CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 44/13
[2013] ZACC 41

In the matter between:

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First Applicant
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Second Applicant
and	
NONTOMBI MASINGILI	First Respondent
SIYABULELA VOLO	Second Respondent
MZONKE MLINDALAZWE	Third Respondent
SITHEMBILE GOVUZA	Fourth Respondent

Heard on : 27 August 2013

Decided on : 28 November 2013

JUDGMENT

VAN DER WESTHUIZEN J (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Madlanga J, Mhlantla AJ, Nkabinde J, Skweyiya J and Zondo J concurring):

Introduction

[1] The crime of robbery is as old as humankind. For a range of reasons, the urge to take what does not belong to you – violently if necessary – is sometimes strong. South African society is sadly plagued by violent crime. The Legislature understandably decided that robbery involving the use of a fire-arm or any other dangerous weapon, the infliction of grievous bodily harm, or the threat to do so, deserves a harsher sentence than what would apply to robbery. Hence it determined that robbery with aggravating circumstances – or armed robbery, as it is often referred to in practice – attracts a prescribed minimum sentence.

[2] Does this comply with our Constitution though? The Constitution guarantees freedom and security of the person in section 12. This includes the right not to be deprived of freedom arbitrarily or without just cause.[1] It also protects every accused person's right to a fair trial in section 35(3), including the right to be presumed innocent until one's guilt is proven in a court of law.[2] And for criminal liability the common law generally requires proof of – in addition to an unlawful criminal act or *actus reus* – fault, culpability, or *mens rea*, usually in the form of *dolus* (intent) on the part of an accused.

[1] Section 12(1)(a) states:

> "Everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause".

[2] Section 35(3)(h) states:

> "Every accused person has a right to a fair trial, which includes the right to be presumed innocent, to remain silent, and not to testify during the proceedings".

[3] The Western Cape High Court, Cape Town (High Court) found that section 1(1)(b) of the Criminal Procedure Act[3] (CPA) creates strict criminal liability (or liability without fault) and is thus unconstitutional.[4] According to the High Court, an accomplice could as a result of this provision be convicted of robbery with aggravating circumstances, even if she or he had no intent with regard to the existence of the aggravating circumstances such as the use of a dangerous weapon.[5] The High Court also found that, because an accused could be convicted even when there is reasonable doubt as to his or her guilt, the presumption of innocence is unjustifiably infringed.

[4] The main question is whether this declaration of invalidity should be confirmed in terms of section 167(5) of the Constitution.[6] The Minister of Justice and Constitutional Development (Minister) and the National Director of Public Prosecutions (NDPP) appeal against the High Court's decision.

[5] A number of issues arise. These include:

(a) What does section 1(1)(b) of the CPA mean?

(b) Is robbery with aggravating circumstances a separate crime, distinct from robbery (or "mere robbery")?

[3] 51 of 1977.

[4] *S v Masingili and Others* [2013] ZAWCHC 59; 2013 (2) SACR 67 (WCC).

[5] For the wording of section 1(1)(b), see [15] below.

[6] Section 167(5) states:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force."

(c) Does section 1(1)(b) require intention in relation to the aggravating circumstances?

(d) If not, is that consistent with the requirements of section 12 and section 35 of the Constitution? In other words, does either section 12 or section 35 require proof of intent regarding the existence of the aggravating circumstances, whether on the part of a perpetrator or an accomplice?

Trial Court

[6] The respondents were indicted and convicted of "robbery with aggravating circumstances" in the Cape Town Regional Magistrate's Court. In October 2009 the third and fourth respondents entered a shop in Table View, Cape Town, and robbed the owner by threatening her with a knife. The first respondent (Ms Masingili) acted as a scout. She inspected the shop before the robbery and waited outside in a parked car during its commission. The second respondent (Mr Volo) waited in the car and drove the respondents away from the shop after the robbery.

High Court

[7] The respondents 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 Ms Masingili and Mr Volo. The Court stated that it was unclear on what basis they had been convicted. It considered three possibilities

and concluded that these respondents had been found to be accomplices, even though the trial court did not state this explicitly.

[8] It is arguable that Ms Masingili and Mr Volo were indeed perpetrators or co-perpetrators (under the doctrine of common purpose), rather than accomplices. Counsel for the Minister and for the NDPP conceded about this much before this Court. But we are not required to make a finding on the conviction of the respondents, or analyse the findings of the Magistrate. So, I assume that they were accomplices, in order to deal with the High Court's reasoning and conclusion. The High Court reasoned that, while they were definitely guilty as accomplices to robbery, it was unclear whether they were guilty as accomplices to robbery with aggravating circumstances as it was not proven that they had intent in relation to the aggravating circumstances. In other words, they did not necessarily intend or foresee the use of the knife.

[9] Relying on the Supreme Court of Appeal's judgment in *Legoa*,[7] the High Court accepted that, in order to convict a person of robbery with aggravating circumstances, the commission of the aggravating circumstances must be proven before the conviction, along with the elements of robbery. According to the decision of the Appellate Division of the Supreme Court (Appellate Division) in *Dhlamini*,[8] the presence of the phrase "or an accomplice" in section 1(1)(b) of the CPA means that an accomplice to robbery is guilty of robbery with aggravating circumstances if

[7] *S v Legoa* [2002] ZASCA 122; 2003 (1) SACR 13 (SCA).

[8] *S v Dhlamini and Another* 1974 (1) SA 90 (A) (*Dhlamini*).

aggravating circumstances were present, even if he or she did not foresee those circumstances.

[10] The High Court held that this effect (which it called "strict liability") rendered the provision unconstitutional. It therefore declared the phrase "or an accomplice" in section 1(1)(b) constitutionally invalid.[9] The hearing of the appeal in the High Court was suspended pending this Court's decision.

Submissions before this Court

[11] In this Court both applicants argue that section 1(1)(b) does not infringe any constitutional rights and that the High Court's declaration of invalidity must not be confirmed. They do so for different reasons, however.

[12] The Minister submits that the prosecution does not need to prove intent in relation to the aggravating circumstances, but that this does not mean that the impugned phrase creates strict liability because the prosecution still has to prove intent in relation to the elements of mere robbery. The aggravating circumstances are facts that objectively exist, rather than elements of the offence. In response to questions from the Bench, counsel for the Minister stated that it very rarely, if ever, happens that several accused are charged with robbery with aggravating circumstances, but that one or more of them is convicted of mere robbery because of the absence of intent

[9] See [15] below for the wording of section 1(1)(b).

regarding the aggravating circumstances, whereas the others are convicted of armed robbery.

[13] The NDPP, on the other hand, primarily argues that the prosecution must prove intent in relation to the aggravating circumstances because, under the common law, an accomplice must intend to further the specific crime committed by the perpetrator. So, section 1(1)(b) must be read to require the intent implicitly. The NDPP argues in the alternative that if this Court finds that section 1(1)(b) is unconstitutional because it does not require intent, the appropriate remedy would be to read in a requirement of intent in relation to the aggravating circumstances.

[14] According to the respondents, the High Court's order must be confirmed. They argue that the Constitution requires that the intent be proven before an accomplice can be convicted of robbery with aggravating circumstances. The phrase "or an accomplice" precludes this and therefore renders the provision unconstitutional.

The meaning of section 1(1)(b)

[15] Section 1(1)(b) of the CPA reads:

> "'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".

[16] Robbery with aggravating circumstances is thus robbery where a fire-arm or other dangerous weapon is wielded, or where grievous bodily harm is inflicted or threatened.[10] The provision must be understood in context. It does not, in itself, create an offence or impose liability. Further, it provides a definition of "aggravating circumstances" in relation to robbery, not a definition of robbery. Robbery is a common-law offence. Accomplice liability is similarly imposed by the common law. The definition of aggravating circumstances is relevant for sentencing. As a result of section 51 read with Part II of Schedule 2 of the Criminal Law Amendment Act[11] (often referred to as the Minimum Sentencing Act), a court must impose a minimum sentence on a person convicted of robbery with aggravating circumstances unless "substantial and compelling circumstances exist which justify the imposition of a lesser sentence". The prescribed minimum sentence ranges from 15 to 25 years, depending on the convicted person's previous convictions or lack thereof.

[17] Apart from the fact that robbery with aggravating circumstances attracts a minimum sentence, it has further significance. The right to prosecute robbery with aggravating circumstances does not prescribe, whereas the right to prosecute robbery prescribes after 20 years.[12] It is also more difficult for a person charged with robbery

[10] Because of the facts, this judgment focuses on the use of a dangerous weapon only.

[11] 105 of 1997.

[12] Section 18 of the CPA.

with aggravating circumstances to be granted bail than it is for a person charged with mere robbery.[13]

[18] The definition of "aggravating circumstances" has a long legislative history. In 1958 it was inserted[14] into the Criminal Procedure Act 56 of 1955 – the predecessor of the CPA – and read as follows:

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

[19] In *Sisilane*[15] the Appellate Division held that a getaway driver in a robbery was not guilty of robbery with aggravating circumstances because he was not a party to the commission of the aggravating circumstances.[16] It reasoned that the absence of the words "by the offender or an accomplice" in subsection (b) meant that someone could be guilty of robbery with aggravating circumstances only if he or she instigated or otherwise made him- or herself a party to the aggravating circumstances. That person would not be guilty of robbery with aggravating circumstances if the aggravating circumstances merely arose in the course of the commission of the robbery to which

[13] Id sections 59A and 63A read with Schedule 7, and section 60(11)(a) read with Schedule 6. These non-sentencing consequences are mentioned for context. Their constitutional validity is not before us.

[14] Criminal Procedure Amendment Act 9 of 1958.

[15] *R v Sisilane* 1959 (2) SA 448 (A).

[16] Id at 451A-4A.

he or she was a party, including as an accomplice.[17] This reasoning was approved by the Appellate Division in *Cain*.[18]

[20] Soon after *Sisilane* and *Cain*, the definition of aggravating circumstances was amended by the insertion of the words "by the offender or an accomplice" at the end of subsection (b).[19] In *Dhlamini*[20] the Appellate Division held that this amendment meant that an accomplice to robbery is guilty of robbery with aggravating circumstances even if he or she did not instigate or make him- or herself party to the aggravating circumstances and even if he or she did not have intent as to the aggravating circumstances. The same applies in reverse which, for convenience, I call the "mirror-image case". The perpetrator of a robbery is guilty of robbery with aggravating circumstances if the accomplice committed the aggravating circumstances, even if the perpetrator did not make him- or herself a party to the commission of the aggravating circumstances and even without intent.[21] The purpose of the amendment – the Court held – was to "block the loop-hole revealed by *Sisilane*'s case".[22]

[21] Is this indeed what the phrase "or an accomplice" in section 1(1)(b) of the CPA means? It is necessary briefly to consider the nature of accomplice liability. An

[17] Id at 453B-C.

[18] *R v Cain* 1959 (3) SA 376 (A) at 381A-C.

[19] Criminal Law Further Amendment Act 75 of 1959.

[20] Above n 8.

[21] Id at 94B-C.

[22] Id at 95D.

accomplice is someone whose actions do not satisfy all the requirements for criminal liability in the definition of an offence, but who nonetheless intentionally furthers the commission of a crime by someone else who does comply with all the requirements (the perpetrator).[23] The intent required for accomplice liability is to further the specific crime committed by the perpetrator.[24] Upon conviction, an accomplice may receive the same sentence as a perpetrator.[25]

[22] An accomplice's criminal liability is therefore contingent on the perpetrator's liability. Even if the words "or an accomplice" were absent from section 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 if the aggravating circumstances were brought about by the perpetrator. In this matter, Ms Masingili and Mr Volo's convictions would stand, as by scouting and driving the getaway vehicle they intentionally furthered the commission of the armed robbery by the other two respondents. It would not matter that they did not wield the knife themselves.

[23] What, then, is the effect of the words "or an accomplice"? They extend liability in the mirror-image case: When an accomplice commits the aggravating circumstances (for example wielding a knife during the flight just after the actual

[23] *S v Williams en 'n Ander* 1980 (1) SA 60 (A) (*Williams*) at 63B. See also Snyman *Criminal Law* 5 ed (LexisNexis, Durban 2008) at 273 and Burchell *South African Criminal Law and Procedure – Volume 1: General Principles of Criminal Law* 4 ed (Juta & Co, Ltd, Cape Town 2011) at 515.

[24] *Williams* above n 23; Snyman above n 23 at 276 and Burchell above n 23 at 521.

[25] *R v Mlooi and Others* 1925 AD 131 at 134.

robbery) but the perpetrator never does, both the accomplice and the perpetrator will be guilty of robbery with aggravating circumstances. In the absence of the words "or an accomplice", the perpetrator and the accomplice would only be guilty of mere robbery (and the accomplice may, in addition, be guilty of assault). This is because, in the absence of the words "or an accomplice", the aggravating circumstances must be committed by the perpetrator, not the accomplice, as was correctly pointed out in *Sisilane*.[26] The inclusion of the words "or an accomplice" allows for the actions of the accomplice to be taken into account in determining whether the perpetrator is guilty of robbery with aggravating circumstances.

[24] On the face of it, the wording of section 1(1)(b) may be confusing, in so far as it appears to require that the accomplice must wield the knife in order to be convicted of armed robbery. But is an accomplice who wields a knife when robbery is committed indeed an accomplice, or rather a perpetrator? How much closer can one be to the actual commission of armed robbery than to wield a dangerous weapon in the commission of the robbery? The words "on the occasion when the offence is committed, whether before or during or after the commission of the offence" are significant – the commission of the aggravating circumstances may happen before, during, or after the commission of the robbery, as long as it happened "on the occasion" of that particular robbery. Thus, an accomplice could wield a dangerous weapon before or after a robbery, without complying with the requirements of robbery and therefore without being a perpetrator, but still commit the aggravating

[26] Above n 15 at 453G-H.

circumstances and therefore render him- or herself and the perpetrator guilty of robbery with aggravating circumstances.

[25] The High Court wrongly targeted the words "or an accomplice" as the culprit in the constitutional deficiency it identified. Its concern seems to be that a person could be guilty of robbery with aggravating circumstances as an accomplice without having intended the aggravating circumstances. The words "or an accomplice" are irrelevant to this question. They say nothing about the requirement of intent. Even if the words were not present, Ms Masingili and Mr Volo could still be guilty of robbery with aggravating circumstances under the ordinary common-law rules of accomplice liability, assuming that intent regarding the use of a knife is not required, because one of the other respondents wielded a knife.

[26] The High Court followed *Sisilane*[27] and *Dhlamini*.[28] However, these decisions of the Appellate Division in 1959 and 1973 do not seem to be entirely correct, as far as the ordinary meaning of the wording of section 1(1)(b) is concerned. To the extent that they held that that the words "or an accomplice" extend liability to the perpetrator in the mirror-image case they were correct; but they were incorrect in holding that the words extend liability to the accomplice when the perpetrator commits the aggravating circumstances. This is already done by the common law of accomplice liability. This is leaving aside for the moment the question whether intent regarding the aggravating circumstances is required either on the part of the perpetrator or the accomplice, over

[27] Above n 15.

[28] Above n 8.

and above the intent to further the elements of mere robbery. I deal with this question in [30] to [58] below.

[27] Arguably, the appeal against the High Court's declaration of constitutional invalidity could succeed on this narrow ground only. This Court could find merely that the words "or an accomplice" are irrelevant to the constitutional deficiency identified by the High Court, and decline to confirm the order of constitutional invalidity formulated by the High Court.

[28] This would mean, however, that this Court would not pronounce on the High Court's animating concern, namely whether or not an accomplice to robbery may be found guilty of robbery with aggravating circumstances if the state does not prove that he or she intended the commission of the aggravating circumstances. The role of culpability in our law is a question of constitutional importance,[29] as well as of practical significance. Counsel for the Minister also argued that requiring this intent for a conviction of robbery with aggravating circumstances, or in relation to circumstances in other offences that may result in the imposition of minimum sentences,[30] would make it very difficult for prosecutors to secure convictions and would defeat the purposes of the Minimum Sentencing Act.

[29] See *S v Coetzee and Others* [1997] ZACC 2; 1997 (3) SA 527 (CC); 1997 (4) BCLR 437 (CC) (*Coetzee*) at paras 176 and 178.

[30] This Court was referred to the fact that dealing in dangerous dependence-producing substances in terms of section 5(b) read with section 13(f) of the Drugs and Drug Trafficking Act 140 of 1992, where the value of the drugs exceeds a prescribed amount, attracts the same minimum sentences as robbery with aggravating circumstances, in terms of section 51 read with Part II of Schedule 2 of the Minimum Sentencing Act.

[29] It is therefore in the interests of justice for this Court to consider whether the Constitution requires that, in order for a person to be convicted as an accomplice to robbery with aggravating circumstances, the prosecution must prove that the accomplice intended the commission of the aggravating circumstances.

Is robbery with aggravating circumstances a separate crime?

[30] The nature of robbery with aggravating circumstances first requires attention. The respondents argue that it is a different offence, separate and distinct from mere robbery. The prosecution must prove intent as to the existence of the aggravating circumstances, because the aggravating circumstances are definitional elements of the crime.

[31] Accused persons are often charged with robbery with aggravating circumstances, as indeed the respondents were, and convicted as such. Further, being charged with robbery with aggravating circumstances has consequences that go beyond sentencing. As stated above, it is more difficult to be granted bail if charged with armed robbery than with mere robbery.[31] Being convicted of armed robbery may carry substantially more stigma than being convicted of mere robbery. Does this make it a separate offence though?

[32] In *Legoa* Cameron JA said:

[31] See [17] above.

> "It is correct that, in specifying an enhanced penal jurisdiction for particular forms of an existing offence, the Legislature does not create a new type of offence. *Thus 'robbery with aggravating circumstances' is not a new offence.*"[32] (Emphasis added.)

Furthermore, the Court relied on *Moloto*, which states:

> "Robbery, or attempted robbery, with aggravating circumstances is not a new sort of crime created by the Legislature. It still remains robbery".[33] (My translation.)

[33] Robbery with aggravating circumstances is a form of robbery with more serious consequences for sentencing.[34] This distinctive form of robbery is not to be confused with a completely different offence, as courts seem to have done in different contexts.[35] The respondents rely heavily on the fact that the Supreme Court of Appeal in *Legoa* found that the existence of aggravating circumstances should be established at conviction stage. This, however, does not mean that armed robbery is a separate crime. The concern in *Legoa* was that aggravating circumstances should be proven before conviction to ensure fairness when the sentence is considered.[36] It would be unfair suddenly to confront a convicted person with an enhanced penal jurisdiction at the sentencing stage, if the state did not give sufficient notice of this possibility.[37] This is consonant with the constitutional principle of the rule of law, which requires clarity and notice to an accused so that he or she can address the state's case

[32] Above n 7 at para 18.

[33] *S v Moloto* 1982 (1) SA 844 (A) at 850C. "Roof, of poging tot roof, met verswarende omstandighede is nie 'n nuwe soort misdaad wat deur die Wetgewer geskep is nie. Dit bly steeds roof".

[34] Id at 850C-D. Academic writers seem to agree. See, for example, Snyman above n 23 at 520.

[35] See, for example, *S v Mokela* [2011] ZASCA 166; 2012 (1) SACR 431 (SCA) at para 6.

[36] *Legoa* above n 7 at paras 19-27.

[37] Id. At para 20, Cameron JA held that giving notice was "desirable".

comprehensively.[38] In this sense it differs from other circumstances that could aggravate sentence, like previous convictions, which for obvious reasons may only be proven after conviction, when sentencing is considered.

[34] In spite of the practice of treating armed robbery as what sometimes appears to be a separate crime, it is not. It is robbery. Robbery is the theft of property by unlawfully and intentionally using violence or threats of violence to take the property from someone else.[39] The elements of robbery are: the theft of property; through violence or threats of violence; unlawfulness; and intent. The definitional elements of armed robbery are no different. The aggravating circumstances are relevant for sentencing. Intent regarding the circumstances is not required for conviction, exactly because an accused will be convicted of robbery, given that armed robbery is merely a form of robbery.

[35] In order to be convicted of robbery with aggravating circumstances, intent as to the unlawful and violent taking of another's property must be proved. Where does this leave us with regard to the common-law requirement of intent and the Constitution? The finding on the nature of armed robbery cannot on its own determine constitutional compliance.

[38] See section 1 of the Constitution and *Veldman v Director of Public Prosecutions, Witswatersrand Local Division* [2005] ZACC 22; 2007 (3) SA 210 (CC); 2007 (9) BCLR 929 (CC) at para 37.

[39] *Ex parte Minister of Justice: In re R v Gesa; R v De Jongh* 1959 (1) SA 234 (A) at 238C-E. See also Snyman above n 23 at 517.

Dolus *under the common law and the Constitution*

[36] It is useful to take a step back, for a quick look at the basics of criminal law. In our common law it is generally accepted that culpability (also known as fault or *mens rea*) is a requirement for criminal liability. "There must be grounds upon which [an accused] may, in the eyes of the law, personally be blamed for [his or her] unlawful conduct."[40] The focus is thus on the actor's personal ability and knowledge, or lack thereof (as opposed to the conduct and unlawfulness requirements, where it is on the act).[41] Once it is accepted that an accused has the mental ability required to establish criminal capacity, the conduct must be either intentional or negligent. For most crimes *dolus* (intent) is required. The accused must "will" the realisation of the conduct knowing that the conduct is unlawful (*dolus directus*), or know and accept it even if it is not "willed" (*dolus indirectus*), or must foresee the possibility of the conduct and its unlawfulness but nevertheless proceed (*dolus eventualis*).[42]

[37] The requirement of culpability encapsulates an accused person's blameworthiness. Much of our criminal law is predicated on imposing legal liability on accused persons who perpetrate acts for which they are culpable; it is a general principle that criminal liability should broadly match personal culpability.[43] In this

[40] Snyman above n 23 at 32.

[41] Id at 33 and 149-50.

[42] Id at 183-4 and Burchell above n 23 at 362-4 and 398.

[43] Criminal-law principles thus draw on the Kantian notion of a morally autonomous individual who exercises control over and is responsible for her or his actions. See Moore *Placing Blame: A General Theory of the Criminal Law* (Clarendon Press, Oxford 1997) at 195-6 and Norrie *Punishment, Responsibility, and Justice: A Relational Critique* (Oxford University Press, Oxford 2000) at 93. Of course this does not mean that the influence of socio-economic circumstances and the extent to which these may impact on one's ability to choose are irrelevant.

sense, our criminal law recognises the importance of autonomy, which this Court has affirmed a number of times.[44]

[38] The corollary to the idea that individuals should be held accountable for the choices they make is that ordinarily individuals should not be held accountable for choices they did not make. The *dolus* required is the ground for an accused's personal blameworthiness arising from his or her unlawful conduct. Not only the fact of an accused's blameworthiness but also its degree is relevant.[45] The relative gravity of punishment must reflect the gravity of the offence.[46]

[39] The role of culpability in our criminal law is of constitutional importance. In *Coetzee* O'Regan J wrote:

> "The general principle of our common law is that criminal liability arises only where there has been unlawful conduct and blameworthiness or fault (the *actus reus* and

[44] In *S v Manamela and Another (Director-General of Justice Intervening)* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at para 100 it was noted that "[o]ur society asserts individual moral agency and it does not flinch from recognising the responsibilities that flow from it". O'Regan J and Cameron AJ also quoted Honoré's observation in *Responsibility and Fault* (Hart Publishing, Oxford 1999) at 125:

> "[W]e do well, indeed we are impelled . . . to treat ourselves and others as responsible agents. But the argument for welcoming this conclusion is not that our behaviour is uncaused – something that we cannot know and which, if true, would be a surprise – but that to treat people as responsible promotes individual and social well-being. It does this in two ways. It helps to preserve social order by encouraging good and discouraging bad behaviour. At the same time, it makes possible a sense of personal character and identity that is valuable for its own sake."

See also *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 251; *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* [2002] ZACC 22; 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117 (CC) at paras 52-3; and *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 57. Autonomy has been understood as linked to the right to dignity, as well as the value of freedom expressed in, among others, sections 1, 7 and 39 of the Constitution.

[45] *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) (*S v M*) at para 110.

[46] Different considerations apply in crimes entailing negligence.

> *mens rea*). . . . At common law, the fault requirement is generally met by proof of intent (*dolus*) in one of its recognised forms, and, in rare circumstances, by the objective requirement of negligence (*culpa*). . . . This requirement is not an incidental aspect of our law relating to crime and punishment, it lies at its heart. The State's right to punish criminal conduct rests on the notion that culpable criminal conduct is blameworthy and merits punishment."[47]

And:

> "The striking degree of correspondence between different legal systems in relation to an element of fault in order to establish criminal liability reflects a fundamental principle of democratic societies: as a general rule people who are not at fault should not be deprived of their freedom by the State. This rule is the corollary of another rule which the same comparative exercise illustrates: when a person has committed an unlawful act intentionally or negligently, the State may punish them. Deprivation of liberty, without established culpability, is a breach of this established rule."[48]

[40] Section 12(1)(a) of the Constitution[49] proscribes the deprivation of someone's freedom when the deprivation is either arbitrary or without just cause. In *Dodo* this Court said:

> "Section 12(1)(a) guarantees, amongst others, the right 'not to be deprived of freedom . . . without just cause'. The 'cause' justifying penal incarceration and thus the deprivation of the offender's freedom is the offence committed. 'Offence', as used throughout in the present context, consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender. In order to justify the deprivation of an offender's freedom it must be shown that it is reasonably necessary to curb the

[47] Above n 29 at para 162.

[48] Id at para 176.

[49] Quoted above n 1.

> offence and punish the offender. Thus the length of punishment must be proportionate to the offence."[50]

[41] This Court has thus recognised the common-law requirement of *dolus* for criminal liability. According to *Coetzee,* it lies at the heart of our law relating to crime and punishment.[51] *Dodo* identifies the cause justifying imprisonment under section 12(1)(a) as the offence (consisting of all factors relevant to the nature and seriousness of the act) as well as all relevant personal and other circumstances.[52]

[42] Earlier I found that armed robbery is not a separate offence and that the state has to prove *dolus* regarding the definitional elements of robbery only, in order to secure a conviction of armed robbery. Does this neglect the common-law and constitutional importance of culpability? In my view it does not.

[43] The definition of aggravating circumstances in section 1(1)(b) is specifically relevant for sentencing, in particular within the context of minimum sentences. *Dodo* explains that the section-12(1)(a) prohibition of the deprivation of freedom arbitrarily or without just cause requires that sentencing take into account the nature and seriousness of the act itself, as well as all relevant personal and other circumstances.[53]

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[50] *S v Dodo* [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC) at para 37.

[51] Above n 29 at para 162.

[52] Above n 50.

[53] Id.

[44] First of all, intent with regard to the aggravating circumstances – or the absence thereof – remains relevant for sentencing purposes. Section 12 requires appropriate proportionality between the offence and its sentence on the one hand and the level of intent on the other, as is well-established in sentencing law.[54] A sentencing court has to take into account all mitigating as well as aggravating circumstances. Together with other factors, the sentencing court should consider whether the prosecution has established that the convicted person intended the consequences that triggered the enhanced penal jurisdiction. This flows from our general approach to sentencing, which considers the nature of the crime as part of a triad of factors along with the personal circumstances of the convicted person and the interests of the community.[55]

[45] The prescribed minimum sentence for robbery with aggravating circumstances, like the minimum sentence at issue in *Dodo*,[56] is subject to an exception for "substantial and compelling circumstances [justifying] the imposition of a lesser sentence".[57] In that case, this Court endorsed the following summary of the factors a court should consider in contemplating whether such circumstances exist:

> "A Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).

[54] Id. This Court held: "The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading, particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue."

[55] *S v M* above n 45 at para 10.

[56] Above n 50 at para 1.

[57] Section 51 read with Part II of Schedule 2 of the Minimum Sentencing Act.

B Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

E The Legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.

H In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

I If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

J In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be

> imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided."[58] (Emphasis in original.)

[46] The failure by the state to prove that a convicted person intended the aggravating circumstances – or concrete proof that there was indeed no intent regarding the aggravating circumstances – is relevant to several of these points. Whether negative consequences flowing from the crime were intended by the convicted person is a sentencing factor encapsulated by "F". Similarly, given the constitutional importance of fault in establishing personal blameworthiness, it may well be that the prescribed sentence would be disproportionate to the crime where the state has not proved that the convicted person intended the act triggering the prescribed sentence ("I").

[47] The absence of intent or even knowledge of, for example, the use of a knife may therefore be taken into account as a factor which may, probably together with other mitigating factors, amount to substantial and compelling circumstances justifying a lesser sentence than the prescribed minimum. One cannot say that this must always be the case though. First, courts must have a discretion when imposing sentences. Second, a firm rule that the absence of *dolus* regarding the aggravating circumstances always justifies a lesser sentence may defeat the purpose of the provision, namely to direct courts to impose harsher sentences for armed robbery than for mere robbery.

[58] *Dodo* above n 50 at para 11, quoting *S v Malgas* [2001] ZASCA 30; 2001 (2) SA 1222 (SCA) at para 25.

[48] Section 1(1)(b) does not expressly require any mental element with respect to the aggravating circumstances. Instead, only objective facts constituting aggravating circumstances are referred to in the section. Nor is intent implicit in section 1(1)(b). In *Jacobs* the Appellate Division held that aggravating circumstances are established objectively and the intention of the accused is not imported into an enquiry as to whether aggravating circumstances are present.[59] Finally, reading section 1(1)(b) not to require specific fault does not offend the presumption against strict liability. This principle is already satisfied because intent is a requirement for robbery. 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, section 1(1)(b) does not imply a requirement of intent with regard to the aggravating circumstances.

[49] This leaves us with the question whether conviction of an accomplice to robbery with aggravating circumstances, without proof of the accomplice's *dolus* regarding those circumstances, would violate section 12(1)(a) of the Constitution, even when this lack of intent does not result in a lesser sentence.[60]

[50] The issue is whether someone will be deprived of freedom *arbitrarily* or *without just cause.* In *De Lange* this Court held that the prohibition of arbitrariness requires a rational connection between the deprivation and an objectively

[59] *R v Jacobs* 1961 (1) SA 475 (A) at 484H.

[60] See above n 1 for the wording of section 12(1)(a).

determinable purpose.[61] One of the purposes of the increased deprivation of freedom entailed by a minimum sentence is to confront the societal scourge of violent crime committed by individuals acting in concert. In *Thebus* Moseneke J affirmed the importance of this goal.[62] The Legislature determined that when aggravating circumstances are established, enhanced sentencing jurisdiction is triggered.

[51] O'Regan J stated in *Coetzee*:

> "[L]eeway ought to be afforded to the legislature to determine the appropriate level of culpability that should attach to any particular unlawful conduct to render it criminal. It is only when the legislature has clearly abandoned any requirement of culpability, or when it has established a level of culpability manifestly inappropriate to the unlawful conduct or potential sentence in question, that a provision may be subject to successful constitutional challenge."[63]

[52] The enhanced penal jurisdiction created by the Legislature is not manifestly inappropriate. It is a rational means to achieve a constitutionally permissible end: confronting violent crime. This is not arbitrary.

[53] As to the just-cause requirement, culpability often provides the cause justifying the freedom deprivation. In *Thebus* it was stated that "once the culpability norm passes constitutional muster, an appropriate deprivation of freedom is permissible."[64]

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[61] *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 23.

[62] *S v Thebus and Another* [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) (*Thebus*) at para 34.

[63] Above n 29 at para 177.

[64] Above n 62 at para 36.

In a case like this, culpability has already been established for robbery. Imprisonment for robbery with aggravating circumstances is thus not imprisonment in the absence of intent, as proving intent is necessary to secure a conviction for robbery. Once the intent to take property with violence is proved, it is a matter of degree whether the intent related specifically to the use of a dangerous weapon.

[54] An enquiry into an accused's personal blameworthiness cannot be made independently of the impact of the crime on other people. Robbery is an essentially violent crime.[65] 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.[66] 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.[67]

[55] The Supreme Court of Canada stated:

> "To require fault in regard to each consequence of an action in order to establish liability for causing that consequence would substantially restructure current notions of criminal responsibility. Such a result cannot be founded on the constitutional aversion to punishing the

[65] Above n 39.

[66] Gardner "Rationality and the rule of law in offences against the person" (1994) 53 (3) *Cambridge Law Journal* 502 at 509. See also Ashworth's exposition of this concept in "A Change of Normative Position: Determining the Contours of Culpability in Criminal Law" (2008) 11 (2) *New Criminal Law Review* 232.

[67] Gardner above n 66.

> morally innocent. One is not morally innocent simply because a particular consequence of an unlawful act was unforeseen by that actor. In punishing for unforeseen consequences the law is not punishing the morally innocent but those who cause injury through avoidable unlawful action. Neither basic principles of criminal law, nor the dictates of fundamental justice require, by necessity, intention in relation to the consequences of an otherwise blameworthy act."[68]

[56] Even though the aggravating circumstances at stake in this matter are not the same as the "consequences" the Canadian Court referred to, the principle seems to be sound. The imposition of liability on an accused in this instance is thus broadly consistent with the principle of autonomy, exactly because the accused actively and culpably chose to participate in an inherently violent unlawful activity. An accused may be held accountable for this choice, even if she or he did not intend the exact circumstances that occurred, or method used. There is no constitutional requirement under section 12 that intent regarding the specific circumstances be proved in order to secure a conviction.

[57] In addition to their argument that the absence of a requirement to prove specific fault violates section 12 of the Constitution, the respondents also contend that section 35 of the Constitution is unjustifiably infringed. The High Court held that section 35 was indeed violated. Section 35(3)(h) provides that every accused person has a right to a fair trial, which includes the right to be presumed innocent, to remain

[68] *R v DeSousa* [1992] 2 SCR 944, 76 CCC (3d) 124 at 967.

silent, and not to testify during the proceedings.[69] The argument is that the presumption of innocence is infringed as the state is relieved of proving the fundamental element of *dolus* regarding the aggravating circumstances. In view of the above findings, this submission cannot succeed. As stated, the state has to prove all the definitional elements of robbery, including *dolus*, as well as the existence of the aggravating circumstances.

[58] In any event, an insufficient fault requirement and a violation of the presumption of innocence are conceptually two different things. One cannot argue that there is a constitutional defect in an offence due to a missing element, and simultaneously that an accused faces conviction despite the existence of reasonable doubt on that element, since by definition the element is not there. O'Regan J said in *Coetzee*:

> "These are separate questions. They raise two different aspects of freedom: the first is concerned particularly with the reasons for which the State may deprive someone of freedom; and the second is concerned with the manner whereby a person is deprived of freedom."[70]

Conclusion

[59] The words "or an accomplice" in section 1(1)(b) of the CPA do not mean that an accomplice could be convicted of robbery with aggravating circumstances if intent on the part of that accused regarding the aggravating circumstances is not proved by the state. The order of the High Court incorrectly targets these words. Furthermore,

[69] Quoted above n 2.

[70] Above n 29 at para 159.

robbery with aggravating circumstances is not a separate criminal offence, distinct from robbery. The objective existence of aggravating factors – such as the use of a dangerous weapon – is relevant for sentencing, but must be proved before conviction, for reasons of fairness and practicality. For a conviction of robbery with aggravating circumstances, the state must prove *dolus* as one of the definitional elements of robbery. The absence of *dolus* regarding the aggravating circumstances on the part of an accused may be taken into account in sentencing and may result in the imposition of a lighter sentence than the statutorily prescribed minimum. Even when it does not, the statutory determination that the existence of aggravating circumstances calls for a harsher sentence than what would be appropriate for mere robbery, does not amount to the arbitrary deprivation of freedom, or deprivation without just cause. Section 12(1)(a) of the Constitution is not contravened, nor is section 35(3)(h) violated.

[60] The High Court's order should not be confirmed.

Order

[61] The following order is made:

1. The order made by the Western Cape High Court, Cape Town in *Masingili and Others v S* [2013] ZAWCHC 59; 2013 (2) SACR 67 (WCC) declaring section 1(1)(b) of the Criminal Procedure Act 51 of 1977 to be constitutionally invalid, is not confirmed.

2. The appeal by the Minister of Justice and Constitutional Development and the National Director of Public Prosecutions succeeds.

3. The matter is remitted to the Western Cape High Court, Cape Town, to finalise the appeal by the respondents who were the accused in the criminal trial.

For the First Applicant:	Advocate A La Grange SC and Advocate T Sidaki instructed by the State Attorney.
For the Second Applicant:	Advocate W Tarantal instructed by the National Prosecuting Authority.
For the First Respondent:	Advocate A Paries instructed by Ismail and Badrudeen Attorneys.
For the Second to Fourth Respondents:	Advocate M Calitz and Advocate A Dejongh instructed by Legal Aid South Africa.