THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 62/2017

In the matter between:

THULANI NCUBE KHUMALO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Khumalo v The State* (62/17) [2017] ZASCA 53 (18 May 2017)

Coram: Tshiqi, Saldulker, Zondi and Van der Merwe JJA and Schippers AJA

Heard: 4 May 2017

Delivered: 18 May 2017

Summary: Criminal Procedure : appeal against refusal of petition by the court a quo : robbery with aggravating circumstances contemplated in s 51 of the Criminal Law Amendment Act 105 of 1997 : no reasonable prospect of success on appeal : appeal dismissed.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Carelse and Bam JJ sitting as court of appeal):

The appeal is dismissed.

JUDGMENT

Schippers AJA (Tshiqi, Saldulker, Zondi and Van der Merwe JJA concurring):

[1] The appellant was charged in the regional court, Alexandra, with two counts of robbery with aggravating circumstances. The State alleged that at a restaurant in Paulshof, Rivonia, the appellant and his two accomplices, at gunpoint, robbed the manager of R 5000 (count 1); and a patron of a wristwatch (count 2). The appellant was convicted of robbery with aggravating circumstances on count 1 and sentenced to 15 years' imprisonment in terms of s 51 of the Criminal Law Amendment Act 105 of 1997 (the Act). The State did not present any evidence on count 2 and the appellant was acquitted on that charge. The regional court refused leave to appeal. A petition to the South Gauteng High Court for leave to appeal against conviction and sentence under s 309C of the Criminal Procedure Act 51 of 1977 was also refused.

[2] Subsequently the appellant was granted special leave to appeal to this Court in terms of s 16(1)(*b*) of the Superior Courts Act 10 of 2013. Since the appeal lies

only against the refusal of the petition by the court a quo,[1] the issue is whether it should have granted the appellant leave to appeal to it. Stated differently, the question is whether the appellant demonstrated reasonable prospects of success on appeal.[2] That requires an examination of the evidence.

[3] The appellant was convicted on the evidence of Mr Happy Molonga, the manager of the restaurant, Mr Nkanyese Letsoaliso, a security guard at the complex in which the restaurant is located, and Constable Andile Thlame.

[4] Mr Molonga testified that around 8:30 pm on 2 September 2012, the appellant and his two accomplices entered the restaurant, the only establishment open in the complex at the time; and the appellant said it was a robbery. He and one of his accomplices, who both had firearms, got under the counter to where Mr Molonga was standing. A gun was pointed at Mr Molonga and they ordered everybody to lie down. Everyone complied. The appellant and his accomplice then instructed the cashier to open the tills, and Mr Molonga to open the safe, which they did. The robbers removed cash of R5000 and an additional R3 000 (a worker's wages which were in the safe) and put it into a money bag which they were carrying. Thereafter they ordered everybody to remain lying down, robbed some of the patrons and left the restaurant on foot.

[5] The robbers had walked a short distance within the complex when Mr Molonga, his staff, some patrons and Mr Letsoaliso followed them. The robbers then ran from the complex. Mr Molonga followed them on his motorcycle. The robbers split up: two ran straight ahead and the appellant turned right into Mount

[1] *S v Tonkin* [2013] ZASCA 179; 2014 (1) SACR 583 (SCA) para 3.
[2] *S v Van Wyk & another* [2014] ZASCA 152; 2015 (1) SACR 584 (SCA) paras 34 and 35.

Fletcher Street. As fate would have it, he ran into a cul-de-sac and was cornered by the crowd. He tried to throw the firearm over a wall, but it fell and dropped next to him. It was later picked up by Constable Thlame. The crowd remained with the appellant until the police arrived, whereupon he was arrested.

[6] In cross-examination Mr Molonga said that the robbery took less than five minutes; that the appellant was apprehended about 10 minutes after it had taken place; that he was certain that the appellant was one of the robbers; and that the visibility at the restaurant and the place where the appellant was apprehended was very clear - there were streetlamps all over. Mr Molonga remembered that the appellant was wearing a reflective vest which security guards usually wear. When asked whether it made sense for persons to commit a robbery and just walk away, Mr Molonga replied that the robbers had arranged transport because a car without number plates had sped off from the complex, when its occupants saw the robbers being followed by the crowd. He denied the appellant's version that he was arrested while standing at a garage waiting for his uncle to fetch him.

[7] In his evidence, Mr Letsoaliso confirmed that at the time of the robbery, all the other shops in the complex were closed. Three men entered the restaurant. As they left and were walking towards him, employees of the restaurant followed them and shouted that the three men had robbed them. Mr Letsoaliso asked the men what they had done at the shop. The appellant responded by threatening Mr Letsoaliso with a firearm. He moved out of their way and they ran from the complex. Mr Letsoaliso and the employees followed them. Two of the men ran into Stone Haven Street and the appellant turned right into Mount Fletcher Street. As the crowd approached him and when he realised that he was cornered, the appellant threw the firearm into a residential complex and sat down. Mr Letsoaliso

apprehended him. He then went to the residential complex and discovered that the firearm was a .38 revolver which the appellant had thrown over the wall, but he did not touch it. When the police arrived, Mr Letsoaliso handed the appellant over to them. They retrieved the firearm, which was loaded, and showed it to Mr Letsoaliso. Save for the firearm, the appellant had nothing else in his possession, but a number of bank cards were found some two metres from the place where he had been apprehended. Mr Letsoaliso said that the appellant was wearing black pants, a black shirt and a jacket with reflectors on which the word 'security' was written.

[8] In cross-examination Mr Letsoaliso said that he had been stationed near the gate of the complex and the three men had to pass him. He confirmed that it was the appellant who had threatened him with a firearm - he saw how he was dressed and did not take notice of the other two robbers. He did not lose sight of the appellant when he turned into Mount Fletcher Street. His attention was focused on the appellant, who could have shot him and those in the crowd. Before he was apprehended, the appellant removed his security jacket and threw it on the ground. Mr Letsoaliso denied the appellant's version - different from the one put to Mr Molonga - that he was walking in the direction of the garage when he was arrested.

[9] Constable Thlame testified that he picked up the firearm in the yard of the residential complex and arrested the appellant. He said that the appellant wore dark clothing. He did not find a jacket at the scene but a security guard brought it to him and said that the jacket belonged to the appellant.

[10] The appellant testified in his defence. He said that he was walking towards a garage next to Paulshof where he had arranged to meet his uncle to collect money

for transport. He had not yet reached the garage when he saw two men being chased by a group, running towards him. The men ran away and as the appellant was about to ask what was going on, the group started assaulting him, saying that he had robbed somebody and later arrested him. He denied that he was one of the robbers, that he had been chased by the group or that he had thrown away a firearm. He testified that no security guard had tried to stop him.

[11] The central issue in this appeal is whether the appellant was one of the robbers. The evidence shows that Mr Molonga had more than one opportunity to identify the appellant. He saw the appellant when he entered the restaurant. He was close to the appellant when he got under the counter. He again looked at him when he was ordered to open the safe. The visibility at the restaurant was very clear. Mr Molonga also saw the appellant leaving the complex. From that time he was never out of sight of Mr Molonga, who pursued the appellant until he was apprehended some 10 minutes after the robbery. Mr Molonga saw the appellant throwing the firearm away, and noticed that he was wearing a vest normally worn by security guards. Again, there was nothing which impaired Mr Molonga's vision: there were streetlights all over. Indeed, Mr Karam, for the appellant, fairly conceded that the identification of the appellant as one of the robbers could not be disputed. And it is highly improbable that Mr Molonga would have invented the explanation for the robbers leaving on foot: the getaway car, with no number plates, had sped off immediately as the robbers were approaching it, followed by the crowd.

[12] Mr Letsoaliso corroborates Mr Molonga's version in virtually every respect. First, that the appellant had a firearm. Mr Letsoaliso was not in the restaurant and could not have known that the appellant was armed, unless his evidence is correct.

The appellant and his accomplices had to walk past Mr Letsoaliso when they entered the complex and he saw them enter the restaurant. Second, the appellant and his accomplices ran from the complex and split up. Third, the person who Mr Letsoaliso pursued and apprehended was the same person who had threatened him with a firearm - the appellant. Fourth, the appellant had worn a jacket with reflectors and the word 'security' was written on it. Finally, Mr Letsoaliso confirmed that the appellant turned right into Mount Fletcher Street and when he had nowhere to flee, threw the firearm away. Nothing turns on the difference between the two witnesses as to where the firearm had landed - it had been used in the robbery, the appellant had been in possession of the firearm, and it was a moving scene. And Constable Thlame retrieved the firearm in the vicinity of the place where the appellant had thrown it.

[13] The finding by the trial court that the appellant's version is riddled with inconsistencies and improbabilities, cannot be faulted. It was put to Mr Molonga that the appellant was standing at the garage waiting for his uncle to fetch him when he was arrested. However, the version put to Mr Letsoaliso was that the appellant was walking in the direction of the garage when he was arrested. The appellant could not explain this discrepancy. Still later, the appellant testified that on his way to the garage, he saw two men running towards him being chased by a crowd. The two men ran away and the crowd then accused the appellant of being one of the robbers. But the version of the two men being chased by the crowd and the appellant being mistaken for one of the robbers, was never put to any of the State witnesses. In any event, it is untrue because the appellant's accomplices ran in the opposite direction of the garage; and the appellant was never out of sight of Mr Malonga or Mr Letsoaliso, hence his arrest.

[14] On the totality of the evidence, I am satisfied that the appellant does not have reasonable prospects of success on appeal against his conviction.

[15] As regards sentence, it was submitted that the finding that there were no substantial and compelling circumstances was a misdirection; that the trial court attached insufficient weight to the appellant's circumstances; and that the sentence imposed induces a sense of shock.

[16] In *Malgas*,[3] this Court held that the minimum sentences prescribed in the Act are the sentences which should ordinarily be imposed. The aim of the Act is to ensure a severe, standardised and consistent response from the courts to the commission of the specified crimes, unless there are substantial and compelling circumstances justifying a departure from the prescribed minimum sentences.[4] The sentences specified in the Act must not be departed from lightly and for flimsy reasons. The legislature however did not intend to exclude the factors traditionally taken into account in the imposition of sentence,[5] namely the nature and seriousness of the crime, the interests of society and the personal circumstances of the offender.

[17] The trial court correctly held that robbery with aggravating circumstances is a very serious crime and was a traumatic experience for the staff and patrons of the restaurant. They were forced at gunpoint to lie on the floor. The fact that no one was shot is not attributable to any act of kindness or thoughtfulness by the robbers, as Mr Karam sought to argue. Rather, nobody was hurt in the robbery because the

[3] *S v Malgas* 2001 (1) SACR 469 (SCA).
[4] *Malgas* n 3 above at 476h-477a.
[5] *Malgas* n 3 above at 477d-f.

victims complied with the robbers' demands, for fear of being shot. The facts show that the robbery was planned: the appellant and his accomplices knew that the restaurant would be the only business open in the complex; the robbery was carried out with precision; and a getaway car was on standby to transport the robbers from the scene of the crime. Only the courage of the staff, patrons of the restaurant and Mr Letsoaliso, foiled the appellant's escape.

[18] The trial court noted that armed robbery was prevalent within its area of jurisdiction, and that courts have a duty to protect the community against this crime by imposing appropriate sentences. In this regard, this Court has said that the natural indignation of interested persons and the community at large should receive recognition in the sentences that courts impose; and that if sentences for serious crimes are too lenient, the administration of justice will fall into disrepute and injured persons may take the law into their own hands.[6]

[19] The trial court also took into account the appellant's personal circumstances, including his age, clean record and the period of his incarceration awaiting trial.

[20] In the circumstances, the trial court's finding that there were no substantial and compelling circumstances that warranted deviation from the prescribed minimum sentence, cannot be faulted. There are no reasonable prospects of success on appeal against the sentence imposed on the appellant.

[21] In the result, the appeal is dismissed.

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[6] *R v Karg* 1961 (1) SA 231 (A) at 236B-C.

A Schippers
Acting Judge of Appeal

Appearances

For Appellant:	W A Karam Instructed by: Johannesburg Justice Centre c/o Symington & De Kock Attorneys, Bloemfontein
For Respondent:	T Byker Instructed by: The Director of Public Prosecutions, Johannesburg c/o The Director of Public Prosecutions, Bloemfontein