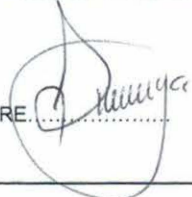


REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
.....	
DATE: 29.6.18 SIGNATURE: 	

CASE NO: AA01/2018

In the matter between:

LYMON MAHLASELA NKUNA

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

SEMENYA J

1. The appellant in this matter was convicted on a charge of robbery with aggravating circumstances read with section 51 (2) of the Criminal Law Amendment Act 51 of 1997. He was sentenced to 12 years imprisonment. The appeal against the conviction and sentence, is with special leave from the Supreme Court of Appeal, pursuant to the trial court and this court's dismissal of the appellant's application for leave to appeal.
2. The argument proffered on behalf of the appellant was that the respondent failed to tender evidence that identified the appellant as the perpetrator of the offence he was convicted of beyond a reasonable doubt. Further that the evidence that led to the conviction of the appellant was that of a single witness which was not satisfactory in all material respect. It was submitted that the court should have accepted the version of the appellant as being reasonably possibly true.
3. The facts that led to the conviction of the appellant are that on the date of the incident, one Phillip Kadir (Kadir) was travelling alone from Durban to Zambia on the N1 near Mookgophong, when the truck he was driving suddenly stopped. He

alighted from the truck in order to inspect it. As he was so doing a person who had his face covered with a woolen hat emerged. This person struck him on the head with a firearm.

4. That person pushed him back into the vehicle and ordered him to show him how to operate its gears. He was instructed to lie on the bed and the person drove away with him. He could not see the direction the driver was taking during the trip.
5. After a long drive, the truck stopped and he heard the driver talking to another person. He was made to alight from the truck and was tied to a pole and was left at that spot. He managed to untie himself and called his employer. Apart from the truck with a tipper loaded on it, his money in the amount of R4600.00 and personal belongings were forcefully taken away from him.
6. Kandira admitted during cross-examination that he will not be in a position to can identify his assailant.
7. Ottavio Giannoccaro, Kadira's employer, testified that he received a call from Kadira who informed him that he was robbed of the truck. He and his wife inspected their satellite and observed that the truck was travelling in a wrong direction. The truck was travelling towards Pretoria in a Southward direction instead of going towards the North. He rushed to a nearby filling station where he saw truck driving past. He

informed the police he found at the filling station about the incident. The said police followed the truck.

8. Gabriel Johannes Smith, a police officer in the South African Police Service attached to the Flying Squad, Pretoria, testified that he was on duty when he was alerted of the incident of robbery committed along the N1. He spotted a truck of the description he was given travelling on N1 South bound in Pretoria. He and other police officers followed it until it collided with an embankment.
9. At some stage, he saw a person running towards the South and he decided to pursue him. He fired some shots in order to stop the man and also climbed on the embankment. He could see the said man returning back to the truck. He further testified that at some stage he lost sight of the man until he was informed by police officers that the man was hiding underneath the truck. He arrested the said man who happened to be the appellant in this matter. He testified that the person he arrested was the same as the one he saw running away from the truck. The appellant was reluctant to disclose his names.
10. The appellant conceded that he is the person who was found underneath the truck by Smith but denied any involvement in the commission of the offence. He testified that he is a mechanic and came into the picture after one of his client known as Jabu Khoza (Khoza) asked him to come and repair his truck. The appellant stated further that he could not have been in a position to run away from the police as he is

suffering from arthritis and has problems with his knee and hands. He was in the process of repairing the truck at the time of his arrest.

11. The appeal court's approach to the factual findings by the trial court has been summarised as follows in **S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645e-f**

"Before considering these submissions it would be as well to recall yet again that there are well established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellate Courts to factual findings of the trial court are so well known that restatement is unnecessary."

12. It was an undisputed fact that neither Kandira nor the owner of the truck could identify the appellant as the person who committed the offence. Counsel for the appellant's submission that the appellant was convicted on single evidence is correct. This is in view of the fact that although the state led the evidence of more than one witness, it is the evidence of Smith only that tends to link the appellant to the offence.

13. I however disagree with both counsel's submission that the appellant was convicted on circumstantial evidence. Nowhere in his judgment did the Regional Magistrate deal with the cardinal rules of logic. On the contrary, the conviction rested on the appellant's failure to immediately inform Smith that he was called by Khoza to come and fix his truck as well as his failure to take the police to the place where the said Khoza resided. The Regional Magistrate further found it improbable that the appellant would go and repair the gears of a truck while in possession of only two spanners.

14. It is now settled that an accused person has no duty to prove his innocence. The state must adduce evidence which, when weighed with other evidence presented before the court, would persuade the court in finding that, beyond all reasonable doubt the accused is guilty. I agree with the statement made by Plasket J in **S v T 2005 (2) SACR 318 (E)** at Par 37 where it was stated that:

"The State is required to, 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 a civilized system of criminal justice – is the core component of the fundamental right that every person enjoys under the Constitution, and under the common law prior 1994, to a fair trial."

15. It was held in **S v Sauls and Another 1981 (3) SA 172 at 180 E – G** that it has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense. I gather from the statement made in this judgment that judicial officers are to take common sense into consideration when adjudicating on matters that come before them. In bringing this in line with the facts

of the present matter, the evidence of Smith is that whilst in pursuit of the suspects, he fired some warning shots with the hope that the suspect will stop. Common sense would dictate that the person in the position of the suspect would run further away from danger, than to return back to the stolen truck. I am of the view that the trial court should have found Smith's version to be highly improbable in this regard.

16. Having accepted that the State relied on single evidence, it follows that the court was enjoined to apply the cautionary rule as envisaged in **R v Mokoena 1932 OPD 79**. Smith testified that he was with other people when they first spotted the truck. He lost sight of the suspect at some stage whilst in pursuit. He was shown by other police officers who had gathered at the scene that the appellant was underneath the truck. He could not say with certainty whether the suspect alighted from the truck on the driver's side or on the passenger side.

17. I feel compelled to deal with one crucial aspect which none of the parties in this appeal addressed, being the issue of the State's failure to call any of the police officers who were at the scene to come and corroborate the version of Smith. In **S v Teixeira 1980 (3) SA 755 (A)** at 763 it was stated as follows:

" In the judgment of the court a quo there is no reference whatsoever to the state's failure to call Sithole or Tshabalala to testify on behalf of the State, nor to the question whether an inference adverse to the State was justified. The burden of proof rested on the State to prove its case. Counsel for the State must have realized how unsafe it is to rely on the evidence of a single

witness. I will disregard the fact that he failed to call Sithole. In the case of Tshabalala, however, counsel for the State must surely have realized that, if Sarah's version is to be accepted as truthful, Tshabalala's evidence could have corroborated her evidence in regard to a matter very much in issue."

18. In the present matter, it became evident from the onset of the trial that the appellant is disputing the allegations that he is the person who robbed the complainant of the truck. It was also clear that the complainant did not identify the culprit. It is further evident that the State's key witness had to rely on his colleagues to see where the appellant was. According to Smith's version, there were about 15 police officers at the scene. He was with others when he was pursuing the appellant. They surely could have seen the suspect getting under the truck. As to why the state failed to call any of the officers to come and corroborate Smith's version to the effect that the suspect ran back to the truck is beyond my comprehension. The only inference one can draw is that he was aware that none of them was going to corroborate him.

19. The reason why the court in Teixeira held that an adverse inference may be drawn against the State's failure to call witnesses lies in the fact that it has a duty to prove the guilt of the accused and it is expected to produce available evidence that will help it to discharge this onus. In any event the State has more resources to use in securing attendance of witnesses than the accused. More so in this case as the potential witnesses were also police officers. No explanation was furnished by the State as to why none of the police officers was called.

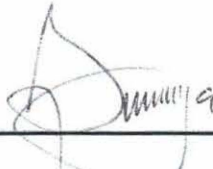
20. I cannot ignore the fact that the appellant's version has its own challenges, specifically with the version that he had gone to repair the truck when on the other hand he alleges that he cannot drive a vehicle because of arthritis. Furthermore I agree with the trial court's finding that it cannot be possible that he could have gone to repair it with only two spanners. This criticism must be taken against the backdrop that he has no onus to prove his innocence. The weaknesses in the appellant's version cannot in any way be taken to be strengthening the State's weak case.

21. The respondent's contention that the only inference one can draw from the facts is that the appellant was the person who committed the offence simply because he was found at the truck cannot be accepted. The evidence of Kandira is to the effect that more than one person appeared to be involved in the commission of the offence. The trial court also made that finding. In any event, the appellant was not convicted on the basis of the doctrine of recent possession nor of possession of suspected stolen property. Furthermore, the State did not rely on the doctrine of common purpose.

22. I am of the view that the factual findings of the trial court are clearly wrong and constitute a material misdirection on its part. I find that the trial court should have found that the State failed to discharge its onus of proving the guilt of the appellant beyond a reasonable doubt and acquitted the appellant on that basis. The appeal should therefore succeed.

23. I therefore propose the following order:

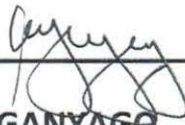
The appeal on the conviction and sentence is upheld.



M V SEMENYA

JUDGE OF THE HIGH COURT; LIMPOPO DIVISION

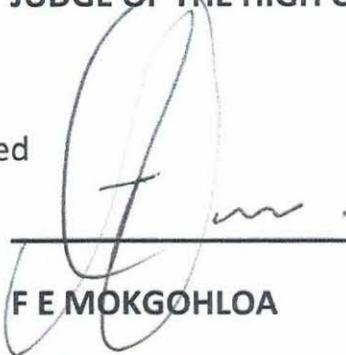
I agree



M F KGANYAGO

JUDGE OF THE HIGH COURT; LIMPOPO DIVISION

I agree and it is so ordered



F E MOKGOHLOA

**DEPUTY JUDGE PRESIDENT OF THE HIGH COURT;
LIMPOPO DIVISION.**

APPEARANCES:

FOR THE APPELLANT:	ADV A STEENKAMP
INSTRUCTED BY:	A W H L STEENKAMP
FOR THE RESPONDNET:	ADV MPHAHLELE
INSTRUCTED BY DPP.	
DATE OF HEARING:	11 MAY 2018
DATE OF JUDGMENT:	29 JUNE 2018