

SOUTH AFRICA / JUDGMENT

S v Ngcobo and Others (123/86) [1986] ZASCA 117 (30 September 1986)

[1986] ZASCA 117

COURT

Supreme Court of Appeal

BEFORE

Tregrove, Smalberger, Boshoff

CASE / FILE NUMBER

123/86

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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between: RODGERS NGCOBO BARNARD MPHAKA NELSON MAJOLA SAMUEL
MANGISA ROBERT MSIBI1st Appellant (Acc 1 in Court a quo) 2nd Appellant (Acc 3 in Court a quo) 3rd Appellant (Acc 5 in
Court a quo) 4th Appellant (Acc 6 in Court a quo) 5th Appellant (Acc 7 in Court a quo)

and THE STATE Respondent

Coram: Tregrove, Smalberger, JJA et Boshoff, AJA

Heard: 29 Augustus 1986

Delivered: 30 September 1986

JUDGMENT 2 BOSHOFF, A J A :

This is an appeal on sentence. The appellants
were charged jointly in different combinations before
Vermooten A J and two assessors in the Witwatersrand
Local Division on six counts of robbery with aggravating
circumstances, one count of motor theft, one count of
being in possession of an unlicensed firearm and one
count of being in possession of ammunition without being

in possession of a licensed firearm capable of firing such ammunition. They were respectively the first, third, fifth, sixth and seventh accused and it will be convenient to continue to refer to them as such.

The first accused was convicted on four counts of robbery with aggravating circumstances, namely, counts /3

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counts 1, 2, 3 and 4, on count 8 for being in possession of an unlicensed firearm and on count 9 for being in illegal possession of the ammunition. After previous convictions were proved, he was sentenced to 15 years' imprisonment on each of counts 1, 2, 3 and 4, to 18 months' imprisonment on count 8 and to 6 months' imprisonment on count 9. The sentence on count 1 was ordered to run concurrently with the sentence on count 2 and the sentence on count 3 was ordered to run concurrently with the sentence on count 4 which meant that the first accused had to serve an effective sentence of 32 years.

The third accused was convicted on four counts of robbery with aggravating circumstances namely counts 1,2,6 and..../4

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1, 2, 6 and 7. After previous convictions were proved, he was sentenced to 15 years' imprisonment on each of counts 1, 2 and 6 and to 20 years' imprisonment on count 7. The sentences on counts 1 and 2 were ordered to run concurrently with the sentence on count 7 which meant

that the third accused had to serve an effective sentence of 35 years.

The fifth accused was convicted on count 7 of robbery with aggravating circumstances, on count 5 of the theft of a light delivery van (bakkie) and on count 8 for being in possession of an unlicensed firearm. After previous convictions were proved, he was sentenced to 20 years imprisonment on count 7, to 4 years'imprisonment /5

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ment on count 5 and to 18 months' imprisonment on count 8

The sixth accused was convicted on count 7 of robbery with aggravating circumstances and after previous convictions were proved, sentenced to death.

The seventh accused was convicted on count 7 of robbery with aggravating circumstances and, after a previous conviction was proved, sentenced to 20 years' imprisonment.

All these accused applied for leave to appeal.

the first accused against conviction and sentence and the others only against sentence. Their applications were refused by the trial judge. This court subsequently granted /6

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granted them leave to appeal against sentence.

Miss Sidwell for the first and seventh accused and Mr Hussain for the third, fifth and sixth accused argued in this court that the sentences imposed on their

clients were unduly severe and that the trial court in meting out punishment over-emphasized certain factors such as the increasing prevalence of armed robberies on financial institutions in the metropolitan area of Johannesburg and the previous convictions of the accused while not paying any or due regard to the difference in the type, seriousness and relevance of the previous convictions of the different accused and the fact that, although violence was threatened no physical violence causing /7

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causing injury was used in committing the robberies In determining the punishment of the respective accused on the different counts the trial court had to consider the nature of the offences, the circumstances under which they were committed and the circumstances personal to the accused. The trial court then had to assess appropriate punishment sufficient to meet the deterrent, preventive, reformative and retributive ends of criminal justice. It is in this context that a trial court has to impose a sentence which it thinks suitable and has to consider the triad consisting of the crime, the offender and the interests of society. The punishment should fit the criminal as well as the crime /8

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crime, be fair to society and be blended with a measure of mercy according to the circumstances in the

sense explained in *S v Rabie* 1975(4) SA 855(A) at pages 861 A to 862 H.

The determination of a sentence is pre-eminently a matter for the discretion of the trial court. In the exercise of that function the trial court has a wide discretion in having regard to factors which, in its opinion, may be either favourable or unfavourable to the convicted person in determining the measure of the punishment, *R v S* 1958(3) SA 102(A) at p 106B. This court will not readily differ from the trial court in its assessment either of the factors to be had regard to /9

-9-to or as to the value to be attached to them. Where, however, the dictates of justice are such as clearly to make it appear to this court that the trial court ought to have had regard to certain factors and that it failed to do so, or that it ought to have assessed the value of those factors differently from what it did, then such actions by the trial court will be regarded as a misdirection on its part entitling this court to consider the sentence afresh, see *S v Fazzie and Others* 1964(4) SA 673(A) at p 684 A-C. This court can only interfere with the sentence if the discretion was not judicially exercised, that is to say if the sentence is vitiated by irregularity or misdirection or is so severe that no

reasonable /10

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reasonable court could have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock, that is to say if there is a striking disparity between the sentence passed and that which the court of appeal would have imposed, *S v de Jager and Another* 1965(2) SA 616(A) at p 629 A-B.

The present appeal is mainly directed against the sentences imposed in respect of the robbery counts.

It is now convenient first of all to consider
the nature of the offences committed by the accused
and the circumstances in which they were committed.

Count 1 /11

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Count 1. On 30 June 1983 at about 10h30

Mrs Armstrong and Mrs Taliadoros, the two tellers of
the agency of the United Building Society in Highlands
North, were behind the counter when they heard a commotion
outside the front door which was closed on account of
the cold. A client entered and went up to the counter to
fill in a slip* The first and the third accused and a
third black man, who was the fourth accused and who
has subsequently died, then entered the agency and
ordered the client to leave. They pushed him into an
adjoining office. The first accused took up a position in
front of Mrs Armstrong, pointed a firearm at her and
demanded money. The third accused had a knife and stood in
front /12

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front of Mrs Taliadoros. The third man was then behind
the counter and had a leather bag with him. Mrs Armstrong
emptied her drawer from underneath the counter onto the
counter in front of her. This third man then told her to
put the money in the bag. Mrs Taliadoros was slow in
getting her money out of the drawer. This third man
pushed her out of the way and ordered her to get down
onto the floor. He emptied her drawer into the bag.

Mrs Taliadoros was sitting on her haunches and Mrs Armstrong was still standing upright. The robbers ordered them both to get down onto the floor and to keep their heads down. They asked them where the rest of the money was. The first accused went through the handbags of /13

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of the two ladies but did not remove anything therefrom. The robbers left the agency with R11 419 belonging to the agency.

Count 2 . The agency of the United Building Society in Jeppestown is in the same building as the firm of estate agents, J Leischnik and Son.

On 11 July 1983 at about 12h00 Mrs Neilsson, the credit controller of the firm, was behind the small counter where she was speaking to two black women. Mrs Schultz, the teller of the agency, was behind the main counter and Mrs Woods, the other teller was in the office of her employer doing some filing work. A black man entered /14

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entered the front door pushing another black man and hitting him with a firearm on the back and side of his head. When they reached the small counter Mrs Neilsson retreated to the side office. The man with the firearm jumped over the counter and pushed her into the office saying "get inside". Mrs Woods was working in that office and Mrs Neilsson was pushed against her causing

her to fall into the chair at the desk. Two other black men had followed the man with the firearm into the agency and they also jumped over the counter and went to where Mrs Schultz was. The one was wielding a knife and the other a long screwdriver. The one with the screwdriver demanded money while threatening her with the /15

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the screwdriver and the one with the knife held the knife in a threatening position. She handed over the keys of her drawer which was then unlocked and the money was removed from it. Mrs Woods had left her drawer open and Mrs Neilsson had also left her drawer underneath the small counter open when she retreated towards the office. All the money was removed from these drawers. R9 300 was taken from the agency. Members of the public who had been in the banking hall had fled through a back door during the robbery.

Count 3 . On 26 July 1983 at about 11h00

Mrs Matos and Mrs da Silva, both tellers of the agency of the United Building Society in Bertrams, were behind the /16

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the counter when a black man entered, pointed a firearm at them and demanded money. At the same time another black man was near the front door and threatening the security guard with a butcher's knife. He pushed him towards the counter and over the counter. The man

with the knife jumped over the counter and came to where the tellers were. He opened the drawers and removed the money. He opened a steel safe and also removed the money from there. The man with the firearm kept on demanding more money and asking where more money was. The man with the knife searched through all the cupboards and then wanted to take the handbag of Mrs Matos. She shouted that she had no money and. he dropped it.

He /17

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He however took the handbag of Mrs da Silva, which contained certain personal items and a loaded automatic pistol worth R500 and left with it. They took R6 718 from the agency.

Count 4. On Friday 12 August 1983 between 09h00 and 09h15 Mrs Seyneave, the company secretary, and Mrs Emmanuel, the secretary of the electrical firm Seyn Engineering in Jeppe returned from the bank with the weekly payroll money amounting to R3 279 in a large leather slingbag. Mrs Seyneave had the shoulder strap over her shoulder and the bag under her arm. They had to walk up two flights of steps to reach their office on the first floor of the building. Mrs Emmanuel followed /18

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followed behind Mrs Seyneave and before Mrs Emmanuel reached the landing before the second flight of steps she felt someone tugging at her from behind. She turned

round and a black man, the first accused, then tried to pull her down the stairs. He jumped past her and grabbed at Mrs Seyneave who had just reached the landing. Mrs Emmanuel started to scream and ran past the first accused and Mrs Seyneave up the stairs. The first accused pushed Mrs Seyneave over backwards onto the stairs and tugged at the handbag to get it free from under her arm. When he did not succeed another black man appeared around the corner on the landing and threatened to stab her with a knife with a long fixed blade. She then let go of the handbag and /19

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and the two men fled with it down the stairs into the street. They took R3 279 from the ladies.

Count 6. On 8 September 1983 at about 09h00

Mr Prinsloo, a teller of the agency of Volkskas Bank in Mellville, was busy making an entry in the savings-bankbook of a client Mrs Wessels when a black man with a firearm, the fourth accused (now deceased) appeared next to her. He ordered Mr Prinsloo to get down on the floor. He went down onto his haunches and then noticed another black man, the third accused, with a knife standing behind the counter. They ordered him to hand over the money and he told them that the money was in the drawer. The third accused put the money in a bag he had with him. The fourth accused pushed the firearm against /20

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against the side of Mrs Wessels and instructed her to

move to the back of the counter and sit on her haunches

He returned to Mr Prinsloo, pointed the firearm at him and asked where the other money was. He replied that the other money would only be delivered at 11h00. The third accused went to the other offices and looked through the drawers. In the meantime another client entered and the fourth accused forced him into an office behind the counter. He fetched Mrs Wessels from where she was and also left her in that office. The third accused went up to Mr Prinsloo and put the knife into the front of his shirt and slit it open.

He cut through his belt and slit his trousers on the left hand /21

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hand side open down to his knee. Thereafter he took Mr Prinsloo into the office and instructed him to sit still. The fourth accused also came into the office and ordered them to remain quiet because he had no mercy for a white. He said he would shoot them if they tried to move. After having left he returned to the office and, pointing the firearm at them, said that he was checking whether they were still sitting quietly. The robbers then left and removed R2 146,75 from the agency.

Count 7. On 15 September 1983 at about 09h35 there were 47 employees at the Fordsburg Branch of the Barclays Bank. There is a long counter with 5 cubicles for /22

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for tellers and a short inquiry counter. There were 4 tellers on duty and Mrs Marsh was attending to a client at the inquiry counter. All of a sudden the client was struck on the ear by a black man and another black man stood on the counter holding a firearm in combat position and shouting "this is a hold-up, you are all under cover, everybody lie down on the floor and don't look". She noticed that everybody in the bank was down on the floor so she also lay down. When Mr Willigenburg the accountant in his raised cubicle did not go down quickly enough, the black man on the counter pointed the firearm at him and threatened to shoot him. Where he was on the floor in the raised cubicle he was still able /23

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able to see the black man on the counter. Thereupon another black man jumped over the counter and went to where he was in his cubicle and pulled him out of the cubicle by his tie and ordered him to lie down under a table. This man had an axe with him and struck Willigenburg one blow with the blunt side behind the shoulder. At that stage Mrs Wilson the other accountant was already under that table. The man then searched Willigenburg for a firearm. One black man with a firearm remained at the front door of the bank. Three black men were behind the counters and raided the cubicles where the tellers

were ordered to remain down on the floor. The money
so /24

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so looted was put in bags. One black man with
a firearm also searched members of the public who were
in the bank when the robbers entered and were ordered
to lie down. In all, 5 black men which included the
third, fifth, sixth and seventh accused were active
in the bank.

Mr Klut the owner of the butchery opposite the
bank was told that the bank was being robbed. He went
to the front door and saw a black man with a firearm
inside the bank near the door. He returned to his
butchery and then saw 5 black men come out of the bank
carrying 2 canvas bags. When he started shooting at
them they ran to a bakkie which was about 2 metres from
the /25

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the corner of the street. Two got into the front
and two jumped onto the back of the bakkie while it was
pulling away. One failed to get onto the bakkie and
dropped the bag that he was carrying. He ran behind
the bakkie and when the driver realized that he had not
manage to get onto the bakkie, he reversed up to him
and he was then hauled through the front window into
the bakkie. The bakkie then left.

Mr Klut returned the dropped bag which contained
money to the bank. The robbers succeeded in stealing

R37 759, 24 from the bank.

In each of these robberies more than one person

took /26

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took part in the robbery and apart from one person who

was the fourth accused at the trial and who has subse-

quently died, the present accused were the only

persons who could on the evidence before the trial court

be positively identified as being involved in the dif-

ferent counts. It is quite clear from the evidence

that these robberies were pre-arranged and planned and

that the accused persons all played an active and more

or less equal part in committing those robberies in

respect of which they were convicted. What each and every-

one of them did was to perform an executive act in the

execution of a planned and common design. They were

armed with dangerous weapons and those who were not

armed /27

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armed filled and carried the bags in which the stolen

money was taken away and in this way left the armed

robbers free to deal with whatever contingencies that

might have arisen.

The dangerous weapons were in each case inten-

tionally brandished by the robbers, threatening physical

violence should any of their victims dare to offer

resistance of any kind or fail to obey instructions.

and more importantly to induce them to submit to the taking

and removal of the money from their custody and control.

The robbers had no reason to think or believe that their victims would not offer any resistance when they embarked on the different ventures and it is therefore reasonable to assume that they /28

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they were prepared and would have used violence to overcome any such resistance as they might encounter.

It was for that purpose that they had the dangerous weapons with them. There was fortunately for them no resistance on the part of the victims and consequently no need to cause physical injury to the victims to achieve their purpose. The limited violence that was used in the few instances was probably intended to be nothing more than a display of violence in order to frighten.

The learned trial judge took a very serious view of the robberies committed by the accused. In his reasons for sentence he referred to the aggravating features in the particular counts, particularly.../29

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particularly the way in which the victims were terrorised, mistreated and humiliated by the robbers. At the time when the robberies were committed there was a spate of such armed robberies in and around the Johannesburg area. He referred to the fact that during the calendar year 1 July 1983 to 30 June 1984 there was an increase of 44,28% in such crimes over the corresponding preceding

twelve months and continued as follows:

"The public is entitled to be protected against this shocking lawlessness and so are the employees of banks and building societies where large amounts of cash are kept in order to serve the public. It requires little imagination to conceive of the fear with which such employees must go to their places of work

each /30-30-

each day. Especially vulnerable are the smaller branches or agencies where only one or two women are stationed, in charge of large sums of cash. And then there is the payroll grab type of robbery from two women, as in Count 4 - a despicable crime. And there is the smaller cafe-on-the-corner type of business which is exposed to miscreants like the Accused.

In my view the public demands that severe sentences be imposed. In all the circumstances which I have outlined, on the one hand, the sentences imposed must act as a de-terrent to would-be armed robbers; on the other hand, the Accused must suffer stern punishment for, after all, one of the objects of punishment is to punish. The other objects of punishment, especially reformatory, must in this case yield to the two I have mentioned.

The Court is not in the first

place /31

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place a crusader trying to stamp out crime; that is only one of its functions. Its function is to mete out a proper and suitable punishment, having regard to the particular circumstances before it.

The circumstances personal to the respective accused are the following. The first accused is 33 years old, married with four children ranging between the ages of 10 and 18 years. Before his arrest he worked as a film operator at R60 per week. He passed std 6 at school and he has been in custody awaiting trial for about one year. He has two previous convictions; one on 22 August 1977 for robbery with aggravating circumstances when he was sentenced to 6 years' imprisonment /32

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ment (the third accused was apparently charged and convicted together with him when R12 800 was stolen and a firearm and a panga were used to commit the robbery) and one on 28 June 1978 for escaping from custody when he was sentenced to 2 years' imprisonment and 6 strokes.

The third accused is a married man

with two minor children. He has seven previous convic-

tions of which three are for offences which have no bearing on his present offences and the sentences imposed in connection therewith. On 26 November 1973 he was sentenced to 2 years'imprisonment for attempted murder with a revolver, to 18 months'and 3 months'imprisonment respectively for being in possession of the unlicensed firearm /33

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firearm and being in possession of the ammunition without being in possession of a licensed firearm capable of firing such ammunition; the sentences were ordered to run concurrently. On 22 August 1977 he was sentenced to 7 years' imprisonment for robbery with aggravating circumstances involving R12 800 in which a firearm and a panga were used (evidently the same robbery in respect of which the first accused was also convicted and sentenced to 6 years' imprisonment as mentioned above). At the time of his present convictions he was serving a sentence of imprisonment for attempted murder which conviction was subject to an appeal. It does not appear from the record of the present proceedings what the period of that /34

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that sentence is.

The fifth accused is a married man and has four minor children. He has six previous convictions of which four are relevant for present purposes. On 18 February 1972 he was sentenced to R30 or 90 days'im-

prisonment for theft of a flashgun worth R53 from a shop where he was employed. On 9 April 1975 he was sentenced to 2 /2 years'imprisonment conditionally suspended for 3 years for the theft of a motorcar worth R2 000 from the street. On 20 October 1975 he was sentenced to 2 years'imprisonment for the theft of liquor worth R1 437 from a wholesale liquor store where he was employed. On 13 May 1980 he was sentenced to R90 or 90 days. . . . /35

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90 days imprisonment and a further 9 months¹ imprisonment conditionally suspended for 5 years for the attempted theft of a money box with R500 from a shop.

The sixth accused is 48 years old, married and has five children of whom three are minors. He has seventeen previous convictions of which seven are for escaping from custody and one for attempting to escape from custody. He was on four occasions declared a habitual criminal obviously under the provisions of the Criminal Procedure Act No 56 of 1955 which was then in force and which prescribed the circumstances in which such a sentence was to be imposed. He has. four previous convictions for motorcar theft. On 29 May 1961 he was /36

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was sentenced to 12 months' imprisonment and 4 strokes for the theft of a motorcar worth R1 400, on 14 December 1962 to 2 years'imprisonment on each of two counts of the

theft of a motorcar, the total worth of the motorcars being R3 500. On 22 February 1965 he was declared a habitual criminal for theft of a motorcar worth R1 200. On 16 July 1971 he was declared a habitual criminal for the theft of a motorcar worth R2 370. He has three previous convictions for housebreaking with intent to steal and theft. On 16 August 1966 he was sentenced to 12 months' imprisonment for breaking into a private house and stealing clothes and liquor to the value of R40. On 22 March 1968 he was declared a habitual criminal.../37

-37-criminal for breaking into a shop and stealing electrical goods to the value of R400. On 18 February 1972 he was declared a habitual criminal for breaking into a furniture shop and stealing recordplayers, radios and bedlinen to the value of R425,90. Of the seven convictions for escaping, one is for escaping from detention after arrest and one for escaping after arrest from the police cells. For escaping from arrest he was on 14 December 1962 sentenced to 1 year's imprisonment and for escaping from the police cells he was on the same date sentenced to 2 years' imprisonment. The two sentences were ordered to run concurrently. For the other escaping from custody convictions he was on 16 November 1967 sentenced

to /38

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to 1 year's imprisonment, on 8 August 1969 to 2 years' imprisonment which was to run concurrently with a sentence he was serving, on 16 July 1971 to 6 months' imprisonment and on 31 January 1972 to 4 years' imprisonment. For the attempt to escape from custody he was on 18 November 1965 sentenced to 2 years' imprisonment and 4 strokes. The seventh accused is 27 years old, married and has one minor child. He passed his std 8 at school and worked as a clerk and in other capacities. He

stopped work in June 1983. He has one previous conviction. On 1 April 1975 he was sentenced to R30 or 30 days' imprisonment and 5 months' imprisonment conditionally suspended for 3 years for assault to do grievous bodily harm /39

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harm.

The learned trial judge referred to the nature of the offences committed by the different accused, the circumstances in which the offences were committed and the circumstances personal to them and then passed sentence. He clearly regarded the robbery in count.7 as the most serious of the 6 counts of robberies and sentenced the third, fifth and seventh accused each to 20 years'imprisonment and the sixth accused to death on that count. He sentenced the first and the third accused each to 15 years' imprisonment on the remaining five counts of robbery. It is not at all clear from his reasons for sentence for what reason or on what basis of /40

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of fact he ordered the sentence of the first accused on count 1 to run concurrently with the sentence on count 2 and the sentence on count 3 to run concurrently with the sentence on count 4 and also why he ordered the sentences of the third accused on counts 1 and 2 to run concurrently with the sentence on count 7. The effect of these orders is that the first accused has to serve

an effective sentence of 32 years in respect of the six counts on which he was convicted and the third accused has to serve an effective sentence of 35 years in respect of the four counts on which he was convicted. It should be noted that the firearm and ammunition in respect of which the first accused was convicted and sentenced on counts /41

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counts 8 and 9 respectively, were in his possession when one or more of the robberies for which he was convicted and sentenced were committed. The same applies to the firearm in respect of which the fifth accused was convicted and sentenced on count 8. The bakkie for the theft of which the fifth accused was convicted and sentenced on count 5 was the bakkie which was used as a getaway vehicle when the robbery in count 7 was committed, The bakkie was most probably stolen for that purpose. The trial judge, after having regard to the previous convictions of the sixth accused in his reasons for the sentence, continued as follows:

"Now summarised, No 6 has been declared /42-42-

declared an habitual criminal on no less than four occasions - in 1965, 1968, 1971 and again in 1972. In addition, he has been convicted of escaping from custody on seven occasions and of attempt to escape from custody on one occasion. He is a housebreaker and a thief and now he has been convicted of this most serious armed robbery of Barclays Bank, Fordsburg, where over R37 000 was robbed. It is clear that he has forfeited the right to remain in society. There is little or no hope of reforming him. At his age of 48 years it is futile to think that the leopard will change its spots. Therefore he must be permanently removed out of society; society is entitled to be protected against a menace like him.

I have considered two alternatives ; either imprisonment for life or the death sentence. It is by this time well-known that the Court

may..../43

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may impose the death sentence for robbery with aggravating circumstances - that is armed robbery. The death sentence will be imposed in extreme cases."

The learned trial judge then referred to

principles extracted from various cases by Du Toit in

his book "Straf in Suid-Afrika", at page 211, and proceeded

as follows:

"Within these principles it is competent for me to pass the death sentence here. What troubles me the most is that if I sentence Accused No 6 to life imprisonment, which is the alternative that I have been anxiously considering, then his character and criminal record is such that it is strongly possible that he may escape from prison again

and...../44

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and once more inflict himself on society. After hours of deep and anxious reflection I have decided to exercise my discretion to pass the death sentence upon him. There is no further hope of reformation for this man and society demands that he be removed permanently."

Whilst such matters as social danger, alarm.

social disapproval, harm and wickedness may influence

the views of the courts on the relative seriousness of

offences, the courts must also pay regard to questions

of proportionality within the whole sentencing structure.

If murder is taken to be the most serious crime, then sentences

for other crimes must generally speaking be relatively

less than that imposed in respect of murder.

Robbery /45

-45-Robbery normally falls within the category of crimes of gravity. There are various factors which effect or influence its seriousness such as, for example, the amount of violence used or threatened, the value of the property stolen, the number of persons who act in concert to commit the robbery and the prevalence of the crime. Anyone who surveys the criminal scene at the

present time must be alive to the appalling problem of armed robbery particularly in the metropolitan area of Johannesburg. Society expects the courts to deal with this problem and those who indulge in this kind of crime can ordinarily expect long custodial sentences. The legislature has, by section 277 of the Criminal Procedure

Act /46

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Act No 51 of 1977, given a superior court a discretion to pass the death sentence on a person convicted of robbery or attempted robbery if the court finds aggravating circumstances to have been present. Aggravating circumstances in relation to robbery or attempted robbery, in terms of section 1 of that Act, means (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. It should however be noted that it has been the approach of this court that where the death penalty is retained as a discretionary form of punishment, it /47

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it should ordinarily only be imposed in extreme cases. Whether any particular case is to be regarded as falling within this category will depend on its own circumstances. What is or is not an extreme case is pre-eminently a matter for the discretion of the trial judge on all the facts before him, see *S v Ken 'n ander* 1972(2) SA 898 (A) at p 902, *S v Ntuli* 1978(1) SA 523(A) at p 528. In the case of *S v Tshomi en 'n ander* 1983(3) SA 662(A) at

p 666E-H the learned Chief Justice Rabie explained that the phrase "extreme case" or "extreme cases" in our judicial pronouncements in this context should not be taken too literally and that it meant no more than that a trial judge should not impose the death penalty unless he /48

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he is of opinion that the crime is of such a serious nature that it would be an appropriate punishment.

The reasoning of the learned Chief Justice is as follows :-

"Hierdie frase 'uiterste gevalle' of 'uiterste geval', wat ook al in ander sake gebruik is, kan nie letterlik opgevat word nie, want as 'n Verhoor-regter die doodvonnis slegs in 'n letterlik, of werklik, uiterste geval kan oplê, sal hy waarskynlik altyd moet besluit dat die doodvonnis nie 'n gepaste vonnis sal wees nie, want hy sal hom waarskynlik altyd 'n erger geval kan voorstel as die een wat voor hom dien. 'n Verhoor-regter se diskresie kan nie op so 'n wyse aan bande gelê word nie, en die uitdrukking 'uiterste geval' kan dus nie letterlik opgevat word nie.

Hierbenewens /49-49-

Hierbenewens moet in gedagte gehou word dat hierdie Hof ook al gesê het dat dit die funksie van die Verhoorregter is om te beslis of die geval voor hom as 'n uiterste geval beskou moet word of nie en dat hierdie Hof nie sê meer sy mening oor die aangeleentheid vir die van die Verhoorregter kan substitueer nie. (Kyk bv S v Kok , 'n uitspraak van hierdie Hof, gelewer op 13 September 1973 en gerapporteer in 1974(1) PH H2.) Die stelling dat die dood-straft net in uiterste gevalle opge-lê kan word, hou dus, in 'n geval soos die onderhawige, niks meer in nie as dat 'n Verhoorregter nie die doodstraf moet oplê nie tensy hy van oordeel is dat die misdaad van so 'n ernstige aard is dat die doodstraf die gepaste straf sal wees. Hiermee word niks nuuts gesê nie want dit is bekende reg dat die Verhoorregter, wie se taak dit is om te besluit oor wat 'n gepaste straf sal wees, in die lig van die ernstig-

heid /50

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heid van die misdaad wat gepleeg is en al die ander feite van die be-trokke geval moet besluit wat 'n ge-paste straf sal wees."

Count 7 was indeed a serious case of armed

robbery- Five persons including the third, fifth, sixth and seventh accused acted in concert, threatened violence to several people in the bank and stole R37 759,24, a considerable sum of money by any standard. Although they had dangerous weapons in their possession and threatened serious harm to their victims no serious injury was caused to them. The fact that no serious injury was caused in itself takes this robbery out of the category of cases that would ordinarily justify the imposition of the death sentence.

The /51

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The first question which now falls to be considered is whether the learned trial judge in the circumstances exercised his discretion in a judicial manner by invoking the provisions of section 277, referred to above, and passing the death sentence on the sixth accused- This court can only substitute its opinion as to the seriousness of the case in question if it is satisfied that the decision of the trial court thereanent is one to which no court could reasonably have come. The test in this connection is not whether the death sentence is in the circumstances of the case shockingly inappropriate. See *S v M* 1976(3) SA 644(A) at p 650F-H, *S v Ntuli* (supra) p 528C-G.

The /52

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The learned trial judge manifestly did not consider whether the robbery as such could be characterised

as sufficiently serious to justify the passing of the death sentence. He clearly based his decision on the seriousness of the previous convictions of the sixth accused and in particular the fact that he had been declared a habitual criminal on four occasions and was convicted and sentenced in respect of escaping from custody on seven occasions and attempting to escape on one occasion. A subsidiary but by no means minor problem for all penal systems is the offender who continues to offend after experiencing penal measures. On the assumption that an important function of punishment is to deter offenders from repeating their offences and /53

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and that those who did, had demonstrated the inadequacy of the deterrent, it seems logical to increase the severity of the punishment. The sixth accused is a persistent offender but has never been convicted for offences causing physical injury. His character and record of offences are nevertheless such as to put it beyond doubt that he is a real menace to society. Unfortunately it is one of the facts of life that there are some offenders like the sixth accused for whom neither deterrence nor rehabilitation works. They will go on committing crimes for as long as they are able to do so. In such a case the only protection which the public has is that such person should be locked up for a long period. There is /54

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is no law that he should receive the death sentence.

The sixth accused however creates the problem that he regularly escapes from custody despite the penal measures he has experienced in respect thereof. These latter offences are more concerned with persistence and incorrigibility rather than serious harm to society.

In my respectful view the learned trial judge did not exercise his discretion in a judicial manner in that he did not consider the previous convictions of the sixth accused in conjunction with the seriousness of the offence in order to decide whether a death sentence is a proper punishment under the /55

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the provisions of section 277. In this respect the learned trial judge misdirected himself- Moreover the nature of the offence and the character, conduct and antecedents of the sixth accused are such that no court could reasonably have come to the conclusion that the seriousness of the offence in all the circumstances was such that the death sentence would be an appropriate punishment.

This court is consequently at large to determine an appropriate sentence.

Having regard to the nature of the offence and the circumstances of aggravation (there being no circumstances /56

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stances of mitigation) and also the character, conduct and antecedents of the sixth accused to which reference has already been made, and applying the classical principles of sentencing which are summed up in four words, retribution, deterrence, prevention and rehabilitation or reform, a sentence of 20 years' imprisonment seems to be an appropriate punishment on count 7.

The third, fifth and seventh accused were each sentenced to a sentence of 20 years' imprisonment on this count but they are entitled to be treated much more leniently because they do not have a criminal record as bad as that of the sixth accused. The learned /57

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learned trial judge misdirected himself in not giving proper consideration to their respective criminal records and differentiating between them on the basis of what can be gleaned about them from these records.

The previous convictions of the third accused show that he is prone to violence and a dangerous man. His previous conviction for robbery and a sentence of 7 years' imprisonment did not deter him from again committing robbery. Thus having regard to his character, conduct and antecedents a sentence of 16 years' imprisonment seems to be an appropriate punishment.

The previous convictions of the fifth accused show /58

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show him to be a thief but not necessarily a violent and dangerous man. A long period of imprisonment has not deterred him from committing robbery. Having regard to his character, conduct and antecedents a sentence of 14 years' imprisonment seems to be an appropriate punishment.

The seventh accused has a previous conviction for assault with intent to do grievous bodily harm. A knife was used but the assault could not have been very serious since he was given a fine and a period of imprisonment which was conditionally suspended for 3 years. Having regard to his character, conduct and antecedents a sentence of 13 years' imprisonment seems to be an appropriate..../59

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appropriate punishment.

The sentence on the remaining counts of robbery now fall for consideration in the light of what has been said earlier in this judgment. Having regard to all the relevant circumstances, the robberies in those counts are less serious than the robbery in count 7. The learned trial judge in fact correctly treated them as such. Although their circumstances of aggravation may vary their gravity for the purposes of the sentencing process remain more or less the same. The learned trial judge also regarded them as being of the same seriousness.

The first accused was sentenced to 15 years'

imprisonment /60

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imprisonment on each of counts 1, 2, 3 and 4. He

has already served a sentence of 6 years' imprisonment

for robbery. Having regard to his character, conduct

and antecedents a sentence of 14 years' imprisonment

seems to be an appropriate punishment on each of counts

1,2, 3 and 4, especially if regard is had to the sentences

imposed on the third accused on counts 1,2 and 6 as will

presently appear. It will be necessary to deal with the

cumulative effect of these sentences later in this

judgment.

The third accused was sentenced to 15 years'

imprisonment on each of counts 1, 2 and 6. On count

7 his /61

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7 his sentence was reduced to 16 years' imprisonment

after regard was had to his character, conduct and ante-

cedents. In the circumstances a sentence of 15 years'

imprisonment on each of the less serious counts 1, 2 and

6 seems to be appropriate.

The effective sentences passed

on the first, third and fifth accused by the learned

trial judge are 32, 35 and 25 /2 years' imprisonment

respectively. The learned trial judge no doubt had

regard to the cumulative effect of the sentences he

imposed on the first and third accused since he ordered

part of the sentences to run concurrently. The question remains whether he has given the matter sufficient or proper /62

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proper consideration to ensure that the resultant effect is still not far too harsh.

In the case of R v Mzwakala 1957(4) SA 273(A) at p 278D Schreiner ACJ described a sentence of 25 years' imprisonment as "exceptionally long according to our practice", In the case of S v Whitehead 1970(4) SA 424(A) at p 438H, Ogilvie Thompson JA without necessarily concurring in the existence of a maximum sentence shared the view that "a sentence of 25 years will only be appropriate in very exceptional circumstances". See also S v Sibiya 1973(2) SA 51(A) at p 57F-H.

The four robberies which the first and third accused /63

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accused each committed are undoubtedly serious ones but taken together the enormity of their criminal conduct is not such that it warrants an aggregate sentence which is exceptionally long and only appropriate in very exceptional circumstances.

As far as the first accused is concerned, the firearm and the ammunition, in respect of which he was convicted and sentenced on counts 8 and 9, were used by him in the commission of some of his robberies for which he was convicted and sentenced. Unlike the third

accused who was out on bail, he was in custody awaiting trial for about one year. As far as the fifth accused is concerned, the bakkie which he had stolen and for which he /64

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he was convicted and sentenced on count 5 was used as a getaway vehicle in the robbery in count 7 for which he was convicted and sentenced. The firearm in respect of which he was convicted and sentenced was used by him in the commission of the robbery in count 7 for which he was convicted and sentenced- Where multiple counts are closely connected or similar in point of time, nature, seriousness, or otherwise, it is sometimes a useful practical way of ensuring that the punishment imposed is not unnecessarily duplicated or its cumulative effect is not too harsh on the accused, by taking them together for the purpose of imposing one sentence thereon, see *S v Young* 1977(1) SA 602(A) at p 610 D-F. It is however pointed /65

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pointed out that it is a desirable practice not to pass globular sentences but to pass appropriate sentences on the separate counts and the cumulative effect of all the sentences imposed can then be suitably controlled to ensure that the totality of the imprisonment is not excessive. The counts in question do not qualify for a globular sentence because they are separate and distinct offences and ought to be treated as such, but the sentences

imposed in respect of them may be suitably controlled to avoid undue harshness by ordering part of the sentence to be served concurrently. Such a practice is allowed by section 280 of the Criminal Procedure Act No 51 of 1977. When all the relevant considerations are taken into /66

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into account to determine the enormity of their respective criminal conduct and the aggregate punishment they should suffer, I am of the view that the effective sentences imposed by the learned trial judge are shockingly inappropriate.

This court has interfered with most of the individual sentences imposed by the learned trial judge on the robbery counts 1, 2, 3, 4, 6 and 7. The sum total of the sentences of the first, third and fifth accused are 58, 61 and 191/2 years' imprisonment respectively.

Taking into account that the first accused was in custody awaiting trial for about a year, an appropriate /67

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appropriate effective punishment for his criminal conduct in my view is 19 years' imprisonment. The appropriate effective punishment for the third and fifth accused in my view is 22 and 16 years' imprisonment respectively.

In order to reduce the harsh cumulative effect of their sentences to appropriate effective punishment it will be necessary to order part of their sentences to run concurrently and this will be reflected in the

sentences to be passed by this court.

In the final result the appeal of the first.

third, fifth, sixth and seventh accused against sentence

succeed in the following respects. The sentences

imposed /68

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imposed by the learned trial judge on the first accused

on counts 1, 2, 3 and 4, on the third accused on count

7, and on the fifth, sixth and seventh accused on

count 7 are set aside and substituted with the following

sentences. The first accused (first appellant) is

sentenced to 14 years' imprisonment on each of counts

1, 2, 3 and 4; 12/2 years of the sentence on each

of counts 1, 2 and 3, 1 year of the sentence on count

8 and the sentence on count 9 are to run concurrently

with the sentence on count 4. The total effective sentence

which the first accused has to serve is 19 years' imprison-

ment. The third accused (second appellant) is sentenced

to 16 years' imprisonment on count 7; 13 years of the

sentences /69

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sentences on each of counts 1, 2 and 6 are to run concurrently

with the sentence on count 7. The total effective sentence

which the third accused has to serve is 22 years' im-

prisonment. The fifth accused (third appellant) is

sentenced to 14 years' imprisonment on count 7; 2/2

years of the sentence on count 5 and 1 year of the sentence

on count 8 are to run concurrently with the sentence on

count 7. The total effective sentence which the fifth accused has to serve is 16 years' imprisonment. The sixth accused (fourth appellant) is sentenced to 20 years imprisonment. The seventh accused (fifth appellant) is sentenced to 13 years' imprisonment.

BOSHOFF, A J A

TRENGOVE, J A)

concur SMALBERGER, J A)

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