

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

CASE NO: CA&R171/2021

In the matter between:

YOLISA KHATU

Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

Bloem J

1. The appellant was charged with robbery with aggravating circumstances in the regional court, Gqeberha. It was alleged that on 12 March 2019 and at Booyenspark, Gqeberha he assaulted Xolile Mngupane (the complainant) and thereafter forcefully took a Mazda motor vehicle and a cell phone from him, while pointing a firearm at him. The magistrate acquitted the appellant of robbery, but convicted him of theft of the motor vehicle and cell phone. He sentenced the appellant to 15 years' imprisonment. The magistrate granted the appellant leave to appeal against sentence, but refused him leave to appeal against conviction. It is with the leave of this court that he also appeals against conviction.

2. The complainant's undisputed evidence was that on the day in question, he stopped his taxi at a four way intersection in Booyenspark. At the time he had four passengers in his taxi, three males at the back and a female in front. One or more of the passengers at the back tried to hold his left shoulder. He felt something being pressed against his neck. He thought that it was a firearm. He managed to open the driver's door of the taxi and ran away. One of the passengers at the back moved to the front and drove off in the taxi. He

stopped a police vehicle and gave a description of his taxi to the policemen. He informed them that one of his passengers had a gold tooth and dreadlocks and described the clothing of the other. The policemen drove off. A policeman later contacted him and informed him that the vehicle, that he had described to them, had been found. He was collected and taken to his vehicle, where a bag was shown to him wherein his cell phone was found. He testified that he had left his cell phone in his vehicle before he had ran away.

3. Charl Jonk testified that he and a colleague, constable Adams, were patrolling when they received a report that a red vehicle had been hijacked. When they came across that vehicle, he saw one person sitting in the driver's seat while another one was pushing the vehicle. He drove in the opposite direction and passed that vehicle, but made a u-turn. The person behind the steering wheel of the red vehicle jumped out and ran into nearby bushes. He was wearing a brown top and a white cap. The man who pushed the red vehicle was wearing a grey top. He had a black bag on his back. He ran in the direction of nearby houses, leaving no one inside the red vehicle. Constable Adams had in the meantime requested for assistance. Shortly thereafter sergeant Killian and constable Justin Petrus reported to them that they had chased two men and managed to apprehend one of them.
4. Constable Petrus testified that he and sergeant Killian were patrolling in the Kwanoxolo area at about 19h00 on 12 March 2019, when they received a report over the radio of a red vehicle that had been hijacked. Constable Adams described the clothing that the two men were wearing to them. As they continued patrolling the area, they saw two men emerging from the bushes. They ran away when they saw the policemen. They ran after the men and managed to apprehend one of them where he was laying in what turn out to be a vlei in a bushy area. They searched him and found a black cell phone in one of his pockets. He also had a backpack in which they found a grey top. They took him to the Bethelsdorp police station where the complainant was in attendance. He identified the cell phone, that the police found in the suspect's possession, as his. That concluded the state's case.

5. The appellant testified that on the day in question he travelled in one taxi from Motherwell to Kwanoxolo, where he was awaiting another taxi to take him to Booyenspark. A maroon or red vehicle (the red vehicle) stopped and a woman alighted. A police vehicle drove past them in the opposite direction, but made a u-turn shortly thereafter. The police fired shots at the red vehicle. Two young males emerged from the red vehicle and ran into nearby bushes. At that stage, he was approximately four meters from the red vehicle. He ran after the two men, but veered off in the direction of the houses. He ran because the policemen were firing shots in his direction. He testified that he was arrested in a street in Kwanoxolo, not the bushes, after a policeman had instructed him to stop running. He denied that he had a cell phone on his person when he was arrested.
6. The magistrate accepted the evidence of all the state witnesses. He described them as honest and credible witnesses. On the other hand, the magistrate described the appellant's evidence as unbelievable. He rejected it as false in those respects where it differed from the evidence given by the state witnesses. The magistrate found that the complainant was not a single witness. Regarding the evidence in respect of the appellant's identity, the magistrate found that he was *"convinced that there is enough evidence with regard to his identity, which proves his identity beyond reasonable doubt and I believe that evidence to be correct"*.
7. The evidence of a single witness should be approached with caution. The aim of the careful consideration of the evidence of a single witness is to reduce the risk of a wrong finding and a wrong conviction. That does not mean that the exercise of caution should displace the exercise of common sense. The magistrate found that the complainant was not a single witness because his evidence was corroborated by circumstantial evidence. He found corroboration in the fact that the complainant's cell phone was found on the appellant and that the appellant hid in the vlei. In my view, the complainant was a single witness, which required his evidence to be carefully considered. That is so because only he gave evidence regarding the circumstances under which he abandoned his taxi. The aspects upon which the magistrate relied

for the finding that the complainant was not a single witness do not undo the fact that the complainant was single witness.

8. Evidence of identification should also be approached with caution. In *R v Shekelele*¹ it was held that in all cases that turn on identification, the greatest care should be taken to test the evidence. The appellant's evidence was that he was wearing a green skipper (T-shirt) underneath a grey top and black pants. The magistrate found that it was the appellant who was wearing the grey top and who stole the red vehicle and cell phone. It is that finding that is central to this appeal. It was submitted on behalf of the appellant that that finding was incorrect.
9. The complainant testified that he had not seen any of his passengers before the day in question. While he was driving, he saw the passengers at the back seat for a few seconds when he looked over his shoulder and when he looked at them through the rear view mirror when he made enquiries about the taxi fare. As he was running away, he also looked backwards when it sounded that the driver of his taxi experienced difficulties changing the gears of the taxi.
10. The complainant's description of the appellant's clothing did not include a green T-shirt, although he said that "*there was a T-shirt underneath*" when he was cross-examined about the grey top that one of his passengers was wearing. It was constable Petrus who testified that the person who they had arrested was wearing a green T-shirt. The appellant corroborated that piece of evidence when he confirmed that he was wearing a green T-shirt. Furthermore, the complainant testified that one of his passengers was dressed in a grey top and black pants. Although sergeant Jonk made no secret of the fact that he would be unable to identify the two passengers who ran away from the red vehicle, he testified that one of them was wearing a grey top. Constable Petrus testified that the person who had been found in the vlei, had a backpack in which they found a grey top. All the witnesses

¹ *R v Shekelele* 1953 (1) SA 636 (T) at 638G.

accordingly testified that the person was either wearing a grey top or had it in his backpack.

11. What presented a bigger problem for the appellant is the complainant's cell phone. The complainant testified that he left his cell phone on the driver's seat before he abandoned his taxi. Constable Petrus testified that, when they searched the appellant after his arrest, they found a cell phone in one of the pockets of his trousers. The appellant denied that a cell phone was found in his possession. It is undisputed that the complainant left his cell phone in his taxi. The complainant's evidence regarding the identification of the cell phone (that constable Petrus testified about) as his, went unchallenged. The issue accordingly is whether or not that cell phone was found in the appellant's possession upon his arrest.
12. The magistrate accepted constable Petrus' evidence that he found the complainant's cell phone in the appellant's pocket when he was arrested. Mrs McCallum, attorney for the appellant, submitted that the magistrate should have rejected constable Petrus' evidence. As part of the attack on his evidence, counsel referred to a portion thereof where he testified that they found the appellant in a bushy area. He *"was completely submerged but his face was above the water. He was not wet"*. While constable Petrus' evidence in that regard seems to be improbable, nothing turns on it. His evidence relevant to the appellant's grey top was confirmed by other witnesses, including the appellant. It must therefore be accepted. His evidence that the complainant's cell phone was found in the appellant's possession was not shaken.
13. It is trite that the factual findings of a trial court are presumed to be correct unless those findings are plainly wrong. An appeal court will only reverse those findings where it is convinced that they are plainly wrong.² It is improbable that the police would have deprived the complainant the use of his cell phone from 12 March 2019 until 13 August 2019, when the complainant testified, only to frame the appellant. For that plot to be plausible, it would

² *Rex v Dhlumayo and another* 1948 (2) SA 677 (A) at 706.

have had to have been hatched by the policemen and the complainant immediately upon the appellant's arrest, since the cell phone was in the possession of the police since then. In my view, the appellant's denial that the cell phone was found in his possession is so improbable, in the light of all the evidence, that his evidence in that regard cannot be reasonably possibly true. The magistrate accordingly correctly found that the complainant's cell phone was found in the appellant's possession. Since the appellant has failed to give any explanation for his possession of the complainant's cell phone, the only explanation therefor is that the appellant unlawfully removed it from the complainant's taxi with the intention of permanently depriving the complainant thereof.

14. In all circumstances, I am unable to find that the magistrate was wrong when he found that the complainant's cell phone was found in the appellant's possession. When one considers that finding; that it was the same person seen by the complainant and sergeant Jonk who was dressed in a grey top and that top having subsequently being found in the backpack by constable Petrus; that the appellant was dressed in a green T-shirt; that sergeant Jonk and constable Petrus testified about the same red vehicle described by the complainant, it must be concluded that the magistrate correctly found that the identification of the appellant by the complainant and constable Petrus was reliable. There is accordingly no justifiable basis for interfering with the magistrate's findings in that regard. In the circumstances, the appeal against conviction must be dismissed.
15. Although the appellant was charged with robbery with aggravating circumstances, he was convicted of the theft of the complainant's vehicle and cell phone. He should accordingly have been sentenced for the offence of which he had been convicted. Mrs McCallum submitted that the sentence which the magistrate has imposed reasonably creates the impression that he sentenced the appellant as if he had been convicted of robbery with aggravating circumstances. Mr Vena, counsel for the state, submitted that 15 years' imprisonment was an appropriate sentence given the circumstance of this case.

16. Sentencing falls within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. An appeal court can only interfere where there has been irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.³
17. To arrive at an appropriate sentence, a sentencing court must take into account the personal circumstances of an offender; the nature of the offence and the circumstances under which it was committed; and the interests of society. The magistrate was informed by the appellant's attorney that, as at January 2020, he was 26 years old, unemployed, single, left school whilst doing standard nine and the father of three minor children who reside with their respective mothers. During 2014 he was convicted of attempted theft and sentenced to a fine of R1000 or 6 months' imprisonment, which was wholly suspended for five years on certain conditions.
18. There can be no doubt that the theft of a motor vehicle is a serious and prelevant offence, and so is the theft of a cell phone. It is a mitigating factor that both the complainant's taxi and cell phone were recovered on the same day of having been stolen. Members of society expect the courts to deal harshly with persons who show no respect for other persons' property.
19. In *S v Davies*⁴ the appellant was convicted of theft of a Mercedes Benz vehicle, albeit on the basis of *dolus eventualis*. The trial court sentenced him to five years' imprisonment on the basis of the facts contained in the statement wherein he admitted guilt to the offence of theft. With the leave of the Supreme Court of Appeal he appealed against that sentence. The full court saw "*nothing to suggest that a sentence of five years' imprisonment was shocking or inappropriate to the facts of that case, the personal circumstances of the appellant or the concerns of the community.*" It found that the sentence was not "*out of touch with the sentences imposed throughout the country and*

³ *S v Bogaards* 2013 (1) SACR 1 (CC) at 14d-e.

⁴ *S v Davies* 2016 JDR 1866 (GJ).

by the highest court in respect of theft of motor vehicles". The appeal was accordingly dismissed.

20. In *S v Connell*⁵ the appellant was convicted of theft of a motor vehicle and sentenced to five years' imprisonment. The appeal against sentence was successful because the appeal court found that the appellant, a 27-year old first offender with the mentality of a 13-year old child, had acted on the spur of the moment when he took the vehicle for a joyride. The sentence was altered to one of correctional supervision for two years.
21. In *S v Naidoo*⁶ the 34-year old appellant was convicted of the theft of a truck, the value of which was in excess of R500 000. The magistrate sentenced him to 15 years' imprisonment. On appeal that sentence was reduced to eight years' imprisonment of which three years were suspended for five years on condition that the appellant not be convicted of theft or an offence of which dishonesty is an element committed during the period of suspension. That sentence was reduced despite the fact that the court found more aggravating than mitigating circumstances.
22. I have used the above authorities as a guide in the determination of an appropriate sentence. I have satisfied myself that, given the circumstances of the present appeal, a sentence of 15 years' imprisonment is so disproportionate to the offence committed by the appellant, his personal circumstances and society's interest that no reasonable court could have imposed it. There is merit in the submission made by Mrs McCallum. That being the case, the sentence must be set aside. In my view, a sentence of seven years' imprisonment will be appropriate.
23. In the result, it is ordered that:
 1. The appeal against conviction is dismissed.
 2. The appeal against sentence is upheld.

⁵ *S v Connell* 2001 JDR 0389 (T)

⁶ *S v Naidoo* 2010 (1) SACR 499 (JGS).

3. The sentence of 15 years' imprisonment is set aside and replaced with the following:

"The accused is sentenced to seven years' imprisonment."

4. The sentence is antedated to 15 January 2020.

GH BLOEM
Judge of the High Court

I agree.

A GOVINDJEE
Judge of the High Court

For the appellant: Mrs HL McCallum of Legal Aid South Africa,
Makhanda.

For the state: Mr L Vena, of the Office of the National
Director of Public Prosecutions, Makhanda.

Date of hearing: 8 March 2023.

Date of delivery of judgment: 14 March 2023.