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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, MTHATHA

CASE NO: CA58/2017

Date heard: **01 August 2018**

Date delivered: **14 August 2018**

In the matter between:

MNCEDISI CHRISTIAN MANCANE GIJANA

First Appellant

LUZUKO SYDNEY ZAKES MPIYAKHE

Second Appellant

and

THE STATE

Respondent

JUDGMENT

LOWE, J

INTRODUCTION

[1] In this matter the two Appellants (Accused 2 and 4 in the Court *a quo*) together with three others were tried in the High Court on charges of conspiracy to commit robbery, theft, robbery with aggravating circumstances, unlawful possession of firearms and unlawful possession of ammunition.

[2] All the accused pleaded not guilty to all charges, whereafter extensive evidence was led.

[3] The Court convicted First Appellant (Accused 2) on the charge of robbery with aggravating circumstances, he being sentenced to 15 years' imprisonment, and Second Appellant (Accused 4) of conspiracy to commit robbery, he being sentenced to 15 years' imprisonment.

[4] The appeal in this matter is in each instance against conviction only.

[5] The appeal is with the leave of the trial Judge *a quo*.

[6] The background to this matter is that on 9 June 2008, a cash in transit motor vehicle belonging to Fidelity Cash Management Services, driven by Accused 1 and guarded by Accused 3, was travelling to Tabankulu when it was stopped by means of certain persons in a stolen City Golf and Nissan van. The City Golf motor vehicle blocked the road forcing the cash in transit van to stop on the roadside. The occupants of the cash in transit van alighted from the vehicle (under threat so it is alleged), the vehicle being cut open using a angle grinder and the sum of R1,100,000.00 contained in money boxes in the vehicle, as well as firearms, were removed therefrom and transported away in the stolen City Golf. That this occurred is not disputed, the question rather being whether any of the accused at the trial, particularly the Appellants were involved in the heist.

[7] In essence it was alleged that Accused 1 was the driver of the cash in transit van, whilst Accused 3 was the guard assisting the driver. It was alleged that

Accused 1 informed Accused 3 that the plan was to rob the vehicle suggesting to Accused 3 that he should offer no resistance, the remaining accused being part of the heist robbery team. When the cash vehicle was stopped the robbers tied up Accused 1 and 3, opened the rear of vehicle and removed the money and firearms.

THE PROPER APPROACH TO CRIMINAL APPEALS

[8] In *S v Leve*¹ the following was said:

“The fundamental rule to be applied by a court of appeal is that, while the appellant is entitled to a re-hearing because otherwise the right of appeal becomes illusory, a court of appeal is not at liberty to depart from the trial court’s findings of fact and credibility, unless they are vitiated by irregularity or unless an examination of the record of evidence reveals that those findings are patently wrong. The trial court’s findings of fact and credibility are presumed to be correct because the trial court, and not the court of appeal, has had the advantage of seeing and hearing the witnesses and is in the best position to determine where the truth lies. See the well-known case of *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705 and the passages which follow; *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645; and *S v Francis* 1991 (1) SACR 198 (A) at 204C-F.”.

[9] Put otherwise, if there is no misdirection of fact by the trial Court the point of departure is that the Court’s conclusion on the facts was correct. It will only reject the trial Court’s assessments if it is convinced that that the assessments are wrong and even if in doubt the trial Court’s judgment must remain in place. If of course the appeal Court is convinced that the trial Court’s conclusion on a factual question was wrong it will reject that finding. It must be remembered that it is not only the finding of the trial Court which must be considered but also particularly importantly the trial

¹ 2011 (1) SACR 87 (ECG) at paragraph [8]

Court's reasons therefor. In doing so, and in considering the appeal, the appeal Court must not lose sight of the fact that the whole body of evidence must be considered and sheds valuable light on the evidential value of its components. Similarly a Court of Appeal will be slow to interfere with the credibility findings of the trial Court. In the result in the absence of factual error or misdirection on the part of the trial Judge that Judge's findings are presumed to be correct.²

[10] As will be seen in this matter the learned trial Judge, in a lengthy judgment, analyzed and set out her findings of fact and the reasons therefore in some detail, and made important credibility findings based on facts and reasoning in respect of all the relevant witnesses.

[11] In summary, in this matter, the learned trial Judge cautiously excluded any evidence that was in any way somewhat tainted in one way or another, exercising considerable effort in favour of the accused and Appellants to make findings against them only on what she regarded as incontrovertible evidence. In doing so, and insofar as the State evidence was concerned, she relied upon the evidence of a Section 204 witness being XOLISWA MTHINGWEVU (the S204 witness) and the evidence led relevant to the cell phone records that were produced in evidence demonstrating not only calls made from particular numbers to particular numbers but also the location of the relevant cell phone at the time where relevant. She then continued to assess the evidence of the Appellants (as also of course the remaining accused and State witnesses) finding that the Appellants were poor witnesses and

² *S v Mlumbi en 'n Ander* 1991 (1) SACR 235 (A).

unreliable. In respect of First Appellant she found that he was *“an unimpressive witness and there were numerous contradictions in his testimony as illustrated from the summary of his testimony”*. She continued to find that his evidence contained demonstrable falsehoods and contradictions, as she put it, and that *“His untrustworthiness was aptly demonstrated during cross-examination of him by State counsel and he is found to be an unreliable witness, fabricated his testimony and lied to the court as he went along”*. In respect of Second Appellant, she found that he was not an impressive witness, as she put it, and that it was evident from his responses under cross-examination that there were discrepancies in his testimony. She found that his version regarding the alibi defence was *“in the circumstances also improbable, especially if his evidence is assessed as against that of the section 204 witness and having regard to the discrepancy between the version put to the witnesses in his testimony”*. It should also be mentioned that Accused 1 was described as *“an extremely pathetic witness”* his version was however not rejected as not being reasonably possibly true. In respect of Accused 3, his version was found to be questionable and suspicious but was not rejected as not being reasonably possibly true. Accused 5 was not implicated by the S204 witness.

[12] The learned Judge was unimpressed by the evidence of the two Appellants, whilst on the contrary she found the S204 witness to be a *“credible, reliable witness and her testimony can safely be accepted and relied upon. I am satisfied that her testimony was substantially satisfactory in every material respect and that her version is essentially true beyond a reasonable doubt”*. The learned trial Judge concluded that this witness’s evidence was of a sufficient calibre to warrant its

acceptance and that the other witnesses evidence which differed from hers warranted being rejected in the context of all the evidence.

[13] In the circumstances, and bearing in mind that the trial Judge saw the witnesses in person and could assess their demeanour, the starting point is, unless convinced to the contrary, that there was no misdirection of fact by the trial Court, the trial Judge's conclusions being correct. In this regard, and correctly so in my opinion, counsel for Appellants did not attempt to persuade us that either of Appellants' assessment as witnesses by the trial Judge was incorrect (without conceding that their evidence should not have been accepted), but rather concentrated on attacking the evidence of the S204 witness, and attempting to distance this from the evidence of cell phone calls and positioning.

[14] In summary, the submission relevant to First Appellant are that the S204 witness ought not to be accepted absent corroboration (as properly understood) which was, so it was argued, absent and accordingly that he should be acquitted, whilst in respect of Second Appellant the State evidence too ought not to be accepted on the same basis, but further did not, even if accepted, amount to evidence of conspiracy to rob.

LEGAL ISSUES

[15] The question is whether the State has proven the guilt of the accused beyond a reasonable doubt. In order to determine whether such guilt has been so proven the evidence must be viewed holistically.³

³ *S v Shilakwe* 2012 (1) SACR 16 (SCA) at para [11].

[16] In *S v Chabalala* ⁴ it was held:

“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.”

[17] We are here clearly dealing with the testimony of a single witness in an instance where the version of the State and that of the accused are mutually destructive, and where credibility must play a significant role.

[18] It is indeed so that the evidence of a single, competent and credible witness may suffice to sustain a conviction.⁵

[19] In a case such as this, involving as it does the testimony of a single witness, the merits of the witness must be weighed against factors which militate against credibility.⁶

[20] Dealing with a single witness’s testimony, the Court in *S v Sauls and Others*, ⁷ held:

“The trial Judge will weigh [her] 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, [the Judge] is satisfied that the truth has been told.”

⁴ 2003 (1) SACR 134 (SCA) at para [15].

⁵ Section 208 of the Criminal Procedure Act 51 of 1977.

⁶ *S v Kubeka* 1982 (1) SA 534 (W).

⁷ 1981 (3) SA 172 (A) at 180 E – H.

[21] In *S v Mahlangu and Another*⁸ the appeal Court held that the trial Court was entitled to base its findings on the evidence of a single witness as long as this evidence was substantially satisfactory in every material respect or if there was corroboration therefore.⁹

[22] In this matter, the S204 witness, was not only a single witness but also an accomplice witness and accordingly there is a second cautionary rule which is applicable to her testimony.¹⁰ The trial Judge took all this carefully into account.¹¹ The basis of treating an accomplice's evidence with caution is that the witness is a self-confessed criminal on the one hand and on the other, that various considerations may lead to such a witness deciding to falsely implicate the accused. If however an accomplice's evidence is satisfactory in all material respects (or is corroborated sufficiently) nothing militates against it being taken into account in the consideration of whether the State has proved its case against the accused beyond a reasonable doubt. The accomplice's evidence need not be wholly consistent, or even wholly truthful applying the ultimate test, after applying the cautionary rule, being whether the Court was satisfied beyond a reasonable doubt that the story told was in essence true.

[23] The acceptance of the evidence of an accomplice introduces a risk which is reduced by the presence of certain features such as corroboration of the accomplice

⁸ 2011 (2) SACR 164 (SCA)

⁹ *S v Sauls and Others* 1981 (3) SA 172 at 179 G; *S v Gentle* 2005 (1) All SA 1 (SCA) at 5d-h.

¹⁰ *S v Ndzekezi* 2014 JDR 2728 ECG

¹¹ *R v Ncana* 1948 (4) SA 399 at 405-6.

implicating the accused. At the end of the day, however, and once the trial Judge appreciated the peculiar danger inherent in the accomplice's evidence, but accepted same as a good witness and pointed to the demerits of the Appellants which approach on the record is beyond question – there is little criticism for the approach and conclusion adopted by the learned trial Judge. Indeed the learned trial Judge reviewed the authorities in respect of both accomplice and single witness evidence, correctly assessed same together with all the remaining evidence, and applied this to the evidence before her before concluding that the accomplice evidence was acceptable and true beyond reasonable doubt whereas the evidence of the Appellants was not reasonably possibly true.

[24] Where, as in this case, there are two mutually destructive versions the proper approach to be followed is that stated in *S v Singh*:¹²

“... it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witness and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore, the defence witnesses, including the accused, must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and the demerits of the State and the defence witnesses but also the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt. The best indication that a court has applied its mind in the proper manner in the abovementioned example is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.”

[25] In *S v Janse van Rensburg*¹³ it was held:

¹² 1975 (1) SA 227 (N) at 228.

“Logic dictates that, where there are two conflicting versions or two mutually destructive stories, both cannot be true. Only one can be true. Consequently the other must be false. However, the dictates of logic do not displace the standard of proof required either in a civil or criminal matter. In order to determine the objective truth of the one version and the falsity of the other, it is important to consider not only the credibility of the witnesses, but also the reliability of such witnesses. Evidence that is reliable should be weighed against the evidence that is found to be false and in the process measured against the probabilities. In the final analysis the court must determine whether the State has mustered the requisite threshold – in this case proof beyond reasonable doubt. (See: *S v Saban en 'n Ander* 1992 (1) SACR 199 (A) at 203j to 204b; *S v Van der Meyden* 1999 (1) SACR 447 (W) (1999 (2) SA 79) at 449g – 450b; and *S v Trainor* 2003 (1) SACR 35 (SCA) ([2003] 1 All SA 435) at para 9.)”¹⁴

[26] An accused, on the other hand, bears no onus to establish his innocence. The standard of proof set in a criminal trial is a stringent one. The Court, per Goosen J (concurrent in by Cossie AJ), in *Buti v S*¹⁵ said the following concerning the criminal standard of proof:

“It serves to ensure that persons who may be innocent of criminal conduct are not readily convicted. It is a standard which occasionally will have the effect that a person who may indeed have committed an offence is nevertheless acquitted. That is the price we pay for insisting that an accused’s guilt is established beyond a reasonable doubt. There is no onus upon an accused to establish his innocence. Where there is a reasonable possibility that the accused’s version is true, then he or she is entitled to the benefit of the doubt. An accused person need not of course be believed. All that is required is that his or her version must be reasonably possibly true. If that is so then the prosecution has not proven beyond a reasonable doubt that the accused is guilty.”¹⁶

¹³ 2009 (2) SACR 216 (C) at para [8].

¹⁴ Also see *S v M* 2006 (1) SACR 135 (SCA) where, at para [189] Cameron JA, as he then was, said:

“The point is that the totality of the evidence must be measured, not in isolation, but by assessing properly whether in the light of the inherent strengths, weaknesses, probabilities and improbabilities on both sides the balance weighs so heavily in favour of the State that any reasonable doubt about the accused’s guilt is excluded.”

¹⁵ [2015] C ZAECGHC 77 (13 August 2015).

¹⁶ Compare with *S v T* 2005 (2) SACR 318 (E) at para [37] where the court held:

[27] The following remarks by Brand AJA in *S v Shackell*¹⁷ are apposite:

“It is a trite principle ... a court does not have to be convinced that every detail of an accused’s version is true. If the accused’s version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. Of course, it is permissible to test the accused’s version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.”¹⁸ .

THE CENTRAL ISSUES

[28] It follows from the above that the central issue relevant to this appeal in respect of both Appellants is whether, having regard to the trial Judge’s factual and credibility findings, which have not been sufficiently challenged on the record to sustain being upset, is whether the S204 witness, having regard to the cautionary rules applicable as set out above and seen in the context of the remaining evidence, constituted insufficiently reliable evidence to sustain the final conclusion reached of proof beyond all reasonable doubt. In respect of Second Appellant, there is the additional issue to whether the evidence establishes the crime of conspiracy to rob.

“The State is required, when it tries a person for allegedly committing an offence, to prove the guilt of the accused beyond a reasonable doubt. This high standard of proof - universally required in civilized systems of criminal justice – is a core component of the fundamental right that every person enjoys under the Constitution, and under the common law prior to 1994, to a fair trial. It is not part of a charter for criminals and neither is it a mere technicality. When a court finds that the guilt of an accused has not been proved beyond reasonable doubt, that accused is entitled to an acquittal, even if there may be suspicions that he or she was, indeed, the perpetrator of the crime in question. That is an inevitable consequence of living in a society in which freedom and the dignity of the individual are properly protected and are respected. The inverse – convictions based on suspicion or speculation – is the hallmark of tyrannical system of law. South Africans have bitter experience of such system and where it leads to.”

¹⁷ 2001 (4) SA 1 (SCA)

¹⁸ *Ibid* at para [30]

THE SECTION 204 WITNESS

[29] In assessing the evidence of the S204 witness, on the proper approach thereto, and having regard to the learned trial Judge's conclusion in this regard in the context of all the evidence, it is necessary to briefly summarize the ambit of her evidence.

[30] In effect the S204 witness was the only credible witness whose evidence remained directly implicating the Appellants in the commission of Counts 1 and 3, as potentially corroborated by the evidence of Warrant Officer JUNQWANA with regard to the cell phone numbers of the Appellants and calls that were made from those cell phones and from which vicinity the calls were made.

[31] This witness testified in summary that she had known Accused 2, (first Appellant) since 2006 they becoming friends thereafter. On 24 May 2008 she met First Appellant in Kokstad this following a previous meeting that they had had in February 2008. At this time she was working at Fidelity Security Services (FSS) in Kokstad. She was what was referred to as a "*controller*" and had been working there since 2005. She was related to Accused 1 having the same clan name. She became acquainted with Accused 3 in 2005 he also working for FSS. She said that in respect of Accused 5 she first saw him in Court. She said that the events leading up to the robbery commenced in 2006, First Appellant saying to her that he needed money and that he wanted to "*get to CPS the place where money for payouts was kept*". First Appellant was aware that she was responsible for keeping the keys for CPS. It transpired that this was impossible due to alarms and cameras in the

building and they gave up and left. In 2008 First Appellant raised the issue again. He came to her in Kokstad and taking her away from work, they talked, he asking how they could get “that money”. She again raised the alarms and cameras and suggested that they should take the money at the “sites”. He asked if she knew people at CPS/FSS who were in need of money and she said yes, many. He requested her to organize such people to participate in a robbery relevant to the money. First Appellant, she said, wanted the money that belonged to CPS but did not know where the money was going to be “robbed” whether on the way, as she put it, or at the “sites”. She informed First Appellant about Accused 1 who had approached her relevant to a robbery.

[32] She informed First Appellant that she had organized the necessary people. She arranged to meet with, him travelling in First Appellant’s vehicle, he telling her that he was going to phone his friend Zakes, who later turned out to be Second Appellant. Shortly thereafter on the same day First and Second Appellants, spoke but not in her presence, she then boarding Second Appellant’s vehicle. She understood that he and Second Appellant were going to talk and discuss, as she put it, about the robbery. Whilst in Second Appellant’s vehicle she called Accused 1 to meet them at Cell C. They all then ended up in Second Appellant’s vehicle introduced themselves, First Appellant asking Accused 1 whether the money was there, which he confirmed. In so doing he referred to CPS there being a discussion of how much money they could “get”.

[33] Later in the day First Appellant called her by phone telling her that they had talked, referring to Accused 1 and Second Appellant. Accused 1 told her that they

had talked but that he did not trust Second Appellant. She then, in Accused 1's presence, called first Appellant telling him of the mistrust whereafter and on the same call First Appellant and Accused 1 talked over the phone. He (Accused 1) then informed her that they sorted out the difficulty and were to continue with the plan.

[34] She did not hear from First Appellant until 9 June 2014 he calling asking her whether the vehicles had left already for the pay points, as she put it. He was referring to the vehicles that belonged to CPS and FSS. She was not on duty that day informing Second Appellant accordingly. She says later at about 19h00 she was phoned by First Appellant on the same day informing her that they had "*found the money*" but that it was "*little*". She says she again received a phone call from him saying that she should go out of her house and that she would see Second Appellant's vehicle. She did so finding First Appellant in Second Appellant's motor vehicle he handing her R500.00. He asked her to call Accused 1 and tell him to meet him in Second Appellant's vehicle. She did so and they both went to the vehicle, she later going to her place as she put it. After about a week to she received a further call from First Appellant asking when she would go to Mount Frere. On a later date she went there meeting Second Appellant who gave her the sum of money which he said was R40,000.00. He dropped her at another place, where she spent some of the money, there discovering that in fact she had been given R33,000.00.

[35] She did not speak again to the accused and was arrested on 4 July. After the arrest a sum of R20,000.00 was recovered from her home.

[36] In cross-examination the principal issue raised in argument was that she had testified that she only made one police statement which she signed on 5 July 2008. In due course she admitted that the investigating officer obtained a second statement after the issue of her becoming a State witness arose. This statement was taken on 20 July 2008. She said ultimately that she had referred to only one statement as she had said the same in both and regarded them as one. Neither of these statements were handed in and do not form part of the record. It was argued before us, and put to the witness, that in essence she had been promised bail if she made a further statement and became a State witness and that she falsely implicated First and Second Appellants for this purpose. This she denied entirely. It was suggested that she should be rejected as she only mentioned Second Appellant in the second statement this being inferred from the fact that he was only arrested some days thereafter. This she had denied saying she only found out his name at Court – which was certainly after the statement.

[37] In respect of the cell phone call she had received from First Appellant she gave his number as [...].

[38] First Appellant while admitting that he knew her and suggesting that she had been disappointed in a romantic relationship with him and for this reason amongst others falsely implicated him, denied her evidence relevant to his being involved in any crime at all. She denied the relationship.

[39] Second Appellant maintained that he was in Johannesburg at all times relevant and had only met First Appellant in June 2008. She was of course unable to say whether Second Appellant was involved in the actual robbery but, as has been set out above, he was, she said, present at the planning stages, and his car was utilized later as she testified.

[40] In respect of First Appellant, and the cell phone calls, the crux of the matter is that First Appellant did not dispute the number she said she had been called from. He said however that this was a second phone utilized at his business by others, the question was not what calls were made but the identity of the caller. The cell phone evidence disclosed without doubt, held the trial Judge, that: First Appellant made calls to Accused 1 on 9 June 2008 at 06:38 and in addition on 5, 6, 7 and twice on 8 June 2008; First Appellant called the S204 witness at 6h35, 11h05 and 18h07 on 9 June 2008; First Appellant called Second Appellant on 1 June 2008, 3 June 2008 and on 8 and 9 June 2008; Accused 1 called Second Appellant on 1 June 2008; Second Appellant called First Appellant on 9 June 2008; Accused 1 called First Appellant on 6 June 2008 from his work cell phone.

[41] The above evidence is highly significant and cannot be seriously contested and, having regard to times, dates and places is considerably supportive of the S204 witness's evidence.

[42] On a proper analysis of the evidence, and what was put to the State witnesses on behalf of both First and Second Appellants, it was simply not possible for their counsel on appeal to seriously challenge that these calls were made and

received as deposed to and by the Appellants as referred to in the evidence of the S204 witness. As found by the learned trial Judge, these calls as summarized above, and in respect of First Appellant made in the vicinity of the robbery of the day in question, which is devastating support for the evidence given by the S204 witness and must be seen to be strongly corroborative of her version.

[43] Balanced against the learned trial Judge's findings concerning the extremely unreliable evidence of the two Appellants, there can be no doubt that the trial Court was completely correct in concluding that the evidence of the S204 witness fell to be accepted as being not only credible, but reliable and substantially satisfactory in every material respect, as also corroborated in important respects relevant due to the cell phone calls and records. Contrary to the submission by Appellants' counsel, the decision in *S v Molimi*¹⁹ is not of assistance to the Appellants as there exists in the present instance evidence that "*directly implicate*"²⁰ Appellants.

[44] The Judge *a quo* recognized that there were some discrepancies in her testimony relevant to when she actually made the statements to the police, but correctly in my view, however, finding that ultimately her explanation in this regard fell to be accepted and that this was not such as to render her evidence unreliable or unsatisfactory.

[45] I have carefully considered each submission made on appeal relevant to the criticisms of the evidence of the S204 witness, and the learned trial Judge's

¹⁹ 2008 (2) SACR 76 (CC)

²⁰ *Supra* at [51]

acceptance thereof. In my view, having carefully considered same against the record, I cannot agree in any respect in this regard.

[46] In the result, in my view, the learned trial Judge's approach to this evidence was perfectly correct, she being entitled to take this into account and rely thereon to the extent that she did so.

[47] This conclusion, against the proper approach to be taken on appeal as set out above, is dispositive of First Appellant's appeal on the merits. It is similarly so in respect of Second Appellant's appeal insofar as the argument relies on the alleged inadequacy of the evidence of the S204 witness.

SECOND APPELLANT CONSPIRACY

[48] It is important to recognize, and it was argued accordingly, that Second Appellant was convicted only of conspiracy to commit robbery.

[49] It was argued on behalf of Second Appellant that even if accepting the evidence of the S204 witness, this did not justify a finding of conspiracy to rob in respect of Second Appellant, the S204 witness falling short of the necessary detail in this regard, there being no evidence that Second Appellant was otherwise involved.

[50] I have carefully summarized above the S204 witness's evidence concerning the involvement of Second Appellant and his motor vehicle, as also phone calls relevant.

[51] It is at all times clear that right from the first meeting on 24 May 2008 it was more than apparent that a robbery of the premises of both entities was doomed to failure due to the security measures in place. It was clear from the evidence that all the parties accepted, and indeed planned, from at least that time forward, that the robbery would have to be committed at a time that the money was in transit or at the sites as it was put.

[52] In respect of a conspiracy this may be express or tacit, but both require agreement to have been reached as to the scheme to be utilized, although the exact manner in which the crime is to be committed is not required to be agreed.²¹

[53] Immediately agreement has been reached the crime of conspiracy is complete and it is unnecessary to prove the commission of any further act in the execution of the conspiracy.²²

[54] In this matter, it is clear that in respect of Second Appellant, the evidence establishing this and that Second Appellant had the intention to conspire with those others intending to commit the robbery or to assist in its commission this being a robbery of a cash vehicle in transit.

²¹ See *S v Adams* 1959 (1) SA 646.

²² *S v Sibuyi* 1993 (1) SACR 235 (A) 249D – E.

[55] In my view, the argument put up for Second Appellant that what was initially planned in his presence at most, if the S204 witness is to be believed, amounted to no more than an agreement to rob the entity's premises and not a in transit heist, falls at the first hurdle once the evidence of the S204 witness is carefully analyzed.

[56] In the result this argument falls also to be rejected.

CONCLUSION

[57] Having carefully considered all the arguments put up for First and Second Appellants, it is perfectly clear that on the appropriate approach to appeals, and to the evidence in this matter, the findings and conclusion of the trial Judge simply cannot be faulted.

[58] In the result the appeals in respect of both First and Second Appellants are dismissed.

M.J. LOWE
JUDGE OF THE HIGH COURT

MAJIKI, J:

I agree.

**B MAJIKI
JUDGE OF THE HIGH COURT**

BEYLEVELD, AJ:

I agree.

**A BEYLEVELD
JUDGE OF THE HIGH COURT (ACTING)**

Obo the First and Second Appellants:

Instructed by:

Adv H J Potgieter

H.J. Groenewald Attorneys Inc, PRETORIA

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MOUNT FRERE

Obo the Respondent:

Instructed by:

Adv N W Lamla

Director of Public Prosecutions

MTHATHA