

**Robbery with aggravating
circumstances revisited:
*Minister of Justice and Constitutional
Development and Another v
Masingili and Another*
2014 (1) SACR 437 (CC)**

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*“The robb’d that smiles, steals something from the thief; He robs himself that
spends a bootless grief.” (William Shakespeare, Othello)*

1 Introduction

Robbery is a well-established offence within the context of South African criminal law manifesting itself on a daily basis. In essence robbery can be defined as theft of property by unlawfully and intentionally using violence to take the property from someone else; or threats of violence to induce the possessor of the property to submit to the taking of the property (CR Snyman *Criminal Law* 5ed (2008) 517; J Burchell *Principles of Criminal Law* 4ed (2013) 706; S Hoctor ‘Examining the expanding crime of robbery’ (2012) 25 *SACJ* 361-378; J le Roux ‘Vonnisoplegging by roof met verswarende omstandighede’ (2005) 30 *Journal for Juridical Science* 145 at 146; see also recent decisions such as *S v Maselani* 2013 (2) SACR 172 (SCA); *S v Mabunda* 2013 (2) SACR 161 (SCA); *S v Mofokeng* 2014 (1) SACR 229 (GNP).

Robbery accordingly consists of theft accompanied by an assault or violence (Snyman op cit 517; Burchell op cit 706). In terms of the common law, robbery, or *rapina*, was acknowledged as an aggravated form of theft and as such constituted theft by means of violence (Snyman op cit 517; Burchell op cit 706; Le Roux op cit 146). Today robbery is acknowledged as a separate offence, distinct from ordinary theft and assault, although the requirements for the latter two offences equally apply to the offence of robbery (Snyman op cit 517). In terms of sentencing for robbery, s 51 of the Criminal Law Amendment Act 105 of 1997 (hereinafter referred to as ‘the Act’) provides for certain minimum sentences to apply in cases of robbery where there are aggravating circumstances or in cases involving the taking of a motor

vehicle (see s 51(2)(a) of the Act; Snyman op cit 520-521; Burchell op cit 714). Section 51(2)(a) of the Act reads as follows:

- '51 Discretionary minimum sentences for certain serious offences
- (2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in—
- (a) Part II of Schedule 2, in the case of—
- (i) a first offender, to imprisonment for a period not less than 15 years;
 - (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
 - (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years...

Part 2 of Schedule 2 of the Act, as stated above, specifically refers to robbery when there are aggravating circumstances or robbery involving the taking of a motor vehicle. The term 'aggravating circumstances' is defined in s 1(1)(b) of the Criminal Procedure Act (hereinafter referred to as 'CPA') as follows:

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

The presence or not of aggravating circumstances only becomes relevant in respect of robbery or attempted robbery (see E du Toit *et al Commentary on the Criminal Procedure Act* (1987-, reissue service 50) Def 2). The interpretation of the section dealing with the definition of 'aggravating circumstances' and specific portions of the section has been an issue of recent debate (see *Maselani supra*; *Mofokeng supra*).

The decision under discussion is of particular importance as the Constitutional Court was required to assess the validity of an order granted by the Western Cape High Court in terms of which section 1(1)(b) was found to be unconstitutional. The unconstitutionality of the section specifically related to the wording in the section referring to 'or an accomplice'. The Western Cape High Court held that the section created strict criminal liability and further gave rise to a breach of s 12(1)(a) of the Constitution of the Republic of South Africa, 1996 (hereinafter 'Constitution'). It was further held that the wording of the section infringed the presumption of innocence contained in section 35(3)(b) of the Constitution (see *S v Masingili* 2013 (2) SACR 67 (WCC) paras [50]-[54]). The decision under discussion is of particular

importance as the Constitutional Court provides elucidation on the interpretation of section 1(1)(b) with specific reference to the question as to whether robbery with aggravating circumstances is a separate crime, distinct from robbery and whether s 1(1)(b) requires proof of intention specifically in relation to the aggravating circumstances. For purposes of elucidation, reference will also be made to the judgment of the Western Cape High Court in *Masingili* supra.

2 Facts

The salient facts appear from the judgment of Van der Westhuizen J for the Constitutional Court (Mogoeng J; Moseneke DCJ; Cameron J; Froneman J; Jafta J; Madlanga J; Nkabinde J; Skweyiya J; Zondo J; Mhlantla AJ; Van der Westhuizen J): The respondents were indicted and convicted in the regional court at Cape Town on a charge of 'robbery with aggravating circumstances'. According to the facts they robbed Ms Chan Touffa, the complainant, on 2 October 2009 at Boy de Goede Circle in Table View of certain goods, including a sports bag, cash in an amount of approximately R1 500-00 and a cell phone, by threatening her with a knife (at para [7]; see also *Masingili* supra at para [1]). The respondents were charged in the regional court in terms of Part II of Schedule 2 to the Act as discussed above. The facts indicated that the first respondent (Nantombi Masingili) acted as a scout and inspected the shop before the robbery took place and waited outside in a parked vehicle during the time that the robbery took place (at para [6]). The second respondent (Siyabulela Volo) waited in the car and drove the respondents away from the shop after the robbery. The third and fourth respondents (Mzonke Mlindalazwe and Sithumbele Govuza respectively) entered the shop of the complainant and robbed her by threatening her with a knife (at para [6]).

In the regional court the first respondent was sentenced to eight years imprisonment, of which two years' imprisonment were conditionally suspended for five years. Second, third and fourth respondents, were sentenced each to ten years' imprisonment, of which two years' imprisonment were conditionally suspended for five years (at para [3] of *Masingili* supra).

The respondents consequently appealed to the High Court against their convictions and sentences. The High Court upheld the convictions of the third and fourth respondents, but questioned the convictions of the first and second respondents (at para [7]). The High Court per Bignaut J and Van Staden AJ held that the first and second respondents were accomplices to the robbery and not co-perpetrators (at para [24] of *Masingili* supra). The High Court, in addition, held that the doctrine of common purpose did not apply in respect of the first and second

respondents as the doctrine, according to the High Court, could only be invoked for purposes of proof of causation as one of the elements of the crime (at para [25] of *Masingili* supra). It was held by the High Court that in order to convict a person of robbery with aggravating circumstances, the commission of aggravating circumstances must be proven before the conviction in conjunction with the elements of robbery (at para [9]). It was held that the phrase 'or an accomplice' in s 1(1)(b) had the effect that an accomplice to robbery would be guilty of robbery with aggravating circumstances if aggravating circumstances were present, even if he or she did not foresee those circumstances (at para [9]). The converse would inadvertently apply where the accomplice is responsible for the presence of aggravating circumstances, and the perpetrator who had no *dolus* in respect of the presence of such circumstances, would nonetheless be liable (at para [40] of *Masingili* supra). It was held by the High Court that the inclusion of the phrase 'or an accomplice' in the definition of aggravating circumstances in section 1 of the CPA creates strict liability with respect to the perpetration of such circumstances and gave rise to an infringement of section 12(1)(a) of the Constitution (at para [50] of *Masingili* supra). In addition, it was held that the wording of the section pertaining to accomplice liability amounted to a breach of the presumption of innocence as contained in s 35(3)(b) of the Constitution (at para [54] of *Masingili* supra). The High Court accordingly declared the phrase 'or an accomplice' in section 1(1)(b) constitutionally invalid and as such the hearing of the appeal in the high court was suspended pending the finding of the Constitutional Court (at para [10]). The issues before the Constitutional Court accordingly related to determining the meaning of section 1(1)(b) of the CPA; whether robbery with aggravating circumstances constituted a separate crime, distinct from ordinary robbery; whether section 1(1)(b) required proof of intention in respect of the aggravating circumstances and lastly whether either section 12 or 35 of the Constitution required intent in respect of the existence of the aggravating circumstances, whether on the part of a perpetrator or an accomplice. The applicants' main contention was that section 1(1)(b) did not infringe any constitutional rights and that the declaration of invalidity should not be confirmed (at para [11]). It was argued on behalf of the Minister that the prosecution does not have to prove intent in respect of the aggravating circumstances as it has to prove intent in respect of the elements of mere robbery (at para [12]). As such, it was argued, the aggravating circumstances are objective facts rather than elements of the offence (at para [12]). The respondents argued in favour of the confirmation of the order of the high court and argued that the said provision was unconstitutional (at para [14]).

3 Judgment

In the assessment of the meaning and interpretation to be accorded to s 1(1)(b) of the CPA, the court reiterated that the particular section does not in itself, create an offence or impose liability, but rather provides a definition of aggravating circumstances in relation to robbery and not a definition of robbery (at para [16]). Aggravating circumstances as such becomes relevant for purposes of sentencing (at para [16]). The court further noted that robbery with aggravating circumstances has particular relevance as the right to prosecute robbery with aggravating circumstances does not prescribe, whereas the right to prosecute robbery prescribes after twenty years (at para [17]). The court specifically assessed the definition of an accomplice namely someone whose actions do not satisfy all the requirements for criminal liability in the definition of the offence, but who intentionally furthers the commission of a crime by someone else who does comply with all the requirements for criminal liability (at para [21]; see also Snyman op cit 273; *S v Williams* 1980 (1) SA 60 (A) at 63B). The accomplice must have the intention to further the specific crime committed by the perpetrator and upon conviction may receive the same sentence as the perpetrator (at para [21]; Snyman op cit 276). The court observed that even if the words 'or an accomplice' were omitted from s 1(1)(b), a person would still be guilty, as an accomplice, of robbery with aggravating circumstances if he or she intentionally furthered the commission of robbery with aggravating circumstances by the perpetrator and the aggravating circumstances were accordingly brought about by the perpetrator (at para [22]). The convictions of the first and second respondents would accordingly in any event stand as they furthered the commission of the armed robbery by the other two respondents regardless whether they wielded the knife themselves (at para [22]). It was held that even if the words 'or an accomplice' were not present the first and second respondent could still have been guilty of robbery with aggravating circumstances based on the ordinary common-law rules of accomplice liability (at para [25]). The court emphasised the importance of the words 'on the occasion when the offence is committed, whether before or during or after the commission of the offence' and stressed that an accomplice could for example wield a dangerous weapon before or after a robbery, without complying with the requirements of a perpetrator, but still commit the aggravating circumstances and render him or herself and the perpetrator guilty of robbery with aggravating circumstances (at para [24]). The practical effect of the words 'or an accomplice', according to the court, refers to the so-called 'mirror image' case namely that when an accomplice commits the aggravating circumstances, but the perpetrator does not, both the accomplice and the perpetrator will be guilty of robbery with aggravating circumstances (at para [23]).

In response to the respondents' contention that robbery with aggravating circumstances constitutes a separate offence, distinct from robbery, the court stated the following:

'Robbery with aggravating circumstances is a form of robbery with more serious consequences for sentencing. This distinctive form of robbery is not to be confused with a completely different offence'. (at para [33])

It was further held that aggravating circumstances becomes relevant for purposes of sentencing and that intent with specific regard to such circumstances is not required for conviction (at paras [34] and [44]). The prescribed minimum sentence for robbery with aggravating circumstances, it was held, is also subject to the exception of 'substantial and compelling circumstances' requiring the imposition of a lesser sentence (at para [44]; see also *S v Dodo* 2001 (1) SACR 594 (CC) at para [37]). It was accordingly held that section 1(1)(b) does not explicitly require any mental element in relation to the aggravating circumstances, but rather refers to objective facts constituting aggravating circumstances (at para [48]). The latter was held not to offend the presumption against strict liability as intent is already a requirement for robbery (at para [48]). With reference to the latter, the court stated as follows:

'Violence is inherent to the crime of robbery, so intent to commit robbery subsumes intent to commit violence (or to threaten to do so). Aggravating circumstances are a manifestation of the degree of the violence. Accordingly, s 1(1)(b) does not imply a requirement of intent with regard to the aggravating circumstances.' (at para [48]).

In conclusion it was held that robbery with aggravating circumstances is not a separate crime distinct from robbery. The objective existence of aggravating circumstances such as, for example, the use of a dangerous weapon, becomes relevant for sentencing but should be proved before conviction for reasons of fairness and practicality (at para [59]).

It was, in addition, held that absence of any *dolus* on the part of an accused in respect of the aggravating circumstances, may be taken into account for purposes of sentencing and result in the imposition of a lesser or lighter sentence than that which is statutorily prescribed (at para [59]). It was held that neither section 12(1)(a) nor section 35(3)(b) is violated in the latter regard (at para [59]).

4 Assessment

Robbery is essentially a crime of violence. The element of violence is either satisfied in terms of the real use of violence or by threats of violence (see Snyman *op cit* 517). It is also the element of violence

which essentially distinguishes robbery from mere theft. The classic definition of robbery was provided at the outset of this contribution. Whenever an accused is charged with robbery with aggravating circumstances, the prosecution bears the onus of proving all of the elements of the crime of robbery, including fault in the form of intention beyond reasonable doubt. In terms of assessing the most appropriate sentence, a court is guided in terms of section 1(1)(b) of the CPA read in conjunction with section 51(2)(a) of the Act in order to assess the proper sentence which it should impose. The question as to whether aggravating circumstances were present or not remains a question of fact which has to be assessed objectively (see *S v Anthony* 2002 (2) SACR 453 (C) at 454j-455b; 456c-d). The latter is also in line with the judgment of Yekiso J in *S v Isaacs* 2007 (1) SACR 43 (C) where it was held that the test for assessing the presence or otherwise of aggravating circumstances was a factual one and that the onus of proving the presence of such circumstances was on the state (see *Isaacs* supra at paras [36]-[38]). Du Toit *et al* supra, however, opine that the state does not carry an onus to prove aggravating circumstances and concomitantly there is no onus on an accused to prove any absence thereof, but that the court will assess the facts before it to determine the existence or not of aggravating circumstances. Section 1(1)(b), it is submitted, is merely a tool that a court can use to determine, based on the facts before it, whether a heavier sentence should be imposed. The latter was confirmed by Lamprecht AJ in *Mofokeng* supra where it was held (at para [18.4]):

‘In this regard it must be noted that the definition of ‘aggravating circumstances’ in relation to, inter alia, robbery had been inserted in the Criminal Procedure Act, mainly to justify the imposition of a heavier sentence ... Since the death penalty has been abolished, it plays no other role than to justify the imposition of heavier sentences than short-term imprisonment in appropriate circumstances.’

The decision under discussion is accordingly of pivotal importance specifically in relation to the finding that robbery with aggravating circumstances is not a separate crime, distinct from robbery (at para [33]).

Robbery in essence entails theft of property by unlawfully and intentionally using either violence to take the property from someone else, or threats of violence to induce the possessor to part with the property (Snyman *op cit* 517). Aggravating circumstances are merely indicative of the degree of violence in order to assess the most appropriate sentence. It does not create a new, substantive offence separate to the general offence of robbery. Such aggravating circumstances are relevant for sentencing and accordingly do not create strict liability by imposing liability on an accused in the absence

of proving fault. Fault in the form of intention is already established in terms of proving the substantive crime of robbery and, it is submitted, that liability in terms of robbery establishes this element. The judgment correctly emphasises the importance of separating the aspects pertaining to substantive proof of the crime of robbery, on the one hand, and assessing the presence or not of aggravating circumstances for purposes of sentencing, on the other hand. The question whether aggravating circumstances are present in addition remains an objective enquiry as stated above (see *S v Anthony* 2002 (2) SACR 453 (C) at 454-455b). Fault in the form of intention, on the other hand, is a subjective enquiry dealing with the blameworthiness of the accused which is assessed in the case of robbery with aggravating circumstances, during the assessment of the presence or not of the elements of robbery.

Another important feature of the judgment by the Constitutional Court, is that it clarified confusion created by the high court in respect of aspects pertaining to the doctrine of participation. Section 1(1)(b) was attacked by the respondents on the basis that the inclusion of the words 'or an accomplice' infringed section 12 and 35(3)(b) of the Constitution.

From the facts it could be argued, as the court correctly points out, that the first and second respondent could have been held liable as co-perpetrators and such their liability could have been founded on the doctrine of common purpose. It is submitted that the high court erred in holding that the doctrine only finds application in cases where proof of causation is one of the elements of the crime. It is trite that the doctrine of common purpose not only applies to crimes of causation, but also to other crimes such as robbery (see *Snyman* op cit 265; *Burchell* op cit 474-475). It is interesting to note that the latter was specifically confirmed by *Lamprecht* AJ in *Mofokeng* supra where the judgment by the high court in *Masingili* supra was criticised and it was held that the doctrine of common purpose also applies to crimes not requiring proof of causation and accordingly also where robbery with aggravating circumstances is committed (at para [18.1] of *Mofokeng* supra; see also *S v Mbuli* 2003 (1) SACR 97 (SCA) at para [69]; *S v Khala* 1995 (1) SACR 246 (A); *S v Khambule* 2001 (1) SACR 501 (SCA) at para [10]). It was, in addition, held by *Holmes* JA in *S v Dhlamini* 1974 (1) SA 90 (AD) at 94B-C that:

'if A and B with common purpose proceed to rob, and A inflicts or threatens grievous bodily harm, aggravating circumstances are present in respect of both of them; ... It is not necessary for the State to prove, in regard to B, for example that he knew that A was armed with a dangerous weapon, or that he foresaw the possibility of the infliction or threat of grievous bodily harm by A in the execution of their common purpose to rob. Again, if it is uncertain which of the two inflicted or threatened the infliction of grievous

bodily harm, it is not necessary to prove that either or both of them foresaw the possibility of such infliction, or threat thereof, in the execution of their common purpose to rob. It is sufficient if one or other or both of them inflicted or threatened to inflict such harm.’

The latter approach was confirmed in the recent judgment by the Supreme Court of Appeal in *Maselani* supra at para [16] where it was held by Swain AJA:

‘In such a situation, if it is uncertain which of the parties to the common purpose to rob, inflicted grievous bodily harm upon the victim, it matters not. It is not necessary to prove that this consequence was foreseen by the members to the common purpose to rob, provided it is established that one, or the other, or all of them inflicted such harm.’

For purposes of the judgment, the court, however, accepted the finding by the high court that the first and second respondents were accomplices. If one disregards section 1(1)(b), the first and second respondents could in any event, based on the general principles pertaining to accomplice liability in terms of the doctrine of participation, have received the same punishment as the third and fourth respondents who were the actual perpetrators (see Snyman supra 277-8). The liability of the first and second respondents would then have been founded on the ordinary common law construction of accomplice liability (see Snyman supra 273-276; *S v X* 1974 (1) SA 344 (RA); *S v Williams* 1980 (1) SA 60 (A) at 63; *S v Wannenburg* 2007 (1) SACR 27 (C) at 32). The assessment of the presence or not of aggravating circumstances remains a challenging task which ultimately has to be determined with reference to the objective facts of each case. It is, however, preferable for the state to allege the existence of aggravating circumstances and that it seeks a conviction on that basis (see Du Toit *et al* supra Def 2A; *Anthony* supra at 456d-e). In the latter regard the *dictum* Ebrahim J in *S v Saule* 2009 (1) SACR 196 (Ck) is relevant where it was pertinently held (at para [2]):

‘The charge-sheet, however, did not allege that the State would seek a conviction in respect of counts 1, 2 and 3 on the basis that aggravating circumstances accompanied the commission of these offences. Even though this omission would not necessarily be fatal it is good practice for the State to allege in the charge sheet that a conviction would be sought on this basis.’ (see also *R v Zonele* 1959 (3) SA 319 (AD) at 323 as well as *S v Moloji* 1969 (4) SA 421 (A) at 424A where Van Winsen AJA held: ‘As a general rule it is desirable practice to charge an accused in such a way that he is apprised of the fact that the State will ask for his conviction on an offence coupled, where this is permitted by law, with a finding that it was committed under aggravating circumstances.’)

The latter is of utmost importance for reasons of fairness and reasonableness in order to ensure that accused receives a fair trial.

The latter does, however, not detract from the fact that robbery with aggravating circumstances is not a separate crime, distinct from robbery which is one of the essential aspects emphasised in the judgment under discussion. It should ultimately be borne in mind that the Act still provides for the exception that should a court find that *substantial and compelling* circumstances exists, it could depart from the minimum sentences provided for in the Act. An accused's lesser role, for example, in the perpetration of the aggravating circumstances can thus still be taken into account in mitigation of sentence together with all the other circumstances of a particular case (see for example the recent judgment by Pillay JA in *S v Nkunkuma* 2014 (2) SACR 168 (SCA) at paras [7]-[9]; see also *S v Malgas* 2001 (1) SACR 469 (SCA) at paras [7]-[9]; *S v Fatyi* 2001 (1) SACR 485 (SCA); *S v Matyityi* 2011 (1) SACR 40 (SCA)).

The decision under discussion is relevant and topical for providing clarity to courts in future faced with the task of convicting and sentencing offenders in terms of robbery with aggravating circumstances. The judgment, in addition, sheds light on the proper interpretation of s 1(1)(b) and confirms that the section is not inconsistent with the Constitution. The court further disseminates the substantive aspect of proving the offence of robbery as opposed to the procedural aspect of assessing the presence or not of aggravating circumstances for purposes of sentencing. Lastly the court eradicated the confusion created by the judgment in the high court relating to accomplice liability and the application of the doctrine of common purpose to the crime of robbery. The words 'or an accomplice' in s 1 of the CPA accordingly do not create strict liability, nor do they offend either s 12 or s 35(3)(b) of the Constitution. Robbery remains a serious offence plaguing our society on a daily basis. The court eloquently endorses the latter (at para [54]) by stating:

'Robbery is an essentially violent crime. When a person engages in criminal conduct that carries intrinsic risk, there is a shift in the normative position of that individual, as far as the bounds of punishment are concerned. The decision to participate in a robbery is the crucial moral threshold which, once crossed, ordinarily renders the accused culpable. Therefore, provided the requirement of proportionality between the unlawful act and its punishment is satisfied, it is ordinarily justified for the law to impose liability on him or her for the consequences that flow from the unlawful act.'

Intrinsic to the crime of robbery is the essential element of violence which is the distinguishing factor between robbery and ordinary theft. It is accordingly pivotal to have a section such as s 1(1)(b) in order to assess the degree of violence in order to impose a just sentence on a charge of robbery with aggravating circumstances bearing in mind that robbery is more often than not committed by a group of persons

acting in common concert. Section 1(1)(b) thus in addition caters for those situations where the aggravating circumstances are performed by persons who do not fall within the framework of liability as perpetrators, but rather classify as accomplices. It is submitted that the latter is a sound approach bearing in mind the seriousness of the offence.