IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Delivered: 28/05/14.

CASE NO: A600/2013 A600/2013

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED.
(4) DATE. **28 MAY 2014**

SIGNATURE SIGNATURE

In the matter between:

HLONGWANE, MANQOBA CALVIN Appellant

V

THE STATE Respondent

JUDGMENT

SPILG, J:

INTRODUCTION

1. The appellant and his co-accused were charged on one count of robbery with aggravating circumstances in that on 19 October 2011 and at Kwa Thema they had assaulted the two complainants and forcibly took their cellphones.

2. The appellant was convicted on 21 November 2012 in the Springs Regional Court of robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977 ('*the CPA*'). He was sentenced to fifteen years imprisonment in terms of section 51(2) of the Criminal Law Amendment Act 105 of 1997 ('*the CLAA*'). The co-accused was acquitted as the State was unable to prove that his presence at the scene.

3. The appellant was refused leave to appeal by the trial court but on petition this court granted leave in respect of both conviction and sentence.

CONDONATION

4. The appellant delivered his heads of argument out of time. An application for condonation was filed. We were of the view that an acceptable explanation was provided and that prospects of success need not be debated as leave to appeal had been granted on petition. Condonation was granted and the appeal proceeded before us.

FINDINGS OF THE COURT *A QUO*

5. The facts are basically common cause and are set out in the following paragraphs.

6. During the day of 19 October 2011 the appellant and his co-participant approached the two female complainants while they were taking a short cut through an open veld towards a supermarket. As the two men came nearer, the first complainant's friend put her hand inside her bra to adjust the cellphone she had concealed.

7. The appellant's heads of argument acknowledge that this movement prompted him to swap sides with his co-participant so that the latter was now approaching the first complainant's friend from the same side. As they drew closer the co-participant produced a knife and '*demanded*' the cell phones. He

took the cellphone from where the second complainant had attempted to conceal it. The first complainant attempted to flee but fell after some distance and the appellant caught up with her. He again '*demanded*' her cellphone and, when she claimed not to have one, put his hand inside her bra, took the cellphone she had also hidden there and ran in the same direction as his co-participant.

8. The trial court found that the appellant had also tried to pull down the first complainant's pants prior to members of the public approaching the scene.

9. The appellant was apprehended by a passer-by and the first complainant's cellphone was recovered. The magistrate noted that the appellant's counsel had put to the first complainant that she had also handed her cellphone over to the appellant when she and the second complainant were initially accosted and not after she had fled. However during his testimony the appellant denied that his counsel had been instructed to put this version.

10. The magistrate found that *'... it is clear to the Court that he (i.e.* the appellant*) was in the company of another person who indeed had a knife and who threatened the complainants with that knife ..... the drawing of the knife by the person who was with accused 1 was clearly designed to overcome any resistance which these two ladies might have".*

11. It appears that the learned magistrate made these findings based *inter alia* on the second complainant's evidence that when the appellant and his co-participant approached them, the latter produced a knife and both "*simultaneously demanded phones from them. That is when my friend saw the knife and ran away".* The knife was an okapi. The whole incident occurred within some 15 minutes.

12. Most significantly for present purposes are the following findings made by the learned magistrate;

    a. the appellant was not in possession of a knife or any other weapon at any time during the commission of the offence;

    b. the appellant was in the company of another person who produced a knife;

    c. the knife was an okapi, i.e. a type of switch blade knife;

    d. *"the drawing of the knife by the person who was with accused 1* (the appellant) *was clearly designed to overcome any resistance which these two ladies might have"* (see above)

THE SUBSTANTIVE ISSUES ON CONVICTION

13. The appellant's argument in respect of the conviction centred on three issues;

    a. whether the evidence regarding the production of the knife is sufficient to satisfy the requirement of aggravating circumstances for the purposes of the CPA;

    b. whether as a fact the appellant was an accomplice as defined under the CPA; and

    c. if so, whether the definition of "*accomplice*" was unconstitutional in that aggravating circumstances would be found in respect of the appellant

without having to prove intention and where he had not produced any weapon.

THE FINDING OF AGGRAVATING CIRCUMSTANCES

14. The first issue is whether the trial court was correct in concluding from the facts that the co-participant "*threatened the complainants with that knife*" for the purposes of finding the presence of aggravating circumstances and if not, whether the co-participant was *'wielding'* the knife in order to satisfy (in the alternative) the first sub-paragraph in the definition of '*aggravating circumstances'*

15. Section 1 of the CPA defines '*aggravating circumstances'* in relation to robbery or attempted robbery under paragraph (b) to mean:

(i) *the wielding of a firearm 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. It is evident from the definition that aggravating circumstances will be present in cases of robbery or attempted robbery where either;

a. under subparagraph (i), the perpetrator performs a particular type of movement with the weapon, even though no actual bodily harm is inflicted; or

b. under subparagraph (ii), the perpetrator actually inflicts grievous bodily harm with the weapon; or

c. under subparagraph (iii), the perpetrator threatens, whether by word or conduct or both, to inflict grievous bodily harm.

17. It appears that in each sub-provision of the definition the legislature intended to identify the appropriate *actus reus, (*i.e. an unlawful criminal act) that would attract the more severe sanction. In this context it must be borne in mind that aggravating circumstances is not a separate crime but a species of robbery which affects sentencing (albeit that it also precludes prescription from running and obtaining bail is made more difficult). See generally *Minister of Justice and Constitutional Development v Masingili* 2013 JDR 2680 (CC) at paras 16, 17 and especially para 33.

Accordingly it was necessary for the legislature to describe the type of conduct that would justify a greater degree of culpability where *dolus* (i.e. the intention of the accused), in relation to aggravating circumstances, is not an element (see *Masingili* at para 34).

18. It is clear that each of the three situations described in the sub-provisions of the definition does not require the presence of the other to amount to aggravating circumstances. Nonetheless each subparagraph cannot be understood to impose an internal limitation on the other. Accordingly even if the term '*wielding*' excludes '*holding*' or '*pointing*' a dangerous weapon for the purposes of subparagraph (i), it does not preclude the same action from constituting a non-verbal threat for the purposes of subparagraph (iii).

19. By way of illustration: If something more than merely holding a weapon is required to satisfy the requirement of either '*wielding*' a dangerous weapon or constituting a threat to inflict grievous bodily harm then aggravating circumstances would not be present where, during the course of a robbery, the member of a gang was simply to put down the bag he was carrying and

without uttering a word, open it to reveal a number of firearms or other weapons that could inflict '*grievous bodily harm*".

In my view it would result in an absurdity or inconsistency of application if, during a robbery, the *'mere'* holding of an AK47 assault rifle could be regarded in a less serious light for sentencing purposes than wielding a knife.

20. Perhaps the most significant reason as to why the term *'wielding'* should not restrict the interpretation of *'threat to inflict'* is that the former provision was not contained in earlier legislation whereas the latter not only was but also became the subject of definitive judicial pronouncements from the then Appellate Division (eg; *R v Zonele and others* 1959(3) SA 319 (AD) at 329A-G approved in *S v Loate* 1962(1) SA 312 (AD) at 320E).

In section 1 of the old Criminal Procedure Act 56 of 1955 (as amended by section 4 of Act 9 of 1958- but prior to the further amendment by section 3 of Act 75 of 1959 which extended the provision to accomplices);

> "*Aggravating* circumstances *in relation to robbery 'means the infliction of grievous bodily harm or any threat to inflict such harm'*".
>
> (See *Zonele* at 329A; and see *S v Mbele* 1963(1) SA 257 (N) at 259C for the 1959 amendment)

21. In *Zonele* Holmes AJA (at the time) said the following, when finding that during a robbery each accused individually made a threat which fell within the meaning of '*aggravating circumstances*' (at 329G);

> *"(T) he first appellant threatened Roberts with grievous bodily harm by mounting guard over him with a sword. The fact that it was still in its scabbard seems to me irrelevant. In effect he was saying to Roberts "If*

you attempt to escape I shall draw and use this sword". (emphasis added)

22. It appears that the present authors of Commentary on the Criminal Procedure Act (*du Toit, De Jager et al)* may have unintentionally created some confusion when stating that; "*mere possession of a weapon is not sufficient, but the wielding of even an unloaded firearm will constitute aggravating circumstances"* (at DEF 2A on section 1of CPA).

It is evident from the context that the statement was confined to the sub-provision dealing with *"wielding".* This becomes clearer if regard is had to the cited reference, being the original *du Toit* Straf in Suid-Afrika (1981) at 45, where each subparagraph of the definition is considered separately. See also the later reference to *Loate* at 320C-F when the authors deal with the *'threat to inflict grievous bodily harm".*

23. It is also evident from the two originally defined situations that the conduct which the legislature considers should attract greater culpability ranges from the threat of inflicting grievous bodily harm to the actual infliction of such harm. Accordingly the introduction of '*wielding'* cannot be regarded as an attempt by the legislature to interfere with the already judicially defined scope of the other sub-provisions. It should rather be construed as a readily discernable collateral ground to that of threatening to inflict the requisite degree of harm. For this reason and also to avoid the inconsistency or absurdity illustrated earlier, the word "*wielding*" in subparagraph (i) should;

a. not be interpreted *expressio unius est exclusio alterius* so as to exclude every other action involving the weapon from amounting to a threat for the purposes of the sub-paragraph (iii) of the definition. In any event this aid to interpretation is generally applied with some circumspection (eg; *Dawood, Shalabi, Thomas v Minister of Home Affairs* 2000 (1) SA

997 (C) 1020E-G and 1022F). See generally Lourens du Plessis *Re-Interpretation of Statutes* at 238;

b. not be interpreted restrictively within the confines of the subparagraph.

24. This last consideration engages the fundamental interpretational principle of attempting to ascertain the intention of the legislature (including the need in statute law to have due regard to constitutional values) by reference to *"...the context in which the words occur, even where the words to be construed are clear and unambiguous."* See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at para 90. In that case Ngcobo J (as he then was) explained the proper approach to statutory interpretation (at para 90) and referred to *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) where the SCA had confirmed that :

> *"The days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in interpreting it if it seemed on the face of it to have a readily discernible meaning"*

25. The interpretation to be adopted must also ensure that unintended consequences do not arise by casting the net too wide. The facts of S *v Isaacs and another* 2007 (1) SACR 43 (C) illustrate the point if *'wielding'* is defined too broadly. In that case a knife hidden in the clothing of a co-perpetrator had inadvertently slipped out during a struggle with the complainant. According to the appellants, the co-perpetrator then only held the knife to try and regain control of it. On appeal the court found that the complainant released the handbag on seeing the exposed blade of the knife but concluded that there was no clear indication that the co-perpetrator had *"wielded the knife he had in his possession"*.

26. The danger of an overbroad definition was pertinently dealt with in *S v Mthembe* 2004 JDR 0454 (W), another case referred to by *Mr Nel* on behalf of the appellant. The court referred to the *Reader's Digest Oxford Complete Word Finder* at 1796 in which the meaning of *'wield'* includes "*flourish, swing, brandish, wave, handle, ply, use.*" The court then proceeded:

> "*Notionally the word 'wield' signifies some form of physical application (use) of the object which is 'wielded'. It seems to suggest something more than merely referring to it, or possession of it by the robber.*
> *There appears to me to be some logic attendant upon that interpretation, in that the wielding of a firearm, in the sense of pointing, brandishing, flourishing it, et cetera, would carry with it a more poignant threat to life or to do grievous bodily harm, thus bringing about a circumstance which may aptly be described as an 'aggravating circumstance'.*"

See generally *Mthembe* at paras 26-27

27. Most standard dictionaries adopt a definition for "*wield* " that requires more than just holding an object. By way of illustration *The Oxford English Dictionary* (2nd ed. Vol. XX at 323) provides among several meanings; "*To use or handle with skill and effect*" (note 5) and; "*To direct the movement or action of, to control*" (note 4).

28. Nonetheless *Zonele* informs us that the visible presence of a dangerous weapon on the person of the accused, although still sheathed (and by extrapolation, carried by that person in a holster or other overt manner) will constitute a threat to inflict grievous bodily harm for the purposes of the present sub-paragraph (iii). It confirms that there are means, other than by *'wielding'* an alleged dangerous weapon, whereby the accused indicates a threat to inflict grievous bodily harm, but that this will require proof beyond reasonable doubt (eg; *Isaacs* at paras 37-38) whether by inference or otherwise and generally by reference to accompanying words or conduct.

29. Conversely, such additional factors need not be proven where the prosecution is able to establish that the weapon was *'wielded'*. This would readily explain the introduction of the *'wielding'* sub-provision (in addition to the existing '*threat*' and *'infliction*' situations). If regard is had to the numerous courts that are generally seized with such cases on almost a daily basis, it would appear that the legislature sought to obviate lengthy and spurious arguments being raised that the brandishing or pointing of a dangerous weapon did not necessarily demonstrate beyond reasonable doubt a threat to inflict grievous bodily harm.

30. In order to give effect to the intention of the legislature as discussed earlier, the first subparagraph of the definition of aggravating circumstances seeks to describe the *actus reus* by reference to the external manifestation of a deliberate action involving a weapon where, by such action or other appearance, the assailant indicates that he would be prepared to use it. No proof beyond an action which amounts to *'wielding'* a dangerous weapon during the course of a robbery (as defined) is required in order for aggravating circumstances to be present under subparagraph (i).

31. I am therefore satisfied that the definition of the term *'wielding'* should be restricted when considered within the context of the definition of *'aggravating circumstances'* as a whole, and the prejudicial consequences to the accused of such a finding (as set out earlier) particularly by reference to the minimum sentencing policy under section 51 of the CPA. I am in respectful agreement with the decisions already mentioned which limit *'wielding'* to the standard dictionary meaning and which requires more than just possession or holding.

32. In short *'wielding'* a dangerous weapon will *per se* constitute aggravating circumstances whereas other forms of holding, carrying or possessing the weapon will not amount to aggravating circumstances unless, having regard to the circumstances, they constitute a threat to inflict grievous bodily harm for the purposes of sub-paragraph (iii).

33. Accordingly, holding a high calibre assault rifle such as an AK47 with its muzzle facing the ground, whether by one person or every member of a gang during the course of a robbery at say a fast-food outlet, may not amount to *'wielding'* in the default type situation contemplated by sub-paragraph (i) but it fits comfortably within the definition of a threat to inflict grievous bodily harm under sub-paragraph (iii).

34. Similarly a robber who opens up his jacket to expose a firearm, which results in the victim dropping his valuables and running away even before the firearm is drawn, may not have been '*wielding*' it for the purposes of sub-paragraph (i), but he was certainly threatening to inflict grievous bodily harm from the time the firearm was revealed, as determined in *Zonele* at 329G. *Zonele* remains binding precedent on the meaning of *"threat to inflict"* grievous bodily harm within the context of '*aggravating circumstances'* in robbery cases.

35. These examples illustrate the point that the circumstances under which an alleged weapon (see the toy gun case of *S v Anthony* 2002 (2) SACR 453 (C) at 454j - 455b and 456c - d) is produced or is exposed will determine whether it constitutes a threat to inflict grievous bodily harm.

36.. *Zonele* together with *Masingili* inform us that the determination of aggravating circumstances is not an objective exercise to discern intention. *Zonele* adopted a common sense approach in deciding whether the manner of displaying the weapon amounted to a threat to inflict grievous bodily harm. In such cases the starting point must surely be that a dangerous weapon is produced during a robbery in order to instil fear that it will be used to inflict grievous bodily harm should the victim not comply.

The law is concerned only with determining the *actus reus* in order to find aggravating circumstances. As mentioned earlier, the Constitutional Court

confirmed that intention plays no part in determining culpability for the purposes of conviction; this requirement is satisfied by the finding that the accused committed the offence of robbery or attempted robbery. It will however remain an aspect in the sentencing process when the court considers the presence or absence of substantial and compelling circumstances.

37. I am satisfied that in the present case the drawing of the knife during the course of a robbery where cellphones were demanded, as found by the trial court, constituted in the circumstances a threat to inflict grievous bodily harm within the meaning of sub-paragraph (iii) of the definition of *'aggravating circumstances'*.

AGGRAVATING CIRCUMSTANCES *VIS A VIS* APPELANT

38. The appellant's argument proceeds on the basis that in order to find aggravating circumstances in relation to the appellant he had to have been an accomplice, and since he was not in possession of the knife the doctrine of common purpose would have to be applied. The State's argument proceeded on a similar basis but *Mr Mphahlele* contended that it had satisfactorily demonstrated common purpose.

39. In my view there are two preceding questions that must be answered in the appellant's favour before the issues as characterised by him become relevant. The first is whether the appellant was a co-perpetrator or accomplice in respect of the robbery. The second is whether an independent enquiry must be undertaken to determine if the appellant is a co-perpetrator or an accomplice where he did not wield or threaten the complainants with a knife, and where only his co-participant did.

40. In dealing with these questions it becomes necessary to consider whether the doctrine of common purpose applies at all in order to render the appellant

culpable. This arises because both counsel argued from the standpoint that the doctrine of common purpose needed to be applied in order to find that the appellant was an accomplice for purposes of aggravating circumstances.

41. The starting point is that a person can commit an offence directly or vicariously through another and that where two or more persons agree to commit a specific crime, such as robbery, it is irrelevant what task each was assigned for its execution. Each is a co-perpetrator because he or she had agreed to commit the crime and either intended that force would be applied in order to rob or foresaw that possibility. Furthermore their agreement can be established through circumstantial evidence alone. See generally Snyman *Criminal Law* (5th ed.) at 260-262; *Hiemstra's Criminal Procedure* on section 155 of eth CPA at 22-25 and under the topic '*Unnecessary reliance on common purpose* at 22-28 to 22-29.

42. By contrast an accomplice *"is someone whose actions do not satisfy all the requirements for criminal liability in the definition of the offence, but who nonetheless intentionally furthers the commission of a crime by someone else who does comply with all the requirements (the perpetrator)".* See *Minister of Justice and Constitutional Development v Masingili* 2013 JDR 2680 (CC) at para 21 and see also Snyman at 258 para 2(b).

It is explained by reference to a person who does not participate in the commission of the offence but acquiesces in its commission by others through intentionally committing an act (such as providing information, or providing the means or the opportunity) which advances the commission of the offence or by failing to prevent the offence (in cases where the accomplice had a legal duty to act). Accordingly the *actus reus* is committed exclusively by another and there is no joint causation to hold the individual who assists liable as a co-perpetrator. It is however necessary to show that the accomplice acted, or refrained from doing so, with the intention of associating with or furthering the

criminal act of the actual perpetrator. See generally Hiemstra at 22-25 to 22-26 and Snyman at 273-6 paras 1-3.

43. The doctrine of common purpose is unrelated to finding that a person is an accomplice. It is only relevant in order to determine if he or she is a co-perpetrator. See Snyman at 258 The doctrine is invoked where a number of persons who have a common purpose to commit a specific crime, although they have not necessarily expressly agreed with one another to do so, as a fact together contribute to the commission of the offence (e.g. in cases of crowd violence leading to death). Even though it is not possible to identify which of them causally contributed to the commission of the crime the conduct of each participant will be imputed to the others thereby rendering them culpable as co-perpetrators. (See *S v Khumalo en andere* 1991 (4) SA 310 (A) at 343F-344B and 351A-F, Hiemstra at 22-27 to 22-29 and Snyman at p264-268, paras 7-10

44. It is evident on the facts that the appellant readily meets the requirements of a co-perpetrator to the crime of robbery since an agreement that they together would rob the two women can be inferred. Moreover he at all times continued to associate with his co-perpetrator when the knife was drawn and after, rendering him at the very least vicariously liable.

45. The second question is whether a separate enquiry must be undertaken to determine if the appellant is a co-perpetrator or an accomplice where he personally did not wield or threaten the complainants with a knife. This was also answered by the Constitutional Court in *Masingili* which held that there is no requirement under the definition of '*aggravating circumstances*' that the State must prove a separate intent over and above that already determined in respect of the robbery itself. This arises because aggravating circumstances does not amount to a separate offence but remains "a *form of robbery with more serious consequences for sentencing*" (at para 33) and for that reason dolus is satisfied when the court finds the accused culpable as a perpetrator,

co-perpetrator or accomplice in respect of the robbery (at para 42). Moreover the definition itself does not imply a requirement of intent (at para 48).

CONSTITUTIONALITY OF DEFINITION OF AGGRAVATING CIRCUMSTANCES

46. In anticipation of the court finding that intention is not a requirement for finding the presence of aggravating circumstances where only the appellant's associate produced the knife, Mr Nel argued that this would render the provision unconstitutional. Reliance was placed on *S v Masingili and Others* 2013 (2) SACR 67 (WCC) which held as much and referred its declaration of constitutional invalidity to the Constitutional Court for confirmation. By contrast the State relied on the Full Bench decision in this division of *S v Tsepo Mofokeng* A644/2011 which declined to follow that decision.

47. The Constitutional Court decision in *Masingili* came out in November 2013 after the case was heard by us. It will be gathered from those parts of the decision already referred to that *dolus* is not a separate requirement to be established for the purposes of finding aggravating circumstances. Since aggravating circumstances is not a separate crime, intention is determined in the finding of culpability for the robbery itself. The court accepted that aggravating circumstances is specifically relevant to sentencing. It also accepted that culpability is a factor to be weighed when considering whether substantial and compelling circumstances are present so as to justify the imposition of a sentence less than the prescribed minimum under section 51 of the CLAA.

48. The Constitutional Court held that the accused was therefore not deprived of his right to address the issue of culpability, whether in relation to the existence of substantial and compelling circumstances or when otherwise considering the triad of sentencing factors, by demonstrating that he or she lacked intent with regard to the *actus reus* which constituted the aggravating circumstances

(at paras 45-47 and 54). The court concluded that the provisions regarding aggravating circumstances were constitutionally valid.

49. Accordingly the appeal on conviction is dismissed.

SENTENCE

50. Mr Nel argued that although the appellant was legally represented such representation was totally inadequate in respect of sentencing. It was pointed out that no information was placed before the court in mitigation and the learned magistrate failed to request any.

51. There are fundamental difficulties with the submissions. The most important is that the appellant does not inform the court that he was not properly consulted on this aspect nor has he revealed the evidence that he would have produced had he appreciated their significance.

52. In my view it is not enough for an accused to claim inadequate legal representation, he must also show that it amounted to trial prejudice which deprived him of a fair hearing.

53. It is also difficult to appreciate how a failure on the part of the magistrate to make enquiries where the accused is legally represented can result, without more, in trial prejudice or a failure on the part of the magistrate to perform his duties. Under section 274(1) of the CPA a court "*may ... receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.* The provision is permissive, although the requirement of needing to be informed might not be in the case of unrepresented accused for possible constitutional reasons. However where an accused is represented a presiding officer is entitled to assume that a deliberate decision was made not to

produce evidence. Enquires direct from the bench may also produce answers that will aggravate the accused's position revealing that there was good reason not to have placed too much evidence before the court.

54. Save perhaps where the inexperience is woefully plain a magistrate might take the risk that a failure to produce further evidence was due to a failure to consult at all or incompetence. Possibly the furthest a court can go is to request whether the accused wishes time to prepare on sentencing or obtain a probation officer's report or other assessment.

55. It would be placing an unwarranted burden on a presiding officer to require, where the accused is legally represented, that a full assessment be undertaken. It is therefore unnecessary for the purposes of this case to set out in what circumstances and in respect of what possibly sentences it may be necessary to require a minimum set of information.

56. I agree that sentencing was handled by the accused legal representative in a most perfunctory manner. This appears to be due to the view taken that aggravating circumstances were shown and that the issue of culpability in relation to using a weapon through vicarious association could not be re-opened. It is also evident from the court *a quo's* reasoning that it considered the issue of culpability in relation to aggravating circumstances to be a closed topic for sentencing purposes.

57. However, since the case preceded the decision in *Masingili* it is understandable that neither the legal representative nor the trial court would have been aware that the issue of *dolus* in regard to culpability for the production of the knife by the associate is a factor relevant to sentencing and may result in finding the existence of substantial and compelling circumstances justifying a reduction in the minimum prescribed sentence.

58. While the terminology used may sound inappropriate since this court readily appreciates that the decision in *Masingili* came out after sentencing in the present case, the outcome of the Constitutional Court decision and its reasoning results in a misdirection by the trial court in;

    a. assuming that the appellant's distinct culpability in relation to the finding of aggravating circumstances could in law be no different to that of his co-perpetrator who actually held the knife; and

    b. thereby failing to consider that the appellant's culpability in relation to aggravating circumstances might result in finding substantial and compelling reasons justifying a reduction in the minimum sentence of 15 years.

59. We have considered whether to determine sentence ourselves. It however appears more appropriate to remit the matter back to the regional court as it will give the appellant an opportunity to present such further evidence as may be considered relevant to inform the court on an appropriate sentence.

ORDER

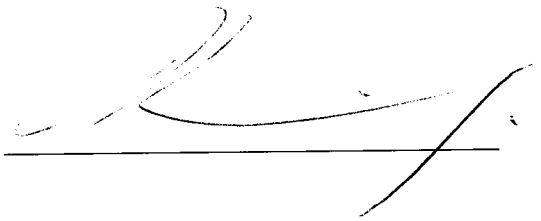
60. In the result;

    1. The appeal in respect of conviction is dismissed;

    2. The sentence of fifteen years is set aside

    3. Sentencing is referred back to the presiding magistrate or if not available as contemplated under section 275 of the CPA that another regional court magistrate imposes sentence afresh.

SPILG J



MASIPA J

I agree and it is so ordered.

DATE OF HEARING:	28 October 2013
DATE OF JUDGEMENT:	28 May 2014
LEGAL REPRESENTATION:	
FOR APPELLANT:	ADV V.Z NEL LEGAL AID SA, PRETORIA
FOR RESPONDENT:	ADV W.K.K MPHAHLELE DIRECTOR OF PUBLIC PROSECUTIONS