



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable / Not reportable

Case no: A185/2023

In the matter between

LESEGO TSIMATSIMA

APPELLANT

and

THE STATE

RESPONDENT

Coram: Naidoo J *et* Nemavhidi AJ

Heard: 20 January 2025

Delivered: 28 January 2025

Summary: Appeal – criminal law – housebreaking with intent to rob and robbery with aggravating circumstances – identity in issue – appellant well known to complainant- sufficient illumination and opportunity to observe appellant. Appeal dismissed.

ORDER

1. The appeal against conviction and sentence is dismissed.
 2. The conviction and sentence imposed on the appellant are confirmed.
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JUDGMENT

Naidoo J (Nemavhidi AJ concurring)

[1] The appellant was convicted on 26 April 2022 on one count of housebreaking with intent to rob and robbery with aggravating circumstances in the Virginia Regional Court, and sentenced to 15 years' imprisonment. The appellant approaches us with the leave of the High Court, after his petition to the Judge President of this Division was successful. The appeal lies against both his conviction and sentence.

[2] The appellant's grounds of appeal against the conviction and sentence are, in essence, that the court a quo erred in:

- a. finding that there were no improbabilities in the state's version and rejecting the evidence of the appellant as not being reasonably possibly true;
- b. finding that the evidence of the state witnesses could be criticized in detail only;
- c. finding that minor contradictions in the appellant's version were sufficient to reject his version;
- d. rejecting his alibi as false;
- e. not taking into account the following factors with regard to sentence:
 - i. not taking into account that 15 years' imprisonment is strikingly inappropriate;

- ii. not recognising that it induces a sense of shock and is out of proportion to the totality of the accepted facts in mitigation;
- iii. not taking account of his personal circumstances and the element of rehabilitation;
- iv. over-emphasising the seriousness of the offence, the interests of society, the effect of the offence on the complainant, the deterrent effect of the sentence and the retributive element of sentencing.

[3] On the evening of 2 November 2018 at approximately 20h30, the complainant, Nonthuthuzelo Joyce Towa (Mrs Towa), locked the doors of her house, secured the windows and went to bed. Her house, having been recently renovated, was in a good state of repair. She was asleep when she heard a scream from her daughter, Mamello Mamasedi (Mamello), who, together with her daughter, were asleep in the next room. Mrs Towa woke up and went into the passage as she heard a noise coming from the blinds in the sitting room, which was about 4 metres away from her bedroom. When she walked into the passage, she saw a man wearing a balaclava, a blue top and black jeans, standing in the house staring at her. She went into the first bedroom and armed herself with a broomstick to defend herself. She approached the man she had seen, but Mamello screamed at her not to, as the man would injure her.

[4] She activated the house alarm and returned to the bedroom where she retrieved the broomstick but then thought about her children and went back into the passage where she saw the man breaking the glass on the door leading from the passage to the sitting room. She proceeded to the second bedroom where Mamello and her child were, but it seems that, on her way there, she slipped, fell and fractured her right arm. She entered Mamello's room. They locked themselves in there, opened the window and began screaming for help. There was a whistle in the room, which they blew in order to attract the attention of the neighbours. She heard footsteps at the bedroom door and then heard noises coming from the other bedrooms and eventually the footsteps moved to the sitting room. They then heard the same noises from the blinds that woke them up earlier.

[5] While they were still at the window, Mamello told Mrs Towa that there was a light in the garage and that Mrs Towa's car, which was parked in the garage, was moving. Then she heard a big bang, which she said was the sound of the car reversing into the

closed garage door. The car was adjacent to the window where they were standing. The light inside the car was on and the person driving the vehicle had removed the balaclava from his face. She observed this and Mamello then screamed at the person, calling him 'Lesego'. He drove off, hitting a steel gate in the process. By this time, the neighbours had started gathering at the house. They called the tracking company, as the car was fitted with a tracking device. The company kept them updated with regards to the movements of the vehicle. About an hour and a half later they were informed that the vehicle had been recovered in Thabong.

[6] Mamello confirmed Mrs Towa's evidence in all material respects and gave more detail in respect of the events which clarified aspects especially pertaining to the identity of the person who had entered the house and subsequently drove away with the vehicle. She confirmed that the person was wearing a 'balaclava' when he was in the house and, when asked to elaborate, she said it was like a balaclava without cut outs for the eyes and nose. She also mentioned that it could have been 'pantyhose', which are stockings worn by women. Mamello said she was not able to identify the intruder when he was inside the house, but when he was in the garage, attempting to reverse the vehicle, he removed the 'balaclava' by pushing it to the top of his head. She was then able to see his face, recognize him and identify him as the appellant, as there was sufficient light to do so. She confirmed Mrs Towa's evidence regarding the manner in which the car was driven and the collision with the gate.

[7] Mamello's evidence indicated that she knew the appellant for a number of years as he lives in the same street as she did. She also frequently met him or saw him at various locations that she had been to. He clearly also knew her well. Mamello's undisputed evidence was that when they interacted with each other, he called her by her nickname, 'Mello'.

[8] The final piece of the puzzle was provided by the arresting officer, Sergeant Serane April Tlhomeli (Sgt Tlhomeli), and the police officer from Virginia, to whom the appellant was handed over, Constable Sello Petrus Nkhobo (Cst Nkhobo). Sgt Tlhomeli said that he and his crew were on patrol duties when they received information about a stolen vehicle. They spotted the vehicle and followed it. At a particular street in Thabong the vehicle came to a halt, the driver's door opened and someone alighted from the vehicle and fled. The police also stopped but gave chase to this person who was wearing

a jacket with reflector strips on the arms. This allowed them to follow him without losing sight of him. They eventually arrested him under a tree near a house, the jacket was lying next to him. This person was led back to the vehicle. Sgt Tlhomeli confirmed the details of the vehicle, which turned out to be Mrs Towa's vehicle. The person he apprehended refused to give him his address and gave him a wrong name, but he was unaware that this name was wrong. It is only when Cst Nkhobo arrived at the scene and upon hearing that name, that Sgt Tlhomeli was informed about the wrong name. He then indicated what his correct name was but Sgt Tlhomeli could only remember the name 'Tsimatsima'.

[9] Cst Nkhobo confirmed Sgt Tlhomeli's evidence in so far as it related to him and that it was the appellant that was handed over to him. When Mamello was told that an arrest had been made, she went to the police station in Virginia, where she saw the appellant and confirmed to the police that he was the person who drove away with the vehicle from her mother's garage. Her evidence was that the appellant then apologized to her for what he had done.

[10] The appellant denied being in Mrs Towa's house, or stealing her vehicle. He also denied apologising to Mamello. He proffered an alibi defence, alleging that he was visiting his brother who lived in Thabong. During the time that the offences were perpetrated in this matter: he was at a tavern in Thabong with Teboho Lelane (Teboho) drinking until about 4h00, when they left, each carrying a bottle of beer. He walked up to Sokayi Street and then parted company with Teboho. As he entered the street he saw a blue Hyundai Tuscon vehicle, which passed him and stopped ahead of him, He walked past the vehicle and saw a person sitting in the driver's seat. As he walked on, he saw a police vehicle approaching at high speed which suddenly stopped. He was still holding the bottle of beer he left the tavern with, and thought he was going to be arrested for drinking in public. When the police called him, he dropped the bottle of beer and fled. The police gave chase and caught up with him in the yard of the house that he had jumped into. They arrested him and then also took a blue jacket that was hanging from the tree. He alleged that Cst Nkhobo was lying that he was wearing the blue jacket when Nkhobo arrived at the scene, and surmised that he was told what to say.

[11] The appellant called Teboho as a witness. He confirmed that he and the appellant were at the tavern until about 3h00 or 4h00 on 3 November 2018. They left the tavern and at a point, they parted ways. He was able to give a detailed description of what he

wore and what the appellant wore on the night in question. There were discrepancies in his evidence and that of the appellant, which the trial court took account of.

[12] The trial court undertook a detailed analysis of the evidence, weighing the evidence led by the state against that of the appellant and his alibi witness. The trial court also mentioned the discrepancies in the evidence of Mrs Towa and Mamello and concluded that such discrepancies were not material and did not affect Mamello's identification of the appellant. I cannot fault that conclusion by the trial court. The trial court found, on the other hand, that Teboho's evidence appeared tailored, especially his remarkable recall of what the appellant was wearing. The incident had happened three and a half years earlier and it was improbable that Teboho could recall such detail. The discrepancies regarding who the appellant was visiting – his brother or his grandmother – led the trial court to conclude that, when weighed against all the evidence against the appellant, the latter's version was concocted. Once again, this reasoning and conclusion cannot be faulted.

[13] An appeal court will be very slow to interfere with a trial courts findings on fact as it is accepted that the trial court was in a better position to see and hear the witnesses and assess the evidence against those observations. In *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705 the majority, per Greenberg JA and Davis AJA (Schreiner dissenting) said: 'The trial court has the advantages, which the appeal judges do not have, in seeing and hearing the witness and being steeped in the atmosphere of the trial. Not only has the trial court the opportunity of observing their demeanour, but also their appearances and whole personality. This should not be overlooked.' A similar view was adopted in *S v Pistorius* 2014 (2) SACR 315 (SCA) para 30, which cited, *inter alia*, *Dhlumayo* with approval:

'It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong. *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 706; *S v Kebana* [2010] 1 All SA 310 (SCA) para 12. It can hardly be disputed that the magistrate had advantages which we, as an appeal court, do not have of having seen, observed and heard the witnesses testify in his presence in court. As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, *this court* is not at liberty to interfere with his findings.'

[14] The trial court in this matter demonstrated a fair-minded and balanced approach

to the evidence. The evidence of Mamello that she was able to identify the appellant as he was driving her mother's car away, and then saw him at the police station, is not in dispute. This was about an hour and a half after she saw him driving away from their premises. This coupled with the evidence of Sgt Tlhomeli, who is a completely independent witness, who knew neither the complainant nor the appellant, made for a compelling case against the appellant and the trial court saw it as such.

[15] The appellant appears to have been an intelligent and crafty person who constantly interrupted proceedings to give instructions to his legal representative, resulting in the court requesting him to wait for an opportune moment to give such instructions, and cautioning the attorney that he should not ask every question that his client requests him to, whether they are relevant or not. I am satisfied with the trial court's assessment that the appellant's version was contrived and concocted. This is evident when he denied wearing the blue jacket which Mrs Towa and Mamello saw and which Sgt Tlhomeli observed as he pursued the fleeing appellant and found it on the ground next to him. The description of his attire at the relevant time by Teboho is another example of the appellant deliberately distancing himself from the detailed description given by Mrs Towa of what the intruder in her house wore. I am therefore satisfied that the trial court did not err in convicting the appellant.

[16] With regard to sentence, it is well established in our law that absent a misdirection, irregularity or error in law, an appeal court will not lightly interfere with sentence. This trite principle has been well settled in our law, and was succinctly enunciated approximately 50 years ago in the case of *S v Rabie* 1975(4) 855 (A) at 857, where Holmes JA said:

'1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -

(a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court"; and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".

2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.'

This principle was subsequently re-iterated in the much-quoted case of *S v Malgas* 2001 (1) SACR, 469 (SCA) at 478 para 12, where the court remarked that:

'... 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. ...'

[17] The personal circumstances of the appellant are that he was a 40 year-old married man with three young children between 13 and 3 years old. All three children are in receipt of a government social grant of R350.00 each. The appellant's wife was unemployed while he was a food hawker. He was the sole breadwinner of his family. Whilst he was incarcerated, his family survived on the social grants received in respect of each child. It was alleged that the appellant spent 18 months in custody awaiting trial, but it was apparent that he was granted bail and absconded for eight of those 18 months, before he was re-arrested. The appellant is not a first offender and had numerous previous convictions, and even though one of those convictions was for robbery, it was more than ten years ago. The trial court regarded the appellant as a first offender for the purposes of sentence in this matter but took account of his propensity for criminal behaviour. In my view, the court correctly found that there were no compelling and substantial circumstances that would have justified a deviation from imposing the prescribed minimum sentence of fifteen years' imprisonment. There is no reason for this court to intervene in the sentence imposed on the appellant.

[18] In the circumstances, I make the following order:

1. The appeal against the conviction and sentence in this matter is dismissed;
2. The conviction of and sentence imposed on the appellant are hereby confirmed



NAIDOO J

I concur.



NEMAVHIDI AJ

Appearances

For the Appellant:

ADV V ABRAHAMS

Instructed by:

LEGAL AID SOUTH AFRICA
BLOEMFONTEIN

For the Respondent:

ADV EB Ontong

Instructed by:

DPP
BLOEMFONTEIN