

THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: A20/2025

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

.....
SIGNATURE DATE

In the matter between:

SERJO CWAICWAI

Appellant

and

THE STATE

Respondent

This judgment has been delivered by uploading it to the Court online digital data base of the Gauteng Division, Pretoria and by email to the attorneys of record of the parties. The date of the delivery of the judgment is deemed to be 10 September 2026.

JUDGMENT

MAKHOB A J

- [1] The Appellant was convicted and sentenced in the Regional Court in Oberholzer. He was convicted on count 1 of Housebreaking with intent to rob and robbery, acquitted on count 2 of contravening section 5(2) of the Criminal Law Amendment Act (Sexual Offences and Related Matters) Act 32 of 2007.
- [2] On Count 3 he pleaded guilty and was convicted as charged.
- [3] On Count 1 he was sentenced to 15 (fifteen) years imprisonment, count 3 (three) he was sentenced to 3 years imprisonment. It was ordered that count 3 is to run concurrently with count 1.
- [4] The appeal before us is conviction on count 1 only.

Grounds of Appeal

- [5] The only ground of appeal is that the evidence of the three state witnesses on identification of the appellant as one of the robbers does not amount to proof of identification beyond reasonable doubt.

Appellant's Submission

- [6] It is submitted on behalf of the appellant, that it is improbable that a person with a salon in the area of the complainant's residence will rob complainants

without covering his face. There is a material contradiction between the state witnesses as to whether the appellant's face was covered or not.

- [7] The state failed to present the evidence of two witnesses, namely Zamo and Sergeant Ngobeni.

Respondent's Submission

- [8] Counsel for the Respondent argued that, the state witnesses identified the appellant and gave an elaborate description which suites the appellant.

The evidence

- [9] All three witnesses that were in the house on the day of the robbery testified that they were watching television when the robbers entered the house and took items mentioned in the charge sheet. They also demanded money from the complainants.

Witness Thandi Nthambayo

- [10] she testified that the appellant entered the house carrying a firearm. The other person with the appellant had his face covered with a surgical mask and was carrying a hammer.
- [11] During cross-examination it was put to the witness that, when the appellant was brought to her house after the robbery, she could not identify him. The

witness answered in the positive. She again testified that, after the appellant left she “..... *thought it over and then I managed.....*”¹

- [12] In paragraph 10 of her statement to the police she says the following, “the one with the hammer I know him, I have seen him around Fidas blyvoor”. It must be remembered that, in her evidence in chief she testified that this suspect had his face covered in a surgical mask.²

Witness Thikiswa Nhlabeng

- [13] She testified that, the appellant was carrying a firearm, and his face was not covered or hidden. She has seen the appellant before at the barber shop the very same week and the barber shop is located near her place of residence.

- [14] She informed her boyfriend about what had happened and provided him with the description of the appellant. At the time, her boyfriend was in the company of other people. It is these people who informed them that the description given by her fits or suite the appellant.

- [15] She identified the appellant at her mother’s house. In cross-examination³ she conceded that, her mother was unable to identify the appellant but one of the suspects look similar to the appellant because of the disfigured teeth but it is not the appellant.

Witness Thando Matwanda

¹ Pages 42-45 of the transcribed record.

² Page 291 of the transcribed record paragraph 10.

³ Page 85 of the transcribed record lines 1-13.

[16] She was also in the house during the robbery. She testified that both robbers had covered their faces. One had a balaclava on and the second one his face was covered from the nose to the mouth. She told the court that she cannot identify any of them.⁴

Witness Bongani Nthambayo

[17] He testified that the appellant was armed with a firearm. In cross-examination he testified that the appellant face was not covered. When the appellant was brought into the house, he did not go outside to identify him.

Legal framework and discussion

[18] The legal position is that the powers of the court of appeal are limited. More specifically a court of appeal is not entitled to interfere with the findings of fact of a trial court unless the appeal court is satisfied that the trial court was wrong.

[19] In *S V Francis*⁵ the then Appellate Division described these limited powers of the court of appeal as follows:

“the powers of a Court of Appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court’s conclusion, including its acceptance of witnesses’ evidence, is presumed to be correct. In order to succeed on appeal, the Appellant must therefore convince the Court of Appeal on adequate grounds that the trial court was wrong in accepting the witness evidence-reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a

⁴ Pages 92-110 of the transcribed record.

⁵ 1991 (1) SACR 198 (A)

trial court has of seeing, hearing and appraising of a interfere with trial court's evaluation of oral testimony".

- [20] Similarly in *S V M* ⁶ the SCA per Cameron JA, as he then was, stated the proper approach to be adopted as follows:

"the point is that the totality of the evidence mut be measured, not in isolation, but by assessing properly whether in the light of the inherent strengths, weaknesses, probabilities and improbabilities on both sides the balance weighs so heavily in favour of the state that any reasonable doubt about the accused's guilt is excluded."

- [21] The important question to be answered in this matter before us is therefore that upon proper consideration, can it be said that the trial court erred and or misdirected itself in the analysis of the evidence and its final findings and conclusions in relation to the identification of the appellant.

- [22] Therefore, this court must determine whether the state succeeded in proving the identity of the appellant beyond a reasonable doubt.

- [23] Evidence of identification must be approached with caution.⁷

- [24] All three witnesses in the court *a quo* testified that the appellant's face was not covered whereas the fourth witness testified that both assailant's faces were covered and hence she could not identify any of the assailants even though she was the one who was not tied up and had best advantage of observing the assailants.

⁶ 2006 (1) SACR 67 (CA)

⁷ *S V Gordon* 1970 (1) PH68 (A), *S V Mthetwa* 1972 (3) SA 766 (A) at par 768 and *S V Charzen and Another* 2006 (2) SACR 143 (SCA)

- [25] In my view this is a material contradiction which the trial court ignored. The other three witnesses were at a disadvantage to can properly identify the appellant. Whereas the witness who had the best view told the court that both assailants faces were covered.
- [26] They were tied and were lying on the floor except the one who testified that both the appellant and his accomplice covered their faces.
- [27] All four witnesses who were in the house during the robbery their evidence have discrepancies, shortcomings and full of intricacies.
- [28] The appellant's version that he was not at the scene of crime was corroborated by his girlfriend Miss Makamo.
- [29] In contrast the evidence of identification against the appellant was not proved beyond a reasonable doubt by the state. Three witnesses testified that the appellant's face was covered. The fourth witness testified that all two robbers' face were covered.
- [30] It is further improbable that the appellant will go and rob at a house not far from where he is residing and employed without covering his face.
- [31] I am therefore of the view that the identification of the appellant was not proved beyond a reasonable doubt, the learned Magistrate erred in convicting the appellant on count one. I am of the view that the trial court misdirected itself by convicting the appellant on the contradicting evidence of whether the appellant's face was covered or not.

[32] This court is therefore free to reconsider the strength of the case against the appellant.⁸ Again the appellant's version was not shown to have been not reasonably possibly true.

[33] In the circumstances, the state's case had to fail because the state evidence is contradictory in material respect.

[34] In the premises. I make the following order:

34.1. The appeal against the conviction and sentence on count 1 succeeds.

34.2. The conviction and sentence on count 1 are set aside.

D. MAKHOB
JUDGE OF THE HIGH COURT
PRETORIA HIGH COURT

I agree

MBOWENI
ACTING JUDGE OF THE HIGH COURT
PRETORIA HIGH COURT

⁸ *Nyabo V S [2008] JOL 22823 (SCA)*

Date of hearing: 01 September 2026

Date of Judgment: 10 September 2026

For the Appellant:

Adv S Simpson

Instructed by:

Legal Aid South Africa

For the Respondent:

Adv MJ Makgwatha

Instructed by:

Director of Public Prosecutions, Gauteng
Division