

REPUBLIC OF SOUTH AFRICA



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

Case Number: A119/2024

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: NO
22 January 2025	
DATE	SIGNATURE

In the matter between:

SIPHISIHLE NJAPHA

Appellant

and

THE STATE

Respondent

JUDGMENT

NOKO J. (*Bokako AJ concurring*).

Introduction

[1] The appellant launched an appeal against his conviction and sentence imposed by Regional Court Magistrate Mr MH Jooma at Orlando, Soweto. The appellant was charged with attempted robbery with aggravating circumstances, read with the provisions of the Criminal Law Amendment Act¹. The appellant was convicted on 11 December 2023 and sentenced to 10 years' imprisonment on 12 March 2024.

[2] The appellant launched an application for leave to appeal, which was dismissed by the court *a quo*. He then petitioned the Judge President of the Gauteng Division, Johannesburg. The Judge President allocated the matter to two judges who considered the petition and granted leave to appeal. The judges have, in addition, stated that the Magistrate interfered with the cross-examination of the complainant on material issues canvassed by the accused's legal representative, and his interference was irregular.

Background

[3] The complainant, Mr Thulani Dube ("Mr Dube"), was a Bolt driver who agreed to provide a ride to the appellant on 23 December 2022. The complainant agreed with the appellant that the fare payable would be R150.00 for the trip. The complainant stopped at a BP garage ('garage') where the appellant had to withdraw cash to pay for the trip. The appellant returned and informed the complainant that he needed an Absa ATM and not an FNB or Nedbank ATM. The nearest Absa ATM was situated at Diepkloof Square, some distance from the BP garage.

[4] The appellant embarked into the vehicle, and the complainant proceeded towards Diepkloof Square. The appellant pulled out a gun, pointed it at the complainant and demanded that he stop the vehicle. The complainant swerved the vehicle off the road and collided with the curb. The firearm then fell onto the seat. The appellant and the complainant wrestled over the gun. The appellant was ultimately assaulted with a wheel spanner by a taxi driver who came to the scene and fainted.

¹ Act 105 of 1997.

[5] The appellant contended before the magistrates' court that he had no intention to rob the complainant of his vehicle. His intention was to threaten the complainant and flee without paying the fare. The complainant, on the other hand, testified that the appellant specifically instructed him to get out of the car as he wanted the car. The court *a quo* accepted the version of the complainant, and the appellant was convicted and sentenced as stated above.

[6] The appellant was aggrieved by the findings of the court *a quo* and instituted the appeal process. His grounds of appeal are, first, that the evidence upon which the conviction was predicated is circumstantial, and the requirements were not met. Second, the court *a quo* disregarded the appellant's evidence. Third, the court *a quo* erred in finding that the state had proven its case beyond a reasonable doubt. Fourth, an added alternative is that the court *a quo* interfered during cross-examination, which interference was irregular. The fourth ground of appeal was not listed in the notice of appeal but was only raised during argument.

On appeal

[7] The counsel for the accused first gave a brief background of the facts. He stated that the appellant was called to his sister's house as she was being evicted from their house. He needed to take a cab but then realised that he had no funds. He then decided that he would nevertheless request a Bolt ride, and on reaching his destination, he would threaten the Bolt driver with a toy gun and then flee without paying. He requested a ride on his Bolt app without success. Coincidentally, he saw a Bolt cab, which was dropping someone off close to his house. He approached it and, upon enquiring from the driver, he established that it was indeed a Bolt cab and requested a ride, which was accepted by the driver. They discussed and agreed that the fare would be R150.00.

[8] He embarked in the cab and began his journey. On the way, the complainant requested payment, and he replied that he needed to withdraw cash from the ATM, and the complainant agreed to stop at a petrol filling station. The filling station was BP, at which point the complainant stopped. This was approximately five kilometres from the appellant's destination. The appellant alighted from the vehicle and proceeded to the ATMs. He came back and informed the driver that he had only found a Nedbank and an FNB ATM and he needed an Absa ATM, which could be found at Diepkloof Square.

[9] The trip resumed, and after a while, he realised that he was no longer too far from his destination and could walk there. He took out a toy gun and pointed it at the complainant. He instructed him to stop the vehicle so that he could alight, and he planned to flee without paying. On seeing the gun, the complainant lost control of the vehicle and collided with the curb. The complainant then grabbed the gun, and the appellant wrestled with him over it. He overpowered the complainant and fled towards the other side of the road. After crossing the road, he noted that he had left his bag and his cell phone in the car. He then returned to the vehicle, where he was captured and assaulted by the complainant and another taxi driver who stopped after seeing the scuffle.

[10] The counsel stated further that the appellant never had the intention to rob the complainant of his vehicle and wanted to threaten the complainant with a toy gun and then flee. Further, that there is no concrete evidence proffered by the complainant that he intended to rob him of the vehicle, contended the appellant. This can also be inferred from the complainant's testimony during cross-examination, who could not, on his own, confirm that the appellant demanded the vehicle from him, counsel argued. He was assisted by the presiding officer, who prompted the complainant to state that, indeed, the appellant demanded the vehicle from him.

[11] In addition, the counsel argued that the court *a quo* disregarded the evidence of the appellant that he did not threaten the complainant, that he wanted to take his car. To this end, the counsel argued that the state has failed to prove beyond a reasonable doubt that the appellant intended to rob the complainant.

[12] During the cross-examination of the complainant, the defence counsel attempted to cross-examine the complainant regarding the contents of his statement, but was frustrated by the presiding officer, who stated that there was no need for the witness to repeat his testimony. Instead, the defence counsel was requested by the court to challenge any aspect of the evidence; counsel further argued.

[13] I asked the counsel whether the instruction that the complainant should not repeat his evidence prevented the defence counsel from cross-examining the complainant. He replied that it would have depended on the skill of the counsel who was cross-examining the complainant. He agreed, however, that the court cannot create a special regime for the defence counsel who may be found wanting in their cross-examination skills.

[14] Regarding the appeal on sentence, the defence counsel argued that the court *a quo* did not set out the reasons why a deviation from the prescribed minimum sentence was not warranted. The factors which should have been considered are that the appellant was 34 years of age, was a first offender, was married with four minor children and was not carrying a real firearm. The court should have, under the circumstances, deviated and imposed a sentence of less than 10 years.

[15] The state counsel contended, on the other hand, that the complainant was a single witness and dealt with in terms of section 208 of the Criminal Procedure Act. The court dealt with his evidence cautiously and concluded that he was indeed credible and his evidence reliable. Though the record indicates that the court *a quo* delved much into the arena, there is no indication that the said interference led to the complainant changing his evidence, as whatever he said was consistent with the evidence he tendered in chief.

[16] In addition, counsel continued, the appellant's stance should be found wanting since his version was not put to the complainant during cross-examination and only surfaced during the defence case. This relates to the statement that he is not the one who suggested that the driver should stop at a filling station to enable him to withdraw cash from the ATM. In addition, his version was that he ran across the road and came back after he realised that he had left his bag and cell phone. The complainant stated that the appellant was overpowered with the assistance of the taxi driver and other people and assaulted until he fainted.

[17] The state counsel submitted that there was nothing out of the norm from the factors alluded to by the appellant. To this end, deviation would have been for flimsy reasons and not consistent with the ethos of the prescribed minimum sentences regime. In conclusion, the interference with the decision of the court *a quo* is not warranted.

Legal principles

[18] It is trite that a notice of appeal should succinctly set out the grounds for the appeal, and those grounds which are not succinctly and unambiguously set out in the notice are antithetical to the rule of law and would accordingly lead to unfair appeal proceedings². The grounds would be foreshadowed by those set out in the application for leave to appeal. Rule 49(1) of the Uniform Rules of Court enjoins a party to spell out the grounds in no uncertain

² See *Cele v S* (CA&R 13/2024) [2025] ZAECMHC 2 (21 January 2025).

terms, and the court held in *Sengono*³ that “The grounds of appeal as required in terms of Rule 49(1)(b) must be clearly and succinctly set out in clear and unambiguous terms so as to enable the court and the respondent to be fully informed of the case the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal. This rule is peremptory in this regard”⁴.

[19] The appellant’s request to add a fourth ground of appeal, which was not in the application for leave to appeal and not listed in the grounds of appeal, clearly goes against the grain of what is set out in *Sengono*. To this end, the request to add a further ground of appeal is unsustainable and bound to fail.

[20] Notwithstanding what is set out above, it appears that the appellant simply copied the sentiments echoed by the judges who considered the petition when they stated that the continued interference by the presiding officer constituted an irregularity and blindly sought to add the same as a ground of appeal. This manifests a failure to distinguish a review and appeal proceedings; the former being concerned with whether the process was in accordance with justice. The impugned conduct of the presiding officer was a procedural issue hence the appropriate route would have been a review and not an appeal process. That notwithstanding, an irregularity may in some instances be of such a nature that the accused’s right to a fair trial has been infringed. The appellant failed to properly ventilate this aspect and properly introduce same as a ground of appeal. In any event, the assessment of the intrusion by the presiding officer was not extremely critical to assail the ultimate conclusion of the court *a quo*.

[21] The respondent was aggrieved by the failure of the appellant to put the appellant’s version to the complainant during cross-examination. Placing the version of the accused assists the accused in testing the credibility of the complainant. Once the complaint is not told about the accused’s version and considered such version of the accused under cross-examination, a version which is only introduced during the defence case would not be reliable, and the credibility of the accused would be questionable. Where such evidence has not been tested, the court would be at large to assume that the complainant’s version was admitted.

³ *Songono v Minister of Law and Order* 1996 (4) SA 384.

⁴ *Id* at 385 (I – J).

[22] The exercise to determine the intention on the part of the accused may, as contended by the accused, in other instances, be circumstantial. This would involve drawing inferences from the proven facts. The complainant insisted that it is incorrect that the appellant only wanted to threaten him and flee without paying the fare. This was not communicated to him by the appellant. The complainant categorically stated during evidence in chief that the appellant told him to get out of the vehicle and give him the car. This instruction was stated during the examination in chief and repeated during cross-examination. These statements can be discerned from the following reference from the record during cross-examination.

MR KOPAS: Now the accused instructs me further that when he pulled out that toy gun and pointed it at you, he instructed you to pull over to the side. That what he was intending to do was to run away, get out the car, all right, and run away from you without paying the agreed fee.

INTERPRETER: (VERNACULAR).

MR KOPAS: So in other words, he wanted to scare you

MR DUBE: I do not know about that. I do not know about that, Your Worship. [Indistinct].

MR KOPAS: Now, the accused instructs me that when, the way he reached when instructed you to pull over is that you jump to the conclusion that he was trying to rob you of belongings in your car.

20 *INTERPRETER: (VERNACULAR) ...[intervenes]*

COURT: I am sorry, Mr Kopas, what ...[intervenes]

MR KOPAS: It is my instructions, Your Worship.

COURT: Thank you

MR DUBE: He said I must pull over. I must get out of the car, and he wants the car. He did not mention anything about being short of money or anything.

COURT: Thank you

MR KOPAS: Now, in your statement to the police, sir, that you made, I just want to...do you confirm you made a statement to the police?

[23] The version of appellant that he just wanted to threaten the complainant and flee from the scene is not borne out by the evidence presented. The evidence by the complainant on what the appellant said was not assailed during the cross-examination. To this end, the appellant's version could not be found to be reasonably possible true.

[24] Concerning the sentence which relates to an offence listed in the prescribed minimum sentence regime, the SCA stated that "Here parliament has spoken. It ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resorting to vague and ill-defined concepts, such as 'relative youthfulness', or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, are foundational to the rule of

law which lies at the heart of our constitutional order.”⁵ The SCA had echoed similar sentiments in *Malgas*,⁶ where the court was emphatic that deviation should not be based on flimsy reasons.

[25] The circumstances listed by the appellant are standard factors that can be identified as mitigating factors for offences. They do not amount to substantial and compelling circumstances. It is trite that the substantial and compelling circumstances are not defined, such that factors should at least be out of the ordinary to qualify as such. The factors put forward by the appellant do not even scratch the surface and cannot be invoked to justify deviation.

Conclusion

[26] It is trite that the findings of the court *a quo* may be upset by the appellate court where it is ineluctable that the said findings were predicated on the incorrect interpretation of the legal principle or incorrect exercise of discretion. In this instance, there is no evidence or an inclination demonstrating any impropriety on the part of the court *a quo* in the assessment of the evidence and the conclusion arrived at. The appeal is therefore bound to fail.

Order

[27] In the premises, I make the following order;

“The appeal is dismissed.”



MV NOKO
Judge of the High Court.

⁵ *S v Matyityi* [2010] ZASCA 127; and referred to in *Peloele v The Director of Public Prosecution, Gauteng* [2022] 117 at para [29].

⁶ *S v Malgas* [2001] ZASCA 30.

I agree



TP Bokako

Acting Judge of the High Court.

DISCLAIMER: This judgment is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 22 January 2025.

Dates

Hearing: 17 November 2025.

Judgment: 22 January 2025.

Appearances

For the Appellant:

A Makile, instructed by Njuze Attorneys.

For the Respondent:

P Monareng, instructed by DPP, Jhb.