

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

Appeal No.: A121/2022

DPP Ref No: 10/2/5/1-(2022/068)

Date of Appeal: 6 February 2023

DELETE WHICHEVER IS NOT APPLICABLE
REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED
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In the matter between:

MAKOTLA, SIMON

FIRST APPELLANT

MALANDULE, THEMBA

SECOND APPELLANT

NGOBENI, DUMISANE JOSEPH

THIRD APPELLANT

and

THE STATE

RESPONDENT

Neutral Citation: Makotla, Simon and 2 Others v The State (Case no: A121/2022)

[2023] ZAGPJHC 483 (1 May 2023)

JUDGMENT

Karam AJ:

INTRODUCTION

1. The three appellants, respectively accused 1, 2 and 3 at the trial, were convicted in the Kempton Park Regional Court on a charge of robbery with aggravating circumstances, read with the provisions of Section 51(2) of Act 105 of 1997.

2. They were each sentenced to 12 years imprisonment.
3. Leave to appeal both conviction and sentence was granted by the trial court.

THE EVIDENCE

4. Wyan Sekelesa testified. He is the complainant. On 4 August 2019 at approximately 21h00 he and his two friends, Christopher and James arrived at the Kempton Park taxi rank where they intended to board a taxi and return home. They did not however find any taxis. They were then approached by the three appellants. The third appellant, upon enquiring from the complainant as to where they were headed, suggested to Christopher that he go and look for a taxi on another side of the rank, which Christopher duly did. The first and second appellants then sat next to the complainant and the third appellant sat next to James.

4.1 The second appellant suddenly grabbed the complainant around his neck and pointed a firearm at him. James, seeing this, fled and the third appellant chased after him. Upon the complainant attempting to flee, the first appellant produced a knife and threatened to kill him if he moved. The first appellant then searched the complainant, robbing him of his passport, his wallet containing R700,00 and his cellular telephone. The first and second appellants then fled.

4.2 The complainant subsequently found his friends, proceeded with them to the police station next to the rank, reported the matter and gave the police a description of the assailants. The police then left to search for the assailants, leaving the complainant and his friends at the police station. The police returned some thirty minutes later with the appellants. The complainant identified them as the assailants. Upon the

police searching the assailants in their presence, the complainant identified his wallet which only contained R200,00 of the R700,00 initially therein, as well as his two store cards. The wallet was recovered from the second appellant. Further, his cellular telephone, which he identified by a marking as well as his list of contacts contained therein, was recovered from the first appellant. His passport was not recovered.

4.3 He further testified that he did not know the whereabouts of James and that Christopher was in Malawi. The area where the incident took place was very well lit. He identified the assailants by their clothing, their complexion and build. Upon seeing them again at the police station, they were dressed in the same attire.

4.4 He disputed the version put that the appellants were not searched at the police station.

5. Mashilo Lepuru testified. He is a police sergeant. On the evening in question the complainant reported the incident to him. He was with constable Manaka. The police station is a three to four minute walk from the taxi rank. The complainant, notwithstanding that he was traumatized, was able to furnish him with a description of the assailants and further advised that because of the lighting at the scene, he would be able to identify them if he saw them again.

5.1 The witness and Manaka were in full police uniform and they set out on foot to patrol the area. They then saw the appellants who matched the description of the complainant. The appellants attempted to flee but they managed to corner them. Upon searching them, they found a wallet in the possession of the second appellant and a cellular telephone with the third appellant. These items matched the description of the complainant's robbed items. Leaving the items in their respective possession,

they arrested them and took them to the police station where the complainant identified the assailants as well as his robbed items. No knife or firearm was found in their possession.

5.2 The witness disputed the version put by the first appellant, that on his arrival at the rank to take a taxi home, he encountered some four women in church uniform and that whilst waiting for a taxi five officers arrested him. He further disputed the version that the police arrived at the taxi rank with the second appellant, approached the first appellant where he was seated waiting for a taxi, the latter having found the third appellant waiting at the rank, pointed firearms at the first appellant, searched him and found nothing on him. He further disputed the version that upon being questioned about cellular telephones and firearms and stating that he has no knowledge thereof, he was assaulted and taken to the police station where one of the officers removed a knife from his, that is the officer's waist, forced the second appellant to take possession of same and when he refused to do so, the latter was also pointed with a firearm.

5.3 The witness further disputed the version put by the second appellant, that he was walking in the street when five officers approached him, searched him, and on finding R1200,00 and a cellular telephone in his possession, took him to the police station. En route thereto, they came across the first and third appellants at the taxi rank, the second appellant was informed that these were his co-accused, they were also apprehended and all three appellants were taken to the police station. There, he was assaulted by an officer, the latter then trying to force him to take hold of a knife which the officer produced, which the second appellant refused to do.

5.4 The witness further disputed the version put by the third appellant, that he arrived at the rank to take a taxi home, encountered a group of women in church uniform, that the first appellant then arrived and also waited for a taxi, whereupon a group of police

officers arrived in the company of the second appellant, arrested himself and the first appellant and proceeded to the police station.

5.5 The version on behalf of the first and second appellants was then amended/corrected to state that it was in fact this witness who had attempted to force the second appellant to take hold of the knife. The witness responded by stating that the weaponry he arms himself with when he is on duty does not include a knife.

6. Kgabo Manaka testified. He is a police constable. He confirmed that he was with Lepuru when the complainant reported the robbery, giving a description of the three assailants, their encountering of the appellants who attempted to evade them and their apprehending of the appellants. He testified that upon searching the appellants, the wallet was found in the possession of the second appellant and cellular telephone in the possession of the first appellant. He confirmed that they left these items in the respective possession of the appellants and escorted the appellants back to the police station where the complainant identified them as his attackers and identified these items as his own.

6.1 He further testified that some twenty minutes prior to the complainant reporting the incident, and whilst patrolling, he and Lepuru had come across the second appellant at the rank seated alone on a bench and they had warned him that they did not want to encounter any problem with him, given that the manner in which he was seated there did not reflect that he had good intentions. He had advised them that he was waiting for his friends. He had, on several occasions in the past, seen the second appellant in the vicinity of the rank as a hawker and knew him by the name of Mnaga.

6.2 He further testified that upon being found in possession of the wallet and cellular telephone, the first and second appellants apologized to them and requested them

not to apprehend them.

6.3 He disputed the versions of the appellants and specifically the versions of first and third appellants that Lepuru was in the company of four other officers when they were arrested and that he, that is this witness, was not one of the officers who apprehended them.

7. The first appellant testified that upon his arrival at the taxi rank he found four women in church uniforms and the third appellant. Some ten minutes later, five police officers arrived with the second appellant and referring to the first and third appellant, stated that here are his friends who work together to rob people. He was searched and nothing was found in his possession.

7.1 Upon their arrival at the police station, three men there were asked whether the appellants were the people who had robbed them, and the men, one of whom was the complainant, replied that they were not sure. Lepuru then took out a knife and gave it to the second appellant to hold, whilst holding his firearm against the second appellant. The latter refused to hold the knife, whereupon Lepuru, threatened to shoot him and the second appellant then told Lepuru to shoot him.

7.2 The first appellant further disputed that he was apprehended in the street.

7.3 In cross-examination he stated that he did not dispute the complainant's description of his clothing as he thought that when his turn came to testify, he would state what he was wearing.

8. The second appellant testified that he was walking alone but there were other people also walking. The police then apprehended him and subsequently, after searching the first and second appellants, apprehended them too and took them all to the police station. Upon arrival there, one of three men seated there was asked whether the second appellant was one of the assailants and the man replied that he was not sure. One of the officers then said that it was the second appellant and commenced assaulting him, stating that the cellular telephone belonged to the complainant. Upon the arrival of another officer who enquired as to what was happening, the other officers stated that the second appellant had stolen a cellular telephone. The second appellant stated that this cellular telephone has his pictures, family pictures, facebook and whatsapp accounts thereon and upon examination of same, it was discovered that this was not the case.

8.1 One of the officers who had apprehended them then assaulted this appellant and forced him to take hold of a knife. When this appellant refused to do so, he removed his firearm and pointed same at him. He testified that the complainant was robbed of the same type of cellular telephone. The complainant and the police who had testified were lying to the court and specifically the police in their evidence that the appellants were apprehended together.

8.2 In cross-examination he stated that he did not dispute the complainant's description of his clothing as it was the complainant's turn to speak. He could not explain how all the content on his telephone had disappeared – it had been removed from him and only opened at the police station. He does not what happened in the interim as it was in the police's possession.

8.3 He could not explain why it was then not disputed that the telephone was left in his possession by the police after they had discovered same, until their arrival at the police station where the complainant identified same as his. He could further not explain why it was never put to either of the officers who testified, that an officer had intervened and discovered that the telephone had no content. He could further not explain why it was not disputed when the complainant testified that notwithstanding that the sim card had been removed from the telephone, the complainant was still able to retrieve his list of contacts.

8.4 When asked why the police would arrest him if, as he had testified in chief, there were other people walking too, he responded that they came to him because he was known to them.

9 The third appellant testified. On the evening in question he arrived at the taxi rank where he found four women in church uniform waiting for a taxi to Ivory Park. He stayed with them and subsequently, the first appellant arrived and sat with them. Five police officers then arrived, in the company of the second appellant, stating that the first and third appellants are friends of the second appellant. Another of the officers then stated that he knows them, referring to all the appellants, that they always rob people at the rank. Upon searching the appellants and finding nothing on the third appellant, they commenced assaulting the appellants and then asked where knife and firearm were. They were then taken to the police station where they encountered three Malawian males. The latter males were asked whether the appellants were the assailants who had robbed them. One of the males responded that it was not the appellants. Another responded that he was not sure.

The third male responded that he was not present when the robbery occurred. One of the officers then took out a knife, instructing the second appellant to take hold of same. When he refused to do so, the officer took out his firearm, pointed it at him and threatened to shoot him. Still refusing to hold the knife, the second appellant advised the officer to shoot him.

9.1 He disputed that he was arrested in the street. He further disputed the clothing description given by the complainant and that he and the other appellants had attempted to flee from the arresting officers. He disputed that he could have acted in furtherance of common purpose with people he did not hitherto know, referring to the first and second appellants.

ISSUES ON APPEAL

10. The issues to be determined are whether the identification evidence of the complainant that the appellants were the assailants and the evidence of the arresting officers as to the apprehending of the appellants and as to what was found in their possession, constitutes proof beyond reasonable doubt and, if so, whether the sentence imposed is startlingly inappropriate in the circumstances.

LAW AND ANALYSIS

11. It is trite that in a criminal trial, the onus of proof is on the State to prove its case beyond reasonable doubt. This is indeed a stringent test but is applied in order to ensure that only the **proven** guilty are convicted. It is further trite that the court is required to adopt a holistic approach in respect of the evidence and its assessment thereof, and use a

common sense approach. It is not sufficient if the guilt of the accused appears possible or even probable – his guilt must be proven beyond reasonable doubt.

S v Hadebe & Others 1998 (1) SACR 422 (SCA)

S v Van Der Meyden 1999 (1) SACR 447 (SCA)

S v Phallo & Others 1999 (2) SACR 558 (SCA)

S v Van Aswegen 2001 (2) SACR 97 (SCA)

S v Shackel 2001 (2) SACR 185 (SCA)

S v Chabalala 2003 (1) SACR 134 (SCA)

12. It is further trite that a court can convict on the evidence of a single witness if such evidence is satisfactory in all material respects. The evidence must not only be credible, but must also be reliable.

R v Mokoena 1932 OPD 79

S v Webber 1971 (3) SA 754 (A)

S v Sauls & Others 1981 (3) SA

S v Stevens 2005 1 All SA 1

S v Gentle 2005 (1) SACR 420 (SCA)

13. The complainant was an impressive witness. His evidence was clear and unambiguous. He could easily, had he wanted to, have exaggerated the evidence against the appellants, which he did not. He was extensively cross examined and nothing material emanated therefrom. It was as a result of his powers of observation that he was able to give a description of the assailants to the police officers, as a

result of which description the officers apprehended the appellants. Notwithstanding that he was a single witness, I am of the view that his evidence was satisfactory in all material respects. I am mindful of what is stated regarding identification evidence in the decisions of **S v Mthetwa 1972(3) SA 766 (A)** and **S v Charzen & Ano 2006(2) SACR 143 (SCA)**.

13.1 It must further be borne in mind that the complainant was single witness due to the unknown whereabouts of James and Christopher having returned to Malawi.

13.2 Significantly, a guarantee as to the reliability of the complainant's identification of the appellants as the assailants, is the finding and identification of his robbed items in the possession of the first and second appellants shortly after the incident.

14. Similarly, the arresting officers were impressive witnesses who corroborated each other in material respects. Whilst Lepuru testified that the robbed cellular telephone was found in the third appellant's possession, Manaka's testimony was that same was found in possession of the second appellant. This conforms with the evidence of the complainant.

14.1 This is not material as whilst claiming that the telephone belonged to him, the second appellant also confirmed that same was found in his possession. Manaka's testimony that he and Lepuru had seen the second appellant earlier that evening lurking at the rank and warned him to behave,

was not referred to by Lepuru in his evidence. This is not a material issue. In any event, Manaka testified that he had on prior occasions seen the second appellant selling items at the rank. It is possible that Lepuru did not testify to this due to his failure to recognise the second appellant as someone that he had seen earlier, and/or possibly due to him testifying about an incident that had occurred more than two years prior to him testifying.

15 . Contrary to the State witnesses, the appellants were poor witnesses and their evidence was riddled with inconsistencies and improbabilities. Examples of these include:

15.1 The failure by the first appellant to testify about his having been assaulted at the rank, as put in his plea explanation and to Lepuru; it was never put to the State witnesses that the complainant and his companions were unsure of the first appellant's involvement in the commission of the offence; it was never put to the State witnesses that he had been assaulted at the police station in order to produce a knife and firearm; it was for the first time in cross examination that he disputed that he was wearing the clothing or that he fitted the description given by the complainant to the police.

15.2 It was never put to the State witnesses that the complainant and his companions were unsure of the second appellant's involvement in the commission of the offence; it was never disputed by the second appellant that the cellular telephone recovered was that of the complainant. It was for the first time in his evidence in chief that the telephone belonged to the second appellant and that when the police opened same, all of his

family pictures and social media accounts were blank; it was for the first time in his evidence that he disputed that he was wearing the clothing described by the complainant to the police; it was for the first time in cross examination that he testified that the cellular telephone was removed by the police and kept in their possession until their arrival at the police station. The evidence of the arresting officers that the items found in the possession of the first and second appellants were left in the latter's respective possession until their arrival at the police station, was never disputed.

15.3 The third appellant testified that five police officers arrived at the rank in the company of the first appellant, whereas it was put to the witnesses that that they arrived in the company of the second appellant; the allegation by the police that the appellants were always robbing people at the taxi rank was never put to the arresting officers; his allegation of having been assaulted at the taxi rank was never put to Lepuru; his exculpatory evidence as to what the complainant and his companions allegedly stated on the arrival of the appellants at the police station, was never put to any of the State witnesses; it was for the first time in his evidence that he disputed that he was wearing the clothing described by the complainant to the police.

16 The submission that the third appellant ought not to have been convicted on the basis of common purpose as he was not present when the complainant was robbed, is devoid of any merit. The complainant testified that it was after the second appellant had grabbed him around his neck, whilst pointing a firearm at him, that James, seeing this, fled and that the third appellant then pursued James.

16.1 Of the three appellants, it was the third appellant who initially spoke to the complainant and his companions, asking them where they were going. It was the third appellant who suggested that the complainant's companion go to another part of the rank, thus separating Christopher from them. It was the third appellant who then went and sat next to James.

16.2 This was clearly a well-planned robbery, and the only reason the third appellant was not present when the complainant was physically deprived of his belongings was due to his pursuit of James. Further, the fact that he was found together with the first and second appellants shortly after the commission of the offence, leads to the irresistible conclusion that there was, in fact, a prior agreement among the appellants to commit the crime.

16.3 In any event, the requirements of common purpose as set out in **Sv Mgedezi & Others 1989 (1) SA 687 (A)**, in instances where there is no proof of a prior agreement, are all fulfilled.

17. Regarding sentence, the appellants were charged in terms of Section 51(2) of Act 105 of 1997 and accordingly faced a minimum sentence of 15 years imprisonment. The learned Magistrate took into account the fact that the appellants had been incarcerated for a period of 2 and a half pending finalisation of the matter and finding this to be a substantial and compelling circumstance, deviated from the minimum sentence and imposed a sentence of 12 years imprisonment.

17.1 Given the prevalence of this type of offence together with the

aggravating factors, the submission that the sentence is shockingly inappropriate is without any substance or merit.

18. I further wish to comment on an unsatisfactory practice that is becoming common amongst presiding officers, relating to the granting of leave to appeal to co-accused in circumstances where they would ordinarily not have done so. However, because leave to appeal is granted to one of the accused in circumstances where the presiding officer is of the view that there are reasonable prospects of success on appeal, the presiding officer then, simply by virtue of the fact that leave is granted to such accused, similarly grants leave to appeal to co-accused in the matter in circumstances where they are not of the view that there are reasonable prospects of success.

18.1 In the current matter, the learned Magistrate, in giving her judgment on the leave to appeal application states:

“...The Court is of the view that the prospects of success is not favourable in respect of the first two accused...” and later:

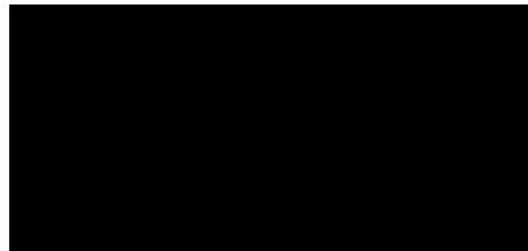
“...This Court is of the view that in respect of accused 3, perhaps another Court could reach a different decision and therefore finds that there are prospects of success. That is in respect of accused 3. But seeing that the application is granted for accused 3, the Court is of the view that the application should just as well be granted for accused 1 and 2...”

Caselines reference p004 – 211 lines 8 – 10; p004 – 212 lines 2 – 8

This practice ought to be refrained from as not only does it not comply with the requirements of whether there are reasonable prospects of success, it further serves to unduly burden the presiding officers determining the appeal in having to deal with the appeal/s of such additional co-accused.

19. In the circumstances of this matter, I propose the following Order:

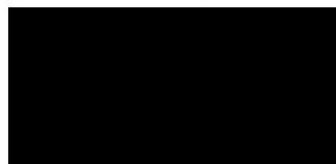
19.1 The appeal against both conviction and sentence is dismissed in respect of all of the appellants.



WA KARAM

ACTING JUDGE OF THE HIGH COURT

I AGREE AND IT IS SO ORDERED



S YACOOB

JUDGE OF THE HIGH COURT

Appearances:

APPELLANTS: Adv N Sikhakhane
 Instructed by Legal Aid SA
 Johannesburg Office

RESPONDENT: Adv P Nel
 Director of Public Prosecutions
 Gauteng Local Division