

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: A49/2018

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES / NO

[12 JUNE 2020]


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SIGNATURE

In the matter between:

HLATSWAYO, STANLEY VUSI

APPELLANT

And

THE STATE

RESPONDENT

J U D G M E N T

MUDAU, J:

- [1] The appellant and his three co-accused appeared before the regional court, Modimolle on 3 charges of robbery with aggravating circumstances read with the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997. The appellant was convicted on all charges. His co-accused were acquitted of all charges. A sentence of 10 years' imprisonment was imposed on each of the three charges coupled with an order for the sentences to run concurrently

pursuant to section 280 (2) of the Criminal Procedure Act, No. 51 of 1977 (CPA). The effective sentence was therefore 10 years' imprisonment, the magistrate having found that there were substantial and compelling circumstances justifying a lesser sentence in favour of the appellant. The trial magistrate refused the appellant leave to appeal against sentence. The appeal against conviction is with leave of the magistrate. The appeal turns on the quality and adequacy of the circumstantial evidence upon which the appellant was convicted by the trial magistrate. After an agreement with counsel, this appeal was disposed of on papers without further oral submissions in open court, pursuant to section 19 (a) of the Superior Courts Act¹.

- [2] The events that gave rise to the appellant's convictions and sentence are largely common cause. Briefly, they are as follows. At approximately 9 PM on the evening of 8 February 2015, a group of six men armed with firearms robbed the complainants in respect of the three charges at a tuck-shop in Rooiberg. Various items that included cash from the till register; various cell phones, cigarette cartons, airtime vouchers and a camera were stolen totalling thousands of rands in value. The victims were shop assistants and customers. The robbers were travelling in a silver Toyota Avanza with registration number BY 25 ZP GP owned by the appellant. After the robbery incidents, the robbers fled the scene in the Avanza.
- [3] Constable Makhubela, a member of the SAPS was on patrol duty that night in the area. Upon receipt of the report regarding the robbery, as well as the description of the motor vehicle involved, he took position at a T-junction on a road he knew, the robbers were likely to take. Not long thereafter, the Avanza drove by and he gave chase in his police patrol bakkie. In the process, the

¹ 10 of 2013

robbers stopped and abandoned the Avanza. Approximately six men fled from the scene into a nearby farm by jumping over the fence. As he was alone, he did not follow the robbers any further. Some of the stolen items including cartons of cigarettes were found inside the motor vehicle including other incriminating objects such as live ammunition. The ownership of the motor vehicle was traced through its registered address in Pretoria, albeit in someone else's names.

- [4] Based on the information provided, the police traced the appellant to an address at Kameelrivier, Mpumalanga, where he lived with his grandparents. However, the appellant was arrested at his girlfriend's house on 22 February 2015 in Siyabuswa on information provided. Subsequent to the appellant's arrest, his co-accused were also arrested. All four of them were linked to the motor vehicle that was used by the fingerprint evidence. However, since the fingerprints were lifted outside of the said motor vehicle, all the co-accused court were given the benefit of the doubt and as a result, acquitted.
- [5] Other than the fingerprints evidence found outside the vehicle the evidence relied upon in convicting the appellant was that of the arresting police officer, Constable, Ngobeni. The trial magistrate found Ngobeni, the investigating officer regarding the case, as an honest witness and accepted his evidence. Ngobeni testified to the effect that, he traced the appellant to his girlfriend's address that night. Upon arrival, the girlfriend's mother denied upon an enquiry that the appellant was there. However, the girlfriend's mother granted him permission to search the house. In the girlfriend's bedroom underneath the double bed, he saw a pair of running shoes, protruding. The appellant was hiding under the bed. He thereafter called the appellant by his name and told

to get out, which he did. The appellant was then arrested which led to the arrest of the co-accused.

- [6] Constable Ledwaba was one of the police officers who responded to the incident of robbery and went to the scene where the motor vehicle used in the robbery was abandoned about 17 km away in response to Makhubela's call. He testified that, all the doors of the motor vehicle were left wide open. The Avanza keys were missing from the ignition.
- [7] The following Monday, on 9 February 2015 following the incident, investigations took them to the appellant's parental home in Mpumalanga. The appellant was not there. It was in appellant's bedroom under the mattress that the car keys of the Avanza involved in the robbery incident were found. However, the keys could only turn the engine on, but the car would not start.
- [8] During cross-examination, Ledwaba disputed that the motor vehicle keys were next to the TV stand. Ledwaba disputed a suggestion that the motor vehicle broke down when the appellant was on his way from Thabazimbi where he left it, but could not find it the next day. Ledwaba reasoned that the proposition could not be true is the motor vehicle was never reported as stolen at the Rooiberg police station in the area where it was found abandoned. Ledwaba also disputed that there was a spare key inside the motor vehicle as he and other officers had checked it thoroughly, including the inside of the cubbyhole, before it was towed away.
- [9] The appellant testified in his defence primarily as follows. On 8 February 2015, he was on his way from Thabazimbi in Limpopo, to Siyabuswa in Mpumalanga where he lived. Halfway through to Warmbath (Bela-Bela) the Avanza broke down. His attempts to have it towed away failed. Instead, he hitchhiked home from about 7 PM, which was about 2 hours before the

incident of crimes that night. He forgot to take the spare key together with house keys from inside the cubbyhole. However, he took with him the usual keys he used for the Avanza. The rear gate or door of Avanza could not lock. He used the vehicle as a taxi. On that occasion, he had taken a group of persons who hired him from Vaalbank to Thabazimbi. When he found it missing the next day, he suspected that the sheriff of the court must have attached it for the reason that his instalments from the bank that financed him when he bought the motor vehicle were in arrears.

- [10] The appellant confirmed however, that the Avanza's keys were found by the police in his bedroom but on his version, on top of the TV stand. Regarding the circumstances under which he was arrested. He disputed that Ngobeni effected the arrest but another unspecified officer. He denied that he had anything to do with the robbery incident. Neither did he know any of the co-accused he was charged with in the trial court.
- [11] During cross-examination, he testified that he did not look around to establish where he was after the motor vehicle broke down. On his version however, he was more than 70 km from Warmbath. As to what was wrong with the motor vehicle, it was because of a leaking radiator that was patched by silicon after an accident some six months before. He confirmed that the motor vehicle was bought and registered in his uncle's names.
- [12] The motor vehicle was not insured at the time of the alleged incident of crime. The insurance had been cancelled three years before. It was put to him that the sheriff of court could not possibly have known where to attach the motor vehicle since on his version, it broke down in an area where he too did not know. He confirmed that he heard Ngobeni testified that he was the one who

arrested him. He could not dispute that Ngobeni's evidence was not challenged in that regard.

[13] It remains to determine whether on a conspectus of the evidence as a whole, whether the state managed to discharge the onus of proving beyond a reasonable doubt, that the appellant was one of the robbers who committed the offences. In *S v Chabalala*² the court held that 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'.

[14] The appellant's challenge to the evidence is in a piecemeal fashion. The appellant takes issue that his grandparents who were present when Ledwaba found the motor vehicle keys in his bedroom were not called by the State to corroborate this evidence.

[15] In *S v Reddy & Others*³, the Supreme Court of Appeal warned against this, wherein it stated as follows:

'In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in R v Blom 1939 AD 188 at 202-203, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all

² *S v Chabalala* 2003 (1) SACR 134 (SCA) at para 15

³ *S v Reddy & Others* 1996 (2) SACR 1 (A) at 8C-D

the proved facts and, secondly, the proved facts should be such "that they exclude every reasonable inference from them save the one sought to be drawn."

- [16] It is accordingly trite that the court should always consider the cumulative effect of all the items of circumstantial evidence. As early as 1944 in *Rex v De Villiers*⁴, it was pointed out that the court should not consider its concerns in isolation and then give the accused the benefit of any reasonable doubt as to the inference to be drawn from each single circumstance. It is the cumulative impression, which all the pieces of evidence made collectively, that had to be considered to determine whether the accused's guilt had been established beyond a reasonable doubt⁵.
- [17] The trial magistrate's approach in the evaluation of the totality of the evidence is above reproach. On the common cause evidence, the magistrate was justified in the rejection of the appellant's evidence. It is improbable that the appellant was hired as the trial court found to drive such a long distance that he alluded to, without fear that he was exposing the engine of the motor vehicle to possible further damage. As the trial magistrate observed, the appellant was not present when the keys were found. Accordingly, he was not in a position to dispute or challenge the state's version that the keys were found underneath a mattress in his bedroom. Again, the appellant's attempt to hide from the arresting officer discredited the probability of his version as reasonably possibly true. The commission of the offence within two hours after the robbers abandoned the robbers, is unfathomable.
- [18] The magistrate found correctly, on the probabilities as highly unlikely that, the motor vehicle would have been attached by a sheriff of court way out of

⁴ *Rex v De Villiers* 1944 AD 493 508-9

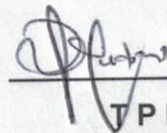
⁵ See also *S v Ressel* 1968 (4) SA 224 (A).

his or ordinary jurisdiction, in somewhat fortuitous circumstances. In the ordinary course, a sheriff of court would have recourse in case of a judgment in favour of the financial institution that financed the sale of the vehicle against the contracting party that in this case is, the appellant's uncle.

[19] The fact that the appellant did not inquire from the sheriff whether that was indeed the position, coupled with the fact that he did not report the disappearance of the motor vehicle to the police, make his version highly improbable that it cannot reasonably be possibly true. The sentiments expressed by the court in *S v Ntsele*⁶ are particularly pertinent. There the Court held that the onus rests upon the State in a criminal case to prove the guilt of the accused beyond reasonable doubt — not beyond all shadow of doubt. There is no justification to disturb the trial court's findings of fact and credibility regarding this matter. It follows, accordingly, that the appeal is without any merit and falls to be dismissed.

[20] In the result I make the following order:

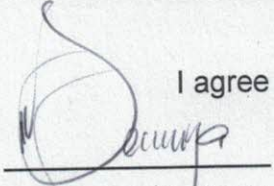
18.1 The appeal against conviction is dismissed.



T P MUDAU

[Judge of the High Court,
Limpopo Division,
[POLOKWANE]

⁶ *S v Ntsele* 1998 (2) SACR 178 (SCA)

I agree

M V SEMENYA
[Judge of the High Court,
Limpopo Division,
[POLOKWANE]

Date of Hearing: 12 June 2020

Date of Judgment: 12 June 2020

APPEARANCES

For the Appellant: HW Moldenhauer

Instructed by: Moldenhauer Attorneys

For the Respondent: Adv. C Chauke

Instructed by: DPP – Polokwane