CASE NO.: SA 5/1999

IN THE SUPREME COURT OF NAMIBIA

THE STATE APPELLANT

versus

PAULUS ALEXANDER RESPONDENT

CORAM**:** Teek, A.J.A., Gibson, A.J.A. *et* Maritz, A.J.A.

HEARD ON: 1999/10/01

DELIVERED ON: 2003/02/13

APPEAL JUDGMENT

MARITZ, A.J.A.: This appeal by the State is against the judgment of the Full Bench of the High Court which upheld the respondent's appeal against the sentences imposed on him by the trial Court. The respondent (to whom I shall henceforth refer to as the "accused") was convicted by the trial Court on counts of murder and robbery, the latter with aggravating circumstances present. On the count of murder, the Court sentenced him to life imprisonment and on that of robbery to 15 years imprisonment. It also ordered that the latter

sentence would run concurrently with the former. Those sentences were set aside and substituted on appeal with the following: On the count of murder, 16 years imprisonment and on that of robbery, one year imprisonment to be served concurrently with the sentence of 16 years imprisonment. Aggrieved by, what it regards as, an unjustified interference with the sentencing discretion of the trial Court and the disturbing leniency of the substituted sentences imposed by the Full Bench, the State moved an application for, and obtained leave to appeal to this Court in terms of section 316(1A)(a) of the Criminal Procedure Act, 1977.

Both crimes were committed in the course of, what started off as, a daylight mugging on Windhoek's main street. The facts found by the trial Court are not in issue for purposes of this appeal. The accused was one of a group of four who roamed the streets of Windhoek on that fateful day. One of them stole a 30 cm-long kitchen knife from a local retailer, wrapped it in a newspaper and eventually handed it to the accused who hid it inside his trousers. Later that same day, they came across Mr Andreas Uzigo. The accused snatched Mr Uzigo's sunglasses from his face and passed it to another in the group. Within seconds, his co-accused made off with it. Mr Uzigo accosted the accused and demanded the return of his sunglasses. The accused suddenly took the knife (still wrapped in the newspaper) out of his trousers, stabbed Mr Uzigo in the throat and ran off. The knife penetrated 6cm into the soft tissue on the right hand side of

his throat, partially severed his left carotid artery and jugular vein and caused his death by exsanguination.

Disregarding for the moment those parts that features prominently in appeal, with which I shall deal with hereunder in more detail, the trial Judge referred in his judgment on sentence to the brutal and cowardly assault on and murder of the deceased; the accused’s contemptuous disregard for the forces of law and order by committing the crimes in broad daylight in the center of town whilst out on parole; his previous convictions of theft and malicious damage to property; his persistent dishonesty during all stages of the trial; the absence of genuine feelings of remorse or contrition; the severity and increasing prevalence of the crimes in question; the public outcry against crimes of that nature and the repeated warnings issued by the courts that those offenders would be punished severely.

These are all aggravating considerations which are compelling and must be accorded due weight in the determination of an appropriate sentence. Precisely what the comparative weight thereof should be when measured against factors advanced in mitigation and what emphasis should be given to them as part of the interrelated components of *Zinn’s* oft-applied *triad* in designing a fitting sentence to meet the objectives of punishment, falls pre-eminently within the sentencing discretion of the trial Court. Steeped in the

atmosphere of the case, exposed to the emotions and demeanour of victims and perpetrators alike, alert to local circumstances such as prevalence and the community's legitimate interests in a fair and just judicial response to the crimes in question, the trial Judge is normally better positioned to tailor a fitting sentence than a Court of appeal which has but a transcript of the record to judge the matter. For these reasons a Court sitting on appeal against sentence will accord the trial Court a significant degree of appreciation in the exercise of its sentencing discretion. It will not interfere with the sentence imposed on insignificant grounds or merely because it would have imposed a different sentence had it been the Court of first instance. It will only do so if it is satisfied that the trial Judge has failed to exercise his or her sentencing discretion judicially or properly. This principle is trite in law and has been stated and restated in numerous cases by this and other Courts in the region (c.f. *S v Gaseb and Others*, 2001 (1) SACR 438 (NmS) at 465B-C; *S v Shikunga and Another*, 2000 (1) SA 616 (NmS) at 631G; *S v Van Wyk*, 1992 (1) SACR 147 (NmS) at 165D; *S v Pieters*, 1987(3) SA 717 (A) at 727G-728C). The Full Bench also recognised this principle when it dealt with the appeal *a quo* but, for reasons I shall presently refer to, concluded that it was nevertheless at liberty to interfere and ameliorate the severity of the imposed sentences.

Whether or not such interference was justified in law is the principal issue in this appeal. Given the exigencies of practice and multiplicity

of circumstances unique to each case, there may not be a *numerus clausus* of specific instances exhaustively defining when a trial Court has acted injudiciously or improperly, but, reduced to its bare essence, the measure is clear: “The test …is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.” (*per* Holmes JA in *S v Rabie*, 1975 (4) SA 855 (A) at 857E). By judicial precedent the Courts have expounded thereon and justified interference on appeal if a trial Court has committed a misdirection of fact or law which by its nature, degree or seriousness is such “that it shows, directly or inferentially that the Court did not exercise its discretion at all or exercised it improperly or unreasonably” (see: *S v Pillay*, 1977(4) SA 531 (A) at 535D-G); if a material irregularity has occurred in the proceedings (*S v Tjiho*, 1991 NR 361 at 366B); if the sentence is manifestly inappropriate given the gravity of the offence and induces a sense of shock (*S v Salzwedel and Others*, 2000 (1) SA 786 (SCA) 790D–E) or a patent and disturbing disparity exists between the sentence that was imposed and the sentence that the Court of appeal would have imposed had it been the Court of first instance (*S v Van Wyk*, 1992 (1) SACR 147 (Nm) at 165d-g; *S v Petkar*, 1988 (3) SA 571 (A) at 574C); if there has been an overemphasis of one of the triad of sentencing interests at the expense of another (*S v Zinn* 1969 (2) SA 537 (A) at 540F – G and *S v Salzwedel and Others*, *supra* at 790F) or if there has been such an excessive devotion to further a particular

sentencing objective that others are obscured (*S v Maseko,* 1982 (1) SA 99 (A) at 102F).

The accused attacked the appropriateness of his sentence on virtually all these grounds *a quo* and the Full Bench agreed with him on most. It held that the trial Court misdirected itself on the facts; that it overemphasised the seriousness of the crimes; that it accentuated the deterrent and retributive aspects of punishment at the expense of other penal objectives; that the sentences are so disturbingly severe in the circumstances that they induce a sense of shock and that there is such a striking disparity between the sentences imposed by the trial Court and those which the Court *a* quo would have imposed that the sentences should be substituted.

The misdirections of fact attributed to the trial Judge are these: That the appellant was a member of a gang that walked the streets, entered shops and robbed people; that it was almost a daily occurrence for people to be assaulted and have their spectacles stolen and that it was the appellant's and his friends' *modus operandi* to roam around armed with knifes which were to be used to subdue their unsuspecting victims. The Court held that there was no evidential basis on which the trial Judge could have properly and justifiably drawn those inferences and that the trial Judge "unconsciously projected his own feelings or views as facts", and punished the accused accordingly.

Had the trial Judge made those findings in his judgment on sentence, the criticism that they were without evidential basis might well have been justified. A reading of his judgment on sentence shows, however that he referred to those matters in substantially different terms:

> "The crimes of theft, robbery and murder have certainly increased markedly in the last few years. Today it is not an exception to hear of people whose goods are stolen, gangs walk the streets and move into the shops to rob people and now we even have the case where a person was murdered in daylight in the main street of Windhoek. …
> The crime here starts off with the accused roaming around in the streets of Windhoek. They snatched a minor item such as sunglasses off the victim's face and then, when the victim was not satisfied and attempted to recover his property, he was assaulted, killed in a brutal and cowardly fashion."

Nothing in these remarks justifies the misdirections attributed on appeal to the Trial Judge. The remarks about gangs and their activities were made in the context of the Court's finding that crimes of theft, murder and robbery had become more prevalent lately. That those are crimes of gravity and of all too common occurrence are facts notoriously known to all the Courts in this country which grapple daily with the waves of crime that erode the very foundations on which we have chosen to build a just, fair and peaceful society. These are sentiments frequently albeit differently

expressed by this, and other Courts in the region. Given his judicial experience, it was not only relevant but also appropriate for the trial Judge to refer to the role of gangs in the escalation of such crimes. The trial Court did not find that he accused actually belonged to such a gang but, by the use of the words "and now" intended to add yet another manifestation of crimes in public places that the public was being subjected to. We are also not impressed with counsel's reliance on remarks made by the trial Judge during argument in support for his submission that the Court misdirected itself in the manner contended for. It is not uncommon that a presiding Judge may put questions and make propositions to counsel during argument to test the underlying premises, the persuasiveness, the logic and the legal basis of his or her submissions. To construe those questions and propositions as the presiding Judge's final views as if they were part of the reasoning in his judgment, is to deny the persuasiveness of advocacy in litigation and to attribute to the presiding Judge a closed, instead of an queationing and searching, mind.

We do not think that there is justification for the finding that the trial Judge reasoned that it had been the *modus operandi* of the accused and his friends to roam the streets with knifes, intending to use them on unsuspecting victims. There is nothing in the judgment to that effect. On the contrary, the trial Court's approach to the evidence is indicative that the very converse holds true. The

employment of a particular *modus operandi* by a group in the commission of crime presupposes the existence of a complicity amongst them forged by an antecedent agreement to further their common criminal objective by the employment of a particular mode of conduct. The appellant did not prove such an agreement and, given its inability to do so, the trial Court acquitted the accused's co-accused on the charge of murder. The Court expressly accepted that he had joined in on the robbery on the spur of the moment.

We also do not think that there is much force in the Court *a quo*'s reasoning that the trial Judge overemphasised the deterrent aspect of punishment. The trial Judge referred to the need for a deterrent sentence only in the following passage from the judgment:

> "In the light of the increase in this type of crime, the sentence of this Court must be such that it will play some role, however small, in deterring the accused or persons in the position of the accused to commit this type of crime."

Neither in this passage nor in its context within the judgment as a whole do we find justification for the conclusion of the Full Bench that the aspect of deterrence was "over-emphasised so as to lose sight of the actual moral blameworthiness of the accused". Deterrence, as a universally recognised important sentencing objective, finds particular application in serving the interests of the community (c.f. *S v Da Costa and Another,* 1990 NR 149 (HC) at

151D). More so too, when the crimes are grave and all too frequently committed. It must become well-known to those tempted to gratify their illicit desires, needs and urges by wanton disregard for their victims' rights and at the expense of law and order in society, that the Courts will to do what they can, through the imposition of condign punishment on offenders, to stem the tide of serious crime.

This case has a number of aggravating features. These crimes are, firstly, crimes that are prevalent on the streets and in other public places in Namibia. Secondly, they are, as we have mentioned, crimes which must be seriously regarded. They involve violent attacks on the streets and at places where people are entitled to be and to feel safe. Thirdly, when the mugging went bad, instead of flight or reconsideration when the deceased justifiably demanded the return of his sunglasses, the accused retorted with murderous violence to protect his ill-gotten gains of inconsequential value. There are considerations that justify society's demand that its interests be served by the imposition of deterrent sentences. Such is the situation in this country too, and it is appropriate to echo the translated remarks of Lombard J *S v Matolo en 'n Ander,* 1998 (1) SACR 206 (O) at 211D-F:

> "In cases like the present the interests of society is a factor which plays a material role and which requires serious

> consideration. Our country at present suffers an unprecedented, uncontrolled and unacceptable wave of violence, murder, homicide, robbery and rape. A blatant and flagrant want of respect for the life and property of fellow human beings has become prevalent. The vocabulary of our courts to describe the barbaric and repulsive conduct of such unscrupulous criminals is being exhausted. The community craves the assistance of the courts: its members threaten, *inter alia*, to take the law into their own hands. The courts impose severe sentences, but the momentum of violence continues unabated. A court must be thoroughly aware of its responsibility to the community, and by acting steadfastly, impartially and fearlessly, announce to the world in unambiguous terms its utter repugnance and contempt of such conduct."

We do not suggest that a deviation from the fundamental triad of sentencing factors as expounded in *S v Zinn*, 1969 (2) SA 537 (A) at 540 is to be allowed, but, as Ackermann AJA pointed out in *S v Van Wyk*, 1993 NR 426 (SC) at 448E-F, the "duty to harmonise and balance does not imply that equal weight or value must be given to the different factors. Situations can arise where it is necessary (indeed it is often unavoidable) to emphasise one at the expense of the other." The application of these factors cannot be subject to rigid rule, since it is obvious that their dynamics are influenced by time and place and because the facts of each case vary infinitely. Thus, the more society in any place is threatened by an escalation in serious crime at any period of time, the more weight should be

accorded to its interests to right the balance when sentencing offenders.

It was perhaps not so much by what had been said that moved the Court *a quo* to conclude that the trial Judge had over-emphasised the objective of deterrence, but rather by what was inferred from the severe sentences imposed. It regarded them so disparate from what it would have imposed in the first instance, that it felt justified in interfering. It also held that the trial Court had over-emphasised the seriousness of the crime because it concluded that the imposition of the death penalty would have been an imperative, had it not been abolished by the Constitution. It is this part of the judgment that, in our view, justifies closer scrutiny:

> "Before the Namibian Constitution, the murder committed by accused number 1 would have been regarded as one without any extenuating circumstances and the death sentence would have been imperative. A court also in the case of robbery with aggravating circumstances was entitled to impose the death sentence but was not compelled to do so. In Great Britain, when the death sentence was abolished, the statute made it compulsory to sentence a person to life imprisonment in the place or in lieu of the sentence of death. Under the pre-independence dispensation, the accused number 1 would have been sentenced to death. Under the present dispensation, the only realistic punishment for accused number 1 is life imprisonment on the charge of murder."

Reiterating, as it did, that under the pre-independence dispensation the accused would have been sentenced to death and pointing out that a compulsory sentence of life imprisonment substituted the death penalty in Great Britain, one is left in no doubt why, after the Constitutional abolition of the death penalty in Namibia on Independence, the trial Judge reasoned that life imprisonment was the only "realistic" sentence for the accused. I find this reasoning, with respect, both fundamentally and substantively flawed.

It is fundamentally wrong to import and apply pre-independence norms for the imposition of the death penalty to the current sentencing criteria for the imposition of life imprisonment in appropriate instances. The crime of murder previously carried with it a mandatory death penalty but, if the Court was of the opinion that there were extenuating circumstances, it was at liberty to impose another sentence. The absence of any statutory guidance on the meaning and contents of this concept resulted in some judicial debate, with it was eventually being agreed that same refers to those facts bearing on the commission of the crime, which subjectively affected the accused's state of mind so significantly that they abated his or her moral blameworthiness in the commission of the crime (*S v Letsolo*, 1970 (3) SA 476 (A) at 476F-H). It was only those "circumstances as are connected with or have a relation to the conduct of the accused in the commission of the crime" that would be afforded any weight (*R v Mfoni*, 1935 OPD 191

at 193). Considerations such as the absence of previous convictions (*S v Shabalala*, 1966(2) SA 297 (A) at 300H), the possibility of rehabilitation (*S v Maimela*, 1976(2) SA 587 (A) at 591H), the interest of the community (*S v Maarman*, 1976(3) SA 510 (A) at 512G) and subsequent conduct (*S v Arnold*, 1965(2) SA 215 (C) at 219F), to mention a few, were not strictly relevant in that context (See generally: MM Loubser, "Versagtende Omstandighede by Moord: Die Gradering van Skuld", 1970 *THRHR* 333 at 335). As Holmes JA pointed out in *S v Matthee*, 1971(3) SA 769 (A) at 771A-F, it was only once extenuating circumstances had been found to be present that a trial Judge had a statutory discretion to impose "any sentence other than the death sentence that factors ordinarily relevant to sentence would be considered, such as –

> "(a) whether the very circumstances found to be extenuating, e.g. intoxication or provocation, did not in themselves contribute to the brutality of the deed, so that the element of heinousness should not be emphasised out of perspective;
> (b) whether, in the particular circumstances of the case, the alternative of imprisonment, if necessary for life, would not be regarded by society as an adequate deterrent to others;
> (c) whether the discipline and training of a lengthy period of imprisonment might have reformative effects, so that the accused's continued existence would not be a real danger to society; and
> (d) whether the evil of his deed is so shocking, so clamant for extreme retribution, that society would demand his destruction as the only expiation for his wrongdoing."

With the constitutional abolition of the death penalty, the Court's sentencing discretion is no longer tied up in the procedural straightjacket of first having to determine whether there are circumstances which could have influenced the accused's state of mind; if so, whether they subjectively so influenced him or her and, if so, whether the influence was so significant that it diminished the moral blameworthiness of the deed. To reason, as the trial Judge seemingly did, that because there were no mitigating circumstances, *ergo* the only realistic sentence (in the absence of the death penalty as an option) was life imprisonment, constitutes a misdirection in law. Instead of reasoning along those lines, the trial Court would have considered all mitigating and aggravating factors (including those previously referred to in the context of murder as "extenuating circumstances") in the context of Zinn's triad and the well-recognised sentencing objectives of the Court. "Mitigating factors" not only encompasses, but also extends wider than "extenuating circumstances" (See: *S v Dlamini*, 1992(1) SA 18 (A) at 29A-B). Even if there were no circumstances which could have been regarded as "extenuating" under the previous dispensation, the Court might nevertheless have been persuaded by other "mitigating factors" (not directly bearing on the conduct of the accused in the actual commission of the murder – such as those we have referred to earlier) that life imprisonment was not an appropriate sentence in the circumstances.

I hasten to add though that the reasoning of the trial Judge is also in my respectful view substantively flawed inasmuch as he found that there were no “extenuating circumstances”. I referred earlier to the trial Judge’s implicit finding that the murder was not pre-planned. It is clear from the evidence that the accused acted impulsively and on the spur of the moment when the deceased confronted him. The absence of premeditation has always been regarded as an extenuating circumstance (*cf*. *R v Mlambo,* 1960(2) SA 55 (W) at 59 and *R v Mharadzo*, 1966 (2) SA 702 (RA) at 704A). So too, may the absence of *dolus directus* be (See: *S v Sigwahla*, 1967 (4) SA 566 at 571E-I). In his judgment the trial Judge did not find whether actual or legal intention accompanied the act of stabbing. The evidence, it seems to me, does not establish an actual intention to kill but rather an inference of constructive (or legal) intention. The knife was not used at the onset of this multi-handed robbery and was only produced when the deceased confronted the accused. Thereafter the events followed in quick succession. The accused reacted and, without even removing the paper in which the knife was wrapped, stabbed the deceased in his upper body. Moderate force was used, causing the knife to penetrate only 6 cm deep into soft tissue. Unfortunately, it partly severed a major vein in the deceased’s throat. It was a single stab and the accused immediately thereafter ran away. Had the accused intended to kill the defenseless deceased, one would have expected a more purposive and severe

attack. The absence of both premeditation and *dolus directus* are factors which a Court would have considered as “extenuating” prior to the abolition of the death penalty and which would have justified the imposition of a sentence other than the ultimate one.

Given these fundamental and substantive misdirections, the Full Bench was at liberty to consider the sentence on the count of murder afresh. It’s considered view was that the sentence of life imprisonment was startlingly inappropriate in the circumstances of the case. It adopted the view that life imprisonment should only be resorted to “in extreme cases either because society legitimately needs to be protected against the risk of repetition of such conduct by the offender in the future of because the offense committed by the offender is so monstrous in its gravity as to legitimize the extreme degree of disapprobation which the community seeks to express through such a sentence” (*per* Mahomed CJ in *S v Tchoeib,* 1996(1) SACR 390 (NmS) at 397*g*) and reasoned that neither the facts nor the murder could properly and justifiably be described as “extreme” or so “monstrous” that society would expect the strongest possible judicial condemnation. Inasmuch as the accused was for all practical purposes a first offender did not, in the absence of any other evidence, suggest the need to protect society against the risk of repetition after his eventual release. Stressing the need for relative uniformity in the passing of sentences and referring to

that imposed in another case of unprovoked stabbing, the Court *a quo* imposed 16 years imprisonment.

Although Mr January, appearing on behalf of the State, seeks to attack the substituting sentence on a number of grounds, there is, in my view, no justifiable reason to interfere with it. His submission that there are no mitigating factors justifying a sentence less than life is, for the reasons I have already given, clearly untenable. So too, is his submission that the murder can be described as "monstrous and even as extreme". Whilst the crime of murder *per se* is one of the most serious of all crimes and falls within a category which may well justify the imposition of life imprisonment, the Court's approach to crimes of that nature cannot be subject to rigid rule since the facts of each case vary infinitely and each must be judged according to its merit. I have exhaustively and keenly reconsidered all the aggravating and mitigating factors referred to earlier in this judgment and, although this murder has a number of alarming features deserving of condign punishment, they do not elevate it into the realm of those deserving of life imprisonment. A sentence of 16 years imprisonment seems to me both fair and proper for a murder of this gravity and circumstance.

I now turn to consider the appeal against the substitution for the sentence of 15 years imprisonment of a sentence of 1 year

imprisonment on the charge of robbery with aggravating circumstances. The crime of robbery presents itself, of course, in an infinite variety of circumstances and in what can generally be regarded as a diminishing scale of seriousness: ranging from large scale planned armed robberies and robberies of financial institutions, businesses and private residences to common muggings. It follows that the sentences imposed will also vary markedly. But even if one were to allow for a significant deviation in the appreciation of the seriousness of the robbery, the difference between 16 years imprisonment imposed by the trial Court and the substituting sentence of 1 year imprisonment imposed by the Full Bench is so significant that it could only have been the result of substantively different approaches to the question of sentence. A closer reading of the two judgments bears this out: The Trial Court considered the death of the deceased as an aggravating factor in sentencing the accused whilst the Full Bench essentially disregarded the violence committed after the snatching of the sunglasses when it determined the substituting sentence. For reasons that will presently follow, it seems to me that both these Courts have erred.

The trial Judge, referring to the approach in *S v Mogala*, 1978(2) SA 412 (A) at 415H-416A, *S v Sithole*, 1981(1) SA 1186 (N) at 1187, *S v Mofokeng*, 1982(4) SA 147 (T) at 150A-C and *S v Witbooi*, 1984(1) SA 242 (C) when an item of value is snatched from a victim, held that the crime of robbery was committed at the moment the glasses

were snatched from the face of the deceased. To justify the finding that aggravating circumstances as defined in s. 1 of the Criminal Procedure Act, 1977 were present, he further held that the subsequent stabbing was so narrowly connected in time and place thereto that it formed part and parcel of the actual robbery. It was on this premise (the correctness of which is not in issue and on which I express no view) that he convicted and later sentenced the accused on the count of robbery.

The stabbing of the deceased is therefore not only an event underlying the accused's conviction on the charge of murder, but is also the reason why he was convicted on the count of robbery with aggravating circumstances. The stabbing, we know, had fatal consequences. Inasmuch as the conviction on both crimes is based on the same series of facts and the violence perpetrated on the victim constitutes an element of both these crimes, the accused found himself in jeopardy of being punished twice for something he had done but once. The trial Court was not alert to this possibility. Not only did it punish the accused with life imprisonment for the murder but again, this time as an aggravating factor, took the murder into account when sentencing the accused on the charge of robbery. This is evident, not only from the difference in the sentences imposed on the accused and his co-accused respectively, but also from the following remarks made by the trial Judge in the course of his judgment on sentence:

> "The murder is one of the elements also of the robbery in the case of accused number 1, but it is clear that the murder cannot be held against accused number 2 when considering his sentence on the crime of robbery."

The Appellate Division of the Supreme Court of South Africa first recognised the risk of double punishment for the same criminal act in *S v Mathebula and Another*, 1978 (2) SA 607 (A) at 613H – also a case where a murder was committed in the course of a robbery and the accused was convicted of both. Until 1992 that Court (and others within its jurisdiction) avoided the risk of double jeopardy by "thinking away" or ignoring the death of the deceased when dealing with the question of sentence on the robbery charge (See: *S v Tloome*, 1992 (2) SACR 30 (A) at 40B; *S v S*, 1991 (2) SA 93 (A) at 103I-105D; *S v Witbooi*, 1982 (1) SA 30 (A) at 35A - G; *S v Moloto*, 1982 (1) SA 844 (A) at 854E - G; *S v Daniëls en 'n Ander*, 1983 (3) SA 275 (A) at 306A - C; *S v Bapela and Another*, 1985 (1) SA 236 (A) at 247C - G; *S v Mooi*, 1985 (1) SA 625 (A) at 630D) and *S v Petersen*, 1989 (3) SA 420 (A) at 426). A Court's failure to do so was described in the *Petersen*-case as a serious misdirection ("growwe mistasting").

Although the death of the victim was ignored when sentencing the accused on the count of robbery, the degree of violence was nevertheless taken into account. So, for example, did the Appellate

Division of the Supreme Court in South Africa refer with approval in *S v Witbooi*, *supra* (at 35E–F) to the following passage from the judgment in the unreported case of *S v Sedick*:

> "Soos ek die uitspraak verstaan (dws in die Mathebula -saak) moet in 'n geval soos die onderhawige by oorweging van 'n gepaste straf op die roofklag sover doenlik die noodlottige gevolg van die aanranding - die dood van die oorledene - buite rekening gelaat word, maar kan en behoort nog steeds ag geslaan te word op die geweld wat gebruik is en veral op die feit dat dit lewensgevaarlik van aard was." (*Own translation: As I understand the judgment (i.e. in the Mathebula case) the fatal consequences of the assault – the death of the deceased – must not be taken into account during the consideration of an appropriate punishment on the charge of robbery in a case like the present one, but the violence that had been used may still and ought to be noted and in particular the fact that in was life-threatening of nature.)*

More recently though, it seems as if the majority of that Court has taken a further step to eliminate the risk of double jeopardy. In *S v Maraisana and Another*, 1992 (2) SACR 507 (A) at 507H -508C Nestadt JA (with whom Eksteen JA concurred) stated the approach of the Court as follows:

> “The two offences are based on the same set of facts. In these circumstances, care has to be taken to avoid a duplication of punishment. This is achieved by 'thinking away' the murder, ie the death of the victim when sentencing the accused for the robbery (see *S v Tloome* 1992 (3) SA 568 (A) at 578D (1992

> (2) SACR 30 at 40b). This is often a difficult exercise. What does 'thinking away' the murder mean? There is authority that the violence used does not fall within the ambit of what must thus be ignored (see, for example, *S v Witbooi* 1982 (1) SA 30 (A)). But is this necessarily so? In *S v Mooi* 1985 (1) SA 625 (A) at 631I, Joubert JA (in a minority judgment) found that the accused's act of permanently incapacitating his victim (which was an element of the crime of murder) went beyond the bounds of robbery (which merely required that the victim be temporarily incapacitated). In a given case, therefore, where the murder was committed in order to facilitate the robbery, it may be that the violence used should, when considering an appropriate sentence for the robbery, also (to a greater or lesser extent) be thought away."

Van Den Heever JA took a different view in a minority judgment. If not only the death of the victim but also the violence which accompanied the murder and the robbery are ignored for purposes of sentence on the charge of robbery, it may well result in a sentence which does not adequately reflect the seriousness with which the Court regards the crime (at 512E). She conceded that "thinking away" the death of the victim when it was the inevitable result of his or her injuries is also problematic. If the death of the victim should be ignored for purposes of sentence on the count of robbery just because it is not one of the elements thereof, why then not also the theft as the dishonest motive behind the murder? The approach she favoured, so I understand her judgment, is that the Court's sentence on the count of robbery must reflect the

seriousness with which it would have regarded the robbery if the accused had not been and would not be charged with murder (at 512H-G).

I have given these conflicting views anxious consideration and find myself in respectful disagreement with the majority view in *Maraisana*'s case. It proposes that under certain circumstances the commission of an act which constitutes a necessary element of the offence for which the accused should be sentenced may be ignored. Whilst it may go a long way to remove the possibility of double jeopardy in sentencing, it derogates from the principle that punishment should fit the crime: if the offender has been convicted of robbery and murder, sentence should be passed on those crimes and not as if he or she had been convicted of theft (by ignoring the element of violence in the robbery) and murder.

The approach adopted by the majority of that Court may conceivably not only lead to the imposition of sentences which do not adequately reflect the seriousness with which the crime should be regarded but may conceivably also have untenable results in practice. If both the violence perpetrated on the victim and his or her resultant death are ignored when sentencing the accused on the charge of robbery, and the conviction on the charge of murder is subsequently set aside on appeal, then what will remain is a hopelessly inadequate sentence on the conviction of robbery – a

sentence which punishes only the element of dishonesty and takes no or inadequate cognizance of the element of violence in the robbery. The latter, in most instances, also constitutes the "aggravating circumstances" of the crime on which the accused has been convicted of in the first instance. This is but one example where the same criminal act or omission constitutes a necessary element of more than one offence and there are many more. In all those instances, if the act or omission is taken into consideration for purposes of sentence only in relation to the one and ignored when punishing the other, the possibility that the same injustice may result when the conviction on the one offence is set aside on appeal or review increases substantially.

I agree with the approach favoured by Van Den Heever, JA: The accused must be sentenced on the count of robbery as if he has not been convicted on the count of murder and is not in jeopardy of such a conviction in future. In many instances the result may well be the same as that of the earlier approach applied by that Court, i.e. to think the death of the victim away when sentencing the accused on the count of murder but its substratum is different and founded on the principle that the sentence should always be designed to fit the crime (and it is not to say that it should not also incorporate the other elements of *Zinn*'s triad). Whilst this approach may well be criticized for not removing the risk of double jeopardy altogether, it remains for the reasons I have already referred to, the preferred

option. To the extent that an element thereof remains, this can be addressed adequately by directing that the sentences (or portions thereof) will be served concurrently.

Having taken the murder (and therefore also the death) of the victim into account for purposes of sentencing the accused on the count of robbery, the trial Judge materially misdirected himself and the sentence cannot be sustained. The Full Bench interfered with the sentence on a different ground: it regarded the sentence as excessive, pointing out that “the robbery involved the snatching of sunglasses from the eyes of the deceased without any accompanying threat or assault upon the deceased. It was only after the deceased confronted the appellant that he pulled out the knife and stabbed the deceased.” Whilst it is true that the stabbing occurred only after the deceased demanded the return of his sunglasses, the Full Bench did not attach any or adequate weight to the fact that the conviction on which sentence had to be passed followed on a finding that the stabbing was so close in time and place to the snatching of the sunglasses in the multi-handed robbery that it formed an integral part thereof. The accused was not simply convicted of robbery, but of robbery with aggravating circumstances and, in whichever league one may place a particular robbery, the seriousness with which it is regarded is always significantly increased when a dangerous weapon is used in the course thereof and even more so if the victim is injured or killed in the course

thereof. The unexpected assault on the victim with the knife was severe and callous. The other aggravating features of the crime to which the trial Court has drawn attention to elevate it to a category which rendered appropriate a much more substantial sentence of imprisonment that the one year imposed by the Full Bench. Moreover, given the accused’s previous conviction of theft, albeit a minor one, and the fact that he committed this crime whilst being on parole on a sentence imposed for malicious damage to property, the substituting sentence of one year imprisonment is disturbingly inadequate and does not adequately reflect the seriousness of the offence.

In the premises, the appeal against the sentence of 16 years imprisonment on the charge of murder fails but it succeeds against the substituting sentence of one year imprisonment on the conviction of robbery.

In the result, the following order is made:

1. The appeal against the sentence of 16 years imprisonment on the charge of murder is dismissed.

2. The appeal against the sentence of 1 year imprisonment on the charge of robbery with

aggravating circumstances imposed by the Full Bench of the High Court under case no. FA 9/94 succeeds and is substituted with the following sentence:

> "8 (eight) years imprisonment), 5 years of which shall be served concurrently with the sentence of 16 years imprisonment imposed on the charge of murder.".

3. The sentence is antedated to 29 May 1992.

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MARITZ, AJA

I concur.

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TEEK, AJA

I concur.

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GIBSON, AJA

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