Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE No: A 563/09

In the appeal between:

JONATHAN PIPERS **Appellant**

and

THE STATE **Respondent**

JUDGMENT DELIVERED ON 10 NOVEMBER 2010

BRUCE-BRAND, AJ:

[1] The appellant was convicted in the Regional Court at Bellville on two charges of robbery with aggravating circumstances and one charge of attempted robbery with aggravating circumstances. Substantial and compelling circumstances were found to exist and on 9 October 2008 the appellant was sentenced to 10 years imprisonment in respect of each of the two counts of robbery, the sentences being ordered to run concurrently. On the charge of attempted robbery he was sentenced to two years imprisonment, the effective total sentence thus being one of 12 years imprisonment. With the leave of this Court, the appellant now appeals to this Court against sentence only.

[2] The appellant was arrested on 26 June 2004. He first appeared in the Regional Court on 21 October 2004 and faced eight charges when the trial eventually commenced on 12 February 2008. The appellant was legally represented at his trial.

[3] The appellant was released from custody on R1 500 bail on 26 July 2004 but on 28 July 2004 he was again arrested on a charge of robbery with aggravating circumstances which forms the subject matter of count 6. He has remained in custody since that date. When he was convicted on 26 September 2008, he had effectively been in custody awaiting trial for four years and two months.

[4] During that time the trial was postponed some 15 times at the instance of both the State and the appellant respectively, for numerous reasons. Comment shall be made below, both on the various causes for the numerous postponements, as well as the basis upon which the long period of time spent in prison awaiting trial, should be taken into account for purposes of deciding on an appropriate sentence.

[5] The appellant pleaded not guilty to all counts, but was convicted on counts 5, 6 and 7 being:

5.1 Counts 5 and 6 – Robbery with aggravating circumstances as described in Section 1 of the Criminal Procedure Act, No. 51 of 1977; and

5.2 Count 7 – Attempted robbery with aggravating circumstances.

[6] On count 5, the victim was robbed of his gold ring worth R250. On count 6, the victim was robbed of her Motorola C200 cellular telephone valued at R549. On count 7, the attempted robbery related to a cellular telephone of which the value is unknown.

[7] According to the three charges on which he was convicted, in terms of which aggravating circumstances were alleged and proved, the appellant threatened to shoot the victims with a firearm (the make and caliber of which were unknown to the State) thereby causing them to believe that he had a firearm in his possession and would have shot them

should they fail to co-operate. The appellant was expressly informed by the Regional Court of the precise terms of the minimum sentences which, in the event of his conviction on the charges of robbery with aggravating circumstances, he would face in terms of section 51(2)(a)(i) of the Criminal Law Amendment Act 105 of 1997 ("the 1997 Act") as read with Part II of Schedule 2 to that Act.

[8] The trial court found that aggravating circumstances were proved in respect of all three charges on which the appellant had been convicted in that he had threatened to inflict grievous bodily harm on each occasion. On the evidence accepted by the Court in all three instances, the appellant uttered threats to shoot persons whom he had confronted even though no one saw an identifiable firearm. However, the manner in which the appellant held his hand under his clothing at the time of uttering these threats, led the complainants to believe that he had a firearm and would be capable of carrying out his threats to shoot.

[9] The evidence of the complainant on count 5, Fabian Benn, was that on 26 June 2004 whilst he was walking in the company of a girl, the appellant ran up behind them holding an object which looked like a black handle ("*swart steel*"). The appellant demanded that Benn hand over a ring which he was wearing, and threatened to shoot the girl if he did not do so. Because of this threat Benn removed his gold ring which he handed to the appellant who, after searching Benn's pockets, ran away.

[10] Benn telephoned the police and, upon their arrival in a police vehicle, reported the robbery to them. They drove off but after a short distance were stopped by Stephen Camphor, the complainant on count 7, who reported there had been an attempt to rob him a short while earlier.

[11] Camphor's evidence was that, after leaving the Sanlam Centre in Bellville on foot, he was approached from behind by a man who asked him the time. As Camphor did not have a watch he took out his cell phone from which he ascertained the time. When he was about to put it away, the man told him to remove the SIM-card and hand over the cell phone. However, Camphor refused to do so and an argument ensued. The man, who was holding his hand under his jacket as if he was holding some object, threatened to shoot Camphor if he did not hand over the cell phone. Even though Camphor thought this man had a firearm, he refused to hand over his cell phone and moved away, whereupon the man ran away in the direction of the Bellville station.

[12] Shortly thereafter Camphor saw the police vehicle which he stopped and reported to the police what had happened. On entering the vehicle he saw Benn. The police drove towards the station and saw the appellant whom Camphor pointed out and identified as being the man who had accosted him and had demanded his cell phone. Upon seeing the police the appellant ran away but was caught and arrested. He was searched but was not in possession of any firearm. At that time Benn identified the appellant as being the person who had robbed him.

[13] The appellant was taken to the Belhar police station where he was searched again. This time two rings were found in his right sock, as well as having in his possession a cell phone for which he did not know the PIN-code. Benn identified one of the rings found in the appellant's possession as being his gold ring which he valued at R250.

[14] On 28 July 2004 Karen de Beer was walking in Bellville South with Jacqueline Jacobs who was seven months pregnant and had a baby with her. They were approached by a man who demanded their cell phones and money. De Beer said she had no money whereupon this man said he would shoot the baby unless they handed over their cell phones. Both de Beer and Jacobs saw that the man was holding his one hand under his

clothing in a way which, together with the threat to shoot the baby, led them to believe he had a firearm. As a result of this threat Jacobs thereupon handed over her Motorola cell phone which she valued at R549. She told the trial Court that, as a result of the stress caused by this incident, she was sick for a few days.

[15] The police showed Jacobs an album containing photographs of a number of people from which she identified the appellant who was then re-arrested.

[16] At the hearing of the appeal the appellant was represented by Mr **Charters** who raised a number of issues in support of his argument for a reduction in the sentences imposed. Due consideration has been given to all of the submissions which were made on behalf of the appellant and I shall deal with the main arguments below.

[17] Appellant's counsel submitted there was serious doubt as to whether, when convicting the appellant, the inclusion of a finding that aggravating circumstances had been established was correct. It was argued that the only element of violence disclosed by the evidence was the threat to shoot if the complainants did not comply with the appellant's demand to hand over cell phones and a ring – which was, in any event, an essential requirement for the conviction on a charge of robbery. It was further argued that the Legislature must have intended that, before there can be a finding of aggravating circumstances to justify an increased sentence, there must be some further conduct over and above the actions necessary to constitute the offence of robbery.

[18] Appellant's counsel additionally suggested that the requisite threat to do grievous bodily harm, both for the purposes of robbery with aggravating circumstances and for the purposes of Part II of Schedule 2 to the 1997 Act, in effect amounts to what he described as an unfair duplication of sanctions and was comparable to double jeopardy.

[19] I do not agree with this proposition. The definition of *"aggravating circumstances"* in section 1 of the Criminal Procedure Act 51 of 1977 specifies requirements which go beyond what is required for conviction on a charge of robbery. In the context of the present matter the requisite threat of violence to justify conviction on a charge of robbery (in the absence of actual violence) does not require the violence threatened to involve a threat to do grievous bodily harm – which is, however, required to establish *"aggravating circumstances"* in the present case as defined under section 1 (b)(iii).

[20] Following the reasoning used in **S v Blaauw** 1999 (2) SACR 295 (W), the commission of the offences of robbery in the circumstances envisaged in Part II of Schedule 2 to the 1997 Act does not change the nature or description of the crime of which the appellant is convicted. There is no specific crime of *"robbery with intent to do grievous bodily harm"* nor *"robbery committed with aggravating circumstances"*. The additional features mentioned in sec 1(1)(b)(ii) or (iii) and in Part II of Schedule 2 to the 1997 Act are matters surrounding the commission of the offence of robbery which, in the eyes of the Legislature, makes it more serious. All the Legislature has done is to define circumstances which it regards as aggravating the offence charged and which, if present, will attract higher sentences than in the past.

[21] The next contention on behalf of the appellant was that, because he was unarmed and therefore not able to carry out his threat to shoot, there should not have been a finding of aggravating circumstances and the appellant should only have been convicted of robbery *simpliciter*. Factually it does appear that the appellant did not have a firearm as appears from the following:

- None of the complainants saw any firearm;

- Cst Greef arrested and searched the appellant on 26 June 2004 shortly after the commission of counts 5 and 7 but found no weapon or firearm on him. He was arrested only a matter of some 400 to 600 metres away from where Campher met Greef shortly after the attempted robbery on Campher.
- Campher ignored the appellant's threat and walked away without any violence being perpetrated and certainly no shots were fired.

[22] Reliance for this argument was based on the case of **S v Cele** 2009 (1) SACR 59 (N) where it was held that, objectively speaking, certain words uttered in conveying a threat could not be regarded as having the meaning contended for or being likely to have the consequences alleged by the State. The present matter is distinguishable in that the threat of violence implicit in a threat to shoot is clear and unequivocal, and not surprisingly in fact inspired fear in two of the complainants.

[23] It is nevertheless appropriate to consider whether, in view of the fact that the appellant was unarmed and allowed the complainant Camphor to simply walk away unharmed, aggravating circumstances were established. In **R v Jacobs**, 1961 (1) SA 475 (A), the Appellate Division held that an enquiry on whether for purposes of the section an accused had inflicted bodily harm, was an objective one based on the facts and did not depend on the further question of whether an accused had actually intended to inflict grievous bodily harm.

[24] Accordingly it was not necessary to enquire into the Appellant's state of mind to ascertain whether he harboured any actual intention to cause harm at the time of the robberies. It is a question of fact as to whether the appellant actually threatened to inflict grievous bodily harm. There is no reason to disagree with the positive finding of the

Regional Court in this regard.

[25] The question which arises here is whether a person who has not inflicted any bodily harm at all can be said to have threatened the infliction of such harm in contravention of section 1(1)(b)(iii) of the Criminal Procedure Act when in fact he was not in a position to implement or carry out his threat.

[26] In **R v Zonele and Others**, 1959 (3) SA 319 (A), an accused who pointed a firearm which was not in working order was found guilty of robbery with aggravating circumstances. This decision was relied upon in **S v Mbele** 1963 (1) SA 257 (N), which examined the question posed above and answered it in the affirmative. The headnote in that matter reads as follows:

> *"A person who has not inflicted any bodily harm at all may nevertheless be said in terms of this section, to have threatened the infliction of such harm when in fact he threatened with an unloaded pistol, ie where he was not in a position to implement or carry out his threat."*

[27] Accordingly, in the circumstances it was in my view correctly held in the present matter that aggravating circumstances were established on the evidence.

[28] Notwithstanding the existence of aggravating circumstances in this matter, the trial Court held that substantial and compelling circumstances, as envisaged by section 51(3)(a) of the 1997 Act, existed which justified the imposition of a lesser sentence than the prescribed minimum sentence of 15 years. These circumstances were found to be:

28.1 the fact that the appellant had no previous convictions;

28.2 the fact that no injuries were inflicted; and

28.3 the considerable period of time during which the appellant was in custody whilst awaiting trial.

[29] In regard to the effect on sentence of the lengthy delay before the appellant was brought to trial, it was contended on behalf of the appellant that his sentence should have been reduced by the period he spent in custody. Reliance was placed on the judgment in **S v Stephen and Another** 1994 (2) SACR 163 (W) where the following statement from the Canadian decision of **Gravino** (70/71) 13 Crim LQ 434 (Quebec Court of Appeal) was quoted with approval:

> *"Imprisonment whilst awaiting trial is the equivalent of a sentence of twice that length."*

[30] In its reasons for sentence the court *a quo* stated as follows on page 308 of the record:

> *"Ek hou in gedagte dat u hierdie lang tydperk in hegtenis was, maar u is die groot oorsaak van die vertraging en ek kan gevolglik nie sê dat hierdie lang tydperk, vier jaar, net so in gedagte gehou moet word of so in berekening gebring moet word wanneer 'n vonnis oorweeg word nie. Ek sê ek hou in gedagte dat u lank in hegtenis was, maar as u as beskuldigde nou kom en u veroorsaak uitstelle vir drie en vier jaar, kan u nie seersekerlik daarop aandring en kom sê maar ek is nou al vier jaar in hegtenis, nou moet ek 'n opgeskorte vonnis kry nie. Dan kan enige beskuldigde mos maar die ding vertraag en dan uiteindelik sê nou maar omdat ek so lank in hegtenis is, moet ek nou 'n buitestraf kry. Wat ek sê dus is dat ek hierdie tydperk bloot in berekening moet bring, dit in gedagte moet hou."*

[31] Whilst it is correct that the appellant was responsible for many of the delays which occurred, perusal of the record reveals that there were numerous other occurrences which gave rise to significant delays in progressing this matter to trial. These included failure of the prisons to bring the appellant to court, an overburdened court roll preventing the matter being heard, delays in holding an identification parade (which was eventually held a year after his arrest), the identification parade being held on one occasion without the

appellant's legal representative being present and on another occasion being frustrated by the actions of the prison authorities, the non-availability of the defence attorney, and the prosecutor being ill on the day of trial.

[32] In the circumstances, and particularly bearing in mind the above-quoted passage, it appears the trial court was unduly critical of the appellant in weighing up the delay as a factor for purposes of sentencing.

[33] In "Guide to Sentencing in South Africa" 2nd ed. by S S Terblanche, the author refers to a number of cases in support of the following passage which appears at page 205:

> *"If the accused is held in custody while awaiting the completion of the trial, the time spent in custody should be taken into account when the duration of the sentence is determined. It is not certain to what extent this should be done. However, as pre-sentence custody increases in duration, it becomes essential to do a rough subtraction in order to do justice to the offender. The courts have stopped short of saying that the term of confinement spent awaiting trial should be subtracted from the term of imprisonment the court considers appropriate; in practice this is probably the basic intention."*

[34] The above passage was quoted in **S v Vilikazi** 2000 (1) SACR 140 (W) by **Goldstein J** who referred to the above dictum from **Stephen's** case (supra), but expressed doubt on whether pre-sentence detention in South Africa is more oppressive than it is for a sentenced prisoner. He reduced the sentence which he imposed on each of the accused before him by two years, being the period for which they had been in custody awaiting trial.

[35] In the case of **S v Njikelana** 2003 (2) SACR 166 (C) this Court deducted the period

of three years for which an accused had been in custody awaiting trial and sentence, from what it considered would otherwise have been an appropriate sentence to be imposed. The charge was one of rape for which there would have been a mandatory sentence of life imprisonment had it not been for a finding that substantial and compelling circumstances existed. The Court reduced the sentence by a further year to make allowance for the fact that, whilst in custody awaiting trial, the appellant had to endure the mental anguish of the prospect of life imprisonment.

[36] In the offence of robbery the value of the goods stolen, or sought to be stolen, is not necessarily of great import but can be a relevant factor. In this present case the items involved were not of great value being a gold ring worth R250 (count 5) and a cellular telephone valued at R549 (count 6). Count 7 involved the attempted robbery of a cellular telephone of which the value is unknown. This was not mentioned by the trial court when assessing sentence.

[37] The trial court correctly considered a significant aggravating feature to be the fact that two days after being released on bail the appellant committed the further robbery which formed the subject matter of count 6. Furthermore the appellant showed no contrition or remorse for his criminal behaviour.

[38] In regard to the personal circumstances of the appellant, he is unmarried and has no previous convictions. He was employed as a forklift operator at the docks and earned R1 700 per week. He lost his parents whilst an infant and was brought up by foster parents from the age of five months. He lost his foster father one year before committing the offences of which he has been convicted and apparently this hit him hard.

[39] The appellant was 22 years of age when he was arrested, and was 27 years old

when he was sentenced. The age of an accused is an important factor particularly as, in this case, the trial Court was asked to consider rehabilitation when assessing sentence. The appellant claimed that he had been rehabilitated during the lengthy period which he spent in custody awaiting trial. This was dismissed by the trial Court on the grounds that he had not admitted his guilt and a person can only be rehabilitated once he acknowledges that he has done something wrong.

[40] At the time of considering sentence the learned Regional Magistrate gave consideration to the traditional subjective factors relating to the appellant, and this led to finding that aggravating circumstances existed. Emphasis was placed upon the seriousness of the offences, prevalence and the demands and expectations of the community. This is appropriate as appears from the statement in **S vs Mhlakaza and Another** 1997 (1) SACR 515 (SCA) at 519d-e that "*Given the current levels of violence and serious crimes in this country, it seems proper that, in sentencing especially such crimes, the emphasis should be on retribution and deterrence*".

[41] This was quoted with approval by the Supreme Court of Appeal in **S v Swart** 2004 (2) SACR 370 where **Nugent JA** commented as follows at page 378 para 12:

> *"What appears from those cases is that in our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role."*

[42] And later he stated as follows:

> *"I have pointed out that in the case of serious crimes society's sense of*

outrage and the deterrence of the offender and potential offenders deserve considerable weight.

"

[43] In the same case reference was made to statements in **S v Rabie** 1975 (4) SA 537 (A) at 540 where **Holmes JA** stated that *"the main purposes of punishment are deterrent, preventative, reformative and retributive"*, and added that the *"punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances"*.

[44] The Regional Magistrate presiding at the trial took account of his personal knowledge of crimes in the area. This was appropriate in the light of the following statement from the judgment in **S v Naidoo** 2000 (1) SACR 361 (SCA) para [10] at page 365:

"In my view, the magistrate was clearly entitled to rely on his personal knowledge of the widespread occurrence of violent crime in the area of his jurisdiction without giving prior notice of his intention to do so to the appellant's representative"

.

[45] In the context of the present case it is important for a court to retain a balance between the various factors which should be taken into account by it when assessing what will be an appropriate sentence. In **S v Mofokeng and Another** 1999 (1) SACR 502 (W) **Stegmann J** stated:

"The balanced approach of the courts is sensitive to the needs to avoid the mistake (which is both unjust and contrary to the interests of society) of 'sacrificing' any individual offender on the 'alter of deterrence'."

[46] On the issue of deterrence, it is pointed out at page 156 of Terblanche's textbook

(above) that two forms of deterrence are recognised namely *"general deterrence"* which operates against society as a whole (ie as an example to other potential offenders), and *"individual deterrence"* which operates against the offender. At page 161–162 Terblanche states:

> *"The theory behind individual deterrence is that the offender will be deterred from re-offending because he has learnt from the unpleasant experience of his punishment, or because he is fearful of what may happen if he re-offends. Ordinary suspended sentences are considered to have a particular individual deterrent effect. In the case of repeat offenders, courts often regard a sentence more severe than the previous one as the only appropriate measure since, it is argued, the offender has not learned his lesson."*

[47] A careful examination of the reasons for sentence by the court *a quo* indicates that, whilst the punitive and general deterrent factors were strongly emphasized, inadequate weight was given to the reformative and individual deterrent factors as well as the personal circumstances of the appellant.

[48] This appears particularly from the following passage in the reasons for sentence at page 310 of the record:

> *"Die Hof moet dus vonnis oplê wat die gemeenskap tot 'n mate tevrede sal stel. Ek moet ook 'n vonnis oplê wat by u sal tuisbring misdaad is nie iets wat u vir u mee moet besig hou nie. U moet ophou met misdaad pleeg, maar daardie selfde boodskap moet uitgaan ook na ander mense in die gemeenskap. Die boodskap is dat die howe swaar vonnisse sal oplê vir ernstige misdaad, wanneer 'n beskuldigde skuldig bevind is. Vergelding speel 'n belangrike rol. U moet gestraf word want dit is 'n uiters laakbare misdryf wat u pleeg."*

[49] The trial court dismissed the appellant's claim that he had been rehabilitated during the four years he had spent in custody, and further stated the following:

"U sê vir die Hof u het gerehabiliteer. 'n Mens kan net rehabiliteer as 'n mens erken dat u iets verkeerd gedoen het. U sê ek het niks verkeerd gedoen nie. As u niks verkeerd gedoen het nie, hoe kan u verander ten goede. .... Dit is duidelik uit u eie getuienis dat u nog niks geleer het omtrent misdaad, berou en dat eers moet besef ek het verkeerd gedoen voordat u kan rehabiliteer."

[50] When assessing sentence, particularly in respect of a relatively young first offender, a court should consider whether individual deterrence is appropriate. In view of the appellant having raised the issue of his rehabilitation, consideration should have been given to whether the aspect of individual deterrence personal to the appellant was appropriate.

[51] This should have appeared in the reasons for sentence – thereby indicating that it was considered. It was not mentioned and appears not to have been considered. During argument the significance of this omission was put to counsel for the State, Mr **Stephen** SC, who conceded this was a misdirection by the trial Court.

[52] It appears that the trial Court effectively stated that the appellant had not learned his lesson whilst in custody awaiting trial, and then treated him in a manner more appropriate to a repeat offender by stating:

"U sê ek is onskuldig, u hou vol daarmee, toon steeds berou nie, toon steeds geen erkenning dat u verkeerd gedoen het nie. U het dus nie kon rehabiliteer in die tydperk wat u alreeds daar is nie. 'n Vonnis moet opgelê word wat u tot ander insigte moet dwing of probeer dwing."

[53] Whilst lack of remorse is relevant to sentence, insofar as this passage shows a lack of remorse on the part of the appellant, it indicates that such lack of remorse was regarded as an aggravating feature in imposing sentence. This concept is dealt with by Terblanche at pages 189–190 where he states:

"Lack of remorse has often been mentioned as an aggravating factor, although there has been little discussion about the reasons for this view. Sometimes it is simply mentioned as a factor which is not mitigating. However, the offender is fully entitled to plead not guilty, to challenge the prosecution to prove his guilt, and to attack in cross-examination the witnesses' versions of events. This should never be held against him when sentence is imposed."

[54] In view of the misdirection by the trial Court, this Court is at large on sentence. Furthermore and in any event, the sentences imposed on counts 5 and 6 are, to my mind, excessive particularly bearing in mind the period of approximately four years during which the appellant was in custody awaiting trial.

[55] In the particular circumstances of this case I consider it is appropriate to examine whether a portion of the sentence imposed on the appellant should be suspended for rehabilitative purposes. Section 297(4) of the Criminal Procedure Act provides:

"Where a court convicts a person of an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion pass sentence but order the operation of a part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a)(i) of subsection (1)."

[56] It is necessary to consider whether it is competent to suspend all or a portion of the sentence of imprisonment for an accused convicted on a charge of robbery involving a threat to inflict grievous bodily harm which constitutes aggravating circumstances (and which therefore falls within the provisions of Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997), but where substantial and compelling circumstances have been found to exist.

[57] As appears from the heading thereto, section 51 of the Criminal Law Amendment Act prescribes *"Minimum sentences for certain serious offences"*. Sub-section 51(5)

provides: *"The operation of a sentence imposed in terms of this section shall not be suspended as contemplated in section 297 (4) of the Criminal Procedure Act, 1977 (Act 51 of 1977)"*. At face value this might appear to remove the court's discretion to impose a suspended sentence for any matter falling under the ambit of section 51.

[58] However, where there has been a finding that substantial and compelling circumstances exist, does the prohibition against suspension contained in section 51(5) preclude the Court from suspending all or part of the lesser sentence being imposed?

[59] One must consider whether the Legislature intended for section 51 of the 1997 Act to restrict the discretion of a Court when sentencing any offender who has been convicted of an offence falling within the ambit of subsections (1) and (2) thereof - even if substantial and compelling circumstances exist. Such an interpretation would not, in my view, accord with the intention of the Legislature when enacting this Minimum Sentence Legislation. As stated above, the subheading to section 51 is focused on minimum sentences for certain serious offences.

[60] Insofar as there may be uncertainty as to the intention of the Legislature in regard to the scope of the application of section 51(5) of the 1997 Act, in view of the serious inroads into the Court's discretion this provision could have if sub-section 51(5) does remove the court's discretion, it should be interpreted restrictively. In this regard in **S v Kimberly** 2005 (2) SACR 663 (SCA) at paragraph 13 the Supreme Court of Appeal (when dealing with section 51) indicated that, insofar as wording in Part 1 of Schedule 2 to the 1997 Act might not be clear, such provisions should be interpreted in a way *"least harsh to the affected person"* and stated:

> *"More particularly, statutes which prescribe minimum sentences, such as the statute here under consideration, thus eliminating the usual discretion*

of a court to impose a sentence which befits the peculiar circumstances of each individual case, will usually be construed in such a way that the penal discretion remains intact as far as possible."

[61] However, as appears from the judgments in **S v Blaauw** (supra) and in **S v Dithotze** 1999 (2) SACR 314 (W), it is clear that the discretion of the courts was not removed by section 51, even though the intention of the Legislature in enacting section 51 was that "*a clear message is to be sent, both by Parliament and the Courts alike, that serious crime will be punished severely*". This follows from the following statements in **Blaauw's** case at 302h and 311e:

"It is my view important to note that this legislation does not create mandatory sentences which strip the Courts of all their traditional discretions when it comes to determining an appropriate sentence in any individual case. The Courts are not reduced by these provisions to the mere rubber stamp complained of in ***S v Toms***, ***S v Bruce*** *1990 (2) SA 802 (A), for some discretion is left to the Court if substantial and compelling circumstances are found to be present."*

"*Section 51(1) read with s 51(3) of the Act does not create a mandatory sentence, for a measure of discretion is permitted to the Court to find that substantial and compelling circumstances exist which justify the imposition of a sentence less severe than that of life imprisonment. This discretion is narrower than that permitted in earlier legislation where the finding of mere 'circumstances' was sufficient to justify a departure from a prescribed sentence. The Legislature has not seen fit to describe what factors may or may not be considered, consequently a Court is, in my view, still able to have regard to all the factors which would traditionally have been considered in imposing sentence.*"

[62] The conclusion that the judicial discretion is not removed by section 51 of the 1997 Act is reflected in a passage in Terblanche, *op cit,* where, in para 3.6.5 at page 69 under subheading "Reinstatement of the court's discretion", he states the following:

"Generally, once the court has found substantial and compelling circumstances to be present in a particular case, the authority in terms of which the discretionary sentence should be imposed has not been an issue. Clearly, the court would then return to the normal position, as if the Act had not been passed."

[63] At page 72 Terblanche, *op cit* paragraph 3.8.2 comments further on when a court may suspend the sentence imposed in respect of offences falling within the scope of the Minimum Sentence Legislation as follows:

"Section 51(1) prohibits the sentencing court to suspend any sentence imposed in terms of section 51, whether in part or completely. A sentence imposed ***after*** *a finding that substantial and compelling circumstances exist is clearly not sentence 'imposed in terms of this section [section 51]. Rather it is a sentence imposed in terms of the court's ordinary sentencing jurisdiction, as mentioned in paragraph 3.6.5."*

[64] In considering the period for which part of the sentence should be suspended, cognisance is taken of the judgment in **S v Wakiri** 1981 (2) SA 527 (ZA) where it was stated:

"*The main purpose of a suspended sentence is rehabilitative and, while a long period of suspension is probably right for a wholly suspended sentence or after a comparatively short period of imprisonment, after a long period of imprisonment what is needed is a comparatively short period of suspension to induce the released offender to settle down to a useful life."*

[65] In all the circumstances of this matter, whilst the sentence to be imposed should be a period of imprisonment of sufficient duration to reflect the serious view taken by this Court to the unacceptable criminal behaviour of the appellant, I consider it appropriate for a portion of such imprisonment to be suspended to deter the appellant from re-offending.

[66] Accordingly, bearing in mind the facts I have set out above, as well as the

unusually long period which the appellant spent in custody awaiting trial, the following order is made:

66.1 On count 7, being the charge of attempted robbery, the appeal against sentence is dismissed and the sentence of (2) two years imprisonment is confirmed.

66.2 The appeal against sentence on counts 5 and 6 is upheld to the extent set out below.

66.3 On each of counts 5 and 6:

66.3.1 the original sentence of ten years imprisonment is set aside;

66.3.2 the appellant is sentenced to (6) six years imprisonment of which (2) two years is suspended for a period of (3) three years on condition that the appellant does not during such period of suspension commit the offence of robbery or any other offence of which violence or theft is an element and for which he is subsequently convicted;

66.3.3 the sentences on counts 5 and 6 are ordered to run concurrently;

66.4 The sentences on counts 5, 6 and 7 are antedated to 9 October 2008.

66.5 The effective total sentence (excluding the portion of the sentences on counts 5 and 6 which are suspended) is thus (6) six years imprisonment.

.....
A BRUCE-BRAND AJ

I agree and it is so ordered.

.....
P J GOLIATH