IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: A153/20

In the matter between:

SIYABULELA NDWANYANA	**First Appellant**
SONELE MAKGOBA	**Second Appellant**
LEHLOHONOLO MATHIBE	**Third Appellant**
LUTHANDO THOSHOLO	**Fourth Appellant**

and

THE STATE	**Respondent**

Date of hearing: 3 September 2021

Date of judgment: 13 September 2021

JUDGMENT

SAVAGE J:

Introduction

[1] The four appellants, who were legally represented, were each convicted on 12 March 2018 in the Paarl Regional Court of one count of robbery with aggravating circumstances (count 1), four counts of pointing of a firearm (counts 3, 5, 6 and 7); four counts of kidnapping (counts 8, 10, 11 and 12); and one count relating to the unlawful possession of a firearm (count 13). The appellants were notified at the outset of the trial that a minimum sentence in terms of section 51(2) of the Criminal Law Amendment Act 51 of 1997 applied to the charge of robbery with aggravating circumstances.

[2] Following their conviction the first, second and fourth apellants were sentenced to an effective 25 years' imprisonment, being 15 years' imprisonment for count 1; 4 years' imprisonment for counts 3, 5, 6 and 7 considered together for purposes of sentencing, 2 years of which sentence was ordered to run concurrently with the sentence imposed in respect of count 1; 12 years' imprisonment for counts 8, 10, 11 and 12 considered together for purposes of sentencing of which sentence 6 years was ordered to run concurrently with the sentence imposed in respect of count 1; and 2 years' imprisonment for count 13.

[3] The third appellant was sentenced to an effective 30 years' imprisonment, being 30 years' imprisonment for count 1; 4 years' imprisonment for counts 3, 5, 6 and 7 considered together for purposes of sentencing, 2 years of which sentence was ordered to run concurrently with the sentence imposed in respect of count 1; 12 years' imprisonment for counts 8, 10, 11 and 12 considered together for purposes of sentencing of which sentence

6 years was ordered to run concurrently with the sentence imposed in respect of count 1; and 15 years' imprisonment for count 13.

[4] Leave to appeal was granted by the magistrate against sentence only. When the appeal came before Henney J and Lekhuleni AJ in October 2020 the Court queried whether there had been a duplication in the charges in the pointing of a firearm and kidnapping charges instituted against the appellants. In addition, it was queried whether the conviction of the third appellant on count 13 could be sustained given he had not been asked to plead to the count. The matter was removed from the roll to allow the appellants to petition this Court for leave to appeal against conviction, which they duly did, with leave against conviction granted by Sher J and Gibson AJ in due course.

Summary of evidence before the trial court

[5] The matter relates to the robbery of the Markhams store in Paarl by six men on Sunday 2 February 2014. The evidence of 19 witnesses before the trial court was that immediately prior to the robbery a green Toyota Camry vehicle driven by the fourth appellant was parked in front of the store. Six men entered the Markhams store where they undertook an armed robbery and locked four people in a back office where their hands and feet were tied with cable ties and their mouths sealed with silver tape. During the course of the robbery the men pointed firearms at a number of people inside the store and held a firearm to the head of a staff member while he was instructed to open the store safe. Clothing, shoes, bags, cellphones and R43 000,00 in cash were stolen during the course of the robbery to a total value of R187 189,00. Two state witnesses were outside the store

and saw the men walking in and out of the store several times carrying boxes and sports bags to the Camry. One of these witnesses called his father who is a colonel in the police stationed at Paarl to alert him as to what was happening at the store. After the men left the store, they got into the Camry which drove away at speed as the police were on the scene. A car chase ensued. The fourth appellant, who drove the getaway vehicle, lost control of it and stopped near a graveyard. The men left the vehicle and ran through the graveyard. As the police chased the men, one policeman identified the second appellant, who he said was holding a firearm in his hand, as he fled from the police. The stolen cash was recovered and the remainder of the stolen items were found in the boot of the Camry. The fourth appellant was arrested near the Berg River with the Camry's keys in his possession. He admitted driving the vehicle but denied involvement in the robbery. The owner of the vehicle testified that he had lent the vehicle to the fourth appellant who then failed to fetch him from church as had been arranged. The arrest of the first and second appellants took place two months after the robbery, with the third appellant arrested four months after the robbery.

[6] The first appellant was identified by the store security guard as having been present during the robbery. In addition, his fingerprints and palmprints were found inside and outside the Camry and on stolen cellphone boxes which were retrieved after the robbery. The store manager identified the first appellant as having forced him to open the store's safe while pointing a firearm to his head and threatening to shoot him when the safe took too long to open.

[7] An employee of the store testified that the second appellant held a firearm held to her head and that her cellphone was stolen during the robbery. When she subsequently received her cellphone invoice, numbers appeared on it that were unknown to her. She entered the numbers into her phone and saw Whatsapp pictures of people she identified in court as the first and second appellant. She identified the first appellant as having been in the store the previous day when he asked her for tekkies. During the robbery she testified that she saw the second appellant at the back of the store. The store's security guard identified the first appellant as having pointed a firearm at his head at the front of the store and saw both the first and fourth appellants behind the tills during the robbery. Although the second appellant admitted not having a firearm licence, his fingerprints were found on the firearm found on the scene. In addition, his fingerprints were also found at a nearby garage where the state alleged the appellants had hidden after the robbery.

[8] The fingerprint and palmprint of the third appellant were found on two cellphone boxes on the scene. On one of these boxes both the first and third appellants' fingerprints were detected. Although no identity parade was held, the third appellant was identified at the trial as having been involved in the robbery.

[9] Each of the appellants pleaded not guilty to the counts against them, save for count 13 in respect of which the third appellant was not asked to plead. Each appellant testified in his own defence. The first appellant stated that he was in Paarl on 30 or 31 January 2014 and had visited Markhams looking for a cellphone. A cellphone box was brought for him to look at,

which was why his palmprint was found on it, although he did not buy the cellphone. He denied taking part in the robbery and said he was on the soccer field in Crossroads on the day but that he had worked in a carwash which could explain how his fingerprints were found on the Camry.

[10] The second appellant said that he was at home on the day of the robbery and had never been to Paarl. He claimed to have no knowledge of the robbery. He explained his fingerprints on the trigger area of the firearm found on the crime scene on the basis that the firearm might have belonged to his cousin and that he slept on the same bed as his cousin so may have touched the firearm while it was under the pillow on the bed on which he was sleeping. He did not know how his Whatsapp profile picture had appeared on Tanita du Preez's phone as he had never phoned her.

[11] The third appellant testified that he had been at Markhams in Paarl to buy a cellphone at the beginning of the year. A staff member fetched a cellphone and placed it on the counter. He asked for a different cellphone and the staff member fetched the phone but the transaction could not be processed and he left the store. He claims to have been unaware of the robbery and could not recall what he was doing on 2 February 2014.

[12] The fourth appellant denied knowledge of the robbery. He admitted that he was the driver of the Camry on 2 February 2014, having been lent the car by its owner, and that a Mr Ntongana, who was not an accused before the court, went with him to fetch money owed to various other people. He stopped near a furniture shop and Mr Ntongana told him to wait for him. After some time, Mr Ntongana called him and told him to drive the vehicle up the street. Mr Ntongana and two other men who were unknown to him

got into the vehicle after putting boxes and bags in the boot. Shortly thereafter another two men got into the vehicle. After the police started following the car, Mr Ntongana told him to speed up and a car chase ensued. When there were problems with the car he stopped and all the men, including himself, fled the scene. He was arrested and the car keys were recovered.

Judgment of the court a quo

[13] The trial court found that the evidence of the state's witnesses, fingerprint evidence and other circumstantial evidence proved that the appellants were the perpetrators of the crimes in respect of which they had been charged. It was noted that the state witnesses had had the opportunity to interact with the perpetrators during the course of the robbery, whose faces were uncovered, and that this had aided their identification of the perpetrators and that the Whatsapp pictures found on the cellphone of one state witness had directly implicated the second appellant. Their evidence was accepted as honest and reliable whereas the court rejected the versions of the appellants as improbable, fabricated and not reasonably possibly true

[14] It was found that the state had proved its case against the appellants in respect of all ten counts. The version of the fourth appellant that he was not involved in the robbery was rejected on the basis that it was highly improbable that he had not been part of the robbery when the appellants moved back and forth to the vehicle and that after the car chase he had run from the police. In addition, it was accepted that the first, second and fourth appellants been identified by state witnesses as having been on the

scene, with fingerprint evidence linking them to the scene and the nearby garage. The state was found have proved the involvement of the appellants on the day beyond reasonable doubt, with the versions of the appellants rejected by the court as improbable and not reasonably possibly true. In relation to the firearm charges, the court applied the doctrine of common purpose and found that:

> 'As far as the firearm charges are concerned even though perpetrators were in possession of the firearm, seen being in possession of the firearm as so stated themselves intentionally with the perpetrators with firearms during the occurrence of the robbery pointing and kidnapping of the complainants as far as well as possession of this 9mm parabellum [pistol]. They also associate themselves with the person who was in position of the firearm…'.

[15] The appellants were found guilty of counts 1, 3, 5, 6, 7, 8, 10, 11, 12 and 13. Turning to sentence, the court had regard to the purpose of sentencing, the personal circumstances of the appellants, the seriousness of the crimes committed and the impact of these crimes on the victims. No substantial and compelling circumstances were found to exist to warrant the imposition of a sentence reduced from the minimum. Regard was had to the fact that some of the witnesses had been injured during the robbery but that these injuries had not been serious in nature. The court differentiated between the sentences imposed on the first, second and fourth appellant and that imposed on the third appellant in that the third appellant was not a first offender, having previously been convicted of unlawful possession of a firearm without a licence.

Submissions on appeal

[16] The appellants contend that the magistrate erred in finding that they had been properly identified as the perpetrators of the crimes alleged and that the charges against them were not proved beyond reasonable doubt. The second appellant took issue with the fingerprint evidence which implicated him on the basis that it was located in an awkward position and that it was improbable that a firearm would have been held in such position. The third appellant also took issue with the reliance on the fingerprint evidence used against him. It was submitted for the first and second appellants that the fact that the fourth appellant admitted to being present at the scene of the robbery corroborates that the first and second appellants were absent. As to sentence it was contended that the sentence imposed was unduly harsh and did not display an element of mercy. It was submitted for the third appellant that the trial court erred in convicting him when he was not asked to plead on count 13, being the unlawful possession of a firearm.

[17] It was argued for the state that it was clear that the appellants were not honest and that their versions and explanations regarding their fingerprints were clearly fabricated. The appellants' faces were not covered during the course of the robbery, while they were inside the store for approximately 30 minutes. This gave victims sufficient opportunity to look at their faces and that, considered with the fingerprint and whatsapp evidence, the versions tendered were not reasonably possibly true. As a result, the state discharged the onus to prove that the appellants were guilty of the crimes committed and that each appellant had associated himself with the acts of the other, with the result that common purpose was proved. Since no material misdirection or irregularity was present, it was submitted that the

sentences imposed should not be interfered with on appeal and that such sentences should stand.

Evaluation

Count 13: Failure to plead

[18] It was submitted for the third appellant that the trial court erred in convicting him when he was not asked to plead on count 13, being the unlawful possession of a firearm. This was in spite of the fact that section 105 of the Criminal Procedure Act 51 of 1977 provides that:

> 'The charge shall be put to the accused by the prosecutor before the trial of the accused is commenced, and the accused shall, subject to the provisions of sections 77, 85 and 105A, be required by the court forthwith to plead thereto in accordance with section 106.'

[19] It was argued for the third appellant that from its language section 105 is peremptory and that the failure to ask the third appellant to plead to count 13 constituted a fatal irregularity and a breach of his constitutional fair trial rights. It was submitted for the State that there could be a range of explanations for the fact that a plea on count 13 was not recorded, with it suggested that the problem may relate to the transcription of proceedings, and that it did not make sense that the third appellant had not been asked to plead to the charge.

[20] The relevant portions of the transcribed record of proceedings read as follows:

PROSECUTOR: ...Your Worship, for plea and trial and with leave of the Court the State will proceed to put the charges to the accused, Your Worship.

COURT: Yes.

AANKLAER STEL KLAGTES AAN BESKULDIGDE 1, 2, 3 EN 4

PROSECUTOR: Your Worship, I see it is already lunch. So I don't know if I can ask if we can maybe proceed after lunchtime.

COURT: ....Okay. I'll ask the interpreter to interpret these charges to you at 14:00, because the Court is going to adjourn now for lunch until 14:00. Court adjourns.

COURT ADJOURNS

[21] From the record it appears that after lunch the charges were interpreted, following which the magistrate warned the appellants that a minimum sentence was applicable in respect of counts 1 and 2. Reference was then made by the magistrate to the fact that "*on count 3 to count 13*" section 270 of the Act applied. The appellants each indicated that they understood what had been explained to them and the court proceeded to ask each appellant to plead to each count. The record reflects in relation the third appellant as follows:

"...COURT: Count 8, 9, 10, 11 and 12 against you are kidnapping people. How do you plead?

ACCUSED 3: Not guilty, your Worship.

ACCUSED 3 PLEADS NOT GUILTY TO COUNT 8

ACCUSED 3 PLEADS NOT GUILTY TO COUNT 9

ACCUSED 3 PLEADS NOT GUILTY TO COUNT 11

ACCUSED 3 PLEADS NOT GUILTY TO COUNT 12

COURT: Accused 4, Mr Luthando Thosholo, count 1 and 2 against you are robbery with aggravated circumstances, how do you plead?...."

[22] The third appellant's legal representative then stated that the pleas entered in respect of the third appellant were in accordance with his instructions and that no plea explanation would be provided, with the accused having chosen to exercise his right to remain silent. It was also stated further that the Act on minimum sentence had been explained to the third appellant, together with competent verdicts.

[23] Section 105 is one of the provisions in the Act which give statutory effect to the fair trial rights of an accused as are entrenched in section 35(3) of the Bill of Rights. The requirements of section 105 are twofold: first that the charge is put to the accused by the prosecutor before the trial commences; and second that the accused is required by the court to plead to the charge put. Binns-Ward J in *S v Moses*[1] indicated that *S v Mamase & others* [2] –

> '...does not hold that s 105 is peremptory in the sense that it is essential that it be complied with to the letter. The judgment holds that a plea process in criminal proceedings is peremptory in terms of s 105, which is something different. The appeal court made that observation in the context of determining when a trial commences. Its determination was that that the effect of s 105 (and s 106, which prescribes the nature of the various types of plea that an accused may plead) is that a criminal trial does not commence until the accused pleads to the charge(s). To use an analogy from civil procedure, *litis contestatio* is not obtained, and the case is not triable, until the accused has pleaded.'

[1] 2019 (1) SACR 75 (WCC) at para 14
[2] 2010 (1) SACR 121 (SCA) at 171.

[24] Where there is non-compliance with the provisions of section 105, the proper approach is to consider whether that non-compliance has materially compromised the appellant's fair trial rights. Section 105 is to be approached pragmatically rather than compelling an adherence to undue formalism.[3] In *Motlhaping v S*[4] the court refused to quash convictions and sentences only because the plea process had not complied with in a manner faithful to the language of s 105. Instead, it was found that "*the appellant knew he was indicted on two counts of murder and that he confirmed counsel's statement that he pleaded not guilty to those charges*".[5]

[25] The facts of the current matter differ from *Motlhaping* and *Moses.* In this matter while the charges, including count 13, were read in open court by the prosecutor and interpreted to the appellants, the third appellant neither signed a plea explanation, nor did he state what his plea was in response to count 13. There was no indication from the record that a plea had been made, entered or accepted in open court in respect of this count and neither the record itself nor any other evidence supports the state's contention that there was a problem with the transcription of proceedings.

[26] The state's submission that it did not make sense that the third appellant did not plead to the charge is no basis on which to conclude that he did. Neither the record nor any other evidence relied upon indicated that the third appellant had pleaded to the charge. As was made clear in *Mamase,* the criminal trial in respect of count 13 was unable to commence until the

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[3] Du Toit *et al*, *Commentary on the* Criminal Procedure Act (Juta) at 15-2 – 15-2B; Moses at para 18.
[4] [2015] ZANWHC 60.
[5] At para 9.

third appellant had pleaded to the charge as the matter was not triable until the accused had pleaded. This is because the plea serves an important function in a criminal trial in that it defines the basis on which the trial is to proceed. In not having pleaded to count 13, the object of section 105 was not substantively fulfilled and the matter was not triable. In such circumstances the magistrate erred in convicting the third appellant on count 13 without the appellant having pleaded to the charge. His conviction on that count cannot stand and must therefore be set aside.

Duplication of charges

[27] Following the issue having been raised by this Court and leave to appeal thereafter having been granted against conviction, it was argued for the appellants that there had been a duplication in charges insofar as the appellants in addition to the robbery with aggravated circumstances were convicted of counts 3, 5, 6 and 7, being pointing of a firearm, counts 8, 10, 11 and 12 being kidnapping and count 13, being the unlawful possession of a firearm.

[28] Different tests have been developed over time to assist in the determination of whether there is a duplication of charges laid against an accused. One approach is to consider whether the evidence on the one charge would also prove the other, and another is to consider whether the different acts were committed with a single intent and as part of one criminal transaction.[6] In *S v Whitehead and others*[7] the court noted that while these are useful practical guides "*if these tests fail to provide a*

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[6] *S v Benjamin en 'n ander*, 1980 (1) SA 950 (A) at 956F–G.
[7] 2008 (1) SACR 431 (SCA).

satisfactory answer, the matter is correctly left to the common sense, wisdom, experience and sense of fairness of the Court".[8]

[29] In determining whether a duplication of charges exists the definitions and elements of the different offences should be considered.[9] Although the elements and definitions of the offences of kidnapping and pointing of a firearm differ, in the criminal misconduct committed the appellants clearly acted with a single intent in one continuous criminal transaction during the course of the armed robbery over a limited period of time in a constrained space.[10] Their intent and the aim of their actions was to engage in an armed robbery at the store and steal money and goods from the store. The aggravated circumstances present for purposes of the robbery involved the wielding of a firearm. The restraining and immobilising of the four individuals in a room at the back of the store was carried out in furtherance of the aggravated robbery.

[30] It follows that having regard to when and where the acts were carried out and the circumstances under which they occurred, this Court is of the view that the four counts of pointing a firearm and the four kidnapping counts were part and parcel of the criminal misconduct carried out with a single intent, namely that of robbery with aggravating circumstances, in one continuous criminal transaction. It follows that counts the pointing of a firearm and kidnapping counts amounted to a duplication of charges with the charge of robbery with aggravating circumstances.

Robbery with aggravating circumstances

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[8] At para 35.
[9] *S v Grobler en 'n ander*, 1966 (1) SA 507 (A) at 511G–512A.
[10] *S v Maneli* 2009 (1) SACR 509 (SCA) at para 8.

[31] Aggravating circumstances are defined in section 1 of the Act as –

(i) the wielding of a firearm or any other dangerous weapon;

(ii) the infliction of grievous bodily harm;

(iii) a threat to inflict grievous bodily harm, by the offender or an accomplice....

[32] There is no doubt that the robbery was committed with serious aggravating factors present, which included the wielding of firearms , the pointing of firearms at the heads of different people in the store and the clear threat of some grievous bodily harm being inflicted on any person who did not comply with the instructions of the offenders. The robbery was clearly pre-planned and premeditated, carried out by the four appellants who acted in concert as a gang with a getaway car borrowed for this purpose.

[33] In *S v Mavinini* [2009] 2 All SA 277 (SCA) Cameron JA at para 26 stated that:

> 'It is sometimes said that proof beyond a reasonable doubt requires the decision-maker to have "moral certainty" of the guilt of the accused....It comes down to this: even if there is some measure of doubt, the decision-maker must be prepared not only to take moral responsibility on the evidence and inferences for convicting the accused, but to vouch that the integrity of the system that has produced the conviction – in our case, the rules of evidence interpreted within the precepts of the Bill of Rights – remains intact. Differently put, subjective moral satisfaction of guilt is not enough: it must be subjective satisfaction attained through proper application of the rules of the system.'

[34] It is trite that the trial court was required to weigh up all the evidence before it, considering it as a whole, taking into account the inherent strengths and weaknesses of such evidence and the probabilities on both sides in order to decide whether the balance weighs "*so heavily in favour of the state as*

to exclude any reasonable doubt about the accused's guilt".[11] It is equally trite that the court must determine whether the version of the appellants is reasonably possibly true. In *S v Shackell* [12] it was made clear that:

> '...a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true'.

[35] On a conspectus of the evidence before the trial court his Court is satisfied that the evidence showed that the appellants were positively identified beyond reasonable doubt as perpetrators of the crime committed. The testimony of the state's witnesses, considered together with the forensic fingerprint evidence put up, clearly proved it was the appellants who robbed the Markhams store on the day in question. The witnesses who identified the first, second and fourth appellants had ample opportunity to do so given that the appellants did not wear masks, the visibility and lighting in the store was good and the witnesses interacted with the appellants who were on the scene for what was described as an extended period of 25 to 30 minutes. In *S v Mthetwa*[13] it was said that –

> 'Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; the opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait and dress; the result of identification parades,

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[11] *S v Chabalala* 2003 (1) SACR 134 (SCA) at 139.
[12] 2001 (4) SA 1 (SCA) at para 30.
[13] 1972 (3) SA 766 (A) at 768.

> if any; and of course, the evidence by or on behalf of the accused. This list is not exhaustive. These factors, or such of them that are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in light if the totality of the evidence, and the probabilities…'

[36] Furthermore, in their identification of the first, second and fourth appellants, the state's witnesses each corroborated one another, with further corroboration provided by forensic evidence in relation to the second appellant. The evidence of the police was that on his arrest the fourth appellant was in possession of the Camry's keys shortly after the store had been robbed. The trial court correctly found the evidence of the state witnesses to have been clear and consistent and their evidence was accepted by the magistrate as reliable, credible and truthful.

[37] The third appellant was identified as having been present by virtue of forensic evidence and the evidence of his Whatsapp pictures on the phone of Ms Du Preez. The veracity and reliability of that evidence was correctly accepted by the magistrate, with it found as a result that the state had proved its case against the third appellant beyond reasonable doubt. The trial court cannot be faulted for rejecting the implausible versions advanced by the four appellants and finding that such versions were not reasonably possibly true. The improbabilities in the versions of each appellant version were of such a nature that the trial court correctly rejected such versions as untrue. The evidence showed beyond reasonable doubt that each of the four appellants participated in the robbery of the Markhams store on the day, during the course of which they threatened the occupants of the store using firearms, and restraining four people by taping their mouths, binding the hands and feet and in a small room adjacent to the store. In doing so,

the appellants were proved beyond reasonably doubt to have been guilty of robbery with aggravating circumstances.

[38] For these reasons the appeal against the conviction of the appellants on count 1 must fail.

Count 13: unlawful possession of a firearm

[39] To be found guilty of the statutory crime under section 3 of the Firearms Control Act 60 of 2000 of the unlawful possession of a firearm requires that the state prove (i) the possession of (ii) a firearm, (iii) unlawfulness and (iv) culpability. Section 1 provides a detailed and technical definition of a firearm for purposes of the Act. Although it is for the state to prove each element of this offence, it was accepted for the state in argument before the trial court that the police did not put up any evidence regarding whether the item found on the scene was in fact a firearm for purposes of the Act. The reliance on the fact that what was found constituted real evidence of a firearm is insufficient in the absence of any evidence that this item fell within the definition of section 1.

[40] In addition, even if this were not so, it fell to the state to prove possession of such firearm by each appellant. As is stated by C R Snyman in *Criminal Law* [14]–

> 'If a number of people commit a robbery with a common purpose to commit robbery but only one of them has the detention of the firearm used, proving that the other participants in the robbery also unlawfully possessed a firearm may be difficult. The mere fact that they commit a robbery with a common purpose using a firearm but that only one of them has physical detention, does not necessarily mean that all of them possess the firearm illegally. Such a deduction can only be made if the court finds that the robber who has the

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[14] 6th edition at 427.

> detention intended to possess it not only for himself but also on behalf of the other(s), and that the other(s) had the intention that the robber having the detention should exercise the physical detention on their behalf. Such a conclusion cannot automatically be made from the mere fact that the participants acted with a common purpose, because such common purpose may equally exist in a situation in which the robber having the detention of the firearm intended to possess it for himself alone.'

[41] In *Kwanda v S,*[15] relying on the earlier decisions of *S v Nkosi*[16]and *S v Mbuli*,[17] the Supreme Court of Appeal found even if an appellant conspired with his co-accused to commit robbery and was aware that some of his co-accused possessed firearms for the purpose of committing the robbery, this does not lead to the inference that he possessed such firearms jointly with his co-accused. Such an inference is only justified where –

> 'the state has established facts from which it can properly be inferred by a Court that: (a) the group had the intention (animus) to exercise possession of the guns through the actual detentor and (b) the actual detentors had the intention to hold the guns on behalf of the group'.[18]

[42] The suggestion made by the state that through application of the doctrine of common purpose it could be deduced that the appellants each possessed the firearm, even if it had been proved to fall within the definition of firearm, is not sufficient to prove the requirement of possession for purposes of the crime. This is so in that it is equally possible that the firearm was possessed by only one of the appellants, in this case most likely the second appellant whose fingerprints were found on it. In any

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[15] [2011] ZASCA 251; (2013 (1) SACR 137 (SCA); [2011] ZASCA 50 at para 5.

[16] 1998 (1) SACR 284 (W)

[17] 2003 (1) SACR 97 (SCA).

[18] 1998 (1) SACR 284 (W) at 286g-i.

event, as was made clear in *S v Mbuli*,[19] mere knowledge by the other appellants that one of them was in possession of a firearm, even if this involved acquiescence by them in its use for fulfilling their common purpose to commit the robbery, is not sufficient to make them joint possessors for purposes of the Act.

[43] Having failed to have regard to the requirements of the charge, with confused reasoning for the conviction of the appellants on this count provided, the trial court erred. With no proof that the item found fell within the definition of firearm for purposes of section 1 and with inadequate evidence regarding the issue of possession, the only reasonable inference from the evidence is not that the appellants possessed the firearm jointly and it follows that the appeal against the conviction of the first, second and fourth appellants on this count must succeed.

Ad sentence

[44] It was submitted for the appellants that the sentences imposed by the trial court were harsh and excessive having regard to the fact that three of the appellants were first offenders and that all four appellants had been held in custody awaiting trial for four years at the time of sentencing. The third appellant had two prior convictions, one in 2009, for the unlawful possession of a firearm, and a second in 2010 for robbery. While the fourth appellant was 45 years old at the time of sentencing, the first, second and

[19] At para 72.

third appellants were each in their 20's. All four appellants had young children who they support and having regard to the fact that the items stolen were recovered, it was argued that an element of mercy should have been extended to the appellants in the imposition of sentence.

[45] It was submitted for the state that given the seriousness of the crime of robbery with aggravating circumstances committed, the finding of the trial court that no substantial and compelling circumstances existed which warranted the imposition of a sentence reduced from the minimum was unimpeachable. In *S v Malgas*[20] it was made clear that minimum sentences prescribed by the legislature should not be departed from lightly and for flimsy reason in the absence of weighty justification the sentences should be imposed for the crimes specified unless truly convincing reasons warrant a different response.

[46] An appropriate sentence is to be determined by a court having regard to the sentencing principle that "*punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy*".[21] The main purposes of punishment are that it is deterrent, preventative, reformative and retributive.[22] In exercising its sentencing discretion a court must strive to achieve a judicious balance between all relevant factors "*in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others*".[23]

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[20] 2001(2) SA 1222 (SCA) at para 25.
[21] *S v Rabie* 1975 (4) SA 855 (A) at 862G-H.
[22] *R v Swanepoel* 1945 AD 444 at 455. *S v Whitehead* 1970 (4) SA 424 (A) at 436F-G; *S v Rabie* at 862A-B; *S v Banda* 1991 (2) SA 352 (BG) at 354E-G.
[23] *S v Banda* at 355A-B.

[47] The test to be applied in determining whether interference by an appeal court in a sentence imposed by the trial court is justified is whether the sentence imposed by the trial court is vitiated by irregularity or misdirection, or, even in the absence of misdirection, is disturbingly inappropriate, in the sense that the appeal court is satisfied that the trial court did not exercise its discretion reasonably and imposed a sentence which was not appropriate.[24] The task of the court in sentencing is to balance the nature and seriousness of the crime against the personal circumstances of the offender and the interests of society,[25] while remaining alive to the purpose of sentencing.

[48] The four appellants were held in custody awaiting trial for four years. In *S v Mqabhi*,[26] with reference to the decisions of the Supreme Court of Appeal in *S v Dlamini*,[27] *S v Vilakazi*,[28] *S v Kruger* 2012 (1) SACR 369 (SCA); and *S v Radebe & another,*[29] it was found that pre-sentence detention is a factor to be taken into account when considering the presence or absence of substantial and compelling circumstances for purposes of section 51, with this period weighed as a mitigating factor in determining whether the period of imprisonment to be imposed is justified in the sense of it being proportionate to the crime committed. It has been recognised by our courts that there is no mechanical formula or rule of thumb to be applied to

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[24] *Director of Public Prosecutions, KZN v P* 2006 (1) SACR 243 (SCA).
[25] *S v Zinn* 1969 (2) SA 537 (A) at 540G-H
[26] 2015 (1) SACR 508 (GJ).
[27] 2012 (2) SACR 1 (SCA).
[28] 2009 (1) SACR 552 (SCA).
[29] 2013 (2) SACR 165 (SCA).

determine the period by which a sentence should be reduced, with the circumstances specific to each case to be assessed.

[49] While the mitigating personal circumstances of the offenders were considered by the trial court, the relevant aggravating factors which included the seriousness of the crime committed and the circumstances under which it was committed, when considered with the interests of society, outweighed the factors put up in mitigation. This included the period spent in custody awaiting trial, which although extensive was, when considered against the other relevant factors, not sufficient to justify a finding that substantial and compelling circumstances existed. It follows that the trial court cannot be faulted for its finding that no substantial and compelling circumstances existed which warranted the imposition of a sentence reduced from the minimum prescribed.

[50] The sentence of 15 years' imprisonment imposed on the first, second and fourth appellants was not vitiated by irregularity or misdirection, nor was it disturbingly inappropriate. In imposing sentence on this count, this Court is satisfied that the trial court exercised its discretion properly and reasonably and that the sentence imposed was just and appropriate.

[51] I turn now to consider the sentence of 30 years' imprisonment imposed on the third appellant in respect of count 1. While the magistrate correctly found that no substantial and compelling circumstances existed which warranted the imposition of a sentence reduced from the minimum, the sentence imposed was unduly harsh and amounted to a material misdirection on the part of the trial court. There was no dispute that the third appellant had two prior convictions.

[52] For the robbery conviction, which was not one with aggravated circumstances present, he was sentenced to 8 years imprisonment of which 5 years was suspended for a period of 5 years on condition that he was not found guilty of either robbery with aggravating circumstances or robbery committed during the period of suspension. Whilst the third appellant was not a first offender, he was not a second offender for purposes of section 51(2)(a)(ii) of Act 105 of 1997 in that his first robbery conviction was one with aggravating circumstances found to be present. Part II of Schedule 2 to the Criminal Law Amendment Act 105 of 1997 sets out the offences to which section 51(2) applies, which includes robbery with aggravating circumstances. Section 51(2)(a)(ii) provides that "*a second offender of any such offence*", is to be sentenced "*to imprisonment for a period not less than 20 years*". In *S v Qwabe*[30] this Court held that "*such offence*" referred to the offences set out in Part II of Schedule 2, which included robbery with aggravating circumstances. On a plain reading of the provision I am satisfied that this is a proper interpretation of these words and that the words "such offence" cannot be read to include a conviction for robbery <u>without</u> aggravating circumstances. It follows that where an accused has been convicted of a prior offence of robbery <u>without</u> aggravating circumstances, that accused is not a second offender for purposes of section 51(2)(a)(ii).

[53] While it is not clear whether the magistrate considered section 51(2)(a)(ii) to apply to the sentencing of the third appellant, the trial court cannot be faulted for finding that no substantial and compelling circumstances existed

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[30] 2012 (1) SACR 347 (WCC) at 25 and 36.

which warranted the imposition of a sanction on the third appellant which was reduced from the minimum prescribed. Such a finding was warranted having regard to the nature and seriousness of the offence, the interests of society, the relevant aggravating and mitigating factors, including the violence of the crime, its clear premeditation, the third appellant's prior convictions but also his personal circumstances and the extended period of time spent by him in custody awaiting trial. Given these aggravating factors, the magistrate was correct to differentiate the third appellant's circumstances from those of the other appellants. However, the sentence imposed was unduly harsh and inappropriate and cannot therefore stand.

[54] While the four-year period spent awaiting trial was significant, the reasons for the delay in the finalisation of the matter, have not been addressed squarely in this appeal by the third appellant. Thus, while it is a factor worthy of being taken into account, in the absence of such information, undue weight cannot be attributed to it. It follows that taking into account the third appellant's prior conviction for robbery balanced against the extensive period he spent in custody awaiting trial, as well as all other factors relevant to sentencing, an effective term of 18 years' imprisonment is just and fair. Such sentence gives due recognition to the third appellant's potential for rehabilitation in due course, while reflecting an element of mercy.

Order

[55] In the result it is ordered that:

1. The appeal against the conviction of the appellants on count 1 is dismissed and the conviction of the appellants on this count is confirmed.

2. The appeal against the conviction of the appellants on counts 3, 5, 6 and 7, 8, 9, 11 and 12 succeeds and the conviction of the appellants on these counts is set aside.

3. The appeal against the conviction of the appellants on count 13 succeeds and the conviction of the appellants on this count is set aside.

4. The appeal against the sentence imposed on the first, second and fourth appellants in respect of count 1 is dismissed, with the sentence of fifteen (15) years' imprisonment imposed on each of the first, second and fourth appellants confirmed.

5. The appeal against the sentence imposed on the third appellant in respect of count 1 succeeds, with the sentence of thirty (30) years' imprisonment set aside and substituted with a sentence of eighteen (18) years' imprisonment.

SAVAGE J

I agree

PANGARKER AJ

Appearances:

For first and second appellants:	Mr Paries
	Instructed by R Davies and Associates
For third and fourth appellants:	Ms Adams
	Instructed by Legal Aid
For State:	Ms Engelbrecht
	Office of the Director of Public Prosecutions