IN THE HIGH COURT OF SOUTH AFRICA,
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: AR 654/12

In the matter between:

Mpho Ndumiso Mbatha and 8 others

And

The State

Draft Judgment

Background

The appellants were convicted in the Regional Court at Ulundi on one count of robbery and were sentenced to a period of imprisonment of fifteen years. Leave to appeal against conviction was refused and the appellants petitioned the High Court. Materially, the appellants did not apply for leave to appeal against sentence. The High Court on petition on the 21 February 2013 granted leave to appeal against both conviction and sentence. This matter has a long and protracted history and much of this is captured in the judgment of Van Zyl J in this matter delivered on the 18th of February 2016. It is not necessary for the purposes of this judgment to traverse this history in detail. Suffice it to say that that the applicants were required in terms of the judgment of Van Zyl J to apply for condonation and for leave to appeal against sentence from the Regional Court sitting at Ulundi. This court having indicated that it was not jurisdictionally competent for the High Court to grant leave in respect of sentence if the appellants failed to apply for leave to appeal against sentence from the Regional court. A petition to the High Court would only be entertained if the learned magistrate declined the application for leave to appeal against sentence. Thus it was held that granting of leave to appeal against sentence in these circumstances was without legal effect. The leave granted in respect of conviction therefore stood. In order to rectify the situation the appellants made an application for condonation and for leave to appeal against sentence. In April 2016, the magistrate that heard the matter granted the condonation application and afforded the appellants leave to appeal against sentence. The appeal in respect of both conviction and sentence in now properly before us.

The charge:

The appellants were originally charged in the Regional Court, Ulundi on four counts of robbery with aggravating circumstances, conspiracy to commit robbery and with the unlawful possession of a fire-arm and ammunition as detailed in the charge sheets. The appellants pleaded not guilty to all the charges and in a statement made in terms of section 115(3) of the CPA 1977, all the accused except accused 1. 3 and 4 admitted that 'on the morning of the 22 December 2008 at or near Shoprite Ulundi they were arrested by members of the South African Police Services.' Unlike the others accused, Accuseds number 1, 3 and 4 were not arrested at the scene. On the 20th of September 2011 after an application was made in terms of section 174 of the CPA, all the appellants were discharged in respect of counts 5, 6, and 7 of the charge sheets. In addition, accuseds 1, 3 and 4 were found not guilty of all counts and discharged.

After the evidence was led and after consulting with the parties, the magistrate amended counts 1 to 4 to be one single count of robbery with aggravating circumstances and convicted all the appellants. This composite count stated that on or about the 21 December 2008 and at the Shoprite Checkers store, the appellants unlawfully assaulted security guards and employees of Shoprite, Dumisani Makhoba, Ntokozo Zulu, Senso Mthetwa, and Sicelo Dumisa, and took by force and violence their possessions which included cellphones and cash. It was alleged that aggravating circumstances were present as a fire-arm was used in the commission of the offence. Reference was made to the minimum sentencing provisions as provided for in section 51(2)(a) of Act 105 of 1997.

Summary and analysis of the evidence

It is common cause that employees were working at the Shoprite/ Checkers Store and were stock taking on the 21 December 2008. After midnight and about 12h20 am, Mr D Makhoba, a security guard saw a white Toyota van outside the gate. He was informed by persons in the van that they had come from Empangeni to resolve electricity problems. There were people seated in the bin of the bakkie. He asked for some proof and was shown a blank sheet of paper. While this was happening two persons alighted from the bakkie on the pretext of wanting to urinate. He was then grabbed by his jacket and 'heard a gun in back of his head' and was ordered to open the gate. Accordingly, he heard and felt a gun to his head. He was made to lie down next to a colleague in the shop and heard one of the assailants saying over the phone that the two have been secured. After he lay down his hands were tied and his money and cellphone were taken. The assailants then ordered the manager, Mr Kunene, to go into the office where the safes were located. The assailants returned looking for extension cables. Shortly afterwards, the police appeared and untied them. The police appeared with one of the appellants whom the witness stated had forced them earlier to lie on the floor He did a dock identification and identified accused number 12 who is Milton Majozi (8th appellant)as one of the persons who were present while they were being coerced to lie down and who had been arrested by the police. He got neither his cellphone nor his cash back. Under cross-examination, he agreed that he did not see the fire-arm but stuck by his story that he heard and felt it. It was clear that the suggestion that it may have been a finger being pointed at him was dismissed by the witness when he stated that he would have felt that it was a finger. It is most improbable that Makoba having testified that heard and felt the gun would have accepted that it was a finger that was pointed at him. The appellants forcibly gained access to the premises by threatening Mr Makoba, took away his cellphone and cash in order to prevent him informing people about the robbery, tied him and directed Mr Kunene to take them into the office containing the safes. This was all done in furtherance of the ultimate objective of breaking into and removing the contents of the safe.

Mr Sibusiso Zulu was employed at Shoprite and was working on the 21st December 2008. He also noticed a white vehicle outside the gate with passengers in the bin when he went outside to throw away some boxes. Two persons hiding in the area emerged and pointed fire-arms at him. Under cross-examination he stated that one of the guns was shinny and the other was not but was not able to describe them further in any detail. He was then forced to enter the store, lie besides the other employees and was tied up. His Alcatel cellphone was also taken away from him. He also testified that there were a number of people in the gang and confirmed that some of them returned asking for extension cables. The police arrived and searched for the suspects. Much later they returned with a person whom this witness identified as accused 12 (8th appellant Majosi) . On the 31st of December 2008, he later identified his cellphone which was in the possession of the police. He identified accused 9 (6th appellant), George Mbangeni, as the person whom the police found hiding in the stock room of the store. He did not notice Mbangeni bleeding as alleged by the accused.

Mr Senso Mthetwa was also employed by Shoprite as a packer and was on duty on the 21st of December 2008. At about midnight he went to pick up stock from the bulk store room. When he was in the store room, he heard footsteps, he turned around and saw three males behind him. One of whom pointed a fire-arm at him and ordered him to be quiet. Under cross-examination, he described the gun as black. He was made to lie on the floor with the others and his hands were tied. He also testified that there were many members of the gang in the store. He was also robbed of both his Nokia and Motorola cellphones. He later identified his cellphone which was in the possession of the police.

Mr Sicelo Nicholas Dumisa was employed as a security guard at Shoprite on the 21st of December 2008. He saw Senzo Mthetwa and two persons walking on either side of him. He did not recognise these persons on either side of Mthetwa and he asked them what they wanted inside the store. One of them then pointed a fire-arm at him. His hands were tied with his shoelaces and he was forced to lie down with his colleagues. He also testified that his cellphone and a sum of money was taken from his wallet. He later identified his cellphone from a bag that was in the possession of the police. He identified accuseds 7(Motloung 4th appellant) and accused 9 (Mbangeni)as the persons who accosted him and specifically identified accused 9 as the person that pointed the fire-arm at him. He also testified that he saw accused later being taken out of the stock room by the police. Under cross-examination, he confirmed that some of them were arrested in the store and some of them were arrested outside. The witness also testified that he heard gunshots.

Mr Innocent Kunene was a trainee manager employed at Shoprite/Checkers and was on duty on the 21st of December 2008. He testified that after 12 midnight, he was accosted by two males in the store, one of whom pointed a fire-arm at him. They took away his cellphone and made him lie down with the other employees. He was identified by the other employees as the manager and the assailants asked for the keys to the safe. He went with them to the cash office and indicated that he did not know which safe contained the money. He was then taken out of the office and saw members of the gang coming in carrying grinders. He was also assaulted by one of them, whom he identified as accused 13 (9th appellant Lucky Nxumalo). They reappeared and demanded extension cords and one of the employees took them to where the extension cords were stored. They then took the extension cords into the office but did not manage to open the safe. He identified accused 9 (Mbangeni) as the person that pointed the fire-arm at him and that accused 8 (5th Appellant– M Ndlovu)took the cellphone from him. Although he never recovered his cellphone, for some reason the accused were not charged with robbing Mr Kunene's of his cellphone. He testified that accused 8 and 9 were arrested at about 4 or 5 am and that accused 13 was arrested in the stock room.

Velaphi Mabika is an inspector with the SAPS and is stationed at Ulundi. He was on duty on the 21st of December 2008 and received a report that that there was a robbery at the Shoprite store. Together with Captain Mbeje, he proceeded to the Shoprite store and upon arrival saw a white vehicle parked in the area where goods are overloaded. The vehicle did not have rear number plates and he saw a number of persons in blue overalls. He called one of the persons who identified himself as Mpho Mbatha who informed him that they work for a construction company and that were there to render repairs. While he was speaking to Inspector Mabika, Mbatha told the others in blue overalls to continue working. At this time he was outside and they were inside the yard. He asked for an entrance permit, entered the area and after inspecting the vehicle realised that the front registration plates did not correspondent with the registration number on the licence disk. As he was suspicious, he circulated the details of the vehicle to the station and called for back-up. After the other police had arrived, he shouted that people inside the premises must raise up their hands. He then testified that one person emerged carrying a shinny fire-arm and ran out of the gate. He thought that the police outside would be able to apprehend him. He then testified another of the gang who appeared coloured in appearance drew a fire-arm and fired. Captain Mabika drew his weapon and the person then threw down his fire-arm. This person later identified himself as George Mbangeni (accused 9 app 6th app) and he was made to lie down next to Mbatha and Majozi. He also testified that he removed a fire-arm with the serial number R11826 and four rounds of live ammunition from the scene. He stated that he did not shoot accused 9 and could not recall whether he was wounded on that day. In cross-examination he stated that cellphones belonging to the employees were found in Mbatha's vehicle. He confirmed that he registered the fire-arm on the SAP 13 form but was unable to state whether it was taken for a ballistic test. It is also common cause that the vehicle was in fact registered in the name of accused 2, Mpho Mbatha. However he was unable to identify Mpho Mbatha in court.

Sifiso Mbeje is a captain in the SAPS stationed at Ulundi. He also went to the Shoprite store upon receiving reports of the robbery in progress. He identified accused 12 as one of the persons with the group who was in the loading area and told the rest to continue working. He testified that accused 9 shot and then fell on some boxes. He confirmed that accused 2 (1st Appellant Mbatha). 9(Mbangeni) and 12(Majozi) were present. Accused 12 was then taken into the store by Constable Shongwe. He also testified that Jozi or (Majozi) was found hiding in the shop and had the keys of one of the vehicles that were found at the Zulu homestead on him. He noticed that accused 9 was bleeding on his forehead but was of the view that it was not a serious injury and that he may have scratched himself. Under cross-examintion, he stated that accused 9 fired in the direction of Inspector Madika but that the latter did not fire back at him.

LK Mduli is a constable with the SAPS and also attended the scene on the 21st of December 2008. When he entered the store, he was informed by the manager that two of the persons who were in the vicinity of the employees were in fact part of the gang. He recorded the names of these individuals as Msholozi Khumalo and Sandile Hlambanyani. Khumalo and Hlambanyani told him that there were other members of the gang in various parts of the shop. The police then searched the store and found four other persons hiding in various parts of the store. These he identified as M Ndlovu accused 8(5th App), Z Majozi, T Motlaung (4th app) accused 7 and Thato Madisha.(acc 11) He confirmed that the manager had stated that M Ndlovu accused 8 (5th App) had demanded the keys from him. M Ndlovu(5th app) was then searched and the keys to the cash office were found in his pocket. He also had three cellphones on his person. He also testified that they found Nxumalo (9th app) hiding in the store room amongst the boxes. When questioned by the court he confirmed that all the persons arrested at the Shoprite/Checkers were taken together in vehicles and conveyed to the police station.

Captain Vezi Shongwe is a member of SAPS and also attended the scene on the 21st of December 2008. He confirmed that they entered the store and identified themselves as police officers. He found some persons lying on the floor and Mr Kunene told him that a group had entered the store, pointed fire-arms at them and ordered them to lie down. The manager then pointed to two people who were not employees and stated that they were part of the gang. These people identified themselves as M Khumalo and S Hlambanyani and informed the police that there were other members of the gang in the store. He confirmed that they search the store and apprehended 4 other persons whose names he recorded in his statement as M Ndlovu, Z Majozi, T Motlaung and Thato Madisha. He also confirmed that the manager indicated that it was M Ndlovu who had demanded the keys to the cash office. He searched M Ndlovu and found the keys which the manager identified as the keys to the cash office. M Ndlovu also had three cellphones in his possession. They later found two grinding machines and various items such as balaclavas, gloves and extension cords. He also confirmed that they later found Nxumalo (accused 13) in one of the store rooms inside the store. He testified that he (Shongwe) was injured by what he assumed was a bullet that ricocheted off a wall while he was in the receiving area.

As stated earlier that it was common cause that the appellant 1 (Mbatha) was the owner of the Toyota bakkie found on the premises of Shoprite and appellant 10 (LB Khumalo) was the owner of the microbus found at the homestead of SL Zulu who was accused 1.

It is pertinent that all the accused were arrested either hiding in the store or in the vicinity of the store. None of the appellants testified and no evidence was led on their behalf refuting relevant aspects of the state's case. As stated earlier, the learned magistrate decided after consulting with the legal representatives to treat the remaining four counts as one count of robbery. The appellants arrived at the Shoprite/Checkers premises after midnight in a vehicle (a Toyota Bakkie) belonging to the 1st appellant. There were a number of people in the back of the vehicle which had false number plates on the front and no number of plates on the back. It is clear that the intrusion onto the premises of Shoprite/ Checkers and the attempt to break into the safes only commenced when this vehicle arrived at the site and was carried out by the occupants of this vehicle. There is no evidence of any other vehicle in the vicinity and neither is there any evidence that the assailants arrived at the scene through any other means. The occupants threatened Mr Makgoba and he heard and felt a gun, although he did not see it. He was then robbed of his cellphone and cash. The gang also threatened N Zulu, Z Mtethwa, S Dumisa and I Kunene and pointed a fire-arm at them. They were also robbed.

There is no basis to dismiss their evidence that they were threatened with a fire-arm which they saw being welded by members of the gang. Zulu, Dumisa and Kunene identified accused 9 (app 6 – Mbangeni) as the person that pointed the fire-arm at them. Further, Inspector Mabika testified that Mbangeni drew his fire-arm and fired a shot and then surrendered. We are satisfied that the at least some of the appellants were armed and did threaten the employees on the day with GBH. Mr Kunene testified that when the appellants entered they demanded access to the cash room and then made various attempts to gain access to the safes. Their demand for extension cables was to enable them to gain access to the safes. Some of the cellphones were found in the Toyota bakkie and the keys to the cash office were found in the possession of M Ndlovu, the fifth appellant together with other cellphones. In addition grinding machines were found by the police. Most of the gang were dressed in blue overalls to create the impression that they were working but it was clear that that was not the case. All the appellants were arrested in the store or near the premises after midnight on the day and they had no legitimate reason to be there. All the appellants bar Vincent Njoko (accused 6) (3rd appellant) who we will deal with separately in this judgment were identified as

playing some role in this endeavour or being on the premises with the gang when they had no legitimate reason to be there. They were on the premises for no other reason than to unlawfully gain access to safes where they believed that the cash was being stored. Given the time that this incident occurred, people on the premises had to either have a legitimate reason to be there. None of the appellants provides any explanation as to why they were on the premises after midnight on that day. The manner in which this was executed and the implements found on the premises clearly indicate that this was planned enterprise. Thus the evidence establishes beyond reasonable doubt that appellants arrested on the day were acting pursuant to a common plan to unlawfully enter the premises of Shoprite /Checkers, break in the safes and steal its contents.

Mr Slabbert is quite correct in urging that dock identifications must be approached with circumspection and caution as the presence of the accused in the dock might impermissibly suggest to the witness that the accused identified was involved in the crime. However in most instances the dock identifications were used to confirm other evidence linking the appellants to the crime. Some of the witnesses were quite clear in identifying some of the appellants and a number identified the 6th appellant (Mbangeni) as the person who wielded the gun. Mbatha 1st appellant was the registered owner of the vehicle which transported the appellants to the scene and some of the cellphones taken from the complaints were found in his van, and keys to the cash office were found in the possession of Ndlovu (the fifth appellant,). The fact that all the appellants were arrested either in the store or in the immediate vicinity of the store together with objective evidence support the identification evidence of the witnesses. It was also permissible for the various police officers, subject to the rules pertaining to admissibility, to rely on records made contemporaneously with the events to indicate the names of the persons who were at the scene. The investigation and identification process could have been handed more effectively and efficiently but having carefully considered all the evidence we are satisfied that the evidence established beyond reasonable that all the appellants, bar Njoko, were part and parcel of the criminal endeavour to rob Shoprite/ Checkers of the contents of the safes.

I now turn to Mr Vincent M Njoko (3rd appellant). There was no direct evidence indicating that he part and parcel of the gang or that he played any role in the attempt to steal the contents of the safe. None of the police officers identified him as one of the persons they arrested on the day. The magistrate took the view that in the context of the evidence as a whole and in the light of the admission made in terms of section 115 of the CPA that he was arrested on the morning of the 22 December 2008 at or near the Shoprite in Ulundi, there was no doubt that he was part and parcel of the events of that evening. It is clear that there is considerable suspicion as to what Njoko was doing at or near the store in the early hours of the morning whilst it was in the process of being robbed.

In the pre-constitutional era, the AD held in S v Mthetwas 1972 (3) SA 766 (A) at 769 :

> Where there is direct prima facie evidence implicating the accused in the commission of the offence, his failure to give evidence, whatever his reason may be for such failure, in general ipso facto tends to strengthen the State case because there is nothing to gainsay it and therefore less reason for doubting its credibility and reliability.

Subsequently the CC in *Osman and Another v A-G Transvaal* 1998 (2) SACR 493 (CC), Madala J reflecting on the position where the right to remain silent at different stages of criminal prosecutions in now contained in our supreme law, held:

> Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut

that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however does run the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that the accused has to make such as election is not a breach of the right to silence.

In the case of all the applications, with the exception of Njoko, the state's case was sufficient to prove the elements of the offence beyond reasonable doubt. I am of the opinion that the statement that Njoko was arrested on the morning of the 22 December 2008 and the fact of his arrest does not amount to direct prima facie evidence implicating him in the commission of the offence. Something more was needed to link Njoko to the offence. In the circumstances, I am of the opinion that the evidence does not establish beyond reasonable that Njoko was guilty of the offence.

Was this robbery with aggravating circumstances?

Mr Slabbert contended that the learned magistrate erred in convicting the appellants of robbery with aggravating circumstances. It was submitted on their behalf that the onus was on the state to prove that aggravating circumstances beyond reasonable doubt and further it was argued that the evidence of the witnesses for the state failed to establish that it was a robbery with aggravating circumstances. The contention was that at the time the cellphones and cash were taken away, the complainants were not threatened with a fire-arm and neither where there was a wielding of a fire-arm. The contention was that they should have been convicted of theft.

The appellants were charged with robbery with aggravating circumstances and reference was made specifically to the provisions of Section 51 and 52 of the Criminal Law Amendment Act 105 of 1997 (the mandatory minimum sentence provision). Section 1 of the CPA defines 'aggravating circumstances ' for the purposes of robbery or attempted robbery as :

(b)

(i) the wielding of a fire-arm or 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.

Thus in order for there to be robbery with aggravating circumstances, the criteria listed in either (i) (ii) or (iii) must be proved to have occurred on the occasion when the offence was committed. There must be an adequate link or nexus between one of these circumstances and the offence. [1] In *S v Anthony*, [2] Griesel J held whether aggravating circumstances exist or not is an objective enquiry. On the facts of the case, he held that the use of a toy gun revealed a 'threat to inflict grievous bodily harm' and thus aggravating circumstances were present.

On the facts on hand, the various witnesses were threatened with grievous bodily harm on the occasion of the offence. As detailed above N Zulu, Z Mtethwa, S Dumisa and I Kunene all testified that fire-arms were pointed at them on various occasions as the events of that evening unfolded. The threat of committing grievous bodily harm and the wielding of fire-arms were intended to gain control over the various witnesses and to assist the appellants succeed in their ultimate objective

[1] . Du Toit Commentary on the Criminal Procedure Act Def 2.

[2] . S v Anthony 2002 (2) SACR 453 (C)

which was to gain access to the safes. I am satisfied that there were threats to inflict GBH and a fire-arm was wielded on the occasion when this offence was committed. In the circumstances, the learned magistrate was correct in convicting the appellants of robbery with aggravating circumstances.

Common Purpose doctrine.

The appellants argument as a I understand it was that the intention of the persons who entered the Shoprite/ Checkers Store late at night on or about the 21 December 2008 did so with the intention to open the safe in the stores with the equipment that they had brought with them. In effect they planned to break into the safes with cutting equipment that they had brought with them and to steal the money that belonged to the store. According to the appellants, there was no common intention to steal the cellphones belonging to the employees to prevent the communicating to others about the robbery occurring. In their heads of argument dated 7 January 2016, [3] the appellants state:

> From the outset it is submitted that the appellants were charged incorrectly and should have been charged with attempted housebreaking and attempted theft. Their intention was to cut open the safe of Checkers, Ulundi and remove the money from the safe.

In his judgment, the learned magistrate found that that the intention of the remaining accused was to break into the safes at Shoprite/Checkers and take the contents of the safe. It is apparent from an analysis of the evidence as a whole, that this finding is correct beyond reasonable doubt.

In S v Thebus and another,[4] the CC defined the common purpose doctrine as a ' set of rules of the common law that regulates the attribution of criminal liability to a person who undertakes jointly with another person or persons the commission of a crime.' The court then quoted Burchell and Milton's[5] definition which stated:

> Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of the number which fall within their common design. Liability arises from their 'common purpose' to commit the crime.

Also pertinently the court quoted the following definition from Snyman[6]

> The essence of the doctrine is that if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others.

It is now established that doctrine of common purpose may arise where there is a prior agreement express or implied to commit the offence or where there is an active association and participation in the common criminal design.

For the reasons stated above, we concluded that there was a common prior agreement amongst the appellants to break into the safes on the Shoprite/ Checkers premises and to steal the contents unlawfully. Mr Slabbert argues that while that might be the case, there was no common purpose to steal cellphones and money from the various persons identified above. The essence of the doctrine of common purpose is that in instances where two or more persons having a common purpose to

[3] . Paragraph 5.7 of the Heads of Argument.
[4] . S v Thebus and Another 2003 (6) SA 505 at 521
[5] . Burchell and Milton Principles of Criminal Law 2nd ed at 393
[6] . Snyman Criminal Law 4th ed at 261

commit a crime and act in furtherance of that objective, the conduct of each of them as they act to realise that purpose is imputed to the others. In this case, the ultimate objective was to break into the safe and the appellants endeavoured to achieve that objective by subduing the various complaints by wielding fire-arms and by threats of grievous bodily harm. The security guards and workers were subdued and their cellphones taken so that they would not be able to raise the alarm or in any way threatened the realisation of the ultimate objective of breaking in the safes. These acts were carried out in furtherance of the ultimate objective and the conduct of robbing each of the complaints must be imputed to all the appellants that participated in this criminal endeavour. The complaints that were able to recover their cellphones only did so because of the intervention of the police.

For the reasons stated we are satisfied that the appellants were correctly convicted of robbery with aggravating circumstances read with section 51 and 52 of Act 105 of 1997.

Sentence:

It was submitted on behalf of the appellants that the minimum sentencing provisions should not be applied in this particular case. In terms of section 51(2) of Act 105 of 1997,a court is obliged if it has convicted a person of an offence referred to in Pat II of Schedule 2 to sentence the person if he or she is a first offence to imprisonment for a period of not less than fifteen years, except if substantial and compelling circumstances exist which justify the imposition of a lesser sentence than that prescribed. Robbery with aggravating circumstances in one of the offences referred to Part ii of Schedule 2. The issue before is whether there is substantial and compelling circumstances justifying a departure from the minimum sentencing provision. It was submitted on behalf of the appellants that the taking of cellphones in these circumstances was not what was intended by the legislature when it passed the minimum sentencing provisions. The majority of the appellants are self-employed and they are supporting children.

It is correct that the appellants must not be punished for offences of which they were not convicted. However the offence of which the appellants were convicted must be placed in context. Security Guards and store employees were threatened with GBH, fire-arms were wielded, at least one of the employees was assaulted, some were tied up and shots were fired in a broader endeavour to steal money from the safes of the store. For those who were threatened and accosted with fire-arms, this must have been a terrifying ordeal. The personal circumstances of the accused and the fact that some of the cellphones were recovered do not in the circumstances of this case amount to substantial and compelling circumstances justifying a departure from the minimum sentence of fifteen years.

In the circumstances the following order is made:

Order

1. **The appeal against conviction and sentence in respect of Vincent M Njoko (the 3rd appellant) is upheld.**
2. **The appeal against conviction and sentence in respect of all the other appellants is dismissed.**