



**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA**

CASE NO: A05/2023

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

30/01/2025

In the matter between:

SIYABONGA PERSEVERANCE MASEKO

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

Coram: Msibi AJ et: Mashile J

MSIBI AJ

Introduction

[1] The appellant, Mr Siyabonga Perseverance Maseko, was arraigned on a charge of robbery in the Carolina Magistrate Court for the district of Chief Albert Luthuli. He was legally represented throughout the duration of his trial. He pleaded not guilty to the charge. He was nonetheless convicted and sentenced to 26 months imprisonment.

[2] The appeal on both conviction and sentence is before this Court with the leave of the court *a quo*. The application is opposed by the respondent.

Grounds of Appeal

[3] The grounds of appeal on conviction that the appellant relies on are that the Court *a quo* erred in finding that:

- 3.1 The State's evidence of a single witness was clear and satisfactory in all material respects.
- 3.2 The appellant was properly identified by the complainant.
- 3.3 The contradictions in the evidence of the complainant were immaterial.
- 3.4 The evidence of the appellant was not reasonably possibly true.

[4] With regard to sentence, the trial court erred in:

- 4.1 Overemphasising the seriousness of the offence over the personal circumstances of the appellant and the context in which the offence was committed.
- 4.2 Failing to consider the rehabilitative element of sentencing.
- 4.3 Not considering that the appellant was a first offender capable of rehabilitation.

Background Facts

[5] The complainant testified that on 9 August 2020, at about 20h30, he was on his way home when he came across two young men. He identified one of them as Siyabonga, the appellant in this matter. His companion was unknown to him. They walked past him, turned around and walked back to him. The one that was unknown grabbed him and held him tight by the neck, demanding his cell phone, while the appellant stood in front of him, armed with a knife. He handed his cell phone and a wallet to appellant's companion who in turn handed same to the appellant. They

requested the phone's pin, which he gave to them. They took R70,00 from his wallet and gave him his wallet back. They repeatedly instructed him to keep quiet during the entire time.

[6] He was able to identify the appellant with the help of a streetlight at the scene. He knew the appellant from his childhood, since he attended pre-school close to his home. He actually grew up in front of him. He also stated that the appellant had a gold tooth. The complainant used to play soccer with his father and attended the same school with his mother. They all lived in the same neighbourhood.

[7] After reporting the robbery to the police, he went to the appellant's mother and informed her. Her response was that she could not do anything since she was unemployed. She referred him to appellant's father. The appellant's father promised to compensate him for the phone on his payday, but he never did. He went to the appellant's family three to four times trying to recover his cell phone to no avail. At one stage the appellant took him to the gentleman who bought the phone, but he denied knowledge of the phone.

[8] The complainant conceded the fact that he did not include in his statement the fact that his wallet was handed back to him by his assailants.

[9] The appellant's version was that he never robbed the complainant. He was never at the scene of the robbery. In fact, he was at his home together with his mother, his girlfriend and child from 12h30 until bedtime. The appellant denied knowing the complainant. He could not dispute the fact that the complainant knew him, his father and mother. The appellant denied going to the home of the alleged cell phone buyer in the company of the complainant.

[10] Before closure of the defence case the appellant indicated that he would call a defence witness. On the said date the defence indicated that no witness will be called, and the appellant closed his case.

The Law

[11] It is trite that the right to appeal is part of an accused's right to a fair trial. In general, the trial court is better suited to make findings of fact, as the trial court directly observes the witnesses and is involved in the proceedings. This allows the trial court to consider the witness's appearance, behaviour and personality, which enables the court to make its findings. For these reasons, a court of appeal is usually hesitant to interfere with the findings of a court *a quo*, unless the findings are plainly wrong. Such interference cannot be based on the opinion of the court of appeal that, after scrutinising the record and evidence, would have come to different factual conclusions. See *Siphoro v S*.¹

[12] Specific care must be taken when there are findings of fact based on oral evidence. This was emphasised in *S v Hadebe*,² where the court stated that:

“ . . . 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.”

[13] In criminal cases, the onus to prove the guilt of an accused beyond reasonable doubt rests with the State. If the accused's version is reasonably possibly true, then he stands to be acquitted. As it was held in *S v Mafiri*,³ this remains the position, even if the version of the accused is found to be improbable, he will be entitled to an acquittal.

[14] As laid down in *R v Hlongwane*,⁴ this determination rests on the evidence considered holistically. In other words, an accused's version is considered in the totality of the evidence of the case rather than in isolation.

¹ *Siphoro v S* [2014] ZAGPJHC 168 para 7.

² *S v Hadebe* 1997 (2) SACR 641 (SCA) 645E–F.

³ *S v Mafiri* 2003 (2) SACR 121 (SCA).

⁴ *R v Hlongwane* 1959 (3) SA 337 (A).

[15] The State relied on the evidence of a single witness. Section 208 of the Criminal Procedure Act 51 of 1977 provides that an accused can be convicted on the single evidence of any competent witness.

[16] However, a single witness must be approached with caution. In *S v Sauls*,⁵ it was held that the exercise of such caution should not be allowed to displace the exercise of common sense.

[17] The appellant contended that the court *a quo* erred in finding that the contradictions in the complainant's evidence were immaterial. In this regard, Nestadt JA in *S v Mkohle*⁶ remarked as follows:

“Contradictions per se do not lead to the rejection of a witness' evidence. As Nicholas J, as he then was, observed in *S v Oosthuizen* 1982 (3) SA 571 (T) at 576B-C, they may simply be indicative of an error. And (at 576G-H) it is stated that not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence”

[18] The complainant gave an explanation for the contradictions that were identified by the defence, stating that while making his statement, his focus was on his new cell phone rather than the wallet and the R70,00 cash.

[19] It is trite that evidence of identification should be treated with caution as laid down in *S v Mthethwa*.⁷ The complainant knew the appellant very well from his pre-school age. There is undisputed evidence that he knew his name, which he gave to the police the next morning. There is also undisputed evidence that he knew his parents and their homes very well. He gave the police the appellant's name and went to his home the next morning. The trial court correctly found him to be a reliable and credible witness.

⁵ *S v Sauls* 1981 (3) SA (A) at 180E-G.

⁶ *S v Mkohle* 1990 (1) SACR 95 (A) at 98E-F.

⁷ *S v Mthethwa* 1972 (3) SA 766 (A) at 768A.

[20] Contrary to the State's case, the appellant's case was riddled with material contradictions and inherent improbabilities which justified the rejection of his exculpatory version as false beyond a reasonable doubt.

[21] In the result, I am unable to find any misdirection in the decision of the trial court on conviction. Accordingly, no reason exists to interfere, and I propose that the appeal on conviction be refused.

Sentence

[22] Marais JA provided guidance in *S v Malgas*⁸ as to when can an appellate court interfere with sentence, stating 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. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate Court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as ‘shocking’, ‘startling’ or ‘disturbingly inappropriate’.”

[23] A mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence. It must be of such a nature, degree, or seriousness that it shows, directly, that the trial court did not exercise its discretion at all or exercised it improperly or unreasonably.⁹

⁸ *S v Malgas* 2001 (2) SA 1222 (SCA) para 12.

⁹ *S v Pillay* 1977 (4) SA 531 (A) 535E-F.

[24] In its judgment on sentence, the trial court correctly considered the triad of factors which also include the personal circumstances of the appellant. The court considered the fact that the appellant was not remorseful which militates against the possibility of rehabilitation without incarceration. This in turn called for a deterrent sentence.

[25] The appellant robbed the complainant who was old enough to be his father. He went to school with his mother and played soccer with his father. The total disregard of the rights and safety of others, which include the elderly should be discouraged by our courts. By imposing the sentence of 26 months, the trial court addressed the need for deterrence.

[26] It is my considered view that the trial court has not misdirected itself with regard to sentence. In the circumstances, this Court cannot be at liberty to interfere with the sentence.

[27] In the result, I propose the following order:

1 The appeal on conviction and sentence is dismissed.




S MSIBI

ACTING JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MBOMBELA

I agree




B A MASHILE
JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MBOMBELA

Appearances

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Instructed by:

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