REPORTABLE

IN THE SOUTH GAUTENG HIGH COURT

JOHANNESBURG CASE NO: A211/09

DATE: 04/11/2010

In the matter between

NCUBE, LAWRENCE and two others APPELLANT

and

STATE

J U D G M E N T

LAMONT J: The three appellants who appear before us today appeared as accused 1, 2 and 4 in the Magistrate's Court. Accused 3 was acquitted.

Each of the appellants was sentenced to 12 years' imprisonment having being convicted of the charge of robbery with aggravating circumstances.

When the matter came before us the record was incomplete as to the proceedings on sentence. All that remained of the record concerning those proceedings was the sentence imposed by the magistrate in the matter namely 12 years' imprisonment.

The three appellants came to the hearing and at the hearing it was explained to them through the use of a duly sworn interpreter of this Court that they were entitled to participate in the reconstruction of the record concerning the sentence.

Attempts made by the state to reconstruct the record including the attempts to access secondary evidence as to what the record was had proved unsuccessful. The only options open to this Court were to obtain evidence from the appellants as to what the evidence was which had been submitted to the magistrate at the time and allow them to participate by doing so in the reconstruction of the record as is contemplated by *S v Gora and another* 2010 (1) SACR 159 (WCC).

In that matter referring to a judgment of Yekiso J in *S v Zenzile* at paragraph 16 it was held that the reconstruction process is part and parcel of the fair trial process and includes the following:

> "The accused has been informed of the missing portion of the record; of the need to have the missing portion of the record reconstructed, of his rights to participate in the reconstruction process, his right to legal representation in such a reconstruction process and the right to have the reconstruction process interpreted for him should he

require the services of an interpreter."

In paragraph 17 it was held that the reconstruction process must give effect to the accused's right to a public trial before an ordinary court, his right to be present when being charged as well as his right to challenge and adduce evidence.

The duty of the presiding officer once it became apparent that the record was lost was to take various steps to reconstruct the record. However the process should not result in the trampling of the rights of the accused.

The appellants in this matter were legally represented, accepted such representation and together with their representatives participated in the procedure which was put in place to establish whether or not the record could be reconstructed.

That procedure involved, informing the appellants that the record needed to be reconstructed, and that it had not been possible to reconstruct it, each appellant was requested to state whether or not such appellant was prepared to and or wished to participate in the process of reconstruction of the record by way of revealing the missing evidence which had been led at the hearing of the matter and also to provide the evidence which had been presented should that appellant wish to do so.

As far as the first appellant is concerned, that appellant indicated that he did not have anything to say and was not able to furnish any evidence which had been led. The second appellant indicated that he well remembered what had taken place and was able to and would

participate in the process of reconstruction. The third appellant's position on request was identified as being the same as the first appellant.

It appeared to me appropriate then to put to the appellants that this Court was prepared to consider allowing the appellants seeing as how they were present, to provide such evidence which was deficient in the record and/or as they wished this Court to receive in relation to mitigation of sentence.

All the appellants individually, as well as the legal representatives of both the state and the appellants indicated that that was a procedure with which they agreed. In the result I requested the appellants to consult with their legal advisor to prepare a statement of such mitigating facts as each appellant wished to place before this Court as and by way of the evidence which would be led should we be prepared to receive that evidence.

This Court is entitled to receive evidence in exceptional circumstances. It appears to us that the circumstances which served before me in the present matter are exceptional.

It is a relatively simple matter for the mitigating circumstances to be placed before this Court and in general those circumstances are not disputed by the state. It was convenient for this Court to deal with the matter in its entirety as the record had been read as far as conviction was concerned and the case could be dealt with on the conviction aspect. If the procedure of hearing the evidence was followed all the evidence would be before Court. If the procedure was not followed this

would result in a remittal of the matter to the Magistrate's Court with the need to summons the appellants from the various prisons in which they are currently resident to the hearing with the view to placing precisely the same evidence which we would receive today and which would not be disputed by the state. There is substantial waste in the form of time and costs.

It appeared to me that the provisions of Section 304 (2) (b) read together with Section 309 (3) of the Criminal Procedure Act of 511977 authorised the hearing of the evidence as did Section 22 of the Supreme Court Act 59 of 1959.

RAIL COMMUTERS ACTION GROUP AND OTHERS v TRANSNET LTD t/a METRORAIL AND OTHERS 2005 (2) SA 359 (CC)

New evidence is admissible in this Court on appeal, including in motion proceedings, in terms of that section, 45 which reads:

'22 Powers of Court on hearing of appeals E

The appellate division or a provincial division, or a local division having appeal jurisdiction, shall have power –

(a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by such division, or to remit the case to the court of first instance, or the court whose judgment is the subject of the appeal, for further hearing, with such instructions as regards the taking of further F evidence or otherwise as to the division concerned seems necessary; and

(b) to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require.'

[40] In Lawrence, Chaskalson P referred to this G provision and held that it is only in exceptional circumstances that evidence may be admitted on appeal: 46

'Section 173 of the 1996 Constitution confers on this Court, the Supreme Court of Appeal and the High Courts an "inherent power to protect and regulate their own process, and to develop the common law, H taking

into account the interests of justice". Counsel for the appellants contended that if the expert evidence on which they rely is not admissible under Rule 19 or Rule 34, this Court should exercise its powers under s 173 of the Constitution to admit it. The appellants do not, however, have to rely on s 173, which in any event seems not 2005 (2) SA p388

O'REGAN J

to be applicable to this case. This Court has power under its Rules to A admit new evidence on appeal. 47 The question is whether that power should be exercised in the circumstances of the present case. For the reasons already given this Court should not, save in exceptional circumstances, permit disputes of fact or expert opinion to be raised for the first time on appeal. Such circumstances have not been established in the present case.'

(Footnotes omitted.) B

[41] The SCA has similarly held that new evidence should be admitted on appeal under this section only in exceptional circumstances. 48 This is because on appeal, a court is ordinarily determining the correctness or otherwise C of an order made by another court, and the record from the lower court should determine the answer to that question. It is accepted however that exceptional circumstances may warrant the variation of the rule. Important criteria relevant to determining whether evidence on appeal should be admitted were identified in Colman v Dunbar. 49 Relevant criteria include the need for finality, the undesirability of permitting a litigant who D has been remiss in bringing forth evidence to produce it late in the day, and the need to avoid prejudice. One of the most important criteria was the following:

'The evidence tendered must be weighty and material and presumably to be believed, and must be such that if adduced it would be practically conclusive, for if not, it would still leave the issue in doubt and the matter would still lack finality.' 50 E

In S v Louw, the Appellate Division held also that for new evidence to be admitted on appeal, some reasonably sufficient explanation must be offered to account for the failure to tender the evidence earlier in the proceedings. 51 F

[42] In Van Eeden v Van Eeden, 52 the Cape High Court held that it was well established that the Court's powers as derived from s 22(a) of the Supreme Court Act should be exercised sparingly. 53 The Court held, further, that in that case the additional evidence related to facts and circumstances which had arisen after the judgment of the Court a quo. This raised the question whether it was competent for the court, in the G exercise of its power under s 22(a), to receive such evidence or to authorise its reception. 54 Comrie J held that the section did not include any express limitation which would

exclude the reception of the evidence then sought to be tendered and that the court exercising appellate jurisdiction had a H discretion whether or not to allow the evidence to be admitted, which discretion should be exercised sparingly and only in2005 (2) SA p389

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special circumstances. From time to time, he held, cases did arise which cried A out for the reception of post-judgment facts. 55

[43] In my view, this approach is correct. The Court should exercise the powers conferred by s 22 'sparingly' and further evidence on appeal (which does not fall within the terms of Rule 31) should only be admitted in exceptional circumstances. Such evidence must be weighty, material and to be believed. In addition, whether B there is a reasonable explanation for its late filing is an important factor. The existence of a substantial dispute of fact in relation to it will militate against its being admitted.

I accordingly put in place the mechanism by which that evidence would be produced. That evidence has in fact now been produced to this Court.

It appears to me proper that this Court should receive such evidence and should deal with the matter in its entirety. It is in the interests of justice that the entire matter be dealt with in one hearing and that the appellants be in a position to know and understand fully what the outcome of the procedure is immediately. It seems to me to be wholly against the interests of justice that there be a piecemeal decision on conviction and later at some uncertain future date the question of the sentence be dealt with. In the interim the appellants are in limbo in that they do not know what the position is insofar as sentence is concerned.

I would accordingly rule that the evidence of the second appellant be received both in the form of reconstructing the record and in the form of fresh evidence before this Court. The evidence of accused 1 and 3 is received as fresh evidence before this Court.

The receiving of the evidence of the second appellant as part of the reconstruction process is in my view in accordance with the formula considered in Gora's case and is appropriate. Insofar as the receiving of the further evidence is concerned, that is in accordance with the provisions of the enabling statutes to which I have referred.

I accordingly rule that the evidence be received.

Insofar as the appeal is concerned, the evidence which is required to enable this appeal to be heard by this Court is before us.

The evidence which we have received concerning the sentence is the following.

The first appellant is 28 years old, has no previous convictions, is a first offender, is currently single, but has two children. He was previously employed as a taxi driver for his brother. He was employed from 1996 to 2003 and was then unemployed.

The second appellant is 24 years old, has no previous convictions, is married with two children. His wife has since died. He was employed as a carpenter and was the breadwinner for his family over the period 1999 to 2003.

The third appellant is 29 years old, has no previous convictions, is married. Unfortunately his wife has recently left him. He has two children, he was self-employed as a taxi driver and ferried passengers to Zimbabwe and back. He was in receipt of sum R10 000.00 per month and was the breadwinner of his family.

It was submitted concerning events before the Magistrate with regards to sentence that the magistrate at the time that he had

considered the matter must have found substantial and compelling circumstances which were, so it was submitted, probably the fact that the appellants are reasonably young, are first offenders and spent three years awaiting the finalisation of their trial as well as the fact that during the course of the robbery no one was injured and no shots were fired.

The fact that the magistrate imposed a period of 12 years' imprisonment is evidence of the fact that he did find substantial and compelling circumstances to exist. Failing that finding he would have been obliged to have imposed the minimum sentence namely 15 years.

Those then are the facts which are before us and which should any further steps be taken in this matter be inserted and contained within the appeal record.

Insofar as the conviction is concerned, it is apparent that there was a bank robbery. During the course of the bank robbery a significant amount of money was stolen. The persons who were called as witnesses to give evidence as to what precisely had happened within the bank and as to precisely how the sum of approximately R138 000.00 had been taken were unable to identify the assailants.

The only question before us today is whether or not the appellants are the persons who perpetrated the crime.

Insofar as the individual witnesses are concerned the evidence was fully and completely analysed by the magistrate and I do not propose to go through each of the findings which he made.

The principle basis upon which the conviction rested was the production at the trial of pictures of the three perpetrators of the crime. It

was common cause that the pictures were taken at the time the crime was committed and that the pictures accurately reflect what happened. Those pictures were put in evidence through the evidence of one Naude who is an inspector in the South African Police Service. They were all correctly admitted and they correctly reflect what was photographed at the material time during the bank robbery.

The persons who appear on the pictures are the persons who executed the robbery. The only question is whether or not the identification of the appellants as the persons whose features appear upon the pictures is sufficient to enable a conviction to have taken place.

The expert gave evidence as to what steps she had taken to analyse the pictures and compare them with the features of the appellants. A number of features in respect of each of the appellants were pointed to by her as identifying in each particular case beyond reasonable doubt the features which were sufficient to identify each particular appellant.

It must never be forgotten that the function of the expert is not to decide the case. The function of the expert is to provide the Court with the tools to assist it in deciding the case. The function of the expert is only to assist insofar as the Court requires assistance with the skills which the Court will use in the process of comparing the pictures with the appellants. The extent to which the opinions advanced by an expert are to be accepted will depend upon whether, in the judgment of the Court, those opinions are founded on logical reasoning or are otherwise valid. See:

Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another 2001 (3) SA 1188 (SCA) ([2002] 1 All SA 384) in para [36].

it is important to bear in mind the distinction between the scientific and the judicial measures of proof See: *Dingley v The Chief Constable, Strathclyde Police* 2000 SC (HL) 77 at 89D - E (cited with approval by this Court in *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA) para G [40] at 1201E - H).

The magistrate in a lengthy judgment considered all of these issues. Today submissions are made before us that there are features which indicate that his analysis was wrong. For example, there was some scarring which did not appear.

It must be remembered that not only did the expert give evidence as to what the expert had before her, but also that the appellants appeared in Court. The appellants were seen by the magistrate over the period of the trial and he was able not only to rely on the evidence given by the expert, but also upon his own observations which he had made during the course of the trial.

In my view the analysis made by the magistrate was proper. I have considered the evidence which was before him in detail and it appears to me that the evidence which he made correctly identified each picture of a perpetrator with each of the appellants. In the circumstances it appears to me that the magistrate properly convicted each of the appellants of the offence. He had available to him ample evidence of identification and using that evidence properly analysed and

found them to have been present at the scene and to have performed the acts which are described. In my view the appeal against conviction should fail.

It remains to consider the question of sentence. The appellants perpetrated a robbery which had clearly been planned. They were armed and although no shots were fired they were involved in a seriously considered activity with a view to obtaining the booty namely sum R138 000.00. In their activities they had no regard for the threat to life in limb which existed to the persons who were faced with these men who were armed with firearms. While no shots were fired there was the potential for shots to have been fired. These shots would have been fired with a view to injuring people in return for the opportunity to obtain money.

The appellants would have had in committing this crime no concern for the life or limb of the persons who were on the receiving end of the violence.

Their personal circumstances have been set out previously in this judgment and I take those personal circumstances into account. The personal circumstances of the appellants must be weighed against the needs of society to impose deterrents for persons who might commit crimes of this nature as well as the nature of the crime, the well known triad. See in this regard for example:

DIRECTOR OF PUBLIC PROSECUTIONS, KWAZULU-NATAL v P 2006 (1) SACR 243 (SCA)

"[13] The so-called traditional approach to sentencing required (and still does) the sentencing court to consider the 'triad consisting of the crime, the offender and the interests of society' (S v Zinn 10). In the assessment of an appropriate sentence, the court is required to have regard to the main purposes of punishment, namely, the deterrent, preventive, reformative and the retributive aspects thereof (S v Khumalo and Others 11). To these elements must be added the quality of mercy, as distinct from mere sympathy for the offender."

In S v Holder 1979 (2) SA 70 (A) at 75A, 81B it was held "Daar moet gestreef word na 'n gepaste vonnis, volgens die eise van die tyd en 'n gepaste vonnis sal altyd 'n vonnis wees wat gebaseer is op 'n gebalanseerde oorweging van die drie elemente . . . Die gemeenskap verwag dat 'n ernstige misdaad gestraf sal word, maar verwag ook tewens dat strafversagtende omstandighede in ag geneem moet word en dat die beskuldigde se besondere posisie deeglike oorweging verdien. Dit, meen ek, is strafoplegging volgens die eise van ons tyd."

In S v Rabie 1975 (4) SA 855 (A) at 865G-866B, Corbett JA held:

'In his Commentary on the Pandects, 5.1.57, Voet writes of the need for Judges to be free from hatred, friendship, anger, pity and avarice. In a note on this section in his Supplement to the Commentary (published in 1973) Van der Linden makes interesting reference to the views of a number of writers, classical and otherwise, as to the proper judicial attitude of mind towards punishment. (A translation of this particular note conveniently appears in the Selective Voet - Gane's translation vol 2 at 72.) The note (quoting Gane's translation) commences:

"It is true, as Cicero says in his work on Duties, bk 1 ch 25, that anger should be especially kept down in punishing, because he who comes to punishment in wrath will never hold that middle course I which lies between the too much and the too little. It is true also that it would be desirable that they who hold the office of Judges should be like the laws, which approach punishment not in a spirit of anger but in one of equity."

Van der Linden further notes that among the most harmful faults of Judges is, inter alia, a striving after severity (severitatis affectatio). Apropos this, a passage is quoted from Seneca on Mercy, including the declaration: "Severity I keep concealed, mercy ever ready' (severitatem J abditam, clementiam in promptu habeo). Van der Linden concludes with a warning that misplaced pity (intempestiva misericordia) is no less to be censured.Despite their antiquity these wise remarks contain much that is relevant to contemporary circumstances. (They were referred to, with approval, in S v Zinn (supra) 1969 (2) SA 537 (A) at 541.) A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects

of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case."

These conducts of the appellants was deliberate and calculated, and driven by greed not need

See: *S v M (CENTRE FOR CHILD LAW AS AMICUS CURIAE) 2007 (2) SACR 539 (CC)*

The crime is an extremely serious one and is recognised to be such by reason of *inter alia* it, the obvious features of the crime, but also the fact that a minimum period of imprisonment has been considered appropriate by the law maker, namely 15 years. That is indicative of the order of the period of imprisonment which the public expects courts to impose upon persons who commit offences of this nature.

During the course of the crime itself, while it is true there was no injury to any person, there was as I have set out earlier the potential of such injury. The motive for the crime was to obtain money by the method potentially of injuring persons and life and limb. So much for the crime.

The needs of society are such that frequently perpetrated crimes and particularly serious crimes of this nature must be met with an appropriate sentence of a sufficiently severe nature to deter other persons from becoming embroiled in this type of activity. All too often this Court has before it evidence of the effects of robberies where firearms have been used some, persons have been murdered during the course of robberies and others seriously injured.

This type of offence is a prevalent one in the present society and steps are being taken to stamp it out, hence the minimum sentence legislation and the serious efforts made by the police force of this country to arrest, detain and deal with perpetrators.

The effect of a lengthy period of imprisonment also has the added salutary purpose of removing the persons from society, thereby preventing them from committing further crimes.

At the same time one must have regard to the need not to become enraged by the activities of the appellants and to with measured control and a degree of mercy consider the punishment which is to be imposed. I do this, the magistrate similarly did this. It appears to me that the magistrate who found there to be substantial and compelling circumstances which may well have included the factors referred to earlier in this judgment including in particular the fact that the appellants were incarcerated for a significant period of time prior to the sentence having being imposed and that such period of detention is not part of the punishment for the offence.

It weighs heavily on my mind that these are relatively young men, 28 years old, 24 years old, 29 years old who previously have led extemporary lives and who appear to have been employed and been acting as proper members of society. This notwithstanding it appears to me that the only appropriate sentence is a custodial period. It appears to me further that 12 years as was imposed by the magistrate is a proper period of imprisonment.

As this Court has received evidence concerning the features of

mitigation both as part of the reconstruction of the record in the case of appellant 2 and as fresh evidence in the case of the other appellants this Court is in a position to determine whether or not the sentence imposed by the magistrate is one which it itself would have imposed. As I have indicated earlier, that sentence is one which I would have imposed

In the circumstances it appears to me that the proper order is that the appeal against sentence be dismissed. That leaving the sentence imposed by the magistrate in place being the sentence which this Court would have imposed and which I have no doubt had the record been complete in this regard would have found had been correctly imposed there being no sense of shock in the fact that less than the minimum sentence was imposed.

I would accordingly dismiss the appeal against both the conviction and the sentence and would allow the evidence to be given.

I propose the following order:

1. The evidence which was placed before this Court by the three appellants be received in the case of the second appellant both as fresh evidence and as part of the reconstruction of the record and in respect of the other appellants as fresh evidence.
2. I would dismiss the appeal against both conviction and sentence.

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LAMONT J
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree

_____
MAKUME J
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

Counsel for Appellant: Adv Cosyn,

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