IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

20/3/2015
DATE

SIGNATURE

20/3/2014.

CASE NUMBER: A851/11

In the matter between:

PAUL TLOU NDLOVU — FIRST APPELLANT

ASIVHANGA TSHIVHASE — SECOND APPELLANT

AND

THE STATE — RESPONDENT

JUDGMENT

LEPHOKO AJ

[1] The appellants were arraigned before the Regional Court Pretoria on five counts. The first appellant was convicted of robbery with aggravating circumstances (count 1); possession of a semi-automatic firearm (count 4); and possession of ammunition (count 5). The first appellant was sentenced to 15 years imprisonment in respect of count 1, 15 years and 1 year imprisonment in respect of counts 4 and 5 respectively. The first appellant was sentenced to an effective 15 years imprisonment as the trial court ordered that the sentences in respect of counts 4 and 5 run concurrently with the sentence on count 1. The second appellant was convicted of count 1 and sentenced to 18 years imprisonment.

[2] The first appellant appeals against both conviction and sentence with the leave of this court. The trial court granted the second appellant leave to appeal against sentence and his appeal against conviction is with the leave of this court.

THE CASE AGAINST THE FIRST APPELLANT

[3] The first appellant's ground of appeal against conviction is that he was wrongly convicted as his identity as one of the robbers was not proved beyond a reasonable doubt. I will deal with the evidence only to the extent that it is relevant to the appeal.

[4] Leslie Bue (Bue) testified that his shop known as Makoola Hopaan is located in Marabastad, Pretoria. The shop was robbed on 15 December 2006. On that day the shop had closed at about 17h00. He and his wife had just finished counting the money received over the past three days when three men came around the counter and

instructed them to lie down. They covered their heads and tied them up with nylon. The robbers who had two firearms asked for money and assaulted them during the robbery. The robbers took cash of about R20 000-00 which was in his wife's bag.

[5] He managed to untie himself and his wife approximately five to ten minutes after the robbers had left. He went to look for help outside. He saw everybody running and some boys shooting. He saw someone running and being followed by everyone. He followed the group and saw the person lying on the floor. He then decided to go back and check how his wife was. Bue was not able to identify the first appellant as one of the robbers.

[6] Captain Hendrik Bergh (Bergh) testified that on 15 December 2006 at about 17h00 he received a complaint regarding a shooting and robbery incident at the corner of Second and Boom Streets. He went to attend to the complaint with constable Mothlabeni. At the corner of Third and Boom Streets they found the first appellant lying on the side of the road. The first appellant had sustained serious head injuries from an apparent assault by members of the public. They called the emergency services who took him to hospital. They later discovered that the first appellant was one of the suspects in the robbery case. Bergh asked Captain Maropa to accompany the first appellant to Steve Biko Academic Hospital (the Hospital). Bergh was not able to identify the first appellant at the trial.

[7] Captain Mhloti Maropa's evidence is that on 15 December 2006 he found the first appellant lying on the ground and being assaulted by members of the public at the corner of Second and Boom Streets in Marabastad. They intervened by chasing the public away. He called for an ambulance and assistance. He accompanied the first appellant to hospital. He was with the first appellant at all times and followed him wherever he went. When the nurses undressed the first appellant to ascertain his injuries an amount of R6000-00 was found in his underpants between his legs. The money was removed by one of the nurses, Christina Kekana. The money was clasped with paper clips and was in denominations R100-00 and in bundles of R1000-00. The money was handed to him and he booked it in an SAP 13.

[8] At the hospital Giyani informed him that his brother (i.e. Giyani's brother) was shot and after the shooting the first appellant dropped the firearm which Giyani handed to him (Maropa) at the hospital. This evidence contradicts the evidence of Giyani which is that his brother was shot by the person that was on the roof of the building and that it is that person who dropped the firearm that was handed to Maropa. Giyani's evidence was that the firearm was handed to Maropa by Johannes who has since passed on. The evidence of Maropa and Bergh is corroborated by Giyani in one material respect, namely, that the first appellant is the person that was stoned by the mob in the vicinity of Makoola Hoopan where the robbery took place. Bue also saw someone running and being followed by everyone to a point where that person was lying on the floor. At the trial Maropa identified the first appellant as the person he found being assaulted by the members of the public at the corner of Second and Boom Streets.

[9] Fransina Kekana is a nurse as the Steve Biko Academic Hospital. She testified that she was on duty on 15 December 2006 when they received the first appellant from casualty for admission in the ward. As they undressed him to bathe him they found R6000-00 inside his underwear between his legs. Some of the money had faeces and had to be washed as the first appellant had defecated. The money was made in denominations of R100-00 notes only. She counted the money with another nurse and a police officer. The money was handed to the police officer.

[10] Stephan Giyani testified that at about 17h50 on the date of the robbery he was walking with his brother, Aaron, at the back of Makoola Hopaan. There was a shooting incident and his brother was shot. He testified that he saw three persons. The first person is the one that shot his brother. The second person is the one that was standing up holding a bag and a gun. The third person is the person that was stoned, i.e. the first appellant.

[11] Of the people that were shooting he only saw the one that shot his brother, i.e. the first person. This person was from inside the shop. He was standing on top of the roof of the building and shooting down in all directions. This person fired several shots and was still on top of the roof when he shot his brother. This person was approximately sixteen metres away when he first saw him. He was very frightened and could not remember what the person was wearing. This person tried to shoot at him as well but the gun could not be discharged. This person threw the gun in his direction. He

managed to catch it and threw it in the car and went back to his brother. This person was about three metres away when he tried to shoot at him. He would not be able to identify this person as he did not see his face.

[12] He testified that he saw a third person running away and attempting to get inside a car, a red like Corolla. He did not know from where this third person was running although he saw him running from the gate side of the shop. At the trial he identified the first appellant as the third person. He also identified the first appellant at an identification parade held at Pretoria Central Police Station on 27 May 2007. The result of the identification parade, the correctness of the procedure thereof and the sworn statement made by inspector MJ Shokane who conducted the identification parade was formally admitted as correct in terms of section 220 of the Criminal Procedure Act 51 of 1977. The entire identification parade process was not placed in dispute.

[13] Giyani testified that he observed the first appellant for about five minutes when the first appellant was being stoned next to the car. He managed to observe his face as the first appellant was about four and a half metres away from him. At that time the first appellant was about seven metres from Makoola Hopaan and ran away from the car when it was stoned. He saw the first appellant again on the same day at the hospital as the first appellant was admitted in the same ward as his brother. The first appellant was seriously injured. At the hospital he was able to observe the scars on the first appellant.

[14] During the trial he identified the first appellant as the person who was stoned and stated that he recognized him by the scar next to his eye. He stated that the first appellant had nothing in his possession when he was stoned next to the car and he did not see anything being taken from him during the stoning.

[15] Giyani's evidence is that he together with Johannes took his brother to hospital. Johannes gave the firearm to the police. The first appellant did not dispute that Giyani would have been able to identify him. He merely put it to Giyani that he was able to identify him because he was able to see him clearly at the hospital and that he was able to identify him because of the injuries that he sustained on the day of the robbery.

THE FIRST APPELLANT'S VERSION

[16] The first appellant testified that on 15 December 2006 he drove from Johannesburg to East Lynne in a City Golf which he was selling to his cousin Adam Maphale. He sold the car for R12000-00 rand and received a cash amount of R8000-00 from his cousin on that day. The money was made in denominations of R50-00 and R100-00 and was in batches of R1000-00 and clasped with paper clips. He was wearing a capris with a zipping pocket next to his right knee and he had put the money in the zipping pocket.

[17] He went to Marabastad to catch a taxi back to Johannesburg. At Marabastad he was robbed and assaulted by four guys. He was hit hard on the head and fell on the ground. He did not remember where in Marabastad he was robbed. He was

unconscious after the assault and did not know what happened thereafter or how he got to hospital. He regained consciousness at hospital and discovered that his phone and wallet were taken during the robbery. He was told after five or six days of hospitalization that money was found in his possession. He was not informed where on his person the money was found. His evidence contradicted his version as put to Bergh during cross examination, namely, that he was robbed at Jerusalem Street. Jerusalem Street is about 2 blocks away from Third and Boom Streets.

[18] In *S v Mthetwa*,[1] the court stated the following about the evaluation of identification evidence: 'Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight, the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any, and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities;..'

[19] Stephan Giyani had enough time, approximately five minutes, to observe the first appellant from a close distance of about four metres during the time he was stoned in

[1] 1972 (3) SA 766 (AD) at 768A-C

the vicinity of the car. He had another opportunity to see him clearly at the hospital shortly after the robbery. The observation at the hospital is confirmed by the assertions of the first appellant. In both these instances visibility was good. Giyani also accurately identified the first appellant at a subsequent identification parade.

[20] In S v Oosthuizen[2] the court stated that ... 'it is not every error made by a witness which affects his credibility. In each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness's evidence.' The court may convict if satisfied that despite shortcomings or defects or contradictions in the testimony it is satisfied beyond a reasonable doubt that such evidence is true.[3]

[21] The contradictions that exist in the evidence of the state witnesses regarding the arrest of the first appellant and the receipt of the firearm by Maropa do not render their evidence untruthful. These type of contradictions are to be expected when witnesses are called upon to recollect evidence concerning an incident that took place a long time before the trial.

[22] It was also contended that the trial court erred in allowing hearsay evidence. This contention is without merit as it is clear from the judgment that the limited hearsay evidence that was led during the trial was not taken into account in determining the guilt of the first appellant.

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[2] S v Oosthuizen 1982 (3) SA 571 (T) at 576G-H

[3] See: S v Sauls and Others 1981 (3) SA 172 (A) at 180E-G; S v Artman and Another 1968 (3) SA 339 (A) at 341B-C.

[23] Whether the first appellant was involved in the robbery is an issue to be determined through circumstantial evidence. In assessing circumstantial evidence not all intermediate facts in a criminal trial have to be proved beyond a reasonable doubt and the test is not whether each proved fact excludes other inferences, but whether the facts as a whole do so.[4]

[24] The first appellant persisted with his version that he was injured when he was robbed despite the overwhelming evidence that he was assaulted by members of the public. The only reasonable inference to be drawn from his version is that he wanted to completely dissociate himself from the robbery that took place at Makoola Hopaan. If he was indeed not involved in the robbery he could have simply stated that he was assaulted by members of the public as a result of mistaken identity. If one takes into account the totality of the evidence, the version of the first appellant is so improbable and untenable to such an extent that it cannot be believed.

[25] The first appellant's version must also be tested against the inherent probabilities.[5] It is improbable that the alleged robbers would have taken only his cellphone and wallet when they searched him whilst according to him he had another R8 000-00 in his possession. The fact that some of the money was covered with fasces is indicative of the fact that it was found in his underwear between his legs. The serious

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[4]DT Zeffert and A Paizes *Essential Evidence* (2010) at 28-30; S v Reddy 1996 (2) SACR 1 (A) at 8C-9 and 10A-C; R v Mtembu 1950 (1) SA 670 (A) at 679-680.

[5] See S v Chabalala 2003 (1) SACR 134 (SCA) at para 15; Shackell v S 2001 (4) SA 1 (SCA) at para 30; R v Mlambo 1957 (4) SA 727 (A) at 738A-B.

injuries sustained by the first appellant, defecation and loss of consciousness seem consisted with the alleged brutal assault by members of the public. It is highly improbable that the four persons who allegedly robbed him would have so brutally assaulted him in broad daylight in full view of members of the public.

THE CASE AGAINST THE SECOND APPELLANT

[26] At the trial the respondent wished to tender evidence regarding certain admissions and pointing out made by the second appellant. The second appellant objected to the admission of this evidence on the basis that these admissions were not properly made as there was a communication breakdown or a language barrier by virtue of the fact that an interpreter was not used during the course of the interview during which these admissions were made and during the subsequent pointing out. It was also alleged that the second appellant was not informed about his Constitution right to remain silent and the right to legal representation. A trial within a trial was held concerning the admissibility of the admissions and the pointing out and the following evidence emerged:

[27] Captain Manoatsela Mphasha's (Mphasha) testified that the second appellant indicated that he was fluent in Sotho. Venda and English were noted as the other languages to be used during the interview. Mphasha stated that he understands Venda. The second appellant was informed of his constitutional right to remain silent and his right to legal representation. The second appellant informed him that he will only require legal representation at the trial. The interview was conducted in Sotho and occasionally

the second appellant used English and a little bit of Venda. There was no need for an interpreter as there was no language barrier and they understood each other well throughout the interview. The interview went smoothly and the second appellant partook freely and voluntarily.

[28] He explained to the second appellant what a pointing out involved and the consequences thereof and the second appellant indicated that he was a policeman and understood what a pointing out entailed. The second appellant indicated his desire to proceed with the pointing out and informed him that it concerned his involvement in a house robbery that took place in Marabastad on Friday 15 December 2006. The second appellant indicated that he was brought to him to point out the scene of a house robbery and where he parked his car during the robbery. He told Mphasha that he had been informed of the reason for his arrest as prescribed by section 35 of the Constitution and that the reason was a house robbery although he was not arrested or detained at the time.

[29] A standard interview form or document was used. The format the interview took was that Mphasha would read what is written in the pointing out documents, then he would explain it to the second appellant in Sotho. The second appellant would answer him. After completing the relevant page he would hand it over to the second appellant to read as he is fluent in English, after he had read it, the second appellant would initial to show that he understood. The second appellant initialed every page and signed at the end of the form.

[30] Inspector Barend Van Staden testified that he took the photographs during the pointing out and was present during part of the interview conducted by Mphasha with the second appellant although he could not precisely say at what stage of the interview. His general observation was that the second appellant participated freely and voluntarily during the interview and the pointing out and that there was no communication problem or language barrier.

[31] The second appellant chose not to testify and did not call any witnesses during the trial within the trial. The state's evidence in the trial within the trial was not disputed save under cross examination. Where an accused person chooses not to testify to rebut the state's evidence against him and only challenges such evidence under cross examination the case has to be decided on the version of the state alone as questions put to a witness during cross examination do not constitute evidence.[6] Consequently the trial court correctly found that there was no language barrier and that the second appellant's constitutional rights were properly explained to him.

[32] Captain Maphasa was called to testify in the main trial. His evidence regarding the pointing out was that the second appellant led them to the corner of First and Grand Streets where he pointed out to them where he had parked the getaway car facing east. He pointed out the escape route he used to get away along a one way street i.e. Second Street. The second appellant explained that the getaway car was the car that he and the other suspects were going to use to get away from the crime scene after the

[6] S v Katoo 2005 (1) SACR 522 (SCA) at 529E; S v Boesak 2001 (1) SA 912 (CC) at 923E-F.

robbery. He pointed out the scene of the crime, namely, Makoola Hopaan. Photographs of the pointing out were taken. He stated that they spoke in Sotho and the second appellant understood Sotho and chose to speak in Sotho.

[33] Mphasha made an additional affidavit on the same day as the pointing out where he noted the results of the pointing out and the information given by the second appellant at the scene of the pointing out. In this affidavit he states that the second appellant explained that the getaway car was the car that he and the other suspects were going to use to get away from the scene of the crime after the robbery; that he was alone in the car during the robbery; he did not participate in the robbery and did not know what was taken. He also informed him that whilst seated in the vehicle something went wrong and he escaped alone from the scene by using Second Street, a one way street, and drove against oncoming traffic.

[34] When they returned to the office after the pointing out the second appellant confirmed in part 4 of the form that he was satisfied with the pointing out and that what he had pointed out had been noted correctly. The second appellant personally read the statement. The second appellant added to the statement that he did not go inside the shop and that he was alone where he had parked the car and when he escaped from the scene. The second appellant confirmed that he had read the whole pointing out document and understood it and signed the document.

[35] Warrant Officer Billy Shokane is the investigating officer in the matter. He testified that he spoke to the second appellant in Northern Sotho. He did not experience any communication problem when dealing with the second appellant or when the second appellant was interviewed by his senior, Director Mangane. The second appellant was interviewed by the director before he was handed to Captain Maphasa for the pointing out. He could not say at what stage the second appellant was arrested although he thought he was arrested during the interview before the pointing out. He did not remember if the accused's rights were explained to him as the interview was conducted by his senior.

[36] The evidence linking the second appellant's firearm to the commission of the crime, the manner in which the firearm was handled by the police as well as the make of the firearm was not placed in dispute.

THE SECOND APPELLANT'S VERSION

[37] The second appellant testified that he was a police officer at the time of his arrest. On 15 December 2006 he was on his way to Pretoria in order to visit his sister. He stopped at a filling station in Hillbrow to fill up petrol. Whilst at the filling station someone came and asked for a lift to Pretoria. He agreed and charged the person R100-00. The person requested that they pick up two other persons in Yeoville. He increased the fee to R200-00 as a result. They stopped at Yeoville to pick up the two extra persons. As these persons were getting into his car he alighted to go and buy airtime. The persons he gave a lift to directed him to Marabstad. When they alighted

from the vehicle at Marabastad they asked him to wait for payment for the trip as they would be back soon and would pay him on their return. He waited in the car.

[38] Suddenly there were people screaming and running as if running away from something. He noticed that one of the guys he had given a lift to was one of the persons running away. People were running for their lives and he could not stop them to find out why they were running away. He thought something bad had happened and he drove away as he was not feeling safe. He drove to Sunnyside where he met some friends and they had something to eat at MacDonald. He went to the toilet and left two guys in the car. He later dropped them where he had found them and went to see his sister. His sister was not at her place and would only be back at about 10 that evening. He then decided to go back to Johannesburg.

[39] On his way to Johannesburg he opened the cubbyhole to check his firearm as he had put it there when he knocked off duty. He did not find the firearm. He went back to Sunnyside to enquire about the firearm from the persons he was with at Sunnyside but could not find them. He then went to report the firearm as lost at the Sunnyside police station and thereafter drove to Johannesburg. At the time he was waiting in the car at Marabastad he did not hear any gunshots or see anyone being apprehended by members of the public.

[40] He disputed Mphasha's evidence concerning the pointing out. He stated that he thought he was pointing out the area where he had parked his car. When he pointed

towards Makoola Hopaan he was merely pointing in the direction taken by the three people he had given a lift.

[41] One of second appellant's grounds of appeal is that the evidence of the pointing out was unconstitutionally obtained as he was not warned of his arrest and the implications of giving self-incriminating information when he was interviewed by Mangane prior to being referred to Mphasha for a possible pointing out.

[42] Section 35 (5) of the Constitution[7] provides that evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice. The Constitutional Court has held that fairness is an issue which has to be decided upon the facts of each case, and the trial judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted[8].

[43] The fact that it is not clear as at what stage the second appellant was arrested or whether he was informed about the consequences of the proposed pointing out during the interview with Mangane did not render the trial unfair as his conviction was not based on any information he divulged during that interview. His conviction was based on the pointing out independently conducted by Mphasha which the trial court correctly

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[7] Constitution of the Republic of South Africa, 1996.
[8] See: Key v Attorney-General, Cape Provincial Division 1996 (4) SA 187 (CC) at para 13.

found to have complied with Constitution. There must be a causal connection between the rights violation and the self-incriminating acts of the accused to render the trial unfair.[9]

[44] The second appellant's version is improbable and not reasonably possibly true. He gave a lift to persons that he was meeting for the first time but failed to ensure that he got paid for his services when he dropped them at Marabastad. He was content to wait for them to pay him on their return simply because they said they would be back soon even though he did not know where or how far they were going. He did not hear any of the several gunshots that were fired in the vicinity of where he was waiting in the car which gunshots had caused people to flee helter-skelter.

[45] He was a police officer but ran away from the scene whilst he was fully aware that there was something amiss that required the intervention of law enforcement officers. He did not make any attempt to call for assistance or report the incident to the police but instead chose to go and enjoy lunch with friends at Sunnyside. At the time of the robbery he was in the safety of his car and did not know as yet that his firearm had been stolen. If he genuinely believed that his life was in danger that was the right time for him to reach for his firearm in the cubbyhole in order to use it to protect himself if it became necessary. The fact that he drove against the flow of traffic is suggestive of the fact that he was fleeing from a crime scene.

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[9] S v Tandwa and Others 2008 (1) SACR 613 (SCA) at para 117; S v Monyane and Others 2001 (1) SACR 115 (T) at 122C-D; S v Tsotetsi and Others 2003 (2) SACR 648 (W); S v Pillay 2004 (2) SACR 419 (SCA) at 432F-H.

[46] In their respective notices of appeal the appellants raised the point that the bullet cartridges found in the vicinity of the crime scene did not match the second appellant's firearm. However this does not avail the appellants' case as the evidence led at the trial is that the robbers had two firearms.

[47] It was contended at the appeal hearing that the second appellant's firearm was not found at the scene of the crime and as Johannes' evidence was missing it could not be ascertained whether the firearm that was handed to Maropa was the same one that Giyani had thrown inside the car. This argument overlooks the fact that Johannes could not testify as he had passed on by the time of the trial; the identity of the firearm was never placed in dispute and the evidence of the pointing out is to the general effect that the second appellant who is the owner of the firearm participated in the commission of the crime.

APPEAL COURT'S CONCLUSION ON CONVICTION OF APPELLANTS

[48] 'The powers of a Court of appeal to interfere with the findings of fact of a trial Court are limited. In the absence of any misdirection the trial Court's conclusion, including its acceptance of a witness' evidence, is presumed to be correct, In order to succeed on appeal, the appellant must therefore convince the Court of appeal on adequate grounds that the trial Court was wrong in accepting the witness' evidence – a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is

only in exceptional cases that the Court of appeal will be entitled to interfere with a trial Court's evaluation of oral testimony.'[10]

[49] In my view there is no indication from the record that the trial court substantially misdirected itself regarding its factual and credibility findings. Consequently the appeal against conviction must fail.

APPEAL AGAINST SENTENCE.

[50] Both appellants were convicted of robbery with aggravating circumstances. The first appellant was also convicted of unlawful possession of a firearm and unlawful possession of ammunition. The provisions of section 51(2)(a)(i) of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentences Act) apply to the offences in respect of which the appellants were convicted. Unless there are substantial and compelling circumstances the Minimum Sentences Act prescribes the following sentences in respect of the crime of robbery with aggravating circumstances: a sentence of not less than 15 years imprisonment for a first offender and an a sentence of not more than 20 years imprisonment for a second offender and in a case of a third or subsequent offender a sentence of not less than 25 years imprisonment. The Minimum sentences Act prescribes a minimum sentence of 15 years in respect of a conviction for possession of a semi-automatic firearm.

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[10] S v Francis 1991 (1) SACR 198 (A) at 198J-199A; see also R v Dhlumayo and Another 1948 (2) SA 677 (A); S v Hadebe and Others 1997 (2) SACR 641 (SCA) 645E-F; S v Leve 2011 (1) SACR 87 (ECG) at para 8.

[51] In imposing sentence the court took into account the serious nature of the crimes of which the appellants were convicted, the impact of crime and the interests of society. The first appellant was sentenced to a period of 15 years imprisonment in respect of the count of robbery with aggravating circumstances. He was sentenced to a period of 15 years imprisonment in respect of the charge of possession of a firearm and 1 year imprisonment in respect of the charge of possession of ammunition. The sentences on counts 4 and 5 were ordered to run concurrently with the sentence on count 1 leaving him to serve an effective period of 15 years imprisonment.

[52] The court found that the fact that the second appellant was a police officer was an aggravating factor and sentenced him to a period of 18 years imprisonment in respect of the convion of armed robbery with aggravating circumstances.

[53] A proviso to Section 51(2) of the Minimum Sentences Act stipulates that "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". This provision was applied by the trial court when sentencing the second appellant to 18 years, i.e. to an additional period of three years over the prescribed minimum sentence of fifteen years.

[54] The first appellant's appeal against sentence is based on the ground that the sentence imposed by the trial court is too harsh and inappropriate. No reasons were submitted in support of this contention. Before imposing sentence the trial court took

into account that the first appellant was 31 years old and a first offender; that he was unemployed and earned about R3000-00 per month; he had four children who lived with their respective mothers; his family was affected by his incarceration; the period of 3 years and 10 months he had spent awaiting trial and that he was partly responsible for the delay in the finalization of the trial. The court also took into account his upbringing and that he suffered from ulcers and was on medication.

[55] A period spent in custody whilst awaiting trial is one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified but does not on its own constitute a substantial and compelling circumstance.[11] The first appellant failed to establish the existence of any substantial and compelling circumstances which is a prerequisite for justifying a departure from the prescribed minimum sentence.

[56] The second appellant's grounds of appeal are *inter alia* that his sentence is out of proportion to the gravity of the offence and does not serve the interests of justice. He also questions the extra three years imprisonment imposed on him over the prescribed minimum of 15 years in respect of count 1 and the effect of the order that sentences of his co-accused were to run concurrently, which resulted in the accused who had received longer sentences than him serving less jail time. In imposing sentence the trial court took into account that the second appellant was a first offender; that he was 36 years old and supported his two children who were 19 years and 11 years old; that he

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[11] Radebe and Another v S (726/12) [2013] ZASCA 31 (27 March 2013) at para 14; Shubane v The State (073/14) [2014] ZASCA 148 (26 September 2014) at para 10.

was employed as a driver and earned R4000-00 per month and that the mothers of his children were unemployed.

[57] The court took into account as aggravating factors that two firearms were used in a premeditated and well planned business robbery; the appellants were motivated by greed as they were employed or earning some income and that they showed no remorse. In sentencing the second appellant to 18 years the court particularly took into account as an aggravating factor the fact that the second applicant was a police officer at the time of the commission of the robbery and had abused the trust placed upon him by his employer and the broader society. Our courts have on numerous occasions found abuse of trust to be an aggravating factor.[12]

[58] In *S v Malgas*[13], dealing with section 51 of the Minimum Offences Act, the court stated among others, that courts are required to approach the imposition of sentence conscious that the legislature has ordained a particular prescribed period of imprisonment as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances unless there are, and can be seen to be, truly convincing reasons for a different response. The court further stated that the ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yard stick ("substantial and compelling") and must be such as cumulatively justify a departure from the standardized response that the legislature has ordained.

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[12] S v Kruger 1995 (1) SACR 27 (A) at 29C-E; S v Maritz 1996 (1) SACR 405 (A) at 417G-I; S v Kellerman 1997 (1) SACR 1 (A) at 8J-9A; S v V 1994 (1) SACR 598 (A) at 601G-H; S v Jackson 1998 (1) SACR 470 (SCA) at 478B.

[13] 2001 (1) SACR 469 (SCA) at para 25.

[59] In *S v Pieters*[14] the court stated that the decision to impose sentence belongs to the trial court and for this reason the appeal court may not and shall not interfere with the imposed sentence unless it is convinced that the sentence discretion has been exercised improperly or unreasonably.

[60] In *S v Pillay*[15] the court stated that 'As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence.'

[61] Having considered the facts of this case this court cannot find that the trial court misdirected itself or exercised it discretion improperly or unreasonably to justify interference with the sentence.

In the premises the following is ordered:

The first and second appellants' appeals against conviction and sentence are dismissed.

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[14] 1987 (3) SA 717 (A) at 727F-H

[15] 1977 (4) SA 531 (A) at 535E-G; see also S v De Jager 1965 (2) SA 612 (A) at 629

A L C M LEPHOKO
ACTING JUDGE OF THE HIGH COURT

I AGREE:

G. Webster.

G Webster
JUDGE OF THE HIGH COURT

Heard on: 27 October 2014.
Judgment delivered on: February 2015

For the First Appellant: Adv. P D Phahlane
Instructed by: Legal Aid South Africa.

For the Second Appellant: Adv. G C Muller
Instructed by: Leofi, Leshabana Inc.

For the Respondent: Adv. P W Coetzee
Instructed by: Director of Public Prosecutions.