REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE: NO/YES
(2)	OF INTEREST TO OTHER JUDGES: NO/YES
(3)	REVISED.
(4)	Signature 29/08/2014 Date

CASE NO: A994/2013

29/8/2014

NKOSINATHI ERIC DUZE	**1ST APPELLANT**
SIFISO COMFORT NDABA	**2ND APPELLANT**
and	
STATE	**RESPONDENT**

JUDGMENT

KHUMALO J

INTRODUCTION

[1] With leave of this court, Nkosinathi Duze and Sifiso Ndaba, 1st and 2nd Accused in the court a quo, in that order (1st and 2nd Appellant in this appeal), are appealing against their conviction for 'robbery with aggravating circumstances' and the sentence of 10 years imprisonment that was imposed by the Regional Court Division, Piet Retief.

[2] On arraignment, the Appellants and one other Accused, referred to in the court a quo as "3rd Accused" (and hereinafter), were charged with robbery with aggravating circumstances and unlawful possession of a firearm and ammunition. They were acquitted on the latter charge. A declaration of their unfitness to possess a firearm was accordingly made in terms of s 103 (2) Act 60 of 2000.

[3] Appellants' grounds of appeal upon which leave was granted was that the court a quo found them guilty of robbery with aggravating circumstances even though:

[3.1] the complainants they allegedly robbed and on whose testimony a guilty verdict was returned, did not know them nor could they identify them as perpetrators.

[3.2] the alleged robbery was committed with a firearm and yet they were acquitted on the charge of possession of arms and ammunition (when violence is an element of the crime). Therefore not all the elements of the crime were proven against them by the state.

[4] It was apparent that after leave to appeal was granted, Appellants did not file a Notice of Appeal. The heads of argument addressed only the issue of identification. On enquiry from the Appellants' legal representative as regards the second ground left out from the heads, Counsel informed the court that the second issue was not going to be addressed. The court then further inquired if the grounds set out in the heads of argument carry any weight over those set out in the Notice for leave to appeal. The state, although opposing the Appeal, had no comment in that regard.

[5] It has become a trend now for the heads of argument to serve as a substitute for the Notice to Appeal, which cannot be. In *S v Carter* 2014 (1) SACR 517 (NCK) Kgomo J urged Respondents in such instances to challenge the improper practice by raising a point *in limine*, for the matter to be struck from the roll for failure to comply with the required procedure, in order to curb the practice.

[6] The question that also arose was whether the heads of argument can substitute, abandon or introduce a new ground of Appeal that is not in the Notice for leave to appeal. It is not permissible to introduce or substitute new grounds of appeal in the heads of argument. Appellants are bound by the grounds contained in their Notice for leave to Appeal and must confine themselves to those. See *Gregory v State* (CA 142/2007) [2013] NAHCMD 46 (25 February 2013). However as *in casu,* a party can decide in their heads of argument not to proceed with some of the grounds in the Notice or leave to Appeal.

[7] The Appellant's decision not to proceed with the second ground was sensible since s 1 (1) (b) of the Criminal Procedure Act 51 of 1977 ("the Act") reads:

> "Aggravating circumstances," in relation to-
>
> (a) ...
> (b) Robbery or attempted robbery, means
> (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. (My emphasis)

[8] Van der Westhuizen J in *Minister of Justice and Constitutional Development v Masingili* 2014 (1) SACR 437 (CC) on p443I to 444a, dealt with this issue and stated that:

> "The definition of aggravating circumstances is relevant for sentencing. As a result of s 51 read with part II of sch 2 to the Criminal Law Amendment Act 105 of 1997, a court must impose a minimum sentence on a person convicted of robbery with

> aggravating circumstances unless "substantial and compelling circumstances exist which justify the imposition of a lesser sentence."

[9] The contention of the Appellants on the definitional elements of the crime is dealt with extensively in *Masingili supra,* where the court had to consider whether the Constitution requires that in order for a person to be convicted as an accomplice to robbery with aggravating circumstances, the prosecution must prove that the accomplice intended the commission of the aggravating circumstances, J van der Westhuizen held on par 456i-457a that:

> "The objective existence of aggravating factors – such as a use of a dangerous weapon is relevant for sentencing but must be proved before conviction, for reasons of fairness and practicality. For a conviction of robbery with aggravating circumstances, the state must prove *dolus* as one of the definitional elements of robbery. The absence of *dolus* regarding the aggravating circumstances on the part of the accused may be taken into account in sentencing and may result in the imposition of a lighter sentence than the statutorily prescribed minimum." (*my emphasis*)

[10] For that reason the Appellants were sentenced to 10 years imprisonment instead of the 15 years that was imposed on the 3rd Accused who threatened the complainants with violence wielding a firearm.

[11] The liability *per se* is extended by the common law of accomplice liability to the Appellants as accomplices when the 3rd Accused commits the aggravating circumstances.

[12] On that occasion the Appellants proceeded to challenge their conviction only on the issue of identification, specifically the witnesses 'failure to identify the accused'.

COMMON CAUSE FACTS

[13] It is common cause that on 4 April 2012, the Appellants, were arrested at Amsterdam on a charge of armed robbery. On their arrest, *inter alia,* 1st Appellant was found in possession of a Nokia E50 whilst 2nd Appellant had a Blackberry cellphone both reported stolen at another robbery that took place at Piet Retief on 24 March 2012, a few days before they were arrested in Amsterdam. An investigation by the Piet Retief police officers led to a third cellphone, an "Ericsson", and a DVD also reported stolen at that robbery being recovered from one Madoda Mashaba ("Madondo") and a shop called Telly Stores in Piet Retief, respectively. The police were told by 1st Appellant that the Ericsson was with Madondo and he also took the officers to the owner of Telly Stores, namely Alkamania to recover the DVD. Appellants were as a result arraigned for the Piet Retief robbery as well.

[14] The 3rd Accused was arrested in Gauteng following the arrest of the Appellants. He alleged to be a friend of 1st Appellant's mother and to stay in Gauteng and that there was no particular reason for his arrest.

[15] On trial, the Appellants together with the 3rd Accused pleaded not guilty to the charges that: they unlawfully and intentionally robbed Faree Gaibee, Nelisiwe Nthleko, Gurfan Muhammad, Gondezwa Signolia Dlamini, Abbobaker His Osman ("the complainants") by depriving them of their property, to wit, 5 cellphones, a necklace and a

DVD Player to the value of R15 000, which items were in the complainants' lawful possession, using a firearm, a 9 millimetre semi-automatic pistol that had no licence.

[16] They separately, stated the following in their Plea explanations:

[16.1] 1st Appellant bought the Nokia cellphone found in his possession from one Vuzi Nyando, ("Nyando") who hails from Pongola and used to stay with 1st Appellant in Johannesburg whilst he was working there, coming from Piet Retief.

[16.2] 2nd Appellant bought the Blackberry phone from Nyando who is well known to 1st Appellant. 2nd Appellant knew Nyando from what he heard about him from 1st Appellant, specifically that Nyando fixes *inter alia*, cellphones, radios, DVD players and anything of that sort. The two cellphones were part of the items that Nyando fixed and as they were not collected by their owners he sold them to make money.

[16.3] 1st Appellants was present at the sale of a DVD player by Nyando to a neighbourhood business known as Telly's Store and also the sale of a Sony Erickson to a certain boy namely, Madoda Mashando.

[16.4] Appellants acknowledged that the cellphones were recovered and given back to their owners by the police.

[16.5] They denied that they were in possession of a firearm.

[17] They denied robbing the complainants but alleged to have obtained the cellphones and the DVD from Vuzi Nyando.

[18] They also in terms of s 220 of the Act admissions did not dispute that the complainants were deprived of the items stipulated in the charge sheet, the robbery based on the testimony of the witnesses was a robbery with aggravating circumstances or that the the minimum sentencing regime was applicable. They further admitted that 1st Appellant took the investigating officer to Alkamania, the owner of Telly Stores, the business that bought the DVD robbed from the complainants. The Sony Erickson was positively identified as belonging to one of the complainants.

STATE'S EVIDENCE

[19] For the state, 6 witnesses gave evidence. The hairdresser, Maria Clara Nthleko ("Nthleko") was the first witness to testify. According to Nthleko the robbery took place at about 13h15 on 24 March 2012. She saw people at the shop next to the hair salon asking the Indian owner if they can buy cold drinks. After these people had entered the shops she heard a noise from the fridge and the talking. At that time the noise sounded like people yelling. She then saw one of those people chasing the Indians (two who worked at the shop and three customers) to the side of the hair salon. The chaser made the Indians lie on the floor. He then pointed a firearm to the lady customer, Sizakele Dlamini ("Dlamini") whose hair she was busy fixing, walked towards her and Dlamini grabbed the necklace from Dlamini's neck after speaking to her for a moment. The chaser then pointed the firearm at her. It looked like a toy to her. He then grabbed her two cellphones that were on the counter. He then spoke to the other people he was with, afterwards they all left. She could not hear what was being said but heard when the chaser told the others in Zulu, not to run.

She identified the chaser to be the 3rd Accused. She said she could recognise him because she took some time to look at him whilst he was busy talking to Dlamini. She confirmed that she got her phone back from the police and that the young man carrying a gun in the photo on her cellphone was unknown to her.

[20] Dlamini's evidence was that whilst at the hairsalon she heard people on the other side of the hair salon enquiring if they can buy Coca Cola. She thereafter saw the Indians coming to the side of the hairsalon, sitting on the floor and prayed. One of the intruders then came to their side brandishing a gun. He pointed the gun at her whilst approaching them. He asked her what she was doing there, grabbed the gold chain from her neck and told her to lie on the floor. The intruder is the 3rd Accused. It was the first time she was seeing this person. She was also sure that it was 3rd Accused because he stood in front of her and spoke to her. She was so traumatised that since that day she never went back there.

[21] Madondo, was the third witness. He confirmed that 1st Appellant who is his brother's friend gave him the Ericsson. According to his evidence he saw the Ericsson lying on the table at 1st Appellant's place whereupon he told 1st Appellant that he would like to buy it from him but did not have money. 1st Appellant gave him the Ericsson as a gift and told him to thank him later when he has got the money. He has been using the phone for some time until he heard from his sister in-law that the police were looking for the phone. 1st Appellant told him to take the Ericsson to the police, however it was eventually collected from him by Xaba.

[22] Xaba ("Xaba") is a constable in the South African Police Service stationed at Piet Retief. According to him he received the Ericsson from Madondo on 14 April 2012. He spoke to both Appellants soon after their arrest at Amsterdam where they were found in possession, inter alia, of 2 cellphones reported stolen at the Piet Retief hair salon robbery. 1st Appellant referred him to Madondo to recover the Ericsson E50. It was identified by the owner, one Abubaker, an indian man robbed in the Piet Retief robbery. 1st Appellant also gave him his mother's particulars who was supposed to know where 3rd Accused was. He did not follow on that information instead 3rd Accused was arrested by the Johannesburg police and 3rd Accused's fingerprints matched the fingerprints of the person named Vuzi Nyando and Mthembu. 1st Appellants told him that the other cellphones and the gold chain were in 3rd Accused's possession.

[23] Xaba's testimony was followed by that of Warrant–Officer Gerrit Andries Erasmus ("Erasmus") who was also stationed at Piet Retief. He was instructed to put together a task team to investigate the armed robbery that took place in Piet Retief where certain persons were robbed of, *inter alia*, cellphones. He, according to his testimony became aware of the arrest of the Appellants for armed robbery in Amsterdam on 4 April 2012 and decided to go there and investigate. He requested the exhibits in that case, which were 6 cellphones, watches and a 9 millimetre pistol. He compared the serial numbers of the stolen phones and the ones recovered from the Appellants. The Blackberry Curve and the Nokia E50 had serial numbers of the cellphones stolen from Piet Retief. The serial number on the firearm had faded except for the number 0022763. He accompanied Xaba to Amsterdam to talk to the accused. The Appellants confirmed that the two cellphones were found in their possession and that 3rd Accused was in possession of the firearm. They took 3rd Accused to Etanda Location. The 2nd Appellant and the 3rd Accused showed them their place of residence

where they stayed together in Polahpark. They could not search the place as the owner changed the locks. They proceeded to search 1st Appellant's residence and found two photos of the 2nd Appellant, a few bank and retail cards, sim-card and 1st Appellant's identity book. None of the cards had the Appellant's name. 1st Appellant then took them to Telly Store where they found the DVD. The owner Alkamenia confirmed that the DVD was pawned to him by 1st Appellant.

[24] Alkamenia was the last witness to testify. According to him 1st Appellant was alone when he arrived with the DVD at his shop on Monday 25 March 2012. 1st Appellant asked told him he was hungry and needed money to go to his mother. He then gave 1st Appellant R150.00. 1st Appellant took the money and left the DVD undertaking to get it back when he has money. He instead came back with the police who took the DVD. The police made him complete a form. 1st Appellant never told him of anybody else nor was 1st Appellant with someone else in the shop yard. He was also very sure that when 1st Appellant approached him it was not a Sunday.

[25] At the end of the state's case, Appellants admitted that the Ericsson found on Madondo belonged to Abu Barker Osmand and it was handed back to him by Xaba. Also that the DVD collected by the police from Telly Stores belonged to Mahommed Karovan. The state then considered it unnecessary to call them as witnesses. The decision was irrational, although not serious, since their testimony could have further corroborated the issue of identity.

DEFENDANTS' EVIDENCE

[26] According to the 1st Appellant they were arrested on 4 April 2012 and found in possession of a Nokia E20 and a Blackberry Curve that were being used by him and the 2nd Appellant respectively. He bought the Nokia from Nyando on Sunday, the 24th of March 2012 at a soccer field at about 13h30. There were a lot of people there including the 2nd Appellant when the 23 year old Nyando arrived. Nyando shared a rented room with him in Johannesburg where he works and owned a workshop and fixed DVD's and radios. On that Sunday at 3h30 a car collected him and a whole lot of people including Nyando from the soccer field at the Shell Garage to go back to work in Johannesburg.

[27] He paid Nyando R700.00 for the Nokia and on Nyando's behalf sold the DVD to Alkaminia for R130.00. He got the DVD from Nyando before they met at the soccerfield. Nyando was with him the same day on Sunday when he sold the DVD to Telly Stores. He was standing under the shop window. He denied that he pawned the DVD or having any knowledge about a robbery that took place at a hair salon. He confirmed that he told Sergeant Xaba that he stays with Nyando and asked Xaba to phone his mother so that she can take Xaba there. Nyando however stays in his own room in Actonville in Benoni in an informal settlement (squatter camp) in zinc houses. He heard that 3rd Accused, his mother's boyfriend had been arrested. 3rd Accused whose arrest he did not expect is not Nyando, but Thulane Mthembu. He is from Johannesburg and in a relationship with his mother.

[28] Under cross examination he denied selling the Ericsson to Madondo and alleged that Nyando did and he was with Nyando at the time. Also denied that he took the police to 3rd Accused's place where Nyando supposedly lives. He also denied mentioning 3rd Accused's name in court. He then again alleged to have told Madondo that he was selling the phone

on behalf of Nyando. He alleged that he was at the soccer field on the date of the robbery 24 March 2011 at 13h30 together with a lot of other boys playing soccer. 2nd Appellant who plays for the same team was also there. On the same day on Sunday he sold the Ericsson to Madondo. Madondo found him at his place bathing as he was sweating after playing soccer. He spoke to Alkeminia regarding the DVD and told him that the person only wants money to go back to Johannesburg.

[29] 2nd Appellant testified that when he was arrested in Amsterdam he was found in possession of a Blackberry Curve that he bought from Nyando at the soccerfield on Sunday the 24th of March 2012. Nyando was in possession of a lot of phones selling them at the soccerfield and 1st Appellant was present as they play for the same team. He liked the Blackberry that Nyando was selling for R800.00. As he only had R600 they agreed he will give the outstanding R200 to 1st Appellant. He was meeting Nyando for the first time. He went to school with 1st Appellant and knew that 1st Appellant and Nyando knew each other before then. He has never met 3rd Accused, he saw him for the first time in the cells at Piet Retief prison and heard that he is one of the Accused.

[30] Under cross examination he testified that he has never met the owner of the Blackberry Curve even though his photo was on her cellphone. He took photos of himself holding a firearm, after buying the cellphone at the soccer field. The firearm belonged to Vuzi Hlatshwayo who was playing soccer there. He will not be able to find Hlatshwayo since he has been in prison. On re-examination he changed his version and confirmed what his legal representative's intimated that the photo was taken with his old phone a month before he bought the Blackberry and then sent to his new phone. He denied any knowledge of the money bag, car keys and a watch lying next to him in the photo. He also denied knowing anything about the nine (9) cellphones, three (3) watches and a bag full of money that was found in their possession during their arrest. He alleged that the photo was taken at the soccer field even though it did not show a soccer field but a house instead because they were sitting under the trees near the house watching soccer.

[31] The 3rd Accused who is not part of the appeal process was born in 1963. During the trial he testified that he is Thulane Michael Mthembu and not Vuzi Nyando. A policeman known as Mthethwa from **Benoni Actonville Police Station arrested him on 1 June 2012** and brought him to Piet Retief for a crime apparently committed there. He knows that 1st Appellant is from Benoni as he has a relationship with his mother. He saw 1st Appellant every day when he visits his mother. They live near each other. He denied any knowledge about a robbery at a hair salon or knowing 2nd Appellant. He worked for himself selling tripe and originates from Lambeti in Ladysmith KwaZulu Natal. He has never heard of Vuzi Nyando nor **was he ever at Piet Retief** and did not know anything about the cellphones. The two ladies who identified him were mistaken. He could not explain why his fingerprints matched the names in the SAP69, the contents of which he did not dispute, that also indicate a name 'Masinga'. Mthethwa arrested him at Police Station when he was there to make enquiries on behalf of the 1st Appellant's mother. **He never brought his identity document to prove his real name** because the police did not tell him that he needed it. Xaba made sure the two ladies identified him. **He has known 1st Appellant's mother for nearly five years.**

[32] 1st Appellants mother, Victoria Duze, ("Duze") was the last witness to be called by the defence. According to her, her relationship with 3rd Accused known to her as Thulane Mthembu started since 2000 or even before 2000, just after 1st Appellant was born, longer than 5 years. She has known 2nd Appellant since he was a small child as he was friends with 1st Appellant, they grew up together. 2nd Appellant disappeared as a young man and has not seen him for a long time. She also knew 1st Appellant's friend Vuzi Nyondo and had seen him when they came from work at Benoni. She last visited Piet Retief in December 2012, she however visits Piet Retief frequently as she was born there and her parents stayed there. **It has been a long time since she and 3rd Accused had been to Piet Retief together. 3rd Accused came only once before to Piet Retief.** She could not explain why 3rd Accused denied ever being at Piet Retief and alleged to have known her only for the past 5 years. In 2002 and 2003 she stayed with 3rd Accused every day. When it was pointed out that 3rd Accused was in prison then she said she stayed with him even when he was in prison. She knew that he was in prison in 2002. 3rd Accused went to the police station to sort something out for her when he was arrested. **They don't stay in the same house.**

CONTENTION ON CONVICTION

[33] The Appellants argue that the court a quo came to its conclusion based on assumptions that because they were friends, they committed the robbery together, and then concluded that they were guilty because of their close and intimate relationship. They alleged to have been linked to the robbery by the cellphones to which they have given reasonable explanation that is probable and not feeble.

[34] They further argue that the state did not present substantial and compelling evidence that allows for no other reasonable conclusion other than that the accused are guilty of the offence with which they are charged.

[35] The essence of the Appellants' argument is on the circumstantial evidence upon which they have been convicted. They argue for their explanation for having in their possession the items from the robbery not to be rejected as a possible explanation, for its likelihood, knowing that if it cannot be ruled out as a possibility, when the matter is judged on the principles of logic from the well-known dicta of Watermeyer JA in *R v Blom* 1939 AD 188 at 202-203, the state would not have proven its case beyond reasonable doubt.

[36] There are, as enunciated in *Blom supra* that: "two cardinal principles of logic" which could not be ignored when it came to reasoning by inference:

> (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.
>
> (2) The proven facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, there must be doubt whether the inference sought to be drawn is correct.

[37] In criminal trials the trier of fact determines if all the proven facts supports the conclusion that the Accused committed the offences they have been charged with, which can either be by direct evidence or inferences drawn. The latter test is applicable in this case

where the court a quo sought to link the Accused through circumstantial evidence hence the contention by the Appellants and the reference to *principles in Blom* applicable.

[39] There were less contentious issues in the evidence led by the state's witnesses, whilst the evidence of the Appellants that was intended to disturb the inference that was to be drawn from the proven facts, was not only unconvincing but far-fetched. It has been accepted that an Accused person need not put up a version that is more than reasonably possibly true and the version need not even be believed. However where there is a prima facie case, an explanation that is above suspicion is required.

[40] From the 1st and 2nd witness' evidence, that the learned magistrate found to be credible, reliable and was uncontested, the court concluded that it was obvious that the robbery was committed by more than one person. 3rd Accused who was identified by the witnesses was therefore not alone when he robbed the complainants of their cellphones and necklace. He said not only were the cellphones shortly recovered from the Appellants by the police, the two witnesses heard the noise and yelling voices during the robbery and saw 3rd Accused speaking to these other people in Zulu telling them that they should leave they have taken what they want. They should walk out and not run. He concluded that it rules out the possibility that 3rd Accused was speaking to the Indian persons and confirms that he must have been speaking to the other people he came with. He also could not rule out those people to have been anybody other than the Appellants who were not long after that found in possession of the stolen cellphones. The Appellants themselves confirmed to have been in possession since the date of the robbery. The 3rd Accused also confirmed that he is from Kwazulu Natal whilst 1st Appellant confirmed that the gun belonged to 3rd Accused.

[41] The court also took into consideration that both witnesses positively identified the 3rd Accused as having been the instigator. They convincingly explained that he stood in front of them with his firearm pointed at the lady customer and spoke to the 2nd witness before grabbing her necklace. All this time they were looking at him even when he then pointed the gun at the 1st witness and took her cellphones, therefore adamant that it was him. The court then ruled out there being any other reason for the witnesses to have pointed out the 3rd Accused as the perpetrator except that they saw him on the day of the robbery. 1st Appellant mentioned the 3rd Accused to the police anyway and that he had the necklace and other 2 cellphones. 1st Appellant also told the police his mother would know where 3rd Defendant is. The mother had a relationship with him. That is how 3rd Accused got arrested. The inference drawn by the court in respect of 3rd Accused involvement is therefore incontestable. He could not produce his identity document to prove his alleged identity and judging from his evidence that was in conflict with that of Duze, inter alia, lying about ever being in Piet Retief, the state had proven beyond reasonable doubt that 3rd Accused together with the Appellants were involved.

[42] In relation to the Appellants the court considered that the stolen goods were found in their possession shortly after the robbery. The robbery was committed on Sunday the 24th of March 2014 and 1st Appellant on the very next day sold the DVD to Alkemina so a day after the robbery he was in possession of the DVD. There was no dispute that the DvD was stolen during the robbery. On his arrest, a few days thereafter 1st Appellant was also found in possession of a whole bundle of stolen cellphones including one stolen during the Piet

Retief robbery. He furthermore, pointed where the remainder of the other stolen goods were found and that the 3rd Accused was in possession of the rest of the other stolen goods. According to the court a quo all this indicated only one possibility, 1st Appellant's apparent involvement.

[43] The court then measured the above proven facts against 1st Appellant's improbable explanation that he bought the cellphone on Sunday the afternoon of the robbery from Nyando at the soccerfield where they were supposedly playing soccer and bought the DvD prior to that. Also that they left together with Nyando from the soccerfield that afternoon at 3h30 and hurriedly boarded a car on their way back to Johannesburg to work. It found that the story could not be reasonably true as it was evident from the proven facts that he was still in Piet Retief the next day pawning or selling the DVD to alkemenia. It also contradicts his other explanation that he sold the DVD to Alkamenia that Sunday and gave Madondo the Erickson in his room after the soccer match where Madondo found him washing after sweating at the soccer field. He had besides, insisted earlier that he sold the phone to Madondo with Nyando present. Both stories are clearly fabrications as in accordance with the courts finding. The soccerfield story alleged to have taken place on 24 March 2014 was definitely a feeble attempt at an alibi and to justify possession on that day, a blatant lie and correctly rejected by the court a quo.

[44] 2nd Appellant also alleged to have got the phone apparently from Nyando on the same day at the soccer field, the same time the robbery took place which has been proven to be a far-fetched likelihood, proffered by the Appellants and fittingly, rejected. The magistrate commented that, although cautious, he could not close his eyes to the fact that a few days from the Piet Retief robbery the Appellants were arrested in another robbery and found in possession of other stolen goods consisting of cellphones, watches and money, including the cellphones stolen in Piet Retief. It can only mean, which the court a quo did not stipulate, that the Appellants are engaged in criminal activities where they rob people of, *inter alia*, cellphones. The court must have been apprehensive due to the prejudice that is associated with similar fact evidence findings. However that evidence is sufficiently relevant in casu, adding to the mountain of evidence that point to the Appellants having been the perpetrators even in the robbery *in casu*. Schreiner JA in *R v Matthews* 1960 (1) SA 752 (A) at 758B-C stated that:

> "Relevancy is based upon a blend of logic and experience lying outside the law. The law starts with this practical or common sense relevancy and then adds material to it or, more commonly, excludes material from it, the result being what is legally relevant and therefore admissible. . . . *Katz's* case is authority for asking oneself whether the questioned evidence is only, in common sense, relevant to the propensity of the appellants to commit crimes of violence, with the impermissible deduction that they for that reason were more likely to have committed the crime charged, or whether there is any other reason which, fairly considered, supports the relevancy of the evidence."

[45] The learned magistrate noted the relationships between 3rd Accused and 1st Appellant, that 3rd Accused was older and with influence on the other two Appellants in their 20s. Also that 2nd Appellant and 3rd Accused stayed together. The court mentioned that as an interesting point to ponder not as proof of their guilt. They all three obviously knew each other very well and in cohorts in concealing these crimes and covering for each other

especially for the 3rd Accused, making sense of Appellants' conduct. It is the only explanation that can be assumed from the incongruences in their evidence as well as Dube who was trying to protect her son by covering for the 3rd Accused. Their guilt was clearly obvious and well-illustrated by the learned magistrate from the proven facts.

[46] In consideration of all the proven facts the state indeed proved beyond reasonable doubt that the only inference that can be drawn from all the proven facts was that the Appellants were involved.

[47] When drawing the necessary inferences of guilt in cases where proof is by circumstantial evidence, the following factors come into play:

[47.1] the doctrine of "recent possession" of stolen goods: This doctrine requires that the property found in possession of the accused must have been recently stolen. In the determination of what is recent, the nature of the stolen article is an important element. See *R Mandele* 1929 CPD 96 to 98 and *S v Letaba* 1993 (2) SCAR. Its application was explained by Harmse JA in *S v Parrow* 1973 (1) SA 603 (A) at 604B-C to be as follows:

> "On proof of possession by the accused of recently stolen property, the Court may (not must) convict him of theft **in the absence of an innocent explanation** which might reasonably be true, ie, the Court should think its way through the totality of the facts of each particular case, and must acquit the accused unless it can infer, as the only reasonable inference, that he stole the property. (*my emphasis*)

[47.2] the conduct of the accused in relation to the property: The conduct plays a very important factor in establishing the accused's guilt from circumstantial evidence. In *S v Tshabalala* and Others 1942 TPD 27 at 30, the court held that:

> "when the property is proven to have been stolen, the accused's conduct and the absence of explanation, or the giving of a false explanation, in relation to such property are relevant to the question whether his possession was innocent or guilty - they constitute circumstantial from which an inference of guilt may be drawn."

[48] The accused where found in possession of the stolen property and their conduct thereafter was distrustful. So their proffering of false explanations on how they got to be in possession of the stolen property, considering all the proven facts, clearly, as illustrated by the learned magistrate, confirm the Appellants' involvement. They have therefore failed to show that the learned magistrate erred in convicting them.

[49] I am satisfied that the Appellants were properly convicted for the robbery with aggravating circumstances with the only inference drawn from the totality of the proven facts pointing to their guilt.

SENTENCE

[50] It is trite that in deciding on sentence, each case is to be decided on its own merits with proper consideration given to the personal circumstances of the accused, the crime

and the interest of society, *S v Zinn* 1969 (2) SA 537 (A), *S v SMM and Others* 2013 SACR 292 (SCA) ([2012] ZASCA 56; The aim of sentencing being to show, through the length of sentence, the gravity of the offence, the person of the offender and the interest of society. The discretion of imposing a proper sentence is settled to be within the trial court's province.

[51] The Appeal court is therefore cautioned to interfere only if the trial court has not exercised its discretion judicially, that is, if the court misdirected itself or if the sentence imposed is disturbingly inappropriate to warrant its setting aside; See *S v Rabie* 1975 (4) SA 855 (A) at 857D-F. The misdirection by the court occurs if it fails when assessing an appropriate sentence to determine or apply the facts judiciously. A mere misdirection is not by itself sufficient to entitle interference with the sentence on appeal, it must be of such a serious nature or degree that it shows that the court did not exercise its discretion or exercised it improperly or unreasonably; See *S v Pillay* 1977 (4) SA 531 (A) at 535E-F.

[52] Having acknowledged that the stated principles are applicable when considering a proper sentence, the court assessed the following circumstances of the Appellants that were presented on their behalf. In respect of the 1st Appellant it was submitted that:

[52.1] in February 2012, he was convicted of theft and a sentence of R2 000 fine and 4 months imprisonment, and a further two years imprisonment that was suspended for five (5) years imposed. On date of sentencing he was 25 years old and has two minor children aged seven (7) and one (1) year old who stay with the mother. At the time of the commission of the crimes he was relatively young and still is. He possibly might have been under the influence of the 3rd Accused, his mother's partner who did most of the planning and played a prominent role in the commission of the crime. He and the 2nd Appellant were not the instigators. Lastly that he already has been sentenced to 20 years in the robbery they committed 10 days after the Piet Retief robbery.

In respect of the 2nd Appellant that:

[52.2] As at date of sentencing he was 24 years old and had 1 child, between the ages 1 and 2. He was convicted of theft on 24 May 2010 and sentenced to R3 000.00 fine or six months imprisonment wholly suspended on the usual conditions. He was convicted and sentenced to 15 years for the robbery in Amsterdam. 5 years for another unnamed offence.

[53] The court then took all the factors that were at play during the commission of the crime into consideration as well as the fact that Appellants were during that period busy with this kind of activities. The court saw it appropriate that the sentence to be imposed should show to have taken into consideration the convictions and sentences already imposed in those activities. Even though the court mentioned the possible influence by the 3rd Accused it noted that the Appellants still went out on their own as well and committed other crimes and that the legislature already decreed sentences for such offences. It was however in mitigation recognized that they did not go about assaulting, kicking or pushing the complainants (the absence of violence). Further that the stolen goods were recovered. The cumulative effect of all the recent sentences was objectively taken into consideration.

[54] The court then in respect of the minimal role the Appellants played in the aggravating circumstance of the offence, imposed a sentence of 10 years instead of the prescribed minimum sentence of 15 years that was imposed on the 3rd Accused as the instigator as indicated in par [9]- [11].

[55] I find that the court has given the required due weight to all the circumstances of the Appellants, aggravating as well as mitigating and the cumulative effect thereof as correctly declared in *S v Vilakazi* 2009 (1) SACR 552 (SCA) Par [18] – [20] that a sentence is not determined in the abstract but upon a consideration of all the circumstances. I therefore find no reason that justifies interference with the court a quo's penal jurisdiction.

[56] Under the circumstances, I therefore make the following order:

[56.1] The appeal in respect of both Appellants is dismissed.

N V KHUMALO J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA

I concur and it is so ordered

A A LOUW
JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA

Date heard:	2 June 2014
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