THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 20401/2014

Reportable

In the matter between:

BUSHI MIKE MACHABA	**FIRST APPELLANT**
ELVIS BOY MBUYANE	**SECOND APPELLANT**
and	
THE STATE	**RESPONDENT**

Neutral citation: *Machaba & another v The State* (20401/2014) [2015] ZASCA 60 (8 April 2015)

Coram: Mpati P, Majiedt JA and Schoeman AJA.

Heard: 16 March 2015

Delivered: 8 April 2015

Summary: Admissibility of hearsay evidence by co-accused contained in extra – curial statement – record incomplete – import of presiding judge or registrar administering the oath in terms of s 162 of the Criminal Procedure Act 51 of 1977.

ORDER

On appeal from: The North Gauteng High Court, Pretoria (Louw AJ sitting as court of first instance).

1 The appeal against the convictions of the appellants is dismissed.

2 The appeal against the sentences imposed on the appellants is upheld and the sentences are set aside and substituted with the following.

‘Count 1: 20 years’ imprisonment; and

Count 2: 10 years’ imprisonment.’

3 It is ordered that the sentences imposed in respect of count 2 will run concurrently with the sentences imposed in count 1.

4 The sentences are antedated to 15 December 2006.

JUDGMENT

Schoeman AJA (Mpati P and Majiedt JA CONCURRING)

[1] The two appellants were accused one and three respectively in the high court when they, and a co-accused, were convicted of murder and robbery with aggravating circumstances and sentenced on 15 December

2006. The erstwhile second accused has passed away in the interim. All three accused were sentenced to life imprisonment on the murder charge and 15 years' imprisonment in respect of the robbery charge. With leave of the court below the appellants appeal to this court against their convictions and the sentences imposed.

The record

[2] It is common cause that the record is not complete as the recording of the last week of the proceedings have not been fully transcribed. The recording can now not be traced. Attempts to reconstruct those portions of the record were unsuccessful. The record does not deal with the evidence relating to a trial-within-a-trial in respect of the second accused (who is not an appellant), the evidence relating to the sentencing proceedings and part of the judgment on the merits.

[3] It was argued on behalf of the appellants that due to the incomplete record, the appeal in respect of the conviction cannot properly be adjudicated and therefore the convictions and sentences must be set aside.

[4] In *S v Chabedi*[1] Brand JA said the following regarding the record on appeal:

> '[5] On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the Court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that was said at the trial. As has been pointed out in previous cases, records of proceedings are often still kept by hand,

[1] *S v Chabedi* 2005 (1) SACR 415 (SCA) paras 5 and 6.

in which event a verbatim record is impossible (see, eg, *S v Collier* 1976 (2) SA 378 (C) at 379A - D and *S v S* 1995 (2) SACR 420 (T) at 423*b* - *f*).

[6] The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, *inter alia,* on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal.'

[5] As will become clearer later in this judgment, I am of the view that the adjudication of this appeal on the record as it stands will not prejudice either of the appellants. The appellants' convictions and sentences can, therefore, not be set aside merely on the basis of the record being incomplete.

The administration of the oath in terms of s 162 of the Criminal Procedure Act 51 of 1977

[6] The issue pertaining to the proper administration of the oath was not raised by counsel for the appellants during the trial or during the application for leave to appeal, nor was it mentioned in the heads of argument. At the eleventh hour supplementary heads of argument were filed on the morning of the appeal, raising alleged non-compliance with s 162 of the Criminal Procedure Act 51 of 1977 (the CPA).

[7] Section 162 of the CPA provides:

'162 Witness to be examined under oath

(1) Subject to the provisions of sections 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath, which shall be administered by the presiding judicial officer or, in the case of a superior court, by the presiding judge or the registrar of the court, and which shall be in the following form:

"I swear that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God."

(2) If any person to whom the oath is administered wishes to take the oath with uplifted hand, he shall be permitted to do so.'

[8] In light of an unreported decision of the North West Division, Mahikeng, *Nkoketseng Elliot Pilane v The State*[2] it was argued on behalf of the first appellant that the record does not reflect that the witnesses for the State were duly sworn in, in terms of s 162 of the CPA. In *Pilane* all the witnesses were sworn in by the interpreter and not the presiding magistrate. The record reflects that the magistrate said: 'Let her take the oath'; 'Please administer the oath' and 'Administer the oath please'. The record thereafter reflects the following after the witnesses' names: 'd.u.o.', which probably is an abbreviation for: 'declares under oath'.

[9] It is peremptory in terms of s 162 that all witnesses be sworn in by either the presiding judge or the registrar in the case of a superior court. It was emphasised in *The State v Matshivha*[3] para 10 that:

'. . . the reading of s 162(1) makes it clear that, with the exception of certain categories of witnesses falling under either s 163 or 164, it is peremptory for all witnesses in criminal trials to be examined under oath. And the testimony of a witness who has not been placed under oath properly, has not made a proper affirmation or has not been properly admonished to speak the truth as provided for in the Act, lacks the status and character of evidence and is inadmissible.' (footnotes omitted)

[10] *Matshivha* dealt with the failure of a presiding judge properly to ascertain whether young witnesses understood the import of the oath. The judge in that instance also instructed the interpreter to administer the oath. This conduct was not addressed on appeal. However, due to the peremptory wording of s 162 the requirement that it is the presiding

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[2] *Nkoketsent Elliot Pilane v The State* (NWM) unreported case no CA10/2014 (5 March 2015).
[3] *S v Matshivha* ; 2014 (1) SACR 29 (656/12); [2013] ZASCA 124 (SCA) para 10.

judge, or the registrar of the court, that must administer the oath, cannot be dispensed with.

[11] Counsel for the first appellant relied on the appearance of the abbreviation ‘(d.s.s.)’ after the names of witnesses, followed by the words ‘(through interpreter)’, as a basis for the argument that the oath was not properly administered. It is accepted that ‘d.s.s.’ is an abbreviation for ‘does solemnly swear’ or ‘duly sworn states’. There is no indication that the judge had instructed the interpreter to administer the oath or that the judge, or registrar of the court, did not themselves administer the oath through the interpreter. Significantly, only the abbreviations ‘d.s.s.’ and ‘v.o.e.’ (which stands for ‘verklaar onder eed’) appear after the names of those witnesses who testified in the English and Afrikaans languages respectively. In the absence of any clear evidence that the judge left it to the interpreter to administer the oath, no deduction can be made that the oath had not been properly administered. This argument accordingly fails.

Background

[12] None of the accused testified in the trial. No valid reason was raised as to why the uncontested testimony of the State witnesses should not be accepted, barring the identification of the appellants by Ms Christa Sonto Ndebele. Therefore, the accepted evidence of the events of the evening of the incident and of the subsequent police investigation was the following.

[13] On 3 May 2002, at 21h00, Mr Cyprian Mthembu (the deceased) and his girlfriend, Ms Ndebele, were walking in a street in Soshanguve. They were accosted by three men, one of whom was armed with a

firearm. One of these men grabbed Ms Ndebele's handbag and another pushed her, whilst the third man pointed a firearm at her and the deceased. Ms Ndebele fled from the scene when a shot was fired into the air and she heard a further shot as she was running away. When she returned to the scene she found that the deceased had a gunshot wound to his chest and that he had passed away. His cell phone was missing and a spent cartridge was found at the scene.

[14] More than two years later, in May 2004, the investigating officer, Inspector Cronje, traced and found the cell phone. This find led to the arrest of the first appellant and the second accused for the commission of these crimes. This in turn led to the arrest of the second appellant in Pretoria. The second appellant led the police to his home where his firearm was seized. The firearm was ballistically linked to the spent cartridge found at the scene.

[15] Captain Sithole of the South African Police Service took the first appellant's warning statement. The fact that the first appellant's constitutional rights were explained to him and that the statement was freely and voluntarily made was not placed in issue, although it was denied that the statement was made at all. Whether the first appellant made the statement or not, was a credibility issue and the fact that he did not testify meant that there was nothing to counter the evidence of Captain Sithole that the statement was freely and voluntarily made. The import of this statement was that the first appellant placed himself on the scene of the incident whilst knowing that a certain 'Boikie' was armed with a 9mm pistol. The statement was exculpatory in that the first appellant said that he had attempted to separate the deceased and

'Boikie', who were involved in an argument, when 'Boikie' fired two shots.

[16] Further evidence was led that during May 2002 the first appellant and the second accused sold a cell phone to a Ms Lebese. The evidence established that this was the cell phone of the deceased that was taken from the scene where the deceased was shot.

[17] The appellants and the second accused testified in their application to be released on bail. The record of the proceedings in the bail application was handed in by consent and it was admitted that the contents of the record were correct. The record of the bail proceedings demonstrates that the magistrate warned the appellants in terms of s 60(11B)*(c)* of the CPA that if they testified their testimony could be used against them in their trial.

[18] At the bail proceedings the first appellant placed himself on the scene when he testified that he had picked up the phone, while the second appellant testified that he never shot the deceased. The latter testified further that during 2002 he lost his firearm, which had apparently been taken by his younger. I proceed to deal with the State's case against each of the appellants.

The first appellant

[19] Ms Ndebele testified as to how all three persons at the scene were involved in the violence perpetrated against her and the deceased. Her dock identification of the appellants and the second accused as the perpetrators and her evidence on the role each played were correctly rejected by the trial court, primarily because two years earlier she had

failed to identify the three accused at an identity parade. However, her evidence that all three young men present took part in the robbery and that one of them had pointed a firearm at her and the deceased, was neither gainsaid nor disputed during cross-examination.

[20] The first appellant was linked to the commission of the crimes by the following facts: shortly after the incident, the first appellant handed the deceased's cell phone to a certain Laka to sell and he was present when the sale took place; he placed himself on the scene in his warning statement to Captain Sithole and, in his bail application, he further admitted that he took the cell phone from the scene.

[21] In the exculpatory portion of the warning statement and in the bail application the first appellant distanced himself from the murder and the armed robbery. However, to determine whether the State had proved the guilt of the first appellant beyond reasonable doubt, the whole mosaic of evidence must be considered. It is clear from the uncontested evidence of Ms Ndebele that there were three men who all partook in the robbery. It is apparent that they acted with a common purpose as one of the unarmed men pushed her and the other took her bag, while the third assailant pointed a firearm at her and the deceased. When she returned to the scene the deceased's cell phone was gone. The version of the first appellant that he only picked up the cell phone after a shot had been fired may well be factually correct. But insofar as he thereby wished to distance himself from the robbery and the murder, the impression he wished to create that he innocently picked up the cell phone cannot reasonably possibly be true. The evidence of Ms Ndebele contradicts this. The evidence of the subsequent events also contradicts his version, in that he was the person who gave the cell phone to Laka to sell. In my view,

the first appellant was correctly convicted of murder and robbery with aggravating circumstances as defined in s 1 of the CPA.

The second appellant

[22] The State's case against the second appellant is premised mainly on the fact that he was the owner of the firearm that killed the deceased and that he was still in possession of that firearm in 2004 when he was arrested. Furthermore, the court below found that the hearsay evidence testified to by Captain Sithole relating to the admissions made by the first appellant and contained in his warning statement, was admissible evidence against the second appellant. This statement made by the first appellant to Captain Sithole was that the second appellant fired the shots at the scene of the crime. Likewise the hearsay evidence relating to what the second accused allegedly had said during the pointing out namely, that they were all three at the scene of the incident and that the second appellant was the shooter, was admitted as evidence against the second appellant.

[23] This court has now authoritatively held that the extra-curial confession or admission of one accused is inadmissible as evidence against another accused.[4] This has the result that the statements made by the first appellant and the second accused were inadmissible against the second appellant and could not be used as evidence against him.

[24] The only remaining evidence against the second appellant, therefore, is the fact that he was the owner of the firearm with which the deceased was shot and killed. As stated before, this firearm was in his possession in 2004.

[4] *S v Litako & others* 2014 (2) SACR 431;[2014] ZASCA 54 (SCA).

[25] During cross-examination of the second appellant in his bail application he testified that he had not been in possession of his firearm during 2002 as he had lost it and that his younger brother had taken it. He also testified that he did not report the loss of the firearm but thereafter testified that he did report it, but not in 2002. This aspect ended with the second appellant testifying that he did not report the loss. He furthermore denied that he was involved in the shooting of the deceased.

[26] What is the importance of the evidence of the second appellant during his bail application and what weight must be given to it? In *Director of Public Prosecutions, Transvaal v Viljoen* para 33,[5] Streicher JA held:

> 'It does not follow from the fact that the record of the bail proceedings forms part of the record of the trial that evidence adduced during the bail proceedings must be treated as if that evidence had been adduced and received at the trial. The record of the bail proceedings remains what it is, namely a record of what transpired during the bail application.'

[27] The handing in of the bail application in terms of s 60 (11B)*(c)*[6] is a shortcut to achieving the same object as provided for in s 235 of the CPA.[7] This has the effect that the record is prima facie proof that any matter recorded on the record was properly recorded. But, the '. . . record does not, however, constitute prima facie proof of any fact it contains.'[8]

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[5] *Director of Public Prosecutions, Transvaal v Viljoen* 2005(1) SACR 505 (SCA) para 33.
[6] S 60(11B)(*c*) reads as follows: '(c) The record of the bail proceedings, excluding the information in paragraph (*a*), shall form part of the record of the trial of the accused following upon such bail proceedings: Provided that if the accused elects to testify during the course of the bail proceedings the court must inform him or her of the fact that anything he or she says, may be used against him or her at his or her trial and such evidence becomes admissible in any subsequent proceedings.'
[7] *S v Dlamini; S v Dladla &others; S v Joubert; S v Schietekat* 1999(2) SACR 51 (CC) para 87.
[8] Du Toit et al *Commentary on the Criminal Procedure Act* Volume 2 24-110 [Service 49, 2012].

[28] In the bail application the second appellant admitted that he was the owner of a firearm that was found in his possession. His defence that he did not shoot the deceased is before court by way of the bail application.

[29] In *R v Valachia & another*[9] it was held that when the State proves that an accused made an admission in a statement, the whole statement must be assessed including the exculpatory portions. It is the duty of the court to 'weigh the credibility of such portion and to give such weight to it as in its opinion it deserves. . . .'
And further:[10]

'Naturally, the fact that the statement is not made under oath, and is not subject to cross-examination, detracts very much from the weight to be given to those portions of the statement favourable to its author as compared with the weight which would be given to them if he had made them under oath, but he is entitled to have them taken into consideration, to be accepted or rejected according to the Court's view of their cogency.'

[30] Can the *Valachia* principle be applied to the record of bail proceedings? In *S v Cloete*[11] this court asked whether the principle could be applied to a plea explanation that was made in terms of s 115 of the CPA. EM Grosskopf JA held at 428A-G that:

'. . .it is clear that the evidential value of informal admissions in s 115 statements derives from the ordinary common law of evidence. That being so, there would appear to be no reason of principle why the rule enunciated in *R v Valachia (supra)* should not be applicable also to such statements. . . .And I can think of no other reason why a court should be entitled to have regard to the incriminating parts of such a statement while ignoring the exculpatory ones.

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[9] *R v Valachia & another* 1945 AD 826 at 835.
[10] *Valachia* at 837.
[11] *S v Cloete* 1994 (1) SACR 420 (A) 428a-g.

There is, of course one practical difference between an extra-curial statement and an explanation of plea. It is in general the prerogative of the State to decide whether or not to lead evidence of an extra-curial statement by the accused. If, on balance, the statement may weaken the State case, the State may decide not to introduce it into evidence. An explanation of plea is different. There it is the accused who decides what to say, and whatever he says is recorded. In this way he may more readily place self-serving exculpatory material before court. This objection to the according of evidential value to a statement pursuant to s 115 was considered in *S v Malebo* [*en Andere* 1979 (2) SA 636(B)] (*supra* at 642H-643A) and regarded as invalid. I agree with this conclusion but not entirely with Hiemstra CJ's reasons. It seems to me that the true answer to this objection is that the Legislature has, in s 115, provided a procedure whereby material can be placed before the court. It is true that an accused may try to abuse it, but the court should ensure that such an attempt does not succeed by refusing to attach any value to statements which are purely self-serving, and, generally, by determining what weight to accord to the statement as a whole and to its separate parts.'

[31] Section 60(11B)*(c)* is in the same vein. It has been introduced as part of the record of the trial, subject to the qualification that it was essential that the accused had to be warned of the consequences of testifying in the bail application, prior to its acceptance as part of the record. As with s 115, as stated in *Cloete,* 'the Legislature has provided a procedure whereby material can be placed before court.' I am of the view that the *Valachia* principle is applicable in this context as well.

[32] By way of the bail proceedings the second appellant had placed the defence he relied on before court. The issue was what weight should have been accorded to it. It must be kept in mind that the evidence presented in the bail application is centred on the applicant being granted bail and not on the merits of the matter. In the present matter there was perfunctory cross-examination on the merits during the bail application. This is understandable because the aim of the prosecutor was not to

secure a conviction. Thus the testimony of the second appellant in the bail application cannot be equated to testimony given during a trial, which would in all probability have attracted more rigorous cross-examination, to determine whether his version was reasonably possibly true in light of all the evidence presented.

[33] In *S v Boesak*[12] the following was said.

'The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. What is stated above is consistent with the remarks of Madala J, writing for the Court, in *Osman and Another v Attorney-General, Transvaal*, when he said the following:

"Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a *prima facie* case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice."' (footnotes omitted)

[34] In my view, there was a prima facie case against the second appellant. He did not testify during the trial to explain that he had not been in possession of the firearm at the time of the commission of the

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[12] *S v Boesak* 2001 (1) SACR 1; [2000] ZACC (CC) 25 para 24.

offences and, more importantly, when in 2002 did he lose it. Ms Ndebele's evidence established that three people accosted her. The evidence has shown that two of the three were the first appellant and the erstwhile second accused, while the third person had a firearm in his possession. The licensed owner of the weapon that killed the deceased is the second appellant who, according to his own testimony was in possession of it in 2004. In evaluating the weight that must be accorded to the defence of the second appellant as contained in the bail application, the following factors are important. There is the objective evidence that the second appellant's firearm fired the fatal shots that killed the deceased. The firearm was in his possession two years later when the investigating officer's investigation led him to the second appellant. The investigating officer by chance discovered that the second appellant was a licensed firearm holder and had the firearm in his possession. The second appellant's version that his brother had taken the firearm in 2002 must be considered against the backdrop that he did not report such loss; there is no indication when in 2002 he lost his firearm, when his firearm was returned to him and how it came about that he was again in possession thereof in 2004. Furthermore, he contradicted himself on whether or not he reported the loss.

[35] I am of the view that the State sufficiently proved the elements of the crimes against the second appellant. There was a prima facie case against the second appellant and his failure to rebut it had the effect that the State proved all the elements of the charges against the second appellant beyond reasonable doubt.

Sentence

[36] The provisions of s 51 of the Criminal Law Amendment Act 105 of 1997 (the Act) would ordinarily apply to the sentencing regime. The murder charge, where the perpetrators acted with a common purpose and the murder was committed during an armed robbery, would attract a prescribed minimum sentence of life imprisonment, unless substantial and compelling circumstances exist to justify the imposition of a lesser sentence. [13] The prescribed minimum sentence for robbery with aggravating circumstances is 15 years' imprisonment.[14]

[37] However, the indictment does not refer to the provisions of s 51 of the Act at all. Furthermore, the record does not reflect that the presiding judge brought the provisions of s 51 of the Act to the notice of the appellants before they pleaded to the charges or at any time during the trial before sentencing commenced.

[38] In *S v Ndlovu*[15] the following was said regarding the duties of a presiding officer to ensure that an accused has a fair trial:

'The enquiry, therefore, is whether, on a vigilant examination of the relevant circumstances, it can be said that an accused had had a fair trial. And I think it is implicit in these observations that where the State intends to rely upon the sentencing regime created by the Act a fair trial will generally demand that its intention pertinently be brought to the attention of the accused at the outset of the trial, if not in the charge-sheet then in some other form, so that the accused is placed in a position to appreciate properly in good time the charge that he faces as well as its possible consequences. Whether, or in what circumstances, it might suffice if it is brought to the attention of the accused only during the course of the trial is not necessary to decide in the present case. It is sufficient to say that what will at least be required is

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[13] Section 51(1) of the Criminal Law Amendment Act 105 of 1997 read with Part I of Schedule 2 of the Act.

[14] Section 51(2) of the Act read with Part II of Schedule 2 of the Act.

[15] *S v Ndlovu* 2003 (1) SACR 331; [2002] ZASCA 144 (SCA) para 12.

that the accused be given sufficient notice of the State's intention to enable him to conduct his defence properly.'

[39] This was not done in the instant matter and thus the sentencing regime of s 51 of the Act is not applicable. On account of the paucity of information regarding the appellants' personal circumstances contained in the judgment on sentence and the absence of the record of the pre-sentencing proceedings, I am constrained to revert to the information furnished during the bail application proceedings.

[40] I take into consideration as held in *S v Vilakazi*[16] that in respect of

'. . . serious crime the personal circumstances of the offender . . . recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be . . . .'

[41] At the time of the commission of the crimes the first appellant was a 23 year old first offender. At the time of his bail application he was single, unemployed and lived with his father and four siblings. He had been in custody for a period of approximately 30 months as an awaiting trial prisoner when sentence was imposed.

[42] The second appellant was also 23 years old at the time of the incident. He had no previous convictions. At the time of the bail application he was a single father and he and his child resided with his parents. The mother of the child was also alive. He was employed at the time of his arrest.

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[16] *S v Vilakazi* 2012 (6) SA 353; [2008] ZASCA 87 (SCA) para 58.

[43] Unfortunately we have no information regarding the victims of these crimes. We do not know Mr Mthembu's age, whether he was a father and whether he was employed and maintained a family. We do not know if he had any dependants and, if so, how many. None of this is evident from the judgment on sentence. I can only repeat what was said in *S v Matyityi:*[17]

> 'I hazard that the value of the sum of his life must have been far greater than the crime statistic that he has come to represent in death. It surely would therefore be safe to infer that in some way or the other his death must have had devastating consequences for others.'

We similarly do not know what effect the crimes have had on Ms Ndebele. The judgment on sentence is silent on that too.

[44] The community demands that consistent and, if necessary, severe sentences be handed down for serious crimes. In this instance the motive was clearly to rob the victims. There was no need to injure or kill any of the victims as the perpetrators outnumbered them and Ms Ndebele had run away when the fatal shot was fired.

[45] Taking into consideration all the known factors I am of the view that a sentence of 20 years' imprisonment on the charge of murder is appropriate, while a sentence of 10 years' imprisonment is suitable for the charge of robbery with aggravating circumstances. The cumulative effect of these sentences must be taken into consideration, as well as the fact that the first appellant had already spent more than two years in custody at the time of sentencing.

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[17] *S v Matyityi* 2011 (1) SACR 40; [2010] ZASCA 127 (SCA) para 15.

[46] Accordingly the following order is made.

1 The appeal against the convictions of the appellants is dismissed.

2 The appeal against the sentences imposed on the appellants is upheld and the sentences are set aside and substituted with the following in respect of each of the appellants.

'Count 1: 20 years' imprisonment; and

Count 2: 10 years' imprisonment.'

3 It is ordered that the sentences imposed in respect of count 2 will run concurrently with the sentences imposed in count 1.

4 The sentences are antedated to 15 December 2006.

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I Schoeman

Acting Judge of Appeal

APPEARANCES

For the Appellants:	F van As (First Appellant)
	L Augustyn (Second Appellant)
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	Legal Aid South Africa, Pretoria
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For the Respondent:	P Vorster
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