

SOUTH AFRICA / JUDGMENT

Morathane and Another v S (A327/2017)

[2020] ZAGPPHC 241 (14 May 2020)

[2020] ZAGPPHC 241**COURT**

North Gauteng High Court, Pretoria

BEFORE

Yende, Rabie

CASE / FILE NUMBER

A327/2017

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14/5/20
CASE NO: A 327/2017
In**the matter between:**LEBOHANG
NICODIMUS MORATHANE
1ST
APPELLANT
RAYMOND
HAPPY SESHABELA
2ND APPELLANT
vs
THE
STATE
RESPONDENT

JUDGEMENT

YENDE AJ :(RABIE J Concurring)

Introduction

- [1] This is an appeal instituted by 1st and 2nd Appellants arising from both being convicted on the 30th July 2014 on charges of count (1) Robbery with aggravating circumstances as meant in Section 1 Act 51 of 1997 read with the provisions of Section 51 (2) of Act 38 of 2007, (2) Possession of fire-arm in Contravention of the Fire-Arm Control Act 60 of 2000 and count (3) Possession of ammunition in contravention of the Fire-Arm Control Act 60 of 2000. The 2nd Appellant was further convicted of count (4) Theft of a Nissan Bakkie and count (5) Armed robbery of a Toyota Tazz. The 1st Appellant was sentenced to an effective 15 years imprisonment and the 2nd Appellant to an effective 25 years imprisonment by the court a quo.
- [2] Both Appellants were duly represented during the trial, they both pleaded not guilty to all the charges and elected to remain silent thus offered no plea explanation. On the 13th August 2014 both the appellants applied for leave to appeal in respect of both conviction and sentence in respect of 1st Appellant same was refused and in respect of 2nd Appellant the appeal was granted only in respect of the conviction. Subsequently they both petitioned the Honourable Judge President of this Court for leave to appeal against conviction and sentence in respect of 1st Appellant and against sentence in respect of 2nd Appellant. Leave was granted on the 6th March 2015.
- [3] There are three crisp issues in this appeal;
- 3.1 Whether the court a quo was correct in its evaluation and acceptance of the evidence of identification of the 1st Appellant by the state witnesses and whether such evidence amounted to proof of guilty beyond a reasonable doubt;
- 3.2 Whether the court a quo erred in accepting the evidence of a written statement containing admissions by the 2nd Appellant taken down by a police officer who is in the same unit as the investigating officer;
- 3.3 Whether the court a quo misdirected itself in convicting the 2nd Appellant on count 2 and 3.
- [4] It is necessary that I should provide a concise summary of the relevant evidence. Mr. Makelipe testified that he was employed as a petrol attendant by one Mr. Magelemele at his Engen garage. On the 15th February 2010 together with Trevor Magelemele they went to bank money at Nedbank, Everton Mall. They drove in his BMW car to the Everton Mall, upon arrival he alighted from the car and got a large suit case on wheels that contained money inside which he pulled and climbed on the stoep nearby Nedbank.

[5] An unknown male came from the direction of Nedbank and pointed at him with a firearm to his head, fearing for his life he covered his head with the suitcase. The unknown male grabbed the suitcase and fled with it towards the pedestrian gate of the Mall which was not far away from the Nedbank. He screamed to alert Mr. Magelemele who was in the car at that moment reversing. Accordingly, Trevor Magelemele chased the suspect with his car towards the direction of the pedestrian gate. There was an exchange of gun shots between the suspect and Mr. Magelemele as he was chasing the suspect. Mr. Makelipe saw the suspect running through the small gate, he observed that the suspect was shot on the leg as he was no longer running normal and at that time a Nissan Bakkie arrived. He

observed the 1st Appellant throwing the suitcase on to the back of the Nissan Bakkie which sped away with three occupants at the back and the suspect

crawled to the nearby shack.

[6] At that time he observed that Mr. Magelemele was chasing at the Nissan Bakkie and he went back to his place of employment at Engen garage which is within walking distance from the Mall to alert the manager about the armed robbery. He returned to the scene of the crime with his manager and found the Police already on the scene. At the scene the police had arrested the 1st Appellant who had a gunshot wound on his leg and he was put in an Ambulance .According to Mr. Makelipe he could not recognize the

suspect save for the gunshot wound on his leg which he sustained after being shot at by Mr. Magelemele while running away with the suit case. Mr. Makelipe further testified that neither he nor Mr. Magelemele was injured during the robbery, it was only the windscreen of the BMW that was shot at and that the suitcase containing money was never recovered.

[7] During cross - examination, Mr. Makelipe confirmed that the 1st Appellant pointed him with a firearm and robbed him of the suitcase and that he was the very same person that was shot by Mr. Magelemele on the leg while escaping with the suit case. He confirmed further that, he observed the 1st Appellant throwing the suitcase over the back of the Nissan Bakkie that had three occupants at the back and drove away with the

suitcase. He further confirmed that the 1st Appellant was the very same person the police had found hiding in a shack with a gunshot wound on the leg who was arrested with a firearm in his possession. According to Mr. Makelipe this person was in the ambulance with the police around when he arrived.

[8] Trevor Magelemele testified and confirmed that on the 15th February 2010 he was in the company of Mr. Makelipe. They drove with his BMW motor vehicle to Nedbank at Everton Mall. They went to bank money. Upon arriving at the Mall he parked his car and Mr. Makelipe alighted from the car and got a suitcase on wheels that contained money which he pulled to the steep near Nedbank.

- [9] As he was reversing the car, he heard Mr. Makelipe screaming "my boss, my boss" and he realized that he was being robbed of the money they came to deposit at Nedbank. He testified that he saw the 1st Appellant running away with the suitcase and he gave chase. There was an exchange of fire between him and the 1st Appellant as he was chasing the 1st Appellant who was running towards a small gate. He shot the 1st Appellant on his leg and the 1st Appellant got through the small gate and threw the suitcase on to the back of the Nissan Bakkie and immediately three other unknown males climbed onto the back of the Nissan Bakkie and it sped away. Thereafter the 1st Appellant crawled to a nearby shack.
- [10] According to Mr. Magelemele he gave chase at the Nissan Bakkie and the occupants were firing towards his direction. The Nissan Bakkie drove until it entered into a yard in Wilbur force behind Mechalin's place at Everton and parked in front of the gate of this yard. The occupants of the Nissan Bakkie started firing shots towards his direction and he drove to the hill of the street and went to call for the police. He returned with the police to the yard where the Nissan Bakkie was parked. When he was taking the police to the yard where the Nissan Bakkie had parked an unknown male person stopped him and made a report that he has been robbed of his Toyota Tazz motor vehicle.
- [11] He returned to the scene of the robbery at the Everton Mall with the police. At the scene there were many people, police officers and an ambulance. He saw blood on the leg of the suspect while he was sleeping on a stretcher in the Ambulance. The witness identified the person as being the very same person that he chased and shot on the leg.
- [12] He further testified that he saw the firearm that was used to carry out the robbery and police had placed it in the plastic bag. During cross-examination, Mr. Magelemele confirmed that after Mr. Makelipe had screamed 'Ngamla Ngamla' he realized that something was wrong and that is when he saw the 1st Appellant running away with the suitcase and he chased at him. He confirmed further that the 1st Appellant was shooting at his direction and he also returned fire and shot him on his leg.
- [13] During cross-examination he confirmed that at the direction in which the 1st Appellant was running towards there were no people. He confirmed further that at the scene of the robbery no one was shot, save for the 1st Appellant whom he shot at while running away with his suitcase filled with money. He further confirmed that while at the scene of robbery no member of the public came forth to the police to allege having been shot at during the shoot-out with the suspects. Mr. Magelemele was adamant that the 1st Appellant was the person that he chased, exchanged gunshots with, who shot at his motor vehicle and shot him on the leg while running away with his suitcase. He further confirmed that it was the 1st Appellant that threw the suitcase at the back of the Nissan Bakkie and later crawled away to the nearby shack.
- [14] Malesela Tshelana, he is a police constable with five years' experience. He testified that he was on duty at the Everton Mall on the 15th February 2010. He testified that he heard several gunshots coming from the Everton Mall and went to investigate. As he approached the

scene, members of the public who were standing outside the Mall pointed out to him a certain shack where food is sold where the suspect crawled to. He went to the shack and inside the shack he saw an unknown male crying holding a firearm with both hands. He ordered this male person to throw the firearm outside the shack, he complied with the order and he effected arrest. The said person gave him his name as Lebohang Morathane and he identified him as the 1st Appellant. Constable Tshelana further testified that he took control of the firearm and inspected same. It had an empty cartridge in the chamber and had a magazine containing four bullets. He further observed that the 1st Appellant was bleeding on his right leg, his trouser had blood stains and he called for an Ambulance.

[15] According to Constable Tshelana he told the 1st Appellant that he was arresting him for shooting at the Mall and for putting the people's life in danger. He testified further that while at the shack, Mr. Makelipe arrived and he identified the 1st Appellant as the person who pointed him with a firearm and robbed him of the suitcase containing money. He testified that Mr. Makelipe

recognized the 1st Appellant by the blood on his right leg which was as a result of being shot by Mr. Magelemele while running away. Constable Tshelana

further testified that Mr. Magelemele also arrived at the scene by the shack where the 1st Appellant was arrested in the company of other police officers and he also identified the 1st Appellant in the Ambulance as the person who was shooting at him while running away with his suitcase and that the 1st Appellant was shot on his leg.

[16] He further testified that while at the scene where the 1st Appellant was apprehended, no member of the community came forth to report that he/she sustained any injury as a result of the shooting thereof. It is the testimony of Constable Tshelana that while at the scene, the police from LCRC arrived. He explained to them what had happened and they proceeded to take photos of the scene, marked the empty cartridges with cones and he handed over to them the firearm which he recovered from the 1st Appellant. The photo album compiled by the LCRC was handed in as Exhibit A and there was no objection in this regard.

[17] During cross -e xamination, Constable Tshelana confirmed that the 1st Appellant was the only person who had a gunshot wound at the scene of the crime and that no member of the community reported any gunshot injuries while he was at the scene of the crime. He also confirmed that it was Mr. Makelipe who identified the 1st Appellant while in the Ambulance as the person who pointed him with the firearm and robbed him of the suitcase containing money. He confirmed further that Mr. Magelemele also arrived on the scene and identified the 1st Appellant as the right person that he was chasing while running away with his suitcase and that while exchanging gunshots with him he shot him on his leg. Accordingly, the 1st Appellant was removed from the scene by an Ambulance.

[18] Koos Mofokeng is the owner of the Toyota Tazz that was robbed. According to his testimony on the 15th February 2010 he had gone to his parents' home at Everton to fetch his daughter. At about past 10:00 as he was packing his daughter's clothes inside the car he saw a person

jumping the fence into the yard holding a firearm and he returned back to the house. This male person entered the house and spoke to her sister requesting the car keys, when noticing that this male person was armed with a firearm he handed over the car keys to him. The male person told them that they will get the vehicle in Zone 3 at a stop sign and proceeded to the motor vehicle. Mr. Mofokeng followed the male person outside the house when he observed three male persons, one pulling a red bag while others got into the driver's seat and they all drove away in his car with the red bag.

- [19] He followed the car on foot until he reached the street. By the street he saw a black BMW vehicle followed by the marked police vehicle he stopped them and reported to them that he had just been robbed of his motor vehicle and the robbers had said that they will get the vehicle in Zone 3 at the stop sign. The police together with the black BMW pursued the robbers and his neighbour came to pick him up to go and look for his vehicle in Zone
3. The drove around Everton searching for his vehicle from Zone 3 to Zone 6 and from Zone 6 to Zone 10. While driving back to the Police Station to report the vehicle they found the Toyota Tazz in Zone 7 nearby a Shopping Complex it was parked in a street, its hazards were on and all the doors were closed without occupants. He did not touch the car and they proceeded to the Police station.
- [21] Mr. Mofokeng testified that at the police station he informed the police that he found his car and made a statement to that effect. He confirms that the same day when he recovered his car it was in a good condition and still had the clothes of his daughter inside. He further testified that he cannot remember these three males including the one who held the firearm requesting his car. There was no cross examination of Mr. Mofokeng by both Appellants Legal representatives.
- [21] The Prosecution handed in an Affidavit of one Solomon Ndtlose Dluli and the Registration papers thereof as Exhibit B and C there was no objection thereto by both the Appellants Legal Representatives. Mr. Dluli is the driver of the Nissan Bakkie that was stolen while parked at Caltex Garage and used in the robbery of the suitcase containing money belonging to Mr. Magelemele. The Prosecution further requested that the Section 212 of the Criminal Procedure Act statement, an affidavit by one Precasia Gavenda be handed in as Exhibit D and there was no objection thereto.
- [22] Daniel Kutoane, he is a Detective Warrant Officer in the South African Police Service attached to Trio Task Force stationed at Vanderbijlpark. He testified under oath that, he has sixteen (16) years of service in the "SAPS" and that he is the investigating officer assigned to this case. He testified that the 2nd Appellant was arrested on the 21st July 2010 for possession of a suspected stolen motor vehicle and his arrest was unrelated to the armed robbery in question. He testified that on the 25th July 2010 he booked the 2nd Appellant and charged him for the suspected stolen motor vehicle.

[23] D/WO Kutoane further testified that during the interview with the 2nd Appellant after he had charged him for the suspected stolen motor vehicle, he told him that he had information that the police were looking for him regarding the case of Mr. Magelemele who was robbed in 15th February 2010. Accordingly, the 2nd Appellant started to incriminate himself and when he realized this, he stopped him as he was not a commissioning officer and arranged for his senior commander Colonel Ndaweni who was at Sebokeng to take his statement. D/WO Kutoane testified that he was at the flying squad offices at Vanderbijlpark when he was interviewing the 2nd Appellant and that his senior commander Colonel Ndaweni was at Sebokeng. He testified that when Colonel Ndaweni arrived at Vanderbijlpark he handed the 2nd Appellant to him and took over the interview with the 2nd Appellant.

[24] D/WO Kutoane confirmed during cross-examination that he could not take the warning statement from the 2nd Appellant since he was not a commissioning officer hence he requested his commander Colonel Ndaweni to assist him. He further confirmed

that Colonel Ndaweni was the Unit commander of his unit and that he has recently joined the unit and was stationed at Sebokeng and not in the same offices with him at Vanderbijlpark. He denied that Colonel Ndaweni had any information about this case. He confirmed further that Colonel Ndaweni was not familiar with the case and knew nothing about the investigations of the case. He further confirmed that Colonel Ndaweni was only requested to come and obtain a statement from the 2nd Appellant since he was a commissioning officer. He denied that the 2nd Appellant was ever threatened and assaulted by the police in his presence and further averred that the 2nd Appellant could not appear at court the following day as the docket was not ready for court. He further confirmed that he was not present when Colonel Ndaweni was taking the statement from the 2nd Appellant.

[25] During cross-examination D/WO Kutoane confirmed that he belonged to the same unit, the Trio Task Team with Colonel Ndaweni. Accordingly, the Trio Task team was made up of police officers drawn from different police stations to form this Unit and was concentrating in combating crimes ranging from house breaking, car hijackings and business robberies. He confirmed during cross-examination that he and Colonel Ndaweni do not sit in the same premises and that Colonel Ndaweni had no knowledge of the 2nd Appellant or the investigation in the case. He maintained that he saw nothing funny in requesting Colonel Ndaweni his superior to assist him in taking down the 2nd Appellant warning statement. He denied that Colonel Ndaweni was presented with any written document when he arrived at Vanderbijlpark

flying squad offices to present to the 2nd Appellant for signature.

[26] Benny Ndaweni testified that he is a Lieutenant Colonel in the SAPS with 28 years of service. He was second in charge in the Detective Section stationed at Orange Farm. He further testified that during 2010 he was working under a Trio Task Team and during May-June in 2010 he took over from Colonel Majaja and was based in Sebokeng. Colonel Ndaweni collaborate the testimony of D/WO Kutoane to the effect that on the 25th July 2010 he was

requested by D/WO Kutoane to come to Vanderbijlpark Flying squad office to take down a warning statement from the 2nd Appellant and confirm that it was for the first time he encountered the 2nd Appellant. He testified that when he arrived at Vanderbijlpark he was assigned an office then D/WO Kutoane brought in the 2nd Appellant in that office and left whereupon he continued with the interview with the 2nd Appellant.

- [27] According to Colonel Ndaweni he spoke in Southern Sotho language with the 2nd Appellant which was the language he understood, he informed him of the charges against him and warned him of his constitutional rights, that whatever he say will be reduced into writing and same may be used as evidence in a court of law against him to which he agreed. Colonel Ndaweni testified that despite the warning the 2nd Appellant of his legal rights to legal representation he chose to make a statement. According to Colonel Ndaweni, during the interview

the 2nd Appellant was normal, he never appeared to him to have been assaulted in fact he asked him if he was injured and the 2nd Appellant confirmed that he did not have any injury.

Accordingly, the 2nd Appellant understood the charges against him and the interview proceeded with a standard pro forma 'SAPS 3M' filled in recording the interview between him and the 2nd Appellant. Colonel Ndaweni further testified that the information he received from the 2nd Appellant was recorded in English by him and read back to the 2nd Appellant who confirmed its correctness and signed each and every page of the whole document. He handed same to O/WO Kutoane and left.

- [28] During cross-examination Colonel Ndaweni confirmed that he was requested by O/WO Kutoane to come to Vanderbijlpark to take a statement from the 2nd Appellant. He further confirmed that he neither had the knowledge of the investigation around this case nor had met the 2nd Appellant prior to the interview on the 25th July 2010 . He denied that he ever spoke to D/WO Kutoane when he arrived at Vanderbijlpark and he also denied that he ever had any documents in his possession when he arrived there. He confirms when he arrived at the Vanderbijlpark he was assigned a separate office and the 2nd Appellant was brought in.

- [29] Colonel Ndaweni further confirmed during cross examination that when he concluded the interview with the 2nd appellant he requested D/WO Kutoane to commission the statement and he confirmed that it was a normal procedure to do so. He denied

having filled in the standard pro forma 'SAPS 3M' prior to having interviewed the 2nd Appellant and confirmed that everything he completed in the standard pro forma 'SAPS 3M' came from the 2nd Appellant he just filled it in English and the 2nd Appellant confirmed the correctness thereof.

- [30] 1st Appellant Lebohang Nicodimus Morathane testified in his defence and denied all the 5 charges leveled against him. Accordingly, his version was that on the 15th February 2010 he was heading to Everton Mall. He alighted from a Taxi and proceeded to a pedestrian gate by the Mall. He heard gunshots and people started to run away and he also run away. He did not run very far when he felt his leg did not want to carry him longer as it did not want to walk. Lots of people came to where he was and thereafter the police also came and they

observed his injuries. Then a security guard from the mall dragged him near Shoprite Checkers at the Mall. After a while the police arrive and loaded him in the police van and put him next to the gate of a Mall. The ambulance arrived and he was put inside and brought to Sebokeng Hospital.

[31] The 1st Appellant confirmed that he was shot on the leg but denies that he was involved in the robbery of the complainant's suitcase containing

money. He also denies that he had a firearm, that he had anything to do with the firing of firearm during the robbery and its possession

and ammunition thereof. He also denies knowledge of theft of the Nissan Bakkie 1400 as well as the robbery of the Toyota Tazz.

[32] The 2nd Appellant Raymond Happy Seshabela also testified in his defence and denied all the 5 charges leveled against him. His version was that on the 21st July 2010 he was arrested for a suspected stolen motor vehicle which was unrelated to the robbery in question. He testified that he was not charged for this suspected stolen motor vehicle and that at the scene of his arrest there were two police officers involved who then called for other officers. He was questioned about the robbery which occurred at Everton Mall which he bears no knowledge of. The police were enquiring from him about the names of persons he did not know namely Photse, Soweto and Lucky which the police alleged were involved in the robbery on the 15th February 2010 at the Everton Mall together with him. He denies knowledge of the 1st Appellant and avers that he only met him on the 6th September 2010 when he appeared together with him at the Regional court 5

[33] According to his testimony while he was being charged by O/W O Kutoane, Colonel Ndaweni just peeped through the door saying that he was present and told O/WO Kutoane that when he is finish with the 2nd Appellant he must be brought to his office. When he arrived at the office Colonel Ndaweni told him that he is linked to robbery together with Soweto, Photse and Lucky. During the meeting Colonel Ndaweni had a writing pad with him like P21's in which he wrote down his statement. He was told to sign the written statement which he did but never read it as Colonel Ndaweni was a little bit harsh on him and the warning statement was never read back to him. The 2nd Appellant was presented with his written statement at court admitted to the signature appearing on the statement but denied the whole contents thereof as his and averred that it was not in the same format as the one he signed at the office of Colonel Ndaweni.

[34] Later during cross examination he brought a defence of alibi to the effect that on the 15th February 2010 he was at work at Endaloyetu Environmental Agency, in Vanderbijlpark where he worked as an environmental educator and hold N4 certificate in Engineering Science. He testified that he knocked in at work at 08:00 signed a register in the present of his supervisor, around 08:30 they went to the fields at the taxi rank in Vanderbijlpark for a campaign project and at 12:45 they proceeded to Caravan Park with the cleaning campaign project and returned to the office with his co-workers they were a team of 20 people. He

signed off and went home. He testified that he is now working at Sebokeng Hospital as an Electrician.

[35] Mandia Mtembu was called at the instance of the 2nd Appellant. According to his testimony he knew the 2nd Appellant as a co-worker as they worked together at Endaloyetu Environmental Agency as environmental educators. His testimony is

similar to that of the 2nd Appellant's testimony regarding his defence of alibi about his whereabouts on the 15th February 2010. He testified that he was at work with the 2nd Appellant and that they ferried to work by same taxi, knocked in at 08:00. Accordingly, they both signed the attendance register at 08:30 they proceeded to Vanderbijlpark Taxi rank for the cleaning campaign project and at 13:00 they together proceeded to Caravan Park to do a cleaning campaign. At 15:00 they returned to the office and signed off the register and went home. According to Mr. Mtembu they were a team of 20 people. He confirmed during cross examination that he never made a statement about the incident to the police and was never requested to do so by the 2nd Appellant in 2010. He confirmed further during cross examination that he was not the supervisor or the project manager for the project. He testified further that he works together with the 2nd Appellant at the Sebokeng hospital where he is employed as a Plumber.

[36] At the hearing of this appeal counsel for the 1st Appellant contended that both Mr. Makelipe and Mr. Magelemele did not have the proper identification of the 1st Appellant and that the police never submitted the forensic results of the PR tests obtained from the hands of the 1st Appellant including the forensic evidence of finger prints obtained from the fire-arm found in the 1st Appellant's possession. As a consequence the whole evidence was insufficient to sustain a conviction on the charges.

[37] The 2nd Appellant's counsel contended that no witness directly implicated him on all the charges nor was he arrested on the scene. He further

contended that the only evidence which links the 2nd Appellant to the crime is the written statement containing admissions obtained by Colonel Ndaweni on the 25th July 2010. He strongly argued that same was obtained by colonel Ndaweni who belonged to the same Unit as the investigating officer

and that such was an irregularity. He further argued that the regional magistrate did not only erred in accepting the 2nd Appellant's written statement as confession but also misdirected himself in convicting the 2nd Appellant on count(s) 2 and 3. He conceded that at most the conviction should have been only on count 4.

[38] The counsel for the state averred in respect of the 1st Appellant that identity was not an issue. He argued that the 1st Appellant pointed Mr. Makelipe with a firearm and robbed him of the suitcase. He was chased by Mr. Magelemele who shot him on the leg, he could not run any longer and threw the suitcase on to the back of the Nissan Bakkie and thereafter crawled to a nearby shack. Constable Tshelana who was nearby the Mall investigated the shooting and the members of the public pointed out the shack where the 1st Appellant crawled to and

hide. Constable Tshelana proceeded to the shack and found the 1st Appellant inside with a gunshot wound on the leg and in possession of a fire-arm with ammunition. The 1st Appellant could not explain his possession of the said fire-arm. Both Mr. Makelipe and Mr. Magelemele identified the 1st Appellant as the person who committed the robbery from the gunshot wound he sustained after being shot while fleeing with the suit case.

- [39] Counsel for the state averred that in respect of the 2nd Appellant that although he was not linked to the crime by any witness however his written statement which contains admissions when taken together with the entire witness's evidence in toto it proves that the 2nd Appellant played a part to the commission of the robbery. He further argued that, the fact that the 2nd Appellant's written statement was taken by Colonel Ndaweni who was the head of the Trio Task team in which the Investigating officer

belong cannot be said to have been an irregularity .He maintainedthat Colonel Ndaweni was stationed at Sebokeng while the investigating

office was stationed at Vanderbijlpark and further that there was no evidence that Colonel Ndaweni was the immediate supervisor of the investigating officer or that he had knowledge of what matters each investigating officer under his Unit was investigating, after all Colonel Ndaweni took the ranks of this unit three months after the robbery was committed.

Evaluation of evidence

- [40] It is trite that the State bears the onus of establishing the guilt of the appellants beyond reasonable doubt and the converse is that both the appellants are entitled to be acquitted if there is a reasonable possibility that they might be innocent (See *R v Difford* 1937 AD 370 AT 373,383). In *S v Van der Meyden* 1999(2) SA 79 (W), which was adopted and affirmed by the Supreme Court of Appeal in the case of *S v van Aswegen* 2001 (2) SACR 97 (SCA).In assessing whether the Appellants are guilty, it goes without saying that the State must prove its case beyond reasonable

doubt. If the case reaches a stage where the Appellants has a duty to answer the state testimony, accordingly the Appellants must provide evidence that is reasonably possible to be true.

- [41] The mere fact that their testimony is unlikely is not enough to reject it. It must be so unlikely to be false beyond reasonable doubt. In *S v V* 2000(1) SASV 453(HHA) at 455 a-c. Zulman AR stated that "It is sad that there is no bond 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 unless it is satisfied not only that the explanation is improbable but beyond any reasonable doubt it was 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."

[42] In *S v Mbuli* 2003(1)SASV97 (HHA) at 110 d-e Nugent WnAR (as he was then) said the following "It is trite that the State bears the onus of establishing the appellant's guilt beyond a reasonable doubt, and the converse is that he is entitled to be acquitted if there is a reasonable possibility that he might be innocent. Whichever form of test is applied it must be satisfied upon considerations of all the evidence. Just as a court does not look at the evidence implicating the accused in isolation to determine whether there is evidence beyond a reasonable doubt, so too does it not look at the exculpatory evidence in isolation to determine whether it is reasonable possible that it might be true". This view was approved in *S v Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426f-h where the court said the following "The question for determination is whether, in light of all the evidence adduced at the trial, the guilt of the appellants was established beyond a reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubt about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it there is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees".

Findings in respect of 1st Appellant ad conviction .

[43] The evidence of state witnesses including that of the Appellants cannot be approached and/or evaluated independently of the entire evidence as a whole in this regard see *S v Civa* 197 4 SA 884(T) where Margo J stated that "The evidence must be weighed as a whole, taking account of probabilities, the reliability and opportunity for observation of the respective witnesses, the absence of interest or bias, the intrinsic merits or demerits of the testimony itself, any inconsistencies or contradictions, corroboration, and all other relevant factors.

[44] This approach was amplified and endorsed in *S v Chabalala* 2003 (1) SACR134 (SAC) at 139i-140b where the court held "The correct approach to evaluating evidence is to weigh up all the elements which points towards the guilty of the accused against all those which are indicative of innocence, taking proper account of inherent strengths and weakness, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused' guilty. The result may prove that one scrap of evidence or one defect in the case can only be ex-post facto determination and a trial court should avoid the temptation to latch on to one obvious aspect without assessing it in the context of the full picture

presented in evidence".

- [45] What is of paramount importance in this case are the established and proven facts, which in my view make out an overwhelming and solid case against the 1st Appellant. The circumstances in which the 1st Appellant was found hiding in a nearby shack with a gunshot wound on the leg and being in possession of a firearm. These pieces of evidence per se make it inconceivable and improbable that he was shot whilst being an "innocent bystander". He was identified at the scene inside an Ambulance by both Mr. Makelipe and Mr. Magelemele as the person who committed the robbery and that the gunshot wound he sustained after being shot at by Mr. Magelemele while fleeing from the scene with the suit case.
- [46] In the circumstance the argument by the 1st Appellant Counsel's that both Mr. Makelipe and Mr. Magelemele did not have the proper identification of the 1st Appellant and that police never submitted the forensic results of the PR tests obtained from the hands of the 1st Appellant including the forensic evidence of finger prints obtained from the firearm found in the 1st Appellant's possession cannot negate the inescapable inference that the 1st Appellant was the person who pointed Thulani Makelipe with a firearm and robbed him of the suitcase. Both Mr. Makelipe and Mr. Magelemele confirmed that he is the one that was shot at by Trevor Magelemele whilst escaping. It is indeed so, as expressed in *R v Shekelele* and *Another* 1953 (1) SA 638 (T), *S v Mthethwa* 1972 (3) SA 766 (A) at 768 A and many other cases that followed them ,that the evidence of identification must, for various reasons stated in those

cases , be approached by the Courts with caution. The evidence of identification of the 1st Appellant by the identifying witnesses Mr. Makelipe and Mr. Magelemele, coupled with collateral evidence of the witness Constable

Tshelana who arrested the 1stAppellant, points to the 1st Appellant as one who robbed Mr. Makelipe beyond a reasonable doubt. I found that the application of caution to their evidence only point in that direction. As a consequence, I find that the Court a quo correctly rejected the 1st Appellan'ts version as not reasonably possible true.

Findings in respect of 2nd Appellant ad conviction.

- [47] The 2nd Appellant was convicted on the strength of a "confession" later accepted and taken as a written statement containing admissions taken down by Colonel Ndaweni who was the head of the Trio Task Team of which the investigating officer also belonged. The 2nd Appellant's counsel contented that this was irregular. The court in *S v Mbata en Ander* 1987(2) SA272 (A) held amongst other that "There exists no legal basis for labeling such practice as an irregularity". Counsel for the stated averred during the hearing of this appeal that the 2nd Appellant statement cannot be considered as a "confession" in the true sense of the word but it may be considered a written

statement containing admissions .I agree with that proposition since the said statement was not a confession but that it contained certain admissions about the robbery by the 2nd Appellant. It is also clear from the record that the 2nd Appellant legal representative denied that the 2nd Appellant had made a confession and there was no need for a trial within a trial.

[48] The 2nd Appellant denied that the written statement containing admissions taken by Colonel Ndaweni was read back to him and that it is the same statement which he gave to him but he admitted his signature therein. In *S v Mokoena and others* 2006 910 SACR 29 (W) Labuschagne J cautioned that "Where statements of the accused are the only evidence implicating them in the commission of the crimes, a court must be mindful that circumstances may arise which call for a particular careful assessment of the question whether the statement of the accused were made freely and voluntarily". No evidence was led to the effect that the 2nd Appellant was ever assaulted while Colonel Ndaweni was taking down the written statement from him. No evidence was led as to whether

Colonel Ndaweni had prior knowledge of the investigation of this robbery against the 2nd Appellant. The 2nd Appellant in his written statement to Colonel Ndaweni admitted to count 1 armed robbery that he was the driver of the getaway Nissan

Bakkie as well as count 4 that he stole the Nissan Bakkie at the Caltex garage.

[49] The 2nd Appellant raised a defence of alibi later during cross-examination and denied being present at the scene of the armed robbery. His alibi was to the effect that he was at work on the 15th February 2010 at Endaloyetu Environmental Agency with a co-worker Mandia Mtembu who corroborates his alibi. In *R v Biya* 1952(4) SA 514 (A) at 521c-d cited with approval by the Supreme Court of Appeal in *S V Liebensberg* 2005 (2) SACR 355 (SCA) ,it was held that "if there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged , then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime ". In this appeal before us the totality of the evidence together with the admission by the 2nd Appellant contained in his written statement proves that he was at the Everton Mall on the date and time of the commission of the

offence and not at the Endaloyetu Environmental Agency as per his late defence of alibi. The 2nd Appellant's denial of being involved in the commission of the armed robbery at the Everton Mall as well as the improbabilities inherent in their alibi defense, appears to be improbable to such an extent that the trial Magistrate correctly and rightly so rejected it as false.

[50] Generally a Court of appeal will be hesitant to interfere with the factual findings and evaluation of the evidence by the Court a quo and will only interfere where the Court a quo materially misdirects itself insofar as its factual and credibility findings are concerned (see *R v Dhlumayo* and another 1948(2) SA 677(A). The principle applicable on the merits (including credibility findings) of a case and the approach to be followed by the Court of appeal was further clearly formulated in matter of *S v Francis* 1991(1) SASV198 (A) at par 198j

-199a.

"The power 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 a witness's 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 - a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the Court of appeal will be entitled to interfere with the trial Court's evaluation of oral testimony". The same principle was reaffirmed by the Supreme Court of Appeal in the matter of *S v Hadebe and others* 1997 (2) SACR 641(SCA), at p645 where the Court held "in the absence of demonstrable and material misdirection by the trial court its findings of facts are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong".

[51] There is no evidence linking the 2nd Appellant to count 5 nor does his written statement contain admissions in respect of this count as a consequent I found the trial

court erred in convicting the 2nd Appellant of robbery of the Toyota Tazz. In respect of count(s) 2 and 3 I found that the evidence on which it was based was insufficient

and this was conceded by the counsel for the State. Accordingly, the conviction was based on the reasoning that as all robbers acted with common purpose thus they were guilty of joint possession of the one fire-arm. In light of the *S v Mbuli* 2003 (1) SACR 97 (SCA) this conviction on count 2 and 3 cannot stand and must be set aside.

The Appeal against Sentence

[52] When considering sentence, it is trite that sentencing is the prerogative of the trial court and should not lightly be interfered with. In *Ndou v The State* (247/18) [2019] ZASCA 85(31 May 2019) at par 21 ZONDI JA said "In general, sentencing is within the discretion of the sentencing court. An Appellate Court's power to interfere with sentences imposed by trial court are circumscribed. It can only do so where there has been an irregularity that results in a failure of justice, or that the trial court misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed (*Bogaards v S* 2013(1) SACR 1 (CC) para41)". The test is not whether the court actually exercised its discretion properly (See *S v Romer* 2011 (2) SACR 153(SCA) at par 22-23). In casu the prescribed sentence was imposed there being no substantial and compelling circumstances found by the trial court justifying a deviation.

[53] Ex facie the entire case record, I am satisfied that the court actually carefully considered all the relevant personal circumstances of both the 1st and 2nd Appellant prior to imposing the prescribed minimum sentence. In *Director of Public Prosecution, Pretoria v Tsotesti* [2017], ZASCA83,

2017 (2) SACR 233 (SCA) (2 June 2017) at par 27 Copper AJA said "As held in Ma/gas confirmed in S v Dodo , and explained in S v Vilakazi, even though 'substantial and compelling' factors need not be exceptional they must be truly convincing reasons, or 'weighty justification,'

for deviation from the prescribed sentence. The minimum sentence is not to be deviated from lightly and should ordinarily be imposed".

[54] In casu the factors advanced by both the 1st and 2nd Appellant in mitigation of sentence in my view are not truly convincing reasons or mighty justification for deviation from the general norm as a result I recommend the following order:

Order

In respect of the 1st Appellant:

1. The appeal against both the convictions and sentences in respect of count 1, 2, and 3 is dismissed.
2. The convictions and sentences imposed by the trial Court in respect of count 1, 2, and 3 are confirmed, with the result that the 1st appellant shall serve an effective sentence of 15 years imprisonment.

In respect of the 2nd Appellant:

3. The appeal against both the conviction and sentence in respect of count 2, 3, and 5 is upheld and the convictions and sentences in respect of counts 2, 3 and 5 are set aside.
4. The appeal against the convictions and sentences in respect of count 1 and 4 is dismissed.
5. The convictions and sentences imposed by the trial Court in count 1 and 4 are confirmed.
6. The sentences in respect of count 1 and 4 shall be served concurrently, with the result that the 2nd appellant shall serve an effective sentence of 15 years imprisonment.

YENDE AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION

I agree, and it is so ordered.

RABIE J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

HEARD ON: 12th March 2020

DATE OF JUDGMENT: 14 May 2020

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