joined the plan and I gave it back to Mkhize and he met Frans and the deal proceeded.

(8)

Before Oupa Sithole was dismissed he was having a cell phone which he hide at (sic) locker, an old Nokia with only two contact details under contacts. Under contact was for Mr Mkhize and Uncle saved so I was instructed to give the cell phone to Frans who will communicate with them when the container is ready to be loaded in the guard [indistinct] vault.

(9)

On 7 March 2017 about 08:00 I reported for duty. At about 14:00 Frans told me that the money was already packed in the container, about 27 bags, and he told me that he was going to send SMS's at the toilet as he was not having a permission to use or to possess the cell phone at the airport side. Indeed he went to a toilet and he informed me that he has already sent SMS's. 16:00 I knock off duty.

(10)

At about 17:00 the same day I received a call from Mkhize confirming that he did receive messages from Frans and they confirmed that they will go and do the job. When they are done they will call me to come and collect the shares. They told me that they spoke to Frans to destroy the cell phone that was in his possession after the robbery.

(11)

The following day that is 8 March 2017 at about 00:00 I tried to call Mr Mkhize but the phone was closed. I also tried Uncle and also his cell phone was closed. I went to work and I was informed at work that there was a robbery that took place. I did saw Frans but we did talk until I was arrested. On the Thursday 9 March 2017 Frans called me and wanted to know if Mr Mkhize called me and I told him that I am still waiting. I never received the call up to date after I was arrested which was 17 March 2017."

APPELLANT 2

32. Tsoai testified that on 17 March 2017 appellant 2 made a report to him during an interview at Delmas police station. Prior to the report, Tsoai took a warning statement from appellant 2. W/O Magogo and Masemola and other colleagues were present. As a result of the report, Tsoai learned where appellant 2's girlfriend was residing.

33. It was put to Tsoai that appellant 2 was assaulted at Delmas police station by police officers and forced to sign papers that were not read to him. This was denied by Tsoai.

34. Colonel Govender (“Govender”) testified that from intelligence gathered, the police established that a syndicate had an operational house at [...] S[...] J[...] St, Norkem Park. He testified that on 16 March 2017, in the evening, he led a team of police officials who “penetrated” this house. Appellant 2 was found in the house and brought outside. Govender testified that he went straight to appellant 2, identified himself and read him his constitutional rights. As part of the warning, appellant 2 was informed that he was in the presence of a high-ranking police officer and that anything that he might say could amount to an admission that could be used against him in court. Appellant 2 was co-operative and volunteered information. According to Govender, appellant 2 confessed to his involvement in the robbery at ORT. Two days later, on 18 March, Govender reduced to writing, in the form of a docket statement, appellant 2’s alleged confession. Govender handed appellant 2 over to an investigation team so that they could follow up on leads that he had obtained.

35. In response to it being put to Govender that appellant 2’s version was that he was arrested at 14h00 on the 16 March 2017 in the Johannesburg CBD, Govender testified that he had no knowledge of such arrest. It was further put that appellant 2 was assaulted in the house where he had been approached by Govender. The police accused him of having taken the money and they forced him to take them to the place where he stayed. These accusations were denied by Govender.

36. W/O Shabalala testified that on 16 March 2017 he was with Govender when they went to the house at [...] S[...] J[...] St, Norkem Park. There were three teams of policemen at the house. He was in Midrand with Govender when they were informed by Captain Radebe that his team had arrested appellant 2 in the Johannesburg CBD.

37. Radebe confirmed in evidence the details regarding appellant 2’s arrest in the Johannesburg CBD. Appellant 2 was taken to Johannesburg Central police station. Thereafter he was taken to a residential house in Norkem Park to check if any evidence

could be found. On their arrival a search was conducted at the house. Radebe summonsed Govender who he had learned was part of the investigating team.

38. Radebe contradicted Govender's testimony in relation to the alleged arrest at [...] S[...] J[...] St, Norkem Park. He testified that when Govender arrived at the house, Radebe was already there and no Tactical Response Team ("TRT") present. W/O Mofokeng confirmed that appellant 2 was taken to [...] S[...] J[...] St, Norkem Park after his arrest in the Johannesburg CBD. He testified that no members of the TRT were present and when the investigating team arrived, he and his team withdrew.

39. Appellant 2 did not testify in the trial-within-a-trial relating to his alleged confession statement. The court ruled that the pointing out and confession he made were admissible. The state then recalled Govender to testify about certain portions of his docket statement in which he revealed that appellant 2 had made a confession to him about his involvement in the robbery. The whole docket statement was not referred to or submitted into evidence.

40. Govender testified that appellant 2, in his presence, had admitted to him that he was part of the syndicate responsible for the robbery and that the house at [...] S[...] J[...] St was a safe-house where the pre-planning of the robbery took place. Govender testified as to the details of appellant 2's alleged oral confession to him about the robbery and his involvement therein. Amongst other details, Govender testified that appellant 2 had provided him with the cell numbers of suspects.

APPELLANT 3

41. Appellant 3 was alleged to have made a confession statement to Colonel Sithole ("Sithole") on 17 March 2017. He challenged the admissibility of his statement on the basis that his constitutional rights were not explained to him, and he was forced to make a statement by being assaulted. Appellant 3 also complained that there was no interpreter and he alleged that this gave rise to misunderstandings.

42. Sithole, Sgt Ndlovu and Constables Sebola and Shiburi were called by the state to prove the admissibility of the statement. Appellant 3 gave evidence in the trial-within-

a-trial. The court found that the statement had been freely and voluntarily made and was admissible. The statement was as follows:

Matabata Frans Manaka: There is another man called Job Mnisi who work[s] for Guard Force as a general worker. I cannot remember when, but Job came to my place in Makhulong during the week accompanied by three other African males. I don't know their names.

Before Job came he phoned that he wants to see me, of which I agreed. I asked myself why he wants to see me and told Piet Sithole about it that he must hide himself, take Job's number plate because I was not sure what he was coming to do.

Job arrived with these three guys in a grey Hyundai and asked me to get inside the vehicle. He said to me, you are the one who works at the Volt (Safe) where money, firearms and other stuff are kept. He came to show me these men that it is me who works there, and I must tell them how many pieces of shipment SA234. I told them I cannot do it as it will lead me into trouble. I have a small child who just came into the world. I did not tell them.

The following day they came, the four of them with the driver having a pistol. Job told me they have two years working on this thing and they have people who are working with them at the Guard Force.

When such a thing has happened they also give a share to the Manager of the VOLT (sic), Avisent Sithole and other, including G4S Supervisor Masuku and Nkosi. Nkosi drives the trucks with shipment on the airlines.

He had three cell phones with him on Tuesday at the airport at Guard Force. He gave me one small Nokia without a camera. The instruction was when the shipment arrives I must send him the container number and tell how many bags of money.

The Shipment came from Prins Company. It was 27 bags of money. I screened it

together with the security Mabote. I put it inside Charlie 8, the VOLT, which is a safe. I went to call G4S Supervisor Nkuna to come pack shipment.

When busy packing I saw a damage and called Floyd from Prins to come and re-pack. When we were done we sealed the container at about 16:00 or 17:00.

Security of G4S took the shipment to the flight at about 19:10. BA flight left from Guard Force with shipment at 18:30 escorted by police.

When this SA234 shipment left at 19:10 I send an SMS to Job Mnisi that the shipment has left to the flight and there are no police with 27 pieces to SA234. The cell phone number had the name "MK" only where I sent the message.

As instructed after sending the message I flushed the phone in the toilet. I do not know what happened on the other side.

During another visit on a Sunday before this incident Job Mnisi, Obas Sithole and Tsepo who is a police officer, came to collect me to Kaalfontein at Serengeti where we met the three men. One driving a blue BMW and a white Toyota Bakkie.

They told me they need the shipment of SA234. Job will bring the cell phones.

Sithole and Job promised me some money. Till now no money was given to me.

Obas Sithole and Tshepo came to me in a white Almera. They told me they know I went [for a] Polygraph, but I must not tell the police who did that. They will give me money. The policeman said I must make sure not to tell the police. They left.

I was not well since the money was taken. I went to my brother-in-law in Soshanguve and told him. He advised me to call the Hawks and tell them what happened.

I called Ndlovu and told him to come in Pretoria. We met at Rosslyn Police

Station. There I told him what happened. That is all I wish to say.”

BANKNOTES ALLEGED TO HAVE BEEN FOUND AT APPELLANT 2’s GIRLFRIEND

43. Tsoai testified as follows:

43.1. He asked appellant 2 whether he had any knowledge about money that was stolen from ORT. In reply, appellant 2 told him that money was given to him by Majeez and that he had given this money to his girlfriend.⁵

43.2. Tsoai asked appellant 2 where his girlfriend was and appellant 2 took him and Warrant Officers Mabhoko and Masemola to a house in Birch Acres in Kempton Park.

43.3. At this particular house they found money in a bundle of R10 notes. They sealed the money in exhibit bag number PA 4002424259.

43.4. It was confirmed in evidence that appellant 2 was left in the police vehicle when Tsoai entered the house. It was also common cause that appellant 2 was not present when his alleged girlfriend was questioned or when the money was allegedly found.

43.5. In cross-examination it was put to Tsoai that appellant 2 denied that he had told Tsoai that he had been given money by Majeez and that such money was found in the possession of appellant 2’s girlfriend.⁶ Tsoai refuted this.

44. W/O Mabhoko testified that he accompanied Tsoai to an address where a person, alleged to be appellant 2’s girlfriend, was staying. A woman was found in the house and she gave Tsoai R10 bank notes contained in a plastic bag.

45. The state called Ms Matshela, an employee of the Reserve Bank. Her evidence was as follows:

⁵ Record 443/209, lines 6 - 14

45.1. She had a meeting with Col Mahlangu in which she was asked to identify money contained in a sealed bag.

45.2. Matshela identified sub-bundles of one hundred R10 banknotes, banded together with a white collar.

45.3. From the samples that she brought with her, Ms Matshela compared the packaging collars with those that were wrapped around the sub-bundles. The packaging matched the sample that she had brought with her.

45.4. The type of banknotes found in the package was issued to commercial banks only and not to members of the public.

46. The following admissions in terms of section 220 of Act 51 of 1977 were made by the appellants:

1. That the banknotes mentioned in the packing request of Standard Bank which is attached hereto and marked as EXHIBIT F2 are one and the same banknotes mentioned in EXHIBIT B.

2. That the banknotes mentioned in EXHIBIT F2 were obtained by Standard Bank from the South Africa Reserve Bank to prepare the said packing request for it to be transported on flight SA234/7 mentioned in EXHIBIT B.”

EVIDENCE RELATING TO NUMBER PLATES

47. Count 1 relates to the theft on 31 December 2016 of a double cab bakkie, registration number T[...].

48. Crime scene photographs taken at [...] S[...] J[...] St, Norkem Park were handed into evidence as Exhibit G. Two loose number plates with registration number V[...]were

⁶ Volume 5B, page 443/218, lines 13 - 16

photographed lying on the ground at this location.

49. Exhibit H comprised a series of photographs of a Toyota double cab bakkie. This bakkie, according to the accompanying police affidavit, was photographed on 5 May 2017 at a SAPS pound at Van Ryn Deep, Benoni. The vehicle did not have registration plates affixed to it.

50. Sergeant Ndlovu testified that after the arrest of appellant 2 he was tasked with investigating registration number plates V[...] appearing in a photograph shown to him. His investigation led him to the vehicle pound at van Ryn Deep in Benoni.

51. He personally inspected the vehicle at the pound. He testified that stickers, apparently pasted on the body of the vehicle, had evidently been removed. He also testified that he observed that the registration number V[...] appeared on the licence disc on the vehicle. He established from police records and the docket relating to the theft of the vehicle, that the bakkie had been stolen on 21 December 2016.

52. John Master testified that he identified a vehicle in the custody of the SAPS as belonging to MAC Imports, a company that he worked for. The registration number of the vehicle was T[...]. He further testified that the registration number V[...] and vin number that appeared on the license disc on the vehicle, did not correspond with the registered details for the vehicle.

EVIDENCE OF THE APPELLANTS

53. All the appellants testified in their defence in the main case.

APPELLANT 1

54. Appellant 1 testified that he had been assaulted at Delmas and forced to make a statement. He alleged in his testimony that Captain Mahlangu had come to him with documents and instructed him to sign them. He did not read them because he does not know how to read and he denied having made any statement to Mahlangu.

55. Appellant 1 did not give evidence in his trial-within-a-trial to confirm his defence that his confession had not been freely and voluntarily made and was therefore inadmissible. In the absence of evidence by appellant 1 to substantiate his defence in this regard, the state's case that the statement had been freely and voluntarily made, was proved. Accordingly, in my view, the court *a quo* correctly admitted appellant 1's confession.

APPELLANT 2

56. Appellant 2 gave evidence in his defence and denied knowing anything about the charges against him. Under cross-examination:

56.1. He admitted that he was staying at [...] S[...] J[...] St, Norkem Park at the time that the robbery occurred.

56.2. He denied having any knowledge of the number plates that appeared in the photographs forming part of Exhibit G.

56.3. He denied having made a statement to Govender and having confessed to the robbery.

56.4. He testified that he was made to wait in the motor vehicle when he was taken by Tsoai to an address in Birch Acres. He did not dispute that money was found. However, he denied that he led the police to Birch Acres and that a person, alleged to have been his girlfriend, was found staying there.

APPELLANT 3

57. Appellant 3 testified in his defence as follows:

57.1. He stood by his evidence in the trial-within-a-trial that he had been forced to make a confession statement. He did not agree with the contents of the statement.

57.2. He testified that he had told the police after the robbery that he wanted to give them leads.

57.3. He testified that prior to the robbery, three unknown persons came to him and instructed him to get into their vehicle. They asked for information as to what was happening inside the airport. These persons told him they worked hand in hand with the police and with some people from his work. One of the persons had a firearm. They threatened that if he did not help them, they would come back and kill his family. They left and did not return. He was too afraid to make a report to the police or his employers.

57.4. Appellant 3 testified that he told Ndlovu about the above encounter when he was interviewed by the police on 16 and 17 March 2017 (this however, was never put to Ndlovu in cross examination).

57.5. Appellant 3 knew appellant 1 because he also worked at Guard Force.

57.6. Appellant 3 testified that employees were not permitted to bring private cell phones into their work area and they were searched three times, making it very difficult, if not impossible for them to do so.

57.7. Appellant 3 admitted having access to the airway bill and having screened 27 bags containing money on the day of the robbery. He also admitted knowing the details of the flight that was to transport the bags of money and when they would be removed for loading on the aircraft.

EVIDENCE AGAINST THE APPELLANT 1 AND 3

58. The only evidence implicating appellant 1 and 3 in the robbery at ORT is contained in the confession statements proved against them and admitted by the court *a quo*.

59. Appellant 1 admitted in his confession statement that he met with certain persons who informed him that they were planning to rob a container at ORT, where he was

working. He stated that he agreed to be part of the robbery. It was decided that Oupa would calculate how many pieces were loaded into containers. Oupa however, was dismissed from work whereupon appellant 1 introduced the robbers to appellant 3. Appellant 1 was tasked with giving appellant 3 a cell phone that would be used to notify the robbers when the container had been loaded with the cash.

60. Insofar as appellant 3's alleged confession is concerned:

60.1. Appellant 3 confirmed in his evidence that he met with Ndlovu on the 16th and 17th and that he had given them information about the robbery that could assist in solving the case. This had been on the advice of his brother-in-law who was a policeman.

60.2. Timing was a crucial element of the planning and execution of the robbery. It was essential for the perpetrators to know when the money would be waiting on the apron of the runway to be loaded onto the aircraft. Appellant 3 was well placed to provide the perpetrators with the information that they required. On his own evidence, he had been approached by persons planning to carry out the robbery and told to co-operate or his family would be harmed. These persons were armed and they told appellant 3 that they worked hand in hand with the police. He was promised rewards. Appellant 3 told his wife what had happened and he said to her that he would protect her.

60.3. In his confession, appellant 3 admits having sent an SMS to the perpetrators to say that money had been taken to flight SA 234 for loading onto the aircraft. His admission that he did in fact provide this assistance is bolstered by his evidence that he was threatened by persons that if he did not provide the information they needed, his family would be harmed.

60.4. Accepting that appellant's confession was freely and voluntarily made, as I do, it is clear that he assisted the robbers by informing them that the money had been loaded into the containers and placed on the dolly for removal to flight SA234. Accordingly, he was correctly convicted of robbery.

EVIDENCE IMPLICATING APPELLANT 2

61. The state argued that appellant 2 was implicated in the robbery by the following evidence:

61.1. Appellant 2 admitted to having resided at [...] S[...] J[...] St at the time the robbery in question occurred.

61.2. Appellant 2 allegedly made an oral statement to Govender confessing that he had been part of a syndicate that carried out the robbery at ORT. Govender subsequently wrote down what appellant 2 had told him and this statement was adduced in evidence and relied upon as a confession made by appellant 2.

61.3. Vehicle registration plates were found at 4 Sam Jennings St bearing the registration number V[...]. These plates were linked to a white Toyota Double Cab bakkie that was impounded by SAPS member, Van Ryan. It was proven that the bakkie was stolen on or about 15 December 2016 as part of a break-in that occurred at commercial premises in Kya Sands.

61.4. The appellant 2 pointed out cash stolen from ORT at a house in Birch Acres.

62. Section 217 of the Criminal Procedure Act, 51 of 1977 ("CPA") provides:

217 Admissibility of confession by accused

(1) Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence: Provided-

(a) that a confession made to a peace officer, other than a magistrate or justice, or, in the case of a peace officer referred to in

section 334, a confession made to such peace officer which relates to an offence with reference to which such peace officer is authorized to exercise any power conferred upon him under that section, shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or justice; and
....

63. It is clear that the alleged confession by appellant 2 did not comply with the requirements of section 217 of the CPA in that his statement was not confirmed and reduced to writing in the presence of a magistrate or justice. In my view, the court *a quo* wrongly accepted and admitted the evidence of the alleged confession made by appellant 2 to Govender.

64. Govender's testimony that the TRT team had penetrated the house and had arrested appellant 2 at [...] S[...] J[...] St was contradicted by the other state witnesses who testified that appellant 2 had been arrested in the Johannesburg CBD. In my view, Govender's evidence on this aspect was unreliable.

65. No evidence was lead that a Toyota double cab bakkie bearing registration V[...] was used in the robbery on 7 March 2017 at ORT. The evidence that registration plates bearing the number V[...] were found on the garage floor at [...] S[...] J[...] St,⁷ does not, in my view, prove that appellant 2 was involved in the theft of the said bakkie or the robbery.

66. The following evidence was given by Tsoai in the trial-within-a-trial:

"MR TSOAI: He said a part of the share that was given to him he had given that money to Majeez. That money was given to him by Majeez and that Majeez it is someone whom I personally do not know.

MR MOHAMMED: Yes, continue. And what happen then?

⁷ Depicted in photographs 49 and 50, Vol 7, page 650 and 650

MR TSOAI: And then I asked them as to where have you taken that money and he answered by saying that he had given that money to his girlfriend.

MR MOHAMMED: Yes, continue and what happened then officer?

MR TSOAI: And then I asked him as to where his girlfriend is and then he said he can be in a position to take me to his girlfriend. Then he then proceeded to take me to a certain house at Birch Acres at Kempton Park.”⁸

67. It was put to Tsoai that appellant 2 would deny that he ever told Tsoai that he had been given money by Majeez and which was found in the possession of the accused's girlfriend possession. However, appellant 2 did not testify in the trial-within-a-trial in relation to any of the evidence adduced against him. When he testified in his defence, he denied that he had taken the police to a place where his girlfriend resided. This denial was never put to Tsoai when he testified. Appellant 2 did not deny that money had been found at an address at Birch Acres. His evidence was that he did not know who it belonged to. Crucially, appellant 2 did not refute Tsoai's testimony, that he (appellant 2) told Tsoai that he had been given a share of the money by Majeez.

68. In terms of section 218 of the CPA, the pointing out or discovery of evidence pursuant to an inadmissible confession made by an accused, is admissible in evidence.

69. In my view, without the alleged confession, the evidence linking appellant 2 to the robbery at ORT was tenuous. His participation could not be inferred from his statement that he had received cash from Majeez that was subsequently found in Birch Acres and confirmed to be part of the money stolen at ORT.

70. The evidence relating to the number plate found out [...] J[...] St in my view does not establish appellant 2 guilt beyond reasonable doubt, either in the theft of the vehicle or the robbery at ORT. Blurry photographs of a vehicle said to depict a Toyota double cab was shown to Makheda. These photographs were not included as part of the record of appeal and no *viva voce* evidence was led identifying the registration plates of this

⁸ Record, p443/209 (7 November 2017)

vehicle at Northgate 1. There was therefore no evidence linking the vehicle used in the robbery to the registration plates V[...], or to the stolen Toyota double cab vehicle found at the SAPS pound at Van Ryn Deep, Benoni.

71. The evidence supports a finding that appellant 2 received stolen cash from Majeez which was found at a house in Birch Acres. He did not offer an innocent explanation as to how he came to be in possession of this cash. In my view, it can be safely be inferred that appellant 2 knew that the cash was stolen money.⁹

72. In terms of section 260 of the CPA on a charge of robbery, an accused person may be convicted of the offence of theft or receiving stolen property knowing it to be stolen. The evidence proved that appellant 2 was guilty of receiving stolen property knowing it to have been stolen. However, he is entitled to be acquitted on the other counts.

AGGRAVATING CIRCUMSTANCES

73. The manner in which the robbery and theft of the cash at ORT was carried out was extraordinary. It was committed in a highly restricted zone under the noses of security and police officials.

74. The evidence shows that there were two stages to the robbery. In the first stage the criminals gained access to ORT. The plan involved the robbers posing as police officers and using vehicles marked as police vehicles with blue lights flashing. The evidence showed that two vehicles gained access at the Northgate 1 entry point, where security employees were approached with firearms and tied up.

75. The second stage of the robbery involved the criminals, who had by this stage gained access to ORT, approaching the container on the apron of the runway and removing the cash that was about to be loaded onto flight SA234. This aspect of the robbery was accomplished by stealth and deception. The money was uplifted from the containers without any resistance or alarm from airport staff and security officials.

⁹ S v Blom 1939 AD 188, at page 202/203

76. The wielding of a firearm and the threat to inflict grievous bodily harm constitutes an aggravating circumstance. However, in my view, on the basis of their confessions (being the only evidence against appellant 1 and 2), their participation in the robbery was limited. It was not shown that they knew about or were part of the plan to forcibly gain entrance to ORT. Makheda testified that one of the persons who approached him at Northgate 1 had an ACSA card hanging from his neck. The evidence appeared to be that Makheda scanned the access permit in order to give one of the vehicles access to the search bay at Northgate 1.

77. The plan could conceivably have been that the robbers would gain access by presenting fake ACSA permits and by posing as police officers in marked police vehicles and flashing blue lights. This element of the crime was envisaged in the charge formulated in count 2.

78. The trial court did not give any reason for convicting appellant 1 in terms of section 18(2)(a) of the Riotous Assemblies Act and appellant 2 and 3 for the common law crime of robbery. I can see no basis for the differentiation. The trial court also did not explain whether or to what extent the convictions of the appellants were based on common purpose.

79. Insofar as appellant 3 is concerned, there was also no evidence whatsoever that he was involved in the theft of cell phones as specified in counts 3 to 8. In his confession, he admitted to sending a text message to the robbers to inform them when the money had been loaded into containers and dispatched to the aircraft. However, there is no evidence that he was part of the planning and execution of the robbery in any other respect.

80. In my view, it was proved, on the basis of the confessions of appellants 1 and 3, that their role was to notify the main perpetrators that the cash was being taken to flight SA234. However, I do not consider that it was proven that their acts of association with the robbers extended to holding up the security officials at Northgate 1 and robbing

them of their cell phones.¹⁰ As I have said stealth and deception was an important part of the planning and execution of the robbery. Accordingly, I am not persuaded that aggravating circumstances were proven against appellant 1 and 3. In my view, they should only have been convicted of robbery.

SENTENCE

81. The findings that I have made require a reconsideration of the sentences imposed on the appellants.

82. Appellant 1 had two previous convictions for fraud and one for possession of stolen property dating back to 2001 and 2003. He received, respectively, a fine of R500 or 50 days imprisonment and a 18 month suspended sentence for these convictions. He was 40 years of age at the time of sentencing. He was employed at ORT as a maintenance officer for approximately four years earning a salary of between R7 000 and R8 000 per month. He has two children aged 18 and 4 years old.

83. Appellant 3 has no previous convictions. He was 27 years of age at the time of sentencing. He was employed by Guard Force at a salary of R6 500 per month. He has a two year old child.

84. Appellant 1 and 2 breached their positions of trust. However, I consider that they played subsidiary roles in the carrying out of the robbery. There is no evidence that they benefitted from the proceeds of the money taken. As was said in *S v Rabie* 1975 (4) SA 855 (A) at p862, punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances. I consider appellant 1 and 3 to be on an equal footing when it comes to the imposition of sentence. In my view, 12 years imprisonment is an appropriate sentence.

85. Appellant 2 was 45 years of age at the time of sentencing. He is married. He worked in various jobs and stated that he ended up owning his own company repairing motor vehicles earning between R8 000 and R10 000 per month. He has no previous

¹⁰ *S v Mgedezi and Others* 1989 (1) SA 687 (A)

convictions. The cash received by him constituted the proceeds of a serious and brazen robbery committed at ORT where a large amount of money was taken. In my view, a sentence of 12 years imprisonment would also be appropriate in his case.

86. In the circumstances, I make the following order:

Appellant 1

1

1.1 Appellant 1's conviction in terms of section 18(2)(a) of the Riotous Assembly Act is set aside and he is convicted of robbery.

1.2 Appellant 1 is sentenced to 12 years imprisonment for robbery.

Appellant 2

2

2.1 The convictions in respect of appellant 2 on counts 1 to 4 are set aside.

2.2 Appellant 2 is convicted of receiving stolen property knowing it to have been stolen.

2.2 Appellant 2 is sentenced to 12 years imprisonment.

Appellant 3

3

3.1 Appellant 3's conviction on counts 3 and 4 are set aside.

3.2 Appellant 3 is convicted of robbery.

3.3 Appellant is sentenced of 12 years imprisonment.

4 The above sentences are backdated to 3 December 2018, being the date on

which appellant 1, 2 and 3 were sentenced by the trial court.

JUDGE KUNY
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

JUDGE MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

JUDGE MBONGWE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 23 October 2023

Date of Judgment: 9 September 2024

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Counsel for the State: F Mohamed