



**IN THE HIGH COURT SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: A143/2022

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
08/06/2023 DATE  SIGNATURE	

In the matter between:

SAULS RANDAL

Appellant

And

THE STATE

Respondent

Neutral Citation: *Sauls Randal v The State* (Case No: A143/2022) [2023] ZAGPJHB
664 (08 June 2023)

JUDGMENT

THUPAATLASE AJ:

Introduction

[1] This is an appeal from the regional court sitting in Johannesburg directed against both conviction and sentence. The appellant pleaded not guilty and reserved the right to remain silent. He was duly represented throughout the trial. At the end of his trial the appellant was convicted of robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977¹ and also read with section 51 (2) of the Criminal Law Amendment Act. The accused was sentenced to fifteen (15) years imprisonment. No portion of the sentence was suspended. In addition, the appellant was in terms of section 103 (1) of the Firearm Control Act, 2000² declared unfit to possess a firearm.

[2] The prosecution presented testimony of five (5) witnesses and the appellant also testified and called a witness. The evidence was that the complainant's son was robbed of a vehicle at gunpoint outside the gate of his parental house on the night of 27 August 2017. He was about to take his uncle home when he was accosted by the two men who ordered him to get out the car. They drove away with the car. He described the two robbers as Coloured males, who spoke English with an Afrikaans accent.

[3] The incident was reported to the Sophiatown police station and later that night the said motor vehicle was recovered in Westbury. The motor vehicle was driven by the appellant who after a short chase by the police was arrested.

Grounds of appeal

¹ (1) In this Act, unless the context otherwise indicates—

'aggravating circumstances', in relation to—

(b) robbery, or attempted robbery, means—

(i) the wielding of a firearm or any other dangerous weapon;

(ii) the infliction of grievous bodily harm; or

(iii) a threat to inflict grievous bodily harm,

by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence;

² 105 of 1997 as amended by Criminal Law (Sentencing) Amendment Act No. 38 of 2007.

[4] The grounds of appeal are to the effect that the court a quo erred in finding that the prosecution proved the guilt of the appellant beyond reasonable doubt and that there were no improbabilities in the State version. In addition, that the learned magistrate erred in rejecting the evidence of the appellant as not being reasonably possibly true and in accepting version of the State.

[5] The appellant also submitted that the effective 15 years imprisonment term was inappropriate as it was out of proportion with the totality of the evidence and that the court failed to give proportionate consideration to all personal circumstances that were placed before the court a quo. The sentence was said to be excessive and had the effect of invoking a sense of shock, as a result of which another court might impose a different sentence.

The case for the prosecution

[6] As indicated at the commencement of the judgment, the State led evidence of five witnesses. Regarding the incident of robbery, the State relied on the evidence of Sifiso Trust Vundla, who is a single witness. He was robbed of the vehicle belonging to his father. He testified that at the time of the incident the visibility in the area was good. Such visibility was provided by the lights of the vehicle, streetlights and from the globe which was placed on the parameter wall outside his home.

[7] He was adamant that it was sufficient to observe the appellant well as the appellant came closer to him. He was able to describe that the appellant had some marks on his face. He was also able to point out the appellant during an identification parade. He denied that he was enabled to do that by the police who had given him a photograph of the appellant, as alleged by the appellant.

[8] The evidence of the two police officials was to the effect that after they had visited the complainant's residence, they registered a criminal complaint for investigation. They continued with their patrolling duties for the night. It was during such patrol that they came across the same vehicle that was reportedly robbed from the son of the complainant.

[9] They tried to stop the vehicle, but the driver sped off on the wrong side of the road into oncoming traffic. This was despite the police officers identifying themselves by

sounding a police siren and flashing lights. According to their testimony they were forced to fire a warning shot and the appellant hit an electric pole and the vehicle came to a stop. The appellant, who was driver of the robbed vehicle, alighted from such vehicle and tried to flee but constable Sithole caught him within a short distance. According to the testimony of the two witnesses the vehicle was damaged in the front and also had a bullet hole as a result of the warning shot, they fired.

[10] The police officers confirmed that they never lost sight of the appellant from the time he got out of the car as he attempted to flee. The investigating officer warrant officer Nawe testified that he never took the photo of the appellant to show to the witness and specifically that he did not influence the outcome of identification parade in any manner.

[11] The complainant testified that he identified his vehicle after it was recovered by the police and that the vehicle was damaged on its front and also had a bullet hole on the bonnet.

Defence Evidence

[12] The appellant testified and denied any involvement in the robbery of the vehicle. He admitted that he was found driving the vehicle by the police. He explained that he was sent to fetch the vehicle parked at Rahima Moosa hospital by Brandon, who also gave him the keys. He admitted further he came across the police and that he even stopped after the police had signalled to him to stop, but he drove off into oncoming traffic when the police officers started to fire shots. He called a witness who confirmed that he heard Brandon requesting him to go and collect a vehicle for him from the hospital.

Analysis

[13] It is trite that in a criminal trial, the State bears the onus to prove the guilt of an accused beyond reasonable doubt. There is no onus on the part of an accused to prove his or her innocence or convince the court of the truthfulness of any explanation that he or she gives. In *S v Jochems*³, the court stated the legal position as follows:

³ 1991 (1) SACR (A) at 211E-G.

'where the onus is clearly on the state, the suggestion that the accused were obliged to convince the court or persuade the trial court of anything is misplaced'.

[14] It is not enough or proper to reject an accused's version on the basis that it is improbable only. An accused's version can only be rejected once the court has found that on credible evidence, it is false beyond reasonable doubt. In other words, if the appellant's version is reasonably possibly true, he is entitled to be acquitted. In *S v V*⁴ the position is articulate as follows:

'it is trite that there is no obligation upon an accused person, where the State bears the onus 'to convince the court'. If his version is reasonably possibly true, he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true.'

[15] On the other hand the courts have been cautioned that it is not incumbent upon the prosecution to eliminate every hypothesis which is inconsistent with the appellant's guilt or which, as it is expressed, is consistent with his innocence. The court in *S v Sauls and Others*⁵ expressed this as follows:

'The State is, however, not obliged to indulge in conjecture and find an answer to every inference which ingenuity may suggest any more than the court is called on to seek speculative explanation for the conduct which on the face of it, is incriminating.'

[16] In an earlier decision of *Mlambo* the true test to be applied in the circumstances of this case was expressed as follows:

'In my opinion there is no obligation upon the Crown to close every avenue which is said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature

⁴ 2000(1) SACR 453 (A) para 3.

⁵ *S v Sauls and Others* 1981 (3) SA 172 (A) at 182G-H

consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime.'

[17] It is also important to consider an approach of the court sitting as a court of appeal. The position was succinctly put as follows in *State v Hadebe and Other*:⁶

'Before considering these submissions it would be as well to recall yet again that there are well established principles governing the hearing of appeals against the finding of fact. In short, in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong'.

Analysis.

[18] There are two elements to this case. The central issue in this appeal is the identification of the appellant. Sifiso was able to provide a description of the appellant and pointed him out at the identification parade. Sifiso was the only witness regarding the offence. The question is whether as a single witness to the robbery, he made a credible identification of the appellant as being one of the two people who robbed him of his father's motor vehicle.

[19] He was criticized about the statement he made to the police shortly after the incident had taken place. In that statement he told the police that he would not be able to identify his robber. He explained in his testimony that he was still rattled by the incident. The presiding officer accepted his explanation. I am satisfied that the court dealt satisfactorily with the clarification he gave regarding seemingly contradictory versions between his statement and his testimony. The court had the benefit of observing the witness testify and was a better position to make credibility findings. See *Mafaladiso v S*⁷.

[20] The affirmative finding on this aspect should put paid to the second question, which is whether the appellant gave a reasonably possibly true explanation of his possession of the vehicle. The question of identity has occupied the courts over time and the approach has become trite. The *locus classicus* is *S v Mthetwa*⁸ where Holmes

⁶ 1997 (2) SACR 642 (SCA) 645E-F.

⁷ 2003 (1) SACR 583 (SACR)

⁸ 1972 (3) SA 766 (A) at 768A

JA (as then was) warned that: "Because of the fallibility of human observation, evidence of identification is approached by courts with some caution".

[21] In *S v Sauls and Others*⁹ the court dealt with the approach to be adopted when dealing the evidence of a single witness. A common-sense approach was advocated, and the court advised as follows:

"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness. The trial judge will weigh his evidence, will consider its merits and demerits and, having done so will decide whether it is trustworthy, and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony he is satisfied that the truth has been told... The presiding officer when evaluating the evidence of a single witness should not allow the exercise of caution to displace the exercise of common sense."

[22] The witness testified that he had opportunity to observe the appellant. There was good visibility as the area was well illuminated. On the objective facts the witness was corroborated by evidence of the two police officers who found the appellant driving the vehicle few hours after it was hijacked. Applying the common-sense approach advocated in the above quoted passage, I am unable to find fault with the finding of the court a quo.

[23] The second issue for determination is whether the court a quo erred in rejecting the explanation given by the appellant. The explanation was that the appellant was sent by Brandan to go and collect a vehicle at a hospital parking lot. He did not tell the court if he asked the reason the vehicle was parked at that place. The explanation by the appellant why he fled when the police tried to stop him cannot be said to reasonably possibly true. This led to the police having to give chase, fire a warning shot and even to call for backup. This is hardly the behaviour of an innocent person.

[24] The appellant's reaction when he noticed that the police were following him, by driving the vehicle at a dangerously high speed and even into oncoming traffic was an obvious attempt to evade apprehension and arrest.

[25] The appellant was on his own admission was found in possession of this vehicle. There is uncontroverted evidence, that the vehicle had been hijacked earlier that same

⁹ *Sauls supra*

night. There is an inescapable inference that the appellant robbed Sifiso of his father's vehicle. This is fortified by the evidence of Sifiso who positively identified the appellant.

[26] The evidence of the Defence witness Turton did not support the appellant's version that one Brandon had requested him to fetch a vehicle from a parking lot about one hundred metres away. He contradicted the appellant's evidence that only he, that is the appellant, and DH went to fetch the vehicle, stating that Brandon also left the room with them.

[27] Strangely, neither Brandon nor DH returned. He further contradicted himself as to whether it was merely minutes or an hour after they had left the room that he heard gunshots. It is further strange that he did not hear the alleged discussion between Brendan and the appellant as to the payment the appellant was to receive for fetching the robbed vehicle.

[28] I am satisfied that the evidence against the appellant is overwhelming. The two police officers never lost sight of the appellant after he alighted from the vehicle. He was the only passenger of the vehicle. Sifiso also identified him.

[29] I find that the court a quo was correct to reject the version of the appellant. The evidence of the appellant is unconvincing and unsatisfactory. It is unlikely that if someone else had committed the robbery that the appellant would have been found driving the vehicle in such a brief time period, between the time the robbery was committed and the police finding the appellant in possession thereof. I agree with the court a quo that the coincidence of something like that happening is highly unlikely.

Sentence

[30] The decision of what an appropriate punishment should be is pre-eminently a matter for the discretion of the trial court. The court hearing the appeal should be careful not to erode that discretion and would be justified to interfere only if the trial court's discretion was not 'judicially and properly exercised' which would be the case if the sentence that was imposed is 'vitiated by irregularity or misdirection or is disturbingly inappropriate'. See *S v Rabie*.¹⁰

¹⁰ 1975 (4) SA 855 (A).

[31] In *S v Ngcobo*¹¹ the court dealt with the role of the appeal court regarding sentence and stated as follows:

'At the outset this is an appeal in which the interference with sentence will be justified if the trial court is shown to have misdirected itself in some respect, or if the sentence imposed was disturbingly inappropriate that 'no reasonable court would have imposed it'. The test is not whether the trial court was wrong, but whether it exercised its discretion properly'.¹²

[32] The court *a quo* is said to have erred for not having given due consideration to the period of time the appellant was in detention before he was sentenced. In *Ngcobo*, *supra*, the court considered various judgments on this aspect and concluded that:

'In short, pre-conviction period of imprisonment is not on its own, a substantial and compelling circumstance; it is merely a factor in determining whether the sentence imposed is disproportionate or unjust'.¹³

[31] The court *a quo* found, correctly, in my view that the personal circumstances of the appellant do not constitute substantial and compelling circumstances justifying deviation from the prescribed sentence. I further agree that the personal circumstances of the appellants paled into insignificance when compared to the seriousness of the offence. The appellant further has a relevant previous conviction of robbery. I am of the view that there was no reason to deviate from prescribed minimum sentence.

[32] The powers of this court are strictly circumscribed where a sentence is properly imposed. This court cannot be seen to be usurping the sentencing discretion of the trial court.

[33] I am of the view that there was no misdirection by the court *a quo* regarding sentence, and I am satisfied that the trial court gave due weight to all the factors which were placed before it in mitigation of sentence.

¹¹ 2018 (1) SACR 479 (SCA)

¹² *Ngcobo* para 11

¹³ *Ngcobo* para 14e

Order:

In the result, I propose the following order:

1. The appeal against conviction and sentence is dismissed.

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T THUPAATLASE

ACTING JUDGE OF THE HIGH COURT

2. I agree and it is so ordered.

A handwritten signature in black ink, appearing to read 'WA Karam', written over a horizontal line.

WA KARAM

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the appellant: Adv. EA Guarneri

Instructed by: Legal Aid SA

For the respondent: Adv SK Mthiyane

Instructed by: The Director of Public Prosecutions

Date of hearing: 12 April 2023

Date of judgment: 08 June 2023