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

CASE NO: A448/12

In the matter between:

NANTOMBI MASINGILI	First appellant
SIYABULELA VOLO	Second appellant
MZONKE MLINDALAE	Third appellant
SITHUMBELE GOVUZA	Fourth appellant

and

THE STATE	Respondent

JUDGMENT DELIVERED ON 20 MARCH 2013

BLIGNAULT J and VAN STADEN AJ:

Introduction

[1] The four appellants were indicted in the regional court at Cape Town on a charge of *'robbery with aggravating circumstances'*. According to the charge sheet theyrobbed Ms Chen on 2 October 2009 at Boy de Goede Circle in Table View, of certain goods, includinga sports bag, cash in an amount of approximately R1 500,00and a cell phone, by threatening her with a knife. Appellants were convicted *'as charged'*.

[2] It is apparent from the charge sheet that the appellants were charged and convicted of the offence defined in Part II of Schedule 2 to the Criminal Law Amendment Act 105 of 1977 ('Act 105 of 1997') as *"robbery – when there are*

aggravating circumstances'. The definition*'aggravating circumstances'* does not apply to any other statutory provision. It is defined insection 1(1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA) as follows:

> *'In this Act, unless the context otherwise indicates-*
>
> *'aggravating circumstances', in relation to-*
>
> *(a) .....*
>
> *(b) robbery or attempted robbery, means-*
>
> *(i) the wielding of a fire-arm or any other dangerous weapon;*
>
> *(ii) the infliction of grievous bodily harm; or*
>
> *(iii) a threat to inflict grievous bodily harm,*
>
> *by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence.'*

[3] In terms of section 51(2)(a) of Act 105of 1997 a first offender of *robbery with aggravating circumstances*shall be sentenced to 15 years' imprisonment unless the court finds substantial and compelling circumstances justifying a lesser sentence. In the present case the regional magistrate found that there were such circumstances. First appellant(NantombiMasingili)was sentenced to 8 (eight) years' imprisonment of which 2 (two) years' imprisonment were conditionally suspended for 5 (five) years. Second appellant,(SiyabulelaVolo),third appellant(MzonkeMlindalazwe) and fourth appellant (SithumbeleGovuza) were sentenced each to 10 (ten) years' imprisonment of which 2 (two) years' imprisonment were conditionally suspended for 5 (five) years.

[4] Appellants appealed to this court, with leave of the regional magistrate, against their convictions and sentences. The broad picture that emerged from the

evidence is that the four appellants acted in concert in committing a robbery at the complainant's shop. First appellant inspected the premises,then returned to their vehicle. Second appellant was the driver of the vehicle. He remained in the vehicle whilst the robbery was taking place. Third and fourth appellants entered the shop and robbed the complainant of cash and a few articles. A knife was used to threaten the complainant.

[5] Upon consideration of the appealswe concluded that the convictions of third and fourth appellants were in order.The roles of first and second appellants, however, were different. Although guilty as accomplices to the robbery, it appeared to us that the State had not proved that they had any *dolus* (intention) with respect to the perpetration of any one of the aggravating circumstances.The question therefore arose whether the inclusion of the phrase *'or an accomplice'* in the definition of aggravating circumstances,does not create strict liability, ie liability without fault, in respect of the offence *robbery with aggravating circumstances.* The phrase *'or an accomplice'*might then beunconstitutional and invalid.

[6] The appeals were accordingly re-enrolled for purposes of argument on the constitutional issue. It was heard on 22 February 2013. Mr AParies appeared for first appellant and Ms Y Rajapfor second, third and fourth appellants. Mr J de V van Niekerk, assisted by Ms A du Toit, appeared as *pro bono* counsel on behalf of appellants and Mr A de V La Grange, assisted by Mr T S Sidaki, represented theMinister of Justice and Constitutional Development ('the Minister'). The court is indebted to counsel for theirhelpful submissions.

The evidence

[7] Before turning to the constitutional issue we propose to summarise the evidence. Ms Chan Touffais the complainant. She is of Chinese origin. She testified that she was the owner of a shop in Table View. At about 12h00 on 2 October 2009 she was alone in the shop. She was not busy that day. A black lady entered the shop. She knew the lady because she had previously come into the shop. The lady asked her whether she was busy that day and she told her that she was not. After the lady had left, she noticed that she walked to a green motorcar and spoke to someone inside it.

[8] About 10 minutes later, when there was no-one in the shop, two black males walked into the shop and asked for a size 34 pair of jeans. Whilst she was looking for the jeans, one of them who she described as the tall man, took out a knife. The other man was meanwhile closing the outer door. He did not have a knife. They asked for money and she told them that she did not have any. The two men then tied her up and put her in the toilet. She could hear them searching for money inside the shop. She managed to get out of the toilet and saw them running away from the shop. She screamed and followed them. As the two robbers were running away she saw that the owner of the neighbouring shop was running after them. She said that she lost a pair of pants and about R1 200,00 to R1 400,00 in cash. She got some of her jeans and hats back at the police station as well as her cellphone. She did not sustain any injuries.

[9] Mr Patrick Grunder was the owner of a shop close to that of Ms Touffa. On the day of the incident he was in his shop. He heard a lady screaming and when he looked out of the window he saw Ms Touffa on her knees with her hands in the air, screaming for help. He ran towards her and she told him that she had been robbed.

She took him to the main road and pointed about 50 metres up the road where two men were standing. Ms Touffa said that they were the persons that had robbed her. One of them had a bag on his shoulder. As soon as the two men saw them they ran away. He ran after them. It was a double road and there was oncoming traffic. When the oncoming cars had passed they crossed over to the middle of the road. They ran towards a parked car of which the back doors were open. The two men jumped into the car and it sped away.

[10] Grunder said that he stopped a passing car, got in and pursued the robbers. About 100 metres up the road he saw that the robbers' car had stopped on the side of the road. He saw that two persons, whom he assumed were policemen, questioning some of the occupants of the car who had meanwhile alighted. He told the policemen that they had robbed a Chinese lady. The policemen ordered the occupants of the car to lie face down on the road. At his suggestion one of the policemen opened the boot of the car and found the same bag that he had seen earlier. The policemen emptied its contents on the road. Two pairs of jeans, a handful of change and a few notes fell out.

[11] Mr Rudi Lizamor is a warrant officer in the South African Police Services. On 2 October 2009 at about 14h45 he and two colleagues, constable Vivian Thompson and constable Gavin Hartnick, were on patrol duty. They were driving in a police vehicle alongBlaauwberg Road. He saw a Chinese woman running out from the business section. She was screaming. In front of her was a white male, also running. He was chasing a black male running across the road. As their police vehicle was making a U-turn he saw the black male jumping into a blue Mazda. He was carrying a bag. The Mazda pulled away at great speed.

[12] The policemen followed the Mazda and tried to stop it by flashing and hooting. He (Lizamor) was sitting in the left front passenger seat. They drove next to the Mazda and he pointed his firearm at the driver. The Mazda pulled to the left and stopped on the side of the road. The police stopped in front of it. The occupants of the Mazda were pulled out of their vehicle. He and a colleague searched the Mazda. They found a blue rucksack carried by the driver.Inside the rucksack were various items, watches and coins. They arrested the suspects and took them to the police station where Ms Touffa identified the goods in the bag as hers. She also identified the knife with the brown handle as the one that was carried by the one robber. Lizamor said that second appellant wasthe driver of the vehicleand thatthere had been no one sitting in the left front passenger seat.

[13] Constable Thompson's evidencecorroborated that of Lizamore.He testified that three persons exited from the back of the Mazda after it had stopped. He tried to open the front left door but it would not open. There was nobody sitting in the left front passenger seat and three personsat the back, one female and two males. When he approached the one male lying on the ground he saw a silver knife with a brown handle lying a couple of centimetres away from his face. On searching the male that got out on the right hand side of the Mazda he found a knife in his pocket. He identified third appellant as the person that alighted from the left side of the Mazda. Fourth appellant was the person that had been chased by the white male. Second appellant was the driver of the Mazda.

[14] Constable Hartnick's evidence fitted in with Lizamore's version of the events. He was the driver of the police vehicle. By the time that he had alighted from the

police vehicle four black men were already lying on the ground and a woman was standing at the side of the road.

[15] First appellant testified that she met second appellant at a garage. He offered to give her a lift. She first went into Ms Touffa's shop and spoke to her. She knew her quite well. She returned and got into the car. Second appellant drove off. Not far away he stopped to get something to eat. She stayed in the car. Suddenly two persons jumped into the back of the car and ordered second appellant to drive away which he did. She identified fourth appellant as one of these persons. The police then pulled them off the road. They were all told to lie down on the ground. She saw that fourth appellant had a bag with him.

[16] Second appellant said that he went to Blaauwberg in his own car. He was looking for work. Whilst filling his car with fuel he met first appellant and at her request gave her a lift. She first wanted to go into a shop. He parked the car in a *cul-de-sac* leading from the main road and waited for her. She returned and got back into the car. He then heard some screaming and two males climbed into the back of his car. They beat him on the shoulders and instructed him to drive away which he did. He then saw a white car pulling up next to him. One of the passengers in the white vehicle pointed a firearm at him. He pulled to the side of the road and stopped. He stayed in the car. The two passengers got out first. When he got out he saw people lying on the ground. He was arrested with them.

[17] Third appellant testified that he was on his way from Langa to Parklands where he worked. He got out of the taxi in Blaauwberg. He then walked along Blaauwberg Road when somebody suddenly pointed a firearm at him and ordered

him to lie down which he did. He was then arrested by the police and taken to the police station. He said that he had not been involved in any robbery.

[18] Fourth appellant said that he was walking down Blaauwberg Road when a blue Mazda stopped next to him. The police arrived. They had firearms and ordered him to lie down on the ground where other persons were already lying. He was then arrested.

[19] The magistrate delivered a thorough judgment. She evaluated the evidence of the state witnesses in some depth and found that there were no grounds for criticising or rejecting it. She pointed, on the other hand, to numerous material inconsistencies and improbabilities in the evidence of all four appellants. She also dealt specifically with and accepted the identificatory evidence in respect of allfour. The magistrate concluded that the State had proved beyond reasonable doubt that there was a robbery with aggravating circumstances and that all four appellants*'partookin this robbery'.*

[20] In our view the factual and credibility findings of the magistrate cannot be criticised. They are detailed, well-reasoned and supported by the evidence. Weaccordingly intend to approach the appeals on thefooting that these findings are correct. On that basis we are of the opinion that the convictions of third and fourth appellants of robbery with aggravating circumstances cannot be faulted. There is some uncertainty as to which one of them used a knife to threaten the complainant but they acted together and both had knowledge of the knife

How the constitutional issue arises

[21] The respective roles of first and second appellants differ from those of third and fourth appellants. First appellant's role appears to have been confined to that of a scout and second appellant drove the vehicle thattransported the robbers to and away from the scene.The constitutional issue concerns the basis on which the two of them were convicted of robbery with aggravating circumstances.

[22] In discussing how this issue arises it is as well to be clear as to our understanding of the meaning of the terms *accomplice* and *perpetrator.* An *accomplice* in a legal context has been defined as a person who does not satisfy the requirements for liability in respect of a crime, but unlawfully and intentionally furthers the commission of the crime by somebody else. See Snyman*Criminal Law*fifth edition (2008) 273. The person that does satisfy the requirements for liability in respect of the crime is described by *Snyman op cit*258 as the *perpetrator*. We intend to use the same terminology.

[23] We also wish to make it clear that our approach to the offence of *robbery with aggravating circumstances* is that it comprises two components. The first is the common law offence of robbery. The second is the perpetration of one or more of the aggravating circumstances. The validity of this approach was disputed by counsel for the Minister. This is an important issue and we will revert to it later in the judgment. At this juncture, however, we intend to proceed on the basis that our approach is correct.

[24] The legal basis of the magistrate'sconviction of first and second appellants is not explicit.There are three possibilities.The first is that she might have intended to apply the doctrine of common purpose. The second is that she might have found

them guilty on the basis that they were accomplices to both components of the crime, the robbery and the perpetration of the aggravating circumstances. The third possibilityis that she might have concludedthat they were accomplices to the robbery and therefore, as a result of the application of the definition of aggravating circumstances in section 1(1)(b) of the CPA, guilty of *robbery with aggravating circumstances*.

[25] Thedoctrine of common purpose would, however, not have assistedin proving any *dolus* on the part of first and second appellants. It is settled law that this doctrine can only be invoked for purposes of proof of causation as one of the elements of a crime. It cannot serve to impute the *dolus* of one person to another: See *S v Malinga* 1963 (1) SA 692 (A)694F-H.

[26] The second possibility depended on proof that first and second appellants were also accomplices with respect to the perpetrationof the aggravating circumstances. It seems unlikely, however, that the magistrate approached their convictions on this footing. It was not the basis on which the State presented its case and it would have depended upon proof of *dolus* on the part of first and second appellants, at least in the form of *doluseventualis,* with respect to the perpetration of the aggravating circumstances. That would have entailed proof, beyond reasonable doubt,of (i) subjective foresight ofa reasonable possibility(cf*S v Van Wyk* 1992 (1) SACR 147 (Nm) at 161b)that aggravating circumstances would be perpetrated by third or fourth appellant; and (ii) an intention to reconcile him/herto that result(see *S v Ngubane* 1985 (3) SA 677 (A) at 85DF).*In casu* the State did not present the necessary evidence and the magistrate did not makethe required findings to support

a conviction on this basis. Nor could she, in our view,have made such findings on the evidence before her.

[27] We accordingly conclude that the magistrate in all likelihood followed the third approach referred to above, namely that she found that first and second appellants were accomplices to the robbery and therefore, as a result of the application of the definition of aggravating circumstances in section 1(1)(b) of the CPA, guilty of *robbery with aggravating circumstances*. We proceed to consider the validity of this approach.

The history of the definition of '*aggravating circumstances'*

[28] By way of background it is instructive to have regard to the recent history of the definition of *'aggravating circumstances*'. It is described in the judgment of Holmes JA in *S v Dhlamini and Another*1974 (1) SA 90 (A). The definition of *'aggravating circumstances'* was inserted in the previous Criminal Procedure Act 56 of 1955by section 1 of Act 9 of 1958. At that stage the definition described some of the circumstances under which the death penalty could have been imposed. It read as follows:

> *"aggravating circumstances" in relation to -*
>
> *(a) any offence, either at common law or under any statute, of housebreaking or attempted housebreaking with intent to commit an offence means the possession of a dangerous weapon or the commission of or any threat to commit an assault by the offender or an accomplice;*
>
> *(b) robbery or an attempt to commit robbery, means the infliction of grievous bodily harm or any threat to inflict such harm.'*

[29] In *R v Sisilane* 1959 (2) SA 448 (A)Schreiner JA pointed to the discrepancy,at that time, between the wording of paras (a) and(b)of the definition and said the following:

> ‘*The introduction of the phrase 'by the offender or an accomplice' must have been deliberate and the reason can only have been to make the accomplice also liable, in the case of housebreaking, for the possession of weapons and the commission of assaults or the threat of assaults by any of his associates, while leaving the robber responsible only for his own act and, I assume, others which he himself instigated or made himself a party to.’*

[30] Para (b) of the definition was then amended by section 3 of Act 75 of 1959 by the insertion, *inter alia,* of thewords *‘ by the offender or an accomplice’.*In the *Dhlamini* case, at 93H and 95BC, Holmes JA summarised the effect of the latter amendment as follows:

> *‘The next enquiry relates to the words "by the offender or an accomplice." If there is only one offender, no problem arises. Did he inflict or threaten such harm?*
>
> *The crucial words are "or an accomplice." An accomplice to what?Clearly, to the robbery (or to the attempt). That is the "offence" of the "offender" mentioned in para. (b). The section does not say*
>
> > *"an accomplice to the infliction of grievous bodily harm or any threat to inflict such harm."*
>
> *… … …*
>
> *It follows, in my view that, when the words "or an accomplice" were later added by statute, aggravating circumstances could be present in relation to a robber even where he had not himself inflicted or threatened grievous bodily harm, or instigated it or made himself a party to it.’*

Section 12(1)(a) of the Constitution

[31] The *pro bono* counsel submitted that thecrime created by the phrase*'or an accomplice'* offends against sections 12(1)(a) and 35(3)(h) of the Constitution of the Republic of South Africa Act 108 of 1996 ('the Constitution'). We discuss section 12(1)(a) of the Constitution first. It reads as follows:

> *'12 Freedom and security of the person*
>
> *(1) Everyone has the right to freedom and security of the person, which includes the right-*
>
> *(a) not to be deprived of freedom arbitrarily or without just cause.'*

[32] The judgment of O'Regan J in *S v Coetzee and Others* 1997 (3) SA 527 (CC) contains an authoritative discussion, with reference to section 11 of the Constitution of the Republic of South Africa Act 200 of 1993 ('the Interim Constitution'), of the attitude of the courts with respect to strict liability. Section 11(1) of the interim Constitution was formulated, insofar relevant, in terms similar to those of section 12(1) of the Constitution. It provided, *inter alia*, that *'every person shall have the right to freedom and security'… '.*

[33] We proceed to quote a number ofextracts from O'Regan J's judgment:

> *'[162] …the requirement of fault or culpability is an important part of criminal liability in our law. This requirement is not an incidental aspect of our law relating to crime and punishment; it lies at its heart. The State's right to punish criminal conduct rests on the notion that culpable criminal conduct is blameworthy and merits punishment. This principle has been acknowledged by our Courts on countless occasions.*
>
> *… … …*
>
> *[165] Repugnance to the notion of criminal liability without fault is evidenced too in the reluctance of courts to interpret statutory provisions which contain no express mensrea requirement as not requiring mensrea.*

… … …

[168] …In England, the Courts have taken the view that there is a presumption that mensrea is always a requirement of a criminal offence, although that presumption may be defeated by the language of a provision. … … Renewed vigour has been afforded to this approach by its recent restatement in a series of decisions by the House of Lords and the Privy Council.

… …

[174] Since the adoption of the Charter, the Canadian Supreme Court has held that where a statute imposes criminal liability without any mensrea requirement (ie absolute liability) which may result in imprisonment, it will be a breach of s 7 of the Canadian Charter of Rights and Freedoms. (See Reference re s 94(2) of the Motor Vehicle Act (1986) 24 DLR (4th) 536 (SCC); R v Vaillancourt (1988) 47 DLR (4th) 399 (SCC); R v Wholesale Travel Group Inc (1992) 84 DLR (4th) 161 (SCC); R v Nova Scotia Pharmaceutical Society (1992) 10 CRR (2d) 34 (SCC); R v Burt (1987) 60 CR (3d) 372 (Sask CA); R v Pellerin (1990) 42 CRR 292 (Ont CA); R v Sutherland (1990) 55 CCC (3d) 265 (NS CA).)

… … …

[176] The striking degree of correspondence between different legal systems in relation to an element of fault in order to establish criminal liability reflects a fundamental principle of democratic societies: as a general rule people who are not at fault should not be deprived of their freedom by the State. This rule is the corollary of another rule which the same comparative exercise illustrates: when a person has committed an unlawful act intentionally or negligently, the State may punish them. Deprivation of liberty, without established culpability, is a breach of this established rule. Where culpability is established, and the conduct is legitimately deemed unlawful, then no such breach arises.'

[34] The judgment in *S v Coetzee and Others supra* was delivered in 1997.The general approach to the concept of criminal liability without fault in the countries mentioned above, does not appear to have changed since then.Snyman*op cit*246 says the following:

> *'…since about 1970 there has been a significant decrease in the number of cases holding that a statute has created strict liability. As far as could be ascertained, since 1970 there have been only three cases in which a court has interpreted a statute as one creating strict liability.'*

In England the judgment in *Crown Prosecution Service v M & B* [2009] EWCA Crim 2615 (11 December 2009) is a recent example of the approach described above. In Canada the judgment of the Ontario Superior Court of Justice in *R v Sappleton and Eubank* 2010 ONSC 6132 illustrates that the decisions referred to in para [174] of O'Regan's judgment in *S v Coetzee and Others supra,*arestill regarded as authoritative.

[35] It may be noted that there is an exception to the general rule, namely that strict liability may in some cases be acceptable in statutes described as regulatory measures. See the judgment of Kentridge AJ in *S v Coetzee and Others supra* para [91].A statute aimed at the punishment of persons guilty of *robbery with aggravating circumstances*can, however, hardly be regarded as a regulatory measure.The exception does not,therefore, apply in this case and need not be considered further

[36] The next issue to be determined is whether the offence of *robbery with aggravating circumstances*in fact creates strict liability on the part of an accomplice or perpetrator who has no *dolus* with respect to the perpetration of the aggravating circumstances. The nature of this offence was clarified in the judgment of Cameron JA in *S v Legoa* 2003 (1) SACR 13 (SCA). In that case the Supreme Court of Appeal considered the application of Act 105 of 1997 in respect of the offence referred to in Schedule 2as dealing in a dangerous dependence-producing substance *'if it is proved that - (a) the value of the dependence-producing substance in question is more than R50 000'*.The court below had concluded that the value of

the substance in question related solely to the question of sentence and was irrelevant before conviction. A principal issue on appeal was whether that conclusion was correct.

[37] Cameron JA held that it was not correct. We quote at some length from his judgment, as it applies directly to the case at hand. For the sake of brevity we omit footnotes:

> *[14] In my view, for three principal reasons it is not. First, the High Court's conclusion flies in the face of the wording of the 1997 statute. That wording, in my view, clearly indicates that for the minimum sentencing jurisdiction to exist in respect of an offence, the accused's conviction must encompass all the elements of the offence set out in the Schedule. (This does not apply when the Schedule specifies an attribute not of the offence, but of the accused, such as rape when committed 'by a person who has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions'.) Second, even if the wording of the statute were open to more than one interpretation (which in my view it is not) the grave injustice that the contrary interpretation can cause compels the conclusion that the elements of the offence must be established before conviction. Third, the High Court's conclusion is contrary to established principle and practice in our criminal trial courts.*
>
> *[15] It is an established principle of our law that a criminal trial has two stages - verdict and sentence. The first stage concerns the guilt or innocence of the accused on the offence charged. The second concerns the question of sentence. Findings of fact may be relevant to both stages. However, those in the first stage relate to the elements of the offence (or the specific form of the*

offence) with which the accused is charged. Those in the second mitigate or aggravate the sentence appropriate to the form of the offence of which the accused has been convicted.

… … …

[17] Where the accused was charged with robbery, the question whether the robbery was committed with aggravating circumstances had to be determined as part of the verdict - that is, as part of the court's finding on guilt or innocence in the first stage. The aggravating circumstances were elements of the form of the offence of robbery with which the accused was charged. Hence they had to be proved in the first stage of the trial, and the finding regarding their presence or absence was part of the main verdict. Their presence or absence accordingly had to be decided by the Judge with the assessors (or, before the abolition of juries, by the jury). [our emphasis]

[18] It is correct that, in specifying an enhanced penal jurisdiction for particular forms of an existing offence, the Legislature does not create a new type of offence. Thus, 'robbery with aggravating circumstances' is not a new offence. The offences scheduled in the minimum sentencing legislation are likewise not new offences. They are but specific forms of existing offences, and when their commission is proved in the form specified in the Schedule, the sentencing court acquires an enhanced penalty jurisdiction. It acquires that jurisdiction, however, only if the evidence regarding all the elements of the form of the scheduled offence is led before verdict on guilt or innocence, and the trial court finds that all the elements specified in the Schedule are present. (As pointed out earlier, it is different when the element specified in the Schedule relates not to the offence, but to the person of the accused, such as rape when committed '(iii) by a person who has been convicted of two or

more offences of rape, but has not yet been sentenced in respect of suchconvictions'.)'

[38] Later judgments of the Supreme Court of Appeal concerning the nature of the offence *robbery with aggravating circumstances* areconsistent with the description thereof in Cameron JA's judgment in *S v Legoa supra.*It was applied directly in *S v Gagu and Another* 2006 (1) SACR 547 (SCA) para 7.In *S v Mokela* 2012 (1) SACR 431 (SCA) Bosielo JA held that a previous conviction of robbery should not be regarded as a previous offence of *robbery with aggravating circumstances* for purposes of the sentencing provisions of the CLAA. He stated, in para [6], that *'robbery and robbery with aggravating circumstances are two different offences calling for different sentences.'* In *S v Mashinini& another* 2012 (1) SACR 604 (SCA) Mhlantla JA dealt with the analogous position in regard to rape. She held, in effect, that an accused can only be convicted and sentenced on the basis of the scheduled offence with which he has been charged.

[39] In our view the reasoning of Cameron JA in the *Legoa* judgment applies directly to the present case. It was incumbent upon the State to provethe perpetration of aggravating circumstances, as defined in section 1(1)(b) of the CPA, during the first stage of the trial culminating in the vereict. This was in fact the manner in which the case was approached in the regional court. The appellants were charged with the offence of *robbery with aggravating circumstances*and they were convicted as charged. Their convictionswere thus based on a finding that the aggravating rcircumstances had been proved beyond reasonable doubt.

[40] In our view it is thus clear that the phrase*'or an accomplice'* in para (b)of the definition of aggravating circumstances,creates strict liability with respect to the

offence *robbery with aggravating circumstances* mentioned in that definition.This conclusionfollows from an ordinary interpretation of the language used. It is also supported by the *dicta* of Holmes JA in the *Dhlamini* case which we quoted in para[30] above.In the case where the perpetrator is liable because of the presence of aggravating circumstances, an accomplice to the robbery may also be convicted of *robbery with aggravating circumstances* even if he had no *dolus*(intention) with respect to the perpetration of the aggravating circumstances. In the converse case, where the accomplice is responsiblefor the presence of aggravating circumstances, the perpetrator of the robbery may be liable without any *dolus*on his part with respect to the presence of such circumstances.

Contentions on behalf of the Minister

[41] Counsel for the Ministercontended that the definition of *robbery with aggravating circumstances* does not create any strict liability. They submitted that itis not a distinct offence, separate from the offence of robbery. According to this argument theaggravating circumstances impact only on the *quantum* of sentence and do not enter into the equation when the guilt of the accused in respect of the robbery is determined.

[42] Thiscontention, in our view, is in direct conflict with the statement of Cameron JA in the *Legoa*judgement that *'the question whether the robbery was committed with aggravating circumstances had to be determined as part of the verdict - that is, as part of the court's finding on guilt or innocence in the first stage.'* The contention on behalf of the Minister is in substance similar to the conclusion of the court below in the *Legoa* case which was rejected by Cameron JA.

[43] Counsel for the Minister relied upon certain passages in earlier judgments in support of the contention that the perpetration of aggravating circumstances does not constitute a separate offence and impacts only on sentence. The first is in *R v Zonele and Others* 1959 (3) SA 319 (AD) at 323A-C:

> *'If 'aggravating circumstances' are found to have been present, a person who has been found guilty of either of these offences may now be sentenced to death. Although the presence of aggravating circumstances affects sentence only, it is of great importance that a person charged with robbery or with housebreaking with intent to commit an offence should be informed, in clear terms, that the Crown alleges and intends to prove that aggravating circumstances were present.'*

[44] In our view this passage is not in conflict with Cameron JA's analysisin the*Legoa*judgment. Cameron JA, in para [9],in fact referred with approval to the *Zonele* judgment in regard to the secondary question that hedealt with, namely whether the charge sheet should include a reference to the elements of the specific form of the offence with which the accused is to be charged. Cameron JA quoted, *inter alia,* the following passage which appears at 323EF in the *Zonele*judgment. It is apparent from this passagethat the two judgments are not inconsistent with each other. It reads as follows:

> *'When an accused pleads guilty to either of these charges, and it appears from the indictment that the Crown intends to prove that aggravating circumstances were present, the presiding Judge will, of course, satisfy himself that the accused intends to admit not only that he is guilty of the offence charged, but also that the aggravating circumstances were present. Unless the facts alleged to constitute aggravating circumstances are formally admitted they must be proved, and it is, naturally, essential that the exact extent of the admissions should be ascertained.'*

[45] Counsel for the Minister also sought to rely on the following passage in *S v Prins en 'n Ander* 1977 (3) SA 807 (AD) at816 AB:

> *'Dit is nounodigomnategaanwatterrol die aanwesigheid van verswarendeomstandighede by die aanklag van roof vervul. Sedert 1958 kan 'n beskuldigdewatskuldigbevind word aan roof, of 'n poging tot roof, waarbyverswarendeomstandighedeaanwesig is kragtens art. 330(1) van dieStrafproseswet, 56 van 1955, die doodvonnisopgelê word. Roof met verswarendeomstandighede is nie 'n nuwemisdaadwatdeur die Wetgewergeskep is nie. Waar 'n beskuldigdeskuldigbevind word aan roof, of poging tot roof, verleen art. 330 (1) aan die Verhoorregter 'n judisiëlediskresieom die doodvonnis op telê of nieindienbevind word datverswarendeomstandighedeaanwesig is.'*

[46] In our opinion thepassage in the *Prins* judgment does not support counsel'scontention. Read in context it is entirely consistent with Cameron JA's statement in the *Legoa*judgment that *'the question whether the robbery was committed with aggravating circumstances had to be determined as part of the verdict - that is, as part of the court's finding on guilt or innocence in the first stage.'*

[47] Counsel for the Minister also referred to the judgment ofVan Winsen AJA in *R v Jacobs* 1961 (1) SA 475 (AD), in particular the following passage at 484G -485A:

> *'The extract from the summing up makes it clear that the learned Judge equated the infliction of grievous bodily harm with an assault with the intent to inflict grievous bodily harm. The repeated reference in such extract to the intention with which the accused wielded the knife, and attacked the deceased, shows that the learned Judge intended to convey to the jury that in deciding whether the Crown had proved the infliction by the accused of grievous bodily harm upon the deceased, they were entitled to have regard to the intention motivating the accused when he committed the assault. This, in my view, constituted a misdirection on the law to the jury. There is no justification to be found in the words of sec. 1 (b) of Act 56 of 1955 for importing the intention of the accused into the enquiry as to whether it has been proved that he has inflicted grievous bodily harm. The enquiry is an objective oneand is directed towards ascertaining whether bodily injury has been inflicted and whether it is serious.'*

[48] We agree thatVan Winsen AJA's approach amounts to an unequivocalaffirmation of the concept of strict liability. It was, however, delivered at a time before there was, according to Snymanop cit246, a gradual shift away from the interpretation of statutory provisions in order to avoid strict liability. It is interesting to note that only five years later the same judge, Van Winsen AJA, said the following in *S v Arenstein* 1967 (3) SA 366 (A) at 381D--E:

> *'In view of such general maxims as nullapoena sine culpa and actus non facitreum nisi mens sit rea, the Legislature, in the absence of clear and convincing indications to the contrary in the enactment in question, is presumed to have intended that violations of statutory prohibitions would not be punishable in the absence of mensrea in some degree or other.' …'*

[49] Be that as it may, it seems to us thatthe *Jacobs* judgment is now of historic interest only as an illustration of the gradual change in the courts' attitude to the notion of strict liability. In the present case it has no relevance as it is the validity of the concept itselfthatis being tested against theConstitution.

[50] We conclude therefore that the inclusion of the phrase*'or an accomplice'*in the definition of aggravating circumstances in section 1 of the CPA,creates strict liability with respect to the perpetration of such circumstances which is a component of the offence *robbery with aggravating circumstances.* As such the phrase gives rise to a breach of section 12(1)(a) of the Constitution.

<u>The presumption of innocence</u>

[51] The *pro bono* counsel submitted that the impugned phrase also gives rise to an infringement of the right contained in section 35(3)(h) of the Constitution which reads as follows:

> *'(3) Every accused person has a right to a fair trial, which includes the right-*
>
> *… … …*
>
> *(h) to be presumed innocent, to remain silent, and not to testify during the proceedings.'*

[52] Section 25(3)(c) of the Interim Constitution contained a similarly worded provision. So does section 11(d) ofthe Canadian Charter of Rights. A classic formulation of the presumption of innocence is found in *R v Oakes*1986 CanLII 46 (SCC); 26 DLR (4th) 200; 24 CCC (3d) 321para 29:

> *'29. The presumption of innocence is a hallowed principle lying at the very heart of criminal law. Although protected expressly in s. 11(d) of the Charter, the presumption of innocence is referable and integral to the general protection of life, liberty and security of the person contained in s. 7 of the Charter (see Re B.C. Motor Vehicle Act, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, per Lamer J.) The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.'*

[53] In *S v Coetzee and Others supra*O'Regan J also discussed the presumption of innocence. She said the following, in paras [187] and [189]:

> *'[187] In a series of cases, this Court has held that, where a legislative provision imposes an obligation upon an accused to establish certain facts to avoid criminal liability, it constitutes a breach of the presumption of innocence as enshrined in s 25(3)(c).*
>
> *… … …*
>
> *[189] We have stated on several occasions that the nub of the protection provided by s 25(3)(c) is to ensure that people are not convicted of an offence where a reasonable doubt exists as to their guilt. Guilt is only established when it is clear that the accused has no defence and that all the elements of the particular crime have been established. If an accused person can be convicted despite the existence of a reasonable doubt either in relation to one of the elements of the offence or one of the elements of a defence and a court is compelled to convict because of a reverse onus provision, the presumption of innocence is breached..'*

[54] In the light of these authorities we hold that the inclusion of the phrase *'or an accomplice'* in the definition of aggravating circumstances in section 1 of the CPA, amounts to a breach of the presumption of innocenceand thus gives rise to an infringement of the right contained in section 35(3)(h) of the Constitution.

<u>The limitation of rights provision</u>

[55] It remains to consider the limitation of rights provision which is contained in section 36 of the Constitution. Itreads as follows:

> *'36 Limitation of rights*
>
> *(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity,*

equality and freedom, taking into account all relevant factors, including-

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

[56] In *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC) *paras [17] and [18]* O'Regan J summarised the effect of the similarly worded provision (section 33)of the Interim Constitution as follows:

'*In S v Makwanyane and Another 1995 (3) SA 391 (CC) (1995 (2) SACR 1; 1995 (6) BCLR 665) at para [104] Chaskalson P held that s 33 required a proportionality assessment:*

'In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.'

(See also S v Williams and Others 1995 (3) SA 632 (CC) (1995 (2) SACR 251; 1995 (7) BCLR 861) at paras [58]-[60].)

[18] In sum, therefore, the Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the

> *inroad into fundamental rights, the more persuasive the grounds of justification must be'.*

[57] In *S v Manamela* 2000 (3) SA 1 (CC) para [42] the test was formulated in the following terms:

> *'It should be noted that the five factors expressly itemised in s 36 are not presented as an exhaustive list. They are included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.'*

[58] Counsel for the Minister argued in this regard that the high rate of crimein this country justifies a measure of this nature. We do not agree. *Dolus* (intention) is an element of all serious crimes in this country and, so it would appear, in comparable jurisdictions. There does not appear to be any logical or practical reason for treating the offence of*robbery with aggravating circumstances*differently. The measure in question, moreover,was introduced at a time when it was not unusual for the legislature to create andfor the courts to enforce offences with strict liability. It has now become an anomaly.

[59] Applying the limitation test to the facts of the present case we are of the view that the nature and extent of the infringement of rights outweigh the purpose, effects and importance of the statutory provision in question. The validity of the impugned phrase is therefore not saved by the provisions of section 36 of the Constitution.

Conclusion

[60] We are accordingly of the opinion that the inclusion of the phrase *'or an accomplice'* in the definition of aggravating circumstances in section 1(1)(b) of the CPAis inconsistent with the Constitution and therefore invalid.

[61] In order to limit the retrospective effect of a declaration to that effect, we are of view that it would be appropriate to make an order in similar terms to the order made in *S v Bhulwana; S v Gwadiso*1996 (1) SA 388 (CC) at 400CD, namely that the declaration of invalidity shall invalidate the application of the phrase *'or an accomplice'* in the definition of aggravating circumstances in section 1(1)(b) of the CPAin any criminal trial in which the verdict of the trial court was entered after the Constitution came into force, and in which, as at the date of the order, either an appeal or review is pending or the time for the noting of an appeal has not yet expired.

[62] In the result, we make the following orders:

(1) It is declared that the phrase *'or an accomplice'* in the definition of aggravating circumstances in section 1(1)(b) of the Criminal Procedure Act 51 of 1977, is inconsistent with the Constitution of the Republic of South Africa Act 108 of 1996 and therefore invalid.

(2) The declaration of invalidity set forth in para(1) above, shall invalidate the application of the phrase *'or an accomplice'* in the definition of aggravating circumstances in section 1(1)(b) of the Criminal Procedure Act 51 of 1977, in any criminal trial in which the verdict of the trial court

was entered after the Constitution of the Republic of South Africa Act 108 of 1996 came into force, and in which, as at the date of this order, either an appeal or review is pending or the time for the noting of an appeal has not yet expired.

(3) The orders in paras (1) and (2) above are referred,in terms of section 8(1)(a) of the Constitutional Complementary Act 13 of 1995,to the Constitutional Court for confirmation. .

(4) The hearing of appellants' appeals is postponed *sine die*pending the decision of the Constitutional Court with respect to the orders set forth in paras (1) and (2) above.

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A P BLIGNAULT

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W H VAN STADEN

Appearing for first appellant	:	Adv Y Rayap
Instructed by	:	Legal Aid South Africa
Appearing for Respondent	:	Adv M Baliwe
Appearing Pro Bono	:	Adv J de V van Niekerk
		Adv A du Toit
Appearing for the Minister	:	Adv A la Grange SC
Instructed by	:	Director of Public Prosecutions
Date of hearing	:	30 November 2012
		22 February 2013
Date of Judgment	:	20 March 2013