IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: A 468/09

In the matter between

MZUHLANGENE QWABE **Appellant**

and

THE STATE **1st Respondent**

For the Applicant
Adv. A. Caiger

For the State
Adv. P. Van Wyk

Republic of South Africa REPORTABLE

In the High Court of South Africa
Western Cape High Court, Cape Town

Case No: A 468/09
On roll: Division 9
Set down for 12/02/2010

In the matter between:

MZUHLANGENE QWABE Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED: 11 MAY 2010

S. OLIVIER AJ

Introduction

1. This is an appeal against sentence.

2. The appellant, as accused number two, and his two co-accused were charged on 8 March 2006 with two counts of robbery with aggravating circumstances, two counts of attempted murder, one

count of unlawful possession of a firearm, one count of unlawful possession of ammunition, one count of pointing of a firearm and one count of unlawful possession of a dangerous weapon in the Wynberg regional court.

3. The appellant was legally represented in the proceedings in the regional court.

4. On 12 March 2007 the appellant and his co-accused, Lwandiso Xunda, accused number one, was convicted on each of the two counts of robbery and each of the two counts of attempted murder charges, with appellant being the only one convicted on the charge of unlawful possession of a dangerous weapon. The third accused was found not guilty.

5. The appellant was then sentenced to a term of imprisonment of twenty years on each count of robbery, and to imprisonment of ten years on each count of attempted murder and to one years imprisonment on the count of possession of a dangerous weapon. The court *a quo* also made an order that the sentences run concurrently, leading to an effective term of imprisonment of twenty years.

6. The appellant had a previous conviction for robbery, and in terms of section 51(2)(a)(ii) of the Criminal Law Amendment Act, Act 105 of

1997, ('the Act') the court *a quo* imposed the sentences of twenty (20) years imprisonment in respect of the robbery convictions, finding that there were no substantial or compelling circumstances justifying imposition of a lesser sentence.

7. The appellant's co-accused, Lwondiso Xunda, on appeal under case number A 379/2007, had his convictions and sentences confirmed by this Court on 7 March 2008.

8. The appellant now appeals against the sentences imposed upon him by the regional court, after having been granted leave to appeal by the regional court on 14 May 2009.

Background

9. On 16 February 2005 and at their residence two young brothers, Alistair and Michael Schreiber and their house keeper, Mrs Contance Mbokoma, were the victims of a robbery wherein three perpetrators took part. Alistair Schreiber was accosted outside the residence by the first accused and a third person (the third accused was acquitted, so we don't know who this person was).[1] Michael Schreiber was accosted by the knife bearing appellant who had grabbed him from behind and put the knife to his throat. The first

[1] There was some inadmissible evidence that the accused had identified the third accused as the third perpetrator.

accused fired two shots with the revolver he had on him.[2] The latter of these shots were fired in the kitchen and in close proximity of Michael Schreiber whilst he was still in the grip of the appellant. Though the appellant had a knife on him, Alistair Schreiber attacked him and the appellant fled through the kitchen door. The accused were shortly thereafter arrested. The appellant tried to flee, was pursued, tried to fend off the arresting officer with a knife, and only submitted after a warning shot was fired.

10. Only the appellant was identified by Mrs Mbokomo at a subsequent identity parade.[3] The other complainants misidentified the perpetrators at the identity parade.[4]

11. The appellant was placed on the scene by virtue of his fingerprints being found on a porcelain pot that was in a drawer in a sideboard in which the small change stolen from the residence was stored. The finger print identification was beyond doubt and no proper explanation could be given for it being on the porcelain pot. DNA analysis also inexorably linked the first accused to the crime scene.

12. Accordingly the first accused and the appellant were convicted.

---

[2] Described as having a "spinning barrel" (at record p 23)
[3] Though there was evidence that Alistair Schreiber had positively identified two of the accused in the police van shortly after their arrest.
[4] For reasons which are not clear accused one and two were excused from the parade at the request of the investigating officer prior to Michael Schreiber being asked to identify the perpetrators.

A duplication of charges on the first two counts?

13. Though the appeal is directed against sentence only it appears that there may have been a duplication with regard to the two charges of robbery. They were levelled as follows: first that the accused unlawfully and with the intention to force him into submission, used force against Alistair Schreiber or threatened and led him to believe that force would be used on him, by threatening him with a firearm and by hitting him with the firearm and unlawfully and with the intent to steal one set of house keys with a remote, one set of car keys and coins, the property of or in the lawful possession or under the control of the said Michael Schreiber and, second, that the accused unlawfully and with the intention to force into submission, used force against Michael Schreiber or threatened and led him to believe that force would be used on him by threatening him with a knife, and unlawfully and with the intent to steal money the property of or in the lawful possession or under the control of the said of Michael Schreiber.

14. In S v Benjamin en 'n Ander 1980 (1) SA 950 (A) the court enunciated two practical tests (at 956E-H) to determine whether there was a duplication of charges. The first is whether the

evidence which is necessary to establish the one charge also establishes the other charge – then there is only one offence. If one charge does not contain the same elements as the other, there are two offences (R v Gordon 1909 EDC 254 at 268 and 269). This can be called the "*same evidence test*". The second test is if there are two acts, each of which would constitute an independent offence, but only one intent, and both acts are necessary to realize this intent, there is only one offence (R v Sabuyi 1905 TS 170). There is then a continuous criminal transaction. This test is referred to as "*the single intent test*". In S v Toubie 2004 (1) SACR 530 (W) at 547f-I a full court held that robbery of different persons at the same premises constituted single intent.

15. In the instant case, however, the appeal is against the sentence only and there is no appeal against the conviction. When we raised the issue with counsel we were met with a muted response.

16. In the premises it does not appear to be a case in which the invoke the provisions of section 304(4) of the Criminal Procedure Act, 51 of 1977, which provides a general remedy to correct proceedings of any lower court which are not subject to automatic review, should be applied. Should the appellant wish to do so, it is open to him to bring a proper application to appeal his conviction on the two charges of robbery, if so advised.

The sentences imposed

17. In sentencing the appellant the learned Magistrate gave a reasoned judgment.

18. For the purpose of sentence he took into account that the accused had been found guilty of very serious offences and had regard to all factors, submitted by both the prosecution and the defence in order to arrive at a balanced conclusion regarding sentence. He noted the personal circumstances of the accused.

19. The appellant had admitted his previous conviction for assault with the intent to inflict serious injury on 29 August 2000 and for robbery on 21 February 2000. In the latter case the sentence was 12 months incarceration suspended for five years on condition that the appellant is not convicted of robbery perpetrated within the period of suspension.[5] It would seem that the minimum sentence provisions, set out below, did not apply to this latter conviction as a suspended sentence may not be imposed,[6] and in the case of someone under the age of 18 years, not more than half the

[5] Record p 434.
[6] See section 52(5)(a) of the Criminal Law Amendment Act, 105 of 1977

minimum sentence period may be suspended.[7] The appellant was 19 years of age at the time of the commissioning of the offence.[8]

20. He found that there were no compelling and substantial circumstances, at least in respect of counts 1 and 2, which would have justified a deviation from the compulsory minimum sentences prescribed by the Act.

21. He also found that the appellant was a second offender, as contemplated by section 51(2)(a)(ii) of the Act, as robbery is an offence referred to in Part II of Schedule 2, and, as such, was to be sentenced to imprisonment for a period of not less than 20 years.

22. "*Robbery*" is defined in Part II of Schedule as "*when there are aggravating circumstances*".

23. "*Aggravating circumstances*" is defined in Section 1 of the Criminal Procedure Act, 51 of 1977, in relation to "*robbery*" to mean "*(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 after the commission of the offence.*"

---

[7] See section 52(5)(b) of the Act.
[8] The SAP 69 reflects his date of birth as being 19 January 1980 – Record p 433

24. Given the facts set out above, it seems clear to me that the conduct of the perpetrators meet the definition of robbery with aggravating circumstances. Both the appellant and accused one wielded either a fire-arm (on the part of accused one) or a dangerous weapon in the form of a knife (on the part of appellant) and accused one had expressly threatened to kill.[9] They were also accomplices in the commissioning of the robbery. They were both correctly convicted of the two counts of robbery with aggravating circumstances.

25. In sentencing the learned Magistrate concluded that the appellant's previous conviction for "*robbery*" fell within the definition section 51(2)(a)(ii) read with Part II of Schedule 2.

26. It would seem to me that in order for the appellant to fall within the provisions of section 51(2)(a)(ii) his previous conviction would have to have been of "*such an offence*" namely "*robbery when there (were) aggravating circumstances.*"

27. Mr van Wyk, who at our request, submitted additional argument on the point, contended that keywords in the section central to the issue at hand were '*of any such offence*' and more particularly the word '*such*'.

28. He referred us to the dictionary meaning of the word "*such*".

---

[9] The evidence was that he had shouted "*shut up or I will kill you*" – Record p 21

29. The Concise Oxford Dictionary of the Current English, 7th edition defines the word "*such*" as

> *"1. of the same kind or degree as; 2. so great, having a quality in so high a degree; 3. of the kind or degree already described or implied in context; 4. the aforesaid, of the aforesaid kind; 5. of a kind that demands exclamatory description; 6. of a kind or degree sufficient to explain the preceding or following statement; 7. of particular kind but not needing to be specified; 8. such a person or thing; 9. those who, persons such as; 10. that, the thing 2. or action referred to; 11. as being what has been named; 12. things of such a kind; 13. the aforesaid thing."*

30. It would seem to me that the word "*such*", as defined above, imports the concept of similarity of *"kind or degree"* or *"of the kind or degree already described or implied in context;* or *"of the aforesaid kind"* into the offence under consideration. It would follow from that not any robbery, but only a robbery of such kind or degree would qualify.

31. Dictionary meanings are, however, only a guide to meaning because the meaning of words depends on context.[10] In City of Johannesburg v Engen Petroleum Ltd and Another 2009 (4) SA 412 (SCA) Lewis JA said at paragraph [10]

[10] National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at par [61].

"*In Monsanto Co v MDB Animal Health (Pty) Ltd (formerly MD Biologics CC)*[11] *Harms JA repeated the general principle that, while dictionary definitions may be a useful guide to the meaning of a word, the task of an interpreter is to ascertain the meaning of a word in its context. The court cited the dictum of Hefer JA in Fundstrust (Pty) Ltd (in Liquidation) v Van Deventer*[12] *where he had said:*

> *'As a rule every word or expression must be given its ordinary meaning and in this regard lexical research is useful and at times indispensable. Occasionally, however, it is not.'*

32. In Nissan SA (Pty) Ltd v Commissione for Inland Revenue 1998 (4) SA 860 (SCA) the court had occasion to consider the meaning of the word "*such*" in the context of exemptions in respect of rebates under taxation legislation and whether ministerial approval was required for exemption under the second leg of section 10(1)(zA) of the Income Tax Act, 129 of 1991. Section 10(1)(zA) has two legs: the first referred to a scheme '*for the promotion or financing of exports which is for the purposes of this paragraph approved by*' the two Ministers, while the second extended the exemption of any amount '*which is paid by the State under any such scheme*'. While it was clear that the first leg contemplated a ministerially approved scheme, the second leg did not necessarily also do so. Whether or not it did depended on an analysis of the further elements of the provision. The phrase '*any such scheme*' could mean either that the scheme in question had to have the same purposive

[11] 2001 (2) SA 887 (SCA) para 9
[12] 1997 (1) SA 710 (A) at '26H-727B. See also De Beers Industrial Diamond Division (Pty) Ltd v Ishizuka 1980 (2) SA 191 (T) at 196E-F; and Seven leven Corporation of SA (Pty) Ltd v Cancun Trading No 150 CC 2005 CS) 186 (SCA) ([2005] 2 All SA 256) para 24.

characteristic as the one referred to in the first paragraph, viz to be one *'for the promotion and financing of exports'*, in which case ministerial approval would not be required, or that ministerial approval was an essential element of the scheme and that if there had been no such approval the payment could not qualify as a payment under the scheme at all.

33. Marais JA held as follows at 869

> *"Is the word 'such' in the context in which it is used in this provision so grammatically intractable that it cannot accommodate another meaning to which other admissible indicia might convincingly point? Some illuminating observations as to the meaning and use (or misuse) of the word are to be found in Sir Owen Dixon's judgment in the Australian case of Jones and Company (Pty) Ltd and Others v The Warden, Councillors and Electors of the Municipality of Kingborough (1950) 82 CLR 282 (HC of A) at 317–19. While readily conceding that 'the prima facie logical or grammatical effect' of the word is to require what has been said before to be taken as having been repeated, he said:*
>
> > *'It is quite another thing to treat the prima facie meaning as prevailing over the indication of a contrary intention supplied by the context and by the substantial nature of the provisions.'*
>
> *(At 317.) After referring to a number of decisions in England in which the courts had declined to give the word 'such' a strictly confined grammatical meaning, Dixon J said this:*

'These decisions are, of course, no more than illustrations of the recognition by the Courts that difficulties caused by the ill-considered resort of draftsmen to the use of the word "such" are to be met by a readiness on the part of the courts to mould the application of that not inflexible relative word so as not to defeat the intention gathered from the context. But the observations quoted suggest what is, I believe, the solution of the difficulty in the present case. It lies in recognizing that a draftsman in using the word "such" may not have in mind all the precise qualities which by an adjectival phrase he may have attributed to its antecedent in an earlier part of his text and may really intend to refer only to the general nature of the thing or concept to which he has occasion again to refer. In yielding to the temptation to employ the word "such" and avoid all repetition he may not have seen or been alive to all the implications which a logical application of the word involves. To borrow the phraseology of Lord Chelmsford (this is a reference to what Lord Chelmsford said in Eastern Countries Railway Co v Marriage (1860) 9 HLC 31 at 73--4) and give it a somewhat different application, there may for this reason be occasions when the relative "such" ought to be referred not to all the characteristics contained in the previous description of the antecedent but to the more general characteristics to which the context appears properly to attract it. Here I think the truth is that the draftsman desired to confine the provision made in s 209 to water districts within municipalities and to rivers, creeks and watercourses within the limits of water districts within municipalities. He sought to re-express the limitation by employing the word "such" but he did not intend by so doing to re-express the further limitation of water districts to those which theretofore had been controlled and managed by the council of a rural municipality or other abolished local body. That it could not have been so intended is, I think, shown by the considerations I have already stated, and effect is best given to the real intention by modifying the strictly logical application of the word "such" and doing so in accordance with what it may reasonably be supposed was left to be the sense of the word when it was employed.'

(The emphasis in the passage quoted is mine.)

These observations seem, with respect, so redolent of common sense that I would not wish to demur. However, it remains of course a question whether in any given case there is indeed adequate justification for concluding that the 'real intention' of the Legislature is properly evidenced. In answering the question the dividing line between impermissible speculation as to the purpose of legislation and permissible reliance upon factors dehors the language under consideration to discover it, is admittedly sometimes fine but it is a conceptually clear line which must be respected."

34. Again, in the context, it seems to me, "*any such an offence*" must be an offence of the same "*kind or degree*" (borrowing from the Oxford dictionary) as the *"kind or degree"* of the offence in question. In other words, I am of the view that *"any such offence"* must be, in the instant case, robbery with aggravating circumstances. To hold otherwise would result in the first conviction of robbery being elevated, for the purpose of sentencing, to a conviction of robbery with aggravating circumstances. It could not, in my view, have been the contemplation of the legislature to impose the sentencing regime of section 52 on offence which would not expressly otherwise fall under its provisions.

35. In this case it is what happened. His sentence on 21 February 2000 was in respect of "*robbery*" for which he was sentenced to 12 months suspended for 5 years. Given his age (19 at the time of the commission of the offence) and the provisions of section 51(5) of the Act (which required direct imprisonment), he could not have

been convicted of any form of robbery as defined in Parts I, II or IV to Schedule 2 of the Act.

36. In the premises I am of the view that the learned Magistrate had erred in applying the provisions of section 51(2)(a)(ii) of the Act and he ought to have treated the appellant as a first offender under section 51(2)(a)(i) of the Act which provides for a minimum sentence of 15 years imprisonment to be imposed.

Substantial and compelling circumstances

37. Section 51(3)(a) of the Act provides that *"any court ... is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence ..."*

38. As mitigating factors the learned Magistrate only found the personal circumstances of the accused, namely their (youthful) ages – which made them candidates for rehabilitation – and expressed sympathy for their families – the appellant has a child eight years of age at the time of sentencing, then living with his paternal grandmother, whilst his mother was at school in Bloemfontein. Both the appellant's parents are alive, but they are separated. The appellant

obtained grade nine at school and has had some training as a barber.

39. As aggravating factors the learned Magistrate had regard to the fact that the appellant was not a first offender. Though, for the reasons set out above, this fact did not make section 51(2)(a)(ii) of the Act applicable, the learned Magistrate was, in my view, quite correct to have regard thereto in considering sentence. Not only did the appellant have a previous conviction for robbery he also had a previous conviction for assault with the intent to do grievous bodily harm. In respect of the conviction for robbery he was subject to a suspended sentence which was now to be imposed as a result of his conviction.

40. In an endeavour to point to "*substantial and compelling*" circumstances, Mr Caiger, who appeared for the appellant sought to rely on the fact that neither of the complainants were seriously injured. He pointed to the fact that the perpetrators did not take much. Finally he relied on the fact that they were apprehended the same day.

41. These arguments do not have any substance to them – it was perhaps only fortuitous that no serious injury or death resulted from the commissioning of the offences. After all the appellant and accused one were correctly convicted of attempted murder. They

only took little because that was all that they could lay their hands on. In addition the appellant fled the police and only submitted to his arrest when cornered and after warning shots were fired – and then only after having drawn his knife on the arresting officer.

42. None of these factors relied upon by Mr Caiger can therefore constitute *"substantial"* or *"compelling"* circumstances.

43. It is appropriate to repeat that which Nugent JA had recently stated in S v Vilakazi 2009 (1) SACR 552 (SCA) at para [18] and [20]

> *[18] It is plain from the determinative test laid down by Malgas,*[13] *consistent with what was said throughout the judgment, and consistent with what was said by the Constitutional Court in Dodo,*[14] *that a prescribed sentence cannot be assumed a priori to be proportionate in a particular case. It cannot even be assumed a priori that the sentence is constitutionally permitted. Whether the prescribed sentence is indeed proportionate, and thus capable of being imposed, is a matter to be determined upon a consideration of the circumstances of the particular case. It ought to be apparent that when the matter is approached in that way it might turn out that the prescribed sentence is seldom imposed in cases that fall within the specified category. If that occurs it will be because the prescribed sentence is seldom proportionate to the offence. For the essence of Malgas and of Dodo is that disproportionate sentences are not to be imposed and that courts are not vehicles for injustice.*
>
> ...
>
> *[20] I do not think it is helpful to revisit constructions of the Act that were considered and rejected in Malgas, as much of the argument before us attempted to do. I have pointed out that the essence of the*

[13] S v Malgas 2001 (1) SACR 469 (SCA); 2001 (2) SA 1222 (SCA); [2001] 3 All SA 220 (SCA)
[14] S v Dodo 2001 (1) SACR 594 (CC); 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC)

decisions in Malgas and in Dodo is that a court is not compelled to perpetrate injustice by imposing a sentence that is disproportionate to the particular offence. Whether a sentence is proportionate cannot be determined in the abstract, but only upon a consideration of all material circumstances of the particular case, though bearing in mind what the legislature has ordained and the other strictures referred to in Malgas. It was also pointed out in Malgas that a prescribed sentence need not be 'shockingly unjust' before it is departed from for '(o)ne does not calibrate injustices in a court of law'. It is enough for the sentence to be departed from that it would be unjust to impose it."

44. I accordingly find that there are no substantial or compelling reasons for not imposing the minimum sentence of 15 years on each count of robbery with aggravating circumstances.

45. Mr Caiger had submitted in his heads of argument that a sentence of 10 to 15 years imprisonment would have been appropriate in the circumstances.

46. A sentence of 15 years in respect of robbery with aggravating circumstances would, given the facts and circumstances set out above, be proportionate. This term also accords with Mr Caiger's submission.

47. In the premises I would

(a) uphold the appeal against the sentences imposed in respect of counts one and two – that is the counts of

robbery with aggravating circumstances – and substitute the sentences of 20 years with sentences of imprisonment of 15 years in respect of each count.

(b) hold that these sentences are to run concurrently with the remainder of the sentences imposed by the learned Magistrate.

(c) Save as aforesaid I would dismiss the appeal against the other sentences imposed by the learned Magistrate.

S OLIVIER

NDITA J: I agree, it is so ordered

T NDITA