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SUMMARY

The crime of in-transit robbery is a sub-specie of the common law crime of robbery, which in essence is a crime of theft with violence. Robbery had evolved from begging, where beggars would harass their victims for money or items of value and then elevating their begging efforts to threats of violence, and in certain instances the usage of physical violence to solicit alms.

As soon as road transport became prominent in society, the incidence of in-transit robbery increased where violence was used to overcome any form of resistance from the victim. During sea-faring transportation, piracy occurred using similar methods of violence to obtain goods from victims.

In-transit robbery has undergone many changes in terms of *modus operandi*. From the early days of violent begging during the Roman Empire it has now become a greed driven, carefully planned crime, which is executed with military precision with high technology weapons of war.

Robbery has advanced in judicial terms from a non-codified crime to a specific defined crime which carries prescribed minimum sentencing as punishment.
CHAPTER 1
INTRODUCTION

The common law crime of robbery has been in existence from very early times. At its most basic it can simply be described as “theft with violence”. However, robbery is encountered in every legal system over the civilized world and it has taken many different forms over the years. It has evolved systematically from a type of aggravated begging to the current sophisticated method of attacking cash-in-transit vehicles with military precision and with the aid of sophisticated arms of war. It is this modern version of the crime that forms the focus of this dissertation.

In the South African legal context, in-transit robbery is regarded as a sub specie of the crime robbery. For this reason a specific legal definition does not exist. However, the South African Banking Risk Intelligence Centre (SABRIC) and the Cash-in-Transit (CIT) Crime Combating Forum, have defined cash-in-transit robbery as follows:¹ “The robbery of cash whilst in transit, and the unlawful, intentional and violent removal and appropriation of cash-in-transit whilst under the control of an individual or company.”

It is common knowledge from printed and electronic press reports that cash-in-transit robbery has reached epidemic proportions in South Africa. It is also clear that the ability to stop this specie of crime is at present largely lacking in South Africa. Can this inability be attributed to the way in which the criminal justice system has responded (or not responded) to the phenomenon; or is cash-in-transit robbery simply a social phenomenon that exposes the very real limits of the criminal law and legal sanctions in society?

In order to answer these questions, a legal historical approach to cash-in-transit robbery is adopted in this dissertation. This approach requires some clarification and justification. The legal historical approach, as it is usually understood, entails the study of either the internal history or the external history of legal phenomena.² An

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¹ Information from SABRIC Head Office in Johannesburg on 20 May 2005.
² Venter, Van der Walt, Van der Walt, Pienaar, Olivier and Du Plessis Regsnavorsing: Metode en Publikasie (1990) 161.
internal history would trace the way in which the content of legal rules has changed over time. The external history would study the factors that contributed to these changes. While this understanding is, on the face of it, wide enough to include a study of the socio-economic, cultural and political context in which law operates, these factors have traditionally not received much attention from legal historians.  

The external history of legal rules has, by and large, remained a study of the history of legal institutions and events. The study of law in its social context has rather come to be associated with what is loosely known as “sociological jurisprudence” or “legal sociology”. These schools of thought do not measure law according to standards of formal rationality, but rather look into the historically conditioned role or function of law as a normative system within society, and, in particular, into the limits of law as an official body of norms.

The basic principle of a sociological legal approach is that law is not made up of a closed set of rules, developed from internal logic, but rather that the law should be regarded as reactions to social pressures and influences, and that such law has a definitive role to play in society. The law should thus be measured according to the effect it has on society, rather than according to the inherent logic thereof. Sociological jurists insist that a “sociological legal history” is a “study of the social background and social effects of legal institutions, legal precepts and legal doctrines, and of how these effects have been brought about”.

The sociology of law studies human behaviour in society in so far as it is determined by commonly recognized norms. Jurisprudence, on the other hand, studies the

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4 A typical example is Thomas et al Historical Foundations of South African Private Law (1998). See also Hosten, Edwards, Bosman and Church Introduction to South African Law and Legal Theory (1995) 272 who writes: “It is the task of the legal historian to evaluate the historical events related to political, constitutional, social, economic, religious and cultural trends and changes which influenced the development of the law. Obviously more attention will be devoted to the persons or institutions which directly created law down the centuries; emphasis therefore falls on the sources of law.”
5 Hosten et al 96-107.
6 Hosten et al 98 uses this term to capture the close relationship between the historical and sociological study of law.
norms as such, from three main points of view: analytical or positive, historical and theoretical.⁸

The content of the sociology of law further depends on the structure of the social phenomenon called law. This is a complex, secondary factor. Two primary factors, those of ethics and power, are united in norms of conduct which are imposed upon the individual. These norms are included not only in law, but also in customs and morals. On the other hand, the juridical pressure on human behavior may be considered as the display of the social energy concentrated in organized social power.⁹

The legal historical approach in this broad sociological sense is relatively unknown to South African legal scholars. Corder and Davis introduced *Essays on Law and Social Practice in South Africa* in 1988 with the following bold, but accurate, statement:¹⁰

“This book represents the first composite attempt to situate jurisprudential models and debates within the South African social context.” Corder and Davis lamented the fact that South African legal scholars have generally failed to come to terms with the social reality in which the legal system operates. They cite the sharp distinction between criminology and criminal law as but one example of this failure.¹¹

The move to democracy during the 1990’s has, ironically, not had a fundamental impact on the fate of the legal historical methodology in the wide sociological sense. The positivism of old has simply been superseded by a new natural law or human rights approach in which the focus (still) falls on the foundational values inherent to the legal order. The legal historical approach to law remains overshadowed by the traditionally dominant perspectives in Western jurisprudence, namely positivism and natural law. By contrast, writers like Berman has called for a more “integrative jurisprudence” in which the formal rules of the law (positivism), the foundational

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⁹ Timasheff 231.
¹¹ Corder and Davis 5.
values of the legal order (natural law) and the historical functions of the legal system (historical jurisprudence) are fully integrated.\textsuperscript{12}

In the spirit of this attempt to develop a more inclusive and integrated conception of the legal historical methodology, it should from the outset be noted that this treatise:

(i) does not purport to study the internal history of robbery;

(ii) does not rely on the traditional distinctions between Roman law, Roman-Dutch law, and modern South African law in order to structure its argument;

(iii) does not only, or even primarily, rely on internal legal sources to discuss the phenomenon in question. The research conducted for this treatise was based on an analysis of historical scripts and books obtained from recognised research libraries were used to either confirm or reject legends and myths regarding robbery and piracy; present day literature and statistics were analysed to confirm or reject in-transit robbery incidents; personal interviews with senior members of the South African Police Service, directors of cash-in-transit security companies, members of the Intelligence Services and other law enforcement agencies were held to confirm or reject statistics and forms of modus operandi during cash-in-transit heists; and museums and municipal institutions were consulted to verify information obtained from senior citizens who had knowledge of in-transit robberies during the 19\textsuperscript{th} century;

(iv) aims to situate the law of robbery in its social context in order to highlight the limitations of a purely legal response to what is essentially a socio-economic phenomenon. The basic argument is that an inter-disciplinary and inter-institutional approach needs to be developed to successfully combat cash-in-transit robberies in South Africa. Criminal law, as it stands on its own, irrespective of improvements and revisions, will not be effective in eradicating this escalating crime.

The argument explores the phenomenon of robbery in four distinct socio-historical contexts. It begins by discussing robbery in ancient Rome, then looks at robbery in medieval England and 19th century America respectively. The focus finally shifts to South Africa where the modus operandi of cash-in-transit robberies is carefully described. The way in which the legal system has responded to this latest version of an old phenomenon is then addressed. The limits of this response and attempts to formulate a more integrated strategy in which both the state, civil society and the business community participate bring the study to a close.
CHAPTER 2
THE LEGAL HISTORY OF ROBBERY IN THE ANCIENT ROMAN EMPIRE

2.1 INTRODUCTION

In this chapter, the origin, incidence, definition and punishment of robbery (with the emphasis on in-transit robbery) during the ancient Roman Empire will be investigated. The crime of piracy as a form of robbery will also be discussed.

Though the corruption of politics through violence has long been recognized as a major contributory factor in the fall of the Roman Republic, it is evident that civil war and internal conflict in government resulted in the neglect of Roman society. The readiness of the poor to join in street violence could be directly attributed to the collapse of public order in and around Rome during 200BC. During this era robbery was a means of survival, and the prosecution of perpetrators was the sole responsibility of the victim. The Roman legal system further made no distinction between a crime and a delict.\(^\text{13}\)

2.2 THE ORIGIN OF IN-TRANSIT ROBBERY 509-40BC

In a quest for more power, the government of Rome sent thousands of troops to defend its borders, and large numbers of troops were dispatched to foreign countries to conquer new territory. This quest for establishing a larger Roman Empire resulted in the cities being unprotected from common crime. Regular troops were not allowed to take up permanent quarters in Rome, but rather garrisoned within a certain distance from the metropolis, ready to answer any sudden attack on the Government. The only bodies of troops tolerated in Rome were those attached to special service of the emperor. These men, however, had nothing to do with the maintenance of public order, in fact they were decidedly against it.\(^\text{14}\)

\(^{13}\) Van Zyl History and Principles of Roman Private Law (1983) 330 fn 322.

\(^{14}\) Lanciani Ancient Rome in the Light of Recent Discoveries (1898) Chapter 8.
As mentioned above, theft and robbery were a means of survival for the poor which were further enhanced by the non-assistance by government to control the general state of lawlessness in and around Rome.

Robbery initially had its origin as a form of begging in ancient Rome. In the city beggars would haunt the bridges and gates, specifically places where the narrowness of the road would sometimes stop, but always slow down traffic. For the same reason they harassed travellers on the steep ascents of public roads in the Campagna where they were sure that even the fastest horses would be obliged to lower their speed. The beggars would then follow riders and drivers up the hill, harassing them until the victim parted with some coins.  

At the very beginning of his reign, Augustus attempted to stop the evil of robbery and theft by covering the whole of the Empire with a network of military and police stations. Tiberius, his successor in throne, increased the number of policemen and military stations in a further attempt to curb violent theft. When Septimus Severus, in his general reform of the Roman military system, caused the praetorian soldiers or bodyguard to be drafted from the provinces instead of Italy, as had been done before, Italian youths, inclined naturally to military life, gave themselves over to brigandage, as a means of enjoying their favourable sport of war.  

This disaffection of the younger generation neglected by Septimus Severus reached such a point that an intrepid chief, Felix Bulla, succeeded in putting the whole of Italy to ransom for two years, crossing it from end to end as the head of an army of over six-hundred bandits. Betrayed, finally, by the woman he loved, he was caught by soldiers where he ended his adventurous career in the arena, devoured by wild beasts, amidst the applause of the people.  

Ancient epitaphs very often speak of persons murdered in encounters with robbers whilst in transit. For example, a historian described in his book the assault

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15 Ibid.  
17 Lanciani Chapter 8.  
18 Ibid.
committed by robbers on Noniun Datus, a prominent Roman soldier, on his way from Lambaese to Saldae.

The most interesting of epitaphs is an inscription discovered near the farm of Lamgalea six miles from Rome. This tombstone, which dates back to the beginning of the third century, describes how a schoolmaster, only twenty eight years of age and having gone out on an excursion on the Via Campana with seven of his pupils, fell into an ambush and was murdered by the robbers together with his pupils.

The slaughter, committed almost within sight of the walls of Rome, must have given rise to the implementation of some serious measures to curb the spate of in-transit robberies in and around the city of Rome.

2.2.1 DESCRIBING ANCIENT ROBBERY

One of the first official references to robbery in-transit can be found in the *Lex Cornelia de Sicariis* of the dictator Sulla in 83BC where the crime is defined as follows: “Latrocinium Latrones armed persons, who robbed persons on public roads or elsewhere.” Murder was not an essential part of the crime, though it was frequently an accompaniment. By the same *Lex Cornelia* the crime of robbery was punished by death. This law continued to be in force into the imperial period.

The Grassatores were another kind of robbers, who robbed people in the streets or roads. The name seems to have been originally applied to those robbers who did not carry weapons or did not use force to steal from travellers. If, however, they appeared to have been using weapons or if they have been united with others in perpetrat ing robbery, they were punished in the same manner as *latrones*.

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19 Officer of the regiment of the 3rd Legion.
20 Rich & Smithley *War and Society in the Roman World* (1932) 22.
21 Julius Thimotius.
22 Smith *Dictionary of Greek & Roman Antiquities* (1878) 670.
23 Smith 673
24 Ibid.
25 Smith 670.
2.2.2 ALTERNATIVE PUNISHMENT FOR ROBBERY

Roman law did not distinguish between the law of delict and criminal law as we know it today. Robbery and theft were, for instance, regarded as delicts although in modern law they are of a criminal nature. In Rome, which had no police force, communal self-defence was the rule for commoners. *Fidem implorer* and *quiritare* are the common phrases used to describe a cry by an injured or threatened person who expected those near to use force on his behalf. This form of self-defence, particularly with regard to property, was recognized as acts in law in Rome. This “self-help” legal act accepted the killing of a thief or robber if he attacked by night or if a weapon had been used.

As mentioned above, robbery was also viewed as a delict in Roman law and, as such, provided the victim with the means to receive compensation from his assailant. The delict *rapina* (robbery) occurred when a person appropriated a movable corporeal thing belonging to another, by violent means. On account of the similarity to the delict of theft (*furtum*), *rapina* was for the most part subject to the same requirements of *furtum*.

In 77BC a specific action was introduced to curb the spate of robbery in Rome. The *actio in bonorum raptorum* could be used to claim as much as four times the value lost in the robbery. This action specifically included compensation for loss or damage which was violently caused by armed robbers.

2.2.3 PIRACY IN ANCIENT ROME

Due to a general lack of road transport during this period, traders relied mostly on sea-faring transport. Italy and surrounding countries were renowned for their well kept port infrastructures. During this time, many wars were waged in the quest to

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26 Van Zyl fn 322.
27 Lintot *Violence in Rome* (1968) 11.
28 Kolbert *Digest of Roman Law: Theft, Rapine, Damage and Insult* (1979) 23.
29 Van Zyl 337.
expand territories. The Romans in their quest for expanding the Empire relied on the sea as method of conveying troops to distant shores.

Ships were heavily laden with either replenishments for the troops, or stocked with riches, looted from conquered countries, which were to be taken back to Rome. This resulted in a new and rewarding crime of piracy.

The history of piracy started in 140BC, when the word peirato (pirate) was first used by the Roman historian Polybius. The Greek historian Plutarch, writing in 100BC, gave the oldest clear definition of piracy as follows: “Those who attack without legal authority not only ships, but also maritime ports.” Although piracy was a form of armed robbery, the use of ships by pirates made them more of a problem for ancient societies than bandits operating on land. Piratical raids could be larger in scale, range over far greater distances and were much harder to anticipate and defend than those of bandits. The lack of a single stable political authority made it easy for piracy to flourish, as did the frequent wars between the kingdoms of the Mediterranean which tended to encourage piracy. Pirates could base themselves in the territory of one state and attack the inhabitants of another state.

The sale of the booty taken on raids, whether it was slaves, luxury goods or basic commodities, contributed significantly to local economies. For this reason, the “host” country would be hesitant to evict pirates from their territory. The piracy threat which came to a head during 60BC was directly due to Rome’s complacency to stop piracy in its infant shoes. Rather stamping out small pockets of piracy earlier, they allowed piracy to flourish into a large force of marauders. A poor economy and degenerated social conditions drove many young and able men to the lucrative business of piracy.

Another reason why Rome was unwilling to stop piracy in its tracks was that the pirates provided slaves for the luxury markets. The pirates did not view Rome as an enemy, but treated all targets as opportunity of profit. During the turbulent 70’s, the Romans were engaged in various civil wars. Whilst the Romans were thus pre-
occupied, pirates were roaming the waters of the Mediterranean, often leaving the water and venturing onto land, raiding islands and ports of coastal cities.\textsuperscript{35}

Piracy turned to robbery on land when pirates ventured up Roman roads and captured those they encountered. Cases were documented where high-ranking Roman officers were robbed and captured by pirates.\textsuperscript{36} Two praetors, Sextilius and Bellinus, were kidnapped on the Appian Way near Rome where a ransom was demanded, and eventually paid.\textsuperscript{37}

Ceasar, too, was captured by pirates near the island of Pharmcusa shortly after escaping from Sulla’s soldiers in 75BC. For some reason, the pirates did not execute him, but actually tolerated his pestering. When the pirates set a ransom of 20 talents, Ceasar set it at 50, claiming that he was worth more. After his release, Ceasar took ships and captured the pirates that once detained him. The Governor of Asia, Junius, convicted the pirates and sentenced them to imprisonment. However, Ceasar did not agree with the punishment and took the matter in his own hands by crucifying all of them.\textsuperscript{38}

\section*{2.2.4 PIRACY LAWS IN ROMAN TIMES}

An inscription found at Delphi describes a document dated as originated in 100BC that sets the rules for dealing with pirates. The law stated that Roman citizens should be able to conduct without peril whatever business they desire, whenever they desire. A copy of this law was sent to the Kings of Cyprus, Alexandria, Egypt, Cyrene and Cyria informing them that no pirate was to use the Kingdom, land, or territory of any Roman ally as a base of operation. No official or garrison would harbour pirates.\textsuperscript{39}

\begin{footnotesize}
\begin{enumerate}
\item[35] Ormerod Piracy in the Ancient World (1924) 136.
\item[36] Ibid.
\item[37] Ibid.
\item[38] Plutarch, Roman writer 121BC.
\item[39] De Souza 59.
\end{enumerate}
\end{footnotesize}
Another inscription found at Cnidos seems to be either an extension or a lost portion of the Delphi text. The Cnidos text shows some similarities to that of Delphi. It stated that the Kings of Syria, Alexandria, Egypt, Cyrene and Cyprus were to prevent the harbouring or pirates. A fine of 200 000 sestertii was set for non-compliance of this law. This further gave Rome the basis for prosecution of pirates.\textsuperscript{40} By 67BC the situation with piracy had become intolerable. The port of Rome itself had been attacked by pirates. Moreover, prominent Romans were taken captive.

In 67BC a tribune instituted a new law through the \textit{Lex Gabinia}. Under this law, Roman General Pompey was empowered to appoint fifteen legates who had their own powers. This principle would allow emperors to control numerous provinces by statutory powers. Pompey was thus given authority equal to that of all provincial governors to a distance of fifty miles from the coast. He was given further powers to raise large numbers of troops (over 100 000) and unlimited funds for the purpose of eradicating piracy.\textsuperscript{41}

With this law in place, piracy could be dealt with effectively. In 66BC the tribune C Manilus passed a law, the \textit{Lex Manilia}, transferring the provinces of Asia, Cicillia, Bithynia and Pontus to Pompey, thus empowering General Pompey with resources and the express right to wage war at his discretion against pirates. No set rules of punishment existed during Pompey’s crusade against piracy. Pirates were captured, summarily executed, killed in battle and even sold as slaves. Finally in 50BC, the Mediterranean was seemingly rid of piracy.\textsuperscript{42}

\section*{2.3 CONCLUSION}

The changes in socio-economic circumstances of society during this era, clearly gave rise to an increase in robbery. It is observed that various new forms of theft, with violence, appeared to have increased with the degeneration of social structures, and the subsequent lack of law enforcement by government structures. Piracy, as a form of robbery, was made attractive for young lawless criminals.

\textsuperscript{40} Ibid.
\textsuperscript{41} De Souza 61.
\textsuperscript{42} Omerod Chapter 7.
It is submitted that robbery is a phenomenon which is closely interwoven with the socio economic dynamics of society, and the political legitimacy and effectiveness of the state. The classic society has endeavoured, with mixed results, to react to the phenomenon of robbery, by introducing delicts and by creating specific crimes of robbery. It is further submitted that society had to fend for themselves and retribution to robbery was simply violent retaliation. In other instances where government officials were attacked, perpetrators were summarily executed.

It is, however, evident from the suppression of piracy by the Roman Empire, that as soon as the Roman economy was adversely affected by piracy, effective and immediate laws were instituted, and the military instructed to curb or end piracy. This reaction, is an example of the combination of juristic response with alternative strategies i.e. military intervention, to counter this phenomenon.

It is suggested that similar endeavours to curb robbery was implemented by other communities under different historic circumstances.
CHAPTER 3
THE LEGAL HISTORY OF ROBBERY IN MEDIEVAL ENGLAND AND REVOLUTIONARY AMERICA

3.1 INTRODUCTION

In this chapter the history of robbery in medieval England will be investigated. The origin of the common law, as it was enforced in medieval England, will be discussed. Thereafter specific incidences of robbery, punishments for robbery and the general operation of the criminal justice system will be discussed. The common law crime of robbery in England will further be compared with robbery in the United States of America during the period 1700-1890. Incidences of robberies and the punishment thereof in the United States of America will also be considered.

3.2 ROBBERY IN ENGLISH LAW

3.2.1 THE HISTORY OF COMMON LAW IN ENGLAND

Common law is the term used to refer to the main body of English unwritten law that evolved from the 12th century onward. The name is derived from the principle that English medieval law, as administered by the courts of the realm, reflected the common customs of the Kingdom.\(^{43}\) Common law has been known as unwritten law due to it not being collated in a single source. Reports of the judicial decisions from which the common law was derived from were only occasionally circulated from the 12th to the 16th century. Some formal reports of decisions were, however, published by private parties.\(^{44}\)

In medieval times common law courts were secular, as contrasted with the ecclesiastical courts of the Roman Catholic Church. Common law courts did not deal


\(^{44}\) For example, Sir Edward Coke 1628.
with merchant law, which was applied in mercantile courts, or with maritime law, which was applied in admiralty courts.\textsuperscript{45}

The most important parallel system was equity jurisdiction. Equity originated in early English law when subjects petitioned the monarch for justice. Such petitions were delegated to the Lord Chancellor and later to a tribunal called the court of chancery.

English law originated from the customs of the Anglo-Saxon and Normans who conquered England in 1066. The Norman Kings established a strong, centralized system for the administration of justice, and the Royal Courts developed a complex system of rules on such customs.\textsuperscript{46} In the struggle between King and nobility, one of the principal weapons of the Crown was the \textit{Curia Regis}.\textsuperscript{47} On the other hand, the judicial strongholds of the nobility were the manorial courts of the barons. Judicial supremacy was won by the Crown and from the 13\textsuperscript{th} century, English courts had been centralized.\textsuperscript{48}

Until the mid 17\textsuperscript{th} century, the English parliament did not convene regularly. As a result, judges rather than legislators created, defined and meted out punishment for crimes. Many of the common law crimes created still influence the definition of crimes in England and the United States of America. Among these major common law crimes are murder, rape, robbery, burglary and arson.

In medieval England serious crimes such as murder, robbery and highway robbery were classified as felonies.\textsuperscript{49} The punishment for a convicted felon was forfeiture of land and goods and the loss of life and limb.\textsuperscript{50}

\begin{itemize}
  \item \textsuperscript{45} Blackstone Chapter 3.
  \item \textsuperscript{46} Radzinowicz \textit{A History of English Criminal Law} (1948) Vol 1 Chapter 2.
  \item \textsuperscript{47} That is, the King’s Court.
  \item \textsuperscript{48} Blackstone Chapter 3.
  \item \textsuperscript{49} Hogue \textit{Origins of the Common Law} (1927) 256.
  \item \textsuperscript{50} \textit{Ibid}.
\end{itemize}
3.2.2 MEDIEVAL LAW AND ORDER

Law and order was very harsh in medieval England. It was believed that people would only learn how to behave properly if they feared what would happen to them if they were to break the law. Even the smallest of offences had serious consequences for the perpetrator. In the 11th century accused had to go through an ordeal. Ordeals were regarded as methods to adduce evidence. There were three ordeals, namely:51

**ORDEAL OF FIRE**: An accused held a red hot iron bar and had to walk three paces. His hand was then bandaged and left for three days. If the wound were to heal within this period, he was considered innocent. Should the wound have deteriorated, he was found guilty.

**ORDEAL BY WATER**: An accused was tied up and thrown into water. If he floated, he was guilty of the crime accused of.

**ORDEAL BY COMBAT**: This was used by noblemen who had been accused of wrongdoing. They would fight in combat with their accuser. Whoever won, was right. Whoever lost, was usually dead after the battle.

The above methods of adducing evidence did not find favour by King Henry II (1154-1189). He subsequently improved the law by reverting to the laws of King Henry I which were *inter alia* trial by jury, with the abolition of trial by ordeal and battle. During 1300-1450 the Anglo-Saxon placed crime prevention squarely on the local community through the tithing, the hue and cry and the *posse comitatus*.52 The tithing was a group of ten people. Everyone had to be a member of the tithing and each had to take responsibility for the others. If any one member of the tithing broke the law, the others had to take responsibility for getting the accused to court; if they failed, they would face punishment themselves.53

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51 Radzinowicz Chapter 3.
52 Pringle *Hue and Cry: The Birth of the British Police* (1955) 68.
53 Ibid.
The hue and cry meant that anyone who was attacked could call upon everyone else in the community to apprehend a criminal simply by calling on them to do so. Again, if they did not respond, the whole community was in the wrong.\textsuperscript{54}

The \textit{posse comitatus} could be raised by the King’s Court official (the Sheriff) to chase after a criminal. Anyone called upon to join in had a legal obligation to do so.\textsuperscript{55}

In the period between 1450 and 1750 justices of the peace were introduced which were responsible for arresting felons. Parliament started to make laws to deal with specific problems such as highway robbery, and in England parliament requested lords to cut down all the trees and bushes for 10 meters on each side of major roads so that robbers would have nowhere to lax and wait for passing travellers.\textsuperscript{56}

\subsection*{3.2.3 INCIDENCES OF ROBBERY}

In spite of the relatively well organised English legal system incidences of robbery abound. In the year 1497 an unknown Venetian diplomat is said to have remarked that “there is no country in the world where there are so many thieves and robbers as in England, in so much, that a few venture to go alone in the country, except in the middle of the day, and fewer still in the towns at night, and least of all in London.”\textsuperscript{57}

If Tudor robbery had one starting point, it may have been from the result of Henry VII’s efforts to abolish private armies. The immediate result was that many professional soldiers were suddenly unemployed. Armed, discharged soldiers were common figures on medieval roads and it was no surprise that so many of them turned to vagabondage of robbery. They had the training, resources and opportunity to do little else.\textsuperscript{58}

\begin{itemize}
\item \textsuperscript{54} Pringle 69.
\item \textsuperscript{55} Ibid.
\item \textsuperscript{56} Fielding \textit{A Plan for Preventing Robberies Within 20 Miles From London} (1755) 96.
\item \textsuperscript{57} Sweyd \textit{A Relation of the Island of England} (1847) 34.
\item \textsuperscript{58} Salgado \textit{The Elizabethan Underworld} (1977) 117.
\end{itemize}
Robbers generally rode on horseback and operated in pairs or more. One of them would stop a coach containing six or seven travellers and with one hand he would present a pistol, with the other his hat, asking the unfortunate passengers for their purses or their lives. No one caring to run the risk of being killed or maimed refused to put all his belongings forward. Should anyone resist, he was sure to be killed.\(^{59}\)

The term used for in-transit robbers were highway men, which, during the 17\(^{th}\) and 18\(^{th}\) centuries described criminals who robbed people travelling in stage coaches and other modes of transport, along public highways.\(^{60}\) The first documented evidence of guns in Europe was found in 1326 in Florentine and English manuscripts.\(^{61}\)

A robber without horse was called a footpad.\(^{62}\) Conflicting evidence exists as to the politeness of highway men. Word has it that foreign visitors to England were astonished by the politeness of the English highway man’s request and his gallant bearing. Others, more particular French victims, said highway men were rough criminals, deserters, drunken murderers, as accustomed to take men’s lives as to risk their own.\(^{63}\)

King William IV used to enjoy telling the story of how his great-grandfather, George II, was robbed by a highway man as he strolled in his garden at Kensington one evening. It is told that the highway man climbed over the wall, apologised that distress drove him to such improper misbehaviour, and, in a manner of much indifference, deprived the King of his purse, his watch, and his buckles.\(^{64}\)

The English highway men took pride in behaving with special gallantry towards women. According to a newspaper article in 1797,\(^{65}\) a very gallant highway robbery was committed on Wimbledon Common upon the person of a young married lady. After receiving her purse, the robber politely demanded an elegant ring which he

\(^{60}\) Hibbert 16.
\(^{61}\) Hayward A Complete History of the Lives and Robberies of the Most Notorious Highway Men, Footpads and Cheats by Captain Alexander Smith (1933) Chapter 4.
\(^{62}\) Ibid.
\(^{63}\) Hibbert 17.
\(^{64}\) Ibid.
\(^{65}\) Hayward Chapter 5.
discovered on her finger. This she peremptorily refused, saying she would sooner part with life. The robbers apparently kissed the hand of the lady and rode away.

On the other hand, there is documented account of notorious highway men who became well known on certain roads. Jerry Abershaw (1733-1795) was a notorious highway man who terrorised travellers along the road between London and Portsmouth in the late 18th century.66 Born Laws Jeremiah Abershaw in Kingston-upon-Thames in Surrey, he started his life of crime at the age of 17, leading a gang based at Bold Faced Stag Inn. He was eventually arrested in London and was hanged at Kensington Common.67 His body was then taken to his old haunt of Wimbledon where it was placed on a gibbet.68

John Nevison (1639-1684) was also one of Britain’s most notorious highway men. He operated from the Talbot Inn at Newark. He had a reputation for not using violence against his victims, most of whom he and his gang attacked along a stretch of the Great North Road between Huntington and York. He was eventually arrested near Wakefield, hanged at York Castle in May 1648, and buried in an unmarked grave.69

3.2.4 PUNISHMENT FOR ROBBERY

As discussed above, robbery was deemed a felony in English law. Felonies defined by common law were punishable by hanging, while misdemeanours were punishable by a range of non-capital punishments. There was, however, a way that felons could escape the death penalty and be given a lesser punishment. This was called “benefit of clergy”. Through the benefit of clergy, which dated back to the Middle Ages, the right was originally accorded to the church to punish its own members should they be convicted of a crime. In this instance the court would not prescribe any punishment for the defendant and he was handed over to the church officials.70 Since it was difficult to prove who was affiliated to the church, convicts who claimed benefit of

66 Hayward Chapter 4.
67 Ibid.
68 Wooden pole used to hang the body of an executed felon alongside the road in the area from where the felon committed his crimes.
69 Hayward Chapter 4.
clergy were required to read a passage from the Bible. Judges usually chose verses from Psalm 51, which was termed the “neck verse”, since it saved many people from the death penalty. In 1706 the reading test was abolished and benefit of clergy became automatic for any offence. Until 1779 the recipients of benefit of clergy were branded on the thumb in order to ensure that the benefit could not be claimed more than once.

Concern that too many serious offenders were getting off too lightly led to the withdrawal of this benefit for crimes such as murder, rape, highway robbery and horse-stealing. As mentioned above, the penalty for robbery was death by hanging. Most defendants sentenced to death were to be hanged at Tyburn. Execution was a public spectacle, and meant to act as a deterrent to crime. Convicts were drawn in a cart and after they were given the opportunity to speak to the crowd, they were blindfolded, had the noose placed around their neck and then the cart was pulled away. Until the introduction of a “sharp drop” in 1783, this caused a long and painful death by strangulation. Friends of the convicts often helped to put them out of misery by pulling on their legs. Some of the bodies of the most serious offenders were hanged on gibbets to act as a deterrent to other criminals.

Should the robbery have included murder, punishment would be death with dissection and hanging in chains.

An Act of 1752 dictated that those found guilty of murder and hanged, should then be delivered to the surgeons to be dissected and anatomised or hung in chains. By increasing the terror and the shame of the death penalty, this was meant to increase the deterrent power of capital punishment.

In the second half of the 18th century the incidence of mounted robbery had begun to decline. This continued into the 19th century and after 1815 it was not a very common

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71 Ibid.
72 Ibid.
74 Beaty Part 2 69.
crime. The last recorded in-transit robbery is said to have taken place in 1831. By that time people were already beginning to think of the highway men as figures of nostalgic romance.\textsuperscript{76}

3.3 ROBBERY IN THE UNITED STATES OF AMERICA

3.3.1 THE BACKGROUND OF AMERICAN LAW

The territory which is now the United States of America was first settled by English speaking people in the early 17\textsuperscript{th} century (these were of course not the first inhabitants of the area). The English settlements were scattered along the eastern coast of the country. The colonists who came to America in the 1600's brought their legal traditions with them. After the American Revolution (1775-1783), the English common law remained as the basis of law in the United States. Although American law is rooted in the English common law tradition, it has evolved in distinctive ways to meet the changing needs and requirements of the American people.\textsuperscript{77}

Amongst the major common law crimes taken from the English are murder, larceny, robbery and arson. After the 1776 war, the fragile ties between England and its colonies snapped. Although the war for independence was won, it left the colonies with the problem of unification.

The colonies drew up a charter, the Constitution of 1787, which gave the central government more power than it had under English law. A president was soon elected, and a capital (Washington DC) was established.\textsuperscript{78} Soon afterwards the new government was faced by the fundamental question of what should be done with the Western Territory? The United States owned a huge tract of wilderness land. Soon American and other settlers started to move into the Western land and established their own tradition and laws in this remote part of the country.

\textsuperscript{76} Spragg Outlaws and Highwaymen (2001) 55.
\textsuperscript{77} Friedman American Law – An Introduction (1984) 56.
\textsuperscript{78} Friedman 59.
3.3.2 LAW ENFORCEMENT IN THE WESTERN TERRITORIES

Due to the isolation of the Western Territories from the capitols of established states, enforcement of laws was taken over by vigilante groups. This form of justice, also known as “alternative justice”, dates back far in American history. In the West the golden age of the vigilantes was in the period 1750-1850. It is estimated that at the time over 500 such groups operated in America. The vigilantes dispensed quick, often bloody justice, against horse-thieves, robbers and rustlers. One estimate is that vigilantes shot or hanged some 729 men.

The law enforcement mechanisms of the vigilantes were often controversial. They were criticized by defenders of orthodox law and order. Still, many people, perhaps a majority, were of the opinion that they performed a public service. It was reasoned that in the raw, lawless towns of the West, there was no alternative to vigilante justice. It is said that the chief-justice of Montana Territory praised them as genuine tribunals of the people’s authority.

“Popular tribunals” (private systems that rival the official system) existed where some groups of the community felt that the official law was too weak or had fallen into the wrong hands. The merchants of Dodge City, Kansas, in 1872 were so concerned about lawlessness that they hired an unofficial marshal and instructed him to enforce law and order. His first official duty of law enforcement resulted in the killing of two men in a dance hall and the ordering of five more to get out of town.

Robbery always constituted a crime in English common law and as such, was also recognised in American law. Robbery in early American law was defined as follows: “Robbery is a form of aggravated larceny. It can be viewed as a combination of assault or battery plus larceny.” All the elements of larceny are

79 Friedman 43.
80 Ibid.
82 Ibid.
83 Odle Dodge City: The Most Western Town of All (1977) 152.
84 Friedman 69.
85 Friedman 73.
required – the trespassing and taking and moving of money or property from another without consent and with intent to permanently deprive that person of the violence or threat of immediate violence; second, the taking had to be from the victim.\footnote{Ibid.}

Incidences of armed robbery were frequent in the West, due to gold and other valuables that had to be transported by road. Stage coach robberies occurred often and outlaws were keen in summarily executing a stage coach driver who did not comply with the robbers’ requests.\footnote{Odle 156.}

In the 19\textsuperscript{th} century American outlaws continued roaming the West by robbing stage coaches, trains and herdsmen. A famous American outlaw, Butch Cassidy, who was born Robert Leroy Parker in Beaver, Utah, was a rancher by trade. He was a prolific bank and train robber and was the leader of the Wild Bunch gang. Cassidy usually stole cattle from larger ranchers who tried to put the smaller rancher out of business. Many historians believe that at the beginning his actions were well-intended, and he was often referred to as the “Robin Hood” of the West.\footnote{Brolin Chapter 5.}

### 3.3.3 PUNISHMENT FOR ROBBERY

As with any serious felony, robbery was punishable by death. In the West, summary justice was implemented and the death penalty usually meant the hanging of the perpetrator. It is, however, documented that the majority of gang related robberies ended in a gun battle where either the robbers or the law enforcers were killed during an attempt to apprehend the former.\footnote{Friedman 73.}

### 3.4 CONCLUSION

From the above it is clear that robbery in medieval time resulted from communal poverty. Similar to the Roman time, robbery had its origin in begging, which advanced in taking contributions with force from victims. This phenomenon is clearly
the result of breaking down in socio economic structures, resulting in crime. It is further an indication that increases in robbery, as a social phenomenon, may be directly attributed to the shortcomings of juristic responses from state organs, and the possible ineffectiveness of the state to curb this crime of violence. Although it is conceded that the state organs in medieval times, attempted through juristic methods to curb robbery by ways of harsh punishment, law enforcement was only available to the higher ranks of social society.

It is interesting to note that the reason for robbery in America was not born from poverty but rather pure greed and lawlessness. In both England and the United States of America punishment for robbery was death. Only the way in which the death penalty was executed, differed in the various eras and legal systems. As mentioned in the above, the breakdown in social structures and the subsequent lack in effective juristic measures in combating robbery, gave rise to increased violent robberies. The lack of government intervention, resulted in vigilante groups taking the law in their own hands and meting out punishment. It is submitted that the lack of effective juristic intervention by government structures, may well have contributed to the increase in violent robbery in both medieval England and revolutionary America.

Since the phenomenon of robbery has been studied in three different contexts, it is now opportune to examine the crime of in-transit robbery in the South African perspective. It should be appreciated that although certain themes which may have been discussed, will again be mentioned in the following chapter, a number of differences will be relevant.
CHAPTER 4
THE HISTORY OF ROBBERY IN COLONIAL SOUTH AFRICA

4.1 INTRODUCTION

In this chapter the history of robbery and its early development in South African society and criminal law are investigated. The specific elements of the crime of robbery are discussed. Several incidents of in-transit robbery are depicted as they had occurred during this era. Some procedural aspects will also be discussed, which include verdicts and punishments for the crime of robbery.

4.2 THE DEVELOPMENT OF ROBBERY AS A CRIME IN SOUTH AFRICAN LAW

According to Hunt\textsuperscript{90} most Roman-Dutch writers describe robbery concisely, but rather unhelpfully, as theft with violence. He further states that those who do elaborate make it plain that they have in mind actual physical violence. From the old authoritative sources, the precise meaning of violence, accompanying robbery, seems unclear. Perhaps for this reason, English law influenced South African courts from an early time.

Section 23 of the Larceny Act\textsuperscript{91} identified different degrees of robbery which resulted in different prescribed punishments. At common law, robbery was the felonious taking of money or goods from the person of another by violence or by putting him in fear.\textsuperscript{92} The elements of larceny were required to be present, implying that violence had to be used with the intent of inducing submission. Threats of violence were therefore sufficient to complete the crime. An important factor in the crime was that the taking of the property during the crime had to be from the victim’s person or immediately from within his presence.

\textsuperscript{91} Laws of George V, c 50.
\textsuperscript{92} Smith and Hogan \textit{Criminal Law} 2\textsuperscript{nd} ed (1969) 392.
The English definition of robbery was adopted by Gardiner and Landsdown\(^93\) in 1917, and was widely accepted thereafter in South African law. Gardiner and Landsdown defined the crime as follows:\(^94\)

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

Even so, some significant differences existed between the South African and English common law of robbery. According to Hunt these included the following:\(^95\)

(1) a difference between the South African concept of theft and English larceny;

(2) the fact that South African law had not adopted the English law on threats to reputation. The South African law of robbery required physical violence or threats of it; and

(3) where goods were taken from the victim’s presence, the English courts required the victim to have custody of them. It was uncertain whether the South African Courts had dispersed with this requirement.

From the above definition it is clear that any property which is capable of theft could form the subject of robbery. The qualifying factor was that the property had to be taken from the body of the victim or from his immediate presence and the violence used had to be to the person or property of the victim.\(^96\) This requirement could have been extended to cover cases where the violence used and by which the perpetrator sought to intimidate or overcome the opposition of the victim, was not to the victim’s person or property, but to that of someone whose property the victim had a right and duty to protect. Although robbery was a crime against both person and property, it was classified by Hunt and others as a crime against property.\(^97\)

\(^93\) Gardener and Landsdown *South African Criminal Law and Procedure* (1917).

\(^94\) Gardener and Landsdown 1706.

\(^95\) Hunt 638 639.

\(^96\) *Ibid.*

\(^97\) Hunt 640.
The most controversial point in the South African law of robbery was settled by the then Appeal Court in 1959. Until the 1950’s, it appears never to have been doubted in South African practice that if the taking were accomplished by threats of physical violence, that constituted robbery. However, in 1949 it was suggested by De Wet and Swanepoel, and in 1957 it was held by the Orange Free State Provincial Division, that it was not robbery if the victim chose to hand over his money rather than suffer the threatened physical violence. It was reasoned that the taking was with consent, so that the crime was not robbery or theft, but rather assault. For good reasons these unfortunate verdicts were overturned.

In terms of section 329(2)(a) of the Criminal Procedure Act of 1955 a person convicted of robbery, or assault with intent to commit robbery, if not over fifty years of age, had to be sentenced to whipping, with or without imprisonment with compulsory labour. Section 330 of the Criminal Code was amended in 1958 to enable the death sentence to be imposed for robbery or attempted robbery if aggravating circumstances were found to be present. The test was an objective one, although the accuser’s intention was seen to be irrelevant. Whether there was grievous bodily harm or such a threat, was for the jury to decide.

4.3 INCIDENCES OF IN-TRANSIT ROBBERY IN EARLY SOUTH AFRICAN HISTORY

Transport riders, carrying anything from farming implements and mail to flour and fabric, had been in business from the early 1800’s in South Africa. They transported items from coastal ports inland on journeys that would last for months. During this

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98 Ibid.
100 R v Gesa 1957 (1) SA 657 (O); R v De Jongh 1957 (3) SA 659 (O).
101 Ex Parte Minister of Justice; In re R v Gesa: R v De Jongh, 1959 (1) SA 234 (AD).
102 56 of 1955.
103 By s 4 of the Criminal Procedure Amendment Act 9 of 1959.
104 S v Mbete 1963 (1) SA (N). In this case it was held that there were aggravated circumstances although it was accepted that the accused had no ammunition for his gun and thus he could not give effect to his threats to shoot the victim.
105 Hunt 648.
time they had to contend with hostile tribes, marauding wild animals, non-existent roads and the possibility of not meeting another soul for weeks on end.\textsuperscript{106}

The discovery of gold and diamonds increased the demands for wagon services. The discovery of gold also led to the advent of highway robbers, such as the infamous Dick Terpend who robbed many coaches of their bullion over a period of four years. He was the first highway man to operate on the Pretoria-Pietersburg and Pietersburg-Leydsdorp routes, one of the more unfortunate similarities with today’s high-jacking and cash-in-transit robberies.

A road, known as the Old Transport Road, dated back to 1844 when the Voortrekker leader, Andries Pretorius, and a party of horsemen were tasked with finding a practical route between the Ohrigstad area and the port city of Laurencio Marques.\textsuperscript{107} This route would also become notorious for its armed attacks on coachmen and other forms of transport.

In 1886 two prospectors discovered gold on a Transvaal farm called Langlaagte.\textsuperscript{108} Gold was, however, not new to the Transvaal. African communities had mined gold hundreds of years earlier. The discovery of gold in Transvaal changed the face of the region. Before 1886 it had been a poor struggling Boer Republic, but ten years later it was the richest gold mining area in the world.\textsuperscript{109} As news of the gold find spread through South Africa and the world, men made their way to the Transvaal. Ships no longer passed South Africa on their way to Australia and New Zealand; boat loads of men arrived at ports and hurried to take coaches and wagons to the Transvaal.

More factory-made goods were being shipped from England to meet the demands of the mines. The goods had to be transported all the way from the coastal ports to the Witwatersrand by ox wagon, a very slow means of transport. With the discovery of gold, labour was sought from all over Africa. Travelling to the mines was dangerous due to highway robbers, both black and white, waiting to get as much as they could

\textsuperscript{106} Holt “Let’s Learn From History” (2001) \textit{Fleetwatch}.
\textsuperscript{107} Now Maputo in Mozambique.
\textsuperscript{108} Callinicos \textit{Gold and Workers} (1980) 73-78.
\textsuperscript{109} \textit{Ibid}. 

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from innocent travellers. Migrants were often arrested by Free State or Transvaal police and made to pay a fine before they could continue on their way. (In any case migrant’s workers had to pay a shilling for a travel pass.)\textsuperscript{110}

Often these fines went into the policemen’s pockets. Other white people would pretend to be government officials and so demanded money for “taxes”. Incidents occurred where workers were stopped by white employers who tore up their passes and forced them to work for new passes.\textsuperscript{111} Some crooks pretended to be policemen and demanded two pounds from each traveller for passing through a “small pox” area. Others pretended to be doctors and gave bogus vaccinations costing a shilling each.\textsuperscript{112}

Some migrants never reached the mines at all. They were kidnapped on route by Free State and Transvaal farmers who were looking for cheap labour. When the travellers reached the mines at last, they still had the worry of the dangerous journey back home. Miners carried wages and presents for their families on them during the journey back home, and numerous were killed and robbed by gangs who lived in the veldt and hills of the Witwatersrand.\textsuperscript{113}

Notorious and often colourful gangs and criminal groups have formed part of the South African landscape throughout recorded history. They may not have the profiles of those real or imagined rogues who featured in the “Wild West” of North America and who were often romanticised by the film industry, but they operated in South Africa under similar circumstances. The discovery of gold and diamonds created new opportunities to make a quick fortune. Renegades from many parts of the world linked up with local criminals to exploit the many possibilities which presented themselves.

In the late nineteenth century Australian born Scotty Smith, a notorious highway man, frequently held up stage coaches with his band of criminals in the Northern Cape and

\textsuperscript{110} Chamber of Mines Annual Report 1894.
\textsuperscript{111} Ibid.
\textsuperscript{112} Ibid.
\textsuperscript{113} Ibid.
Free State. He and his men engaged in one of the first transnational crimes in South Africa when they smuggled horses from the Northern Cape across the border to German cavalry regiments stationed in German South West Africa.\textsuperscript{114} Another group of criminals well known in the annals of South Africa’s crime history was the more violent Foster Gang. The gang committed suicide in a cave in Johannesburg in 1914 when confronted by police after many ruthless robberies.

With gold and diamonds being transported to various destinations in and around Southern Africa, groups were formed which engaged primarily in robbing wagons, coaches, trains and other forms of transportation.

One of the more notorious organised criminal groups was the Msomi gang, which operated from Alexandria. In the mid 1950’s they were responsible for organized reign or terror involving numerous armed robberies and murders.\textsuperscript{115} Another feared Johannesburg criminal mob of the early 1950’s was the gang known as the Sheriff Khan organization. It was led by Sheriff Khan who was destined to become king of the South African underworld.\textsuperscript{116} A common feature to both above mentioned groups was the close contact which they both appeared to have had with the police. Most of the members of the Msomi gang had acted as informers for the police prior to their arrests.\textsuperscript{117}

In other parts of the county coach robberies were also reported. The coach to Machadodorp via Lydenburg in the then Eastern Transvaal operated twice a week. The Zeederberg coach company provided mule stations along the route. The mule’s stationed at Kruger’s Post, halfway between Pilgrim’s Rest and Lydenburg, had the difficult task of hauling the coach up and down Pilgrim’s Hill, now known as Robbers Pass.

\textsuperscript{115} Du Toit “Hulle het verskrikking gesaai” (February 1960) Nonqai (Official SA Police magazine) 15.
\textsuperscript{116} Ibid.
\textsuperscript{117} Du Toit 16.
The Zeederberg coaches transported mail and passengers to and from Pilgrim’s Rest as well as carrying gold bullion from the mining companies and commercial banks to Lydenburg. Twice in the history of Pilgrim’s Rest, the coach was robbed at the summit of Pilgrim’s Hill.\(^{118}\)

The first robbery occurred in 1899. Two masked highway men stopped the coach and threatened to shoot the driver and passengers. They unhitched the mules and made their escape with gold valued at 10 000 pounds. The robbers disappeared into the mountains and were never found.\(^{119}\)

In 1912 Tommy Dennison, a well known character in Pilgrim’s Rest, was badly in debt. His attempt at robbing the coach a few metres from the spot where the first robbery took place was not successful. Instead of gold sovereigns, Dennison found only a case of silver coins. He was arrested at the Royal Hotel while he was paying his 20 pound debt in half-crowns. After a five year jail term Dennison returned to Pilgrim’s Rest where he opened the Highway man’s Garage.\(^{120}\)

### 4.4 CONCLUSION

From the foregoing it is submitted that robbery, as a crime, is not a new phenomenon. It is further clear that the development of the crime of robbery could be interlinked to socio economic conditions in society. *Modus operandi* of robbers changed and were adapted as economic changes were brought about in society, that is, urbanisation, new modes of transportation, and developments in road infrastructure.

It is obvious that from a juristic perspective, the legal system did not regard the developments of robbery as either unique, or viewed it as a specific problem area in our legal system. The response from the judiciary towards the developing crime of robbery was to pursue the route of severe sentencing, which included the death

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\(^{118}\) Anonymous “Robbers Pass” Introduction to Sabie Thaba Chwey municipal library information letter.

\(^{119}\) Ibid.

\(^{120}\) Ibid.
penalty. It is submitted that this response was a one sided approach, which had little or no effect in combating the crime of robbery.

It is further submitted that in-transit robbery had developed substantially, and parallel with urban and economic development during the colonial era in South Africa. A further investigation is however, required into the present day situation in South Africa, to ascertain if further developments have taken place in both the method of the crime, and the juristic reaction thereto.
CHAPTER 5
THE HISTORY AND INCIDENCE OF IN-TRANSIT ROBBERY IN PRESENT DAY SOUTH AFRICAN CRIMINAL LAW

5.1 INTRODUCTION

In this chapter the development of the crime of in-transit robbery in South Africa will be investigated.

Specific reference will be made to the history of the phenomenon of in-transit robbery, from a sociological and criminological perspective. It will be submitted that a different approach needs to be followed to curb this phenomenon due to the failure of the legal system to react to this crime effectively.

In a further endeavor to illustrate the limitations of criminal sanctions and criminal law in general to effectively curb this specific crime, the characteristics of in-transit robbery will be discussed.

5.2 DEVELOPMENT OF THE CRIME OF IN-TRANSIT ROBBERY

According to a socio-legal approach, the analysis of law is directly linked to the analysis of the social situation to which the law applies and should be put into perspective of that situation by viewing the part the law plays in the creation, maintenance and change of the situation.

In determining the origin of in-transit robbery in South Africa, one cannot only study the phenomenon from a strict jurisprudential point of view. It is submitted that a combination of socio-legal and jurisprudential approaches should be followed when studying the development of in-transit robbery.

Many members of the colored Cape Corps who returned from active duty after the Second World War sought refuge in areas such as District Six in the Cape Town area, because they could not find work in other areas. During the 1960’s they formed
gangs such as the “Goofies” and the “Red Cats” together with local elements from the squatters in the area.\textsuperscript{121} The forced removals from District Six and the massive relocation of colored from many part of Cape Town during the 1960’s to townships in the Cape Flats created an environment in which the collapse of social structures and many other factors were bound to lead to an increase in criminal activities.

The highly trained members of the Cape Corps were dissatisfied with the treatment they received after the war, and many had access to a variety of weapons collected and, sometimes, stolen during the war. Members formed gangs, and with stolen firearms they committed the first type of in-transit robbery after the Second World War, namely pay packet robbery.

Armed gangs would follow employers from the banks, where the pay-roll was made up, to the site where pay-packets would be paid out, and then rob the paymaster at gunpoint as he stepped from his vehicle.\textsuperscript{122}

The establishment of organized gangs increased in the early 1970’s and evidently expanded to other metropolitan cities. Armed robberies were on the increase and more and more gang related violent robberies took place. During the years 1973 to 1978, a significant increase in violent robberies occurred in South Africa, as depicted in the table hereunder.\textsuperscript{123}

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>Robbery under aggravated circumstances</td>
<td>1964</td>
<td>2450</td>
<td>3573</td>
<td>4485</td>
<td>4014</td>
</tr>
<tr>
<td>Other robbery</td>
<td>34510</td>
<td>35233</td>
<td>35280</td>
<td>39493</td>
<td>39704</td>
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</tbody>
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From the above statistics and many enquiries at the SAPS archives and other statistical sources, the number of specific armed robberies in transit that were included in the statistics could not be ascertained with certainty. During this specific time in the South African Police history, certain crime codes were used to statistically

\textsuperscript{121} Pinnock \textit{The Brotherhoods: Street Gangs and State Control in Cape Town} (1984) 14.

\textsuperscript{122} \textit{Ibid.}

record crime. Unfortunately, no system was applied to differentiate between different types of robbery, save for robbery under aggravating circumstances and “other types” of robbery.

Up to this period, very little was documented on modern, organised in-transit robbery. However, armed bank robberies did occur and as discussed earlier, armed gangs started robbing employers of pay-packets on site.

One of the first major cash-in-transit heists occurred on 28 April 1971 when a security vehicle containing R240 000 was taken from the outside of the Commissioner Street branch of the Trust Bank in Johannesburg. At the time, it was the biggest robbery in South African history. What was amazing of the crime is that it was planned and executed by two complete amateurs. They were eventually arrested and convicted to fourteen years in jail.

During the early 1980’s, South Africa experienced major political revolt and uprising. In terms of existing legislation during that period, various states of emergency were declared, resulting in various restrictions being placed on people and organizations. Individuals could be held in detention for long periods without a trial. Arguably this measure further contributed to the decline in armed robberies. Although robberies did take place, no evidence could be found that any cash-in-transit robbery had indeed taken place during this period. It should be noted that South African Police and Defence Force troops were deployed in nearly every township, and road-blocks were set up in every town in an attempt to curb political unrest, arguably thereby contributing further to the decline in armed robberies.

In 1987, the then State President PW Botha extended the state of emergency. Regulations were promulgated, empowering police officers and defence force personnel with extraordinary powers of search, seizure and arrest. Restrictions were placed on various political figures and organizations, control over movement of residents was enforced, restrictions were placed on funeral ceremonies, gatherings

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125 In terms of s 2(1) of the Public Safety Act 106 of 1953.
126 By virtue of Proclamation R96 of 11 June 1987.
were banned, and people were detained without trial for long periods of time. It is submitted that above measures contributed to a further decline in armed robberies.

With the unbanning of political organizations in the early 1990’s and the subsequent returning of political figures from exile, questions were raised about the role of the armed wing of the African National Congress, Umkhonto We Sizwe (MK). An author of a report on the history of MK\textsuperscript{127} predicted that former MK soldiers, especially those who have not been integrated into the defence force, would pose a security problem for future society.

During an ANC daily news briefing on 9 March 1998, former soldiers of the disbanded army of the ANC admitted to a Johannesburg newspaper agency that they were behind cash heists involving millions of rands.\textsuperscript{128} They admitted that about R100 million rand had been stolen and that a dozen of security guards were killed during cash-in-transit heists from 1997 across the country. Several former MK soldiers who did not want to be named told a newspaper that they had become involved in the heists as part of a different form of guerrilla warfare.\textsuperscript{129}

One soldier described their *modus operandi* as to make friends with low ranking security guards in SBV (a security company transporting large amounts of cash for banks) or one of the other security companies. These security officials would then inform the robbers of the daily scheduled and routes to be taken. Such contacts were then paid thousands of rand for the information.\textsuperscript{130}

Acting on the admissions made by previous soldiers of MK, the Banking Council of South Africa established a Crime Strategies Department to ensure a more specific approach toward the investigation and combating of in-transit robberies.\textsuperscript{131}

\textsuperscript{127} Motumi *Special Report on the History of Umkhonto We Sizwe* (1994).
\textsuperscript{128} SAPA March 1998.
\textsuperscript{129} *Saturday Star* 8 March 1998.
\textsuperscript{130} Banking Council of South Africa Information letter May 1998.
\textsuperscript{131} Goodenough “MK Scapegoats” (April 1998) (10\textsuperscript{th} Issue) *Focus* (Helen Suzman Foundation).
The establishment of a more scientific approach toward the combating of robberies and sharing of information led to significant arrests and improved intelligence by police. It was reported that R139 million was stolen from banks in 1997, of which 230 were cash-in-transit robberies.\textsuperscript{132}

In 11 years of the existence of SBV services (set up in 1986 by Standard Bank, First National, Volkskas and Nedcor to transport money) they were subjected to 52 attacks in which criminals got away with money in 27 cases.\textsuperscript{133}

The police then set up a Special Investigative Task Unit (SITU) to coordinate cash-in-transit heists on a national basis. The following are examples of cash-in-transit robberies that have taken place between July 1997 and January 1998,\textsuperscript{134} and describes the nature of serious violence used during present day robberies.

- In July 1997 one security guard was killed and one injured during a R6 million SBV cash-in-transit robbery in Nongoma, KwaZulu Natal.

- Two security members died in a R17 million robbery on 31 July 1997 on the N4 highway near Bronkhorstspruit. About 15 armed robbers ambushed a SBV van by dragging a chain of metal spikes across the highway. More that 100 spent AK47 assault rifle, R4 rifle and 9mm pistol cartridges were found on the scene.

- A 25 man gang escaped with R500 000 during an in-transit robbery near Sun City, Northwest Province, in September 1997. A spiked chain was again used in this robbery.

- R12.6 million was taken from a SBV vehicle near the SBV cash-clearing depot in Sunnyside, Pretoria, on 22 October 1997. Fifteen robbers were party to this heist.

\textsuperscript{132} Ibid.
\textsuperscript{133} Information obtained from South African Banking Risk Intelligence Centre.
\textsuperscript{134} Ibid.
• On 17 December 1997 at Marble Hall, Mpumalanga, R10 million was taken and six security guards were killed, when 20 robbers used AK47 rifles, grenades, and Tokarev pistols to ambush a SBV convoy. A provincial government vehicle was used to force the SBV vehicle off the road. Six guards were killed during the collision. The gang also had a spiked chain in their possession, although it was not used during this incident.

• Two men employed by Fidelity Guards were injured when attempts were made by 20 men to rob a cash-in-transit vehicle on the N1 highway near the Carrousel, North of Pretoria, on 18 December 1997. Robbers, sitting on the back of three open vehicles, opened fire of the guards, using handguns, R5 rifles and AK47 rifles.

• Police foiled a robbery on 23 December 1997 near Ogies in Mpumalanga. The SAPS received information about a robbery near a Witbank mine. On their way to the mine the police noticed a light delivery vehicle with 12 men on board. The vehicle sped away at high speed with the police in pursuit. The vehicle overturned and ten suspects were arrested. Two suspects managed to get away. Various types and numbers of fire arms were seized by the police.

• On 14 January 1998 R500 000 was stolen during a heists in Nelspruit, Mpumalanga. A Coin security vehicle was ambushed after collecting money from a farm. About 15 men surrounding the security vehicle and ordered the guards from the vehicle, which they threatened to set alight.

• On 20 January 1998 R1 million was stolen during a cash-in-transit robbery on the M1 in Sandton.

• In KwaZulu-Natal R12 million was taken during a heist on the R74 between Kearney and Stanger on 30 January 1998. Sixteen robbers, travelling in two vehicles, ambushed a SBV vehicle. A shootout ensued, where after two vehicles collided, injuring three security guards.
According to Patrick Lawrence, a researcher with the Helen Suzman Foundation, whilst former guerrillas of MK have been involved in some robberies, their role should not be exaggerated. He further argues that people who blame “all the woes of post-apartheid South Africa on the ANC and the ex-combatants of its now disbanded guerrilla army (MK), are located mainly in the white community, a large proportion of which is affiliated by a transition including anxiety. They detect a MK-factor in robberies on the flimsiest of evidence, particularly the cash-in-transit heists, some of which have been carried out with military precision”.

Statistics obtained from the SAPS during the period 1996 to 2004 indicate precise numbers of cash-in-transit robberies on a national scale.

135 Goodenough.
TOTAL CASH-IN TRANSIT ROBBERIES REPORTED

PERIOD

1996 - 1997
1997 - 1998
1998 - 1999
1999 - 2000
2000 - 2001
2001 - 2002
2002 - 2003
2003 - 2004

400
350
300
250
200
150
100
50
0
It is evident from the statistics that a distinct increase of robberies occurred during the 1996/7 and 2002/3 financial years. Following the accusations and counter-arguments that ex-guerrilla soldiers were behind the majority of cash-in-transit heists, the Institute for Security Studies (ISS) was approached in 1998 by the secretariat of the department for Safety and Security to facilitate the drafting of a policy on fire-arm ownership in South Africa. It was then found that the role of fire-arms in crime remained a grossly under-researched area. In addition it appeared that South African Police statistics do not document sufficient detail on the role of fire-arms in crime.

In an article published in the press in December 2003 it was reported that Cape Town police had arrested four employees of a security company after they apparently faked a robbery of one of their cash-in-transit vehicles. Western Cape police commissioner, Mwandile Petros, stated that detectives of the Serious and Violent Crimes Unit (SVC) received information that employees of Coin security Group were planning a theft. The police set up an operation, along with officers from crime intelligence and other specialised units which included the surveillance of Coin armoured vehicles. While they were monitoring a certain vehicle, it was involved in a minor collision in Goodwood, a suburb of Cape Town. During investigation the vehicle was found to be emptied of cash and weapons.

It was ascertained that the crew of the armoured vehicle met with their colleagues whilst on their rounds collecting cash, and later staged the collision under the pretence of being robbed. This incident indicates that now violent in-transit robbery through “in-house” crime does occur.

In order to effectively deal with in-transit robbery the SAPS and Security companies combined resources in an effort to curb this crime. It is further evident that with the establishment of the elite Serious and Violent Crime Unit, many robberies have been foiled. One such incident, reported widely in the printed and visual press, will be

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136 Ibid.
used as illustration of the response of the security forces. A proactive operation was held by members of the serious and Violent Crime Unit in conjunction with the Intervention Unit of the SAPS. When these members moved in on the suspects, they attempted to flee the scene and opened fire on the SAPS members, who returned fire. The vehicle used by the suspects came to a standstill and burst into flames. Three suspects died at the scene (burnt to death), one died in hospital and two other were arrested. This incident took place in a busy street and it is evident that the safety of the public did not matter to the robbers at all.

As a measure to increase the centralization of information and sharing of resources, the banking community established the South African Banking Risk Intelligence Centre (SABRIC), and Cash-in-Transit (CIT) Crime Combating Forum. These two organisations support crime operations through comprehensive intelligence and partnership support services. This partnership has resulted in the following achievements in banking related crimes:

- ATM Street crime forums were established countrywide.

- The SAPS established several Serious and Violent Crime reaction units including the use of helicopters needed to limit or prevent robberies, reduce response time and further criminal prosecutions.

- Several robbery prevention strategies have been implemented.

- Weekly crime statistics are distributed to banks and police for tactical and crime prevention plans.

- Up to date crime scene procedures in the event of cash-in-transit crimes were developed.

SABRIC receives about 90% of its information from banks and cash-in-transit companies, and the remaining information is obtained from other sources, for
example the SAPS, National Prosecuting Authority (NPA), National Intelligence Service (NIA) and other partners.

In 2004 statistics suggest that cash-in-transit heists had decreased by 50%, but at the same time robbers had become more violent, with attackers going to extreme lengths to lay their hands on cash. Cash-in-transit gangs, which strike mostly in Gauteng and KwaZulu-Natal, have now turned their crimes into high-tech operations with groups purchasing high-powered weapons from foreign arms dealers and using hijacked or stolen vehicles to ram cash vans off the road. Gang members are well armed, and probably many have military backgrounds.

According to SABRIC the sites for heists, which are usually deserted roads or quite sections of highways, are carefully chosen as escape is of the utmost importance as the robbers cannot be “stuck” in traffic.

A senior SABRIC researcher, who cannot be named for security reasons, said that Gauteng and Kwazulu-Natal were identified as the “hot-spots” because most of the cash-in-transit companies operate from these areas.

According to a newspaper report, the “hottest” periods for heist were over the festive period. The report further stated that the usual modus operandi of heists was the “tap-tap” method. In terms of this method a stolen or hijacked vehicle is used to collide with the cash-in-transit van. The collision is so timed that on impact, the cash vehicle falls on its side allowing robbers to gain access to the money boxes.

The article further quoted the head of the Institute of Security Studies Crimes and Justice Programme, Anton du Plessis, as saying that heists and the arrogance and excessive force used by robbers had an impact on people’s feelings of safety and security, making citizens feeling extremely vulnerable. He continues by saying that these types of robbers are not day-to-day criminals and that they were carrying out well orchestrated attacks on highly secured vehicles with military precision.

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140 Information from SABRIC Head Office in Johannesburg on 20 May 2005.
141 Official SAPS statistics obtained from SAPS.
142 Pretoria News December 6 2004 5.
A member of the Cash-in-Transit Forum, Anton Wiid, reportedly said that although authorities were beginning to win the war on heists, these crimes would continue as there will always be a threshold of crime where greed is a factor.

National police spokesperson, Director Sally de Beer, stated in response to this article that a national project known as Operation Greed which was launched by the Serious and Violent Crime Unit, had been established to combat heists and other bank robberies. She further indicated that detectives are working closely with the banking council and SABRIC to discuss ways of combating heists. As an example of combined efforts De Beer stated that police successes from January to the end of November 2004 under Operation Greed included the arrest of 69 cash-in-transit robberies, 52 bank robbers and the recovery of 126 weapons and 92 vehicles.

5.3 CHARACTERISTICS OF IN-TRANSIT ROBBERY

From the above statistics and recorded incidents of in-transit robberies, it is clear that in-transit robbers are increasingly becoming more brazen and sophisticated in their efforts. In-transit robberies is a threat which not only endangers profitability but may also cause the collapse of an economic system.

The following characteristics are obvious from the incidents depicted above:

- Perpetrators operate in large groups;
- Sophisticated and high powered weapons of war are used to commit the crimes;
- Robberies take place amongst members of the public and on public roads;
- Robbers apply high levels of force against their victims; and
- Heists are planned and executed with military precision.

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Ibid.
5.4 CURRENT LEGAL SYSTEM

To ascertain how the current South African legal system reacts to the crime of in-transit robbery, it requires a closer examination of criminal law, procedure and punishment.

5.4.1 SUBSTANTIVE LAW

5.4.1.1 DEFINITIONS AND ESSENTIAL ELEMENTS OF ROBBERY

The 1970 definition of robbery as depicted in Hunt\textsuperscript{144} was widely accepted during this time by writers and courts of law. It reads as follows: “Robbery consists of the theft of property by intentionally using violence or threats of violence to induce submission to the taking of it from the person or another or in his presence.”

In essence, it differs from the definition which appeared in Gardener and Landsdown\textsuperscript{145} as it was described from the first edition (1919). The 1970 definition was more concise in that it did not elaborate on the elements of the violence. The 1970 definition emphasizes that the violence had to be used with the intention of inducing submission and that it had to actually induce submission to the taking.\textsuperscript{146}

Essential elements of the above definition included (a) theft, (b) violence or threats thereof, (c) intent and (d) the property had to be on the victim or at least in his presence. With specific regard to violence and threats, it is interesting to note that any violence which would constitute an assault would suffice. It may be only slight in degree and need not have to cause any injury.\textsuperscript{147}

With regard to punishment during the early part of this era, in 1958 section 330 of the Criminal Code was amended to enable the death sentence to be imposed for robbery or attempted robbery, if aggravating circumstances were found to be present. Since...

\textsuperscript{144} Hunt 640.
\textsuperscript{145} Gardener and Landsdown 1118.
\textsuperscript{146} Hunt 640.
\textsuperscript{147} Ibid.
1959, with the implementation of section 3 of the Criminal Law Amendment Act 75 of 1959, aggravating circumstances meant “the infliction of grievous bodily harm or any threat to inflict such harm by the offender or an accomplice, on the occasion when the offence is committed, whether before, during or after the commissioning thereof”.

The Appellate Division held in *R v Jacobs*\(^ {148}\) that it is a question of fact whether aggravating circumstances are present in a particular case, and that the test is an objective one, the accused’s intention being irrelevant.\(^ {149}\)

At present, the most common definition referred to is the one of Snyman\(^ {150}\) and agreed upon by virtue of similarities in their writings by various authoritative South African writers.\(^ {151}\) In terms of this definition “robbery consists of theft of property by unlawfully and intentionally using

(a) violence to take the property from somebody else or

(b) threats of violence to induce the possessor of the property to submit to the taking of the property”.

Snyman\(^ {152}\) further states that it is customary to describe the crime briefly as “theft by violence”.\(^ {153}\)

The elements of the crime are similar to those mentioned by earlier writers, that is theft of property, violence and or threats of violence, unlawfulness and intent. However, Snyman includes another specific element to this crime, one of a causal link between the violence and the taking of the property.

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\(^{148}\) 1961 (1) SA 475 (AD).

\(^{149}\) In *S v Mbele* 1963 (1) SA 275 (N).


\(^{152}\) Snyman 117.

\(^{153}\) See *S v Marais* 1969 (4) SA 532 (NC); *S v Benjamin* 1980 (1) SA 950 (A) 958 H.
It thus follows that the property must be obtained by the accused as a result\(^\text{154}\) of the violence or threat of violence.\(^\text{155}\) It is important that the violence must precede the taking and that robbery is not committed if the violence is used to retain a thing already stolen or to facilitate escape. Should this happen, the accused would have committed separate crimes of theft and assault.\(^\text{156}\)

Snyman further submits\(^\text{157}\) that the rule stated earlier that the violence must precede the taking, must be qualified: robbery may in certain circumstances be committed even though the violence follows the completion of the theft. This will be the case if, having regard to the time and place of the perpetrator’s act, there is such a close link between the theft and the violence that they may be regarded as connecting components of one and the same action. In *Yolelo*\(^\text{158}\) X was found in possession of Y’s property before he could leave Y’s house. X’s ensuing assault on Y was regarded as so closely connected to the process of taking the property that X was convicted of robbery.

With regard to punishment, it should be noted that section 51 of the Criminal Law Amendment Act\(^\text{159}\) lays down minimum sentences for robbery. Capital and corporal punishment may no longer be imposed, but section 51 provides that if a person has been convicted of robbery (a) when there are aggravated circumstances or (b) involving the taking of a motor vehicle (hijacking) a court must impose the following minimum sentences:

1. fifteen years in respect of a first offender;
2. twenty years for a second offender; and
3. twenty five years for a third or subsequent offender.

\(^{154}\) My emphasis.

\(^{155}\) *S v Ngopyo* 1959 (2) SA 462 (T) 463; *S v Moerane* 1962 (4) SA 105 (T) 106 D; *S v Marais supra*.

\(^{156}\) *S v John* 1965 (3) SA 20 (R); *Ngoya supra* 463-464; *Marais supra* 533 B-C; *S v L* 1982 (2) SA 768 (ZH) 770.

\(^{157}\) Snyman 508.

\(^{158}\) 1981 (1) SA 1002 (A) 1015.

\(^{159}\) 105 of 1997.
The Constitutional Court in S v Dodo\textsuperscript{160} held that the introduction by the legislature of minimum sentences in section 51 is not unconstitutional.

SABRIC uses the following definitions of robbery to collate standardized statistics on robberies:

- **ROBBERY**

Robbery is defined as the unlawful, intentional and violent removal and appropriation of any movable property of another, or a threat of violence, where the victim believes that the offender is able to carry out the threat to obtain the said property.

- **CASH-IN-TRANSIT ROBBERY**

Cash-in-transit robbery is defined as a robbery of cash whilst in-transit, and is the unlawful, intentional and violent removal and appropriation of cash-in-transit while under the control of the security company. This may include incidents inside or outside a bank and/or other premises. This may further include removal and appropriation of cash under threats of violence.

- **ATTEMPTED CASH-IN-TRANSIT ROBBERY**

Attempted cash-in-transit robbery is described as a situation in which the offender/robbers were unsuccessful in their attempt to hijack cash. This usually occurs when the offenders are hindered or prevented by guards, vehicle locking systems, smoke boxes, alarms or bystanders. The main characteristic of attempted cash-in-transit robbery is that the robbers leave the crime scene without the cash. If the perpetrators were to rob the guards of the cash boxes and the boxes would have exploded, resulting in the robbers leaving the scene without the cash, this would constitute an attempted robbery.\textsuperscript{161}

\textsuperscript{160} 2001 (3) SA 382 (CC).
\textsuperscript{161} SABRIC.
The question now arises if any amendments need to be made to the definition of robbery, or whether a statutory crime should be created to cater for in-transit robbery. From the above discussion regarding the development of the definition to robbery, it is submitted that the definition is sufficient and that no lacuna exists in the said description of the crime of robbery.

As discussed, the crime of in-transit robbery is characterized by a number of distinct factors for example, committed in a gang environment (larger number of perpetrators), high powered weapons are fired indiscriminately in public and the high level of physical violence during the attack.

To assist authorities in curbing this crime, two distinct legal doctrines are available to the prosecution:

(a) COMMON PURPOSE DOCTRINE

This doctrine is defined where two or more people agree to commit a crime or actively partake in a joint unlawful enterprise, each will be responsible for the specific criminal conduct committed by one of their number which falls within their common design.162

In essence, the doctrine has as its aim that if participants are charged with having committed a consequence crime, it is not required for the prosecution to prove beyond reasonable doubt that each participant committed conduct which contributed causally to the ultimate unlawful consequence. It would be sufficient to establish that they all agreed to commit a particular crime or actively associated themselves with the commission of the crime by one of them with the requisite fault. If this is established, then the conduct of the participant who actually causes the consequence, is attributed to the other participants. It is furthermore not required to establish precisely which member of the common purpose caused the consequence, provided that it is established that one of the group brought about the result. The

Appellate Division in *S v Mgedezi*\(^{163}\) drew a distinction between common purpose liability where there is prior agreement, expressed or implied, to commit a crime and where is no such agreement. In the latter situation certain requirement need to be satisfied before common purpose can arise.\(^{164}\) The *Mgedezi* rule was approved by the Constitutional Court in *S v Thebus*.\(^{165}\) It is submitted that the rationale for the common purpose rule is one of crime control. This rule has been used by our courts to establish a principal of liability.

In *S v Mkhize*\(^{166}\) it was held that the accused’s common purpose arose from his agreement to commit robbery and the foreseeing of the possibility of participants causing the death of someone during the robbery. The accused’s liability in respect of murder was found not to be excluded merely because the robbery and killing occurred at a place other than where planned.

In *S v Maelangwe*\(^{167}\) the accused was found guilty under *inter alia*, the common purpose rule, where the common purpose arose from impulse. In this case the criteria for establishing common purpose was evaluated more stricter.

In *S v Lungile*\(^{168}\) the Supreme Court of Appeal held that where common purpose arises from prior agreement, and the accused had participated to a substantial degree in the execution of the planned crime, more is required than mere withdrawal of the accused from the scene of the crime to establish legally effective dissociation from common purpose.

In *S v Sibeko*\(^{169}\) the accused appealed his innocence to the Supreme Court of Appeal, citing dissociation from common purpose. The facts, in essence, pertained to the accused participating in robbery, thereafter the accused shot a victim after the accused escaped from the police. The court held that the accused must have

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\(^{163}\) 1989 (1) SA 687 (A) [161].

\(^{164}\) Burchell 575.

\(^{165}\) 2003 (2) SACR 319 (CC).

\(^{166}\) 1999 (2) SACR 632 (W).

\(^{167}\) 1999 (1) SACR 133 (NC).

\(^{168}\) 1999 (2) SACR 597 (SCA).

\(^{169}\) 2004 (2) SACR 22 (SCA).
foreseen the use of fire-arms in the event of encountering resistance during the robbery itself. The fact that the accused ran away leaving his co-accused behind, did not absolve them from blameworthiness. The usage of a fire-arm in accord with the groups intention to use fire-arms in the robbery, or to withstand capture, established sufficient common purpose, and they were correctly convicted of murder.

(b) **ABERRATIO ICTUS**

As mentioned in the characteristics of in-transit robbery, this type of crime frequently results in public shoot-outs during which innocent bystanders are killed or wounded. These scenarios, in which the consequences merely turn out to be different from those that the perpetrators expected, are instances of *aberratio ictus* (literally, going astray of the blow).

According to Burchell\(^{170}\) the classic *aberratio ictus* situation is where A, intending to kill B, fires a rifle at him, but the bullet misses B, and kills C. In terms of what could be described as the *aberration ictus* rule, which derives support from two 1949 Appellate Division decisions (*R v Kuzwayo*\(^{171}\) and *R v Khoza*\(^{172}\)) because of his intention to kill, A is guilty of the murder of C without the prosecution’s requirement to establish an intention to kill C specifically. In *Khoza* Centlivres JA held that “where a person commits an act intending to murder one person and kills another he is guilty of murdering that other person”.

Another case in point was decided in the Supreme Court of Appeal in *S v Nkombani*\(^{173}\) where X and Z, who were armed with revolvers, took part in a robbery. During the struggle that ensued, Z was killed by a shot fired by X at the victim of the robbery (Y) with the intent to kill him. X was found guilty of the murder of Z since he foresaw the possibility of the death of Z and was reckless as to whether his death resulted or not.

\(^{170}\) Burchell 507.

\(^{171}\) 1949 (3) SA 761 (A).

\(^{172}\) 1949 (4) SA 555 (A).

\(^{173}\) 1963 (4) SA 877 (A).
The *aberratio ictus* rule was also applied in *S v Tissen*\(^{174}\) and *S v Raisa*\(^{175}\) and has finally been accepted by the Appellate Division in *S v Mavhungu*.\(^{176}\) The decision in *Tissen* regarding *aberratio ictus* is further endorsed in a recent decision in *S v Mkhanzi*.\(^{177}\)

From the above, it is submitted that both common purpose and *aberratio ictus* rules are suitable tools to be used by our courts in judging cases of serious robbery. It is further submitted that both rules are sufficient for its intended purpose and need no further development.

5.4.2 LAW OF EVIDENCE AND PROCEDURE

The Criminal Procedure Act\(^{178}\) provides for a clear definition of aggravating circumstances for purpose of robbery or attempted robbery insofar that it is

(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.

This definition was a requirement emanating from the minimum sentence legislation\(^{179}\) which is discussed later in this chapter. The definition further strengthens the possible denial of bail in Schedule 6 type crimes, which includes robbery.

In terms of sections 50(6), 58 and 60(ii) and Schedule 6 of the Act,\(^{180}\) an accused charged with either planned or premeditated murder or robbery with aggravated circumstances, needs to bring a formal bail application. A further burden rests on the

\(^{174}\) 1979 (4) SA 293 (T).
\(^{175}\) 1979 (4) SA 541 (O).
\(^{176}\) 1981 (1) SA 56 (A).
\(^{177}\) 2004 (1) SACR 281 (T).
\(^{178}\) Act 51 of 1977.
\(^{179}\) S 51 of the Criminal Law Amendment Act 105 1997.
\(^{180}\) See fn 216.
bail applicant to adduce evidence which will satisfy the court that exceptional circumstances exist which permits his release from custody.

Schedule 6 was added to the main Act by section 10 of Act 85 of 1997, and assists in crime control by ensuring that perpetrators of violent crimes are not granted bail through the normal informal bail hearing process.

In terms of section 35(3)(h) of the Constitution, every accused has the right not to testify in his own defence, and thus to remain silent. In *S v Budha* four accused were charged with robbery and murder. The accused chose not to testify, and relied on their constitutional right to silence. The Court, however, found that there are limits to this right, and that the accused had a duty to tell their versions or to lead other evidence, which would, *inter alia*, show their innocence. All accused were found guilty of murder and robbery.

The Supreme Court of Appeal approved of above viewpoint in *S v Chabalala*, where Heher AJA stated in paragraph 20 that “where there is direct *prima facie* evidence implicating the accused in the commission of the offence, his failure to give evidence, whatever his reason may be for such failure, in general *ipso facto* tends to strengthen the State’s case, because there is nothing to gainsay it, and therefore less reason for doubting its credibility or reliability”.

This doctrine is entirely consistent with the constitutional position which was elucidated in *Osman v Attorney General Transvaal* and *S v Boesak*.

The issue of armed robbery and murder by a large group of perpetrators sometime raises specific evidential problems. In *S v Nzimande* the accused was convicted in a Provincial Division on charges of murder and robbery and sentenced. He appealed to a full bench against the conviction. The only evidence connecting the

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181 Of 1996.
182 2004 (1) SACR 9 (T).
183 2003 (1) SACR 134 (SCA).
184 1998 (2) SACR 493 (CC).
185 2001 (1) SACR 1 (CC).
186 2003 (1) SACR 280 (O).
accused with the charges was a palm print found on a wall above the body of one of the deceased. The accused did not testify under oath to explain the presence of the print. On appeal the Court reiterated that whether the presence of fingerprints constituted a *prima facie* case requiring a response from the accused was a question of fact, and that the evidence in respect of the prints was clear and persuasive, a conviction could be based exclusively on that fact, without any additional evidence linking the accused with the crime. It was pre-eminently evidence constituting *prima facie* proof that became conclusive if no rebutting evidence was tendered. In the present case the evidential value of the print was, because of its location, very compelling, and it was further strengthened by the failure of the accused to explain its presence. The print was proof of his presence on the scene of the crime and his failure to account therefor was indicative of his inability to give an innocent explanation. Accordingly the Court a quo properly convicted the accused.

In some instances of robbery, perpetrators use toy fire-arms. In *S v Anthony*¹⁸⁷ the Court had to decide whether a robbery by means of a toy gun constituted aggravated circumstances sufficient to bring the minimum sentence into play. The judge emphasized that the determination of whether aggravating circumstances are present or not should be evaluated objectively. In his case the judge was of the view that although a toy gun is not included within the definition of a fire-arm under section 1(i) of the Criminal Procedure Act, the circumstances of the case revealed a threat to inflict grievous bodily harm and so, aggravating circumstances were present.

From the above discussion it is clear that the law of evidence and procedure has been developed substantially to *inter alia* cater for in-transit and other serious robberies and thus contributes to a crime controlling legal system.

**5.4.3 PUNISHMENT**

In an effort to further curb serious and violent crimes, section 51 of the Criminal Law Amendment Act¹⁸⁸ was enacted in 1997. It provides for prescribed minimum sentences. It further provides that a conviction of robbery with aggravating

¹⁸⁷ 2002 (2) SACR 453 (C).
circumstances or motor vehicle high jacking attracts a minimum sentence of 15 years for the first offence, 20 years for the second offence and 25 years for third or subsequent offences.

In *S v Msimanga*\(^{189}\) the court held that the reason for the existence of the criminal justice system is to serve the interests of the public and sentencing, as an integral part of that system, has the same *raison d’être*. Violent conduct in any form is no longer to be tolerated, and courts, by imposing heavier sentences, convey the message on the one hand, to prospective criminals that such conduct is unacceptable and, on the other hand, to the public that the courts take seriously the restoration and maintenance of safe living conditions. Deterrence is the over-arching and general purpose of punishment. Since no civilised community should have to tolerate barbaric conduct, in cases of crime in particular the deterrence and retribution aims of punishment are to be preferred over those of prevention and rehabilitation which in such cases play a subordinate role.

From this judgment it is evident the high incidence of in-transit robberies is influential to traditional philosophy of sentencing.

In *S v Nombewu*\(^{190}\) a first offender appealed his sentence of seven years imprisonment for robbery. The court increased his sentence from seven years to one of ten years imprisonment merely on account of the large amount of money taken and the method of violence used during the robbery.

In *S v Khambule*\(^{191}\) Supreme Court of Appeal also voiced its concern over the prevalence of violence in our country. In this matter it was held that crime was becoming so common, especially in large cities, that innocent men and women use roads with great anxiety. The minimum prescribed sentencing was confirmed.

\(^{189}\) 2005 (1) SACR 377 (O).
\(^{190}\) 1996 (2) SACR 396 (E).
\(^{191}\) 2001 (1) SACR 501 (SCA).
5.5 CONCLUSION

It is submitted that the phenomenon of robbery has made a significant impact on the development of our legal system. It is further evident that the crime of in-transit robbery has developed, as in previous timelines, with socio economic developments in society. As society progressed, the modus of operation by robbers adapted to suit the present day conditions. Weapons used have increasingly become more sophisticated, and larger quantities of cash are involved during robberies. It is further submitted that more violence are used during cash heists.

Although the traditional legal response to in-transit robbery through convictions and punishment contributes to a crime control model, the legal system needs to be supplemented with more preventative and cooperative planning between various stakeholders.
CHAPTER 6
CONCLUSION

From the discussion above it is submitted that the crime of robbery evolved from a form of aggravated robbery during the early Roman times. This form of robbery was viewed as a menace rather than a crime *per se*. As the world economy declined, robbery became more prominent and more affluent members of society became victims of robbery. As governments and societies became more modernised, the crime of robbery increased, which resulted in various legal authors attempting to formalise the crime of robbery into clearer and substantial definitions.

The crime of in-transit robbery developed from ordinary theft of goods from individuals, with some form of violence, to specific planned raids on any form of items of value being transported. This developed further into piracy at sea.

It is further submitted that early day piracy and in-transit robberies could have been curtailed by governments, but due to a lack of policing and specific laws against robbery and piracy, the crime flourished during the time of the Roman Empire.

During medieval English time, robbery was curtailed through strict laws and severe punishment.

Influences from Roman and English law continued to change the South African perspective on robbery. Although South African courts have always viewed robbery as a serious crime, various different types of punishment were meted out for the crime of robbery.

In analyzing the post-modern era, it is evident that in-transit robbery is becoming a serious violent crime problem. The crime appears to be well organized, well planned and well executed in ways of military precision. It appears as if in-transit robbery is fast becoming a crime that cannot be prevented and managed by the South African Police Service alone. Intervention of all role-players in the cash-in-transit industry needs to partake in a concerted effort to devise strategies to prevent this serious
crime to escalate even further. In the meantime, certain substantive and procedural doctrines, for example common purpose and minimum sentences, assist courts in adjudicating cases of robbery, including in-transit robbery.
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