

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A297/2023

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
<u>23-04-2025</u> DATE	<u>PD. PHAHLANE</u> SIGNATURE 

In the matter between:

SIMPHIWE MABENA

1st APPELLANT

NDITSHENI EDDISON KHOROMBIE

2nd APPELLANT

And

THE STATE

RESPONDENT

Delivered: This judgment was prepared and authored by the Judges whose names are reflected herein and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be ~~23~~ April 2025

JUDGMENT

PHAHLANE, J

- [1] This appeal comes before this court by way of leave to appeal granted on petition on 1 September 2023 against the conviction and sentence imposed. The appellants who were legally represented during trial proceedings were cited as accused 1 and 2 in the Nigel Regional Court. Accused 7 who for purposes of convenience was referred to as accused 3 in the trial court has not appealed his conviction and sentence imposed in the trial court and is therefore not part of this appeal process. In this appeal, accused 1 and 2 will be referred to as the first and second appellant respectively, and as "appellants" collectively.
- [2] The appellants were charged with one count of robbery with aggravating circumstances read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997. They pleaded not guilty and denied the allegations levelled against them, and did not give any plea explanation in their defence. The appellants were convicted as charged on 13 February 2023 and sentenced to fifteen (15) years imprisonment on 7 March 2023.
- [3] The appeal against the conviction is essentially based on two grounds. The appellants contend that the trial court erred in relying on the evidence of the State witnesses, specifically the police officers who arrested them, and finding that the State has proved its case against them beyond a reasonable doubt. Furthermore, that the trial court misdirected itself in rejecting their version as not being reasonably possibly true.
- [4] It appears from the grounds of appeal and the appellant's heads of argument that the appeal is against a finding of fact. There are well-established principles governing the hearing of appeals against findings of fact and credibility. It should be noted that the powers of the appeal court to interfere with the findings of fact of a trial court are limited. In essence, the appeal court will not interfere with the trial court's decision regarding conviction unless it finds that the trial court misdirected itself as regards its findings or the law¹. In the absence of

¹ R v Dlumayo and Another 1948 (2) SA 677 (AD) at 705-6.

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 wrong².

[5] In determining whether the appellants were correctly convicted, this court must look at the totality of the evidence led, including evidence led on behalf of the defence, and compare it to the factual findings made by the trial court in relation to that evidence, and then determine whether the trial court applied the law or applicable legal principles correctly to the said facts in coming to its decision.

[6] To succeed on appeal, the appellants must convince this court on adequate grounds that the trial court was wrong in accepting the evidence of the State and rejecting their version as not being reasonably possibly true.

[7] The conviction of the appellants flows from the incident that occurred on 22 December 2022 at a Tuckshop situated in Mpumelelo Township, Devon, in the Regional Division of Gauteng. The State alleged that the appellants acted in the furtherance of a common purpose.

7.1 It is common cause that on the day of the incident, a group of seven men entered the complainant's tuckshop under the guise of being potential customers. Some of these men were armed with, and were wielding knives, and the complainant was ordered to lie on the ground and robbed of his property. His brother who was at the time of the incident sleeping in the bedroom, was also ordered to lay down on the floor. It is also common cause that the complainant was unable to identify any of the perpetrators.

7.2 It is indisputable that while the perpetrators were still inside the tuckshop, the complainant managed to exit the tuckshop, and due to shouts for help, the community responded and three of the perpetrators were locked and

² S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645e-f. See also: S v Monyane and Others 2008 (1) SACR 543 (SCA) at para 15; S v Francis 1991 (1) SACR 198 (A) at 204e.

trapped inside the tuckshop. The police officers, constable Rasool and his colleague constable Ngwenya, who were on duty in the vicinity patrolling the area, noticed a lot of people gathering at the tuckshop and they drove over there.

- 7.3 According to constable Rasool's evidence, they approached the scene and noticed that people were blocking the entrance of the tuckshop. He testified that the complainant reported to them what happened and also informed them that the suspects have been locked inside the tuckshop. He entered the tuckshop with his colleague and arrested three suspects who were locked inside the tuckshop and were identified as the first and second appellant, as well as accused 3.
 - 7.4 The evidence that the appellants were found trapped inside the tuckshop was corroborated by constable Ngwenya.
 - 7.5 The two police officers searched the appellants and found the complainant's property from the first appellant, while the knives the appellants were wielding when they entered the tuckshop were found from the second appellant and accused 3.
 - 7.6 The appellants testified and denied any involvement in the commission of the offence and further denied being arrested inside the tuckshop.
 - 7.7 It is common cause that when the case commenced before the trial court, the charges were withdrawn against other suspects. It is for this reason that the appellants contend that a possibility existed that other people were in the tuckshop and constables Rasool and Ngwenya were confused about the people who were arrested in the tuckshop.
 - 7.8 Unfortunately, they were the only ones found inside the tuckshop because there was no one else in there, according to the corroborated evidence of the two constables and the complainant.
- [8] The appellants belatedly sought to rebut their participation in the robbery for the first time during the defence case when they both raised an *alibi* and testified that they were attending a party at the house of Ms Thandiwe Dlomo in Mpumelelo.

They alleged that they were arrested at the time when Ms Dlomo had sent them out to buy more beer for the party.

- [9] The first appellant testified that he was standing in the street when the people he was with went to source out some beer and he was arrested by the police who alleged that he was involved in the robbery that occurred at the tuckshop. In support of his case, he called Ms Dlomo who testified that both appellants spent the night at the party at her place and that she also sent them out to buy more beers for her.
- [10] The second appellant alleged that while others were looking for a place to buy beers, his attention was drawn to a certain lady whom he was interested in, and that while in the company of this lady, a commotion broke out at the tuckshop, and he ran away because he was afraid of being arrested for drinking in public but was finally arrested.
- [11] An accused person is entitled to raise any defence, including that of an alibi – that **at the time of the commission of the offence, he was not at the scene of crime but somewhere else.** He can also lead evidence of a witness(es) **to corroborate the version of his whereabouts at the critical time when the offence was committed.** (emphasis added)
- [12] Where an alibi has been raised, the correct approach is to consider it in the light of the totality of the evidence presented before the court because it cannot be considered in isolation from the other evidence. The legal position is that there is no onus on the accused to establish their alibi. If it might reasonably be true, they must be acquitted³. In *S v Musiker*⁴ the SCA held that once an alibi has been raised, it has to be accepted, unless it can be proven that it is false beyond a reasonable doubt.

³ Tshiki v S (358/2019) [2020] ZASCA 92 at para 32 (18 August 2020)

⁴ 2013 (1) SACR 517 (SCA) at para 15; See also: S v Shabalala 1986 (4) SA 734 (A)

[13] With that in mind, it is clear from the evidence of Ms Dlomo who testified on behalf of the first appellant that her evidence stood in stark contrast to the overwhelming and corroborated evidence of constables Rasool and Ngwenya who found the appellants and accused 3 trapped and locked inside the tuckshop, as well as the evidence of the complainant who locked the appellants inside his tuckshop. Most importantly, it should be noted that Ms Dlomo was not present at the crime scene at the time of the commission of the offence, and she could therefore not corroborate the version of the appellants regarding their whereabouts at the time when the said offence was committed.

[14] In this court, counsel on behalf of the appellants conceded that the appellants' version and alibi were not put to the State's witnesses because it was only disclosed during the defence case, and further conceded that their alibi was not corroborated by the defence witness because Ms Dlomo was not present when the appellants were arrested and had no knowledge of the exact whereabouts of the appellants at the time when the offence was committed.

14.1 On the same token, counsel acknowledged that the appellants were in the vicinity of the tuckshop but submitted that the trial court misdirected itself in relying on the evidence of constables Rasool and Ngwenya to justify a conviction because the two police officers had no independent recollection of the people they arrested and had to refresh their memory and refer to their statements, where no attempt was made to establish the circumstances under which their statements were made.

14.2 It was further submitted that the fact that the case was withdrawn against other suspects in respect of this matter is an indication that there was confusion about the people who were arrested.

[15] In my view, the submission is misplaced. The evaluation of the whole evidence adduced is a crucial phase in the fact-finding process which includes a determination of the truthfulness of the alibi. A consideration of the evidence in its totality shows that the conclusion reached by the trial court was justified.

15.1 It is undeniable that in a case where it appears that the alibi presented turns out to be a lie (or falsehood), and it contradicts the evidence presented before the court, the lie together with the other evidence of the accused may point towards his guilt.

15.2 On perusal of the judgment of the trial court, I could find no misdirection in its credibility findings of all the witnesses. As indicated above, the two police officers testified that they found the appellants trapped and locked inside the tuckshop and at that time, there was no other suspect around the scene of the tuckshop. Consequently, there can be no room to argue that the police officers were confusing the appellants with the other suspects because according to constable Rasool, "the appellants were immediately placed at the back of the police van after being searched and handcuffed".

15.3 It is common cause that the incident occurred during the day, and both constables Rasool and Ngwenya explained that they spent quite a reasonable time with the appellants because apart from spending time searching the appellants and being in their presence at the crime scene, they were also with the appellants at the police station when they went through the process of booking them into the cells and registering them and the items found from them in the SAP13.

15.4 In my view, the trial court was correct in finding that the appellants were the correct suspects who were found in the tuck shop and were arrested by the two police officers.

[16] Similarly, the submission that the trial court misdirected itself in relying on the evidence of the police officers because constable Rasool could not remember the full names of all the appellants and had to refresh his memory from his statements – is without merit.

16.1 It is on record that constable Rasool testified that he could only remember the name of Sibusiso and not the other suspects because it had been long since the incident occurred. Accused 3's name is Sibusiso. What is however

important is that both constables Rasool and Ngwenya testified that they could clearly remember the appellants and were able to identify them – even before refreshing their memory. Their evidence is further that they made their statements immediately after arresting the appellants and also completed the SAP13 register which reflects the names of the appellants and the items found in their possession.

- [17] There is no rule which precludes a witness from reading his own statement or refreshing his memory from his statement. In *R v Varacia and Another*⁵ the court stated the following:

“As a rule, when the Crown calls a witness who wishes to avail himself of the right to refresh his memory from notes which have been made, it is usual, and in my opinion correct, that the Crown should first of all satisfy the court that the notes in question had been made at a time when his recollection of the incidents to which the notes refer were still fresh in his mind”.

- [18] Having regard to the decision in *Varacia supra*, I cannot find any misdirection in the trial court’s decision to allow the police officers to refresh their memory. From the reading of the record, there was no suggestion that the statements were not made immediately after the arrest of the appellants.

- [19] Having said that, what this court fails to understand is why the appellants would fuss about the circumstances under which the statements of the police officers were made – for the first time at the appeal stage – when that aspect was never challenged before the trial court, considering that the appellants were legally represented during the trial stage.

- [20] On consideration of the evidence as it appears on record, it is evident that the trial court followed the ‘holistic’ approach as enunciated in *S v Chabalala*⁶ and

⁵ 1947 (4) SA 267 (T)

⁶ 2003 (1) SACR 134 (SCA) at para 15

evaluated all the evidence before it and also considered the probabilities and improbabilities inherent in the case. This is so because the trial court had the following to say: *"The court must adopt a balanced approach in analysing the evidence in that any contradictions, inconsistencies, and improbabilities in the State's case as well as in the defence case must be analysed and criticised with equal care and diligence"*.

- [21] In convicting the appellants, the trial court justifiably rejected the alibi of the appellants as false beyond a reasonable doubt and as fabricated because it was riddled with inconsistencies. Having given proper and due consideration to all the circumstances, the trial court held that there were no improbabilities in the evidence of the State.
- [22] In my view, the trial court correctly accepted the evidence of the State witnesses as reliable, trustworthy, and credible, particularly with regards to how and where the appellants were arrested and having considered the manner in which the events unfolded during the commission of the offence. In the circumstances, I am satisfied that the trial court was correct to have accepted the version of the State witnesses and rejected that of the appellants as not being reasonably possibly true.
- [23] It is further my considered view that the trial court did not misdirect itself in convicting the appellants and finding that the State proved its case against the appellants beyond a reasonable doubt. Accordingly, the appeal on conviction stands to be dismissed.
- [24] With regards to sentence, the trial court found no substantial and compelling circumstances that warranted a deviation from the imposition of the minimum sentence prescribed by the legislature and accordingly sentenced the appellants to fifteen (15) years imprisonment.

[25] It was submitted on behalf of the appellants that the sentence imposed is excessive and strikingly inappropriate, and that the court erred in not considering the circumstances of the appellants as constituting substantial and compelling circumstances, and further ignoring the time spent by the appellants in custody awaiting finalization of their trial.

25.1 The respondent on the other hand argued that the appellants were correctly sentenced because the court took into account all the legal principles relating to sentence, as well as the personal circumstances of the appellants, in the exercise of its judicial discretion. It was further submitted that the sentence of fifteen (15) years imprisonment is not excessive or inappropriate because it has been prescribed by the legislature.

[26] It is trite that sentencing remains pre-eminently within the discretion of the sentencing court. The appeal court is therefore only entitled to interfere with a sentence imposed where such a sentence is disturbingly inappropriate or vitiated by misdirection of a nature which shows that the trial court did not exercise its discretion reasonably⁷. The principle was expressed by the SCA in *S v Malgas*⁸ as follows:

“A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court”.

[27] The principle was reaffirmed by the SCA in *Mokela v The State*⁹ where the court stated that: “This salutary principle implies that the appeal court does not enjoy

⁷ S v Salzwedel 1999 (2) SACR 586 (SCA) at 591F-G; See also: S v Kgosimore 1999 (2) SACR 238 (SCA).

⁸ 2001 SACR 496 at para 12 (SCA).

⁹ 2012 (1) SACR 431 (SCA) para 9,

carte blanche to interfere with sentence which have been properly imposed by a sentencing court”.

- [28] It is evident from the reading of the judgment that in determining an appropriate sentence, the trial court had due regard to the applicable legal principles and the triad factors in *S v Zinn*,¹⁰ which includes a consideration of the personal circumstances of the appellants – which the appellants allege were ignored. It further appears from the reading of the record that the court was also mindful of the purposes of punishment which were expressed by the court in *S v Rabie*.¹¹ Furthermore, the trial court took into consideration the time spent by the appellants in custody awaiting finalization of their case, as well as the fact that the appellants had previous convictions.
- [29] Although the trial court did not outline the full details of the personal circumstances of the appellants, those circumstances were duly considered by the court as is reflected in the judgment. In light of what I noted in the preceding paragraph, I am of the view that the trial court correctly applied its mind when determining whether the prescribed sentence of fifteen (15) years imprisonment is a just one. The SCA in *S v Matyityi*¹² stressed the importance of proportionality and balance between the crime, the criminal and the interests of society. The SCA in *Aliko v The State*¹³ reaffirmed the principle and stated that: “it remains the paramount function of the sentencing court to independently apply its mind to the consideration of a sentence that is proportionate to the crime committed”.
- [30] While the respondent submitted that this court should not lose sight of the warning given in *Malgas* that prescribed sentences are not to be departed from lightly and for flimsy reasons, as well as the warning given in *S v Vilakazi*¹⁴

¹⁰ *S v Zinn* 1969 (2) SA 537 (A) at 540G.

¹¹ 1975 (4) SA 855 (A).

¹² [2010] ZASCA 127; 2011 (1) SACR 40 (SCA); [2010] 2 All SA 424 (SCA).

¹³ (552/2018) [2019] ZASCA 31 (28 March 2019) at para 17.

¹⁴ 2009 (1) SACR 552 (SCA)

regarding the balancing effect as it relates to the personal circumstances of an accused person *vis-à-vis* the retributive element of punishment, it was submitted on behalf of the appellants that the seriousness of the offence in this case is at the lower end of aggravated robberies and as such, the trial court misdirected itself when imposing the sentence of fifteen (15) years imprisonment.

- [31] I do not agree with the appellants' submission because the elements of the offence of robbery do not identify the offence by its degree – as to whether it was at the lower end or otherwise. Once all the essential elements of the crime of robbery are proven, the offence remains an aggravated offence. With that in mind, section 1(1)(i) of the Criminal Procedure Act¹⁵ specifically stipulates that the wielding of any dangerous weapon, and in this case, a knife, is an aggravating circumstance in respect of the offence of robbery. In *S v Moloto*¹⁶, Rumpff CJ said the following:

“Robbery is theft committed by means of violence, or the threat of violence. It consists of two unlawful acts, namely the commission of violence or the threat of violence, against the victim, and the taking and appropriation of the victim’s property. It is committed with the intention to steal, that is to say, to take and appropriate the victim’s property, and with the intention of rendering the victim temporarily defenseless for the purposes of committing the robbery by the use of violence or the threat of violence, by eliminating his resistance so that he submits to the robber not to defend his property or acquiesces in the robber stealing his property.”

- [32] With regards to the pre-sentence detention, this aspect was also taken into account by the trial court, which after a consideration of all the circumstances and evidence placed before it, had to exercise its sentencing discretion.

¹⁵ 51 OF 1977.

¹⁶ 1982 (1) SA 844 (A) at 850B-C

[33] Having given proper and due consideration to all the circumstances of this case, I am of the view that the trial court considered all the factors when imposing the sentence appealed against. This court cannot find any fault in the decision of the sentencing court, nor can it be said that the sentence imposed is excessive or unjust. Consequently, we cannot find any misdirection in the trial court's finding, and the appeal on sentence cannot succeed.

[34] In the circumstances, the following order is made:

1. The appeal against conviction and sentence is dismissed.



PD. PHAHLANE
JUDGE OF THE HIGH COURT

I agree,



M MUNZHELELE
JUDGE OF THE HIGH COURT

APPEARANCES

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Heard on : 12 February 2025

Date of Judgment : ~~23~~ April 2025