NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR613/14

In the matter between:

PREGASEN GUNGIAH **FIRST APPELLANT**

CLAUDE OLIVER DANIEL **SECOND APPELLANT**

TYRON RAMSAMY **THIRD APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

Delivered on: Friday, 20 MAY 2016

OLSEN J (XOLO AJ concurring)

[1] Each of the first two of the three appellants before us in this appeal holds the rank of Warrant Officer in the South African Police Service. Each has 23 years' service. The third appellant was presented to the court *a quo*, the Regional Court at Durban, as a police informer. He is not a member of the South African Police Service. In the court *a quo* the appellants were accused of having robbed two Pakistani nationals of cell phones, laptops, a watch, and some cash. Two counts of robbery were put, relating respectively to a Mr Nadeem and Mr Raza. The appellants were convicted on both counts, which were taken as one for the purpose of sentence. Each of them was sentenced to five years imprisonment. The appellants appeal against both their convictions and sentences with the leave of the court *a quo*.

[2] The State called three witnesses, namely the two complainants and a Warrant Officer Denver Daniels, who was the investigating officer. Each of the appellants gave evidence. Each was represented at the trial by his own lawyer.

[3] As already mentioned, both the complainants are Pakistani nationals. Mr Raza is a 23 year old man who is employed by a company called Dotcom Holdings in the information technology field. When the events in question took place in March 2011 Mr Raza shared a flat with the other complainant, Mr Nadeem, in a building in the North Beach area of Durban. Mr Nadeem is about 30 years of age and is an accountant. He has been in South Africa for about 10 years, and was at the time working for a firm known as Khan Salejee and Company.

[4] I commence with an account of the State case. At about 11pm on the night of Friday, 11 March 2011 Mr Raza was busy working at home on his laptop. At the time Mr Nadeem was either asleep or dozing on his bed. Mr Raza heard a knock at the door (which was open) and on enquiring he was told that the three men there were police and that they were acting on information that the occupants of that flat had drugs. The doorway to the flat was secured by a gate which was unlocked by Mr Raza in order to admit the three men, who, it is common cause, are the three appellants. The first and second appellants were dressed in uniform. Judging from the record, at that time the occupants of the flat would have regarded the third appellant as a plain-clothes policeman. Mr Nadeem woke up when these three men were already in the flat talking to Mr Raza. He heard them saying something about drugs. According to the complainants the first and second appellants then started searching their flat. The third appellant was inside the flat, but initially at the door.

[5] The search revealed nothing. Once that was established the second appellant took notice of the laptop computer on which Mr Raza had been working, and asked him for the receipt for it. Mr Raza said that he did not have

one as the computer was old, whereupon the second appellant struck him three or four times. The second appellant appeared to have become angry.

[6] The first appellant then picked up Mr Nadeem's laptop which was lying next to his bed, and also demanded a receipt. Mr Nadeem told him that the laptop belonged to his employer, that he was an accountant, and that he could only produce a receipt for the computer when he returned to work on Monday.

[7] By this time the third appellant had now come right into the flat, and enquired about some cash that was lying on the table next to the bed. He asked to be handed the cash and that was done. He counted it and found it to be R700, 00, and announced that he regarded that as too little and that he wanted more cash. The money in question belonged to Mr Raza. In the meantime the second appellant took Mr Nadeem's Sony cell phone from his hand where he was holding it and put it in his pocket. He asked Mr Nadeem for a receipt for the cell phone and Mr Nadeem told him that he could not produce one. At about that time or perhaps a few minutes later the first appellant searched Mr Raza's bed and there found his cell phone. He took possession of it. When Mr Raza asked for it back he was slapped on his face by the first appellant.

[8] The second appellant then asked the third appellant to search the persons of the two complainants. During that process the third appellant found Mr Nadeem's wallet and extracted the money in it (R300, 00) which he kept.

[9] The complainants were then asked to produce the keys to the flat. These were used to lock the complainants in the flat whilst the appellants went outside. On Mr Raza's evidence it is possible that the first appellant left a little in advance of the second and third appellants.

[10] Mr Nadeem had another cell phone and he used it to telephone the police. He was just about to explain the emergency situation to a woman who had answered the telephone when the second and third appellants returned.

Mr Nadeem cut off the call. The second appellant saw that Mr Nadeem had another cell phone and snatched it from his hands. He then said to the complainants that the two of them were going to be locked up, without telling them on what account that was to be done. They took the laptops with them, and accompanied the two complainants downstairs to a waiting car then occupied by the first appellant in the driver's seat. The two laptop computers were in laptop bags.

[11] The first appellant drove the car to the Durban Central Police Station, but stopped in a parking area outside the main gate. There the second appellant got out of the car and opened the rear door and started punching, kicking and otherwise assaulting Mr Nadeem. Mr Nadeem sustained injuries on his body and face and by consent a Form J88 was handed in, reflecting a medical examination which corroborated Mr Nadeem's account of his injuries. During the course of the assault the complainants were told that they were not to report the events of the night.

[12] The appellants apparently then decided that they should take the complainants back to or near the block of flats in which they lived, and on their way back the second appellant continued with his assault upon Mr Nadeem, warning both complainants that they were not to report the incident. When they arrived at a point near the block of flats and were told to get out of the car, Mr Raza became concerned about his hard-drive (presumably an external hard-drive) which was in the same bag in which his laptop had been taken from him. The laptops were in the boot of the car. He had a lot of his work on that hard-drive and asked for it to be returned, and that was done. The appellants kept the computers. When they returned to their flat the two complainants were traumatised and at that stage Mr Nadeem noticed that his gold citizen watch had also gone missing. He had seen the second appellant looking at the watch when he was searching, but had not seen the second appellant take it.

[13] Mr Nadeem had a friend in the block of flats whom he then went to see, and who telephoned the police at the request of Mr Nadeem to make a report

about what had happened. The period during which the events unfolded in the flat was somewhere around 40 minutes. (That appears to be common cause, although the appellants' versions of events are obviously somewhat different to those of the complainants.) The police responded to the call and one sees that Mr Nadeem signed a statement shortly after midnight at about 01h35 on 12 March 2011. Mr Nadeem was medically examined the next day.

[14] Some weeks after the property of the complainants was taken all of it except the money was returned. The complainants received a message from the security guard at their block of flats that a parcel had been delivered for them and they collected it. It was a box from which their computers, cell phones and the watch were recovered. The money was not recovered.

[15] When he gave evidence the third appellant sought to distance himself from many of the events of the night in question. He claimed not to have entered the flat at all; to have stood instead outside in the passage from where he could not observe what was going on inside; and therefore said that he was unable to admit or deny the complainants' version as to what took place inside the flat. He admitted carrying the two bags out of the building and down to the car, but claimed that when they got to the parking lot outside Durban Central Police Station he had to go and relieve himself, and therefore could not say whether an assault was perpetrated whilst the car was parked in the parking lot.

[16] Accordingly one must look to the evidence of the first and second appellants in order to unravel the defence version. In broad outline it was as follows. The first and second appellants received a report from the third appellant that he had heard that two Indians were selling drugs in the flat which turned out to be the one occupied by the complainants. On the night of 11 March 2011 they went there. As they approached the flat on the third floor they noticed a very strong smell of dagga. The only open door was the one to the flat to which they were being directed by the informer. The informer (the third appellant) accompanied them to the flat but stayed in the doorway once they entered. The appellants' account of their entry was substantially the

same as that of the complainants. As to the smell of dagga which they mentioned, their evidence does not extend to claiming that the inside of the flat was found to be the source of the smell. (Under cross-examination the second appellant said that he had smelt the hands of one of the complainants, and found no sign of dagga, an allegation which was absent from his account of events until he was pressed in cross-examination.)

[17] The appellants agree that the complainants made no objection to the proposition that their flat should be searched, and also that the search proved fruitless, save for one issue which I will mention shortly. They agree that they asked for a receipt for one computer, and that they accepted the explanation that if it was required it could only be obtained on the following Monday.

[18] The defence version is that during the course of the search the two policemen found two bags containing documents, and inside those bags, apparently with the documents, pieces of orange bin bags (the bags had been cut into small pieces) and also small bank packets, which, from their experience, are used by people who sell drugs. But no drugs were found. These bags are of some importance, as they are the ones allegedly carried out of the flat, containing not computers, but these documents and these small pieces of plastic or polythene.

[19] According to the first and second appellants they then enquired after the status of the two complainants in South Africa. The complainants claimed to be in the country legally and were asked to produce what the appellants called their permits. The complainants said that their permits were amongst their documents. At that stage the first and second appellants decided to take the complainants to Durban Central Police Station in order to verify their status in the country. The two bags were carried out of the block of flats and, during the apparently short journey to the Durban Central Police Station, were in the back of the car with the two complainants, who rifled through the bags searching for their permits. (This is an issue to which the third appellant could speak as he was also in the car. He gave evidence to the effect that the complainants were searching through their bags on their way to the police

station.) On arrival at the police station the complainants are said to have produced their permits. They were examined by the first and second appellants (or perhaps one of them) and found to be satisfactory. This was done whilst the third appellant carried out an instruction to throw away the bits of orange plastic which had been found in the bags. The complainants were then driven back to the vicinity of the block of flats in which they lived.

[20] The appellants denied that anything at all had been taken from the complainants. They denied that there was any assault, and indeed denied that there were any signs of injury to be seen on Mr Nadeem.

[21] The account of events furnished by the appellants raises two material issues which go to the probabilities of the case, and which played a part in the magistrate's finding that the appellants' version could not reasonably possibly be true. Firstly, the appellants' version offers no explanation for the injuries which Mr Nadeem was proved conclusively to have suffered. The answer to this furnished by counsel for the appellants is that they had no duty as accused persons to explain anything. One supposes that there is little else counsel could have said in order to overcome the difficulty that the appellants confronted on this issue. The injuries were consistent only with the complainants version, unless one postulates that they were in effect self-inflicted for the purposes of supporting a false accusation of robbery against the appellants. In considering that remote speculative proposition it should not be overlooked that on either version the complainants would not have got back to the flat until after midnight, that they telephoned the police immediately, and that the promptness of the report of the events of that night is reflected in the fact that the preliminary statement taken from Mr Nadeem was completed at 01h35. Secondly none of the appellants were able to explain why, if in fact the complainants asserted that their immigration documentation was amongst the documents in the bag, a search was not made there and then, in the flat, either by the appellants or by the complainants, in order to find and produce the documents which the complainants are alleged to have found whilst on the journey from their block of flats to the parking lot outside the police station. It should be noted that the

complainants denied under cross-examination that any enquiry was made of them in their flat or otherwise as to whether they were in the country legally.

[22] The entire State case was revealed to the court through the evidence of the first witness, Mr Nadeem. At the end of his cross-examination by three counsel, two of whom represented the first two appellants who were on both versions in the flat throughout, the only things revealed to the court about the defence case were the following.

(a) The proposition that the first and second appellants wanted documentary proof of the legal status of the two foreign complainants in the country (but not that they were unable to produce it).

(b) The proposition that the entire account of events given by Mr Nadeem was a fabrication developed or put together with the assistance of a few corrupt members of the police force.

As to this latter contention it was later contended that in fact the investigating officer, Warrant Officer Daniels, was either the responsible police officer or perhaps the principal author of the conspiracy, despite the fact that this was not even hinted at when he gave evidence.

[23] It is plain from the record that once Mr Raza had given his evidence in chief the instructions from especially the first and second appellants to their counsel had become more certain. As pointed out by counsel for the State in arguing the appeal, it was put to Mr Raza, but not to Mr Nadeem, *inter alia*,

(a) that there was a smell of drugs in the vicinity of the complainants flat;

(b) that the complainants were not only asked for documentary proof of the legitimacy of their residency in South Africa, but were unable to produce papers;

(c) that it is in this context that the complainants gave the appellants bags of documentation which were taken so that the appellants could search

them (which were propositions not put precisely in accordance with the evidence ultimately given by the first and second appellants).

[24] Counsel for the State has also pointed out that the allegation that the complainants were arrogant during the course of these interchanges was not put to them. The first appellant's evidence that both complainants refused to produced documentation relating to their status was not put to either of them. The allegation as to the discovery in the flat of small pieces of orange plastic bags, and small bank packets, was not put to the complainants. It was put to Mr Raza that packages for sealing drugs (whatever that may mean), with which the police were familiar, were discovered during the search and placed in a plastic bag together with some documents that had been found in the complainants' flat. That did not accord with the appellants' evidence, which was that bags of documents, rather than documents which were then placed in bags, were found; and that the orange pieces of plastic were found in those same bags. It was put to neither of the complainants that they spent their journey between the block of flats and the parking lot at Durban Central Police Station rifling through the two bags of documents to find documentary proof of their status. It was put to Mr Raza only that eventually these permits were found at the police station.

[25] What emerges from the record is that the defence version carries all the hallmarks of one fabricated during the course of the trial, to be presented (somewhat imperfectly) only when confidence was achieved as to the content of the State case.

[26] The attack upon the credibility of the evidence of the complainants made before us on appeal was characterised by what might be called forensic hyperbole.

(a) It is said that the complainants told a "remarkably different story" when a statement was made on the night the incident occurred that R1000,00 had been taken from Mr Raza, whereas their evidence before court was that R700,00 was taken of Mr Raza's money and

R300,00 of Mr Nadeem's money. Errors in very broad but nevertheless short statements taken immediately after an event such as this are inevitable. Yet counsel for the appellants characterised the explanation that such mistakes creep in when the police are interviewing traumatised victims as "unconvincing to say the least", ignoring altogether that when a statement was carefully taken on 16 March 2011 (four days after the event) it recorded that R700,00 had come from Mr Raza's money and R300,00 from that of the other complainant.

(b) There is said to be a "notable" and "serious" contradiction between the evidence of the two complainants, because one testified that the sum of R700,00 which was lying on a table was made up of R100 and R50 notes; whereas the other said it was made up of those notes as well as R20 and R10 notes. It was Mr Raza's money. Mr Nadeem was watching money being counted and could easily have come under the impression (which was his evidence) that there were R100 and R50 notes which made up the sum stolen. Counsel also ignores the fact that Mr Raza said that the money was in R100 and R50 denominations, and that he also had some "loose change …R20, R10".

(c) It was said to be an "important contradiction" in the description of the incident that whereas Mr Nadeem "gave the impression" that the first appellant remained in the flat until he left to fetch the police car, Mr Raza saw him leave (for what must have been a short while) before he returned and found Mr Raza's telephone at the former's bed. In the description of events which were taking place, assuming there is any contradiction at all, it is hardly surprising that one complainant would notice a brief absence of the first appellant from the flat, but not the other.

(d) There is said to be a "most material contradiction" over the question as to how the second appellant got the third cell phone from Mr Nadeem. Mr Nadeem said it was snatched from his hand whereas Mr Raza said it was given to the second appellant when he asked for it. That, counsel

argues, shows that Mr Nadeem was exaggerating and embellishing, and that the evidence is fabricated.

[27] In my view none of these arguments undermine the credibility finding made in favour of the complainants by the magistrate. They are minor matters – minor contradictions the absence of which, or the absence of the like of which, might have caused the trial magistrate to wonder whether indeed this was a carefully contrived fabrication.

[28] Counsel for the appellants has argued that there are inherent improbabilities in the account of events given by the complainants. It is said that the magistrate overlooked them. It is said that the complainants' version that they were taken to the parking lot outside the Durban Central Police Station where Mr Nadeem was assaulted for no apparent reason is improbable. The argument overlooks the fact that if the appellants were going to keep the goods they had taken from the complainants flat, then they had to ensure that the complainants did not report the evening's events. According to the complainants the appellants sought to achieve that, *inter alia*, through the brazen assault on Mr Nadeem in the car park which the appellants made plain at the time was carried out to reinforce the instruction that there should be no report made by the complainants.

[29] It was argued on behalf of the appellants that the magistrate overlooked that if the complainants' account of events was a fabrication, they would have to account for the fact that they continued to retain possession of their computers and cell phones, and had to invent the story of the items being returned in a box as it would be possible to trace these articles through technology available to the police. But of course exactly the same considerations would have encouraged the appellants to return the articles once they realised that the incident had been reported, as they would have the same problem if they retained possession of them. Furthermore, trying to get rid of them other than by returning them to the complainants would carry the risk that the stolen property may be found; with the result that the defence

that there was no removal of property other than documents would be difficult indeed to maintain.

[30] Counsel for the appellants argued that the magistrate overlooked that it was improbable that the police would confront foreign nationals in their flat (in this case over an alleged drug issue) and not make enquiries as to the legality of their status in this country. That criticism of the magistrate's approach overlooks that if, as the complainants say, the appellants were about the business of stealing the complainants' property, the legality or otherwise of the presence of the complainants in this country would be of no interest to the appellants.

[31] The magistrate did make one mistake in his account of the evidence. He was under the impression that the third appellant had denied carrying anything out of the flats until confronted with photographic evidence (emanating from CCTV cameras), when he conceded that he carried the two bags out of the building. In fact, as counsel for the appellants points out, if one examines the record one sees that the third appellant did not at any time deny having carried articles out of the block of flats. In my view that minor error does not in any way undermine the magistrate's ultimate decision, and open the door to a complete reassessment of the facts of the case by this appeal court. The applicable principle is well known. As put by Marais JA in *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645E-F,

> "…in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong."

In my view it is by some margin that the appellants fail to show a demonstrable and material misdirection justifying interference by this court with the magistrate's findings of fact. I take the view that a careful consideration of the record reveals that the magistrate's decision was correct. He rightly rejected the appellants' version and accepted that of the complainants.

[32] Counsel for the appellants argues that if the case is to be decided on the version of events provided by the complainants, then there should have been convictions not of robbery, but of theft and assault. (The argument proceeded along the lines that there need not be an equal distribution of those convictions amongst the three appellants, but in the view I take of the matter it is not necessary to decide that question.) In convicting the appellants the magistrate relied on the judgment of the then Appellate Division in *S v Yolelo* 1981 (1) SA 1002 (A). He relied in particular on the passage in the English version of the headnote at page 1004H which appears to me to be a satisfactory rendition of the original Afrikaans statement of the principle in the judgment at page 1015G-H. In that case the thieves had got relatively insecure control over the goods they proposed to steal, and still needed to get them out of the complainant's house. They assaulted the complainant in order to ensure that the complainant, or somebody who might hear her crying out, would not obstruct their efforts to get the stolen goods out of the premises. It was found that robbery had been proved even though the violence followed the initial possession of the stolen goods. The principle relied upon by the magistrate is set out as follows in the headnote referred to above.

> "Robbery can also be committed if violence follows on the completion of the theft in a juridical sense. In each case an investigation will have to be made into whether, in the light of all the circumstances, and especially the time and place of the (accused's) acts, there is such a close link between the theft and the commission of violence, that they can be regarded as connecting components of substantially one action. This is also applicable to a threat of violence in so far as it can be an element of robbery.
>
> The question whether the intention of the offender in the commission of violence must be directed towards the retention of possession or control of the goods which the thief has already taken – as opposed to merely flight – raised by not decided."

[33] In this case possession of some of the goods was taken before the complainants and the appellants left the flat. Possession of the computers was taken by the third appellant who carried them out of the block of flats and such possession was maintained by placing them in the boot of the car. The principal assault upon Mr Nadeem, which was directed at ensuring that the

theft would not be reported, occurred in the car park and on the way back to the flats. It is plain that the appellants intended to steal everything they had taken at and from the flat. But the execution of their plan to deprive the complainants permanently of their property would be near impossible if the complainants reported what had happened to the police, as, given the account of events set out earlier in this judgment, the risk of being identified and caught was far too high. That meant that the complainants had to be persuaded not to report the matter to the authorities. The violence at the car park and on the way back to the flats was perpetrated to achieve that aim. It seems to me that the connection between the theft and the violence makes them components of substantially one action, with the result that robbery was the correct verdict.

[34] However the criticism of the magistrate's reliance on *Yolelo* does not address the implications of the assaults which took place in the flat. More than one assault took place in the flat during the course of the events there, and in my view it is clear that the exhibition of force was intended to and did have the effect of subduing the complainants. In fact, Mr Nadeem's evidence reveals that the first blow struck upon Mr Raza preceded the taking of any of the stolen items. (The gold watch may be an exception to this.) The appellants were dealing with Pakistani nationals in a foreign country. Two of the appellants were dressed in a uniform which proclaimed the authority and the power of the State. They showed quickly that they would use violence for no reason at all. They took advantage of the power thus achieved over the complainants. Even the third appellant appeared to overcome whatever reticence he might initially have had when keeping to the doorway, and joined in. It is fallacious in these circumstances to argue that there was no direct evidence linking a particular assault with a particular upliftment of an article which was stolen. It is clear that the conduct of the appellants, and especially the first and to a greater extent the second appellant, was aggressive and directed at inducing a sense of shock and fear in the complainants. If the expression of an inability to produce a receipt for an old computer generated an assault, the complainants could have been in no doubt as to what the consequence would be of offering any resistance to the taking of their

property. If there was any doubt about that, the assault upon Mr Raza in response to a mere request that his cell phone should be returned illustrates both the intention behind the violence perpetrated in the flat and the existence of a real and intended threat of more to come if the arrogant appropriation of the property of the complainants executed under their very eyes was resisted in any way.

[35] The complainants' version establishes that the three appellants were acting in concert at the time. The leadership came from the first and second appellants. The third appellant adopted as his own the advantage of the submissive attitude of the complainants achieved by violence and threats of further violence, and personally participated in taking the property. He had the opportunity to turn around and walk away when the first blow was struck. He chose not to do so.

SENTENCE

[36] There is plainly merit in the argument advanced by counsel for the appellants that the magistrate misdirected himself in failing to draw a distinction between the third appellant and the two policemen as regards culpability or moral blameworthiness. It is plain from the evidence of the complainants themselves that the third appellant acted under the influence and direction, if not the command, of the first and second appellants. On the evidence before the court he had no say in the question as to whether violence would or would not be used. He went along with it without himself participating in it, albeit that he took advantage of the assaults and the threat of further violence, to share in the spoils of the robbery. The third appellant was a first offender, 28 years of age, married with one child. He cannot be tarred with the same brush, or fixed with the same moral blameworthiness, as the first and second appellants. In my view a wholly suspended prison sentence would be the appropriate sentence, giving the third appellant cause to reflect on where he went wrong, and at the same time good reason to keep his slate clean in the future.

[37] Turning to the first and second appellants, the magistrate was furnished with details of their personal circumstances and took them into account. Each of them was in his early 40's, divorced and remarried and obliged to support dependents. Each had 23 years of service and, as far as can be seen from the material put before the magistrate, had financial commitments. Neither had previously been convicted of any crime. Nevertheless the magistrate was rightly concerned about the high level of moral blameworthiness evident in the conduct of the first and second appellants, given their duties as police officers to protect members of the public. The magistrate also made the observation that he found it disconcerting and disturbing that more and more police officers are being charged with serious offences, using their status to generate opportunities to commit crimes. He therefore stressed that this was a case in which a sentence should be passed which would also operate as a deterrent to other members of the South African Police Service. He expressed the view that direct imprisonment was required and that he could not pass a more lenient sentence than five years imprisonment.

[38] Counsel for the State has argued that if the magistrate erred at all he erred on the side of leniency. However there is no dispute between counsel concerning the principle that sentencing is pre-eminently a matter for the trial court. There is no appeal made by the State with regard to sentence, and at the same time no general submission made by counsel for the appellants that, by virtue only of its quantum, the sentence imposed by the magistrate is shockingly inappropriate.

[39] Regarding the first appellant, counsel has submitted that the magistrate misdirected himself in failing to take account of what counsel called his lesser degree of participation, especially in the assaults. In my view, that argument has no merit. It is true that the second appellant was the major perpetrator of violent acts, but equally true that on the evidence before the court the first and second appellants were acting together, with equal responsibility and seeking the same benefits from their unlawful conduct. The distinction already drawn between the first and second appellants (on the one hand) and the third

appellant as regards moral blameworthiness cannot be drawn as between the first and second appellants themselves. In my view, on the evidence before the court, both the first and second appellants dominated the events of that night. Both breached the trust placed in them by society.

[40] Much of the argument on the question of sentence from counsel for the appellants was structured around the proposition that the convictions in this case ought to have been convictions of assault or theft. Concerning the appropriate sentences for the first and second appellants on a conviction of robbery, counsel's argument focused on correctional supervision.

[41] As mentioned earlier, before the magistrate each of the appellants had his own lawyer. None of them argued for a sentence of correctional supervision under s 276(1)(h) of the Criminal Procedure Act, 51 of 1977; and accordingly none of them asked that the appropriate report required by s 276A of that Act be acquired. It is unsurprising, given the facts of this case and the matters already referred to, that the magistrate expressed a conviction that a custodial sentence was required and did not call for a report on the question as to whether s 276(1)(h) might be appropriate in this case. In this appeal counsel for the first and second appellants has suggested that such an order would be appropriate and has asked us to remit the matter to the Regional Court to consider the issue of sentencing afresh. His submission is that a sentence under s 276(1)(h) of the Criminal Procedure Act would "address all of the requirements of sentencing in this matter, namely punishment, deterrence, retribution and rehabilitation. At the same time the appellants would be able to maintain their employment." I must confess to some difficulty in understanding the proposition that punishment, deterrence and retribution would characterise the imposition of such a sentence. We are not dealing with peculiar circumstances such as featured in the case of *S v Kasselman en 'n Ander* 1995 (1) SACR 429 (T) to which counsel for the appellants referred us. The crimes in this matter were committed by two seasoned and senior members of the South African Police Service who could not have claimed to have required more time or experience in their lives, or the benefit of further instruction, in order to understand the moral turpitude which attaches to

crimes of the type they committed. Counsel has not drawn our attention to any advantage which might be expected to flow from correctional supervision which would not already have been given to warrant officers of 23 years experience in the South African Police Service.

[42] Concerning s 276(1)(i) of the Criminal Procedure Act, the submission of counsel for the appellants is that a sentence under that section is not suited to the first and second appellants because it will unnecessarily disrupt their employment, family lives and probably lead to their dismissal. But he submits further that it would certainly be preferable to a sentence of five years direct imprisonment. (Of course this latter statement is somewhat at odds with a judgment relied upon by counsel for the appellants, namely *S v Truyens* 2012 (1) SACR 79 (SCA) where in paragraph 27 it is said that there is a misconception that a sentence under s 276(1) (i) of the Act is a "softer option than an ordinary sentence of direct imprisonment".) Counsel has not addressed the question at all of why it should be supposed or assumed that there is a realistic expectation that any correctional programmes available to the Commissioner would surpass or add anything to the training and experience which the first and second appellants have had over a period of 23 years of service as police officers.

[43] With reference to the case of *Truyens*, and also such cases as *S v Scheepers* 2006 (1) SACR 72 (SCA), *S v Oosthuizen* 2007 (1) SACR 321 (SCA) and an unreported judgment in this Division, namely *Bester v S* [2014] ZAKZPHC 22, counsel for the appellants argues that the failure of the magistrate to deal in his judgment with the option of a sentence under s 276(1)(i) of the Act, leads to the inference that he did not consider it, and therefore constitutes a misdirection justifying interference with the sentence. I take the view that counsel carries the argument too far. There are some convictions which call for a sentence under s 276(1) (i) and some which do not. The introduction of the option of a sentence under that section did not extinguish the sentencing option of five years direct imprisonment or less. It seems to me that the position is as stated by Cameron JA in paragraph 10 of the judgment of *S v Scheepers*.

> "The particular advantage of s 276(1) (i) should always be in the foreground when the sentencer considers that a custodial sentence is essential, but the nature of the offence suggests that an extended period of incarceration is inappropriate. In such cases, s 276(1)(i) achieves the object of a sentence unavoidably entailing imprisonment, but mitigates it substantially by creating the prospect of early release on appropriate conditions under a correctional supervision programme. This sentencing option seems tailor-made for the appellant's offences. Neither the magistrate nor the High Court considered its precise advantages. Their failure to do so requires us to intervene."
> (My emphasis)

[44] In the case of *Scheepers* the court considered an effective sentence of three years imprisonment on two counts of theft, one involving R130 and the other R1000. In *Oosthuizen's* case the court was concerned with an assault with intent to do grievous bodily harm which had attracted a sentence of 36 months imprisonment, 12 months of which were suspended. After quoting paragraph 10 of the judgment in *Scheepers* the court came to the conclusion that a sentence in terms of s 276(1) (i) would be appropriate as it would "bring home to the appellant and others that behaviour of the kind in question will not be tolerated. It would promote rehabilitation and will achieve a balance between the appellant's interests and those of society".

[45] It seems to me, based on these authorities, that whilst an appeal court is entitled to intervene because the sentencing court has failed to consider a sentence under s 276(1)(i) of the Act as an option before imposing a sentence of direct imprisonment of five years or less, whether it should do so depends on the answer to the question as to whether the case is suitable for the substitution of a sentence in terms of s 276(1)(i), or for that matter under s 276(1)(h).

[46] In the present case the magistrate expressed clearly his conviction that what Cameron JA referred to in *Scheepers* as "an extended period of incarceration" is appropriate. This is a case in which general deterrence is prominent. It is a case in which a service of vital public importance was

compromised, and a clear signal needs to be sent to others who may think that they will be treated leniently if they are caught committing the very crimes which their office is supposed to prevent and investigate. Here two uniformed senior members of the police service invaded the home of two members of a vulnerable class, and robbed them. Violence was employed both to subdue them and convey to them that two foreigners, far from their home countries, would be best advised not to confront the might of the South African Police by reporting the robbery. It would have been unsurprising if the complainants had succumbed, and not reported the crimes. Given what happened it may be assumed that it required courage on the part of the complainants to make their report.

[47] The magistrate recorded that he had been as lenient as he could, (that is that he had mitigated the sentence as far as he could) in imposing the sentence of five years imprisonment. Imposing the same sentence under s 276(1) (i) would have mitigated it further and substantially by "creating the prospect of early release" (see *Scheepers* at paragraph 10). In my view the magistrate cannot be faulted for not doing so. In my view the sentencing option under s 276(1) (i) is not "tailor-made" for the crimes for which the magistrate imposed the sentences he did.

The following order is made.

(1) The appeals against conviction are dismissed.

(2) The appeals of the first and second appellants against sentence are dismissed.

(3) The appeal of the third appellant against sentence is upheld. The sentence of five years imprisonment imposed on the third appellant is set aside and the following sentence is substituted.

“The third appellant is sentenced to three years imprisonment, wholly suspended for a period of five years on condition that the third appellant is not convicted of theft or robbery committed during the period of suspension”.

OLSEN J

XOLO AJ

Date of Hearing:	TUESDAY, 19 APRIL 2016
Date of Judgment: :	FRIDAY, 20 MAY 2016
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