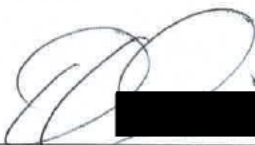




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

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

27/11/2025
DATE


SIGNATURE

CASE NO: A119/2019

DPP REF: 10/2/5/1-2019/98

DATE OF APPEAL: 24 NOVEMBER 2025

In the matter of:

THWALA, TSEKO FRANS

APPELLANT

versus

THE STATE

RESPONDENT

JUDGMENT

DOSIO J et PJ DU PLESSIS AJ:

Introduction

- [1] The appellant was arraigned in the Regional Court sitting in Randburg on one count of robbery with aggravating circumstances, one count of unlawful possession of a firearm and one count of unlawful possession of ammunition.
- [2] The appellant pleaded not guilty but was convicted of robbery with aggravating circumstances. He was acquitted in respect to count two and three. He was sentenced to 12 years imprisonment on 1 February 2018.
- [3] The appellant was legally represented.
- [4] The appellant sought leave to appeal against his conviction on 1 February 2018. The appellant did not apply for leave to appeal his sentence from the court a quo.
- [5] The appeal is accordingly in respect to conviction.

Evidence

- [6] Four witnesses testified for the respondent, namely; Michelle Bailey, Sergeant Shirley Ramasela, Sergeant Makonyane and Warrant Officer Swart.

Michelle Bailey

- [7] She is the complainant. She testified that during the morning of 30 July 2009, she travelled to Fairlands with her red Audi motor vehicle. While she was waiting on the driveway at her sister's premises, around 07h30 to 07h40, she was pointed with a firearm by an unknown male person through her vehicle's window. The said male instructed her to get out of her vehicle. She complied with the instruction. He further instructed her to hand over her wedding ring which she threw on the ground. The second assailant took it. The unknown male drove off in her vehicle. The second male he was with, drove away in a green vehicle. She could not give a good description of her assailants. All that she could recall was that the one who pointed her with a firearm was short and youngish. He was wearing dark clothes. The second male was older. Her vehicle was fitted with a tracking system. She was assisted by someone to contact her tracking company. She thereafter went to the police station to report

the incident. On the same day during the afternoon, she went to Randburg Police Station where she identified and took back possession of her vehicle, her Nokia cell phone and all her valuables.

Sergeant Shirley Ramasela Rafapa

- [8] She testified that on 30 July 2009, she and Sergeant Makonyane responded to a complaint received through radio from their control room about a stolen vehicle which was driving in the Randburg area in an unmarked police vehicle. They were informed that the assailant was a short young boy wearing a black jacket, khaki trousers and brown boots. While driving at CR Swart and Fabric Streets, Sergeant Makonyane spotted the appellant walking in their direction while speaking on the phone. He fitted the description provided to them. They stopped him and requested to search him. He gave them consent. Sergeant Makonyane searched him and found a firearm with ammunition, a Nokia cell phone, car keys and a calculator. The appellant was arrested and detained at the Randburg Police Station. The vehicle key was handed over to Warrant Officer Swart who found the complainant's car. All the exhibits were sealed inside forensic bags and booked into the SAP 13 register.

Sergeant Makonyane

- [9] Sergeant Makonyane has 15 years' experience in the South African Police. He together with Sergeant Rafapa received a report to lookout for a young man wearing a black jacket, a green shirt, khaki trouser and brown boots. This man was spotted at Fabric Street, talking on his cell phone. The man was searched, and two cell phones were found in his possession, namely, a Nokia and Samsung cell phone. A .38 special revolver was also found in his possession. The Nokia cell phone was green in colour, and the accused also had Audi car keys in his possession, cream white gloves and a calculator. Warrant Officer Swart came to collect the Audi car keys from Sergeant Makonyane.

Warrant Officer Swart

- [10] He testified that while he was on duty on 30 July 2009 around 08:30, he received information about a red Audi which was hijacked at Fairlands. The vehicle had a tracking system which enabled him to track its location. He used

a LoJack system to get the signal of the said Audi. The signal led him to President Fouche Drive at Engen garage where he found it parked next to mailboxes. There was no one inside and it was locked. The engine was warm, indicating that it had just been parked. He heard over the radio that there was a suspect apprehended while he was still at the garage. Thereafter, he proceeded to Randburg Police Station where Sergeant Makonyane gave him the vehicle key to unlock and drive the Audi back to the police station.

[11] That was the evidence for the respondent.

Accused's version

[12] The accused also testified in his defence and called no witnesses. He denied that a green Nokia cell phone and Audi car keys were found in his possession. He denied even seeing those items. He further denied being found in possession of a firearm and ammunition. He believes that the police officers might have found the complainant's car key inside the garage whilst they were searching. He testified that on the morning in question he had an appointment to meet with a client for a painting quotation. However, he could not even provide the name of the said client. He further testified that he travelled from Alexandra to Randburg taxi rank. Whilst he was waiting for a taxi on the Street and speaking on his cell phone, a lot of police officers approached from all directions. Three of them came to him. It was Sergeant Makonyane and two other female officers. Makonyane requested to search him. He hung up his cell phone and raised his hands. Makonyane searched him and found his cell phone, taxi fare, calculator and a piece of paper with the details of the client he was going to meet. There was another male who was standing next to him. He and that unknown person were assaulted by the police. He does not know what happened further to the unknown person. He did not sustain any injuries as a result of the assault and did not lay any criminal charges against his attackers. This ended the evidence of the appellant.

Common cause facts

[13] The common cause facts are that on 30 July 2009 during the morning, Michelle Bailey was robbed of her vehicle at gun point by two males while she was

parked on her sister's driveway at Fairlands which is in the Regional Division of Gauteng. That inside her vehicle, a red Audi, there was a cell phone and other valuables. The vehicle was recovered one and a half hours later, parked at a garage in President Fouché Drive. The complainant's green Nokia cell phone was also recovered a few hours later. That the accused was arrested on 30 July 2009 at CR Swart Street by Sergeant Makonyane.

Ad Conviction

[14] It is trite law that the onus rests on the State to prove the guilt of the accused beyond reasonable doubt. If his version is reasonably possibly true, he must be acquitted.

[15] In considering the judgement of the court a quo, this court has been mindful that a Court of Appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record reveals that those findings are patently wrong.¹

Grounds of Appeal

[16] The appellant has raised the following grounds of appeal:

- a) That the respondent has not proven its case beyond reasonable doubt. That the court a quo erred in failing to acquit the appellant in respect of the robbery with aggravating circumstances charge, in that none of the circumstances, as recorded in the definition of aggravating circumstances in terms of s1 of the Criminal Procedure Act 51 of 1977 ('Act 51 of 1977'), were proven by the state.
- b) That the court a quo acquitted the appellant of possession of a firearm and ammunition. This implies that because there was no firearm that was used in the commission of the offence, that accordingly the conviction of an offence of robbery with aggravating circumstances, is not valid.

¹ See *S v Francis* 1991 (1) SACR 198 (A) at 198 J – 199A and *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645 E-F

- c) That the Court a quo erred in finding that the State witnesses were credible witnesses, that their evidence was satisfactory in all material respects and that such witnesses were honest witnesses. The Court even failed to evaluate and apply cautionary rules when it dealt with the evidence of the complainant.
- d) That the court a quo erred in convicting the appellant in the absence of evidence of identifying features and any corroboratory evidence.
- e) That the court a quo erred in finding that the discrepancies in the testimony of different witnesses was not material enough to dismiss their evidence in totality.
- f) That the court a quo erred in rejecting the version of the appellant as false without giving reasons and that version of the appellant was reasonably true.

[17] In the matter of *Stellenbosch Farmer's Winery Group Ltd and Another v Martel & Cie SA and others*² the Supreme Court of Appeal held that:

"The technique generally employed by the courts in resolving factual disputes of this nature may be conveniently summarized as follows: To conclude on the disputed issues, a court must make findings on

(a) credibility of the factual witnesses, (b) their reliability and (c) the probabilities. As to (b) the court's findings on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as:

- (i) The witness's candour and demeanour in the witness box,
- (ii) His bias, latent and blatant,
- (iii) Internal contradictions in his evidence,
- (iv) External contradictions with what was pleaded on his behalf or with established fact or with his own..... statements or actions,
- (v) The probability or improbability of particular aspects of his own version,
- (vi) The calibre and cogency of his performance compared to that of other witnesses testifying about the event or incident.

² *Stellenbosch Farmer's Winery Group Ltd and Another v Martel & Cie SA and others* 2003 (1) (SA) 11 (SCA)

As to (b), a witness's reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above; on opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c) this necessitates an analysis and improbability of each party's version on each of the disputed issues. In the light of (a), (b) and (c), the court will then, as a final step determine whether the party burdened with the onus of proof has succeeded in discharging it." ³

[18] The court a quo correctly found that the arresting officers corroborated each other with regards to the fact that the complainant's vehicle key and Nokia cell phone were found in possession of the appellant. The suggestion by the appellant that police officers could have found the complainant's vehicle key inside the garage and pin it on him is highly improbable. If police officers were on a spree to falsely implicate people, they would have implicated the other male who was next to him, especially in light of the fact that there were two males who robbed the complainant.

[19] In the matter of *Mothwa v The State*, ⁴ the Supreme Court of Appeal set out the requirements necessary for the doctrine of recent possession to apply:

"The doctrine of recent possession permits the court to make the inference that the possessor of the property had knowledge that the property was obtained in the commission of an offence and in certain instances was also a party to the initial offence. The court must be satisfied that (a) the accused was found in possession of the property; (b) the item was recently stolen. When considering whether to draw such an inference, the court must have regard to factors such as the length of time that passed between the possession and the actual offence, the rareness of the property, the readiness with which the property can or is likely to pass to another person." ⁵

"There is no rule about what length of time qualifies as recent. It depends on the circumstances generally and, more particularly, on the nature of the property stolen. If the property stolen is commonplace the time might be very short as it is always easy

³ Ibid paragraph 5

⁴ *Mothwa v The State* (124/5) [2015] ZASCA 143; 2016 (2) SACR 489 (SCA) (1 October 2015)

⁵ Ibid para 8

to trade it. It can thus change hands easily and much quicker. Property such as money and motor vehicles are easily circulated.”⁶

“Courts have repeatedly emphasised that the doctrine of recent possession must not be used to undermine the onus of proof which always remains with the State. It is not for the accused to rebut an inference of guilt by providing an explanation. All that the law requires is that having being found in possession of property that has been recently stolen, he gives the court a reasonable explanation for such possession.”⁷

[20] The appellant was found in possession of the complainant’s car key and cell phone within an hour and a half of the robbery. By being in possession of the vehicle keys the appellant enjoyed full control over the vehicle. He was therefore in possession of the vehicle and failed to offer a reasonable explanation for his possession. Therefore, the only reasonable inference that the court a quo could have drawn, is that he was one of the robbers.

[21] Due to the chain evidence, pertaining to the handing in of the firearm and ammunition, not being proven, the court a quo correctly acquitted the appellant on count two and three.

[22] Section 1 of Act 51 of 1977 states that:

“Aggravating circumstances”, in relation to robbery, include –

- a) The wielding of a firearm or other dangerous weapon,
- b) The treat to inflict grievous bodily harm, or
- c) The infliction of such harm...”

[23] The complainant stated that she was pointed with a firearm. For purposes of the definition of robbery with aggravated circumstances, the respondent merely needed to prove the appellant threatened the complainant using what appeared to be a firearm, regardless of whether it is a real or fake firearm. Accordingly, the Court a quo correctly found the appellant guilty on count one.

⁶ Ibid para 9

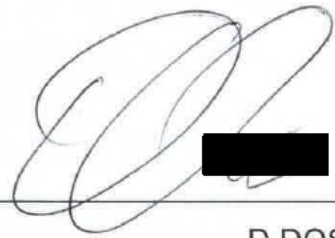
⁷ Ibid para 10

[24] After the thorough reading of this record this court has no doubt as to the correctness of the court a quo's factual findings. This court finds no misdirection on the part of the court a quo.

Order

[25] In the premises, I make the following order:

The appeal in respect of conviction is dismissed.



D DOSIO
JUDGE OF THE HIGH COURT
JOHANNESBURG

I agree and it is so ordered



P.J. DU PLESSIS
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

This judgement was handed down electronically by circulation to the parties' representatives via email, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 27 November 2025.

FOR THE APPELLANT:

Ms L. Qoqo

INSTRUCTED BY:

Legal Aid South Africa

FOR THE RESPONDENT:

Adv. N.P. Serepo

INSTRUCTED BY:

The National Prosecuting Authority