

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A302/2024

Delete whichever is not applicable	
(1) Reportable: No.	 
(2) Of interest to other judges: No	
(3) Revised.	
07 November 2025 Date	Signature

In the matter between:

LUCKY ZITHA
SPHAMANDLA NGUBANE

FIRST APPELLANT
SECOND APPELLANT

and

THE STATE **RESPONDENT**
The matter was heard in an open court. The Judgment is handed down electronically by circulating to the parties' legal representatives by email and uploading to Caselines. The date and time for hand-down is deemed to be the date that it is uploaded.

JUDGMENT

Ledwaba AJ (Munzhelele J concurring)

Introduction

- [1] This appeal is against the conviction and sentence imposed by the Regional Court sitting at Benoni (the trial court or court of first instance) on the 24th of January 2020. The court of first instance granted leave to the Full Bench of this Division.
- [2] The appellants were charged as accused numbers two and three. They were convicted of robbery with aggravating circumstances, read with section 51(2) of the Criminal Law Amendment Act 105 of 1997 (the minimum sentence Act), where a firearm was used, as well as housebreaking with intent to steal and theft. Mr Ephraim Mohapi and Samuel Dlamini were charged as accused numbers one and three.
- [3] They were sentenced to 15 years' direct imprisonment for robbery with aggravating circumstances, and 5 years' direct imprisonment for housebreaking with intent to steal and theft, both sentences to run concurrently. In terms of section 103(1) of the Firearms Control Act 60 of 2000, they were declared unfit to possess a firearm.
- [4] The appeal is based on the submission that, relying on the evidence of a single section 204 witness, the state failed to prove the appellants' guilt beyond a reasonable doubt. Not relying on any authority, the appellants submit that Mr Pelation Samini Nhavoto (Nhavoto) is a single 204 witness who did not implicate himself in the commission of the offences and who did not remember the date the appellants allegedly delivered the tyres to

him.

- [5] The appellants' submission is that there is no direct evidence that they committed the offences and that their alibi plea should have been accepted as reasonably, possibly true, and the case decided on their version.
- [6] Regarding the sentence, the appellants submit that their personal circumstances regarding age¹, that they have children,² they were employed³, that most of the stolen items were recovered, and that they waited for trial whilst in police custody⁴ Should have counted in their favour to reduce the sentence.
- [7] They submit that the trial court should have found that their personal circumstances have the cumulative effect of constituting substantial and compelling circumstances justifying deviation from the prescribed fifteen years' imprisonment.
- [8] The appellants submit that the trial court over-emphasized the seriousness of the offence, the prevalence of the offence, and the interest

¹ The first appellant was forty-two years while the second appellant was thirty-two years old.

² The first appellant has twenty-two- and eleven-years old children. The second appellant has one three old child.

³ The first appellant was employed as security officer while the second appellant was employed at Sapana Electricity.

⁴ The appellants submits that they spent two years and eleven months in custody before they were sentenced.

of society. They submit that the sentence under-emphasises their personal circumstances, is disproportionate to the circumstances of the offence, is shockingly harsh, and induces a sense of shock.

[9] On behalf of the **respondent**, it is submitted that:

9.1 It is not necessary for the State to prove its case beyond all doubt that:

9.2 It is a common cause and or not disputed that there was a robbery at the business premises of Mega Scrap Yard owned by Mr Arel Potgieter (Potgieter), that the contents and correctness of the complainant's statement of Mr Nhavoto were read and handed in as an exhibit, and that

9.3 The identification of the perpetrators and whether the appellants failed to provide a reasonable explanation for having the stolen items were in dispute.

[10] It is submitted that the trial court is also required to apply its mind not only on the merits or demerits of the state and defence witnesses but also to the probabilities of the case.

[11] On behalf of the respondent, it is submitted that the trial court correctly applied the **cautionary rule** of a single witness, Nhavoto. It is submitted that the cautionary rule is a rule of practice and not a rule of law. The trial

court found that Nhavoto testified truthfully and made a good impression on the court.

[12] Nhavoto testified that he is well known to the first appellant and that the first appellant was with the second appellant when they allegedly delivered the stolen tyres to him.

[13] It is submitted that Sibusiso Ndaba and Potgieter confirmed Nhavoto's testimony of robbery and the stolen items. The ownership of stolen and recovered items was corroborated by the police officers, Constable Tebogo Koko and Sgt. Philimon Magwasa, when Potgieter identified them as his properties.

[14] On behalf of the respondent, it is stated that the trial court found that the appellants' version was improbable, that the appellants were found to be untruthful, and the state has proved its case beyond a reasonable doubt.

Background

[15] Before pleading, the trial court explained to the appellants, both competent verdicts and minimum sentences referred to in section **51(2) of the Criminal Law Amendment Act**. They pleaded not guilty

[16] The State led the evidence of four witnesses, being Potgieter, Nhavoto, Ngubane, and two police officers.

[13] Potgieter is the owner of Mega Scrap Yard, where they do second-hand vehicle spares, including tyres and mag wheels. He knew the first appellant as he worked for him as a security guard at the premises together with complainant Ngubane.

[14] The previous day of the incident, he locked his business and left before the complainant, Ngubane, came to do night shift security work. Around 4 a.m. the following day, he received a police call that the complainant Ngubane was tied up, there was a break-in in the business premises, and the items he listed on the paper with his own handwriting were stolen. These included second-hand mag wheels, rims, tyres, a generator not in a working condition, a weed eater, a **vehicle sales agreement, and license disk documents with his business letterhead bearing his handwriting and his signature.** The list was, by agreement with the defence, handed in as Exhibit A.

[15] The missing documents were important for his sales track record. He made his own investigations, and after about two weeks, he received information which he passed to the police. The police recovered the stolen items. He was not with the police when the goods were recovered.

[16] The first appellant was arrested at the premises before he was called to identify his items.

[17] He remembered **Nhavoto** as the person who bought tyres and other stuff from his business before the incident. He recently learned that he sells

second-hand tyres.

[18] Nhavoto is a 204 witness who was previously charged as accused number five before the charges against him were withdrawn.

[19] He was warned by the court that the charges were withdrawn against him on condition that he tell the whole truth to the satisfaction of the state and the court, failing which the state would have the discretion to charge him again.

[20] He testified that he was arrested for having bought stolen tyres, which were brought to his workplace, where he fixes tyres. They were brought by the first appellant in the company of the second appellant.

[21] On his return to his tyre repair workplace, his former employee Fernando Aaron Mmusi, or Nyamusi, also called Bandana, told him the first appellant came looking for him. Bandana identified the first appellant by his name, and because he had his number, he called the first appellant on his cell phone. He said he became aware of the second appellant's name after his arrest when they were in the cells. He said the first appellant used to come to his workplace to play cards when he had no job to do. The first appellant previously sold him his Uno car tyres.

[22] It was on a Saturday, around 15 hours, when the first and the second respondents came back pushing a wheelbarrow containing six tyres. They claimed the third person's employer gave him the tyres.

- [23] The tyres were offered to him for sale, which he bought for R600.00 after negotiations. He testified that two weeks later, the police came with the first and second appellants in the back of the police car, and he was arrested for having purchased stolen tyres.
- [24] He confirmed that he bought tyres from Mega Scrap Yard when his clients needed good tyres. He said it was about four kilometres from his workplace.
- [25] The police officers, Constable **Tebogo Koko and Magwaza**, testified about the recovery of the stolen items.
- [26] Koko was the investigating officer of this case. The complaint Mr. Sibusiso Ndaba was a security officer at the premises, when he was attacked by five African males at gunpoint. It was dark, and he was instructed to lie down and cover his face.
- [26] About two weeks after the break-in, he received a call from the owner, Potgieter, who informed him that he had received information that the stolen goods were hidden at Zenzele township and that one of the places belonged to his former security employee, Ephraim Mohapi.
- [27] He left with Sergeant Magwaza and four members of the Crime Prevention unit for Potgieter, who took them to the accused number one, Ephraim Mohapi's address. They found three tyres under the bed, which Potgieter identified as his, and Ephraim Mohapi could not explain where

he got them from. Ephraim Mohapi was in possession of a Norinco semi-automatic firearm with ammunition, which he claimed he had a license to possess. He produced an expired license.

[28] Potgieter then led them to the second appellant's place in the same area, where they found a grass cutter, motor vehicle registration documents, and memoranda of agreements used to change car ownership. The documents had **Mega Scrap Yard letterhead, Mr Potgieter**, as well as three vehicle computer boxes. When asked to explain possession, the second appellant just looked down without giving an explanation for possession.

[29] Potgieter led them to the first appellant's place, where they found two electricity generators, a grass cutter, and a file with vehicle documents and a memorandum of agreement with **Mega Scrap Yard letterhead, as well as two boxes full of tools**. The first appellant could not explain the possession of those items.

[30] They then went to Nhavoto's workplace and found that he was not at his workplace. They went to collect him from his residential place and brought him to his workplace, where he took out five tyres and a mag wheel with a tyre on. Nhavoto told them he bought the items from the second appellant and Mr Dlamini. Mr Dlamini denied involvement in the commission of those crimes.

[31] Potgieter identified the confiscated goods as his. He did not participate in

the house searches but stayed outside until the items were brought to him for identification. The confiscated goods were entered into the exhibit register.

[32] Police officer **Sergeant Philiimon Magwaza** went with the investigating officer, Koko, and gave similar testimony.

[33] **Sibusiso Ndaba**, complainant's statement was admitted as an exhibit by agreement with the defence. The statement says he is employed as a security guard at Mega Scrap Yard. He was doing night patrol duty around 00:13 when he was accosted by five black males, one of them carrying a firearm. They told him not to scream, took him to the corner of the yard, and tied him up with shoelaces. They pointed a gun at him and told him to lie down on his stomach.

[34] One of them remained with him while the rest went to the warehouse and broke the door and window open, and went inside. They went past him several times, collecting computer systems. They then left, leaving one of them behind with him for about ten minutes before also leaving him.

[35] He stood up, saw the police car passing, and whistled. The police came and untied him. He opened the gate, and they went inside the shop to find that the items valued at R50 000.00 were stolen.

[36] The **first appellant** testified that the police officers Koko, Magwaza, and another uniformed police officer came to his place of residence in the

evening and conducted a search. His fifteen-year-old child opened for them, and he was assaulted by the police.

[37] The police then asked about Dlamini. He showed them Dlamini's residence, where they also searched. They were handcuffed, and the police ordered them to lie on the ground and assaulted them with an iron rod.

[38] The police ordered his son to remove things from the shack. He testified that they found two of his lawn machines, a steam wash, a Hoover, a toolbox, a roll of razor wire, and a video machine. These items were never returned to him. He had receipts for his items. He denied having seen the documents with the Mega Scrap Yard letterhead being removed from his place of residence. He did not see Potgieter identifying his goods, as alleged by the police.

[39] They were put in the car with the removed items loaded in another car and were taken to the police station. They were joined by other accused at the police station and were again assaulted by the police, and talked about the business robbery that took place. He knew nothing about that robbery.

[40] He testified that he is from Mozambique, with Nhavoto, and has known him for a period of about twenty years. He conducts garden services, and Nhavoto sometimes transports him to his workplaces. He denied having gone to the Nhavoto tyre workplace, pushing tyres in a wheelbarrow and

selling them to him. He sold his Fiat Uno tyres to Nhavoto. He is surprised that Nhavoto implicates him in something he did not do.

[41] The **second appellant** testified that he was arrested at his place of residence by Koko and Magwaza for alleged business robbery. They assaulted him while the Uniform police officer searched his place and found meat, a plastic bag containing some documents such as payslips, UIF, ID photocopy, and a CV. Koko and Magwaza handcuffed him and took him to the white Nissan Double Cab parked outside the house. They handcuffed him with accused number one. He sustained injuries from the assault.

[42] He denied that the police found two computer boxes, a lawnmower, and car registration documents bearing the name Mega Scrap Yard.

[43] He denied having broken into Mega Scrap Yard or having committed robbery.

[44] He denied having brought some wheels in a wheelbarrow to Nhavoto's business. He denied having known Nhavoto before then. He admitted knowing Nhovoto's place of business and having seen him there. He said he met him at the police station.

[45] He was told about his alleged involvement in the business robbery at the police station when he was charged.

[46] He knew the second appellant and accused number one, but did not know Nhovoto, and they were not on speaking terms. Accused number one sold vegetables and cold drinks.

Discussion

[47] The burden is on the State to prove the guilt of an accused person beyond a reasonable doubt, no more and no less. There is no burden on an accused to establish his innocence. In any case, where there is a reasonable possibility that the account of the accused may be substantially true, then he must be acquitted.⁵ The onus is not to be understood to be beyond all shadow of doubt.⁶

[48] A court cannot convict an accused unless it finds that the accused's version is so improbable that it cannot be reasonably possibly true.⁷

[49] Sibusiso Ndada and Potgieter are the only witnesses who testified about what happened at Mega Scrap Yard, where robbery and housebreaking occurred. Neither of them could identify the people who were involved in the commission of those crimes.

[50] The appellant denied any involvement in the commission of the crimes they were charged. Their response was mostly that they knew nothing about the subject matter they were asked about. They claimed that the items removed from their residential places belonged to them and that

⁵ State v Jackson 1998(1) SACR 470(SCA) -page 476- paragraph e-f; S v Chabalala 2003(1) SACR 134(SCA) ; Maila v S (2023) ZASCA 3- par 20 ; Tshiki v S (2020) ZASCA 92(SCA).

⁶ Sv Ntsele 1998(2)SACR 178(SCA)

⁷ Michael Jantjies v S (2024) ZASCA 3

they had the receipts to prove ownership. They deny that the vehicle registration documents with the Mega Scrap Yard and Potgieter signature were recovered from their places of residence.

[51] The powers of an appeal court to interfere with the findings of fact of the trial court are limited. In the absence of a witness's evidence, it is presumed to be correct. To succeed on appeal, the applicant must therefore convince the appeal court on adequate grounds that the trial court was wrong in accepting the witness's evidence. - A reasonable doubt will not suffice to justify interference with the findings. Bearing in mind the advantage which the trial court has seen, hearing and appreciating a witness, it is only in exceptional cases that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony.⁸ In the absence of demonstrable and material misdirection, the court's findings of fact are taken by an appeal court to be correct and will only be disturbed if they are clearly wrong.⁹

[51] In terms of the doctrine of recent possession,¹⁰ Their possession of the stolen items, such as the documents bearing Mega Scrap Yard letterheads, justifies conviction on the charges.

[52] This doctrine permits the court to make certain inferences on the possession of goods stolen from Mega Scrap Yard and identified by Potgieter as his property.

[53] The court of first instance correctly rejected the appellants' version as not reasonably possibly true.

⁸ S v Francis 1991(1) SACR 198(A) at 198j-199a.

⁹ Director of Public Prosecution, Free State v Mokati (2022) ZASCA 31; (2022) 2 All SA 646(SCA); 2022(2)(SACR 1(SCA)- par 7

¹⁰ Rv Blom 1939 AD 188 ; State v Parrow 1973(1) SA 603(A)

[54] It is correct that although the state led the evidence of five witnesses, Nhovoto is the single witness whose evidence connected the appellants to the commission of crimes they were convicted of.

[55] Nhovoto is the single witness referred to in section 208 of the CPA. The principle in section 208 of the CPA is that the trial court may convict on the evidence of a single witness, provided that such evidence is clear and satisfactory or corroborated in all material respects. The exercise of caution must not be allowed to displace the exercise of common sense.¹¹

[56] Nhovoto's evidence is corroborated by the recovery of Potgieter's properties, including the tyers.

[57] Sentencing is within the discretion of the trial court. An appeal court's power to interfere with a sentence imposed by the trial court is circumscribed. It can only do so where there have been irregularities that failed justice, the court has misdirected itself to such an extent that its decision on sentence is so disproportionate or shocking that no reasonable court could have imposed it.¹²

[58] There is no basis to interfere with the court of first instance's conviction and sentence.

[59] The appeal fails

Order

[60] The appeal for both conviction and sentence is dismissed.

¹¹ S v Artman & Another 1968(3) SA 339(A)

¹² Bogaards v S (2012) ZACC 23; 2012 (12) BCLR 1261; 2013(1) SACR 1 (CC) at 41 and 42
; S v Motloun 2016(2) SACR 243(SCA) -par 6


LGP LEDWABA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA

I agree


MUNZHELELE
HIGH COURT JUDGE
GUATENG DIVISION: PRETORIA

APPEARANCES

Heard on: 11 September 2025

Judgement delivered on: 07 November 2025

For the Appellants: Mr. M.B. Kgagara

Instructed by: Legal Aid South Africa

Pretoria Local Office

For the State: Adv. V.G. Khosa

Instructed by: DPP