IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 44/13

In the matter of:

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First Appellant
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Second Appellant

and

NANTOMBI MASINGILI	First Respondent
SIYABULELA VOLO	Second Respondent
MZONKE MLINDALAE	Third Respondent
SITHUMBELE GOVUZA	Fourth Respondent

MAIN HEADS OF ARGUMENT (SECOND APPELLANT)

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INTRODUCTION

1. The respondents were tried, convicted and sentenced in the Regional Court, Cape Town on a charge of robbery with aggravating circumstances.

2. With leave of the trial court all the respondents appealed to the Western Cape High Court against their convictions and imposed sentences.

3. In a judgment dated 20 March 2013 the Western Cape High Court held that the term "or an accomplice" in Section 1(1)(b) of the Criminal Procedure Act, 1977 (Act 51 of 1977) (the "CPA") was inconsistent with the Constitution and therefore invalid.[1] The appeal on the merits has been postponed *sine die* pending the decision of this Honourable Court regarding the order of invalidity.[2]

4. On 15 April 2013 second appellant (hereinafter referred to as the "appellant") lodged a Notice of Appeal Against the Order of Constitutional Invalidity in terms of Rule 16(2) as envisaged in Section 172(2)(d) of the Constitution.

5. The National Director of Public Prosecutions opposes the confirmation of the declaration of invalidity of sections 1(1)(b) of the Criminal Procedure Act 51 of 1977 proposed by the Western Cape High Court in this matter (hereinafter referred to as the *"Court a quo"*) on the grounds that:

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[1] Record (Vol.6): Page 30.
[2] Record (Vol.6): Page 28, para.[4].

(i) the interpretation accorded to the provisions of section 1(1)(b) of the CPA by the Court a *quo* is, with respect, incorrect and that the section does not exclude the element of fault on the part of an accused to be convicted of robbery with aggravating circumstances; and

(ii) the interpretation accorded to the provisions of section 1(1)(b) by the Court a *quo* is, with respect, incorrect and that the section does not violate an accused's right to freedom and security of the person or an accused's right to a fair trial.

THE ISSUE

6. The appeal turns on whether, due to the application of the definition of aggravating circumstances as set out in Section 1(1)(b) of the CPA, strict liability attaches to an accused whose participation in the crime only fulfills the requirements for conviction as an accomplice to the crime of robbery, but such an accused is convicted of robbery with aggravating circumstances.

RELEVANT LEGISLATION

7. Aggravating circumstances are defined in Section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977) as:

" (1) In this Act, unless the context otherwise indicates- 'aggravating circumstances', in relation to-

(a) .....

(b) robbery or attempted robbery, means-

(i) the wielding of a fire-arm or any other dangerous weapon;

(ii) the infliction of grievous bodily harm; or

(iii) a threat to inflict grievous bodily harm,

by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence;" [Underlining added].

8. Robbery is listed in Part II of Schedule 2 to the Criminal Law Amendment Act 105 of 1997 (The so-called minimum sentencing legislation). The said Act commenced 13 November 1998. The relevant part of the schedule reads as follows:

"5. ….

6. Robbery-

(a) when there are aggravating circumstances ; or

(b) ….." [Underlining added]

9. With regards to the minimum sentence for "robbery, when there are aggravating circumstances", section 51(2) of Act 105 of 1997 reads:

"(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-

(a) Part II of Schedule 2, in the case of-

(i) a first offender, to imprisonment for a period not less than 15 years;…" [Underlining added]

10. The relevant part of section 12(1) of the Constitution of the Republic of South Africa, 1996 (the "Constitution") reads:

"(1) Everyone has the right to freedom and security of the person, which includes the right-

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) …."

11. Section 35(3)(h) of the Constitution reads:

"3) Every accused person has a right to a fair trial, which includes the right-

(a) ….;

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;"

PURPOSE OF SECTION 1(1)(b) OF THE CPA

12. Appellant respectfully submits that the wording of the above section is unambiguous and that the intention of the legislation is clear. The provisions of the section was clearly designed to render an accused liable for conviction as an accomplice to robbery with aggravating circumstances, providing that

any one of the three circumstances mentioned in section 1(1(b) of the CPA is present.

13. The above approach is in line with with the approach stated by the Honourable Justice Mokgoro in *Bertie van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* 2010 (2) SA 181 (CC)[3] a purposive approach to statutory interpretation. The Court states at 192, para.[21]:

"[21] Our Constitution requires a purposive approach to statutory interpretation. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*, Ngcobo J stated:

'The technique of paying attention to context in statutory construction is now required by the Constitution, in paraticular, s 39(2). As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights.'

Indeed this approach is one that has been applied in varying degrees by our courts under the common law. The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law." [Footnotes omitted].

[3] 2010 (2) SA 181 (CC).

THE FACTS

14. The factual matrix underlying the conviction is summarized by the Court *a quo* as follows:

> **"**The broad picture that emerged from the evidence is that the four appellants acted in concert in committing a robbery at the complainant's shop. First appellant inspected the premises, then returned to their vehicle. Second appellant was the driver of the vehicle. He remained in the vehicle whilst the robbery was taking place. Third and fourth appellants entered the shop and robbed the complainant of cash and a few articles. A knife was used to threaten the complainant."[4]

The evidence is more fully set out by the Court *a quo* on pages 7 to 11 of the record (Vol.6) and appellant does not intend to repeat it, safe to mention that the evidence did not establish knowledge on the part of first and second respondents (first and second appellants in the Court *a quo*) of the knife that was used in the robbery.

BASIS OF THE CONVICTIONS

15. Since the approach followed by the trial court in convicting all the respondents of robbery with aggravating circumstances is, with respect, not apparent from

[4] Record (Vol 6): Page 3, para [4].

the judgment of the trial court, the Court *a quo* postulated three approaches which the trial court might have followed. The Court *a quo* based its finding of constitutional invalidity on its conclusion[5] that the trial court had convicted first and second respondents on the following basis:

"The third possibility is that she might have concluded that they were accomplices to the robbery and therefore, as a result of the application of the definition of aggravating circumstances in section 1(1)(b) of the CPA, *guilty of robbery with aggravating circumstances*."[6] [Underlining added].

And further:

"We accordingly conclude that the magistrate in all likelihood followed the third approach referred to above, namely that she found that the first and second appellants were accomplices to the robbery and therefore, as a result of the application of the definition of aggravating circumstances in section 1(1)(b) of the CPA, *guilty of robbery with aggravating circumstances*."[7]

16. Appellant respectfully submits that the question as to whether robbery *simpliciter* and robbery with aggravating circumstances are "two different offences"[8], needs not be addressed *in casu*. It is respectfully submitted that in terms of South African law it is legally impossible to convict an accused of

[5] Record (Vol.6): Page 14, lines 6-11, para [27].
[6] Record (Vol.6); Page 13, lines 5-9, para [24].
[7] Record (Vol 6): Page 14, lines 6-11, para [27].
[8] Record (Vol.6): Page 21, line 13, para [38].

robbery with aggravating circumstances if his or her participation in the crime renders him or her an accomplice to robbery only. Appellant submits that the trial court could not have followed such an approach and that the Court *a quo* erred in this regard. If an accused advanced or furthered the commission of the crime of robbery *simpliciter*, he is convicted as an accomplice to robbery. To hold otherwise would, with respect, amount to an absurdity.

NO CONSTITUTIONAL INFRINGEMENT

17. It is respectfully submitted that no constitutional issue arises as no violation of any rights contained in the Bill of Rights is violated. Whether the first and second respondents are guilty of; (1) robbery with aggravating circumstances or; (2) robbery *simpliciter* or; (3) as an accomplice to the crime of robbery with aggravating circumstances or; (4) as an accomplice to the crime of robbery is a factual one and depends on the facts of each case.

18. As is argued below, an accomplice must have the intention to commit the crime of robbery to be liable for conviction as an accomplice to robbery. Furthermore, absent any of the three jurisdictional facts mentioned in section 1(1)(b) of the CPA, an accused cannot be convicted of accomplice to robbery with aggravating circumstances. An accomplice remains an accomplice and cannot be convicted of the principle crime, in this instance as proposed by the Court *a quo* of robbery with aggravating circumstances.

CONCEPTS PERPETRATOR AND ACCOMPLICE

19. In view of the approach adopted by the Court of appeal it is apposite to deal with certain aspects of liability as an accomplice to a crime.

20. It is submitted that the distinction between the concepts perpetrator and an accomplice has been more precisely delineated since the case of *S v Dhlamini* 1974 (1) SA 90 (A) and as such the case is not of any assistance with regards to the nature of fault required on the part of an accomplice. Accomplice liability has evolved to such an extent that it has been held by the courts and suggested by academic writers to constitute a separate crime.

21. Burchell *Principles of Criminal Law* (3ed) defines an accomplice as follows at 599:

> "An accomplice is one who takes part in the commission of the crime, but not as a perpetrator or an accessory after the fact. Accomplice liability is distinct from that of the perpetrator, being based on the accomplic's own unlawful conduct and fault (*mens rea*), but it is also liability which is accessory in nature in that there can be no question of accomplice liability without the existence of a perpetrator who commits the crime"

22. In relation to intent the learned author states at 604:

"In order to be convicted as an accomplice, a person must have intentionally furthered or assisted in the commission of the crime by someone else. *Dolus eventualis* would be sufficient for liability as an accomplice. Thus, liability as an accomplice could result if the accused foresaw the possibility that the principal offender's crime was being or was about to be committed and, accepting this risk into the bargain, went ahead and furthered or assisted in the commission of that crime."[Underlining added].

23. The learned author of Snyman *Criminal Law* (5ed) states the following about the required intention of an accomplice at p.276:

"To be liable as an accomplice a person must *intentionally* further the commission of a crime committed by somebody else.

…

The principles relating to intention as a requirement for accomplice liability are the same as the principles governing the general requirement of intention in criminal law: *dolus eventualis* is therefore sufficient."

24. Criminal liability as an accomplice to a crime is a substantive crime.

The learned author of Van Wyk *Algemene Beginsels of Besondere Misdade* De Jure (Vol.1) 1977 at page 165 states as follows:

"Ook in hierdie geval beskou Van der Merwe, met respek tereg, hierdie regsfiguur nie as 'n algemene beginsel nie, maar as 'n besondere misdaad en omskryf hy die misdaad soos volg:

'*Hy wat op wederregtelike en opsetlike wyse die pleging van 'n misdaad deur iemand anders bevorder, is skuldig aan die misdaad medepligtigheid en strafbaar met dieselfde strawwe as wat opgelê sou word by skuldigbevinding aan die misdaad Aldus bevorder.*'"

And further at 167:

"Respekvol word met Rabie saamgestem waar hy verklaar:

'Ek wil graag die standpunt van ons regspraak onderskryf: m.i. hou die woorde vereenselwiging of bevordering begripsmatig in dat die optrede opsetlik moet geskied. Mens kan jou nie met iets vereenselwig of dit bevorder as jy nie kennis daarvan dra nie. Nalatige vereenselwiging of bevordering is vir my 'n contradiction in *terminis* …. Die medepligtige moet derhalwe, soos ons regspraak vereis, bewus wees daarvan dat dit waarmee hy himself vereenselwig 'n misdaad is of moontlik kan wees."

25. The learned author of Rabie *Some complications of Section 90 of the Criminal Procedure Act,* THRHR, Feb 1985 at p.86 set out the position as follows:

"(Contrary to *Tommy supra* it was held (333-334) that, since the crime of the accomplice is separate and distinct from that of the perpetrator, the forerunner of section 90 of the Criminal Procedure Act did not apply to accomplices and that no onus was consequently cast upon the accomplice)."

And at p.87:

"Although there is a considerable degree of uncertainty in our case law in regard to what exactly the accomplice's intention comprises (cf Joubert (ed) *The Law of South Africa* vol 6(1981) para 133), it is submitted, following *De Blom* (*supra*) which admittedly, related only to the perpetrator), that the accomplice must know that the perpetrator's act is unlawful, otherwise he would not be aware of the fact that he is furthering a criminal act."[9]

26. Van Oosten De Jure (Vol.2), 1979 at page 361 argues as follows:

"Kortom, die dadersmisdaad en die medepligtigheidsmisdaad is twee selfstandige en asfonderlike misdade omdat hulle twee verskillende hoedanighede, elk met sy eie vereistes, aandui waarin 'n person strafregtelike aanspreeklikheid kan opdoen."

27. The full bench of the Western Cape High Court stated as follows in *S v Hess and Another* (A596/2005) [2008] ZAWCHC 251 (22 August 2008):

[9] At p.87.

"As explained by Burchell. Principles of Criminal Law, 3rd Edition, page 602, an accomplice commits a substantive crime in his or her own right."

28. The learned authors of Burchell (*supra*), when dealing with the element of causation, state as follows at 602:

"The accomplice, in fact, commits a separate crime to that committed by the perpetrator."

29. Appellant respectfully submits that an accomplice is not a perpetrator nor a co-perpetrator, but is a person who advances the commission of the crime. It is settled law that an accomplice's can be given the same sentence as the perpetrator. It is however, not compulsory to impose the same punishment on a perpetrator and an accessory.

30. Generally, an accomplice's intention, proven by facts or by inference, is to advance the commission of a crime (or a crime consequent thereto) by a perpetrator of the crime. This follows that intention on the part of the accomplice to advance the commission of the crime by the perpetrator is present. It is respectfully argued that such intent is inclusive of the intention to commit the crime by the perpetrator,.

31. Appellant respectfully submits that the question of strict liability does not come into play as far as an accomplice's culpability for the crime of robbery (or for

that matter, robbery with aggravating circumstances) is concerned. After all, an accomplice's criminal liability does not stem from statute.

32. It is respectfully contended that unless an accused's intention was to advance the commission of robbery involving any of the aggravating circumstances mentioned in section 1(1)(b) of the CPA, such an accused cannot be convicted as an accomplice to robbery with aggravating circumstances.

SINGLE OR SEPARATE CRIMES

33. Should this Honourable Court be of the view that the issue of two forms of a single crime or two separate crimes is relevant, appellant makes the following submissions.

34. Robbery with aggravating circumstances is simply a form (with the attributes mentioned in section 1(1)(b) of the CPA) of the crime of robbery. It respectfully submitted that the case law referred to by the Court *a quo* is not conclusive of the fact the two distinct crimes exist.

35. *S v Legoa*[10], by the full bench of the Supreme Court of Appeal (SCA), is with respect not authority for the proposition that robbery and robbery with aggravating circumstances are two different crimes. That case dealt with the

[10] 2003 (1) SACR 13 (SCA) at 21E-F [para. 18]. Judgment by the Honourable Judge of Appeal Cameron (Vivier JA, Streicher JA, Brand JA and Lewis AJA concurred).

aggravating circumstances being proved before conviction. The Court states the following:

"[18] It is correct that, in specifying an enhanced penal jurisdiction for particular forms of an existing offence, the Legislature does not create a new type of offence. Thus, 'robbery with aggravating circumstances' is not a new offence. The offences scheduled in the minimum sentencing legislation are likewise not new offences. They are but specific forms of existing offences, and when their commission is proved in the form specified in the Schedule, the sentencing court acquires an enhanced penalty jurisdiction. It acquires that jurisdiction, however, only if the evidence regarding all the elements of the form of the scheduled offence is led before verdict on guilt or innocence, and the trial court finds that all the elements specified in the Schedule are present." [Underlining added].

36. Neither is the case of *S v Gagu*[11], where the *dictum* in *S v Legoa* was referred to. The passage in the former case should be construed in the context of the judgment in the latter case. The relevant passage in the *Gagu* case reads:

"[7] With regard to these divergent views, I agree with the conclusion by Nepgen that the appellants were not convicted of an offence referred to in Part I of Schedule 2 to the Act. As was pointed out by Cameron JA in *S v*

[11] 2006 (1) SACR 547 (SCA**) a**t 551B-C, para.[7]. Judgment by the Honourable Judge of Appeal Brand (Navsa JA and Van Heerden JA concurred).

Legoa 2003 (1) SACR 13 (SCA) ([2002] 4 All SA 373) para [14], it is evident from the wording of s 51(1) of the Act, first, that the elements of the offence of which the accused person had been convicted must be established before conviction and, second, that such conviction must encompass all the elements of the offence set out in the particular part of Schedule 2."

37. So too is the case of *S v Mokela*[12] where the Honourable Judge of Appeal Bosielo (Mthiyane JA and Maya JA concurring) stated:

"The conviction must be robbery with aggravating circumstances. Robbery and robbery with aggravating circumstances are two different offences calling for different sentences.

[7] In its judgment the court below correctly pointed out that there is a distinction between robbery and robbery with aggravating circumstances. "

38. In *S v Dhlamini and Another*[13] the Appellate Division, after an historic overview of the amendments to the definition of aggravating circumstances, held that the section covers the accomplice as well as the perpetrator. It is important to have regard to the facts of the *Dhlamini* matter as summarised by Holmes JA:

[12] 2012 (1) SACR 431 (SCA) at 435B-C.
[13] 1974 (1) SA 90 (A).

"The appellants were both convicted. Aggravating circumstances were found to have been present because, during the course of the joint attack upon the complainant by the appellants, one of them lunged at her with a sharpened piece of iron, exh. 1, causing her to let go of her handbag."[14]

The Court proceeded as follows:

"FANNIN, J., was of the same opinion. The learned Judge expressed himself thus _

"It seems to me to place an unduly restrictive interpretation upon the amendment introduced by Act 75 of 1959, to say that all that was intended was to enact that the accused is guilty of robbery with aggravating circumstances where an accomplice has done or threatened grievous bodily harm at the instigation of the accused or where the accused has made himself a paraty thereto. As I understand the section, the Court has got to look at what happened and say: 'Was grievous bodily harm done?' or 'Was there a threat of grievous bodily harm?' If the answer to that is 'Yes', the next question is: 'Was it done or threatened by the accused or by an accomplice of the accused?' If the answer to that question is also 'Yes', then the accused is guilty of robbery with aggravating circumstances."

See, too, *R*. v *Jacobs*, 1961 (1) SA 475 (AD) at p. 484, *in fin*.

In my view FANNIN, J., was right in the view which he took of the matter."[15]

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[14] *S v Dhlamini* (*supra*) at 93A-B.
[15] *S v Dhlamini* (*supra*) at 439E-G.

INTENT NOT A CONSTITUTIONAL REQUIREMENT

39. Even if this Honourable Court finds the above submission to be wrong, it is respectfully submitted that intent in the present matter (robbery being a hybrid crime) is not a "constitutional requirement". With regards to the mental element, the court in confirming a conviction on a charge of unlawfully causing bodily harm, held in *R v DeSousa*, as quoted in Hogg *Constitutional Law of Canada* (3ed) at 44-28 (*in fine*) that:

> "…there was 'no constitutional requirement that intention, either on an objective on[16] subjective basis, extend to the consequences of unlawful acts in general'"

40. The facts of the above matter as stated by the learned authors are:

> "… the accused, while in a fight, threw a glass bottle that shattered against a wall, causing fragments of glass to injure an innocent bystander. The accused neither intended nor foresaw this injury. However, the injury was used as a basis of a Criminal Code charge of unlawfully causing bodily harm. This offence carried a penalty of imprisonment(ten years in fact), so that s.7 of the Charter was applicable."[17]

[16] Should be clearly be "or".
[17] At 44-28.

41. In the United States of America the doctrine of natural and probable consequences applies to accomplice liability. In terms of the said doctrine an accomplice need not have the same intent as the perpetrator or that he or she had the intention to commit the specific crime by the perpetrator, but he or she is criminally liable for the acts committed the perpetrator that are natural and probable consequences of the criminal venture he or she intentionally participates in.

42. Appellant respectfully submits that whether one is dealing with a single or two separate crimes is neither here nor there as far as the requirement of fault (or no fault at all) on the part of an accomplice to robbery is concerned.

43. An accused is not convicted as an accomplice to robbery or robbery with aggravating circumstances based on strict liability. It is incumbent upon the State to prove an accused's guilt beyond a reasonable doubt, including proof beyond reasonable doubt of an accused's intention to advance the commission of the crime. No reverse onus rests on the accused by the application of the definition of aggravating circumstances in section 1(1)(b) of the CPA.

44. It is respectfully submitted that fault, in the form suggested by Snyman *Criminal Law* (*supra*) is a prerequisite for conviction of an accomplice and that the issue of strict liability does not arise. Hence, the basis for the finding by the Court a quo that the phrase "or an accomplice" infringes the rights

contained in section 12(1)(a) (the right "not to be deprived of freedom arbitrarily or without just cause')[18] and section 35(3)(h) (the right "to be presumed innocent, to remain silent, and not to testify during the proceedings.")[19] falls away.

45. Appellant respectfully submits that the above two rights are not limited by the application of section 1(1)(b) of the CPA and that the need for arguing justification of a limitation falls away.

APPROPRIATE REMEDY

46. Should this Honourable Court find the phrase "or an accomplice" to be in violation of an accused's constitutional rights, it is respectfully submitted that an appropriate remedy in line with the principles laid down in *S v Manamela and Others* 2000 (1) SACR 414 (CC) at 438B-F, para [57] and *S v Coetzee and Others*[20] would be to read in the fault requirement.

CONCLUSION

47. In conclusion appellant respectfully submits that strict liability does not attach to an accomplice to robbery and that the constitutional rights of an accused are not violated by the application of section 1(1)(b) of the Criminal Procedure Act. The section, as it stands, does not prejudice an accused person and does not compel the court to do anything in breach of the Constitution.

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[18] Record (Vol.6): Page 25, para [50].
[19] Record (Vol.6): Page 27, para [54].
[20] 1997 (1) SACR 379 (CC) at par.[226].

48. Appellant respectfully requests this Honourable Court not to confirm the order of invalidity of the Court *a quo*.

DATED AT CAPE TOWN this 28th DAY of JUNE 2013.

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ADV W B TARANTAL

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TO: **THE REGISTRAR**
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LIST OF AUTHORITIES

SA CASES

S v Dhlamini 1974 (1) SA 90 (A) at 93A-B.

S v Hess and Another (A596/2005) [2008] ZAWCHC 251 (22 August 2008)

S v Legoa 2003 (1) SACR 13 (SCA) at 21E-F, para [18].

S v Gagu 2006 (1) SACR 547 (SCA**)** at 551B-C. para [7].

S v Mokela 2012 (1) SACR 431 (SCA) at 435B-C.

Bertie van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others 2010 (2) SA 181 (CC) at 192 , para [21]

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BOOKS

Burchell *Principles of Criminal Law* (3ed) at 599.

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SA LAW JOURNAL ARTICLES

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