



**IN THE HIGH COURT OF SOUTH AFRICA**  
**FREE STATE DIVISION, BLOEMFONTEIN**

Reportable: YES/NO  
Of Interest to other Judges:  
YES/NO  
Circulate to Magistrates:  
YES/NO

Case number: A14/2022

In the appeal between:

**THABO KHANYE**

Appellant

and

**THE STATE**

Respondent

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**CORAM:** VAN ZYL, J *et* MPAMA, AJ

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**HEARD ON:** 25 JULY 2022

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**JUDGMENT BY:** VAN ZYL, J

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**DELIVERED ON:** 28 MARCH 2023

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- [1] The appellant stood trial on one count of robbery with aggravating circumstances. He pleaded not guilty, but was convicted as charged on 26 November 2020. On the same date he was sentenced to ten years' imprisonment.

- [2] This appeal is directed against both the conviction and the sentence upon leave to appeal having been granted by the court *a quo* on 11 November 2021.

**Condonation:**

- [3] The appellant filed a substantive application for condonation for the appellant's late filing of his heads of argument and the non-filing of a certificate of completeness by the Regional Court Magistrate who presided in the court *a quo*.
- [4] At the start of the hearing of the appeal Mrs Claassens, who appeared on behalf of the State, indicated that the State is not opposing the application for condonation.
- [5] Since we were satisfied with the merits of the said application, we granted condonation at the commencement of the hearing of the appeal in terms of prayers 1 and 2 of the Notice of Motion.

**A: Ad merits**

**Grounds of appeal:**

- [6] The following grounds of appeal are set out in the Notice of Appeal:

“3.1 The Honourable Magistrate erred in finding that the appellant was properly identified, since the State led evidence that he wore a mask and therefore the witness could not see the face of the alleged perpetrator.

- 3.2 Erred in finding that the appellant's version is not reasonably possibly true.
- 3.3 Erred in regard to the impression that the court found the appellant created in regard to the rain. Impression created by attorney on behalf of appellant and not appellant himself. The evidence of the appellant however remained constant and reliable.
- 3.4 Erred in finding that the State disproved the appellant's version.
- 3.5 Erred in finding that the phone found in the possession of Enoch Mgenezulu was stolen by the appellant, in light of the witness providing a statement in this regard and upon testifying in court that the SAPS paid him to state that he received the phone from the appellant. It is submitted that a statement without supporting evidence under oath cannot be sustained.
- 3.6 The Honourable Magistrate did not properly take into account the contradictions between the witnesses for the State, in that it was firstly testified that there was good light to see the appellant and this was then contradicted by the second state witness that the lighting was not so good.
- 3.7 The Honourable Magistrate failed to properly evaluate the evidence.
- 3.8 The Honourable Court erred in finding that the state witnesses were reliable and took into account the confessions which were excluded by the court.
- 3.9 The Honourable Magistrate erred by finding that the contradictions in the testimony of the witnesses, are not material.

Said contradictions should have cast doubt in the eyes of the court, which doubt should have counted in favour of the appellant.

3.10 The Honourable Magistrate should have:

- (1) Found that, given the contradictions by the witnesses of the events, the benefit of the doubt should go to the appellant, and that the State by virtue thereof, did not prove their case beyond a reasonable doubt.
- (2) Attached less value to the testimony due to the contradictions.

3.11 The Honourable Magistrate erred in finding that the State proved its case beyond a reasonable doubt. The Honourable Magistrate should have taken into account that the burden of proof never shifts and remains with the State.

3.12 Erred by not taking into account that the defence case is in direct conflict with the State case as it stands and that these different versions should be properly weighed against each other. The Honourable Magistrate should have properly weighed the said versions against one another with reference to all the relevant facts and should have found the appellant not guilty and discharged him.

3.13 Erred by not, because of the material contradictions in the witnesses of the State, rejecting the State's version.

3.14 The Honourable Magistrate erred by rejecting the appellant's version as not being reasonably possibly true.

3.15 The Honourable Magistrate erred in finding the appellant guilty.

3.16 The Honourable Magistrate erred in dismissing the application of the appellant in terms of section 174."

**Background events:**

- [7] The background events to the incident are not in dispute.
- [8] The 40-year old Mr Mohammed Maqsood ("Mr Mac"), a citizen from Pakistan, was the owner of a grocery shop in Namahadi, Frankfort ("the shop") at the time when the robbery occurred.
- [9] Mr Mac was robbed at gunpoint outside the shop just after 20h00 on 19 November 2019, while he was waiting for his cousin, Mr Zameer, to fetch him with his motor vehicle to take him home. At the time Mr Zameer was the person who took him to the shop in the mornings and took him back home when the shop closed.
- [10] Mr Mac's shop assistant, who was also the owner of the property in which the shop was situated, Samuel Mofokeng, referred to in the evidence as "Lerato", was also present during the incident.
- [11] The robber appeared, pointed Mr Mac with a firearm and demanded money and his phone, whereafter Mr Mac in fact handed the money from the shop and his cell phone to the robber.
- [12] Almost immediately thereafter Mr Zameer arrived in his vehicle and upon hearing of the robbery from Mr Mac, he pursued the robber with his vehicle.

[13] The cell phone was eventually found in the possession of the witness, Enoch Mgemezulu.

[14] As indicated earlier, the appellant pleaded not guilty. The following plea explanation was recorded on behalf of the appellant:

"...our defence is based on that of an alibi. Two witnesses, one Puleng Mdunda and Matakale Tosetsti will be called as witnesses. And will verify that the accused on the said day was nowhere near the shop, he was indeed present, it was a rainy day that day and the accused did not even take out his vehicle for a drive on the said day." (sic)

[15] The identity of the robber is consequently the main issue in dispute.

**The evidence:**

**The complainant, Mr Mac:**

[16] The complainant, Mr Mac, testified that on 19 November 2019 at approximately after 20h00, he and his assistant, Mr Mofokeng, stood outside the shop waiting for Mr Mac's cousin, Mr Zameer, to pick him up with his vehicle and take him home. He explained that at the time Mr Zameer transported him by taking him to the shop in the morning and fetching him in the evening again. He explained that the building where his shop is, is the property of Mr Mofokeng. The building is one structure which consists of the

shop on the one side and the house of Mr Mofokeng on the other side.

- [17] During cross-examination much was made of the issue whether Mr Mac phoned Mr Zameer to fetch him or whether Mr Zameer phoned Mr Mac. In my view nothing turns around this issue, since it is not in dispute that Mr Zameer actually arrived in his vehicle to pick up Mr Mac.
- [18] Whilst standing outside the shop, the robber appeared and pointed Mr Mac and Mr Mofokeng with a firearm. Mr Mac testified that when he first saw the robber he was about eight metres away from them and when the robber was about four metres away from them, he pointed Mr Mac with a firearm.
- [19] At that stage Mr Mac and Mr Mofokeng were standing in front of the shop, almost at its door. Mr Mac testified that when he saw the robber at the distance of eight metres, he could not recognize him. However, when he saw him with the firearm at four metres from him, he recognized the robber to be Thabo. When the robber came even closer and asked about the phone and the money, Mr Mac was 100% sure that it was Thabo. (It is common cause that the reference to Thabo was a reference to the appellant. For purposes of dealing with the evidence, I will, however, continue to refer to "Thabo".)
- [20] Mr Mac testified that Thabo was a customer at his shop and even when Thabo passed his shop, the people outside the shop called him Thabo. He used to come to Mr Mac's shop once or twice a

week and most of the time Mr Mac served him. When asked how many times before the incident he served Thabo at the shop, Mr Mac responded as follows:

“...if I remember correctly maybe about I start with 5 times, but previously one and recently one I remember, it was before the incident about two times.”

- [21] According to Mr Mac he never asked Thabo his name, but he heard it from the people outside the shop who called him Thabo, to whom Thabo then responded. He testified *“I did learn from the people and the face and certain features that he is Thabo”*.
- [22] At the time when Thabo was about four metres away from him, Mr Mac started to run away. Thabo instructed him not to move or he will shoot him. Mr Mac then stopped. At that stage Mr Mac was at the door of Mr Mofokeng's house, because he actually wanted to enter the house. That was about six to seven metres away from the door of his shop. Thabo then demanded money and a cell phone from Mr Mac. When he made the said demand, he was about a metre to a metre and a half from Mr Mac. Although Mr Mac recognized him to be Thabo, he did not mention his name, because he was scared that Thabo would shoot him.
- [23] Mr Mac testified that Thabo's jersey covered his head. He further testified that he had a mask on his face, but explained that the mask was not a Covid-19 type of mask, but a cloth which covered his lips and the bottom part of his face; hence from under his nose downwards.

- [24] When Thabo demanded the money, Mr Mac threw the money on the ground and when Thabo bent down to pick up the money, *“that clothing thing gone down and I saw it is Thabo...the nose was not in the cloth and the cloth was closing the lip and the bottom of the face...the side was loosening and when he picks up the money from down the full face I could see it...”*. Mr Mac further testified that he could then see Thabo clearly.
- [25] Mr Mac testified that at the time when they were still standing in front of the shop, the visibility was good. The apollo lights and the lights inside (shining through the windows) and outside the surrounding buildings and houses, also provided light. At the time when they were standing in front of Mr Mofokeng's house, an apollo light was still providing light and the light outside Mr Mofokeng's house was also switched on. Light was also shining through the windows from inside Mr Mofokeng's house. Both Mr Mac and Thabo were standing under the outside light of Mr Mofokeng's house and Mr Mac testified that *“I could see nicely and he could see me nicely”*.
- [26] Whilst Thabo took the money, which was in a plastic bag, and the cell phone from the ground, he continued pointing the firearm at Mr Mac. After he picked up the two items, Thabo *“run downwards”*. When Thabo started running away, he pointed Mr Mac with the firearm and instructed him not to follow him, since he will then shoot him.
- [27] At that stage Mr Zameer arrived with his vehicle to fetch Mr Mac. The vehicle was coming from the left side of the shop and its

lights were facing in the direction in which Thabo was running. Mr Zameer asked Mr Mac what had happened and Mr Mac told Mr Zameer that the man who was running robbed him. At that stage Thabo was about ten metres away from them. Mr Zameer immediately followed Thabo with his vehicle, whilst Thabo was in front of the vehicle.

[28] Mr Mac testified that *"the bakkie followed him and then when he reached to him there was a corner edge, and on that edge, he goes to the side and then after I do not know what happened"*.

[29] When asked whether Mr Mac knew the parents of the appellant, he testified that he does not know any of his family members. No family member of the accused ever paid him a visit.

[30] During cross-examination further questions were posed to Mr Mac as to when he first saw the firearm and it was put to Mr Mac that he was contradicting himself. I will later return to this aspect of the evidence.

[31] It was put to Mr Mac that the appellant never visited his shop as a customer since he stayed about 8km away from the shop and there were about four to six shops which sold similar products in the area where the appellant lived. Mr Mac testified that that was not true, since the appellant did visit his shop as a customer before the day of the incident. He testified that even the day prior to the incident Thabo came to his shop and bought a cooldrink.

- [32] When asked about the lighting Mr Mac again gave the same explanation as during his evidence in chief and testified that there was enough light to see each other.
- [33] With regard to the weather, Mr Mac testified that during the incident the weather was fine, but that it was drizzling a bit before the incident occurred.
- [34] During further cross-examination Mr Mac testified that Mr Zameer drove a Kia van and when he arrived to pick up Mr Mac, he had not even stopped properly when Mr Mac told him in his language "*go and chase that guy because he took the money and the phone from me*". Mr Zameer then gave chase to Thabo with his van on his own. Mr Mac did not see whether Mr Zameer met up with Thabo and/or spoke to him. However, Mr Zameer told Mr Mac when he returned "*that it was Thabo, because he felt*".
- [35] When it was put to Mr Mac that due to the bad weather the appellant never went outside his home on the specific night, he was safely at home and that two witnesses will come and verify that he was not close to Mr Mac's shop that night, Mr Mac responded that "*...he was present that night there, there is no doubt*".

Mr Zameer:

- [36] Mr Zameer testified that Mr Mac is his cousin and also his friend. He fetched Mr Mac from the shop every day.

- [37] He testified that when he reached the shop that night, his vehicle had not even yet stopped when Mr Mac told him *"that guy he robbed me and gone"*. He further testified that *"then I could not wait him to sit in the car I proceed"*.
- [38] With regard to the general lighting in the area, Mr Zameer testified as follows:
- "It was light Your Worship, and even that the light for the big pole was also on and it was easy to anybody can see it."
- [39] Mr Zameer further testified that the lights of his vehicle were switched on and *"when I proceed followed Thabo because my cousin he also told me the name Thabo and I knew the Thabo also the name and his face and I proceed and because there is a downhill little bit that road where I followed Thabo..."*.
- [40] When asked how he knew which direction to take with his vehicle, Mr Zameer testified that Thabo was not far from his vehicle, he could see him running.
- [41] Whilst Mr Zameer was following Thabo, he saw that Thabo fell on the road in front of Mr Zameer's vehicle and when he stood up, Mr Zameer said to him *"Thabo what are you doing"*, whereupon Thabo pointed him with a firearm.
- [42] Mr Zameer explained that when he saw Thabo for the first time, Thabo was walking. However, when Thabo saw that Mr Zameer

was following him in his vehicle, he started running and that is when he fell down.

- [43] Mr Zameer testified that after the person fell down and stood up in front of his vehicle's lights, he then saw that it was Thabo. That was when he pointed the firearm at Mr Zameer and told him that should he follow him, he was going to shoot Mr Zameer. Mr Zameer remained in the vehicle and Thabo then walked away from there.
- [44] At that very same time Mr Zameer called the police, but they did not answer the phone. He then went to the police station and the police came to the scene. Mr Zameer informed the police about the identity of Thabo and he also knew where Thabo stayed at the time.
- [45] When asked how he knew Thabo, Mr Zameer explained that he has been living in Frankfort since 2009 and that he knows most of the people from there, one of which is Thabo. He knew him as a person, since Frankfort is a small community. Mr Zameer further testified that he, Mr Zameer, also has a shop there and that he sometimes saw Thabo in his shop as a customer.
- [46] The day after Thabo was arrested, Mr Zameer was at his shop when an unknown person came to the shop with a phone and told him that Thabo wanted to speak to him. He then spoke to Thabo over the phone, during which conversation Thabo said that he made a mistake by robbing Mr Zameer's cousin's shop, that Mr Zameer should please forgive him, that his parents were going to

come to Mr Zameer and whatever he stole from Mr Mac, "*they will return you back*". Thereafter Thabo's parents came to Mr Zameer's shop and asked him whether they could not come to an agreement that the case be withdrawn and that whatever "*you people lost we will return you*". Mr Zameer then told them that he cannot withdraw the case and that they should go home.

[47] Mr Zameer testified that it was Thabo who spoke to him over the phone, since he recognized his voice.

[48] With regard to the people who came to his shop, Mr Zameer testified that it was Thabo's father, whom he knew, accompanied by two ladies who were unknown to him.

[49] During cross-examination Mr Zameer testified that he and Mr Mac stay together.

[50] Mr Zameer was cross-examined on the basis of his witness statement in which he stated as follows:

"The suspect Thabo was not far from the shop and I went to him together with my brother but he tried to ran away and fell to the ground."

[51] He explained that because it was approximately only seven metres from where Mr Mac was standing, which, according to him, is a short distance, he was unsure whether to say that they were together or separate. Mr Zameer further explained that the fact that Thabo had a firearm placed a lot of pressure on him, but he did not see Mr Mac being personally present when Thabo fell.

- [52] Mr Zameer further testified that when he reached the shop of Mr Mac, he saw Thabo at a distance of about five to seven metres from there. At the time when Thabo fell to the ground, he was in front of Mr Zameer's vehicle at a distance of about two metres. Initially Thabo was walking, but when he saw that the vehicle was following him with its lights on, he started running, but almost immediately fell to the ground.
- [53] In further cross-examination Mr Zameer testified that Mr Mac never told him that it was Thabo who robbed him. Mr Mac only told him that "*that guy robbed me*". When Mr Zameer himself saw the person, he recognized him as Thabo.
- [54] With regard to the lighting, Mr Zameer testified that the Apollo light provided bright light, his vehicle's lights were also switched on and the outside lights of some of the houses were also switched on. He testified that "*there was light, there was bright light*".
- [55] Concerning the weather, Mr Zameer testified that it was drizzling before the incident. Thereafter the weather was fine and the sky was clear, it was not overcast.
- [56] With regard to the incident when a person came to Mr Zameer's shop and gave him a phone, Mr Zameer testified that the person said that Thabo wanted to speak to him. Mr Zameer testified that it was the day after the incident. Although it was the first time that Mr Zameer spoke to Thabo over the phone, Mr Zameer testified that the person on the phone introduced himself as Thabo. Mr

Zameer furthermore testified as follows with regard to his identification of Thabo as being the person to whom he spoke:

"Your Worship, if it happened with someone before the time and then he introduce himself as Thabo understanding the whole story, I have to admit this is Thabo."

[57] Mr Zameer testified that he received the call before 12h00 in the afternoon the day after the incident. It was put to Mr Zameer that the appellant had already been arrested earlier that morning at 09h00 and that he was in custody; hence, he could not have phoned Mr Zameer at the stated time. Mr Zameer responded that he does not know how Thabo was able to phone, but he did.

[58] It was further put to Mr Zameer that the appellant denies that he was at Mr Mac's shop on 19 November 2019 and that he further denies that he was the one who spoke to Mr Zameer over the phone. It was also put to Mr Zameer that the appellant would not have phoned Mr Zameer, since Mr Zameer was not the complainant in the matter and could therefore not have been of any assistance with regard to the withdrawal of the case against the appellant. Mr Zameer responded as follows:

"As I indicated earlier Your Worship, we are one family and in the town, location, the vicinity, the people knows us that is why he called me because I am the eldest and the experienced person in this area."

[59] Mr Zameer testified that it is for the same reason that the appellant's parents came to see him and not Mr Mac.

- [60] During re-examination Mr Zameer testified that immediately after Thabo left the scene after having pointed Mr Zameer with a firearm, both Mr Mac and Mr Zameer said to each other that Thabo was the perpetrator.

Mr Mofokeng:

- [61] Mr Mofokeng testified that he and Mr Mac were standing outside the shop waiting for Mr Zameer to fetch Mr Mac. A man arrived with his two kids and stood with Mr Mofokeng and Mr Mac, whilst talking to one another. This man was known to Mr Mofokeng, since they stayed in the same street, His name is Nqana. Whilst they were busy talking, a young man appeared from the street. They did not give this man much attention. When the young man was supposed to pass the man with the kids, he turned and approached them. At that stage the young man realized that what he was wearing, "*it is becoming to open*". He stopped and rearranged what he was wearing. Mr Mofokeng explained the aforesaid by testifying that the young man was wearing a tracksuit top with a hoody which was over his head. He pulled the strings of his hoody so that the hoody could cover half of his face. The young man lifted his tracksuit top and drew a firearm, which he pointed at them. The man with the kids managed to run away, so did the kids. When the young man approached Mr Mac, Mr Mac tried to run away. The young man then pointed the firearm at Mr Mac and instructed him to stand where he was. The young man then asked Mr Mac for the money and his cell phone. At that stage Mr Mac and the young man were standing approximately half a metre apart, at arm's length.

- [62] Mr Mac handed the money and the cell phone over to the young man by throwing them on the ground. The young man picked up the items, whilst still pointing Mr Mac with a firearm. The young man then left running down the street. As the young man was leaving, Mr Zameer arrived in his vehicle. Mr Zameer apparently noticed that something was wrong, because he spoke through the window of the vehicle and asked Mr Mac what has happened. Mr Zameer then drove off down the street.
- [63] When asked whether Mr Mofokeng knows the young man who robbed them, he testified that he knows him very well and pointed the appellant out in court. When asked where he knew him from, he testified that the appellant's parental home is not far from his own parental home and that they attended the same primary school, Tuto Kitsela Primary School, although the appellant was one grade ahead of him.
- [64] With regard to the lighting, Mr Mofokeng testified that there was an apollo light *"in the street in front of the street where I am staying"*, it was not far from the shop and where he was staying so *"the brightness of the apollo light is very bright or it makes very clear"*.
- [65] Two or three days after the incident the father of the appellant came to the shop of Mr Mac, which is a different shop than the one of Mr Zameer. He spoke to the one lady who assisted at the shop and said he wanted to meet with Mr Mac, since he wanted to hear from him what had happened. However, Mr Mac was not present in the shop at the time. Mr Mofokeng overheard the said

conversation. Mr Mofokeng does not know whether they eventually met or not.

- [66] With regard to the weather conditions, Mr Mofokeng testified that it rained that night, but that it was soft rain. It was put to Mr Mofokeng that *“for a few days or the day before that and during that period it was a long period of rain or a couple of days with rain and he (the appellant) never left his home and did not come close to the shop”*. Mr Mofokeng responded that *“what I am saying to you and of which I am sure with it is that it is him that I saw”*.

Mr Mgemezulu:

- [67] Mr Mgemezulu testified that he was questioned by W/O Mahamotsa about a Samsung S5 cell phone. He testified that he found the cell phone in water just a street down from where a robbery took place. He passed the scene and saw the incident. He testified that *“there was this person who had covered his face with a balaclava, who had pointed a gun to one of the Pakistani shop owner”*.
- [68] He further explained that what drew his attention were two children who came to him and then he saw people outside the shop. He was asked to explain what he saw then:

“He was pointing at this person with the gun and the person I did not know and then after that I saw ... [mechanical interruption] ... that it was handed over to him and as the street have a steep I was on the down steep of this

street and he was up the steep of the street and then when he approached towards me and then I run away." (*sic*)

"I hide in one of the houses there, after I hide and then I come another street going to where the incident happened, because I wanted to see what was happening, there I saw a van that belongs to the Pakistani, who was driving towards where that person had run to, or to the direction where that person had went to." (*sic*)

[69] At that stage there was nobody outside where the incident happened and Mr Mgemezulu walked down the street, in the same direction as where the Pakistani vehicle went. Whilst walking, there was a small hole from where a cell phone was ringing, He picked up the cell phone since he wanted to answer it, but it stopped ringing. According to the witness the phone shut down because it had been in the water in the hole. Mr Mgemezulu took the phone home. The distance from where he picked up the phone to where the incident occurred, was approximately 200 to 300 metres.

[70] Mr Mgemezulu was asked what the visibility was where he was walking and he testified that he was far from the scene where the incident took place, "*so the light was not enough*". He heard the name Thabo being mentioned at the scene, but he did not know whether they were speaking to Thabo or calling him. Mr Mgemezulu furthermore testified as follows:

"... after I hear they say Thabo because he was this one who was pointing the firearm and then this other Indian guy I saw he throw some items to that person, there is nothing that had happen." (*sic*)

- [71] W/O Mahamotsa came to look for the witness at his parental home, but the witness was not home. Eventually W/O Mahamotsa went to the workplace of Mr Mgemezulu and enquired from him which phones he were using, to which Mr Mgemezulu responded that he was using a SK and a Samsung S5. He told W/O Mahamotsa that he picked up the S5 and W/O Mahamotsa told him that the said cell phone has a connection to a robbery.
- [72] When asked about the weather Mr Mgemezulu testified that during the day of the incident there was no rain. It was only after 18h00 that it became cloudy and started drizzling. The witness explained that it was not raining hard and that is why he could walk home in the rain.
- [73] During cross-examination Mr Mgemezulu testified that from where he was standing and viewing what was happening, he could not identify any person. However, there was light at the scene where the incident occurred. He explained that the light was coming from the shop, although he did not know whether the light was coming from inside the shop or whether there was a light above the door of the shop.
- [74] During further cross-examination Mr Mgemezulu was again asked about the sequence of events. He testified that when he saw the person whose face was covered with a balaclava coming towards him, he feared for his life since the person had a gun. He went and hid himself in some house until the person had passed him. At that stage the person was walking normally, not as though somebody was chasing him. When Mr Mgemezulu came out of

the house where he was hiding, he saw the van stationary at the scene where the incident occurred. The van then drove at a fast speed in the direction where the person had gone to.

- [75] Mr Mgemezulu did not see the person falling down or stumbling.
- [76] With regard to the cell phone, Mr Mgemezulu testified that it did not cross his mind that there was any connection between the cell phone and the robbery. W/O Mahamotsa came to his workplace, enquiring about the cell phone, approximately a week or two after the incident. According to Mr Mgemezulu W/O Mahamotsa wanted him to become his informer and told him that he will get some money should he become his informer. W/O Mahamotsa told Mr Mgemezulu to take his ID to Capt. Swanepoel "*so that they could do everything*", but Mr Mgemezulu was not interested in doing so.
- [77] It was put to Mr Mgemezulu that he at some stage visited the appellant's family and indicated to them that W/O Mahamotsa said that he will give Mr Mgemezulu R1 500-00 should he testify and say that he received the cell phone from the appellant. Mr Mgemezulu testified that W/O Mahamotsa did promise him R1 500-00 although he did not know the reason for it. W/O Mahamotsa did however ask him several times whether he stole the phone from Thabo. Mr Mgemezulu never went back to W/O Mahamotsa and he did not receive R1 500-00.

W/O Mahamotsa:

- [78] The last witness for the State was W/O Mahamotsa. He testified that he was the investigating officer in the case.
- [79] He spoke to Mr Mgemezulu twice. The first time was when he confiscated the cell phone and the second time was when he told Mr Mgemezulu that he should come to the police station so that W/O Mahamotsa can take a statement from him. He at no stage offered any money to Mr Mgemezulu.
- [80] W/O Mahamotsa confirmed that it did rain the night of the incident.
- [81] W/O Mahamotsa was advised that the one witness testified that the robber's face was covered with a balaclava. W/O Mahamotsa responded that the complainant told him that the person who robbed him just had a hood over his head with the result that they could see his face and who he was.
- [82] When confronted with the fact that no formal identification parade was held, W/O Mahamotsa explained that the witness who was with the complainant when they were robbed, told W/O Mahamotsa that it was Thabo who robbed them and that they at some stage attended the same school. He further testified that that witness also explained to him where Thabo lives. W/O Mahamotsa further testified that the witness also explained to him that the appellant used to move around in town with his brother and that that is how he knows the appellant.

[83] W/O Mahamotsa denied that he offered Mr Mgemezulu R1 500-00 to testify that he received the cell phone from the appellant. He further denied that he requested Mr Mgemezulu to become his informer.

[84] That concluded the State's case.

The appellant:

[85] The appellant testified that on 19 November 2019 he was at home. He woke up shortly after 08h00 and then he went to the shop to buy a cooldrink for one of his family members and Matlakala.

[86] With regard to the weather, the appellant testified that it was drizzling. When asked to elaborate, he further testified that it did not rain the whole day. It started to rain in the afternoon, although he cannot remember what time and that it was wet outside.

[87] The appellant was at home with his wife, his child Nebo and Matlakala also arrived there at about 08h30 in the morning.

[88] When he returned from the shop, he took a bath, ate some food and then he went back to bed since he was suffering with his kidneys. He spent the whole day in bed.

[89] The appellant testified that he lives approximately 8km from Phahameng where the shop relevant to this incident, is situated. He does not know exactly where the shop is, but heard in the

evidence that it is situated in Phahameng. He has never visited the said shop. He testified that in the vicinity where he is staying there are approximately seven to eight shops from where he could buy whatever he needed.

[90] According to the appellant he does not know the complainant. The second witness, Mr Zameer, is known to him "*because we are used to each other from long ago*". He knows Mr Mofokeng by sight and they used to attend the same primary school.

[91] The appellant denied any knowledge of the robbery and again confirmed that he was at home the whole day, except when he went to buy the cooldrink.

[92] The appellant was arrested on 20 November 2019.

[93] During cross-examination when the appellant was asked about the weather, he testified that it was not raining hard like in showers, it was drizzling, but it was wet. He further testified that he does go out when it is wet, but that he did not have any reason to go out on that particular day.

[94] The prosecutor put it to the appellant that she understood his attorney to state that it was raining so much and it was so wet that he did not even take his car out for two days. The appellant confirmed same. When he was then asked whether it was because of the rain, he responded that there was no reason for him to take his car out for a drive.

- [95] The appellant testified that when he went to the shop to buy cooldrink, he walked there and according to him the outing did not even take three minutes. He bought "*Coke, R31-80, 2 litre*".
- [96] The lady who visited them at home on the particular day is a family member of his biological mother. She remained there for the whole day until late, so late that he did not even see when she left since he was sleeping. He last saw her when he said that he was going to sleep.
- [97] According to the appellant he did not know what his wife and the lady did all day. His wife did not tell him and he did not ask her. However, his wife was pregnant at the time and she was assisting his wife "*in some of the other things*".
- [98] With regard to the witness Mr Zameer, the appellant testified that he is the brother of the complainant, that he knows him and that they were on good terms. He testified that he knows Mr Zameer through one of his (the appellant's) friends. He knows Mr Zameer very well and he even used to come to the appellant's parental home to call him. However, they never went to the complainant's shop.
- [99] It was put to the appellant that considering that Mr Zameer knows him so well, Mr Zameer could not have made a mistake by identifying the appellant when he saw him in the lights of his vehicle. The appellant denied same.

[100] The appellant denied that he phoned Mr Zameer and requested him to withdraw the case. He further explained that he would not know whether his parents went to see Mr Zameer, since by then he had already been arrested.

[101] In re-examination the appellant testified that he and Mr Zameer did not visit each other on a daily basis. He explained as follows:

“I did not even go and pay a visit to him, Mr Zameer is the one who come to my friend, because he was a friend to my friend and he, Mr Zameer, is the one who went to my friend and this friend of mine is staying at my parental place.”

Ms Matlakala Tsotetsi

[102] Ms Matlakala Tsotetsi was called as a defence witness. She testified that her mother is a relative to the appellant's father.

[103] She testified that during the time when the appellant was living behind her, which was also the case during November 2019, she visited the appellant on a daily basis.

[104] The day before the appellant's arrest she also went to the appellant's home at about past 08h00 or just before 09h00. He was staying with his wife and children. She woke them up, because they were still sleeping. The appellant's wife opened the door for her. She asked her what she wanted. The witness told her that she wanted the appellant to buy cooldrink for her, because she felt like having some cooldrink. The appellant's wife

went to the bedroom and woke him up. His wife told her that the appellant did not appear to be well, because of his kidneys. The appellant went to the shop and bought her cooldrink, namely two 2 litres of Coke. The outing to the shop took about five minutes. The rest of the day the appellant was in bed, since he was not feeling well.

[105] Ms Tsotetsi testified that except for going out to buy the cooldrink, the appellant never left the house that day. She sat with his wife for the whole day. She just went out to the toilet and then returned to the appellant's wife. She only left to go home just before 12h00 at night, because they were watching television. According to Ms Tsotetsi the appellant's wife was also not well, since she was pregnant.

[106] According to her if the appellant had left the house during the time when she was there she would have seen him.

[107] With regard to the weather conditions, Ms Tsotetsi testified that the rain was drizzling the whole day.

[108] During cross-examination Ms Tsotetsi testified that it was her habit to visit the appellant's house from the morning till approximately midnight. She then just sat there. This habit started since the time when the appellant started renting that house, which was February or March of that year.

[109] When she was then asked how she can remember what she did on 19 November 2019, she responded that it was "*because I was*

*there*". When asked what happened on 20 November 2019 she testified that the police arrived to arrest the appellant. When asked what happened on 18 November 2019, she testified "*I cannot remember well*".

- [110] Ms Tsotetsi was asked why she expected the appellant to go to the shop when he was so sick. The question had to be put to her a couple of times before she gave a straight answer to it. She answered as follows:

"He said if we go by ourselves to the shop buy the drink we are going to spend his change."(*sic*)

When asked whether she did not feel sorry for the appellant, she testified that she did feel sorry for him, "*but he said he will go*".

- [111] It was further put to Ms Tsotetsi that the appellant testified that he only bought one 2 litres of Coke, to which she responded that he bought two of those.

- [112] It was further put to her that the appellant testified that it did not rain the whole day, to which she responded that it did rain.

**Applicable legal principles:**

- [113] The court *a quo* correctly stated that the guilt or otherwise of an accused must be arrived at after considering the totality of the evidence, which is to be considered holistically. See **S v Van Aswegen** 2001 (2) SACR 97 (SCA) at para [8].

- [114] In **S v Chabalala** 2003 (1) SACR 134 (SCA) the approach to be followed in a criminal case is set out as follows at para [15]:

[15] The trial court's approach to the case was, however, holistic and in this it was undoubtedly right...The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. ...”

- [115] It is trite that evidence pertaining to the identification of a person, must not only be truthful, but also reliable. See **S v Sithole and Others** 1999 (1) SACR 585 (WLD) at 591 C – D. See also **S v Ndika and Others** 2002 (1) SACR 250 (SCA) at 256 G.

- [116] Evidence pertaining to identification is therefore to be approached with caution. In the well-known *dicta* in **S v Mthetwa** 1972 (3) SA 766 (A) at 768 A – C the applicable principles are set out as follows:

“Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not

exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities; see cases such as *R. v Masemang*, 1950 (2) SA 488 (AD); *R. v Dladla and Others*, 1962 (1) SA 307 (AD) at p. 310C; *S. v Mehlahe*, 1963 (2) SA 29 (AD)."

[117] There is no burden of proof on an accused with regard to an alibi defence. See **S v Mhlongo** 1991 (2) SACR 207 A at 210 D.

[118] A court must not consider an alibi in isolation, but in the totality of the evidence and the court's impression of the witnesses. See **S v Hlongwane** 1959 (3) SA 337 (A) at 341 A.

[119] In **S v Ngcina** 2007 (1) SACR 19 (SCA) at para [18] the following is stated pertaining to an alibi defence:

"...courts occasionally fall into the error of treating an alibi defence as a separate issue to the issue of identification. An alibi defence is essentially a denial of the prosecution's case on the issue of identification...."

[120] The ultimate test remains whether the prosecution has furnished proof beyond reasonable doubt with regard to the issue of identity. See **S v Ngcina**, *supra*, at para [19].

#### **Evaluation of the evidence:**

[121] The court *a quo* correctly found that it was not disputed that the appellant was well known to Mr Mofokeng and to Mr Zameer. The complainant, Mr Mac, testified that the appellant was known

to him having attended his shop previously, with Mr Mac overhearing the complainant being called Thabo. This was disputed by the defence on the basis that the appellant never attended the shop of Mr Mac.

[122] Both Mr Mac and Mr Mofokeng testified that the visibility was good at the scene where the incident occurred and they explained the different sources of light at the scene. Although this evidence was challenged during cross-examination, the court *a quo*, in my view, correctly found that there was no evidence to gainsay the aforesaid evidence and that it is to be accepted that the lighting and the visibility in the area of the scene was good. Mr Zameer's evidence with regard to the lighting in the area was also to the effect that the visibility was good. The evidence of Mr Mgemezulu did not detract from the aforesaid evidence, considering that he was at a distance of approximately 200 to 300 metres from the scene. In fact, his evidence corroborated the evidence of Mr Mac and Mr Mofokeng with regard to an outside light at the door of Mr Mofokeng's house.

[123] In my view it is evident that the lighting in the circumstances was such that it is to be accepted that the visibility was good.

[124] With regard to the identity of the appellant, Mr Peyper, who appeared on behalf of the appellant, submitted that the evidence of Mr Mac and Mr Mofokeng was riddled with contradictions as to what occurred during the robbery and also with regard to their ability to have identified the appellant as the robber.

[125] I cannot agree with the aforesaid submission. As correctly submitted by Ms Claassens, the mobility of the scene and the fact that the firearm was pointed at Mr Mac and Mr Mofokeng at different stages of the incident, are of importance in the evaluation of the evidence. As it was put in **S v Bruiners** 1998 (2) SACR 432 (SE) at 439 E – F:

“Ondervinding het geleer dat daar byna nooit twee of drie getuies sal wees wat presies dieselfde getuienis sal aflê met betrekking tot dieselfde voorval of gebeure nie. Dit is derhalwe vir die verhoorhof om te besluit, in aggenome die getuienis as ‘n geheel, of sodanige verskille wesenlik genoeg is voordat gesê kan word dat die staat se weergawe nie aanvaar kan word nie.”

The aforesaid principle was also referred to by the Constitutional Court in **S v Liesching** 2019 (1) SACR 178 (CC) at para [96]:

“Two witnesses seldom give identical accounts of the same incident, so not all errors or contradictions between their evidence will affect their credibility.  
...”

[126] The aforesaid principles are also applicable to the discrepancies between the evidence of Mr Mac and that of Mr Shameer.

[127] In my view there were no serious contradictions in the witnesses’ description pertaining to the essence of how the robbery occurred and of the events that followed when Mr Shameer arrived in his vehicle.

[128] Mr Peyper, during his oral argument, also submitted that the witnesses contradicted themselves pertaining to the visibility of the robber's face. In this regard he submitted that Mr Mac testified about a mask, Mr Mofokeng testified about a hoodie and Mr Mgomezulu testified about a balaclava. In my view the following aspects of their evidence are to be taken into consideration:

1. Mr Mac testified that Thabo's jersey covered his head. Since it only covered his head, it was in all probability the hoodie of the jersey. The so-called mask was described as a cloth which only covered the robber's face from under his nose downwards, which cloth in any event dropped downwards when the robber picked up the cell phone and the money, whereupon his face became visible.
2. Mr Mofokeng testified about a tracksuit hoody which covered half of the robber's face. As mentioned, this description is in my view not irreconcilable with Mr Mac's description of the jersey. The fact is that according to this description, the face of the robber was still visible.
3. With regard to Mr Mgomezulu's evidence with regard to a balaclava must be considered against the background that he was 200 to 300 metres away from the scene of the robbery. There was no evidence as to the distance and the lighting in the area at the time when the robber passed Mr Mgomezulu whilst he was hiding in some house. His

evidence was in any event not relied upon by the State for purposes of identification.

- [129] In addition to the aforesaid, Mr Zameer's evidence with regard to the identity of the appellant as the robber serves as corroboration for the identification of the appellant by the other two witnesses. In this regard one must be mindful of the fact that there was no mention in the evidence of Mr Zameer that something prevented him from seeing the whole face of the appellant, which occurred right in front of his vehicle and in the headlights of his vehicle.
- [130] All the witness had adequate time and opportunity for purposes of identification and they knew the appellant prior to the incident.
- [131] The state witnesses testified with clarity and confidence about the identification of the appellant. In the circumstances it appears that their evidence is not only truthful, but also reliable.
- [132] With regard to the weather conditions, the court *a quo* found as follows at p.287, line 11 to p.288, line 11 of the judgment:

"The assessment of the version starting with the weather conditions. At the beginning of the trial a plea explanation which the accused confirmed was furnished to the effect that the accused was nowhere near the shop of the complainant that day. That it was a rainy day and he did not even take out his car for a drive on that day. This version was maintained throughout the testimony of the state witnesses and created the impression that it was raining so much, so that the accused did not get out of the house at all that day, nor take out his car for a drive. It became apparent during the testimony of accused, that it did not rain the whole day, but only started to

drizzle in the afternoon. He testified that although he could not say when it began raining, it was wet outside and that showed that it had rained. This was contrary to the earlier impression that it had rained so much that the accused could not take his car for a drive, because of the rain that day. It transpired in the testimony of the accused and Ms Tsotetsi that the accused went out briefly and walked to buy Ms Tsotetsi a cold drink. It is apparent from the testimony of the accused when his attorney asked him about the weather conditions that even when it began to rain, it was only drizzling and the testimony that he had to this effect was nothing other than the wetness that he saw outside and most probably the following day since he slept the whole day. I therefore accept the state witnesses' testimony that it began to drizzle in the late afternoon and it was not raining the whole day."

[133] Mr Peyper submitted that the wrong impression with regard to the rain was created by the attorney who acted on behalf of the appellant in the court *a quo* and not the appellant himself.

[134] I cannot agree with the aforesaid contention. The attorney in the court *a quo* obviously gave the plea explanation and posed the appellant's version to the different witnesses based on the instructions which he received from the appellant. This version was continued with throughout the State's case. It should therefore be accepted that at no stage did the appellant indicate to his attorney that what he was posing to the State witnesses, was not in accordance with his instructions or his version. Throughout the trial many discussions were held, which the court *a quo* itself was also part of, with regard to the difference between drizzling rain and rain showers. It was only subsequent to all of the aforesaid that the appellant, during his evidence, gave a version with regard to the rain which was different to what had

been posed on his behalf to all the witnesses and was eventually also contradicted by his alibi witness.

[135] With regard to the evidence of Ms Tsotetsi the following:

1. In her evidence in chief it was her version that she woke up the appellant and his wife because she wanted the appellant to buy her cooldrink. She went further by testifying that the appellant's wife went to the bedroom to wake him for the said purpose.
2. However, when Ms Tsotetsi she was confronted about the fact that despite the appellant being sick, she still requested him to go to the shop, she out of the blue gave an explanation that the appellant was the one who insisted to go to the shop instead of his wife and Ms Tsotetsi.
3. The appellant testified that Ms Tsotetsi is a family member of his biological mother. She, however, testified that her mother is a relative to the appellant's father.
4. Despite the simplicity of her version, Ms Tsotetsi and the appellant differed pertaining to the number of bottles of cooldrink which he bought.
5. I have already dealt with the contradiction pertaining to the rain between Ms Tsotetsi's evidence and that of the appellant.

6. Ms Tsotetsi's version that she has been going to the house of the appellant and his wife since February or March 2019 up to 19 November 2019 every day and for the whole day is nonsensical and highly improbable.
7. At the beginning of the trial it was indicated that the appellant will be calling two witnesses who will confirm his alibi. However, eventually the appellant did not call his wife as a defence witness, without providing any explanation thereto.

[136] The court *a quo* specifically stated at p.292, lines 16 to 18 of the judgement, that the version of the appellant need only be reasonably possibly true and that there is no onus on the accused to prove his alibi.

[137] In my view the court *a quo* correctly applied the abovementioned legal principles in her evaluation of the evidence.

[138] The following findings by the court *a quo* as stated at p. 293, line 17 to p. 294, line 2 of the judgment, cannot, in my view, be faulted:

"I thus reject the version of the accused's alibi as not reasonable possible true.

I find that the evidence of the identity presented by the State as reliable, the situation and mobility of the scene, the visibility, opportunity to observe and prior knowledge of the accused by the witnesses is in my view proved by the State beyond reasonable doubt.

I further find that the evidence of Zameer and Lerato [Mr Mofokeng] of attempts made [by] and on behalf of the accused to have the case withdrawn as credible and most probable in the circumstances.”

[139] Lastly in relation to the merits of the appeal, I need to deal with the ground of appeal set out in paragraph 3.16 of the Notice of Appeal to the effect that the Magistrate erred “*in dismissing the application of the appellant in terms of Section 174*”. From a proper reading of the record it is evident that the Magistrate did not dismiss the application, since no such application had in fact been made. Although the Magistrate could and should have handled the defence’s indication of its intention to bring an application in terms of Section 174 differently, it was the defence who decided not to persist with such an application.

[140] The appeal against the conviction can consequently not succeed.

### **B: Ad sentence**

[141] In the notice of appeal the following grounds of appeal against the sentence are set out:

“The Honourable Magistrate erred by sentencing the appellant to a sentence that is shockingly inappropriate, for the following reasons:

- 4.1 The Honourable Magistrate erred by not giving proper consideration to the appellant's personal circumstances, more specifically his chances of rehabilitation.
- 4.2 The Honourable Magistrate erred by not taking into consideration that the appellant was a first offender.

4.3 ...

4.4 The Honourable Magistrate erred in over-emphasising the aggravating circumstances and the nature of the crime.

4.5 The Honourable Magistrate erred in under-emphasising the mitigating circumstances of the appellant.

4.6 The Honourable Magistrate erred in over-emphasising the crime and community interests at the expense of the offender and imposing a shocking heavy sentence.

4.7 The Honourable Magistrate erred by not taking into consideration other appropriate forms of sentence and properly weighing them up against one another."

[142] In terms of The Criminal Law Amendment Act, 105 of 1997, the prescribed minimum sentence for robbery with aggravating circumstances is 15 years imprisonment for a first offender.

[143] The court *a quo* found substantial and compelling circumstances to be present and imposed a lesser sentence than the prescribed minimum, in my view correctly so.

[144] The court *a quo* imposed a sentence of 10 years imprisonment.

[145] It is trite that sentencing is pre-eminently a matter for the discretion of the court *a quo* and that a court of appeal should be loath to interfere with an imposed sentence. In **S v Petcar** 1998

(3) SA 571 (A) at 574 D the applicable principles are stated as follows:

“This Court’s powers to interfere with a sentence on appeal are circumscribed. It may only do so if the sentence is vitiated by (1) irregularity, (2) misdirection, or (3) is one to which no reasonable court could have come, in other words, one where there is a striking disparity between the sentence imposed and that which this Court considers appropriate.”

[146] The court duly referred to and applied the three elements of sentencing in its consideration of an appropriate sentence, namely the personal circumstances of the appellant, the nature and seriousness of the offence and the interests of the community. The court further considered the objects of punishment, being prevention, retribution, deterrence and rehabilitation.

[147] The following personal circumstances of the appellant were duly considered by the court *a quo*:

1. At the time of the sentencing the appellant was 34 years old.
2. He is the father of three minor children, who at the time were 10 years, 6 years and 3 months old, respectively.
3. The appellant is customarily married to the mother of the three children.
4. At the time of his arrest, the appellant was employed as long-distance truck driver.
5. The appellant is a first offender.

[148] It is evident from the judgment on sentence that the court *a quo* also took the appellant's possible rehabilitation into consideration in his favour.

[149] The court further took the following mitigating factors into consideration:

1. No actual violence or injury was inflicted on any person.
2. The amount of the goods which were robbed are not that substantial.
3. The cell phone was later recovered, although not due to any doing on the part of the appellant.

[150] The court considered the following aggravating factors:

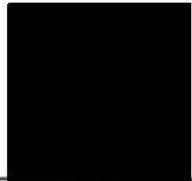
1. The prevalence of the offence in the court's jurisdiction.
2. The seriousness of the offence.
3. The fact that the appellant denies any wrongdoing and there is no remorse on his side.

[151] In the totality of the circumstances of this appeal I cannot find that there is any basis upon which we can interfere with the sentence of 10 years imprisonment.

[152] The appeal against the sentence can consequently not succeed.

**Order:**

[153] The appeal against the conviction and sentence is dismissed.

  
C. VAN ZYL, J

I concur:

  
L. MPAMA, AJ

On behalf of the appellant:

Mr P. Peyper  
Instructed by:  
Peyper & Botha Attorneys  
Bloemfontein

On behalf of the respondent:

Adv. B.G Claassens  
Instructed by:  
Office of the Director  
Public Prosecutions  
Bloemfontein