IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case Number: A162/2017

In the matter between:

ISMAEL PULE MOSEPELE Appellant

and

THE STATE Respondent

CORAM: VAN ZYL, J *et* MURRAY, AJ

HEARD ON: 30 OCTOBER 2017

JUDGMENT BY: MURRAY, AJ

DELIVERED ON: 21 DECEMBER 2017

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[1] The Appellant was convicted in the Regional Court, Bloemfontein, by Mrs Nulliah, on 15 November 2013, of Robbery with

Aggravating Circumstances and Attempted Murder. The two charges were taken together and the Appellant was sentenced to 15 years' imprisonment. He appeals against both conviction and sentence.

[2] Adv Strauss appeared for the State and Mr Tshabalala represented the Appellant. The State supports the conviction and sentence, while the Defence avers that the State failed to prove the Appellant's guilt beyond a reasonable doubt and submitted that the Appellant should be acquitted if there is any reasonable possibility that he might be innocent.

[3] The court *a quo* found the facts that were common cause on the evidence to be: that Mr Booysen ("Booysen") was robbed on 21 September 2012; that he was assaulted by being kicked, hit and dragged; that he was stabbed with a knife and sustained stab wounds; that the Appellant was present during the incident; that he ran away from the scene; what the nature and value of the items stolen were and that the canister of pepper spray looked exactly like the one which Booysen had given the Appellant. The court *a quo* listed the facts in dispute as: whether the Appellant acted in concert with the other two men in assaulting and robbing Booysen; and whether the inclusion of the second charge of attempted murder amounted to a duplication of charges.

[4] The Appellant was an ice-cream vendor in the employment of Booysen, the owner of Will's Ice Cream in West Burger Street, Bloemfontein. Booysen's version is that on 21 September 2012 he

waited for the Appellant, who had by then worked for him for five weeks, to return from his daily rounds on his vending bicycle. He was late and it was already 18:00 when he arrived, and Booysen reminded him that he had warned him about returning late just the day before.

[5] As soon as Booysen opened the gate for him, two men charged at him from outside and pepper-sprayed him in the face and eyes. After emptying the canister on him, they kicked and hit him, slamming his head against the ground. When he shouted to the Appellant to help him, the Appellant merely shouted back: "I'm not helping you, I'm helping them!"

[6] The Appellant joined the other two assailants. While continuing to kick and hit Booysen, they dragged him away from the gate, towards the shop, and left him lying on the cement, face down, with one assailant restraining him with one foot on his neck. They removed his necklace, worth R83 000, his bracelet, worth R48 000, his watch of R7000 and took his laptop, cell-phone, jacket and the keys to his pick-up truck.

[7] When he tried to escape through the front door of the shop, the Appellant blocked the exit and stabbed him five times with an Okapi knife: three times in the shoulder, once in the neck and once next to his eye, while threatening "ek gaan jou f----n doodmaak" (*"I'm going to f------g kill you"*).

[8] The three attackers then ran away, upon which Booysen ran outside and asked two unknown passers-by for help. They had by then already called the police and the ambulance, and one of them gave him his cell-phone to call his wife. He later saw that person giving a statement to the "black policeman", Const. Lukasa, while he gave his statement to W.O. Breytenbach.

[9] Booysen testified, furthermore, that he had seen the Appellant before that day with the Okapi knife which the police found at the scene with opened blade with blood on it. He also identified the green canister of pepper spray which the police recovered from the scene as a distinctive type of imported canister which he buys in Johannesburg and which he had provided to the Appellant and his other employees for self-defence. He testified, moreover, that the Appellant's bag with his street wear was still at the ice cream shop where he had left it during the attack on 21 September 2012.

[10] The court *a quo* correctly handled Booysen's evidence with caution since he was a single witness regarding parts of the events, whilst keeping in mind that the evidence of a single witness needs to be satisfactory, not perfect.[1] Mr Strauss submitted, and I agree, that the trial court was correct in finding that Booysen's evidence was corroborated by other witnesses on the material aspects of the case. Thakoli, Booysen and the J88 all confirmed Booysen's injuries. Even the Appellant in certain respects corroborated

[1] S v Abdoornham 1954 (3) SA 163 (N); S v Sauls and Others 1981 (3) SA 172 (A).

Booysen's version, but only to the extent that it did not implicate the Appellant himself in the incident.

[11] Thakoli (the passer-by who had given Booysen the use of his phone) testified that on 21 September 2012 he saw Booysen in his office when he walked past the shop. He confirmed that a little later, on his way back, he saw from across the street, three men running out of and away from the shop, shouting "Waar's daai man?" (*'Where is that man?'*). He saw the Appellant whom he later identified from a photo in an identity document, run ahead and open the 'tralie-gate' for the other two. He described the Nestlé uniform which the Appellant was wearing as a blue shirt with a red logo, a blue cap with a red logo and black formal pants, and stated that one of the persons with the Appellant was a tall dark man in a maroon uniform jacket. The latter fell at the street-corner as they were running away, then got up and ran after the other two, with the Appellant running ahead of them all.

[12] Thakoli testified, furthermore, that he saw Booysen emerge from the premises with blood streaming from his ear, his neck and his shoulder. He called the ambulance and the police on his friend's phone, and lent Booysen his phone to call his family. He testified that he stood next to Booysen when the ER24 paramedics bandaged Booysen's head, and that he gave his statement to a black police officer while the white police officer took Booysen's statement. He did not know the Appellant before the incident, but identified him at the scene from an ID photo and in person in the

dock. Since he did not know the Appellant, he had no motive to falsely implicate him.

[13] W.O. Breytenbach also corroborated Booysen's version. He testified that he and Constable Lukasa responded to Thakoli's call. He stated that Booysen's son and the ER24 crew were already there when they arrived. They had already bandaged Booysen whose upper body and face were covered in blood, with a knife-wound to the left shoulder, under the left ear and next to his left eye. He testified that the shop floor was covered in drops of blood, and stated that they recovered from the steel gate on the right side of the steps an Okapi knife with an opened blade with blood on it, and from the other corner a green can of pepper spray, as well as the gold pendant of Booysen's necklace which he left in the care of Booysen's son because he was afraid it would disappear from the evidence room if he handed it in. He admitted that Booysen did not describe his attackers, but stated that he gave the police his employee's (the Appellant's) name.

[14] The Court *a quo* applied the principles set out in **Stellenbosch Farmer's Winery Group Ltd and Another v Martel**[2] regarding the evaluation of credibility, namely that:

> "... the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors ... such as (i) the witness' candour and demeanour in the witness box, (ii) his bias, latent or blatant, (iii) internal contradictions in his evidence,

[2] 2003 (1) SA 11 (SCA)

> (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra-curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events."

[15] In doing so, the Court *a quo* found Breytenbach's evidence, as well as that of the "bystander" Thakoli, that Booysen was stabbed, and robbed, to "corroborate and emphasise the consistency of" Booysen's version. The Court regarded this "evidence of corroboration and consistency as emphasising the honesty and credibility of the complainant". The Court held that Breytenbach corroborated the nature and position of the injuries sustained by Booysen, the greater part of Booysen's testimony regarding what transpired when he was attacked and assaulted; his evidence about being robbed of his jewellery, pepper-sprayed and stabbed with an Okapi knife and the theft of the charm of his necklace which was recovered.

[16] The court *a quo* effectively addressed the discrepancies between Breytenbach's evidence and that of Thakoli. Breytenbach averred, for instance, that there were no members of the community at the scene when they arrived, only the paramedics and Booysen's son, whereas Thakoli stated that he was there while the ER24 paramedics bandaged Booysen's head, and when the two police officers arrived. He testified that he gave his statement to Breytenbachs' partner while Breytenbach was taking Booysen's statement, averring that Breytenbach even joked with him about a pen at the time. His version corroborated Booysen's who stated

that he saw the 'black policeman' (Const. Lukasa) take Thakoli's statement while he was giving his to Breytenbach.

[17] The Court *a quo* did not attach undue weight to the contradiction between Breytenbach's evidence that Booysen had told him that the Appellant had pepper-sprayed him whereas in court Booysen testified that the other two assailants had sprayed him. The Court ascribed the discrepancy to the lapse of time and the viciousness of the attack. It viewed the differences as independence of recall and found no evidence of collusion between any of the witnesses.

[18] The Court also did not regard the contradiction between Breytenbach's and Thakoli's evidence that there were no members of the public present, as significant. It found Thakoli to have been consistent in his testimony and under cross-examination with reference to the location, the time of the incident, and as to what happened while he was present at the scene. He was found not to have been hesitant or evasive, and the Court stated that he was able to point out unhesitatingly from the photographs shown to him the door and the gate from which Booysen and his attackers ran out.

[19] The Court *a quo* found Booysen to have been a credible witness. The inconsistencies in his version were thoroughly and objectively considered and assessed by the Court. His evidence was found to be clear and concise and his version to have been corroborated by that of Breytenbach and Thakoli. The Court pointed out that he was able to identify the Okapi knife as belonging to the Appellant,

as he had seen it before and was consistent during cross-examination. He did not unnecessarily implicate the Appellant and was honest in stating that he did not see the Appellant give the other two the pepper spray. He was adamant that even though he did not know who did what to him during the attack all three of the Appellant participated in the attack.

[20] In **S v Francis**[3] the Court held that a court of appeal's power to interfere with findings of the trial court on credibility are limited:

> "... bearing in mind the advantage which a trial court has in seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere in the trial court's evaluation of oral testimony."

[21] The Court *a quo* in this case found the demeanour of all three State witnesses to have been impressive and their evidence to have been given in a straightforward manner and unhesitatingly. He found them to have corroborated each other in all material respects and the contradictions that did occur, not to be material when regard was had to the totality of the evidence in conjunction with the Appellant's own version.

[22] I cannot fault the Court *a quo's* approach to the State's evidence. In my view, too, none of the discrepancies were material enough to detract from the credibility of the State's version, whereas there were so many contradictions and improbabilities in the Appellant's

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[3] 1991 (1) SACR 198 (A) at 204 c - a

version that the latter can clearly be dismissed as a fabrication devised after hearing the evidence of the State witnesses.

[23] The Appellant pleaded not guilty. He offered no plea explanation and opted to "reserve the basis for his defence". He admitted to having been at the scene, but averred that he merely witnessed the attack on Booysen from under the veranda where the bikes were parked. According to him, he was already in the premises and on his way to the bicycle storage area with Booysen still trying to close the gate, when he heard Booysen scream "Pule!" and saw him being held by two men. He averred that he simply hid where he had parked his bicycle and watched while the men hit Booysen and dragged him to the building because he was too scared to help or to go for help because he would have had to pass the attackers.

[24] He described in detail how he saw the perpetrators take Booysen's gold chain, bracelet, wallet and phone, and saw one of them exiting the shop with a laptop while Booysen was still lying outside with the other assailant stepping on his neck. The Appellant denied either knowing or speaking to the attackers. He maintained that when the two attackers left through the back gate, Booysen and he got up, and he then allegedly followed the two attackers through the back gate and chased them up to Hoffman Square, but was unable to catch up with them. There he allegedly searched for them for half an hour before he went home.

[25] It is extremely improbable, however, that the Appellant, who had on his own version been so afraid of the attackers that he hid all

through the robbery, would suddenly chase the same men for a considerable distance and thereafter search for them for another half an hour. It is as inconceivable that he, who allegedly witnessed everything and who described the attackers' actions in detail, would not mention seeing anyone stab Booysen. That begs the question as to where the blood drops all over the floor would have come from, and when and by whom the wounds had been inflicted, since the three of them, even on his version, all left together immediately after the robbery. It was evident, furthermore, that he was at pains to aver that they all left through the back gate because Thakolli had testified that he saw them emerge from the front entrance.

[26] As improbable, furthermore, is the Appellant's allegation that he was no longer wearing his Nestlé uniform at the time of the attack because he had already removed it and changed into his own clothes at 17h00 (in other words while he was still riding along on his vendor bicycle since he on his own version only arrived at the gate at 17h45). According to him at the time of the attack he was wearing a striped brown-and-white long-sleeved T-shirt, black Nike pants and sneakers, which he had worn under his Nestlé uniform. On his own improbable version, he removed the uniform before entering the premises and put it in the lunchbox when he got back to the shop at 17:45 (in other words during the attack, since on his own version he left with the attackers).

[27] According to him, he neither carried a knife, nor recognised the knife that the police had found, and did not take the green pepper

spray with him on that day. It is most improbable, furthermore, that if the Appellant had really been a mere innocent onlooker to the robbery as he averred, he would not have returned to the shop to collect his casual clothes at some time since the robbery. It is as improbable that he would just happen to have been there at the time of the robbery and been allowed to watch it, unscathed. Equally improbable is it that he would have taken such trouble to pursue and search for the assailants, only to go home without informing the police of the attack on his employer or of the robbery, never to return to work again.

[28] In my view the Court *a quo* complied with the requirements for finding the Appellant guilty of the offences of which he was convicted that were set out in **S v Van der Meyden**[4], namely that:

> "The *onus* of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the Appellant beyond reasonable doubt. A Court does not look at the evidence implicating the Appellant in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true. A process of reasoning which is appropriate to the application of the proper test in any particular case will depend on the nature of the evidence which the Court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or acquit) must account for all the evidence. Some of it might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored."

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[4] 1999 (1) SACR 447 (W)

[29] I agree with Mr Strauss, therefore, that the Court *a quo* followed the correct approach when it analysed the evidence, namely to:

> "... weigh up all the elements which point towards the guilt of the Appellant against all those which are indicative of his innocence, taking proper account of the inherent strength and weaknesses, probabilities and impossibilities on both sides, and having done so, to decide whether the balance weighs so heavily in favour of the State so as to exclude any reasonable doubt about the Appellant's guilt."[5]

[30] As the Court *a quo* correctly pointed out, there could be no mistake about the Appellant's identity since on his own admission he was present during the robbery and ran out of the premises. Thakoli, for instance, identified the Appellant in the dock as the person who had worn the ice cream shop uniform. He was very certain of what he saw and when the Appellant's version was put to him that he did not participate in the robbery, he firmly stated that "all that he knew was what he saw which was that the [Appellant] was running out of the shop". The only issue to be proved, therefore, was that the Appellant took part in the robbery and that he committed the subsequent stabbing of the Booysen.

[31] The Court indicated that although it could not fault the Appellant's demeanour in the witness box, there was "much fault to be found in his testimony" and found the Appellant's version "to contain substantial improbabilities". The Court found it strange and suspicious that the Appellant disputed that he wore the Nestlé uniform and averred

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[5] S v Chabalala 2003 (1) SACR 134 (SCA) at 140 a - b

that he took it off before he reached the premises while admitting that he was the only employee on the premises and that he was the one who had chased after the two men.

[32] It was never disputed that Booysen was stabbed. The Court found it surprising that the Appellant focused with such remarkable clarity on how the assailants stepped on Booysen's neck, removed his necklace, then removed his bracelet, then emptied his pockets, and even remembered the colour and make of their clothing, but that he never saw any stabbing. As improbable, furthermore, was his averment that he ran after the two men all by himself despite his earlier statement that he did not get involved in the attack because he was scared of them; that he would chase the two men for such a distance and look around for them for half an hour, but never report the incident to the police, return to the shop to make sure that his employer was alright, to go back to work or to collect his clothes.

[33] The Court accordingly found the Appellant to be an unimpressive witness and to be "an opportunist who tainted or adapted his evidence to suit the circumstances". The Court held the Appellant's version to contain substantial improbabilities to the extent that it was satisfied that his version was so improbable as not to be a reasonable possibility. This the Court decided after having considered the totality of the evidence. The possibility that the Appellant was falsely implicated was, furthermore, in the Court's view "so remote that it can safely be disregarded". I could find no reason to disagree.

[34] With regard to the submission that the Appellant's conviction of two distinct offences amounted to a duplication of charges, I agree with the Court *a quo* that Booysen's stabbing occurred after the robbery had already been completed, and therefore constituted a separate offence. Booysen testified that he was trying to escape when he was stabbed, and this was never disputed. It was clear from the evidence that Booysen was indeed not offering any resistance at that stage to either the Appellant or the other two assailants. This was clearly borne out by the fact that he ran in the direction away from them after all three of them had already subdued him and removed his property. The use of a knife to stab him therefore evidently was not necessary and the evidence showed, as the Court *a quo* held, that the act of stabbing Booysen could not be regarded as being committed in order to facilitate the robbery, and therefore as part of one and the same action or offence.

[35] The evidence was that the Appellant chased after Booysen, blocked his path by standing in front of the door to prevent him from escaping, then stabbed him when he was not offering any resistance to the taking of the property. On the contrary, he was at that stage actually running away from the Appellant and the other two men. He was therefore no longer any threat or impediment to their purpose to rob Booysen of his property. Accordingly the Court a *quo* correctly found that it cannot be said that Booysen's stabbing was causally connected to the taking of the property or that, but for the stabbing of Booysen, the Appellant and the other two men would not have been able to obtain or retain the property. In my view, too, the only inference to be drawn from

the particular circumstances of this case, as the court *a quo* correctly found, was that the Appellant did attempt to murder Booysen, as was confirmed by his words: "Ek gaan jou f----n doodmaak".

[36] I agree with the court *a quo,* therefore, that the Appellant was indeed faced with direct and credible evidence implicating him in both the offences, and that, on the totality of the evidence, the State had been able to establish his guilt beyond reasonable doubt regarding both charges. I support its conclusion that, having regard to the totality of the evidence, any reasonable doubt as to the Appellant's guilt had been excluded, and therefore find that the Appellant was correctly convicted of both Robbery with Aggravating Circumstances and Attempted Murder. The appeal against the conviction therefore has to fail.

[37] It is a trial court's prerogative to impose a sentence which it, after an objective weighing up of all the relevant circumstances, considers to be just and proportionate to the crime. The Appellant was sentenced to an effective term of imprisonment of 15 years. In **S v Pillay**[6] the Court stated that:

> "It is trite law that the Appeal Court will only interfere with sentence if it is of the opinion that such sentence is unreasonable, unjust or vitiated by irregularity or that the trial court has misdirected itself."

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[6] 1997 (4) SA 531 (A) at 535 d - g

[38] The State supports the sentence imposed by the court *a quo*. Mr Strauss submitted that the aggravating circumstances outweigh the mitigating factors and that the trial court's finding that the mitigating factors were such that they do not constitute compelling and substantial circumstances to justify a departure from the prescribed minimum sentence cannot be faulted.

[39] The test for what constitutes substantial and compelling circumstances was articulated in **S v Malgas**[7]. The Court in that matter emphasised that the Legislature has ordained the prescribed minimum sentence that should in the normal course be imposed in the absence of weighty justification to depart from. In **S v Matyityi**[8] it was held that courts should not depart from the provisions of the Criminal Law Amendment Act 105 of 1997, ("the Act") for flimsy or unconvincing reasons. The provisions of the Act are applicable to Count 1, Robbery with Aggravating Circumstances, and a sentence of 15 years' imprisonment is determined for first offenders in the absence of substantial and compelling circumstances.

[40] The crux of the appeal before us is that the court *a quo* is alleged to have erred in not finding compelling and substantial circumstances to exist. The basis for this submission was the numerous personal circumstances raised on behalf of the Appellant, namely that: he was 39 years old on 1 November 2013;

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[7] 2001 (2) SA 1222 (SCA)

[8] 2011 (1) SACR 40 (SCA)

he is unmarried; both his parents are deceased; before his arrest he stayed with his girlfriend and their 11 year old daughter; he has another child that was 3 years old at the time of his sentence; he suffers from TB and HIV; he had been in custody for at least 13 months; he is a member of the Salvation Army Church; his previous convictions with reference to offences involving violence were committed before 2012 and his pre-sentence report dated 1 November 2012 stated that he had no previous convictions (obviously erroneously). Mr Tshabalala submitted that the appellant's personal circumstances should have caused his punishment to have been tempered with some measure of mercy and averred that his sentence of 15 years' imprisonment should be set aside.

[41] The Court gave serious consideration to each of the various potentially mitigating factors and properly motivated each decision to discard a particular factor or factors as neutral or less weighty in view of the particular circumstances. Those factors to which more significance were attached, were that he was suffering from tuberculosis, that he was HIV positive, and that he had spent more than a year in custody. The fact that the appellant has two minor children, the Court considered to be of less significance since he did not contribute to their maintenance on a regular basis, and due to his numerous previous convictions, he had already spent the greater part of their lives in prison, which implied that renewed incarceration would have little or no impact in their lives. That was weighed, furthermore, against the fact that the elder of the two children does not reside with him and there was no evidence

before the Court that the mother of the 3 year old child could not be employed and support the child.

[42] I agree with the Court *a quo* that there was nothing in the appellant's family or background which needed special sympathy or which lent significant weight to the cumulative effect of the personal circumstances on the mitigation side of the scale, especially in view of his lengthy criminal record. It was evident, too, that Correctional Supervision was not a viable sentencing option, since it had not prevented him on a previous occasion committing further offences.

[43] The Court *a quo* weighed the totality of the mitigating factors against the totality of the aggravating ones. It regarded as aggravating, first of all, that the Appellant pleaded not guilty to both of the charges of which he has been found guilty and persisted with his claim of innocence even during the sentencing, and in so doing depriving himself of the opportunity to express genuine remorse, which would have been a weighty factor in considering an appropriate sentence.

[44] The Court regarded the gravity of the offence to have been exacerbated by Booysen having been the Appellant's employer; by the stabbing attack on Booysen having been completely unnecessary, and by Booysen having sustained extensive injuries to his person. The Court *a quo* accordingly held the weightiest of the aggravating factors to have been the "remorseless, unscrupulous and brutal attack" on the Appellant's employer and the fact that the

Appellant showed him no mercy even though on the evidence of both Booysen and the Appellant, Booysen had appealed to the Appellant to help him.

[45] The Court considered it to be significantly aggravating, furthermore, that the robbery was pre-planned and that this type of offense was becoming more and more prevalent in this area. It also took into consideration the fact that the Appellant was clearly not a first offender and that he persisted during his testimony in "being contradictory, opportunistic and manipulative in the evidence that he gave".

[46] It then found the aggravating circumstances to have outweighed the mitigating ones and was unable to find substantial and compelling circumstances which allowed it to impose a lesser than the prescribed minimum sentence on the first charge. The Court further justified the imposition of the 15-year sentence by explaining that it found the imposition of the prescribed minimum sentence to be just and proportionate to what it would have imposed even if the minimum sentencing legislation had not been enacted.

[47] The Court *a quo* applied the triad principle laid down in **S v Zinn**[9]. It took into consideration the purposes of sentencing, namely deterrence, prevention, rehabilitation and retribution. In doing so, it considered the personal circumstances of the appellant, the gravity

[9] 1969 (2) SA 537 (A)

of the offences of which the Appellant had been found guilty, and the interests of society. It applied those criteria in a balanced way and introduced an element of mercy by taking the two offences together to impose a sentence of 15 years' imprisonment instead of imposing two sentences to be served consecutively.

[48] Despite the submissions by Mr Tshabalala on behalf of the Appellant, therefore, I am satisfied that the court *a quo's* approach was correct and that it exercised its discretion reasonably. I find no evidence of any improper exercise of its sentencing discretion[10],[11] and therefore find no justification for interference in the Court *a quo's* exercise of such discretion.

[49] Consequently I find that the appeal against both conviction and sentence ought to be dismissed.

WHEREFORE I make the following order :

1. The appeal is dismissed.

2. The conviction and sentence are confirmed.

H. MURRAY, AJ

[10] S v Pieters 1987 (3) SA 717 (A) at 728 b - c

[11] S v Pillay 1997 (4) SA 531 (A) at 535 e - g

concur

C. VAN ZYL, J

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