THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 115/2016

In the matter between:

KHETANI MBUISE NKABINDE	**FIRST APPELLANT**
ORAPELENG LAWRENCE MOGOJE	**SECOND APPELLANT**
AUBREY MMUSHI DIKOBE	**THIRD APPELLANT**
JABULANE ELLIOT PAPI MAKHENE	**FOURTH APPELLANT**

and

THE STATE	**RESPONDENT**

Neutral citation: *Nkabinde v The State* (115/17) [2016] ZASCA 75 (01 June 2017)

Coram: Navsa, Theron and Majiedt JJA and Fourie and Schippers AJJA

Heard: 18 May 2017

Delivered: 01 June 2017

Summary: Criminal Law and Procedure: acting in concert with common purpose: murder and robbery with aggravating circumstances: purported special entries in terms of s 317 of the Criminal Procedure Act 51 of 1977: to be strictly complied with and resorted to only if the irregularity does not appear on the record: appeal dismissed.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein: (Cillié J, sitting as court of first instance):

1. The order of the court a quo granting leave to appeal to a full court is set aside and replaced with the following:

   'The appellants are granted leave to appeal to the Supreme Court of Appeal against their convictions and sentences.'
2. The appeal is dismissed.

JUDGMENT

Schippers AJA (Navsa, Theron and Majiedt JJA and Fourie AJA concurring):

[1] The appellants appeal against their convictions of murder, numerous counts of attempted murder, robbery with aggravating circumstances, and unlawful possession of explosives, firearms and ammunition, as a result of a cash-in-transit heist in 2008 near Petrusburg in the Free State Province. They were each sentenced to life imprisonment as well as lengthy terms of imprisonment.

A summary of the state evidence

[2] A substantial part of the evidence on behalf of the state is common cause. The divergences will become apparent in due course. Fidelity Security Services (Fidelity) is in the business of transporting cash with attendant security. On 8

August 2008 one of its armoured, cash-in-transit vehicles containing a built-in safe (the armoured vehicle), transported R2.5 million from Bloemfontein to Kimberley. The money was in four sealed bags, locked in the safe in the armoured vehicle and manned by four security guards employed by Fidelity (the guards). They were armed with three LM5 rifles and a Vector 9 mm pistol. The armoured vehicle was accompanied by two guards in a Ford Bantam delivery vehicle (the Bantam). They too, were armed with a LM5 rifle and a 9 mm pistol, respectively.

[3] As the convoy was proceeding along the N8 national road, also known as the Bloemfontein-Petrusburg Road (the road), about 3 km outside Petrusburg they fell victim to a brazen armed robbery carried out in broad daylight. The robbers pursued the convoy in no less than five vehicles. Three of those vehicles travelling at high speed, overtook the Bantam in pursuit of the armoured vehicle. A Mercedes-Benz rammed twice into the Bantam from behind, causing the driver to lose control. It left the road and came to a stop opposite to the direction in which it had been travelling. Four robbers, armed to the teeth and wearing balaclavas, fired shots at the Bantam, one of which struck its side window and went through the windscreen. Fortunately the guards were not injured. The robbers then at gunpoint ordered the guards out of the Bantam, forced them to lie face down on the ground, and robbed them of their firearms and cellular telephones. With the guards subdued, the robbers left the scene.

[4] In the meantime, their accomplices, in other vehicles, continued to pursue the armoured vehicle: one slowed it down from the front and others pursued it from behind. A third vehicle, another Mercedes-Benz, joined the pursuit and at high speed slammed into the right side of the armoured vehicle, causing it to overturn, slide on the roadway and come to a standstill on its passenger side. As

the guards emerged from the overturned vehicle, they were surrounded by some 20 robbers, also armed to the teeth, with automatic rifles, AK-47 assault rifles, handguns and wearing balaclavas. They demanded the keys to the safe and threatened to shoot the guards to show that they were serious about getting the money. When it was clear that the guards did not have the safe-keys, they were told to lie alongside to the road, face down. All of them were robbed of their firearms, cellular telephones and some of their wallets.

[5] Next, the robbers tried to blow off the doors to the safe in the armoured vehicle with dynamite. The guards, lying on the ground, described the sound of the explosions like those of a bomb or grenade going off. The robbers however succeeded only in blasting a hole into an internal door granting access to the safe. But the robbers were determined to get to the money. Some robbers then pulled up in a black Audi Q7 (the Audi) which stopped at the rear of the armoured vehicle. They removed an orange-coloured angle-grinder and generator from the back of the Audi. They placed the generator on the ground, held the angle-grinder and tried to start it in order to open the safe of the armoured vehicle, but without success. They also unsuccessfully tried to start the generator. In what follows, I shall refer to the incidents near the Bantam and the armoured vehicle as ‘the first scene’.

[6] At the first scene, the armoured vehicle lying on the roadway caused a build-up of traffic on both sides of the road. A number of innocent motorists and their passengers caught in the traffic were robbed at gunpoint of their cellular telephones, car keys and cash. In most of these cases, the cellular telephones were thrown into nearby bushes, to prevent the motorists from contacting the police. These victims also testified that they heard loud explosions (as the robbers tried to

blow open the safe); and that the robbers fired several shots at the first scene, in some cases directly at their victims.

[7] In one of these cases, the robbers shot and killed an innocent motorist, Mr De La Rey, who with his son was driving towards Bloemfontein. They were on their way home to Potgietersrus, after they had bought sheep at a farm in Petrusburg. As they approached the first scene, they heard shots being fired in the veld and wanted to turn around. However, they could not do so quickly enough because they were in a Ford F250 delivery vehicle (the F250), towing a trailer with the sheep. Four robbers in a Ford Focus stopped next to them. They wore balaclavas and three of them pointed their rifles at Mr De La Rey and his son. The former turned the F250 towards the Focus and accelerated. The robbers then fired directly at Mr De La Rey and his son. The son was forced to dive for cover and saw his father's head turn to one side as he was struck by a bullet. Mr De La Rey lost control of the F250, which went into the direction of oncoming traffic and his son turned the vehicle to the left, off the road. The robbers fired a few more shots at them before fleeing in the direction of Bloemfontein. Later that day Mr De L a Rey died in hospital of a gunshot wound to the chest.

[8] Another victim, Mrs de Meillon, was on her way to Bloemfontein from Kimberley. She was accompanied by her mother and two children. As she was driving on the road she saw the armoured vehicle overturning and come sliding towards her. Next, she saw armed robbers run towards the armoured vehicle and realised that it was a robbery. She tried to make a U-turn but some of the robbers in a BMW, brandishing their firearms out of its windows, forced her to the other side of the road. Two armed robbers banged on her side of the car and told them to get out. Mrs de Meillon and her mother were manhandled and the barrel of a rifle was

shoved into her back when the robbers could not find her cellular telephone. She and her family were forced to lie on the ground, face down. Shortly thereafter she heard a loud explosion and numerous shots being fired. She said that for at least half an hour, shots were being fired and the robbers sped up and down, pulling innocent people off the road. At one point she thought that they were going to be run over and she and her family crawled to the front of her car. They were robbed of R2 100 and cellular telephones valued at about R10 000.

[9] After the mayhem at the first scene, and when the robbers could not open the safe in the armoured vehicle, one of them shouted 'time up' and they fled the scene in the Audi, an Opel Corsa delivery vehicle (the Corsa), a BMW and a Ford Focus (the Focus). Unbeknown to them, at about 9:15 am on 8 August 2008, police officers taking part in a mock exercise at an Air Force base outside Bloemfontein in preparation for the 2010 soccer World Cup, received a report of the heist, that shots had been fired and that there was an explosion. Colonel Joubert (Joubert), who was part of the mock exercise and knew the area well, took command of a task force and set off in an army helicopter in pursuit of the robbers. They were told that the robbers had fled in an Audi, a Corsa, a BMW and a Focus.

[10] Joubert received a radio report that the robbers had left the road and taken a secondary gravel road. On a gravel road near Soutpan, some 90 km away from the first scene, the helicopter approached the Audi and the Corsa from behind. The vehicles were travelling at high speed: estimated at about 160 km/h. The door of the helicopter was open and members of the task force signalled the driver of the Audi to stop numerous times, but to no avail. The helicopter then flew ahead and hovered across the width of the road in an attempt to stop the Audi. The driver did not slow down, the helicopter was forced to ascend and the Audi passed under it.

In the meantime the Corsa stopped following the Audi and disappeared in the dust. The robbers in the Corsa and those in other vehicles got away.

[11] The helicopter continued the pursuit of the Audi on its passenger side, the windows of which were open. The persons in the Audi fired gunshots at the helicopter, which was forced to veer further to the left of the Audi to avoid being hit. A member of the task force then fired a shot at the Audi which shattered its right rear window. Joubert called for ground reinforcements on the radio. About 1 km past the entrance to Soetdoring Nature Reserve, the Audi suddenly pulled off the road and stopped. Two of the occupants sitting at the back got out, opened the tailgate, removed a white and orange object and threw it next to the road. They got back into the Audi and it sped away.

[12] The chase continued. As the Audi passed over the Modderrivier bridge, its occupants threw firearms out of the windows. Two shots were fired at the Audi from the helicopter. One struck its left front wheel and the other, the radiator. Still, the Audi did not stop, but eventually it was forced to do so near a stationary Toyota Hilux delivery vehicle (the Hilux) where some people were standing. All four doors of the Audi were opened and the occupants, later identified as the appellants, made a run for it. The people standing at the Hilux also ran away. The helicopter landed and members of the task team pursued the appellants. The second appellant jumped into the Hilux in an attempt to get away. A shot was fired from the helicopter, shattering the back window of that vehicle. The second appellant got out of the Hilux and started running again. Members of the task team caught the appellants and arrested them. I refer to the events at the place where the Audi was stopped and the appellants arrested, as ‘the second scene’.

[13] At the second scene, a Vector 9 mm pistol was found in the boot of the Audi. This firearm was issued by Fidelity to one of the guards in the Bantam, who was robbed of it at the first scene. A SIM card and Nokia cellphone battery, belonging to Fidelity and issued to a guard in the Bantam, were found in the Audi. A packet containing dynamite, Durafuses and insulation tape was found in the boot of the Audi. A Durafuse was used to ignite the blast at the first scene in the attempt to blow open the safe of the armoured vehicle. A disassembled R5 rifle, a magazine, 15 live rounds, balaclavas and gloves were also found in the boot of the Audi. A Glock 9 mm pistol was found near its left front wheel. That firearm was found to have been stolen during a robbery in Johannesburg in June 2008. A R5 rifle and an AK-47 assault rifle were found about 700 m from the Audi.

[14] After the appellants were arrested, Joubert drove to the Soetdoring gate, where the appellants had thrown weapons out of the Audi, and cordoned off that area. Two police officers who were not in the helicopter but travelling in different police vehicles, saw these weapons in the road, which were about 500 m from where the helicopter had landed at the second scene. Two LM 5 rifles which Fidelity had issued to the guards the morning of the attack on the convoy were found at the Soetdoring gate. The guards had been robbed of these rifles at the first scene. Numerous firearms, magazines, parts of firearms and ammunition were also found at the place where the appellants had thrown the weapons out of the Audi.

[15] At the Soetdoring gate, a civilian who had picked up the orange angle-grinder which the appellants had thrown out of the Audi, handed it to Warrant Officer Boukes (Boukes). He also took Boukes to the place where he had picked up the angle-grinder, which was further from the second scene and from where the Audi (which was stationary, after the appellants' arrest) could not be seen. There in

the grass Boukes found the loading mechanism of a LM 5 rifle, an AK-47 assault rifle, and a slot and slot cover of a LM 5 rifle.

[16] The state proved that a number of spent cartridges found at the first scene were fired from five weapons found at the second scene. Although the defence indicated that on this issue it would call an expert to contradict the evidence of Captain Kekana, the state's ballistics expert, no such evidence was presented.

The appellants' version

[17] Initially only the first appellant testified in his defence, after which the defence closed its case. Subsequently the defence was granted permission to reopen its case and the second to fourth appellants testified. The appellants' evidence may be summarised as follows. The first appellant drove the Audi on 8 August 2008. He said that it belonged to Mr Bennie Mohema (Mohema) who had pledged it to him in 2007 for R100 000. They had agreed that the first appellant could use the vehicle in the meantime. The appellants were going to Upington to get spares for vehicles at metal scrap yards. En route, near Petrusburg, they were stopped by a motorist who had flashed his lights and told them that there was an incident up the road and that he heard shots being fired. They pulled off the road, asked somebody for directions and were directed to Immigrant road, but they got lost and drove down a gravel road, when they saw the helicopter. At that stage the appellants turned into Bultfontein Road.

[18] The appellants denied that the persons in the helicopter signalled them to stop, that it hovered across the road to get them to stop or that they had fired shots at the helicopter. Thereafter the second appellant was shot from the helicopter and bled. He told the first appellant to stop. The latter made a U-turn and stopped next

to a stationary vehicle (the Hilux). The first appellant said that he did not stop when the second appellant had been shot because he thought that they were being attacked. He also said that they, together with the persons at the Hilux, ran into the veld. However, the second appellant testified that the fourth appellant helped him out of the Audi and that they did not run away, but stood against the Hilux. The fourth appellant however said that all of them ran away when they got out of the Audi. They were arrested by the police who got out of the helicopter.

[19] Apart from the first appellant who said that he had some T-shirts and toiletries, none of the appellants had any baggage and none was found in the Audi. They denied that the angle-grinder, explosives, firearms, balaclavas, gloves, SIM card or the Nokia charger were in the Audi and said that they did not know where these items came from. When challenged as to whether it was their contention that the police had planted these items, all of them replied that they did not know. The first and third appellants said that they would be lying to the court if they tried to explain where the items came from. They denied that they were involved at the first scene where Mr De la Rey was shot and killed. They also denied that they had thrown the angle-grinder or firearms out of the Audi.

[20] The court a quo held that it was clear from the evidence that the attack on the convoy and the crimes at the first scene were committed by a group of robbers acting in concert with the common purpose of armed robbery of the armoured vehicle, and the persons who happened to be there. The appellants were part of that group. The court rejected their version as ‘nonsense’. They were found guilty of murder; four counts of attempted murder; five counts of robbery with aggravating circumstances; numerous contraventions of the Firearms Control Act 60 of 2000 (the Firearms Control Act); and two contraventions of the Explosives Act 26 of

1956 (the Explosives Act). The first appellant was found guilty of theft of the Audi.

The applications for leave to appeal

[21] The appellants applied to the court a quo for leave to appeal against their convictions and sentences. In that application they simultaneously applied for the recusal of the trial judge (Cillié J) on the ground that he was biased; and for special entries to be made on the record in terms of s 317(1) of the Criminal Procedure Act 51 of 1977 (the Act), in accordance with their proposed special entries (the special entries).

[22] The trial judge dismissed the application for his recusal. He granted the application for the special entries; and granted the appellants leave to appeal to a full court of the Free State High Court against their convictions and sentences.

[23] The full court (Musi, Naidoo JJ and Reinders AJ) did not decide the appeal against the convictions and sentences. It held that the order by Cillié J was incompetent since appeals based on special entries under the Act may not be referred to a full court; and that it had no jurisdiction to hear the appeal. It struck the appeal from the roll. The full court said that the appellants' right of appeal would not be taken away if it did not decide the appeal, and that if they were not satisfied with the outcome, they would then have to approach this Court, which would be another costly exercise.

[24] Thereafter the appellants applied to this Court for 'leave to appeal' against the convictions handed down and sentences imposed by Cillié J on 9 July 2013. The notice of motion states that 'general leave to appeal and leave to appeal on

Special Entries' were already granted to a full court; that the grant of the application for the special entries 'implied that the appeal had to be heard by the Supreme Court of Appeal'; and that the court a quo had erred in granting leave to a full court and 'impliedly granted leave' to this Court. The application for leave to appeal was referred for oral argument in terms of s 17(2)(*d*) of the Superior Courts Act 10 of 2013.

[25] Leave to appeal however had already been granted by the court a quo to a full court. The special entries were properly before this Court and Mr Shapiro for the appellants, and Ms Giorgi for the state, agreed that it was in the interests of justice that this Court decide the appeal. They also agreed that the application for leave to appeal to this Court be construed as an application in terms of s 315(2)(*b*) of the Act, ie an application to set aside the direction by the court a quo that the appeal be heard by a full court; and that it be substituted with an order that the appeal be heard by this Court.[1] This Court granted the application under s 315(2)(*b*) of the Act.

The special entries

[26] Section 317(1) of the Act, in relevant part, reads:

'If an accused is of the view that any of the proceedings in connection with or during his or her trial before a High Court are irregular or not according to law, he or she may . . . apply for a special entry to be made on the record (in this section referred to as an application for a special entry) stating in what respect the proceedings are alleged to be irregular or not according to law,

[1] Section 315(2) of the Act, in relevant part, reads:
'(*a*) If an application for leave to appeal in a criminal case heard by a single judge of a provincial or local division … is granted under section 316, the court or judge or judges granting the application shall, if it, he or she or, … they … is or are satisfied that the questions of law and of fact and the other considerations involved in the appeal are of such a nature that the appeal does not require the attention of the Supreme Court of Appeal, direct that the appeal be heard by a full court.
(*b*) Any such direction by the court or a judge of a provincial or local division may be set aside by the Appellate Division on application made to it by the accused or the attorney-general or other prosecutor … after the direction was given.'

and such a special entry shall, upon such application for a special entry, be made unless the court to which or the judge to whom the application for a special entry is made is of the opinion that the application is not made *bona fide* or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of the court…'

[27] The purpose of a special entry is to raise an irregularity in connection with or during the trial as a ground of appeal against conviction under s 318(1) of the Act.[2] The latter section provides, inter alia, that if a special entry is made on the record, the person convicted may appeal to this Court against his conviction on the basis of the irregularity stated in the special entry. Recently this Court has held that the sole purpose of a special entry is to record an irregularity that does not appear on the record.[3] As is shown below, all of the so-called special entries are not proper special entries but grounds of appeal under s 316 of the Act, because they appear on the record. Some 60 years ago this Court held that the special entry procedure is of vital importance and should be utilised where the irregularity does not appear on the record of the proceedings.[4] So, the statement in the application for leave to appeal to this Court that a special entry is 'simply a method of applying for an appeal in regard to irregularities on or off the record' is quite wrong.

[28] The proviso to s 322(1) of the Act makes it clear that a conviction or sentence must not be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the appellate court that a failure of justice has in fact resulted from such irregularity or defect.[5][6] In *Naidoo*,[7] Holmes

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[2] *A Kruger Hiemstra's Criminal Procedure* (Issue 8) at 31-29.
[3] *S v Staggie* [2011] ZASCA 88; 2012 (2) SACR 311 (SCA) para 16.
[4] *R v Nzimande* 1957 (3) SA 772 (A) at 774B.
[5] Section 322(1) of the act reads inter alia as follows:
'In the case of an appeal against a conviction . . . the court of appeal may-
(a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; or
(b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or

JA identified two broad categories of irregularities: those of a serious and gross nature that per se vitiate a trial; and those of a less serious nature, where the court can separate the good from the bad and is able to consider the merits of the matter.

[29] The respects in which the appellants contend that their trial was irregular and not according to law, may be summarised as follows:

(a) Mr De La Rey was a white Afrikaans-speaking farmer like the trial judge, which 'strongly suggests bias in favour of the State … against the Accused'.

(b) The judge fell asleep during the presentation of the evidence.

(c) The trial judge unfairly denied the appellants a postponement and forced their counsel to continue with the trial without evidence relating to police radio communications that was unlawfully withheld from the defence, which manifested bias against the appellants.

(d) In recounting the facts in the judgment, the trial judge 'spoke as if the State case had been proved even before he got to the evaluation of the evidence'.

(e) Counsel for the state misstated the position and misled the court regarding the relevance of a video of the first appellant, made after his arrest.

(f) The court 'misdirected itself by omission in that almost all its attention is given to the State case and the Court ignored crucial and highly material elements of the defence case.'

(c) make such order as justice may require:
Provided that, notwithstanding that the court of appeal is of opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect.'

[6] *Hiemstra's Criminal Procedure* fn 2 (Issue 8) at 31-30 and 31-31 (Issue 5).

[7] *S v Naidoo* 1962 (4) SA 348 (A) at 354D-F.

(g) The court 'misdirected itself by omission regarding the improbability of Joubert … not going to all the scenes,' and 'it is clear he did not tell the truth when he said he did not go to the first scene.'

(h) The court 'ignored and misdirected itself' by failing to mention *Mbuli*,[8] regarding joint possession of the firearms, ammunition and explosives, given that the appellants did not physically possess these items.

(i) The court permitted a police officer to make unfair attacks on the character of the first appellant.

(j) The appellants were pointed out by a witness 'for blatantly racist reasons.'

(k) The court described the appellants' defence as 'snert'.

(l) The court allowed the state advocate to put leading questions and the fact that there was no objection in many instances, shows that the defence counsel did not provide the appellants with competent and effective representation.

(m) A dark coloured sack lying on the road with other exhibits was deliberately excluded from the exhibits by the police.

(n) Captain Kekana, the state's ballistic expert, was not a member of the Association of Firearm and Tool Mark Examiners, and his expertise was poor.

(o) The court overlooked the fact that the SIM card was planted by the police in the Audi.

(p) The court overlooked the fact that the state did not prove that the Audi was stolen.

[8] *S v Mbuli* 2003 (1) SACR 97 (SCA).

(q) The record was at first incorrectly transcribed; at some stages the interpretation was faulty; and the court 'unfairly rejected an application that the proceedings be conducted mainly in English'. This was aggravated by the fact that the first appellant is hard of hearing.

(r) When the third appellant testified, the interpreter said that Mr De la Rey had been shot dead and somebody was going to be found guilty of the murder.

(s) Any other matter that counsel for the appellants or the state 'may wish to advance as being relevant to the consideration of the application.'

[30] It is convenient to deal firstly with special entry (s). On its own, it is virtually meaningless and plainly impermissible. The court a quo should not have made this a special entry on the record.

[31] None of the so-called special entries (a) to (r), are true special entries as contemplated in s 317(1) of the Act. The court a quo should not have made them special entries on the record. They are properly grounds of appeal.

[32] It must be stressed that an application for a special entry is not there for the asking: the requirements of s 317(1) of the Act must be met, and the court must satisfy itself that the application is bona fide and that it is not frivolous, absurd or an abuse of the process. The court a quo failed to do so. All the so-called special entries should not have been made. In some instances they are simply not bona fide. In others, they are frivolous and consist of points that lack any substance and

cannot be seriously taken; or they are absurd in that they are inconsistent with reason or common sense and unworthy of serious consideration.[9]

[33] Special entry (a) has no merit. The trial judge rightly posed the question to Mr Shapiro whether the allegation of bias is not tantamount to saying that no white male Afrikaans-speaking judge should preside over a trial where the accused are black. Mr Shapiro's answer effectively was 'yes' - there are other judges who can hear such matters. The submission is untenable. But more fundamentally, the allegation does not begin to meet the threshold test for bias, namely 'whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the Judge had not or would not bring an impartial mind to bear on the adjudication of the case.'[10] Indeed, before us Mr Shapiro conceded that the allegations in (a) would not justify an application for the recusal of the presiding judge on the ground of bias. Moreover, he accepted that seen in isolation, special entry (a) is offensive.

[34] Special entry (b) lacks merit and is an abuse of process. The trial judge, unsurprisingly, found the allegation that he fell asleep during the trial unfair and embarrassing, and did not know how to respond to such a vague and general allegation, raised more than three years after the trial. The appellants were represented by Mr Potgieter, who Mr Shapiro said was an experienced counsel. The record shows that Mr Potgieter defended his clients and advanced their interests without fear. He no doubt would have raised a concern if the judge had nodded off. Further, a reading of the evidence does not demonstrate a presiding officer who is not following the proceedings. On the contrary, the evidence of at

[9] *S v Halgryn* 2002 (2) SACR 211 (SCA) para 3; *S v Cooper & others* 1977 (3) SA 475 (T) at 476C.
[10] *President of the Republic of South Africa & others v South African Rugby Football Union & others* 1999 (4) SA 147 (CC) at 148G para 48; 1999 (10) BCLR 1059.

least 30 witnesses, shows that the judge was alert to and aware of the evidence being tendered. At the appropriate time he would ask questions if the evidence was unclear.

[35] There are numerous examples of this but three will suffice. One of the guards testified that a firearm with serial number 106355 was issued to him. Shortly thereafter he said that the serial number was 104355. The judge said that the latter number differed from the one he had heard ie 106355. He was right and the witness said that the correct number was 104355. Secondly, when Joubert was asked about the position he had taken in the helicopter, the judge interrupted counsel and asked Joubert to explain the seating arrangements. Joubert replied that the helicopter had no seats, that it was a shell, as he put it, and that four officers were sitting on the floor at each door. Thirdly, when the second appellant testified, Mr Potgieter put it to him that he had met the other appellants in Bloemfontein on 8 November 2008. The judge pointed out that the date could not be right because the appellants were in custody. Again, he was right. Aside from this, the appellants can point to no prejudice, irregularity or failure of justice because the judge allegedly fell asleep. As is demonstrated below, the appellants' convictions are entirely sustainable on the evidence.

[36] Special entry (c) is not bona fide and a distortion of the facts. On no less than three occasions, the appellants applied for the postponement of the trial, during which evidence was heard, causing a delay of some nine months in the commencement of the trial. The record shows that in those applications, the judge was extremely patient and tolerant, particularly in the light of the reasons for the postponement: the appellants sought radio control records relating to police communications and information as to when the helicopter had taken off and

landed; and the first, second and fourth appellants wanted to consult jointly in prison (the third appellant was released on bail). In any event, the police were not in possession of the records relating to radio communications, which were held by an independent service provider. Mr Potgieter informed the trial court that he had taken steps to obtain these records from the service provider, which he wanted to use in cross-examination of the guards. Nothing further was heard from Mr Potgieter in this regard.

[37] The police witnesses testified about the radio communications they received concerning the incident and on this score, their evidence was not seriously challenged. The defence sought the records of these radio communications in an attempt to show what the security guards had told Joubert concerning the vehicles used by the robbers. Mr Potgieter however had in his possession Joubert's witness statement with which he could confront the security guards on this issue. Moreover, the trial judge informed Mr Potgieter that if necessary, any security guard could be recalled for cross-examination should the records of the radio communications reveal discrepancies in their version. The appellants plainly were not prejudiced.

[38] Special entries (q) and (r) are not bona fide, and are frivolous and absurd. The appellants have not stated how the initial incorrect transcription of the record is alleged to be irregular and not according to law. The proceedings were interpreted in the mother tongue of the appellants, and it was unnecessary to conduct them in English. The parts of the record upon which Mr Shapiro relies are a distortion and do not support the allegations in these special entries. When Mr Potgieter informed the court that the appellant had complained that the interpretation was incorrect in some respects, the interpreter was replaced. Once

during the proceedings, Mr Potgieter informed the court that the first appellant did not have his hearing aid, but that he was willing to proceed with the trial and would indicate to Mr Potgieter if anything needed to be explained. The Judge noted this and said that if necessary, the first appellant could sit nearer (to aid his hearing). Subsequently, there was no complaint during the trial about the first appellant's hearing.

[39] The remaining special entries are to a large extent interrelated and concern the trial court's judgment on the merits and will be dealt with in the analysis of the merits of the appeal.

Analysis

[40] Regarding the merits, there can be no question that the robbers had agreed to attack the convoy; that the attack was carefully planned; that all the robbers participated in its execution; and that each robber associated himself with the acts perpetrated by the others - the murder, attempted murder and armed robbery of innocent civilians at the first scene. This alone is sufficient to establish common purpose.[11] The appellants foresaw and reconciled themselves with the possibility that the execution of the armed robbery by their co-conspirators - who were heavily armed with assault weapons - could result in the death of a person. They were thus rightly convicted of murder.[12]

[41] But even in the absence of an agreement to attack the convoy, the evidence conclusively shows that the appellants were present at the first scene where the said acts of violence were being committed; that therefore, they knew or must have

[11] *C R Snyman Criminal Law* 6th ed (2014) at 259.
[12] *S v Majosi & others* 1991 (2) SACR 532 (A) at 536I-537E.

been aware of these attacks; that they intended to make common cause with the robbers who committed those acts; and that they manifested this intention by themselves performing acts of association with the conduct of the other robbers.[13]

[42] The ineluctable inference to be drawn from the facts is that the appellants were part of the robbers wearing balaclavas and armed with rifles and AK-47 assault weapons at the first scene. The evidence of the police who pursued them in conjunction with the retrieval of the items referred to earlier, lead to the compelling conclusion that the persons who had been travelling in the Audi and who had been arrested by the police, namely the appellants, were the individuals involved in the murder and robberies at the first scene.

[43] Then there is the appellants' evidence. Unsurprisingly, they could not explain how the incriminating items came to be in the boot of the Audi. They did *not* suggest that the police had planted them there. And it was never put to Joubert that he, or any officer under his command, had 'planted' any evidence at the second scene. So there is no room for that contention. In fact, the first and third appellants were not willing to proffer any explanation for the presence of the incriminating items, for fear of 'lying'. The Corsa following them at high speed is also unexplained. The appellants' version that they were on their way to Upington but got lost and ended up on a gravel road and that they did not try to dispose of the angle-grinder and weapons, is highly improbable, let alone reasonably possibly true. It may safely be rejected as false. And there is nothing wrong in characterising their version as nonsense – in Afrikaans, 'snert'.[14]

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[13] *S v Mgedezi & others* 1989 (1) SA 687 (A) at 705I-706B.

[14] F F Odendal and R H Gouws *Die HAT (Verklarende Handboek van die Afrikaanse Taal)* 4ed (2000) defines 'snert' as 'onsin'. In English, 'nonsense' or 'rubbish'.

[44] Mr Shapiro's theory that the police planted the SIM card in the Audi and that Joubert was dishonest when he said that he never went to the first scene, strains credulity. The helicopter and its occupants were nowhere near the first scene: the unchallenged evidence is that Joubert saw the Audi for the first time some 90 km away from the first scene. And the facts show that none of the police officers who collected the evidence at the second scene, were present at the first scene. The theory implies a conspiracy of epic proportions. It would mean the following. The police somehow obtained the cellular telephone and Vector 9 mm pistol issued to a guard (of which he had been robbed) from the robbers (who had escaped) and placed the SIM card of that phone and the pistol in the Audi. In a moving scene, the police then obtained the angle-grinder, and LM 5 rifles (of which the guards at the first scene had been robbed) from the robbers (who had also escaped) and planted these items at two separate places on the road where they were found. They also planted explosives and fuses in the Audi, coincidentally of the same type as those used at the first scene. The pursuit of the appellants in a helicopter and their attempts to get rid of the angle-grinder and weapons are all a figment of Joubert's imagination. The theory is fanciful and absurd.

[45] The appellants' possession of the firearms and explosives may be dealt with briefly. This is not a case where a single possessor exercised possession of firearms on behalf of a group. Instead, all the appellants at the relevant times had the intention of jointly possessing the firearms and explosives, as a group.[15] This was established by the evidence. There were no competing claims to the firearms and explosives. The appellants had the requisite intention: firstly, they all knew of the existence of the firearms and explosives in their possession and secondly, that they

[15] *Mbuli* fn 8 above para 71.

were exercising control over them.[16] Their joint possession as a group and common state of mind is buttressed by their attempts to get rid of the firearms. When they were being pursued by the helicopter, the Audi stopped and two of them got out so as to dispose of the angle-grinder and an AK-47 assault weapon. Later they threw more firearms out of the windows of the Audi. All of them attempted to flee once the Audi had been stopped. The only reasonable inference to be drawn from these facts is that the appellants had the common intention to possess the firearms and explosives.

[46] What remains is the charge of theft against the first appellant. The state proved that the Audi was one of two Audi Q7's stolen from Port Elizabeth harbour on 28 June 2007. The first appellant's initial explanation to the police was that he had borrowed the vehicle from Mr Thabo Stimela (Stimela). The police followed up that information, which revealed that Stimela had disappeared and that a warrant for his arrest had been issued. However, during the trial the first appellant's explanation for his possession of the Audi changed. It was put to the state witnesses, and the first appellant testified, that the Audi belonged to Mohema who had pledged it to him in September 2007 for R100 000. As the court a quo noted, according to the appellant, Mohema had coincidentally passed away.

[47] On his own version the first appellant had driven the Audi and was in possession of it some three months after it was stolen in Port Elizabeth. The nature of the stolen thing is an important element in determining what constitutes recent possession. If it is of a kind which is usually, and can easily and quickly be disposed of, anything beyond a relatively short period generally will not constitute

[16] *Snyman* fn 11 at 261.

recent possession.[17] The thing in this case - a brand-new, expensive sports utility vehicle - is not one which can easily and rapidly pass from person to person. Aside from this, the unchallenged evidence is that two number plates displaying different registration numbers, not linked to any owner on the police registration system, were found in the boot of the Audi. Now if the first appellant's explanation is true that Mohema, supposedly the owner of the Audi, pledged the vehicle to him, why would these number plates be necessary at all? And why would they be in the Audi, if not to be used illegally? All of this, coupled with the first appellant's different explanations for his possession of the Audi, in my view, is sufficient to justify the conviction of theft.

[48] On a conspectus of all the evidence, what all of this shows, is that special entries (d) to (p) are frivolous and absurd. Even considered as grounds of appeal, they have no merit. They are unsustainable on the evidence. The state proved its case beyond reasonable doubt and accordingly, the appellants were rightly convicted.

Sentence

[49] The appellants were sentenced as follows:

Count 1 - theft: the first appellant: 15 years' imprisonment;

Counts 11, 19, 22 and 25 - attempted murder: 7 years' imprisonment on each count;

Counts 13-15 and 17-18 - robbery with aggravating circumstances: 15 years' imprisonment on each count;

Counts 16 and 20 - contravention of s 120(6)(a) of the Firearms Control Act: 3 years' imprisonment on each count;

[17] *S v Skweyiya* 1984 (4) SA 712 (A) at 715C-E.

Count 21 - murder: life imprisonment
Count 23 - contravention of s 27(1) of the Explosives Act 26 of 1956: 6 years' imprisonment;
Count 24 - contravention of s 6(1) and (2) of the Explosives Act 26 of 1956: 1 year imprisonment;
Count 26 - contravention of s 3 of the Firearms Control Act 60 of 2000: 15 years' imprisonment;
Count 27 - contravention of s 90 of the Firearms Control Act 60 of 2000: 1 year imprisonment; and
Count 28 - contravention of s 4 of the Firearms Control Act 60 of 2000: 15 years' imprisonment.

[50] The court a quo noted that in terms of the provisions of the Correctional Services Act 111 of 1998, the sentences imposed on all the charges run concurrently with the life sentence imposed on the appellants, by the operation of law.[18] It ordered, in terms of s 280 of the Act, that all the sentences imposed in respect of all the other charges should also run concurrently with the sentence of life imprisonment,

[51] It is trite that sentencing lies in the discretion of the trial court. In the absence of material misdirection by the trial court, an appellate court cannot approach the question of sentence as if it were the trial court and then substitute the trial court's sentence simply because it prefers to.[19]

[18] Section 39(2)(*a*)(i) of the Correctional Services Act.
[19] *S v Malgas* 2001 (2) SA 1222 (SCA) para 12.

[52] The court a quo imposed the minimum sentences prescribed in the Criminal Law Amendment Act 105 of 1997 in respect of the charges of murder, robbery with aggravating circumstances, possession of semi-automatic and automatic firearms, and possession of explosives. After considering the factors required to be taken into account in the imposition of sentence, including the appellants' personal circumstances, the court a quo came to the conclusion that there were no substantial and compelling circumstances to deviate from the prescribed minimum sentences.

[53] In this regard, the court a quo said that the robbery was planned, and brazenly executed on a public road by some 20 heavily armed robbers who did not hesitate to indiscriminately shoot, and, I would add, kill an innocent civilian. They terrorised defenceless motorists to overcome any resistance. Cash in transit heists are becoming an epidemic in this country and communities expect the courts to impose severe sentences for these crimes. All the appellants had completed high school and earned an income. They committed the crimes out of greed. The seriousness of the crimes outweighed their personal circumstances.

[54] The reasoning of the court a quo cannot be faulted. This Court has held that the prescribed minimum sentences should not be departed from lightly and for flimsy reasons. The legislature has ruled that these are the sentences that ordinarily, and in the absence of weighty justification, should be imposed for the specified crimes, unless there are truly convincing reasons for a different response.[20] This is not such a case. The sentences are appropriate.

[20] *Malgas* fn 17 para 25.

[55] In the result, I make the following order:

1. The order of the court a quo granting leave to appeal to a full court is set aside and replaced with the following:

   'The appellants are granted leave to appeal to the Supreme Court of Appeal against their convictions and sentences.'

2. The appeal is dismissed.

A Schippers
Acting Judge of Appeal

Appearances

For Appellant:	S Shapiro Instructed by: Shapiro Attorneys, Johannesburg c/o Tshangana Attorneys, Bloemfontein
For Respondent:	S Giorgi Instructed by: The Director of Public Prosecutions, Bloemfontein