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

Not Reportable

Case no: A151/2023

In the matter between:

NDUBUSI JOSHUA OGUH

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Oguh v The State* (A151/2023) [2025] ZAFSHC 220 (18 July 2025)

Coram: Daniso *et* Van Rhyn JJ

Heard: 14 April 2025

Delivered: This judgment was delivered by email to the parties and release to SAFLII. It shall be deemed to have been delivered at 14h00 on 18 July 2025

Summary: Criminal procedure – appeal against conviction – assessment of identification evidence – identification reliable-appeal against conviction dismissed.

ORDER

The appeal against conviction is dismissed.

JUDGMENT

Daniso J (Van Rhyn J concurring)

[1] The appellant, who was accused number two in the Bloemfontein Regional Court, was convicted together with Mr Alfonso Alan Cogill (Cogill), as accused number one, after pleading not guilty to a charge of robbery involving aggravated circumstances as predicated in s 51(2) of the Criminal Law Amendment Act 105 of 1997. They were subsequently sentenced to eight years' imprisonment respectively.

[2] The appellant is aggrieved by the conviction. The appeal is with leave of the trial court and it is opposed by the State.

[3] The complainant, Mr Mzikayise Makame, is a taxi operator. On 17 November 2017, he was assaulted and robbed of his motor vehicle a Toyota with registration numbers and letters FJL[...] by three men brandishing firearms. The appellant, Cogill and a third gentleman who is still at large were identified by the complainant as the perpetrators.

[4] In the court *a quo*, it was not in dispute that the complainant was robbed of his motor vehicle under the circumstances alleged by the State. The only issue for determination by the trial court was the identity of the perpetrators.

[5] In convicting the appellant and Cogill, the trial court relied on the testimony of the complainant, warrant officers in the South African Police Services (SAPS) Phillina Maria

Charlotte du Preez, Stefanus Johannes Wessels and Efraim Rakwena and held that it pointed towards the guilt of the appellant beyond a reasonable doubt.

[6] The summary of their testimony is the following: Shortly after 20h00, the complainant was parked at the taxi rank situated next to Stadium Fast Foods at Small Street in Willows when he was approached by Cogill accompanied by the appellant and a third gentleman who is at large. They asked to be taken to Windmill Casino and, after a discussion regarding the trip and the fare, all three gentlemen climbed into the complainant's vehicle. The appellant and Cogill occupied the back seat with the appellant sitting directly behind the complainant. The third gentleman sat in the front passenger seat. The complainant was about to reach the Windmill Casino when he heard a strange sound. He thought he had driven over an obstacle on the road however, when he looked into the rear mirror, he saw Cogill pointing a firearm at him. He then realised that the strange sound he had heard was in fact a sound of cocking gun. The appellant also produced a firearm and pointed it at the back of the complainant's head.

[7] The third gentleman ordered the complainant to keep driving and listen to his instructions otherwise they will blow his head off. He also asked about his name, how much money he had made and where he keep it.

[8] As a taxi operator, the complainant was trained to ensure that he concentrates on the perpetrators' features during a hijacking so that he can be able to identify them as a result he continued to drive whilst observing the appellant and Cogill from his rear-view mirror. Being well aware that, in these kinds of hijackings, drivers are not only robbed, they are also killed and their bodies dumped in a dam. He jumped out of the motor vehicle whilst it was still in motion. After landing on the tarmac, he saw his motor careering towards a pavement. He flagged down a motorist who allowed him to climb into the back of his bakkie and drove him to Windmill Casino. The complainant was thereafter assisted by the police who were passing by the Windmill Casino.

[9] Warrant officer du Preez is attached to the flying squad, a unit in the SAPS which responds to crimes in progress such as armed house robberies, hijackings and crime intelligence. On the night of the incident, she was on night duty when information came in about a highjacked Toyota Tazz. Upon being informed that it had a tracking device, she contacted the relevant tracking company Cartrack and they provided her with the coordinates of the vehicle's location. The coordinates led her and her colleagues, warrant officers Wessels and Fouche, to a house in Exton Road. When they entered the yard, a male person took off running, jumped over the fence and fled. The complainant's vehicle was found at the back of the house.

[10] In the house, they found two occupants, a lady and another Nigerian man. They asked to be shown the room of the person who ran away. They were shown the appellant's room. Inside the appellant's room they found asylum seeker documents with a photograph of a Nigerian man attached thereto. Motor vehicle registration documents with several photographs were found in the complainant's motor vehicle. Warrant officer du Preez confiscated the asylum seeker documents for investigation.

[11] Warrant officer Wessels corroborated warrant officer du Preez's version regarding the circumstances under which the complainant's motor vehicle was recovered from the appellant's residence and that he subsequently seized the motor vehicle and its contents. A message was then left for the appellant to report to the police station.

[12] A few days after the incident, the documents seized from the complainant's were presented to the complainant to establish whether he could identify the people on the photos. He positively identified the appellant as one of the perpetrators who robbed him.

[13] Approximately a month later, on 17 December 2017, Cogill was arrested by warrant officers Wessels and Rakwena after the complainant spotted him at a shopping mall and called the police.

[14] The appellant was arrested a day later on 18 December 2017 at the police station. He had gone there accompanied by another Nigerian male to enquire about his documents. Again, the complainant was asked to identify him and he pointed him out of four other males who were seated next to him at the waiting area of the police station.

[15] It was the State's case that the taxi rank and the interior of the complainant's vehicle was well illuminated by the streetlights. The incident also took quite some time. Aside from the time spent discussing the trip and the fare, the appellant and his co-perpetrators were in the applicant's motor vehicle for about 10-11 minutes before he jumped out fearing for his life. During that period, the complainant was able to observe the appellant and his co-perpetrators' physical appearances namely: that they all appeared to be foreign nationals. The appellant was dark in complexion, his companions were light skinned and spoke English with a distinctive accent. Cogill appeared to be coloured and the third gentleman Indian. He also took note of the appellant's shape of his head. The entire incident stuck to his mind he could still see his attackers in his visions and it is for that reason that he informed the police shortly after the incident that he would be able to identify them if he saw them again. Due to his previous ownership of a firearm, the complainant was also able to identify their firearms as 9mm pistols.

[16] The trial court rejected the appellant's version as false beyond a reasonable doubt on the premise that he provided contradictory versions regarding the circumstances under which the complainant's vehicle was found at his residence and also raised a false alibi.

[17] The record of the proceedings reveal that, in his defence, the appellant told the court that he was not involved in the robbery as, at the time of the robbery, he was with his friend Rasta in Grassland from 19h00 until 22h00. Thereafter, he went to Pitseng tavern where he spent the remainder of the evening with his brother until 00h00 whereas, Mr Wendel Wadro (Rasta), who testified as an alibi witness, told the court that the appellant was at his residence from between 17h00 and 18h00 and left around

19h00 or 20h00 after receiving a call from someone. He said he does not know the appellant, he was just a client who regularly bought herbs from him.

[18] The appellant confirmed that, when he arrived home after the police had left, his housemates told him that the police broke into his room, searched it and confiscated his asylum documents, his wristwatch and the motor vehicle that was parked outside his room. The police also left a message that he must come to the police station for questioning.

[19] Initially, he averred that he knew nothing about how the complainant's vehicle got to be at his residence and explained that it could have been brought there by any of his other housemates. He then changed his version and stated that he was informed by housemates that the motor vehicle was brought there by one of his friends who ran away when the police arrived. Another version that he proffered was that, whilst at the tavern, he met some friends, one lived in Aliwal North, and offered them a place to sleep as they had no money to pay for a guest house. When he woke up on Friday morning, they were still asleep, he left his residence and, when he returned later, they were no longer there. They returned later with the complainant's vehicle. When asked why he never informed the police about these details, his explanation was that the police did not ask.

[20] He also confirmed that he was arrested at the police station when he went there to collect his documents. The complainant pointed him out as one of his assailants.

[21] The appellant challenges his conviction essentially on the grounds that, in convicting the appellant, the trial court relied on the State's evidence which did not prove beyond reasonable doubt that the appellant was one of the perpetrators who robbed the complainant in that, the complainant was a single witness and, prior to the robbery, he had never seen the appellant. The robbery took place at night and it was dark. The complainant only relied on the streetlights for illumination. The scene was also mobile and everything happened very fast ending with the complainant jumping out

of the vehicle fearing for his life. After the robbery, the complainant did not describe the assailant's clothing and bodily features to the police. He was only able to identify the appellant because he was shown his photograph. There is no other evidence linking the appellant to the crime such as fingerprints and identification parade. The appellant's conduct of going to the police station to claim his documents is uncharacteristic of a person who was involved in the robbery.

[22] Tritely: in determining an appeal directed against a trial court's findings of fact regarding conviction, the appeal court takes into account that the trial court was in a more favourable position than itself to form a judgment as it was able to observe the witnesses during their questioning and was also absorbed in the atmosphere of the trial. The appeal court therefore initially assumes that the trial court's findings were correct and will normally accept those findings unless there is some indication that the trial court misdirected itself as regards its findings of facts or the law.¹

[23] On the facts germane to this matter, the complainant was a single identifying witness implicating the appellant and his co-perpetrators to the robbery charge. In terms of s 208 of the Criminal Procedure Act 51 of 1977, an accused may be convicted of any offence on the single evidence of any competent and credible witness.

[24] Indeed, the reliability of the complainant's observations must be tested however factors such as a witness's prior knowledge of the perpetrator, evidence of identity parade, fingerprints and conditions of the scene are but some of the factors impacting on the reliability of the identification evidence. They are not individually decisive, they include factors such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; and, of course, the evidence by or on behalf of the accused. These factors, must be weighed one against the other, in the light of the totality of the evidence, and the probabilities of the case to

¹ *Rex v Dhlumayo & Another* 1948 (2) SA 677 (A).

decide whether it is satisfied that the truth has been told despite the shortcomings or defects in the evidence.²

[25] Furthermore, alibi evidence should be tested or corroborated. In *S v Carolus*,³ the Supreme Court of Appeal pointed out the importance of confirming or verifying alibi evidence of an accused. Witnesses should be able to corroborate the actual defence or evidence of an accused. The importance of corroboration of alibi evidence by other witnesses was also restated in *Mathebula v S*,⁴ where it was held that the 'vulnerability of unsupported alibi defences is notorious, depending, as it does, so much upon the court's assessment of the truth of the accused's testimony'.

[26] On the available facts, the complainant's evidence pertaining to the description of the identification was succinct and corroborated by the discovery of his stolen motor vehicle from the appellant's residence. The discrepancies in the appellant's version regarding the circumstances under which the complainant's vehicle was found at his residence shortly after it was stolen including his uncorroborated alibi affected his credibility.

[27] Resultantly, the trial court was correct to reject the appellant's alibi defence as false and to accept that the State's evidence proved that the appellant committed the offence he was charged with beyond a reasonable doubt. The appellant was convicted correctly.

Order

[28] In light of the conclusions reached, the following order is made:

The appeal against conviction is dismissed.

² *S v Sauls* 1981 (3) SA 172 A at 180E-G; see also *S v Mthetwa* 1972 (3) SA 766 (A) 76.

³ *S v Carolus* [2008] ZASCA 14; [2008] 3 All SA 321 (SCA); 2008 (2) SACR 207 (SCA) para 28-31.

⁴ *Mathebula v S* [2009] ZASCA 91; 2010 (1) SACR 55 (SCA); [2010] 1 All SA 121 (SCA) para 11.

DANISO J

I concur

VAN RHYN J

Appearances

For the appellant: T Diba

Instructed by: Molefe Attorneys, Bloemfontein

For the respondent: S Tunzi

Instructed by: The Director of Public Prosecutions, Bloemfontein.