FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ NO: 101

PARTIES:

AYANDA MKASE	**FIRST APPELLANT**
AYANDA TIZANE	**SECOND APPELLANT**
SIYABONGA SKOSANA	**THIRD APPELLANT**

and

THE STATE	**RESPONDENT**

Registrar CASE NO: **CA&R13/06**

- Magistrate:
- Supreme Court of Appeal/Constitutional Court: **ECD**

DATE HEARD: **31/1/07**
DATE DELIVERED: **1/2/07**

JUDGE(S): **Plasket J**

LEGAL REPRESENTATIVES -
Appearances:

- for the State/Plaintiff(s)/Applicant(s)/Appellant(s): **D Geldenhuys**
- for the accused/defendant(s)/respondent(s): **MR JC Coltman**

Instructing attorneys:

- Plaintiff(s)/Applicant(s)/Appellant(s):
- Respondent(s)/Defendant(s): DPP

CASE INFORMATION -

- *Nature of proceedings* :
- *Topic*:

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION)

CASE NO: CA&R13/06

DATE HEARD: 31/1/07

DATE DELIVERED: 1/2/07

NOT REPORTABLE

In the matter between:

AYANDA MKASE	**FIRST APPELLANT**
AYANDA TIZANE	**SECOND APPELLANT**
SIYABONGA SKOSANA	**THIRD APPELLANT**

and

THE STATE	**RESPONDENT**

JUDGMENT

PLASKET J

[1] This is an appeal from the judgment of a Regional Court Magistrate, sitting in Port Elizabeth, in which the appellants were convicted of robbery with aggravating circumstances, kidnapping and escaping from lawful custody. In addition, the third appellant was convicted of the unlawful possession of a firearm.

[2] The appellants were sentenced to 15 years imprisonment in respect of the robbery conviction and three years imprisonment in respect of the kidnapping conviction, the latter sentence being ordered to run concurrently with the former. The third appellant was sentenced to three years imprisonment in

respect of the conviction of unlawful possession of the firearm and this sentence was ordered to run concurrently with the sentence of 15 years imprisonment. All three were, in addition, sentenced to an additional two years imprisonment in respect of the conviction of escaping from lawful custody.

[3] The appellants appeal against both conviction and sentence. The evidence led by the State was to the following effect. On 16 February 2004, five men, one of whom brandished a pistol, hijacked a Nissan truck worth about R200 000.00 and which was loaded with about R20 000.00's worth of goods. They ordered the driver, Mr Alfred Moses, to lie down at the back of the cab and drove off in the truck, thus depriving him of his freedom of movement.

[4] Mr Moses' colleague, Mr Every Cane, witnessed the hijacking. He alerted two policemen, Inspector David Du Plessis and Sergeant Mario Basset. They, together with Mr Cane, followed the truck. At a robot, a man jumped off the back of the truck. He was immediately arrested by Inspector Du Plessis and placed in the back of his police van. This was the second appellant.

[5] The policemen continued to follow the truck. When the men in the truck realized that a police van was following them, the truck was brought to a stop and all four men ran away. Inspector Du Plessis chased a man who was carrying a firearm. He saw the man throw the firearm away. He continued to pursue the man and succeeded in apprehending him. After he had done so, he went to the area where the firearm had been discarded, searched that area and found the firearm. The man that he chased and apprehended was the third appellant.

[6] Sergeant James Kleinbooi arrived on the scene after the truck had stopped and the four men in it had fled. He assisted in searching for the men and found the first appellant hiding in thick bush. He arrested the first appellant who was then identified by Mr Moses and Mr Cane as one of the hijackers.

[7] About three weeks after these events, on 9 March 2004, the appellants were to appear in Court 29 of the Port Elizabeth Magistrates Court to make a bail application. They were taken there from prison and placed in a holding cell with a number of other awaiting trial prisoners. From the evidence of Sergeant Mzwabantu Mgamama, who worked at the court and was responsible for taking awaiting trial prisoners from the holding cell to court 29 and back, it appears that a locking mechanism on the grille-door of the cell malfunctioned. When he discovered this, he took a roll-call and ascertained that the appellants had escaped.

[8] Sergeant Mgamama explained the procedure for releasing an awaiting trial prisoner when a charge is withdrawn. He said such a person would be taken to the holding cell after the charge is formally withdrawn in court. Later he or she would be taken to the main cells at the courts where he or she would be booked out after it had been ascertained that he or she was not an accused in any other matter.

[9] The first appellant was arrested less then a week after the escape. The second appellant was arrested about two months after the escape and the third appellant was only arrested some 14 months after the escape.

[10] The version put up by the appellants was the following.

[11] The first and third appellants testified that they were in each other's company on 16 February 2004. They had gone to a butchery and were on their way home when they saw a casual acquaintance of theirs driving a truck. They asked him for a lift. He agreed to convey them and they got into the cab. Apart from the first and third appellants, there were a further four men in the cab of the truck, inclusive of the driver. When the truck approached a bridge the driver brought it to a halt. He and two of the men with him got out and ran

away. It was at this stage that the first and third appellants heard shots being fired. They also alighted from the truck. The first appellant hid under a tree. The third appellant ran towards a body of water. He was in the process of wading through the water when he was confronted by an armed policeman who arrested him. He denied that he had been in possession of a firearm, stating that he had lost his cellphone as he ran away from the truck.

[12] The second appellant stated that prior to his arrest he did not know his co-accused at all. His evidence was that, on 16 February 2004, he had been on his was home when he saw a truck which was stationary at a robot. He asked the driver for a lift and the driver told him to get on the back of the truck, which he did. Although the driver had earlier said that he was going to the township, after the truck had travelled for a while, he shouted to the second appellant to tell him that he was first going to the Traffic Department. The second appellant decided to alight from the truck. When he did so, he was arrested.

[13] Insofar as the charge of escaping from lawful custody is concerned, the appellants' version is that, on 9 March 2004, before their case was called, the orderly in charge of the cells informed them that the charges against them had been withdrawn, that they were free to go and that they should leave through court 24, which was not in session.

[14] In his judgment, the magistrate made strong credibility findings in favour of Mr Moses, Mr Cane, Inspector Du Plessis and Sergeant Basset. In addition he held that their evidence, taken together with the evidence of Sergeant Kleinbooi (who had arrested the first appellant), was consistent and that the witnesses corroborated each other in their identification of the appellants and on the occurrences of 16 February 2004. He found that the appellants' versions to explain their presence in and on the truck were false and he highlighted a number of problems with their evidence in this regard. On this

basis he held that the State had proved beyond reasonable doubt that the appellants had committed the offence of robbery with aggravating circumstances when they hijacked the truck and the offence of kidnapping when they deprived Mr Moses of his freedom of movement when they drove off with him in the truck. In addition, he held that the State had proved beyond reasonable doubt that the third appellant had been in unlawful possession of a firearm.

[15] Turning to the charge of escaping from lawful custody, the magistrate accepted the evidence of Sergeant Mgamama and held that there were 'too many improbabilities in the version of the accused to say that the version is reasonably possibly true'. He then listed a number of glaring improbabilities.

[16] In an appeal such as this, in which it is argued that the trial court's findings of fact were wrong, our powers to interfere with those findings on appeal are limited: in *S v Hadebe and others* 1997 (2) SACR 641 (SCA), 645e-f, it was held that 'in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong'. See too *S v Francis* 1991 (1) SA 198 (A), 204c-e.

[17] In my view, the magistrate did not misdirect himself in any way in his evaluation of the evidence and in making the factual findings upon which the convictions of the appellants is based. His judgment is thorough and well-reasoned. His conclusions are fully justified in relation to the evidence adduced before him. There is accordingly no proper basis for us to interfere with the conviction of the appellants.

[18] I turn now to the question of sentence. It will be recalled that the appellants were sentenced to an effective 15 years imprisonment in respect of the robbery, the kidnapping and, in the case of the third appellant, the

unlawful possession of the firearm. In addition, a further two year sentence was imposed on each for escaping from lawful custody.

[19] As with his judgment on conviction, the magistrate's judgment on sentence is thorough and well-reasoned. He considered the personal circumstances of the appellants as well as the nature of the offences committed. Despite holding that the offence of robbery, in particular, was a serious offence he was also alive to the fact that the truck and its load were recovered. He considered the fact that a firearm was used to be an aggravating factor and he concluded that no substantial and compelling circumstances justified a downward departure from the prescribed minimum sentence, which he then imposed.

[20] It is only this sentence that is attacked on appeal. I can see no basis for interference with the sentence: I can find no misdirection on the part of the magistrate and the severity of the sentence certainly does not induce a sense of shock. Indeed, for what it is worth, the prescribed minimum sentence of 15 years imprisonment for the type of robbery disclosed by the facts appears to me to be appropriate. One must, of course, bear in mind that the minimum sentences prescribed by the legislature 'are not to be departed from lightly and for flimsy reasons' and that departures from the prescribed minimum sentences are only justified if there are, 'and can be seen to be, truly convincing reasons' for such a departure. See *S v Malgas* 2001 (1) SACR 469 (SCA), para 25, sub-paras C and D.

[21] In these circumstances, the appeals against sentence, like the appeals against the convictions, must also fail.

[22] In the result:

a) the appellants' appeals against their convictions are dismissed and those convictions are confirmed; and

b) the appellants' appeals against their sentences are dismissed and those sentences are confirmed.

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C. PLASKET

JUDGE OF THE HIGH COURT

I agree:

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L. E. LEACH

JUDGE OF THE HIGH COURT