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**A CRITICAL ANALYSIS OF THE CRIME OF ROBBERY “WITH
AGGRAVATING CIRCUMSTANCES.”**

BY

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School of Law

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14 DECEMBER 2017

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ABSTRACT

This paper is a result of a critical consideration of the crime of robbery with aggravating circumstances as defined in section 1(1) (b) of the Criminal Procedure Act 51 of 1977. The historical origin and development of the crime was investigated. The development of the crime of robbery in South African law and the current law relating to robbery and robbery with aggravating circumstances were researched. Sentencing for the crime of robbery in comparison with robbery with aggravating circumstances in South African law is discussed and relevant aspects relating to criminal procedure Act were identified.

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CHAPTER 1

INTRODUCTION

1.1 Purpose of the study

The dissertation seeks to critically examine the legal position in respect of the crime of robbery with aggravating circumstances as defined in section 1(1) (b) of the Criminal Procedure Act (hereafter ‘CPA’)¹. This examination of the legal position will be based on the Constitutional Court judgement in *Minister of Justice and Another v Masingili and Another* (hereafter *Masingini*).²

The examination conducted in this dissertation will serve to answer two burning questions pertaining to the crime of robbery with aggravating circumstances raised by the *Masingili* judgement. The first of these questions is whether an accomplice to a robbery with aggravating circumstances can be convicted of such crime even where the accomplice³ had no knowledge or intention of the aggravating circumstances. The second one is what effect the *Masingili* judgement has on the two stages of the criminal trial (i.e. verdict and sentencing stage).

This dissertation will be divided into four chapters including this introduction chapter, which evaluates the historical background of the crime of robbery with aggravating circumstances. In chapter two the paper will analyse the High Court as well as the Constitutional Court judgments in the *Masingili* case. Chapter three will involve the evaluation and the discussion of the two burning questions which are raised in the paragraph above. This will also include comments by the other writers on the *Masingili* judgement. This dissertation will be summed up and concluded in chapter four.

1.2 THE HISTORICAL BACKGROUND OF ROBBERY

1.2.1 Roman law

In 1652 the Dutch East India Company came into the Cape, and they brought with them Roman-Dutch Law, which was a combination of Roman and Roman-Dutch law. Roman laws had treated robbery not as a separate crime from a crime of theft.⁴ However, robbery

¹ Criminal Procedure Act 51 of 1977.

² *Minister of Justice and another v Masingili and another* 2014 (1) SACR 437 (CC).

³ *S v Williams* 1980 (1) SA 60 (A) 675, An ‘Accomplice’ was defined as someone who consciously associated himself with the commission of the crime by the perpetrator or perpetrators by giving assistance at the commission of the crime or by consciously supplying the opportunity, the means or relevant information which furthers the commission of the crime. The accomplice is not similar to the perpetrator since he does not fulfil all the requirements in the definition of the offence he has become involved in it.

⁴ JRL Milton. *Criminal Law and Procedure Volume II Common Law Crimes*. 3rd ed. (1996) 644.

was a special kind of theft called *rapina* (theft with violence). It provided special penalties and some special rules.⁵ In general, the same principles that applied to theft applied to robbery.

The main distinguishing feature between theft and robbery during the early times of this crime was the ‘**violence**’ element. This situation made robbery to be defined as an aggravated form of theft and it created a special delict, *rapina*, (theft with violence, with special penalties and some special rules.⁶

1.2.2 Roman - Dutch law

Early Germanic law regarded robbery differently because they treated it as a separate crime from theft and they called it *raub*. During that period the punishment or sentence for robbery was less severe than the punishment for theft.⁷ In the sixteenth century the crime was redefined in Holland and they followed the Roman law of treating it as a special form of theft.⁸ That is theft from another person, where violence or the threat of force was used. As a result it was treated by the Roman-Dutch writers as simply theft with violence.

Both laws became part of the law of the Cape. Ultimately the Roman-Dutch law became part of South African Common Law.⁹ The book of Lansdown, *South African Criminal Law Procedure* states as follows:

“The basis of South African criminal law is the Roman-Dutch law. When the pioneers sent out by the Dutch East India Company came to the Cape in 1652, they brought with them the laws in force in the province of Holland. This was, in the main, the Roman law modified by ancient custom and by statute.”¹⁰

1.2.3 English law

During the years when the Cape was under the control of Great Britain, Roman Dutch law continued to be in use in South Africa. The law remained in use but they were criticised by the judges of South Africa at the time for the lack in precision.¹¹

⁵ Ibid.

⁶ JM Burchell. *Principles of Criminal Law*. 4th ed. (2013) 706.

⁷ PMA Hunt. *South African Criminal Law and Procedure* vol. II *Common Law Crimes revised*. 3rd ed. (1990) 644.

⁸ Ibid.

⁹ Ibid.

¹⁰ CWH Lansdown, WG Hoal, and AV Lansdown *South African Criminal Law and Procedure*. Vol I 6th ed. (1957) 5.

¹¹ Ibid at page 6.

The appointment of judges who were schooled in the English legal tradition made matters worse for the Roman Dutch law. Since those judges were unacquainted with Roman Dutch law and they preferred to use English laws more. The changes made influenced and modified the Cape Laws. The judges at that time had even criticised the Roman Dutch law and they indicated that it was not certain on the crimes it covered and such uncertainty made it difficult for the court to draw the line between delict and criminal cases.¹²

Early English law regarded robbery as a species of theft. However, it was treated differently in that, unlike a thief, a robber was supposed to stand trial in a secular court in England.¹³ Originally the crime was theft accompanied with violence directed to the person of the victim.¹⁴

A new development in English law included the use of threat to the victim during robbery as the violence required for robbery. Robbery was then defined as the felonious taking of money or goods from the person of another, or in his presence, ‘by violence or putting fear’.¹⁵

Such violence had to be directed towards the person of the victim and not the property. The violence had to be used with the intention of inducing submission to the taking and it had to precede and induce the taking.¹⁶ The English authority is found in the case of *R v Donnelly*¹⁷, where the accused was convicted of robbery where he had threatened the victim with the accusation of sodomy, and that made the victim fearful. The court regarded that threat as the fear required as a violent element necessary for the crime of robbery.

The Larceny Act of 1916 codified the crime of theft in England. In terms of the Larceny Act section 23 codified the common law concept of “robs” which meant that the common law authorities continued to apply.¹⁸ Further, section 23 of the Act recognised different levels of robbery with different levels of punishment.

In 1968 another development was brought into the crime of robbery and a new definition of robbery was found in the Theft Act¹⁹ which states that:

¹² Hunt supra note 7 at 645.

¹³ Milton supra note 4 at 645. During this time the English legal system was divided in religious and secular courts. Religious courts dealt with spiritual issues. Secular courts dealt with civil and criminal cases and were similar to our modern day ordinary courts.

¹⁴ Milton (see note 4; 645).

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ *R v Donnelly* (1779) 1 Leach 229, 168 ER 199.

¹⁸ JRL Milton and PMA Hunt, *South African Criminal Law and Procedure*. 2nd ed. (1982) 678.

¹⁹ Theft Act of 1968, Chapter 60, section 8. (English Legislation).

‘(1)A person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force.

(2) A person guilty of robbery, or of an assault with intent to rob, shall on conviction on indictment be liable to imprisonment for life.’

The above Act brought two new changes to the crime of robbery, namely that the person assaulted does not have to have any interest in the property and that the property needs to be seized from the property owner or their person.²⁰

1.2.4 South African law on robbery

The South African version of the crime of robbery went through different phases. The history of it has its roots from English law and Roman Dutch law; and this can be followed by reading the paragraphs above on this chapter.

In the early stages of the development of South African law, the English common law of robbery influenced the South African courts. That was after the Roman-Dutch law seemed to be vague and hard to interpret. Subject to certain modifications, the English definition was adopted by the South African writers, Gardiner & Lansdown in 1919 that is to say:

‘Robbery is theft, from the person of another, or in his presence, if the property stolen is under his immediate care and protection, accompanied by actual violence or threats of violence, to such person or his property or reputation intentionally used to obtain the property stolen or to prevent or overcome resistance to its being stolen.’²¹

In turn, the above definition was influential in shaping the South African definition of Robbery at the time.²²

Over the years the crime of robbery continued to be developed by the courts and writers. Therefore it is no longer the same as the one inherited from the Roman – Dutch law and English law. The current definition of robbery by Snyman is ‘theft of property by unlawfully and intentionally using violence to take property from somebody else; or threats of violence to induce the possessor of the property to submit to the taking of the property.’²³ Many SA

²⁰ Milton supra note 4 at 679. Further see the discussion of *S v Yolelo* below, for the current position in South African Law.

²¹ Gardiner & Lansdown *Criminal Law and Procedure*. 6th ed. (1957) 1706.

²² Milton supra note 4 at 646.

²³ CR Snyman. *Criminal Law*. 5th ed. (2002) 517. Snyman also states that the definitions from the book of Hunt

criminal law writers define robbery in the same way as Snyman. As a result of that this paper will use the above definition of robbery.

The above definition was used in the appeal court case of *S v Salmans*,²⁴ where a cell phone was taken by force from the complainant's hand, the case where the court decided that any force applied to the victim, however slight, will be sufficient to constitute robbery.

The same definition above has also been used by Kemp, and he defined the elements of Robbery as theft, actual or threatened violence, causally linked to the theft, and an intention to acquire the property by means of violence.²⁵ The distinguishing feature, therefore, of robbery when compared to theft is that robbery is theft accompanied by force or violence.²⁶ I elaborate on this point immediately below.

(i) Violence or Threat Requirement

The violence required for the crime of robbery, must be directed at the victim. In the case of *S v Makhalanyane*²⁷ the court stated that, 'the object of violence will be to reduce the victim to impotence or submission.' This means that the intention behind the violence or force must be to deprive the victim of any will to resist the taking of his property when robbery takes place.

In the case of *S v Salmans*²⁸ the court stated that any force applied to the person of victim, however slight, is sufficient to constitute robbery. Milton goes on to interpret the word violence required for robbery as a term of art meaning no more than the use of force of any significant degree²⁹. Hunt also stated that any violence which would consist of an assault will be sufficient as the violence required as an element of robbery, even the slight violence which had not caused an injury.³⁰ In *S v Yolelo*³¹ the court said the violence required for the offence of robbery need not necessarily precede the taking of the property, but what is important is that there must be a relationship between the taking of the property and such violence.³²

and Milton on *Common Law Crimes* at page 642; and the book of Burchell and Milton, *Principles of Criminal Law* at page 817 are substantially similar to his definition of robbery.

²⁴ *S v Salmans* 2006 (1) SACR 333 (A) 336.

²⁵ G Kemp... et al. *Criminal Law in South Africa* 2nd ed (2015) 392.

²⁶ *Ibid.*

²⁷ *S v Makhalanyane* 1980 (3) SA 425 (O) at 430 D. Also the case of *R v Gesa; R v De Jongh* 1959 (1) SA 234 (A) at 238. See also the book of Milton JRL *Criminal Law and Procedure Volume II Common law crimes* 3rd ed (1996) at page 654.

²⁸ *S v Salmans* supra note 24.

²⁹ Milton (note 4; 651).

³⁰ Hunt (note 12; 682).

³¹ *S v Yolelo* 1981(1) SA 1002(A).

³² Milton (note 4; 646). Also take note of the comments by the court in the case of *R v Magao* 1959 (1) SA 489 (A), where the court stated that there must be a relationship between the act of violence and the theft.

Based on the how the courts have expressed and applied the violence element of in the paragraph above, it becomes clear that the type of violence required for robbery is a special kind of violence. Even a slight degree of violence would be enough to prove the violence element required for the crime of robbery, this view was expressed in the case of *S v Salmans*³³

(ii) Theft requirement

A completed crime of theft is an essential element of the crime of robbery. It involves the taking of property belonging to someone else with the intention to permanently deprive that person of the property.³⁴ Therefore if any of the essential elements of theft are lacking, robbery is not committed and the accused may face the charge of assault, if violence can be proven against the accused person.³⁵ This element is not difficult to interpret and apply.

(iii) Concluding remarks

Milton states that it is difficult to analyse the elements of Robbery. He goes on to state that:- ‘Since robbery is a crime involving two *acti rei*, namely the taking of property and the performance of an act of violence upon the person of another.³⁶ This duality lends a measure of complexity to the analyses and application of the elements of the crime that has ensured a continuing quality of ambiguous uncertainty about the crime, which sometimes leads to strange anomalies.’³⁷

The courts are struggling to apply these two elements consistently, as the crime requires two separate acts namely theft coupled with violence or threats. Each of these has their own separate requirements.³⁸ What Milton state above was observed in *Masingili* case law, in the constitutional court and the high expressed different judgements. Chapter 2 would deal more with such judgements.

³³ Hunt (note 7; 681)

³⁴ Ibid.

³⁵ Ibid.

³⁶ Milton (see note 4; 643).

³⁷ Ibid.

³⁸ See the article by S Hocter, “Examining the expanding crime of robbery”, (2012)3 *SACJ*. This article has got a discussion where the courts had been stating that bag and cellular phone snatching is not robbery but theft and other courts in the country were saying it is robbery. The article and case laws quoted in it are a proof that courts do sometimes find it difficult to apply the two *acti rei* elements of robbery (theft coupled with violence). Further, there have been debates in legal fraternity and by courts as to how much violence is required for theft to be robbery.

1.3 ROBBERY ‘WITH AGGRAVATING CIRCUMSTANCES’

Robbery with aggravating circumstances was introduced for the first time by section 1(b) of the Criminal Procedure Act 9 of 1958 which stated that:

1) ‘In this Act, unless the context otherwise indicates-

‘aggravating circumstances’ in relation to-

(b) robbery or attempted robbery, means-

(i) the wielding of a fire-arm or any other dangerous weapon;

(ii) the infliction of grievous bodily harm

Robbery or an attempt to commit robbery with aggravating circumstances means using violence or threats of violence to seize another’s property.’

The reason the section was inserted into the Criminal Procedure Act in 1958 was to make robbery with aggravating circumstances to be a form of robbery with more serious consequences for sentencing.³⁹ It gave court the powers to sentence the offenders up to death sentence⁴⁰, but that does not necessarily mean that the court cannot exercise its normal sentencing discretion in order to decide the appropriate sentence.⁴¹

However, the interpretation of the meaning of robbery with aggravating circumstances by the court in *R v Sisilane*⁴² created a loophole in the law with regards to accomplice liability. A driver of a getaway car cannot simply be found guilty of robbery with aggravating circumstances because he was not party to the violence that constitutes the robbery to be of aggravating circumstances. The court reasoned that the absence of the words ‘by the offender or an accomplice’ in sub section (b) of the CPA 9 of 1958 meant that someone could be guilty of robbery with aggravating circumstances only if he or she instigated or otherwise made him or herself a party to the aggravating circumstances.⁴³ Schreiner JA held that in his view para (b) of section 1 of Act 9 of 1958 should not be read as if the words ‘by the offender or an accomplice’ appeared in it.⁴⁴ He then held that the aggravating circumstances were not proven against the appellant (accomplice in the robbery). The case was sent back to the trial court to consider the appropriate sentence other than death sentence.

³⁹ *S v Moloto* 1982 (1) SA 844 (A) at 850 C.

⁴⁰ Hunt (note 7; 689).

⁴¹ *Ibid.*

⁴² *R v Sisilane* 1959 (2) SA 448 (A).

⁴³ *Ibid* at para 451 G.

⁴⁴ *Ibid* at para 453 H.

In *R v Cain*,⁴⁵ the court decided that the amendment brought by section 1 of Act 9 of 1958 to the CPA was in respect of sentencing of the person who committed grievous bodily harm during robbery or attempted robbery. The suitable sentence prescribed was a death sentence. Again the in the case of *R v Cain* mentioned above the court also opened a loophole for the accomplice liability in a case of robbery with aggravating circumstances. The appellate division stated that the State must prove the person who used the fire arm and shot (aggravating circumstance) the victim of robbery, during the time when victim was robbed. The State had failed to prove the shooter and this resulted to the appellant's conviction of robbery with aggravating circumstances being changed by the Appellate division.

The court made it clear that such an inquiry will always be a question of facts, depending on the circumstances of a particular case. The court went on to state that in robbery the mere possession of a weapon by the accomplice does not per se constitute aggravating circumstances required for the crime of robbery with aggravating circumstances. It went on and stated that if however a dangerous weapon is used by an accomplice in the commission of the robbery and it is proved that the perpetrator had prior knowledge, that the accomplice was carrying such weapon, both participants can be found guilty of robbery with aggravating circumstances. This case of *R v Cain* set the tone on the interpretation of robbery with aggravating circumstances on cases when it is not the main perpetrator who uses the aggravating circumstances (weapon) during the commission of the crime of robbery but it is the accomplice.

1.3.1 The Criminal Law Further Amendment Act 75 of 1959

In 1959, the Legislature remedied the loophole created by *R v Cain*⁴⁶ and *R v Sisilane*.⁴⁷ This was achieved by the insertion of the words 'by the offender or accomplice, on the occasion when the offence is committed, whether before, during or after the commission thereof' at the end of section 3 (b) of Criminal Law Further Amendment Act.⁴⁸ This resulted to section 3 of the Act⁴⁹ made to read as follows:

- a) 'By the addition or extension into paragraph (a) of the definition of "aggravating circumstances" of the words "on occasion when the offence is committed, whether before, during or after the commission thereof..."

⁴⁵ *R v Cain* 1959 (3) SA 376 (A).

⁴⁶ *Ibid.*

⁴⁷ *R v Sisilane* supra note 42.

⁴⁸ Act 75 of 1959.

⁴⁹ *Ibid.*

- b) Robbery or an attempt to commit robbery means the infliction of grievous bodily harm or any threat to inflict such harm, **by the offender or accomplice, on the occasion when the offence is committed, whether before, during or after the commission thereof**.⁵⁰

The amendment made the legislatures objectives or intentions to be clear, that is in respect of accomplice liability, on cases of robbery with aggravating circumstances, was that an accomplice could now be convicted of robbery with aggravating circumstances, as the Act now expressly stated that fact. In *S v Dhlamini*⁵¹ Appellate Division expressed that:

‘this amendment meant that an accomplice to robbery is guilty of robbery with aggravating circumstances even if he or she did not instigate or make him or herself party to the aggravating circumstances and even if he or she did not have intent as to the aggravating circumstances. The same applies in reverse which, for convenience, I call the “mirror-image case.’ The perpetrator of a robbery is guilty of robbery with aggravating circumstances if the accomplice committed the aggravating circumstances, even if the perpetrator did not make him or herself a party to the commission of the aggravating circumstances and even without intent.’⁵²

It is this paper’s view that the Constitutional Court in *Masingili* followed the approach adopted by the court in 1974 in the case of *S v Dhlamini* and that resulted to the Constitutional Court not to develop the crime of robbery to a new level of the current constitutional era. The Appellate Division in *S v Dhlamini* held, that the purpose of the amendment Act 75 of 1959; s 3 (b) was to block the loophole created by the *Sisilane* and *Cain* cases.⁵³ Further the same case of *S v Dhlamini* also came with the principle of mirror image cases, for accomplice liability in cases of robbery with aggravating circumstances.

In *R v Jacobs*,⁵⁴ the court, when interpreting ‘aggravating circumstances’ for section 1 (1) (b),⁵⁵ stated that: “The aggravating circumstances are established objectively and the intention of the accused is irrelevant into an enquiry as to whether aggravating circumstances are present. This case is relevant in helping to interpret whether aggravating circumstances

⁵⁰ Ibid.

⁵¹ *S v Dhlamini* 1974 (1) SA 90 AD.

⁵² Ibid at 94B-C.

⁵³ *S v Dhlamini* supra note 51 at 95D.

⁵⁴ *R v Jacobs* 1961 (1) SA 475 (A).

⁵⁵ Criminal Procedure and Evidence Act 9 of 1958.

are present in a particular case. The court said upon a proper construction of section 1(b) it is a question of fact whether aggravating circumstances are present in a particular case.”⁵⁶

This case of *R v Jacobs* above was used by the constitutional court to decide that the intention is not required to prove the presence of aggravating circumstances, for the crime of robbery with aggravating circumstances.

1.3.2 The Criminal Procedure Act 51 of 1977

In 1977 a new CPA⁵⁷ was introduced which repealed the whole of the Act 56 of 1955 including its amendments except for section 319 (3) and 384. This resulted to the current definition of aggravating circumstances in terms of section 1(1) (b) of the Criminal Procedure Act.⁵⁸ The ‘aggravating circumstances’ are defined for the purposes of robbery or attempted robbery as follows:

- ‘(i) the wielding of a fire-arm 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.’⁵⁹

The CPA of 1977 has codified the principle set out in *S v Mbele*⁶⁰ by expressly stating any conduct involving the wielding of a firearm or any dangerous weapon will be considered as aggravating circumstances for the purpose of section 1 (1) (b) of the Act.

1.3.3 Concluding remarks

In conclusion, the crime of robbery has got its own elements that must be proven, likewise, the ‘aggravating circumstances’ also has its own requirement. In terms of sentencing they do not carry the same sentences. Robbery with aggravating circumstances has got harsher sentences and the minimum term of imprisonment is 15 years imprisonment. As a result, the criminal law amendment Act 105 of 1997 will be applicable in cases of Robbery with aggravating circumstances.⁶¹ Recently, the Constitutional Court was called to interpret the

⁵⁶ *R v Jacobs* supra note 54 at para 478.

⁵⁷ Criminal Procedure Act 51 of 1977.

⁵⁸ Ibid at s 1 (1) (b).

⁵⁹ Ibid.

⁶⁰ *S v Mbele* 1963 (1) SA 257 (N).

⁶¹ See, Criminal law Amendment Act 105 of 1997 s 51 (2) (a) (hereafter also referred to as the Minimum Sentence Act).

meaning of ‘aggravating circumstances’ in terms of section 1 (1) (b), in the case of *Masingili*.⁶² The ruling of the Court will form the core part of this dissertation paper.

CHAPTER 2:

SUMMARY OF THE MASINGILI CASE

This chapter will discuss the Constitutional Court decision in *Masingili*.⁶³ This chapter will give a background of the litigation history of the case in question through summarising the judgments of the initial Magistrate court decision up to the Constitutional Court judgment. The main objective of this chapter is to give context to the arguments that will follow namely; whether or not robbery with aggravating circumstances is different from robbery, whether an accomplice to a robbery with aggravating circumstances be convicted of such crime even, where the accomplice had no knowledge or intention of the aggravating circumstances (does section 1(1)(b) of the CPA create strict liability?) and what is the effect of this Constitutional Court judgment on the two stages of a criminal trial. This decision under discussion is crucial as the Constitutional Court was required to assess the validity of an order granted by the Western Cape High Court⁶⁴ in terms of which section 1(1) (b) was found to be unconstitutional.⁶⁵

2.1. Facts

In October 2009 the four accused hatched a plan to rob a shop in Table View, Cape Town. First accused entered into a shop wherein she was acting as a scout and assessing if the shop was busy in order to determine if a robbery was feasible. After that she went on to inform the other accused that the complainant (shop owner) was alone and they can proceed to rob the shop. Second accused acted as the getaway driver and throughout the robbery he did not leave the getaway vehicle. It emerged from the evidence that the third and fourth accused proceeded to go into the shop and pretended to be interested in buying a pair of jeans from the shop owner.⁶⁶

As the complainant was looking for the correct pair of jeans the accused had asked for, the third accused proceeded to produce a knife and to demand that the complainant give him all

⁶² *Masingili* supra note 2.

⁶³ Ibid.

⁶⁴ *S v Masingili and others* 2013 (2) SACR 67 (WCC).

⁶⁵ P Stevens “Robbery with aggravating circumstances revisited: Minister of Justice and Constitutional Development and Another v Masingili and Another 2014 (1) SACR 437 (CC)” (2014) 2 *SACJ*.

⁶⁶ *S v Masingili and others* supra note 64.

the money she had. The two men then tied her up and put her in the toilet. She could hear them searching for money inside the shop. When she managed to free herself and get out of the toilet and saw them running away from the shop. She screamed and followed them. As the two robbers were running away the complainant saw that the owner of the neighbouring shop was also chasing after the accused. By chance there was a police vehicle which was on patrol and passing by the shop within a few minutes of the robbery. When the officers stopped to ask what had happened they were informed by the complainant that she had been robbed and she proceeded to describe the getaway car of the accused. The police officers pursued the vehicle and managed to apprehend and arrest all the four accused.

2.2 Findings of the Regional Court

In the court *a quo*, the trial Magistrate, after evaluating the evidence of the state witnesses in some depth, found that the witnesses gave credible evidence and accepted their evidence into record.⁶⁷ The Magistrate concluded that from the evidence adduced, the State had proved beyond reasonable doubt that the accused were guilty of robbery with aggravating circumstances and that all four accused ‘partook in this robbery’. The regional court came to the conclusion that all the accused were guilty and convicted them on a charge of robbery with aggravating circumstances, and each received different sentences. The accused then appealed to the Western Cape High Court against their convictions and sentences. First and second accused appealed the judgment on the basis that the state had failed to prove beyond reasonable doubt that the two had intention with regards to the aggravating circumstances and that 1(1) (b) of the CPA was unconstitutional as it created liability without fault.

2.3 Findings of the High Court

On appeal to the Western Cape High Court, it was held that the second appellant (Mr Volo) who had been the driver of the getaway vehicle and the first appellant were equally as guilty of robbery as accomplices as the third and fourth applicants who actually carried out the robbery. The Court, however, went on to find that the State had failed to prove beyond reasonable doubt that the accomplices had an intention with regards to the aggravating circumstances. The question that arose from this finding is whether the definition of aggravating circumstances creates strict liability (i.e. liability without intention or negligence) in respect of the crime of robbery with aggravating circumstances, in which case it may

⁶⁷ Ibid.

infringe on the following sections in the Constitution⁶⁸: section 12 (1) (a) (“right to freedom and security of person”) and section 35 (3) (h) (“the presumption of innocence”).⁶⁹

In examining the relationship between the section 1 (1)(b) of the CPA and the right to freedom and security of person, the court relied on the case of *S v Coetzee and others*⁷⁰ in which O’Regan J set out the attitude of the courts to strict liability. The general principle of our common law is that criminal liability arises only where there has been unlawful conduct and blameworthiness or fault (the *actus reus* and *mens rea*). The court had to consider whether the interpretation of the above mentioned provision with regards to robbery with aggravating circumstances creates strict liability on the part of an accomplice or perpetrator who has intention with respect to the robbery but who does not have intention with respect to the perpetration of the aggravating circumstances. In arriving at its judgment the court relied on the judgment handed down in *S v Legoa* wherein the court stated that

“Where the accused was charged with robbery, the question whether the robbery was committed with aggravating circumstances had to be determined as part of the verdict - that is, as part of the court's finding on guilt or innocence in the first stage. The aggravating circumstances were elements of the form of the offence of robbery with which the accused was charged. Hence they had to be proved in the first stage of the trial, and the finding regarding their presence or absence was part of the main verdict. Their presence or absence accordingly had to be decided by the Judge with the assessors (or, before the abolition of juries, by the jury).”⁷¹

The Court went on to follow the *ratio* in *S v Legoa*, that the question of whether a robbery was committed with aggravating circumstances had to be determined as part of the verdict and not as part of the sentencing stage of a trial.⁷² In *Legoa* court held that it is obligatory on the State to prove the perpetration of the aggravating circumstances during the stage of the trial culminating in the verdict, and not during sentencing.

The Court in *Masingili* further held that the phrase “or an accomplice” in the impugned provision does create strict liability with respect to the offence of robbery with aggravating circumstances.⁷³ This means that in the case where a perpetrator is liable because of the

⁶⁸ The Constitution of the Republic of South Africa Act 108 of 1996: (hereafter referred to as The SA Constitution).

⁶⁹ *S v Masingili and others* supra note 64.

⁷⁰ *S v Coetzee and others* 1997 (3) SA 527 CC.

⁷¹ *S v Legoa* A 2003 (1) SACR 13 (SCA) at page 21 para 17.

⁷² *S v Masingili and others* supra note 64 at page 79 para 42.

⁷³ *Ibid* at page 81 paras 48 to 50.

presence of aggravating circumstances, an accomplice to the robbery may also be convicted of robbery with aggravating circumstances even if he or she had no intention in that regard, and *vice versa*.⁷⁴ It was therefore held that section 1 (1) (b) of the CPA infringes the right to freedom and security of person.⁷⁵

The court in its judgment then further held that the inclusion of the phrase “or an accomplice” in the impugned provision infringes the presumption of innocence. This is because the inclusion of the phrase or accomplice violated the right to be “to be presumed innocent, to remain silent, and not to testify during the proceedings” in section 35(3) (h) of the Constitution.⁷⁶ The High Court went on to conduct a section 36 limitation analysis⁷⁷ in order to establish whether the limitation was justifiable in an open and democratic society. The court found that the infringement of the rights to a fair trial in this situation cannot be justifiable under the limitation clause. This is because the limitation analysis has to weigh whether or not purpose, effects and importance can justify infringements to the Bill of Rights. The court went on to declare section 1 (1) (b) of the CPA to be constitutionally invalid and, as such, the hearing of the appeal in the high court was suspended pending the finding of the Constitutional Court.

2.4 Findings of the Constitutional Court

The matter was then referred to the Constitutional Court for two issues. First on the basis of section 165 of the Constitution for a confirmatory order of the decision of the High Court decision that found section 1 (1) (b) of the Criminal Procedure Act creates strict criminal liability (or liability without fault) and is thus unconstitutional. The second issue that was before the Court was an appeal by the Minister of Justice and the National Prosecuting Authority, and the basis of the appeal was that the High Court misinterpreted section 1 (1) (b) of the CPA in that it treated robbery with aggravating circumstances as a crime separate from robbery, and that it failed to consider that aggravating circumstances are only considered after satisfying the requirement of robbery and were are relevant for sentencing.⁷⁸

The Constitutional Court identified four points it had to deal with in its judgment, these points were central in getting to its judgment on the issues that were before it. The points the

⁷⁴ *S v Masingili* supra note 64 page 79 para 40.

⁷⁵ *Ibid* from page 75 para 31 to page 77 para 35.

⁷⁶ The SA Constitution supra note 68.

⁷⁷ *Ibid*.

⁷⁸ *Masingili* supra note 2, at page 457 para 59.

court identified were the following: (i) the meaning of section 1 (1) (b) of the CPA, (ii) whether or not the section creates strict liability, (iii) whether or not robbery with aggravating circumstances was a separate crime from robbery and (iv) whether or not accomplices can be held accountable in terms of the doctrine of common purpose.

The Constitutional Court in *Masingili* held that intent or fault element should be proven as a definitional element for robbery at a first stage of the trial, and therefore it is not a required for the state to prove intent to use aggravating circumstances as a definitional element for robbery with aggravating circumstances.⁷⁹ Furthermore, the Constitutional Court held that robbery with aggravating circumstances is not a separate criminal offence, distinct from robbery.⁸⁰ And it further decided that the objective existence of aggravating factors, such as the use of a dangerous weapon is relevant for sentencing, but must be proved before conviction, for reasons of fairness and practicality. It further held that even if the words ‘or an accomplice’ were not present the first and second respondent could still have been guilty of robbery with aggravating circumstances based on the ordinary common-law rules of accomplice liability. It held that the words or accomplice in the section 1 (1) (b) of CPA were only relevant for mirror image cases.⁸¹ As a result the Court went on and defined the phrase ‘mirror image cases’ to mean cases wherein the accomplice is the one who carries out the aggravating actions before, during or after the robbery. It went on to state that robbery with aggravating circumstances is a form of robbery with more serious consequences for sentencing. This distinctive form of robbery is not to be confused with a completely different offence.

The absence of intention regarding the aggravating circumstances on the part of an accused may be taken into account during sentencing and may result in the imposition of a lighter sentence than the statutorily prescribed minimum. Even when it does not, the statutory determination that the existence of aggravating circumstances calls for a harsher sentence than what would be appropriate for mere robbery, does not amount to the arbitrary deprivation of freedom, or deprivation without just cause.⁸²

The Court went on to state that Section 12 (1) (a) of the Constitution is not contravened, nor is section 35 (3) (h) violated because the accused must still have criminal intent for robbery (itself a violent crime), and whether the accused intended the aggravating

⁷⁹ Ibid at page 457 para 59.

⁸⁰ Ibid at page 449 para 34.

⁸¹ Ibid at page 445 para 23.

⁸² Ibid at page 457 para 59.

circumstances will be relevant to sentencing.⁸³ It was accordingly held that section 1(1) (b) of the CPA does not explicitly require any mental element in relation to the aggravating circumstances, but rather refers to objective facts constituting aggravating circumstances. The latter was held not to offend the presumption against strict liability as intent is already a requirement for robbery. With reference to the latter, the court stated as follows: “Violence is inherent to the crime of robbery, so intent to commit robbery subsumes intent to commit violence (or to threaten to do so).”⁸⁴

The court held that aggravating circumstances are a measure of the level of the violence used in the commission of the offence of robbery. Therefore, it decided that section 1 (1) (b) of the CPA does not create a requirement of intent with regard to the aggravating circumstances.

In conclusion it was held that robbery with aggravating circumstances is not a separate crime distinct from robbery. The objective existence of aggravating circumstances such as the use of a dangerous weapon becomes relevant for sentencing but should be proved before conviction for reasons of fairness and practicality.⁸⁵ Further the Constitutional Court held that section 1 (1) b of the CPA does not create strict liability with regards to aggravating circumstances. The Constitutional Court in *Masingili*, in its order, did not confirm the decision of the High Court that section 1 (1) b of the CPA was unconstitutional and further went on to uphold the appeal by the Minister of Justice.

2.5 Concluding remarks

The Constitutional Court effectively overturned the High Court declaration of unconstitutionality with regards to section 1 (1) (b) of the Criminal Procedure Act. In its Judgment the Constitutional Court decided that the High Court had erred in finding that the section in question created strict liability with regards to aggravating factors. It went on further to state that section 1 (1) (b) of the Criminal Procedure Act neither violated the presumption of innocence clause in terms of the SA Constitution nor did it create a distinct crime of robbery with aggravating circumstances separate from robbery. The issue of intention will be discussed further in chapter 3 later of this paper.

⁸³ Ibid at page 457 para 59.

⁸⁴ Ibid.

⁸⁵ Ibid.

CHAPTER 3:

ANAYISIS OF CONSTITUTIONAL COURT JUDGEMENT IN *MINISTER OF JUSTICE AND ANOTHER V MASINGILI AND ANOTHER*

This decision of the Constitutional Court in *Masingili* cannot be viewed as correct, and this paper does not support the way it interpreted or applied section 1 (1) (b) of the CPA, on accomplice liability. This chapter will firstly discuss the relationship between accomplices and perpetrators as these two are central concepts in the discussion of this paper.

3.1 General discussion of the Accomplice and Perpetrator liability

Historically our courts did not distinguish between accomplice and perpetrator liability for both verdict and sentencing in a criminal trial. The example of such fact was seen in the case of *Rex v M and Another*,⁸⁶ where Juta JA, stated the following: "All persons who knowingly aid and assist in the commission of a crime are punishable just as if they had committed it." However, this common law principle has since been changed by our courts; our criminal law now treats perpetrators and accomplices as different concepts.

Presently, at common law an accomplice is defined as a person who does not satisfy all the requirements for liability contained in the definition of a crime.⁸⁷ Simply put, an accomplice, although he or she willingly participates in a crime, does not meet all the requirements required to be successfully found guilty of the crime in question. Hence, the criminal liability of accomplice is therefore auxiliary in nature and is reliant on the perpetrator's liability.

In the recent case of *S v Kimberly and Another*⁸⁸ the court explained that although perpetrators and accomplices are all participants to a crime, but the perpetrator is the person who performs the act that constitutes that particular crime with the fault element required by law for the crime.⁸⁹ The court went further on to state that where there are two or more perpetrators then they are referred to as co-perpetrators. This is different from an accomplice in that he is neither a perpetrator nor a co perpetrator; acts performed by him do not constitute a component of the *actus reus* of that particular crime. This position is supported by the decision in *S v Msomi*⁹⁰, where the court stated that an accomplice is liable for a crime on the

⁸⁶ *Rex v M and Another* 1950 (4) SA 101 (T) at page 490.

⁸⁷ Snyman supra note 23 at page 273.

⁸⁸ *S v Kimberly and Another* 2005 ZASCA 78

⁸⁹ *S v Kimberley and Another* (unreported, referred to as 2005 ZASCA 78).

⁹⁰ *S v Msomi* 2010 (2) SACR 173(KZP), at para 130.

basis of his or her contribution in the carrying out of an offence which he or she can not commit as a perpetrator.

3.2 Accomplice liability in terms of section 1 (1) (b) of the CPA

The accomplice liability in the crime of robbery with aggravating circumstances, as defined by section 1 (1) (b) of the CPA and the way in which the constitutional court has decided on the issue in the *Masingili* judgement has received some criticism by the writers of the Commentary on the Criminal Procedure Act.⁹¹

The Mirror image principle

The constitutional court in *Masingili* stated that the words ‘or accomplice’ which are in section 1 (1) (b) of CPA are relevant in mirror image cases where the aggravating circumstances were used by the accomplice.⁹² Du Toit in the Commentary book has expressed different a view which is different from the above judgement of the Constitutional Court. He stated that where the aggravating circumstances are performed by the accomplice the perpetrator should not be guilty of robbery with aggravating circumstances, but should be guilty of robbery, when we use the common law principle of accomplice liability. Du Toit went on further and stated that they do not have the problem if such conduct is imputed to the perpetrator by using the common purpose principles.⁹³

The constitutional court in *Masingili* put too much focus on the nature of the crime of robbery with aggravating circumstances and on the problems encountered in *R v Sisilane*, where the Appellate Division held that a getaway driver, was not a party to the commission of the aggravating circumstances, because the aggravating circumstances only arose in the course of the robbery, which robbery he was not a perpetrator of, but an accomplice to it. The court reasoned, at the time, that the absence of the words ‘by the offender or an accomplice’ in subsection (b) of the CPA of 1956 after the amendment of 1958, meant that someone could be guilty of robbery with aggravating circumstances only if he instigated or otherwise made

⁹¹ E Du Toit...et al. *Commentary on the Criminal Procedure Act*. (2015) 31-25 DEF (hereinafter referred to as the Commentary).

⁹² The court further stated that, the courts in *R v Sisilane* supra note 42 and in *S v Dhlamini* supra note 51, were wrong to say that the addition of the words “or accomplice” in section 1 (1) (b) of the CPA extend the liability to the accomplice, when it is the perpetrator who committed aggravating circumstances, since that is done by common law accomplice principle.

⁹³ The commentary supra note 91 at the last sentence of DEF 5 and the first para of DEF 6.

himself a party to the aggravating circumstances.⁹⁴ It is our view, that by the court focusing too much on the nature of this crime, the court failed to properly develop this crime of robbery to suit well the Constitutional era of South Africa.

Does section 1 (1) (b) of the CPA extend criminal liability to the accomplice?

Further when one view at how the Court treated an accomplice liability in the decision of *S v Chauke*⁹⁵ where the accused was found guilty of the rape of a 16 year old girl and his co-accused was found guilty for being an accomplice. The High court held that the regional court should have sentenced the accused as the Minimum Sentence Act was not applicable to the co-accused as he was an accomplice and the Court referred the matter back to the regional court for sentencing.

The above case law was also used by one of the leading academic commentators in law of sentencing, in his book, that is Professor Terblanche, when he was advancing the same point of view that participation in an offence like being an accomplice or an attempt should not amount to committing the offence which is covered by the Minimum Sentence Act.⁹⁶

In light of how the accomplice is treated in other crimes, in particular in the case of *S v Chauke* above, this paper submit that the Constitutional Court in *Masingili*, made an error when it concluded that the insertion of the words ‘or accomplice’ to the section was not extending the liabilities of the accomplice to cases of robbery with aggravating circumstances.⁹⁷

3.3 Intention element in robbery with aggravating circumstances (Strict liability)

Intention comprises of two elements, cognitive and conative elements. The cognitive element is where the perpetrator must have knowledge of the act, the elements of the crime and of its unlawfulness and the conative element where the perpetrator directs his will towards a certain act.⁹⁸ Intention may take the form of *dolus directus*, *dolus indirectus* and *dolus eventualis*.

⁹⁴ *R v Sisilane* supra note 42.

⁹⁵ *S v Chauke* 2006 (1) SACR 117 (W) at para 3-4.

⁹⁶ SS Terblanche *The Guide to sentencing in South Africa* 3rd ed (2016) 59.

⁹⁷ *Masingili* supra note 2 at pages 446 to 447. It criticised the way in which the *Sisilane* judgement dealt with the definition of accomplice liability, since the *Sisilane* judgement had stated that the section will extend liability to the accomplice when the perpetrator commits aggravating circumstances.

⁹⁸ Du Toit A “Minister of Justice and Another v Masingili and Another Constitutional Law”, *Review 2015*.

What is strict liability?

The concept of strict liability in South African law is used to refer to no fault liability, which is liability without proof of intention or negligence. At common law, a person could be held liable for unintended consequences of an illegal activity under the doctrine of *versari in re illicita*. This doctrine meant that a person could be held criminally liable without proving the fault requirement on his part, thereby creating liability without fault. This doctrine was however dealt away with by the Appellate division in *Die Staat v Van Der Mescht*⁹⁹ which was of the view that the *versari* doctrine was not in accordance with contemporary traits of criminal law and our courts should not follow it.

It is important to note that the test for intention is a subjective test, which requires a court to look at the particular state of mind of the perpetrator when the act was committed. The Constitutional Court should have inferred the intention from the facts to establish and determine the accomplice's state of mind with regards to aggravating circumstances and at least imputed liability through the application of the doctrine of common purpose or *through dolus eventualis* as it would have been a stronger argument, rather than to simply state that intention with regards to the crime of robbery is enough to impute liability to an accomplice on a charge of robbery with aggravating circumstances.

It is the writer's argument that the section as it stands is not properly constructed, and furthermore, since it was created during the times when strict liability concept was common in South African criminal law, and the section as it currently stand has got echo and negative connotation of strict liability. We argue and state that it will be a good idea for this crime to be developed properly to suit the current period of the South African constitutional era.

The Court further found that robbery with aggravating circumstances is not a new crime, but it is a form of robbery where there are aggravating circumstances, and the 'intention' with regards to aggravating circumstances is not relevant to the enquiry.¹⁰⁰ The writer states that this cannot be correct as such situation creates a scenario where a court can convict a person without taking into consideration whether or not the accused person intended the use of aggravating circumstances. As argued above the fault is generally met by proof of intent in one of its recognised forms, or by the objective requirement of negligence. Therefore it is this

⁹⁹ *Die Staat v Van Der Mescht* 1962 (1) SA 521 (A).

¹⁰⁰ *Masingili* supra note 2 at page 454 para 48.

paper's argument that it would not be proper in the current constitutional era, for the court to simply impute intention of aggravating circumstance on an every accused person.

Does robbery and robbery with aggravating circumstances really have the same definitional elements?

The argument of the writer is that the definitional elements of a mere robbery in comparison to that of robbery with aggravating circumstances are not really the same, and that is why this paper states that the intention to use aggravating circumstances should form part of definitional elements of the crime of robbery with aggravating circumstances. This paper's position to be argued later is supported by Bishop and Brickhill who point out that the element of violence in aggravated robbery is different from the element of violence in a mere robbery.¹⁰¹

When one look at how well couched the definitional elements of the crime of assault with intent to cause grievous bodily harm, the writer is of the view that the same should have happened in the crime of robbery with aggravating circumstances. The crime of assault with intent to do grievous bodily harm recognises that 'intention' must be present with regards to the causing grievous bodily harm. Therefore, for this reason, our argument is that intention with regards to the aggravating circumstances must be treated as forming part of the definitional element required for the crime of robbery with aggravating circumstances.

SA Constitution

It is difficult to accept, Van der Westhuizen J's view that insufficient fault requirement and a violation of the presumption of innocence are conceptually two different things.¹⁰² This is because the very fact that, one, there is insufficient fault equipment violates the presumption of innocence in the sense that the moment you remove intention from the inquiry automatically you will have violated the presumption of innocence. The approach of the Constitutional Court is divergent to the view taken by our courts, in that courts are very reluctant to interpret statutes which contain no provision with regards to intention as not requiring intention.¹⁰³

It has been argued by the legal commentator, Louw, 'that the right to be presumed innocent in statutory offences does not mean the right to be presumed innocent of a crime as it happens to be defined by the legislature, but, rather, once we take into account what is proper and

¹⁰¹ M Bishop and J Brickhill "Constitutional Law." 2013 (4) *Juta's Quarterly Review* 2.4 at 2.4.2.

¹⁰² *Masingili* supra note 2 at page 456 para 58.

¹⁰³ *S v Coetzee and Others* 1997 (3) SA 527(CC)

necessary in the shape and construction of criminal offences, the right to be presumed innocent of a crime that is required to contain an element of fault.’¹⁰⁴

Therefore the role of culpability is of paramount importance in the SA criminal law and in particular for SA constitution. As a result of that the writer’s view, is that the constitutional court in *Masingili* did not remain faithful to the spirit and thrust of the constitution by allowing form and technicality to trump over constitutional substance.¹⁰⁵As a result the court in its strict interpretation of section 1 (1) (b) of the CPA, failed to consider that by negating the requirement of intention with regards to aggravating circumstances they were reintroducing a muted version of the *versari* doctrine of criminal liability without culpability. This has the net effect of violating the right to a fair trial as guaranteed by the Constitution¹⁰⁶ in section 35 (3) of an accused in that a person will be held liable for a crime without any moral blameworthiness.

Lastly on this issue of intention, this paper view is that the Constitutional Court in *Masingili* concerned itself much with the submission which was placed by the parties in the case in order to make the decision. That is why the court did failed to properly develop this crime and it allowed the form of the section 1 (1) (b) of the CPA to trump over the substantive crime.

3.4.Robbery with aggravating circumstance as a stand-alone crime

How the crime had been applied by SA courts?

The Constitutional Court in *Masingili*, expressly stated that robbery with aggravating circumstances is not a stand-alone crime. It went on to state that:-

“Robbery with aggravating circumstances is thus robbery where a fire-arm or other dangerous weapon is wielded, or where grievous bodily harm is inflicted or threat of violence. The provision must be understood in context. It does not, in itself, create an offence or impose liability. Further section 1 (1) (b) of CPA, provides a definition of “aggravating circumstances” in relation to robbery, not a definition of robbery.”¹⁰⁷

¹⁰⁴ R Louw, *Specific Crimes South African Journal of Criminal Justice*, Vol. 11, Issue 1 (1998), pp. 120-123.

¹⁰⁵ The commentary supra note 91.

¹⁰⁶ The SA Constitution supra note 68.

¹⁰⁷ *Masingili* supra note 2.

The Court was of the view that aggravating circumstances only come into considerations at the sentencing stage of a trial. The State does not have to prove intent with regards to them during the verdict stage of a trial. The Court further went on to state that “It is correct that, in specifying an enhanced penal jurisdiction for particular forms of an existing offence, the Legislature does not create a new type of offence. Thus ‘robbery with aggravating circumstances’ is not a new offence.”¹⁰⁸

This position that robbery with aggravating circumstances is not a separate crime is in principle correct, through a strict interpretation of section 1 (1) (b) of the CPA. In getting to this position the Constitutional Court did not consider well that in a practical sense robbery with aggravating circumstances is treated differently from robbery by our courts. The treatment of robbery with aggravating circumstances and mere robbery as two distinct crimes signifies an evolution of robbery with aggravating circumstances into a stand-alone crime, separate from robbery. More over in practise the two are treated differently for the purposes of both bail and prescriptions as will be explained further below.

The evidence of development of the law through practice can be seen in other closely related crimes such assault and assault with intent to cause grievous bodily harm which have developed into two separate crimes. For example, in cases of assault GBH ultimate aim for the requirement for intention to cause grievous bodily harm is for sentencing as assault with intention to cause grievous bodily harm attract a harsher sentence than assault common.

In *S v Isaacs and Another*¹⁰⁹ the court stated that the contention that no onus attached to proof of aggravating circumstances is flawed and the state has the onus to prove aggravating circumstances prior to conviction in light of the presumption of innocence and the signifying impact on aggravating circumstances on the length of the sentence imposed by the court. This reflect that our courts sometimes recognize and appreciate that robbery and robbery with aggravating circumstances are two different crimes with their own definitional elements. In the *Legoa* case above, the Court went on further to state that:-

‘Apart from the fact that robbery with aggravating circumstances attracts a minimum sentence, it has further significance. The right to prosecute robbery with aggravating circumstances does not prescribe, whereas the right to prosecute robbery prescribes after 20 years. It is also more difficult for a person charged with robbery with aggravating circumstances to be granted bail than it is for a person charged with mere robbery.’

¹⁰⁸ Ibid.

¹⁰⁹ *S v Isaacs and Another* 2007 (1) SACR 43 (C).

The above cases are further practical evidence that robbery with aggravating circumstances is morphing into a different crime from mere robbery with different consequences with regards to not only sentencing but substantial issues like prescription and bail. Further, the very fact that robbery with aggravating circumstances expressly requires the use of a fire arm or dangerous weapon, or the threat of violence is different from mere robbery and the legislature through section 1 (1) (b) of the CPA unknowingly through the wording of this section have created a new crime and it is now up to the courts or the legislature to endorse this view.

In *S v Mokela*,¹¹⁰ as per Bosielo JA, expressed that a previous conviction of robbery should not be regarded as a previous offence of “*robbery with aggravating circumstances*” for purposes of the sentencing and in particular as far as the provisions of the Criminal Law Amendment Act.¹¹¹ The court went on distinguished robbery with aggravating circumstances and robbery as two different crimes, albeit it was in the application of section 51 (2) of the CPA. This is evidence that the courts have tacitly acknowledged that robbery and robbery with aggravating circumstances are evolving into two different crimes. In that the Supreme Court of Appeal has no problem with interpretation of robbery with aggravating circumstances as different from robbery with regards to previous crimes.

The above position was reiterated in *S v Qwabe*¹¹², wherein the court in determining whether the accused was a 'second offender' on a charge of robbery with aggravating circumstances, held that the legislation section 51 (2) (a) (ii)¹¹³ relating to a minimum sentence would not be triggered by a previous conviction of robbery; it would require a conviction of robbery with aggravating circumstances to do so. In this case of *S v Qwabe* the court treated robbery with aggravating circumstances as a separate crime different from robbery. It is unquestionable that section 1 (1) (b) CPA presents '*aggravating circumstances*' in a way that proposes that they are conditional to the existence of the crime of robbery, and that no new or distinct crime is being created by the addition of the words to section 1 (1) b of the CPA.

Does section 1 (1) (b) create a new crime of robbery with aggravating circumstances?

Unarguably the result of section 1 (1) (b) of the CPA is to fashion a distinctive and significantly severe 'criminal status', in terms of which more serious criminal consequences

¹¹⁰ *S v Mokela* 2012 (1) SACR 431 (SCA) at para 6.

¹¹¹ Also referred to as Minimum Sentence Act supra.

¹¹² *S v Qwabe* 2012 (1) SACR 347 (WCC) 2012.

¹¹³ Minimum Sentence Act supra.

than that of mere robbery must be imposed upon an accused unless substantial and compelling circumstances exist which justify the imposition of a lesser sentence with regards to robbery with aggravating circumstances.¹¹⁴ The considerably amplified punitive and social consequences to which an accused is subjected to when aggravating circumstances are present in the crime of robbery warrant this type of robbery to be treated as a different crime from common robbery. The courts cannot put a blind faith in the legislature's failure to identify armed robbery formally as separate crimes and rely on that to the detriment of their duty to develop common law.

The argument adopted by the Constitutional Court, that the legislature could not have intended robbery with aggravating circumstances to be a different crime, it may be true but the court should not have turned a blind eye on the time of parliamentary supremacy, which is the time this crime was created in the South African law. Those were the times when the Bill of Rights and the Constitutional Supremacy did not exist. Therefore it is submitted that the constitutional court in *Masingili* was insufficiently faithful to the spirit and thrust of the Constitution.¹¹⁵ In that by a strictly interpreting robbery with aggravating circumstances the court is negating on one of its fundamental constitutional function which is to develop the common law.¹¹⁶

It is submitted that the in interpreting section 1 (1) (b) of the CPA to only look at the wording of the section is a bit naïve, this is because the court did not consider the practical application of this section. Robbery with aggravating circumstances deserves to be a stand-alone crime. The narrow interpretation of robbery with aggravating circumstances is contradictory to the approach adopted by the High Courts. The practical application and interpretation of the law with regards to robbery with aggravating circumstances and robbery is evidenced by the different jurisdiction afforded to common robbery which is dealt in the district court by the magistrate whereas, the regional courts and higher courts have jurisdiction with regards to robbery with aggravating circumstances.

The constitutional court, in failing to develop the crime of robbery with aggravating circumstances adequately, failed to speak up in the constitutional dialogue that functions in South Africa between the various arms of the state. There is no reason why the crime of

¹¹⁴ A. Paizez "Robbery with aggravating circumstances and the constitutional validity of s 1 (1) (b) of the Criminal Procedure Act; two conflicting decisions." (2013) 2 *Criminal Justice Review (Commentary on the Criminal Procedure Act)*.

¹¹⁵ The SA Constitution supra note 68.

¹¹⁶ Ibid at s 39 (2) which reads: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

robbery with aggravating circumstances and robbery cannot be two different crimes. Furthermore, there is no rule of law that prohibits the Court from executing such an extension. On the contrary, creating a new stand-alone crime would have enhanced the Court's commitment to its obligation in section 39 (2) of the SA Constitution. According to the section the Court has the power to make any order that is just and equitable. Therefore taking into account that there is no law that prohibits the Court from executing such an extension, it is this paper's view that the court should have developed this crime of robbery with aggravating circumstances into becoming a stand-alone crime from robbery. Therefore, it is this paper's conclusion that it was ripe for the court to develop this law by using section 172 of the SA Constitution.¹¹⁷

The court's remedial power is not limited to declaration of invalidity. In short s 172 (1) of the SA constitution give powers to the court to make any order that is just and equitable. In the case of *Head of Department Mpumalanga Department of Education v Hoërskool Ermelo*¹¹⁸ the constitutional court had decided in favour of developing the law and it made an order that did not follow on the prayers of the contesting parties. The court stated the following:

“The litmus test will be whether considerations of justice and equity in a particular case dictate that the order be made. In other words the order must be fair and just within the context of a particular dispute.” The power to grant a just and equitable order is so wide and flexible that it allows courts to formulate an order that does not follow prayers in the notice of motion or some other pleading. This power enables courts to address the real dispute between the parties by requiring them to take steps aimed at making their conduct to be consistent with the Constitution. In *Hoërskool Ermelo Moseneke DCJ* declared: “A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements. In several

¹¹⁷ The SA Constitution supra note 68; s 172(1) states that: ‘When deciding a constitutional matter within its power, a court (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency; and (b) may make any order that is just and equitable, including — (i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect’.

¹¹⁸*Head of Department Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC).

cases, this Court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties.”¹¹⁹

We expected the Court in *Minister of Justice and Constitutional Development and Another v Masingili and Others* to expressly lay this issue to rest by giving a decision that was going to properly develop the crime of robbery with aggravating circumstances and the definition of it as defined by section 1 (1) (b) of the CPA. The development which would have ultimate result to push the legislature to enact a statute which will formally make robbery with aggravating circumstances to be a different crime to robbery, by evoking its inherent power to develop the common law.¹²⁰

Similarly Kemp in his book *Criminal Law in South Africa* is of the view that the crime of robbery and the crime of robbery with aggravating circumstances are two different crimes.¹²¹

Also Burchell is critical of the judgement, in that he is of the view that the court should have gone further and state that The State should prove whether the accomplice had the same intention as of the crime committed by the perpetrator, which is robbery with aggravating circumstances. If the intention were the same then the accomplice, according to Burchell, can be convicted for robbery with aggravating circumstances.¹²²

3.5.Two Stages of a Criminal Trial

The criminal trial in SA law is divided into two stages. That is the first stage when the court will decide on the guilty or not guilty of the accused person and express the court verdict. And the second stage is when the court will decide on the appropriate sentence.

Verdict Stage

The first stage concerns of the trial, which will prove the guilt or innocence of the accused on the offence charged. This is the stage where the accused has to be proved either guilty or innocent; the burden of proof at this stage rests with the prosecution which has to prove that, the accused is guilty beyond reasonable doubt to secure a conviction. This means that the judge and assessors must be satisfied that there is no reasonable possibility that the accused is

¹¹⁹ See also, the decision of the case between *Economic Freedom Fighters and Others v The Speaker of The National Assembly and Another* CCT 76/17 page 88 par 209.

¹²⁰ The SA Constitution supra; s 172. “The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.”

¹²¹ Kemp supra note 25 at page 423.

¹²² J Burchell, *Principles of Criminal Law* 5th ed. (2016) 733.

innocent before he is convicted. The rationale for the higher test is that everyone's freedom is fundamental; that a criminal penalty is a very grave harm to impose; and that it is better to let the guilty go free than to punish the innocent. Requiring proof "beyond reasonable doubt" means that criminal punishment is imposed only when the court is very sure of the accused's guilt. It is hard to give any definition more precise than that. After a court is satisfied that the state has proved its case beyond reasonable doubt, it then can convict an accused and move to sentencing the accused.

Sentencing Stage

The second stage of trial concerns the question of sentence. The sentence is defined as, any measure applied by a court to a person convicted of a criminal offense which finalises a case¹²³. The general underlying principle with regards to sentencing is that the punishment should fit the crime, be fair to society and it must be blended with a measure of mercy according to the circumstances.¹²⁴ A sentence must also consider the following purposes of punishment namely retribution, deterrence, prevention and rehabilitation.¹²⁵ In cases of more serious crimes the court is guided by the Criminal Law Amendment Act¹²⁶ on what sentence it has to impose on an accused. The sentences provided by the Act vary from 5 years to Life imprisonment, depending on the type of the offense and the part it falls under in terms of this Act.

During the sentencing stage in principle there is no onus of proof that needs to be satisfied¹²⁷ even though the presumption of innocence does not apply to sentencing as the accused has already been convicted, the court in *S v Shephard*¹²⁸ stated that; ' it is anomalous to give the accused benefit of all reasonable doubt before finding him guilty then when dealing with a question that may make a vast difference to his sentence to place the onus on him so that the Court if it finds the probabilities equally balanced in relation to some mitigating fact, will punish him for a fact that does not exist.' The court has to conduct a factual inquiry to ascertain whether the particular aggravating or mitigating circumstances exist before handing down a sentence.

¹²³ JJ Joubert. Criminal Procedure Handbook 12 ed. (2017) 374.

¹²⁴ *S v Rabie* 1975 (4) SA 855 (A).

¹²⁵ *S v Nkambule* 1993 (1) SARC 136 (A) at page 146 C.

¹²⁶ Minimum Sentence Act supra.

¹²⁷ *R v Van Zell* 1953 (4) SA 552 (A) at 561.

¹²⁸ *S v Shephard and others* 1967 (4) SA 170 (W).

3.5.1. An analysis on how the constitutional court in *Minister of Justice and Another v Masingili and Another* treated the two stages of the trial.

The Constitutional Court in *Masingili* held that the aggravating circumstances in a case of robbery with aggravating circumstances are only relevant for the second stage of the trial; namely, sentencing. This position in principle, on a strict interpretation of the law is correct. However, it is contrary to the approach that had been adopted and developed in the Supreme Court and the High Court.

The decision by the Constitutional Court is contrary to the precedent set in *S v Legoa*,¹²⁹ wherein, the court went to great lengths to allude that procedural fairness dictates and has impelled our courts to require that proof of intention of aggravating circumstances be proved during the verdict stage of a criminal trial. The court was of the view that the inquiry into the two stage process is a fluid process in that the two stage process of a criminal trial is not a rigid concept cast in stone which requires strict adherence to the separation of the two stages of the criminal trial.

The Court in *S v Legoa* rightly held that aggravating circumstances should be proved before conviction as it would be unfair to suddenly confront a convicted person with an enhanced penal code at the sentencing stage. It further stated that it is proper for the State to give sufficient notice to the accused that they would be confronted with a harsher and more severe sentence during the conviction stage.¹³⁰ The position stated in *S v Legoa* is in line with the constitutional principle which requires clearness and notification to an accused of all the implications of a trial so that he or she can address the State's case comprehensively including being able to prepare for the sentencing inquiry.¹³¹ This is encompassed on the criminal law principle of legality.

A strict interpretation of the two stage trial as stated in *Masingili* has the effect of ignoring the fact that for practical purposes in cases of robbery with aggravating circumstances the courts have always treated "aggravating factors" as elements of the form of the offence which the accused was charged, hence they had to be proved in the first stage of the trial, and the finding regarding their presence or absence was part of the main verdict.¹³² The Constitutional Court decision in the case of *Masingili* decided that the aggravating circumstances will be considered relevant for sentencing, cannot be viewed as correct. Du

¹²⁹ *S v Legoa* supra note 71.

¹³⁰ *Ibid* at para 20.

¹³¹ *Veldman v Director of Public Prosecutions*, Witwatersrand Local Division 2007 (3) SA 210(CC); at para 37.

¹³² *S v Jacobs* 1961 (1) SA 474 (A), *S v Sparks* 1972 (3) SA 396 (A) 404.

Toit does not agree with how the highest Court in matters of SA constitution treated this issue and their view in the Commentary was that robbery with aggravating circumstances is a distinct offence from robbery.¹³³

In the case of *R v Zonele and others*¹³⁴ the court held that:-

‘Although aggravating circumstances affect sentencing only, it is very importance that a person charged with robbery or with housebreaking with intent to commit an offence should be informed, in clear terms that the Crown alleges and intends to prove that aggravating circumstances were present.

It is desirable that the facts which the Crown intends to prove as constituting aggravating circumstances should be set out in the indictment, as was done in the present case. Without laying down any rule, I venture to suggest, for the consideration of Attorneys-General, that it might be good practice to go further and, in addition, to allege specifically that the accused is charged with robbery (or with housebreaking with intent to commit an offence) in which aggravating circumstances were present...’¹³⁵

In *S v Moloto*¹³⁶ and *S v Benjamin*,¹³⁷ the Appellate Division reiterated the position that in cases of robbery with aggravating circumstances, aggravating circumstances must be proven in the verdict stage as they are central in both stages of the trial. Consequently in practice aggravating circumstances are treated as elements of the crime of robbery with aggravating circumstances; effectively making it a distinct offence in its own right. Whereas the Constitutional Court in *Masingili* did not view robbery with aggravating circumstances as a separate crime from robbery.

3.6.Concluding Remarks

The decision of the court in *Masingili* although in principle is correct when one considers that section 1 (1) (b) of the CPA does not create a new crime, but it failed to take into consideration that law is dynamic and fluid and it is up to it to be at the forefront of this development. There is enough evidence that our courts are shifting towards recognising robbery with aggravating circumstances as a different crime from common robbery. In the

¹³³ Du Toit A “Minister of Justice and Another v Masingili and Another Constitutional Law”. Supra note 98.

¹³⁴ *R v Zonele* 1959 (3) SA 319 (A).

¹³⁵ Ibid.

¹³⁶ *S v Moloto* 1980 (1) SA 950 (A) at page 850 par 13 C-D.

¹³⁷ *S v Benjamin en n Ander* 1980 (1) SA 950 (A).

case in discussion the Constitutional Court missed an opportunity to follow on this positive path of interpreting robbery with aggravating circumstances as different crime from robbery.

In *Masiya v DPP*¹³⁸ the Constitutional Court developed the common law crime of Rape, which was recognising only the vaginal penetration of the victim as a rape case. The Constitutional Court in *Masiya v DPP* also recognised and treated anal penetration to female by the offender as rape. The legislature then enacted the Sexual Offences Amendment Act, 32 of 2007. Therefore the above case of *Masiya v DPP* serves as a precedent and as evidence to support the view of this paper, to prove that the Constitutional Court has got powers to develop the common law to be consistent with SA Constitution and the bill of rights in South Africa.

Professor Hoctor raised good and proper arguments when he was analysing the Constitutional Court decision of the case of *Masiya v DPP*, and the court's power to develop the common law. Since he emphasised that it is important for the Courts when developing the common law to take into account the principles of legality.¹³⁹

The Constitutional Court has overturned many years of jurisprudence with regards to interpretation of the effect of aggravating circumstances and its relevance on the two stages of the trial, by adopting a formalistic and rigid interpretation. The approach adopted by the Constitutional Court has the effect of strangling the development of robbery with aggravating circumstances and prevent it from being a stand-alone crime. Furthermore, the approach under discussion fails to pass the constitutional muster in the sense that it has got the implications of causing confusion to lay people or accused person who do not have legal qualifications.

¹³⁸ *Masiya v Director of Public Prosecutions* 2007 (5) SA 30 (CC).

¹³⁹ See for example S Hoctor "Recent cases: Specific crimes." (2007), 1 *SACJ* 78 at 86.

CHAPTER 4: CONCLUSION

4.1. Overview

The Constitutional Court in *Masingili* adopted a particularly narrow reading of section 1 (1) (b) of the CPA by failed to develop it properly and treat it as a separate crime from mere robbery. The Court conducted a thorough discussion of the historical development of aggravating circumstances, through an analysis of the following three main cases of *Cain*; *Sisilane*; and *Dhlamini*, cases mentioned in chapter 1 above. These three cases had been the authority on the history of robbery with aggravating circumstances after its inception in 1958.

The definition of robbery where there are aggravating circumstances is found in section 1 (1) (b) of the CPA. The question that had to be solved by the Constitutional Court in *Masingili* was simply whether the section violates the constitution of the country or not, that is a right to a fair trial and a right to be presumed innocent of the Constitution.¹⁴⁰ The Court reached the conclusion that the section does not violate the Bill of Rights. In reaching that conclusion, the Court had to decide whether or not robbery with aggravating circumstances is a separate offence from common robbery. In answering this question, the Constitutional Court came to the conclusion that robbery where there are aggravating circumstances is not a new crime; therefore, for all intents and purposes it is still robbery.

The court in *Masingili* paid a lip service to *Legoa* and *Moloto* judgements, which were of the view that robbery with aggravating circumstances was developing into a new crime and further, that intention with regards to aggravating circumstances had to be proved for one to be found guilty of robbery with aggravating circumstances. Bearing in mind that there was no argument from the parties to request the Constitutional Court to develop this crime, but the Court still had an obligation to do so.

¹⁴⁰ The SA Constitution supra note 68.

The decision in *Masingili* has the implication of meaning that a person can be found guilty of robbery with aggravating circumstances even though there is no evidence proven by the State that he had intention to use or cause such aggravating circumstances during the robbery. Procedurally and substantively it does not sound correct, to say that a person will be found guilty of robbery with aggravating circumstances when the evidence points to fact that he is guilty of robbery only.

In practice, robbery and robbery with aggravating circumstances are treated by our courts as different crimes, as argued in Chapter 3 of this dissertation. This is highlighted by the fact that robbery and robbery with aggravating circumstances are treated differently for the purposes of bail applications by the CPA, in that it is more difficult for an accused to be granted bail when they are being charged with robbery with aggravating circumstances than for an accused being charged with common robbery; the prescription periods are not the same; and their legislation under both the CPA and the Minimum Sentencing Act. Even when one looks at robbery and the fact that it has got less harsh punishment than robbery with aggravating circumstances it makes sense to not treat these crimes in the same scale. It is clear that they are not the same.

The court in *Masingili* went contrary to the norm that, a person can only be found guilty where there is both the *actus rea* and the *mens rea* to commit the crime are present. The Court stated that the State does not have to prove the intention to commit aggravating circumstances as the element of this crime. The doctrine of criminal culpability states that peoples can only be punished for the choices they make freely, knowingly and with the full appreciation of the actions consenting. This statement supports the legal principle which says, that an accused can be found guilty of a crime where blameworthiness in the form of intention is present and proven against him.

The court in *Masingili*, wrongly decided, that intention with regards to aggravating circumstances was irrelevant and the State did not need to prove it during the first stage of the trial. This sounded like the court turned a blind eye to how this crime is treated in practical sense by our courts. Most courts were requiring the intention to be proven as an element for crime of robbery with aggravating circumstances. That is why I think they were regarding it as a separate crime hence to prove the intention with regards to aggravating circumstances was regarded as central in the application of such cases.

In South African Constitutional era, the constitutional values and norms demand that for an accused to be convicted of a crime there must be culpability on the part of the accused; and further, it is always important for a State to prove a case beyond reasonable doubt, in criminal cases.

In *Masingili* the court, though not evident in the words from the judgement; but one can see that the court was cautious not to interfere with the legislature and not to break the rules or principle of doctrine of separation of powers. It did that by not interfering with the wording or purpose of the legislature in its interpretation of section 1 (1) (b) of the CPA.

By so doing the Court missed the opportunity to develop a common law crime, since the constitution of South Africa had given the court with a duty to develop the common law.

In adopting a narrow interpretation of section 1 (1) (b) of the CPA the Constitutional Court failed to take into account the *ratio decidendi* set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹⁴¹ on the interpretation of legislation. In *Natal Joint Municipal Pension Fund*, the Supreme Court of Appeal expressly stated that courts must avoid putting too much emphasis on the intention of the legislature, the case set out a new approach to statutory interpretation when it stated that:-

“It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in *Jaga v Dönges* NO and another¹, namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate.”¹⁴²

The Constitutional Court, had it adopted what was referred to in *Natal Pension Fund* as the new trend in statutory interpretation it would have arrived at a different outcome. The Court in *Masingili* would have inevitably arrived at the conclusion that the implication of section 1 (1) (b) of the CPA is that the legislation has created a new crime of robbery with aggravating circumstances which is different from the common law robbery. This would have meant that intention with regards to aggravating circumstances would have been required in terms of the aggravating circumstances.

¹⁴¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

¹⁴² *Ibid.*

The Constitutional Court in the *Masingili* case gave too much weight on the intention of the legislature with regards to the wording of section 1 (1) (b) of the CPA. In giving too much weight to the intention of the legislature when interpreting the statute in question, the Constitutional Court ended up disregarding authority from the various High Courts and Supreme Court of Appeal which points to the evolution of robbery with aggravating circumstances into a different crime.

The failure by the Constitutional Court to develop robbery with aggravating circumstances into a separate crime from robbery is regrettable given that our higher courts, which include the Constitutional Court has a the power and duties to develop the common law.

The inherent duty for our courts to develop the common law has been enshrined in section 173¹⁴³ of the SA Constitution which expressly states that:-

“The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.”¹⁴⁴

The Constitutional Court in this regard had constitutional duty and an obligation to develop robbery with aggravating circumstances into a new crime, just as other crimes which were once viewed as the same crime, for example, assault with intent to cause grievous bodily harm is a species of common assault which has been developed by our courts into a stand-alone crime. In the case at issue the interests of justice require that an accused has a right to a fair a trial, and the principle of legality plays an important role in that regard.

Snyman¹⁴⁵ states under the topic of principles of legality, that ‘the crime must be clear in terms’. If robbery and robbery with aggravating circumstances can become two separate crimes, the development will make it easier for most people to understand it easily, more especially the lay people.

Further, the Court *Masingili* misdirected itself in stating that on an interpretation of section 1 (1) (b) of the CPA aggravating circumstances are only relevant for sentencing and further that a court must only inquire into aggravating circumstances after an accused has been convicted. This is contrary to the approach that had existed and adopted by SA courts,

¹⁴³ The SA Constitution supra note 68 at s 173.

¹⁴⁴ Ibid.

¹⁴⁵ Snyman supra note 23 at page 36.

which had stated that for the purposes of procedural fairness and justice, a court must establish the intention element of aggravating circumstances during the verdict stage of a criminal trial. The position adopted by the Constitutional Court with regards separation of the verdict and sentencing stages of a trial has the effect of creating an artificial rigid and strict separation of what must be inquired into at both sentencing and verdict stage.

5.2. Concluding Remarks

There is a need for robbery with aggravating circumstances to be classified as a separate crime as argued in the discussion above. This is because it has evolved into a different crime to mere robbery in almost every aspect. The crime of robbery should be developed either through legislative intervention or through our courts exercising their inherent powers to develop and promote common law.

This paper does not support what was said by Farlam J in *S v Mintoor* 1996 (1) SACR 514 (C), when he refused to extend the crime of theft of electricity, and stated that it was not appropriate for the ambit of our criminal law to be extended by courts as this was the discretion of the legislature.¹⁴⁶ Section 173 of Act 108 of 1996 empowers the court to develop common law taking into account the interests of justice. Therefore, it is this paper's argument that it would have not done much harm to both parties of the *Masingili* case to develop this crime to be a stand-alone crime from robbery. Whereas, on the contrary, a new development will bring a fresh and clear distinction between the two related crimes of robbery and robbery with aggravating circumstances.

¹⁴⁶ *S v Mintoor* 1996 (1) SACR 514 (C) at 517 par a-b.

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