

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: A357/2017

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
20/06/2025	[REDACTED]
DATE	SIGNATURE

In the matter between:

MOKONE, TN

Appellant

and

THE STATE

Respondent

CORAM: MDALANA-MAYISELA, MALINDI AND MOOSA JJ

JUDGMENT

MALINDI, J

Introduction

[1] The appellant was convicted of charges related to the so-called second Omar robbery, being counts 13, 14, 15, 16, 17, 18 and 19, and those related to the Viviers robbery, being counts 25, 28, 29, 30, 31, 32, 33 and 34:

[2] He was sentenced as follows:

- a. Count 13 – 4 years;
- b. Count 14 – 12 years;
- c. Count 15 – 3 years;
- d. Count 16 – 1 year;
- e. Count 17 – 4 years;
- f. Count 18 – 1 year;
- g. Count 19 – 6 months;
- h. Count 25 – robbery – 12 years;
- i. Count 28 – 12 years;
- j. Count 29 – 10 years;
- k. Counts 30 to 34 – taken together – 6 years.

- [3] The sentences imposed in respect of counts 13, 15, 16, 17, 18 and 19 were ordered to run concurrently with the sentence imposed on count 14 and the sentences imposed in respect of counts 29, 30, 31, 32, 33 and 34 were ordered to run concurrently.
- [4] The Appellant's effective sentence was therefore 36 years direct imprisonment ¹
- [5] The appellant appeals against all of the said convictions and sentences, leave to appeal having been granted by a different Judge to the trial Judge who had already passed away at the time leave was sought. ²
- [6] The appeal revolves around whether the appellant was one of the perpetrators of the crimes involving the second Omar and Viviers robberies. The reliability of his identification is challenged in both cases.

¹ CaseLines 007-4 to 007-5

² Caselines 004-963

The Second Omar Robbery

- [7] The Omar family had suffered two robberies. The first one on 28 November 2008 was when Mr Ismail Yacoob Omar (Mr Omar) was robbed at gunpoint near the Sasol Garage on Main Reef Road in Johannesburg. The appellant was acquitted in respect of these charges. They are counts 1 to 5 of the indictment.
- [8] Counsel for the appellant, Ms Kolbe, submits that the reasons why the Court below found the evidence of Mr Omar completely unreliable remains relevant with regard to the second Omar robbery referred to in counts 13 to 19 of the indictment which took place on 9 April 2009.
- [9] Mr Omar was the only identifying witness in the first robbery. He, his wife and their domestic worker were the identifying witnesses in the second robbery.
- [10] The appellant was arrested on 31 October 2011 during the Viviers robbery which will be dealt with later in this judgment.
- [11] The Learned Judge in the Court below criticised Mr Omar's evidence regarding his identification of the appellant, in the first robbery, *inter alia*, for the following reasons:³
- a. Mr Omar's identification of the appellant as part of the first robbery is unreliable because if the appellant was part of it Mr Omar would have immediately said so to the investigating officer after the second robbery. In other words, Mr Omar would have immediately told the police at the scene of the second robbery that the appellant had been part of the first robbery too.
 - b. If the appellant had been part of the first robbery Mr Omar would have said so to the police after viewing the security video footage of the robbery.
 - c. Mr Omar missed the opportunity to mention that the appellant was part of the first robbery later when the police returned to him some of his robbed

³ CaseLines 004-907 line 23 to 004-908 line 17.

items after the second robbery and during the identification parade where he identified Mr Mbatha as being part of the first robbery.

- [12] The sum total of this criticism of Mr Omar's evidence is that he included the appellant as part of the first robbery without any evidence to do so. The reason why remains unknown. Although section 208 of the Criminal Procedure Act, 51 of 1977 ("CPA") provides that an accused may be convicted on the evidence of a single witness, such evidence has to be substantially satisfactory in relation to all material aspects or be corroborated.⁴
- [13] When testifying about the second robbery, Mr Omar stated that the appellant was the person who jumped into the front passenger side of his vehicle after his car was intercepted by the robbers. At this moment he remembered the appellant from a previous robbery (the first Omar robbery) in November (2008).⁵
- [14] It is evident from Mr Omar's evidence and that of Mrs Omar and Ms Dikolomela, that all three had an opportunity to observe the appellant over a long period during the robbery in the house. How they were able to identify him is challenged on several grounds by the defence. In as far as Mr Omar is concerned, his evidence is challenged on the basis that he contradicted himself in material respects when asked whether he had told the police that he could identify the appellant after the second robbery, and whether he had stated this in his statements. In evidence under cross-examination he testified that he had not been asked to give any description of the robbers in both incidents but changed his evidence to say that he mentioned this to the police but that they did not write it down in his statement.⁶
- [15] The above contradictions must be considered in the context of Mr Omar having said in his statement made to Warrant Officer Haynes on 26 July 2011 that he would not be able to identify the suspects in the first robbery.⁷ This can only mean that Mr Omar falsely included the appellant in the first robbery and that there was no other evidence linking him to that robbery.

⁴ *Rugnanan v S* [2020] ZASCA 166 (SCA) at [23].

⁵ CaseLines 004-315 lines 15 to 18.

⁶ CaseLines 004-376 to 004-379.

⁷ CaseLines 004-382.

- [16] His explanation that he did not mention that the appellant was involved in the first robbery is because he was traumatised by the second robbery is itself a contradiction of his specific statement to Warrant Officer Haynes that he would not be able to identify the suspects in the first robbery.⁸ He was now testifying that he would have been able to identify the suspects but being traumatised led to him forgetting to mention it to the police.
- [17] The contradictions and inconsistencies must be seen in the context that objective evidence in the form of the security video footage had been “changed” or swapped or altered by the time the investigations were concluded. This resulted in the footage not being presented in Court.⁹ This evidence was crucial, not only for placing the appellant at the second robbery but also the first robbery by Mr Omar mentioning it to the police that the appellant was also involved in the first robbery. Counsel for the appellant, Mr Meiring’s submission in the Court below that the footage would have resolved the issue of the appellant’s identification at the second robbery was on point. Its disappearance is indeed mysterious as submitted by Ms Kolbe in argument. In view of Mr Omar’s unsatisfactory evidence it is probable that the footage may have proved the appellant’s absence during the second Omar robbery.
- [18] Mrs Omar testified that she gave the police a description of the appellant and was thereafter able to identify him at the identification parade and in Court.¹⁰ However, she had not given such a description in her statement.¹¹ It is inconceivable that the police would have asked her for the description of the assailants but not Mr Omar as he had testified.
- [19] Mrs Omar identified the appellant on the third occasion of attending identity parades. The appellant had not been present at the first two.
- [20] Ms Dikolomela (Tsholofelo Wilhemina) testified that she was able to identify the appellant because she would never forget his face.¹² This response is usually

⁸ CaseLines 004-391 to 004-392.

⁹ CaseLines 004-414 line 11.

¹⁰ CaseLines 004-502.

¹¹ CaseLines 004-505 lines 16 to 18.

¹² CaseLines 004-553 lines 1 to 9.

most decisive because what a witness means is that the event was so profound that they would have paid particular attention to the persons involved and their faces were imprinted in their minds. However, she was not honest when she said that the identity of the robberies was never discussed between her and the Omars.¹³ This is improbable in the circumstances. It is only logical that after such an experience they would have discussed what happened. Her denial suggests that she was concealing that she was coached.

[21] It is submitted on behalf of the appellant that all witnesses in the second robbery were made aware of the appellant's identity before they pointed him out at the identity parade. It is not necessary to survey the evidence of all the police officers who were involved in the identity parade process. The contradictions in their evidence is what is to be expected when witnesses testify about such processes without the assistance of contemporaneous notes or statements. However, the evidence of Warrant Officer Haynes and Warrant Officer Elvis Mgiba warrants such examination.

[22] Warrant Officer Haynes testified that he left the Omars and Ms Dikolomela in his office when he went downstairs to meet the appellant and his attorney in the parking area.¹⁴ Before leaving his office he had, for no apparent reason, told them not to look through the window.¹⁵ At this time he had left the witnesses with Warrant Officer Mgiba in his office¹⁶ which overlooked the parking area where he was going to meet the appellant and his attorney.¹⁷ When Warrant Officer Mgiba testified he was at pains to distance himself from the identity parade and the witnesses by claiming that he was preparing to go to Court at 09h00. Warrant Officer Mgiba shared the office with Warrant Officer Haynes. The witnesses would not have been left unattended to while Warrant Officer Haynes went to the parking area to meet the appellant. Warrant Office Mgiba had no intelligible answer when it was put to him that if he was preparing to go to Court at 09h00, he would not have seen the witnesses at all because they had arrived shortly before the identity parade scheduled for 11h00. This scenario leaves an

¹³ CaseLines 004-559 lines 16 to 26.

¹⁴ CaseLines 004-627 lines 1 to 5.

¹⁵ CaseLines 004-634 lines 11 to 25.

¹⁶ CaseLines 004-644 lines 11 following.

¹⁷ CaseLines 004-627 lines 3 to 4.

impression that it was at this time that the witnesses were primed as to the appellant's identity. Warrant Officer Mgiba conceded that a person standing in the parking area can be identified from the window of his and Warrant Officer Haynes' office.¹⁸

[23] The trial Court erred in its assessment of this evidence. The conclusion that the witnesses would not have had a clear view of the appellant from Warrant Officer Haynes' office was not based on the facts of Warrant Officer Haynes and Warrant Officer Mgiba's evidence.¹⁹ The trial Court erred in concluding that the identification parade was reliable. The evidence of the witnesses shows that they had not provided descriptions of the appellant to the police which would have been useful in their investigations. It is inexplicable how they were thereafter able to identify the appellant at the identification parade. It would have been expected that they would give reasonable descriptions of the appellant if he was present at the second robbery considering the long period of time the robbers were at the house and each of the robbers having interacted with each of the witnesses for a considerable length of time. The only reasonable inference is that the witnesses were primed as to the identity of the appellant, and this probably happened in the circumstances stated above when Warrant Officer Haynes and Warrant Officer Mgiba were readying them for the identity parade and at the same time meeting the appellant in a spot where the witnesses could see the appellant shortly before participating in the identity parade.

[24] The State failed to prove beyond reasonable doubt that the appellant was present at the second Omar robbery. The appellant stands to be acquitted of counts 13 to 19.

The Viviers Robbery

[25] The appellant's version is that he was arrested on 31 October 2011 at the intersection of Church Street and Crownwood Street. He had been walking from Langlaagte Traffic Department which is a block away from the intersection where

¹⁸ CaseLines 004-761 lines 7 to 9.

¹⁹ CaseLines 004-913 lines 17 to 23.

he had gone to apply for a temporary driver's licence since he had misplaced his driver's licence at the time.

- [26] The appellant alleged that he was walking away from the Traffic Department in order to have photographs of him taken at the Home Affairs office further down the road when a car came at high speed, with tyres screeching and followed by a bump or thud. As his sight of the car was obscured by a truck he walked in the direction of the noise in order to see what had happened. Before he could reach the scene he heard gunfire and he hid himself at the wall behind the API signage.
- [27] After the gunfire ceased a male person came towards him and pointed a gun at him and arrested him. At this stage he was about to stand up from where he had taken cover.
- [28] The appellant denies that he was the driver of the silver bakkie that the State alleges was pursued by the police after a gang of robbers had committed a robbery.
- [29] The Court below assessed the evidence of two police officers, Constable Bonongo and Warrant Officer Mofokeng, who testified that they saw the appellant run away from the bakkie that had been pursued by them after it had crashed into a traffic light. They both testified that he was the driver of the silver bakkie. The Court pointed out discrepancies in their evidence as to how far they were from the bakkie when they observed the driver and in which direction he ran from the bakkie.
- [30] The Court below accepted the police evidence on the appellant's identity despite the criticism of their evidence and rejected the appellant's version as not reasonably probably true. It pointed out that it is improbable that he could have been so brazen as to attend to a driver's licence, when by his own admission, he was a fugitive from justice after having breached bail conditions in another trial for which a warrant of arrest had been issued against him. He testified that he was in hiding at the time to avoid being arrested. Reference was made to *S v Sauls and Others*²⁰ for accepting that the truth had been told by the State

²⁰ 1981 (3) SA (AD) 173.

witnesses. He was accordingly convicted of counts 25 and 28 to 33 in respect of the Viviers robbery. For sentencing purposes the appellant was to serve 12 years for count 25, 12 years for count 28 and 10 years for counts 29 to 34 which run concurrently.

- [31] The robbery was admitted in terms of Section 220 of the CPA during the trial. Mr Viviers received back from the police items that he confirmed he was robbed of, including a rifle.
- [32] The evidence of the incident was briefly as follows. On 31 October 2011 police staked out China Mall after receiving intelligence that a robbery involving a bakkie and a Corolla would take place.²¹ While they were there and being briefed by Warrant Officer Motlha, a bakkie left the Mall and they followed it to the intersection where they stopped next to the bakkie and ordered the driver to stop after displaying their police badges and announcing themselves as the police. They (Constable Bonongo, Warrant Officer Montane, Constable Kganyago and Warrant Officer Njeya) gave chase in a silver BMW vehicle driven by Warrant Officer Montane.
- [33] The bakkie drove off at high speed and Constable Kganyago and Constable Njeya gave chase on foot. Soon thereafter the bakkie came to a stop after crashing into a traffic light and the one robber who was shooting from the back of the bakkie and the driver alighted and ran in different directions.²²
- [34] Warrant Officer Mofokeng testified that he was 60m to 80m from the bakkie when the driver jumped out of the bakkie and ran towards him²³, not aware that he was a policeman as he was dressed in civilian clothes.
- [35] He saw the driver for the first time at point C14 in photograph 24 and point Z1 in photograph 15.²⁴

²¹ CaseLines 004-86.

²² CaseLines 004-93.

²³ CaseLines 004-154 lines 19 to 20.

²⁴ CaseLines 004-188 to 004-189.

- [36] Constable Bonongo testified that he saw the driver after he (driver) had opened the driver's door after the bakkie had crashed into a traffic light. He chased after the driver and pushed him to the ground.²⁵
- [37] Constable L M Masangwane was not part of the team that was staking out China Mall. She was attending to a different complaint when she heard gunshots and went out onto the street where the gunshots came from. She saw Constable Bonongo struggling with the appellant in the road. Constable Bonongo instructed her to assist him to handcuff the appellant, which she did. This was near point D on photographs 16 of exhibit B.²⁶
- [38] The appellant submits that this evidence is not sufficient as proof of his identity as the driver beyond reasonable doubt. The testimonies of the officers are criticised on the basis that:
- a. Constable Bonongo did not see the bakkie crash into the traffic light and therefore that he was not observing the bakkie at that stage.
 - b. Constable Bonongo did not see the driver getting out of the bakkie but only saw a man running away.
 - c. Constable Maswangane testified that the appellant was wrestling with Constable Bonongo on the tarmac of the road whereas Constable Bonongo pointed out an area on the pavement.
 - d. Warrant Officer Mofokeng testified that he was the first to confront the appellant whereas Constable Bonongo said that he chased and arrested the appellant and did not mention Warrant Officer Mofokeng's presence.
- [39] Further criticisms of the contradictions and inconsistencies of the police officers are made. Most of these criticisms are not pertinent to the identity of the appellant but to how the chase took place. The critical witnesses as to whether the appellant was in the bakkie is that of Warrant Officer Mofokeng and Constable Bonongo. The evidence of Constable Bonongo is corroborated by that of Constable

²⁵ CaseLines 004-90 to 004-93.

²⁶ CaseLines 004-133 to 004-136.

Masangwane that the appellant was being wrestled with on the road and not on the pavement against a wall near the API street signage that the appellant alleges to have taken cover at after hearing gunshots.

[40] Constable Bonongo's evidence under cross examination that he did not see the driver getting out of the bakkie must be seen in context. His evidence in chief is that:

*"Yes, so what did you see with regard to the driver of the bakkie, what did you see? – At the time when we were still approaching the intersection with the other unknown person busy shooting at us the driver opened the driver's door as I was looking at him."*²⁷

[41] Under cross-examination he testified as follows:

"CROSS-EXAMINATION BY MR MEIRING (Continued): Thank you, M'Lord. Constable Bonongo, in your evidence-in-chief you have been questioned by my learned colleague for the state you said the following, and you will recall that I actually objected to the following question, you said: 'I came out of our motor vehicle, but that time I got out from the back of the BMW, the person firing the shots had run away and by that time the driver of the bakkie also fled'. Do you remember that? – Yes ²⁸

... Are you saying that at the time when you got out of your vehicle vehicle, the BMW, from the back that the driver of the bakkie had already fled, is that your evidence? – He was already out of the vehicle, and not having as yet ran far away.

You say not having as yet ran far away, so he was away from the vehicle when you saw him? – Yes, he was away from the bakkie.

How far away? – It is from her where the witness is standing to the end of the table here.

About six metres, M'Lord.

MR LE ROUX: I agree, M'Lord.²⁹

and

"Are you saying for the first time at the robot where the bakkie collided with the robot you saw him in the middle of the road as you have indicated a few minutes

²⁷ 004-93 lines 18 to 21.

²⁸ 004-94 lines 12 to 19.

²⁹ 004-113 line 13 to 004-114 line 7.

ago, is that right? – No, I saw him for the first time at the time when this car was stopped, and also saw him for the second time, after he got out of the vehicle, being there where I have pointed, that is where I saw him.

Mr Bonongo, I do not know whether my questions are not clear or maybe the interpreter is not interpreting it correctly to you, but all I want to know is at the stage where the bakkie collided with the robot, forget about the first stop, at the robot where he collided with the bakkie, or where he collided with the robot you saw the driver of the vehicle there for the first time standing in the middle of the road, that is where you saw him. – That is correct.

To make it more clear, you did not see him getting out of the bakkie? – I did not see him.

Now let me read you your evidence that my learned colleague led you on a little bit earlier. She referred you to photograph 15. Sorry Your Lordship, it should be photograph 16. This was your response, my learned colleague asked you: 'What did you see on photograph 16 of EXHIBIT B at the bakkie' and the following: 'At that stage my mind was that I wanted to see everything inside the bakkie that we were chasing. The driver opened the driver's door as I was looking at him. Now this, I must tell you, my learned colleague listened to the recording during the lunch break, and this is what came out – so your evidence now is, you did not see him met off the bakkie, you only saw him the time, is that correct – I responded by saying that what I saw was that there was someone who was standing at the back of the vehicle towards the right, shooting towards us. The canopy at the back flipped open and these other two doors were opened and the driver's side door was opened at the time when the driver got out and running.

You did not see him get out. Your evidence is that you did not see him. You cannot say the driver's door, got out then the driver ran away. Your evidence is that you did not see him in the car. – I did not see him getting out of the vehicle, I only saw him at the time when he was now running away.

Yes. So when you said to this honourable court earlier on that you saw him getting out of the vehicle that was wrong? – Will you kindly repeat the question?

I said when you told his Lordship and the learned assessors a little while ago that you saw the driver opening the door and getting out as you were looking at him. That evidence of yours is wrong, it is incorrect? – I did not see him when he got out of the vehicle.³⁰

[42] The evidence is that there were no other people near the crash scene. Only the person who was shooting with a rifle from the back of the bakkie and the driver ran away from the bakkie.

[43] The Learned Judge's assessment of the evidence in the court below of these three witnesses cannot be seriously characterised as fraught with misdirections or errors of fact. The scene was by all accounts a fast moving scenario. However,

³⁰ 004-118 line 1 to 004-19 line 19.

what has been established beyond doubt is that the appellant exited the bakkie after it had crashed into a traffic light. As he was running away from the bakkie, Constable Bonongo fired a warning shot to the ground and the appellant stopped running. He was then wrestled to the ground by him and an arrest effected with the help of Constable Maswangane on the tarmac. The Court below properly rejected the appellant's averments that he was an innocent pedestrian walking on the pavement and having taken shelter against a wall after hearing gunshots.

[44] The Court below was alive to the fact that even if the appellant's version is rejected, the State still bore the onus to prove its case beyond reasonable doubt. In considering whether the state has discharged its burden of proof as enunciated in *S v Ntsele*³¹ and *S v Jackson*³², the evidence has to be evaluated in its totality.³³ I am satisfied that this is what the Learned Judge in the Court below did.

[45] For these reasons I find that the case against the appellant was proved beyond reasonable doubt as found by the trial Court. The appeal therefore falls to be dismissed.

Sentence

[46] It is submitted on behalf of the appellant that the sentence was startlingly severe. It is submitted in respect of count 28 that the killing of the co-perpetrator of the robbery as a result of his conduct of shooting at the police and other people who were in the line of his fire did not involve a deliberate act by the appellant. It is accordingly submitted that an effective 24 years imprisonment in respect of the Viviers robbery is exceedingly harsh and warrants interference and amelioration by this Court. A sentence not exceeding 10 years imprisonment is proposed.

[47] Sentencing is pre-eminently within the discretion of the trial Court. A Court of Appeal may only interfere with such sentence if the trial Court did not exercise its discretion judiciously or applied wrong principles on sentencing. This Court has not been pointed to any such misdirections save that the circumstances of the

³¹ 1998 (2) SACR 178 (SCA).

³² 1998 (1) SACR 470 (SCA).

³³ *S v Van der Mayden* 1999 (1) SACR 447 (W) at 450; *S v Chabalala* 2003 (1) SACR 134 (SCA) at [15].

robbery are unknown and its victim did not testify as he was untraceable at the time of trial. In this regard the only reasonable inference to be drawn is that the firearms that the robbers had, and were used against the police were also used in the robbery.

[48] It would be inappropriate for this Court to interfere with the sentence unless the trial Court was wrong in imposing such a sentence.

[49] Having upheld the appeal in respect of the second Omar robbery, the appellant is left with serving the sentence imposed in respect of the Viviers robbery, that is, the effective 24 years imprisonment.

Order

[50] In the circumstances the following order is made:

1. The appeal on conviction in respect of counts 13 to 19 is upheld.
2. The appeal on conviction and sentence in respect of counts 25 and 28 to 34 is dismissed.


G MALINDI

JUDGE OF THE HIGH COURT
JOHANNESBURG

I concur


MMP MDALANA-MAYISELA
JUDGE OF THE HIGH COURT
JOHANNESBURG

I concur



C I MOOSA
JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Appellant:

For the Respondent: