

SOUTH AFRICA / JUDGMENT

Masinga and Others v S (A24/2020; SH256/17) [2021] ZAMPMHC 26 (30 September 2021)

[2021] ZAMPMHC 26

COURT

Middelburg High Court, Mpumalanga

BEFORE

Langa AJ, Mphahlele DJP

CASE / FILE NUMBER

A24/2020; SH256/17

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION, MIDDELBURG LOCAL SEAT

CASE

NUMBER: A24/2020

RC

CASE NO: SH256/17

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED

07/10/2021

In

the matter between:	WITNESS PATRICK MASINGA FIRST APPELLANT MUSA NXUMALO SECOND APPELLANT ZAKHELE JOSEPH MLAMBO THIRD APPELLANT DUMISANI FAKUDE FOURTH APPELLANT EVENS MOSES HLATSHWAYO FIFTH APPELLANT AND THE STATE THE RESPONDENT
Coram:	Langa AJ et Mphahlele DJP Date delivered: 30 September 2021 This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 7th day of September 2021 at 14h00.
Summary:	Criminal appeal – the appellants convicted in the Regional Court of robbery with aggravated circumstances – unlawful possession of a firearm and ammunition - all sentenced to 15 years imprisonment for robbery – whether the crime was robbery or theft – common purpose - court to apply its mind not only to merits and demerits of witnesses, but also to probabilities of case –application for leave to appeal having been granted by the court a quo – appeal dismissed – convictions and sentences confirmed ORDER On appeal from: Regional Court Ermelo, Regional Magistrate Jonker sitting as court of first instance. 1. The appeal by all 5 appellants is dismissed. 2. The convictions and sentences in respect of all five appellants is accordingly confirmed.

JUDGMENT

Langa AJ (Mphahlele DJP concurring):

Introduction

[1] On 01 August 2019 the five appellants were all convicted in the Ermelo Regional Court on one count of robbery with aggravating circumstances (all appellants) and one count of unlawful possession of a firearm and one of unlawful possession of ammunition (only the fifth appellant). The five appellants were all sentenced to fifteen years imprisonment on the robbery charge while the fifth appellant was sentenced to a further three years imprisonment in respect of the unlawful possession of a firearm and ammunition. The fifth appellant's sentences were ordered to run concurrently. The appeal is with the leave of the trial court. The parties dispensed with the hearing of oral submissions and the appeal was therefore dealt with on the papers.

The

facts

[2] There appears to be no dispute that on 25 July 2017, at around 14h00 an incident took place at the Ala Madien store belonging to one Mr Mohamed Shabaz in Daggaskraal, Mpumalanga. It is common cause that a number of men entered the store and made off with an unknown amount of cash, cellphones and cigarettes amongst other things. It is also common cause that the shopkeeper Mr Ali Munthaza was injured on his head during this incident. It is further not disputed that the five

appellants were arrested the same day in Volksrust while inside a motor vehicle and that the goods which were identified as those which were taken from the Ala Madien shop were found inside their motor vehicle.

[3] The State contends that the appellants acting together in common purpose robbed the Ala Madien store. While the third appellant denies having been at this shop at all on that day, the first, second, fourth and fifth appellants admit that they were at the shop. The first and second appellants however deny having entered the store at all and stealing therefrom or robbing anyone. The fourth appellant admits having entered the store together with the fifth appellant but denies stealing from the shop or robbing anyone. He instead implicates the fifth appellant and alleges that he is the one who stole from the store. On the other hand the fifth appellant admits having entered the store and stealing the goods and money therefrom but denies that he robbed Mr Munthaza as alleged. His version is that the shopkeeper was nowhere in sight and he helped himself with money from the open till and other goods. I will deal with their respective versions hereunder to give proper context to the matter.

The

issues

[4] The issues in this appeal can succinctly be summed up as follows:

1. Whether all the appellants robbed the shop and whether in doing so they acted in common purpose.
2. Whether the third appellant was positively identified by the state witness, Mr Mzwakhe Nkosi.
3. Whether the sentence imposed is competent.

The State evidence

[5] Mr Ali Munthaza, the shopkeeper who was in charge of the shop, was not available and therefore did not testify as he was reportedly back in Pakistan where he apparently originates from. The state however called three witnesses namely, Mr Mzwakhe Nkosi, Mr Sifiso Thabethe, Mr Mohamed Shabaz, the owner of the shop and Ms Samariya Jiyane, the shop assistant. It is common cause that Mr Mohamed Shabaz was not present when the alleged robbery took place and that he only came to

the scene after the robbery or theft had already taken place. He could therefore only testify about what he discovered at the shop

after he was called by Ms Samaria Jiyane.

[6] Ms Samariya Jiyane, who was inside the shop but at the back in the kitchen, could only testify that the shopkeeper Mr Munthaza was indeed accosted by three men who she saw while she was hiding back in the kitchen. She testified that she saw one man holding Mr Munthaza while the other two were busy at the till area. She however, could not identify any of these men. She then sneaked a call to the owner Mr Shabaz from her hiding place. She further stated that she had never seen any firearm in the shop before. Save to question why she did not make her statement immediately, her evidence was not challenged at all.

[7] Next was Mr Sifiso Thabethe, the owner of the premises in which the shop is trading. He also could not testify about the identify of the robbers but could only confirm that on 25 July 2017 while he was with one Siphiwe and Mzwakhe Nkosi some people arrived at the shop in a vehicle which had a dent on its petrol cap. He apparently dozed off after they entered the shop and was later woken up by Mzwakhe. He only saw the same men getting into the same car and driving off “rough” and at high speed. He then went to the shop where he found Mr Munthaza injured and bleeding. He spoke to Mr Munthaza, who informed him about what happened. Mr Thabethe also confirmed that he found Ms Jiyane hiding in the kitchen under a hot stove as Ms Jiyane testified. Mr Thabethe said he then tried to chase the vehicle but it is not clear how far he went.

[8] The next witness Mr Mzwakhe Nkosi corroborated the evidence of Mr Thabethe that they were together at the shop premises on 25 July 2017 when the incident took place. He confirmed that a dark silver grey VW Polo with a damaged petrol tank cap arrived at the shop and three men alighted and entered the shop. After about 40 minutes they came out

running with one of them having a firearm in his possession. They got into the same Polo vehicle and drove away at high speed. He confirmed that he woke up Mr Thabethe who had been dozing off at the time the men got out of the shop. Mr Nkosi identified the first appellant as the man who was in possession of a firearm and the third appellant as the man who entered the shop with a school bag or rucksack. He testified further that the first appellant was however holding the rucksack when the men came out of the shop.

[9] The next State witness Sergeant Thokozani Stanley Dlamini of the Daggaskraal SAPS testified that he only came into the picture after the arrest of the appellants who he found at Volksrust police station. His evidence did not take the matter any further in terms of the identity of the robbers save to confirm that he found the recovered money, airtime and a firearm at the Volksrust police station. Likewise his colleague Sergeant Mbongwa Sunday Paulos Nkosi, also of Daggaskraal SAPS, could not testify about the incident itself or the identities of the robbers. He only testified that he received a call from Mr Sifiso Thabethe informing him of the robbery committed by men driving a grey Polo vehicle with a dented petrol cap. He then apparently broadcast a message on the police radio to the police in the surrounding areas about the robbery and to be on a lookout for that vehicle which he had also apparently previously seen in the area days before.

[10] The last State witness Khulani Stanley Makhathini of Volksrust SAPS confirmed that he received a radio message about the Polo vehicle with a dented petrol cap and five occupants which had allegedly been involved in a robbery in Daggaskraal. He testified that he spotted a vehicle fitting that description in the Amersfoort area and followed it while at the same time calling for police back up. When other police officers arrived the vehicle was stopped and the five occupants were searched and arrested. He stated that he found a 9mm firearm in the possession of the first appellant but that it was not a revolver. He also stated that he also found goods which were identified as goods taken from the Ala Madien shop.

The defence evidence

[11] The first appellant Mr Masinga testified that on 24th July 2017 he was at Ogies with the other appellants except the third appellant. They all drove to Volkstrust, apparently for a tiling work which had been arranged and secured by the fifth appellant. He confirmed that he was the driver of the vehicle which was hired by the fifth appellant. He further stated that the fifth appellant had apparently hired the vehicle from one Samkelo, his neighbour. He however, said when they arrived there, the person they were supposed to do the tiling for called it off as he apparently had an emergency. They were told to come back the next day. They then picked up the third appellant in Volksrust and went to search for alternative work in Vlakpoort. While there they bought food from Vlakpoort filling station and thereafter

decided to drive back to Ogies. On their way back they dropped the third appellant at Volksrust where he stayed. They then went back to Ogies where around 19h00 he dropped the vehicle with the owner, Samkelo, who is his neighbour. However later around 21h00 Samkelo called him and told him to pick up the vehicle again the next day the 25th and drive his co-appellants again. Indeed on the morning of the 25th he took the vehicle from Samkelo as arranged and collected his co-appellants from where he left them the previous day and drove them from Ogies to Volksrust for the same tiling job. Once again before they arrived the man who hired them called the job off and they decided to drive to Volksrust to look for alternative piece jobs as they did the day before.

- [12] He stated that the fifth appellant decided that they must go to Daggaskraal first. At Daggaskraal they went to a shop next to the road apparently to buy food. This is the shop they visited the previous day. According to him the fourth and fifth appellants entered the shop and the second appellant also alighted from the vehicle but did not enter the shop. Later the fourth and fifth appellants came back from the shop and they all drove away. He then called the third appellant on the phone, apparently to inform him that they were no longer going to do the work they were supposed to do. He says the third appellant then asked them to pick him up from Volksrust as he wanted to go back with them to Ogies. At a Volksrust garage they picked up the third appellant who sat in the front passenger seat while the fifth appellant, who had been in the front seat, moved to the back seat. It was while they were there at the Engen filling station that they were confronted by the police and arrested for an alleged robbery at the Daggaskraal shop. He testified that he was not aware of the robbery and that he did not know what happened inside that shop. He also testified that from the shop they used a gravel road as advised by some school children they found along the road, ostensibly as they did not know their way around. He confirmed that a bag was also found inside the vehicle by the police

and that he saw the firearm during the arrest.

- [13] Under cross examination the first appellant confirmed that on both the 24th and the 25th he together with the second, fourth and fifth appellants were in the vicinity of the shop in question in the Polo vehicle described by the witnesses. He confirmed that they had no tiling tools with them and that he did not know why the fifth appellant hired the others. He however denied alighting from the vehicle and entering the shop or possessing the firearm on the 25th.
- [14] The second appellant also confirmed that he was in the company of the first appellant as well as the fourth and fifth appellants on the 25th at the shop in question. He also conceded that he was at the scene but denied having taken part in the robbery. He however testified that it was the fourth and fifth appellants who entered the shop while he waited outside the vehicle busy on his phone. Although

in his plea explanation he stated that the fifth appellant came back with money and he told him he wanted nothing to do with the robbery, under cross examination the second appellant recanted and blamed this on a misunderstanding between him and his legal representative. He further said that he saw the fourth and fifth appellant come back from the shop with a bag which he thought had food inside. He however, also confirmed that the police found airtime, cigarettes and money in the bag when they were arrested in Volksrust. He also conceded that he did not have any tiling experience.

- [15] In his testimony the third appellant basically denied that he was at the scene of the robbery. He stated that he only joined the other appellants in Volksrust just before they were arrested. He denied the allegation that he is the person who was seen wearing a jacket and having a firearm. There is however confirmation by the first appellant that on the 24th the third appellant was with the group in the vicinity of the same shop.
- [16] The fourth appellant in his testimony also confirmed that he was present at the scene of crime on the 25th. He further confirmed that he went into the shop with the fifth appellant but that the latter is the one who stole items including money from the shop. He denies involvement in what he calls the theft and says that he at some point even tried to stop the fifth appellant by reprimanding him. He however conceded that after they left the shop he did not report to the others that the fifth appellant had taken the money and other items from the shop. He further averred under cross examination that the first and second appellants never entered the shop and that he did not at any stage see any firearm until the police arrested them. When pressed further under cross examination he confirmed that he also took some goods from the store, mainly food which he handed over to the fifth appellant before leaving the shop. He however denied seeing the shopkeeper at all at any time during the incident.
- [17] The fifth appellant in his testimony essentially admitted having been in the shop in question together with the fourth appellant. He also admits stealing money and other items from the shop but denied that it was robbery. His version is that the shopkeeper was not in the shop when they entered and that he only met him on his way out of the shop. He stated that it was at this stage that he, out of panic, pushed him out of the way so hard that he, the shopkeeper, hit the burglar bars or gate and injured himself. Although his co-appellants denied that they left the shop in a rush the fifth appellant however

confirmed that they did. He confirmed that he ran to the car and they drove off and claims that he did not tell anyone about what happened inside the shop and they were therefore all unaware of the theft. He also apparently did not show them what was in the bag until the police arrested them.

Evaluation

[18] It is trite that the onus of proof in criminal cases rests on the State. The onus is discharged if the State establishes the guilt of the accused beyond reasonable doubt. On the other hand the accused is entitled to an acquittal if it is reasonably possible that he might be innocent or his version is reasonably possibly true. *Shusha v S*

[2011] JOL 27877 (SCA); *S v Van der Meyden* 1999

(1) SACR 447 (W). In *S v V* 2000 (1) SACR 453 453 (SCA) at 456 A-C the Supreme Court of Appeal stated the following:

*“It is trite that there is no obligation upon an accused person where the State bears the onus, ‘to convince the court’. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused’s version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused’s evidence may be true.” See also *S v Mavinini* 2009 (1) SACR 523 (SCA).*

However, a trial court must apply its mind not only to the merits and the demerits of witnesses, but also to probabilities of case.

[19] I now turn to the pertinent legal and factual findings by the court a quo. It is necessary in this exercise to revisit the authorities on the approach to be adopted by a court of appeal in a case such as

this one. The following holding by Davis AJA in *R v Dhlumayo & Another* 1948 (2) SA 677 (A), at 706 is instructive in dealing with appeals:

[8] Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.

[9] In such a case, if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.

[10] There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.

[11] The appellate court is then at large to disregard his findings on fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular case, and so come to its own conclusion on the matter.

- [12] An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial Judge. No judgment can ever be perfect and all – embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.' See also *S v Francis* 1991 (1) SACR 198 (A) at 204 C – E.
- [20] It is clear from the authorities that a court of appeal is entitled to interfere with a trial court's evaluation of oral testimony only in exceptional cases. For an appeal to succeed against the trial court's factual findings, an appellant must convince the appeal court, on adequate grounds, that

the trial court was wrong when it accepted the evidence in issue. This case is, in my view, a typical example of a matter in which the court of appeal is not entitled to interfere with the trial court's factual findings as will be illustrated.

- [21] Although Mr Munthaza did not testify, there is no dispute that he is the person who was in charge of the supermarket when the incident took place and that he was injured during the incident as conceded by the fifth appellant. It has also not been disputed that Ms Jiyane, the shop assistance, was in the shop at the time of the incident and saw what happened. It is further evident from the evidence and the plea explanations that at least the first, second, fourth and fifth appellants were at the scene of crime during the commission of the alleged robbery.
- [22] However, notwithstanding their admissions regarding their presence at the scene, the first, second and fourth appellants still deny any involvement in the robbery. The first and second appellants deny entering the shop at all while the fourth appellant admits entering the shop but denies any involvement in the alleged robbery. The fourth appellant however implicates the fifth respondent and alleges that he is the one who stole from the shop while disassociating himself from his actions. He even claims to have attempted to stop the fifth appellant from stealing from the shop. He however, admitted having handed some goods to the fifth appellant. On the other hand the fifth appellant admits having committed the crime, albeit one of theft instead of the robbery that he is charged with. His plea of guilty on the alternative count of theft was however rejected by the State. The third appellant denies having been at the scene at all and denies that he committed any offence.
- [23] Considering the totality of the evidence the court a quo correctly rejected the fifth appellant's version and find that the crime that was committed at the Ala Madien shop was robbery and not theft. Taking into account the uncontroverted evidence of Ms Jiyane and the fact that Mr Munthaza was injured, it is an ineluctable conclusion that Mr Munthaza was robbed. Ms Jiyane witnessed the incident from her hiding place in the kitchen and saw Mr Munthaza being held by one man while the other two were busy at the till. Although the fourth appellant denies having seen Mr Munthaza at all, his evidence is highly improbable based on the evidence of Ms Jiyane and that of the fifth appellant. If he, as he claims, exited the shop ahead of the fifth appellant and at almost the same time, he should have seen Mr Munthaza who the fifth appellant claims collided with as he left the shop.

[24] I am therefore satisfied that the trial court was correct in accepting the unchallenged evidence of Ms Jiyane and rejecting the fourth and fifth appellants' claim that the shopkeeper was not inside the shop when they were inside the shop. The defence did not challenge the evidence of Ms Jiyane based on which the trial court correctly found that it was robbery that was committed.

[25] Concerning the question whether it was robbery with aggravating circumstances or theft, the trial court also correctly found that a firearm was used in the commission of the crime. Based on the fourth and fifth appellants' own evidence, there was a firearm at play when the money was taken even though they claim it fell from under the till. This is in my view highly improbable and the trial court correctly rejected the appellants' version that the firearm fell from the counter when they were taking money. Apart from the fact that a firearm was found inside their vehicle upon arrest, Mr Nkosi also testified that he saw the first appellant with pistol when they entered the shop. Although in the end a revolver was found inside their car, this discrepancy is understandable given that Ms Nkosi did not see the full firearm as part of it was hidden under the

jacket. The finding of the trial court cannot therefore be faulted as the facts support a case of armed robbery or robbery with aggravated circumstances and not theft as the fourth and fifth appellants would like the court to believe.

[26] While the state version was by and large corroboratory, the same can hardly be said about the defence evidence which is replete with contradictions in several material respects such as for instance the following:

1. While the first appellant stated that they went to look for work in Daggaskraal and Vlakpoort on the 24th July, the fifth appellant stated that they went to search work opportunities on the 25th. Despite this claim there is no evidence that they actually searched for any work on these days.
2. The first appellant contradicted the fourth appellant who stated that he left the shop after giving food to the fifth appellant while the first appellant said that the fourth appellant brought the food to the vehicle.
3. Another material contradiction is by the first appellant who stated that he was at the shop on the 24th and 25th but later denied under cross-examination having been near the shop on the 25th. His co-appellants however also confirmed that they were with him at the shop on the 25th.
4. The first appellant also contradicted the second appellant by saying that he picked up the second and the fourth appellants at Ogies on the 25th whereas in his plea explanation the second appellant stated that he was picked in Witbank on the 25th. In addition, the second appellant further states that he was fetched by the fifth appellant and another unknown person at Witbank on the 24th and that none of the appellants were present. However, in his plea explanation the second appellant concedes that the fourth appellant

was already in the car when the fifth appellant came to fetch him from Witbank on the day in question. This also contradicts the first appellant's version that he is the one who fetched the appellants, including the second appellant, from Ogies on both dates.

5. The fourth appellant stated further that the shopkeeper was not present until he left the shop followed by the fifth appellant. The fifth appellant however claims to have pushed the shopkeeper out of the way when he left the shop. If the fifth appellant was following the fourth appellant as the latter claims, the fourth appellant should have seen the shopkeeper. Their versions are not reconcilable.
6. Another discrepancy is that while the fifth appellant made a plea explanation, he however did not mention pushing the shopkeeper at all. Furthermore this important fact it was not put to any of the state witnesses but was only revealed during his evidence in-chief.
7. The second appellant also contradicted himself materially by stating in his plea explanation that he saw the fifth appellant possession of money only to deny this under cross-examination claiming that there was a misunderstanding between him and his lawyer.

[27] Furthermore, the state witnesses were not confronted with critical aspects of the defence such as the following:

1. It was never put to Mr Mzwakhe Nkosi by the defence that nobody entered the shop with a bag and that the fifth appellant found it under the till;
2. It was further not put to him that it was not the first appellant who collided with the shopkeeper.
3. Furthermore, the probabilities of the case are also not in favour of the appellants particularly when the following are considered.

3.1 The appellants were admittedly in the vicinity of the same shop on the day of the robbery and the day before, apparently to look for work opportunities and to buy food.

3.2 Based on their own versions that they were in the same area the day before and in the light of what took place the next day, their visit on the 24th can only be regarded as a reconnaissance mission. It is a reasonable inference to draw that on the 24th they checked out the shop and the surroundings and decided that it could be robbed. The next day they went back and indeed robbed the shop.

3.3 It is further highly improbable that the whole group would have traveled all the way to Daggaskraal to look for work opportunities on two days in succession and still be unable to present evidence of their efforts in this regard. Their story does not add up that they went to the same place for the same mission of taking measurements again the next day.

3.4 Furthermore, the first appellant's version that they did not know their way around and even had to ask for directions from school children is patently false given that he and his companions had admittedly been in the same area the day before and did not have issues finding their way back to Volksrust.

3.5 Shortly after the crime was committed they were all found together with the goods taken from the shop when arrested.

- [28] In the light of the above I find that concerning the participation by the appellants in the commission of the crime, the trial court was correct in rejecting the appellants' version and finding that at least the first, second, fourth and fifth appellants were involved in the commission of the crime. By his own admission the first appellant was the driver of the group. Although he confirms that he was hired by the fifth appellant on the 24th, he has however in his own testimony said that the owner of the vehicle told him to fetch the vehicle on the 25th in order to pick up the same group of persons and drive them around.
- [29] The second appellant, even if it is accepted that he did not enter the shop, he was however, evidently there as part of this group of people, probably as a sentry or lookout. The second appellant was not standing outside the car unaware of what was happening inside the shop as he maintains. He made a critical and material contradiction when he denied his version given in his plea explanation that he saw the fifth appellant come from the shop with money. Furthermore while he stated that the fifth appellant and another unknown person picked him up in Witbank on the 24th, he however later conceded that the fourth appellant was also present when he was picked by the fifth appellant. The trial court in my view correctly rejected his claim that he and the first appellant were at the shop innocently and did not know what was happening. They were evidently there as part of this group which was acting together in common purpose to rob the shop.
- [30] The fourth and the fifth appellants' situation is even more difficult for them to explain. Both admitted having been inside the shop and taking some goods although they deny they robbed the shopkeeper. Although in his testimony the fourth appellant conceded that he gave some items from the shop to the fifth appellant before he allegedly left the shop, he however confirmed that he was aware that the fifth appellant was committing a crime which he disassociated himself from by trying to discourage him.
- [31] The fifth appellant on the other hand admitted stealing from the shop but denied robbery. His explanation of how the shopkeeper was injured was, in my view, correctly rejected by the trial court which found that he manhandled and injured the shopkeeper during the robbery. That the shopkeeper was manhandled is also clear from the uncontroverted evidence of Ms Jiyane who saw the drama unfolding in the shop.

- [32] Based on the above facts and taking into consideration of the myriad of contradictions, the trial court correctly found that the version of the first, second, fourth and fifth appellants could not be accepted as reasonably possibly true. The trial court therefore did not err in concluding that these appellants were all involved in the robbery. They are demonstrably not credible witnesses and their versions were correctly rejected by the trial court.
- [33] I now turn to the alleged participation by the third appellant in the commission of the crime. Although he was arrested in the car with the rest of the appellants when they were arrested shortly after the robbery, the third appellant however maintains that he was not at the scene of crime when the shop was robbed. His version is that he was only picked up by the rest of the appellants in Volksrust shortly before their arrest. His version is confirmed by the rest of the appellants. The third appellant essentially raised an alibi by stating that he had proof that he was not at the shop. He however did not provide to the court with any details of where he was and his defence, which was also belatedly raised, therefore basically amounts to a bare denial. *S v Zwayi* 1997 (2) SACR (Ck). It is to be noted that the third appellant makes exactly the same allegation in respect of what took place on the 24th. Even on this day he says he was picked up from Volksrust by the same group of people on their way back from Daggaskraal.
- [34] Apart from the circumstantial evidence that he was found inside the car with robbers immediately after the robbery, the only other evidence implicating the third appellant is that of Mr Nkosi who testified that he saw both the first, third and fifth appellants entering and exiting the shop during the robbery. He also identified them from the dock as such. There is no corroboratory evidence as Mr Thabethe could not identify the three people he saw exiting the shop. It is trite that the evidence of dock identification may be considered but generally it carries little weight. The fact that Mr Nkosi's evidence is that of a single witness should heighten the degree of caution that the court has to adopt in dealing with his evidence. This court therefore has to determine whether the trial court erred in concluding that the third appellant was also involved in the robbery.
- [35] The trial court accepted Mr Nkosi's identification of the third appellant and found that he had sufficient opportunity to observe him at the scene. It further found that the conditions were also conducive as it was day broad light and in close proximity. It further found that his evidence that three people entered the shop finds corroboration in the testimony of Ms Jiyane. In the end the trial court found that Mr Nkosi was a credible and reliable witness and accepted the reliability of his testimony. Based on Mr Nkosi's evidence together with the fact that the third appellant was found inside the same vehicle with the rest of the appellants almost immediately after the robbery, the trial court found him guilty on count 1 as well. However, in addition to this evidence, the third appellant was also compromised and drawn into the picture by the first appellant who stated that appellants 2, 3 and 4 were hired by the fifth appellant. However under cross-examination by the prosecutor he changed this version and stated that he only gave the third appellant a lift.

[36] It is trite that a court of appeal is entitled to interfere with a trial court's evaluation of oral testimony only in exceptional cases. While a court of appeal may allow an appeal and give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed by the trial court, the powers to interfere with the factual findings of a trial court are limited unless it found that the trial court has misdirected itself or committed an irregularity. In the absence of recognized grounds warranting interference, the factual findings of the trial court should remain undisturbed. *Matana v S*

[2011] JOL 26701 (ECG).

[37] Consequently, in order for an appeal to succeed against the trial court's factual findings, the appellant must convince this court, on adequate grounds, that the trial court was wrong when it accepted the evidence in issue. It is my considered opinion that in the light of the evidence and the facts alluded to above, this court is not entitled to interfere with the trial court's findings in respect of the convictions of the appellants in this case. Their guilt was in my view proven beyond reasonable doubt. Therefore the appeal by all the appellants against the conviction on count 1 of robbery with aggravated circumstances stands to be dismissed. The conviction of the fifth appellant of count 2 also appears to be beyond reproach and the appeal in that respect should be dismissed as well. I now turn to the appeal on sentence.

[38] The sentence imposed in respect of all the appellants on count 1 is

(15) years imprisonment. The appellants argue that this sentence induces a sense of shock. They argue further that the court misdirected itself by finding that the appellants' personal circumstances, cumulatively considered, did not constitute substantial and compelling circumstances which would have justified deviation from the imposition of the prescribed minimum sentence. It was further argued that the court erred by overemphasizing the seriousness of the offence and the aggravating factors and misdirected itself by making a finding that the mitigating factors are outweighed by the aggravating factors.

[39] It is an incontrovertible fact that robbery with aggravating circumstances is a serious crime which attracts the provisions of the CLAA. It is trite that in the case of a conviction for such a crime, and where no substantial and compelling circumstances are found to be present, the prescribed minimum sentence is fifteen (15) years imprisonment. The court a quo found that there were no substantial and compelling circumstances in this case and imposed the prescribed minimum sentence on count 1 in respect of all the appellants. Based on the findings of the court a quo and the circumstances of the case I am of the view that the trial court cannot be faulted on this sentence particularly if the following are taken into consideration.

[40] The State proved a previous conviction of theft against the first appellant and housebreaking and theft against the third appellants. In mitigation of sentence all the appellants essentially relied on their personal circumstances and the fact that they were in custody for about 2 years. While recognizing that the offence was serious and prevalent, the defence however submitted that a long-term imprisonment is not appropriate. It was further submitted that

their personal circumstances, cumulatively considered, constitute substantial and compelling circumstances, thus justifying deviation from the imposition of the minimum sentence ordained by the CLAA.

- [41] It is trite that in cases such this one where the provisions of the CLAA apply, a court imposing sentence does not always have an unrestrained discretion to determine sentence. Where the so-called minimum sentences are applicable, the court must determine whether substantial and compelling circumstances are

present which may justify deviation from the imposition of the minimum sentence. There must be good persuasive grounds and the court must record them. See *S v Malgas* 2001 (1) SA 439 (SCA) and *Calvin v The State* (962/2013)

[2014] ZASCA.

- [42] In *S v Vilakazi* 2009 (1) SACR 552 (SCA) the SCA stated the following in respect of the approach to the minimum sentences:

‘In respect of serious crimes the personal circumstances of the offender recede into the background once it becomes clear that the crime is deserving of a substantial period of imprisonment, whether the accused is married or single, whether he has two children or three, whether or not he is employed, are themselves largely immaterial to what the period should be.’

- [43] In *S v Mokoena* 2009 (2) SACR 309 (SCA) the SCA stated the following in respect of serious crimes:

‘It is hardly necessary to emphasise that South Africa has for a number of years been plagued by crimes of violence of the nature committed by the appellant, to such an extent that Parliament has considered it necessary to enact minimum sentences for such crimes. Society is clamant for retribution and deterrence must also play a major role in the sentences imposed. The personal circumstances of the appellant must recede into the background.

- [44] There is in my view nothing exceptional about the personal circumstances relied upon by the appellants. Given the seriousness and prevalence of robbery with aggravating circumstances, the personal circumstances of the appellants must recede into the background. It can hardly be said that these circumstances constitute substantial and compelling circumstances and the trial court therefore correctly made a finding that there were no compelling circumstances as envisaged by section 51(3) of the CLAA.

- [45] In *S v Rabie* 1975

- (4) SA 855 (A) at 857D-E the Appellate Division, as it then was, stated that sentencing is a matter for the discretion of the trial court. An appeal court may only interfere with the sentence provided that the discretion was not judicially and properly exercised and the sentence is irregular or inappropriate. In this case I find that it has not been established that the court did not exercise its discretionary sentencing powers judiciously and properly. The circumstances therefore do not justify interference with the sentence imposed in respect of

the sentence which, in my view, should stand. I consequently conclude that the appeal by all the 5 appellants in respect of their convictions and sentences should be dismissed.

Order

[46] In the result I would propose the following order.

1. The appeal by all the appellants in respect of their convictions and sentences is dismissed and the convictions and sentences confirmed.

Langa AJ

Middelburg High Court

Mpumalanga Division

I agree, and it is so ordered.

PP. Mphahlele DJP

Appearances:

For the Appellant: Mr MC Mavasa

Instructed by:

Legal Aid of South Africa, Mbombela.

For the Respondent: Advocate D Rowles

Instructed by:

The Office of the DPP, Middelburg, Mpumalanga.

Date of Judgment: 07 October 2021

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