

SOUTH AFRICA / JUDGMENT

Tafeni and Another v S (A 07/21)

[2021] ZAWCHC 289 (17 June 2021)

[2021] ZAWCHC 289**COURT**

Western Cape High Court, Cape Town

BEFORE

Baartman, Nel

CASE / FILE NUMBER

A07/21

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(WESTERN CAPE****DIVISION, CAPE TOWN)****Case****no: A07/21****In the matter between:**TABO
TAFENI
First Appellant
VUYISANI
JAJINI
Second Appellant
and
THE
STATE
Respondent**Court:**Justice Baartman et
Acting Justice Nel**Heard:**

14 June 2021

Delivered:

17 June 2021

JUDGMENT

(Delivered by email to the parties' legal representatives and by release to SAFLII.

The judgment shall be deemed to have been handed down on 17 June 2021)

NEL AJ:

INTRODUCTION:

1. On 19 March 2019, the two appellants[1] together with another[2] were jointly convicted on a charge of robbery with aggravating circumstances in the Regional Court held at Blue Downs.
2. Each of the appellants and their co-accused were sentenced to 8 years' imprisonment of which 2 years were suspended for a period of 5 years on condition that they were not again convicted of robbery committed during the period of suspension.[3] They were also declared to be unfit to possess a firearm.
3. Leave to appeal against the conviction having been refused by the court a quo, the appellants successfully petitioned this court which granted them leave to appeal against the conviction only.

PRELIMINARY**ISSUES:**

4. The matter was initially set down for 16 April 2021, prior to which date it was found and pointed out to the parties, that the record of the proceedings in the court a quo was incomplete in that a portion of Basana Kobeni's evidence in chief which was not included therein. The legal representatives

for the parties are however ad idem that the portion of Kobeni's evidence which has been omitted contains common cause facts in respect of him being introduced as a witness and testimony regarding his chase of a motor vehicle. The parties are moreover ad idem that the record from page 152 onwards sufficiently covers the relevant portions of Kobeni's evidence to such an extent that the appeal can be argued without any prejudice to any of the parties.

5. In *S v Chabedi* 2005 (1) SACR 415 (SCA) it was emphasized-

On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the Court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that was said at the trial... The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, inter

alia, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal.

6. Despite the fact that a portion of Kobeni's evidence has been omitted from the trial record, we are satisfied that the record is adequate for this court to adjudicate the appeal against the conviction of the appellants.
7. For reasons unrelated to the above, the matter was postponed for hearing to 14 June 2021, at which date the appeal was argued on behalf of the parties.

THE EVIDENCE:

8. I now revert to the merits of the appeal.
9. The first and second appellants and their former co-accused, who has not appealed his conviction, were convicted by the Regional Court based upon the evidence of various eye witnesses and further circumstantial evidence. All three were legally represented at the trial. They all pleaded not guilty to the charge without providing plea explanations. No admissions were made by any of the appellants.
10. It is not in dispute that on 12 July 2013 Big Daddy's Fisheries in Blackheath, Western Cape ("the fisheries"), owned by Mr. John Fernandes da Silva ("da Silva"), was robbed, when a number of perpetrators entered the premises, two of which wielded firearms, of an undisclosed sum of cash was taken from the cash register.
11. The state called nine witnesses: Da Silva, two Fidelity Guard security guards and six police officers.

John Fernandes da Silva:

12. The evidence of Mr. da Silva was that at approximately 3pm on the day in question he was at the fisheries, with his wife and three staff members, when a number of men entered the premises,[4] one of which he had recognized from a previous robbery. He told his wife to press the panic button to notify the security company. Two of the men who had entered the premises had firearms; one of whom leaned up against the wall[5] and the other accompanied them behind the counter and directed them to hand over the cash in the till. They were then instructed to go to the back of the store, which they did, and whilst the robbers were taking the cash, he ran outside and called for help through a back door which he kept open as a result of prior robberies. He waved down a Fidelity Guard van, which had just driven past one of the getaway motor vehicles, describing the getaway vehicle as green in colour. He could not recall the colour of the second motor vehicle. He informed the Fidelity Guards of the robbery and they gave chase after the green motor vehicle. An amount of between of R 2 000.00 and R 2 500.00 was taken from the cash register.
13. He was called to an identification parade, where it appears that appellant number 1 was present, but appellant number 2 absent; however, he was unable to identify anyone as being one of the robbers, as he was focused on identifying the two men who had the firearms and

no one else. He initially testified that it was very likely that the appellants participated in the robbery, but he did not focus on them during the robbery itself as his focus was on the armed men. He later however testified that the appellants were definitely part of the group of robbers.

14. As a result of the various robberies at the fisheries, Mr. da Silva eventually sold the store.

Patrick Kama:

15. Patrick Kama testified that he was on duty on the day in question and was the passenger in the Fidelity Guard motor vehicle, which was on its way to the fisheries in order to collect money therefrom. Da Silva informed them that they had just been robbed and that the suspects fled in a bottle green Polo hatchback motor vehicle which had four people in it. They turned around and gave chase as the motor vehicle had passed them on their way to the fisheries. They initially lost sight of the motor vehicle but shortly thereafter spotted it again. They called their controller for backup. The suspects fired gunshots at them and Kama returned fire. During the shootout he sustained a gunshot wound to his left hand.
16. The suspects alighted from the motor vehicle whilst it was still in motion. Kama's partner stopped the car and Kama climbed out, saw one of the suspects, who was sitting at the back of the motor vehicle, fall and face his direction after exiting the Polo. He testified that the suspect picked up a cap that he had dropped when he had fallen and this gave him an opportunity to observe the person. When questioned about how far away this person was from him when this occurred he testified that he was not very good with distance. He then attempted to explain the distance by making reference to the distance between the witness box and a glass door outside the courtroom. A discussion ensued between the legal representatives and the court, the court stating that it was in the vicinity of 30, 40 or 50 metres, and the legal representative for the appellants proposing that it was 50 to 60 metres. There is a substantial difference between 30 and 60 meters, and this should have been properly canvassed by the court. Nevertheless, this suspect ran away and entered a yard that was on his left-hand side, at which point Kama ceased the chase, as he was uncertain as to how heavily armed the suspects were. Shortly thereafter the police, as well as his colleagues who he had called for backup, and an ambulance, arrived on the scene. Thereafter a police van returned with suspects in the back thereof. He identified the second appellant, in the back of the police van, as the person who had fallen and picked up a cap. He testified that he identified him by the clothing he was wearing. No further description is however given of the clothing.
17. He once again identified the second appellant in court as the person who had fallen and picked up his cap. He stated that he was unable to identify any of the other suspects as they ran away too quickly.

18. He also attended an identification parade, however, he was unable to point out any person thereat as being one of the suspects. He was however certain that the second appellant was not in attendance at the identity parade.
19. Under cross-examination it was put to him that he had in fact identified the first appellant at the back of the police van; however, he was adamant that he had identified the second appellant.[6]

Basana Nicholas Kobeni:

20. Mr. Basana Nicholas Kobeni testified that he was the driver of the Fidelity Guard motor vehicle which gave chase to the green Polo. He testified that the suspects alighted the motor vehicle whilst it was still in motion; the two people in the backseat jumping out first, followed by the person in the passenger's seat, with the driver being the last person to exit. He was approximately 15 meters away from the motor vehicle when the first person jumped out and about 10 meters therefrom when the driver had jumped out.
21. The motor vehicle was headed towards children and he therefore ran after it, climbed into it, and was able to bring it to a halt by pulling up the handbrake. He saw the driver of the motor vehicle running away when he ran after the vehicle. Shortly thereafter the police arrived. He noticed a bag containing cash behind the driver's seat of the motor vehicle.
22. He and Kama were required to hand their firearms in at Mfuleni police station after the incident. Whilst they were waiting at the police station, two police officers entered with accused number 3, who he immediately identified as the driver of the motor vehicle. He testified further that accused number 3 was wearing a red t-shirt and blue jeans at the time of the chase but that he had a different colour t-shirt on when he saw him at the police station.
23. He also testified that the second person who alighted the motor vehicle was wearing a brown jacket and a blue t-shirt.[7] He testified that he saw this person again when they came back with the police officers, presumably after the police apprehended two suspects and placed them in the back of their van. He recognized this suspect by the clothing he was wearing. He did not make a statement, and accordingly never formally identified this person, as Kama was doing so. He later testified that he did not look at who was inside the police van. This begs the question as to when he would have seen this suspect again; the police officers came back to the scene with the suspects already in the back of the van, and if he never looked inside, when would he have seen him?
24. He testified further that he identified this suspect by his clothing and he also later saw him at the Mfuleni police station. In court he indicated that this person was the first appellant. He testified that this was the person that Kama saw and identified.

When it was put to him that Kama identified the second appellant he maintained that it was in fact the first appellant who had been identified by Kama.

25. He testified further that the only person that he was personally able to identify was the driver and that Kama would be able to identify the others.

Bonginkosi Goodman Ndawonde:

26. Bonginkosi Goodman Ndawonde is a Sergeant at Mfuleni police station. He received information that a robbery was taking place at the fisheries. En route they drove past a Fidelity Guard motor vehicle flashing its lights at them and pointing towards the direction in which he was coming from. He then turned around and when turning into Government Street he noticed that the Fidelity Guard vehicle had come to a halt. There were 2 Fidelity security officers, one of whom had sustained a gunshot wound. Kobeni, who he described as the Fidelity officer who had not been shot, informed him of the motor vehicle they were chasing and that the suspects had jumped out of it whilst it was still in motion. At that time a young lady approached and informed him that she saw a suspect holding a firearm run in her direction. His colleagues arrived and they went in search of the suspects. As he was the first person to arrive on the scene he had to remain behind. He found a bag of money on the backseat of the Polo motor vehicle, which motor vehicle had evidence of gunshots being fired at it.

Vincent Malunda:

27. Vincent Malunda is a sergeant at Mfuleni police station. At approximately 4:40pm on the day in question, whilst patrolling with Constable Nxotso, he heard a dispatch on the police radio that there had been a shooting at Government Street in Bardale where the Polo and Fidelity Guard motor vehicles had come to a stop. When they arrived at the scene the street had already been cordoned off and Constable Zengezi was there with two suspects. There was a member of Fidelity Guard security present, who had been shot, and who had pointed out one of the suspects to Constable Zengezi, as being a person involved in the chase.
28. It was thereafter suggested by Constable Zengezi to revisit the address where the two suspects had been apprehended. Accordingly, he accompanied Constable Zengezi and Constable Nsiba to the house in Matutu Street. They entered the first informal structure and discovered it only had a bed in it. They then entered the second informal structure and he saw a bed with an enormous pillow on it. When he removed the pillow he found a male person laying on his stomach with a firearm in his right hand. He testified that the suspect's right arm was extended in his direction. In shock, he screamed and jumped upon the suspect. They then drove the suspect to the police station and discovered that he did not have a licence to possess a firearm. It is unknown how the suspect could be laying on his stomach whilst at the same time pointing the firearm in the direction of Sergeant Malunga, nonetheless, nothing turns on this point. This suspect was arrested; however, he has absconded and there is a warrant out for his arrest. This suspect identified himself to Sergeant Malunga as being Siyabulela Funani.

Gerhard Myburgh van Zyl:

29. Gerhard Myburgh van Zyl is a Sergeant at Mfuleni police station. He was informed that the owner of a motor vehicle which was involved in a robbery at the fisheries was at Khayelitsha police station in order to report a hijacking.
30. He drove to Khayelitsha police station where he met the owner of the Polo motor vehicle. He drove the owner of the motor vehicle to Mfuleni police station. Upon arrival, Kobeni was present and identified the owner as the driver of the motor vehicle during the robbery.

Ncedikhaya Zengesi:

31. Ncedikhaya Zengesi is a Constable at Mfuleni police station. He was driving in a marked police van on the day in question and at approximately 4:30pm he heard over the police radio that a shop had been robbed in Blackheath and that a motor vehicle had been fired at. He heard further that the motor vehicle was in Government Street. When he arrived on the scene it had already been cordoned off and he was informed by the police and bystanders that the suspects had run in a certain direction towards informal structures.
32. They secured the structure that the person had gone into. Behind this structure there were footprints, which he referred to as “takkie” prints in the sand, leading to another informal structure where there were two men sitting outside. They looked suspicious and were wanting to leave. They then took the two men to the scene where Kama identified them as the people who had been firing gunshots at him. Kama did not single out any one of the two persons, but rather pointed out both suspects.
33. He informed the two men that they were being arrested. These men are the two appellants in this matter. They were placed at the back of a police van after which one of the appellants asked whether the police had inspected the house at which they were arrested. This prompted Constable Zengesi, Constable Malunda and Constable Nsiba to return to the informal structures.
34. The yard had three informal structures thereon. When they searched the second informal structure, Constable Malunda removed something that resembled a blanket which was next to a bed, and discovered someone holding a firearm. Constable Malunda arrested the person for being in possession of a firearm.
35. The distance between the area cordoned off by the police and the informal structures where the two appellants were apprehended is approximately a meter.

Nana Mngqebisa:

36. Nana Mngqebisa, was employed in the South African Police Service as a Constable from 2010 to 2014, and working as a forensic investigator

as a photographer. He is responsible for taking the photographs in Exhibit “1” on the day in question.

Nicholas Viwe Mdawe:

37. Nicholas Viwe Mdawe is a Constable stationed at Mfuleni police station and is the investigating officer in the matter. He testified that accused number 3 was the owner of the Polo motor vehicle in which they discovered approximately R 1 800.00 in cash at the scene.
38. He was not next to Kama when he identified the suspects at the back of the police van.
39. An identity parade had been arranged and was attended by da Silva, one of his employees and Kama. The second appellant was not present at the identity parade despite being informed to attend. No positive identifications were made at the parade.
40. Photograph 22 of Exhibit “1” is a cap that was found on the scene.
41. That then concluded the case for the State and the three accused unsuccessfully applied for a section 174 discharge.
42. Each accused thereafter testified in their defence.

First appellant:

43. Appellant number 1 testified that he and appellant number 2 had known each other for a considerable amount of time as they had previously been neighbours in the Eastern Cape. He did not know accused number 3, nor the other person arrested at the premises of appellant number 2.
44. He and appellant number 2 were arrested at the place of residence of appellant number 2. At the time of their arrest they were sitting in the sun and listening to music. They did not hear any gunshots whilst sitting there, nor did they see anyone running or walking past them.
45. The police arrived and asked them if they had seen a person wearing Cavello shoes. The police requested appellant number 2 to show them his shoes which he did. They were not Cavello shoes. The police then requested appellant number 2 to bring out all of his shoes, which he duly did, and none of them were Cavello shoes. He too was not wearing Cavello shoes. The police then departed. Thereafter his girlfriend telephoned him and he left to go and see her. Appellant number 2 remained behind. When he reached his girlfriend, appellant number 2 telephoned him and informed him that he had been arrested. He therefore returned to the informal structure and upon his arrival appellant number 2 was already in the back of the police van. The police instructed him to get into the back of the van as well in order to take them to the scene where the incident had occurred. He testified that it wasn't very far away, approximately 80 metres.
46. When they arrived a man wearing security clothing was brought over to the van and identified him, although he did not know the purpose of the identification, and he was thereafter taken to another van.
47. He testified that he was wearing a grey hoodie jacket and blue jeans with “takkies” on that day. He was not involved in the robbery and does not even know where Big Daddy's Fisheries is located.

48. He attended an identity parade with accused number 3, accused number 2 being absent therefrom.
49. He could provide no comment when it was put to him that in an informal structure on the same plot as the place of residence of appellant

number 2, a person was arrested with a firearm.

Second appellant:

50. Appellant number 2 confirmed that he had known appellant number 1 since 1992, when they met in the Eastern Cape. He however did not know accused number 3. He resided at the address in Matutu Street where he and appellant number 1 were arrested; there were three informal structures on that plot. He further confirmed that he and appellant number 1 were sitting outside and listening to music. He testified that he was at home the entire day, he was not involved in any robbery, and had never been to Big Daddy's Fisheries before. He also testified that they did not hear any gunshots that day nor did they see anyone run past them.
51. The police arrived and informed him that they saw footprints leading to his residence and requested him to bring his shoes to them which he duly did. They asked him where his Cavello's are and he told them that he did not own any. The police then informed them that they were leaving but would return. Thereafter appellant number 1's telephone rang and he informed appellant number 2 that he was going to his girlfriend. Thirty minutes later the police returned and asked where appellant number 1 was. He informed them that he had gone to his girlfriend. He then telephoned appellant number 1 and informed him that he was being arrested. He was then taken to the police van. When appellant number 1 arrived back at the informal structure he too was placed in the back of the police van and they were driven to the scene, which was only a 3-minute walk away. At the scene a security guard, being Kama, identified appellant number 1, and he was thereafter taken out of the van. He only saw appellant number 1 again at the police station later on. He testified that he had not been involved in any robbery.
52. He testified that he was not present at the identity parade as no one had informed him to attend same.
53. He was employed at the time in question at Jabelo Bus Services. He started work at 4pm and would travel via taxi to get there. He was arrested at approximately 3pm on that day,[8] but was not getting ready to go to work before his arrest.

Siyabulela Mtya – accused number 3:

54. Although accused number has not appealed his conviction and is accordingly not before this court, his evidence, insofar as it provides further context to the facts of this present matter, are summarized below.

55. Accused number 3 testified that on the day in question he received a call from his friend Siyabonga Funani, who he referred to as Siya, who requested him to transport them to Blackheath. He collected Siya who sat in the passenger's seat as well as four other persons who sat at the back. He testified that he did not know the four other persons and would not be able to identify them and did not know whether they were the first and second appellants. In Blackheath they stopped at a fish and chips shop; all of the occupants got out of the motor vehicle, and he waited inside the motor vehicle. When the men returned to the motor vehicle they instructed him to drive fast which he did. He saw a firearm but no one had threatened him. He then heard gunshots, one of which hit the back window of the vehicle. He eventually slowed the vehicle down, at a random place, and jumped out whilst it was still in motion. He ran away because the other people in the motor vehicle were running away too. He ran until he reached Khayelitsha police station (even though Mfuleni police station was much closer) in order to open a case of hijacking. The licence plate at the back of the motor vehicle was in the boot. He testified that this is because it had fallen off the previous day.

THE LAW AND ITS APPLICATION TO THE PRESENT FACTS:

56. It is not in dispute that the fisheries had been robbed on 12 July 2013 by a number of assailants, two of whom made use of firearms. It is furthermore not in dispute that accused number 3 drove a number of individuals to the fisheries and that after leaving he was followed by a Fidelity Guard motor vehicle, gunshots were exchanged and the occupants of the motor vehicle eventually jumped out, in Government Street, whilst the motor vehicle was still in motion, ran away, and that thereafter an amount of R 1 800.00 in cash had been discovered in the motor vehicle by the police.

57. Central to the dispute between the State and the defence is the question of identification.

58. In the oft cited matter of *S v Mthetwa* 1972 (3) SA 766 (A) Homes JA held at 768A-C that:

Because of the fallibility of human observation, evidence of identification is approached by the Court with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities; see cases such as *R v Masemang* 1950 (2) SA 488 (AD); *R v Dladla and Others* 1962 (1) SA 307 (AD) at p. 310C; *S v Mehlaphe* 1963 (2) SA 29 (AD).

59. The evidence of da Silva was that he had only focussed on the two assailants who were armed during the robbery. Although he

identified the first and second appellants in court as firstly “very likely” to be present at the robbery and later changing it to “they were definitely there”, his evidence in any event constitutes a dock identification which by itself, without more, has limited (if any) evidential value.[9] The court a quo accordingly erred in accepting da Silva’s identification evidence to the effect that the appellants had participated in the robbery.

60. The identification evidence of the appellants therefore turns on the evidence of Kama and Kobani.
61. Kama testified that he identified the second appellant at the back of the police van on the scene whilst Kobeni testified that Kama identified the first appellant at the back of the police van at the scene. This discrepancy between their evidence is not dealt with in the trial court.
62. Accused number 3 admitted being the driver of the motor vehicle. He was arrested at Khayelitsha police station after attempting to open a case of hijacking following the event. The evidence indicated that the passenger was Funani, who was a friend of accused number 3, and as stated above, he had absconded and the police were still trying to locate him. This leaves the two passengers at the back of the motor vehicle. Kobani testified that he saw both the driver of the motor vehicle and one of the passengers alight it. He testified that the passenger who alighted the motor vehicle was wearing a jacket, blue t-shirt and jeans, and that he had later identified him by his clothing. In court Kobani identified this person as the first appellant.
63. Kama on the other hand says that he identified the second appellant at the back of the police van as the person who had fallen and picked up his cap by the clothing he was wearing. No description of this clothing was however ever given.
64. No evidence was led as to what clothing the appellants were wearing at the time of their arrest. Nor was any evidence led as to whether the clothing they had on at the time of their arrest was the same clothing as at the time that the photographs in Exhibit “1” were taken. It is evident from such photographs that neither of the appellants had a jacket or blue t-shirt on.[10]
65. Moreover, the evidence of Kama was that appellant number 2 had picked up his cap, thus providing Kama with an opportunity to see his face, yet a cap was found at the scene. No evidence was led as to whether any of the other suspects had worn a cap.
66. This casts serious doubt as to the reliability of the identification evidence relied upon by the State.
67. In *S v Duze*

[2015] ZASCA 170 (unreported, SCA case no 272/15, 26 November 2015) at para [10] the following factors caused Zondi JA to be dissatisfied about the reliability of the evidence: the time for observation was ‘a second or less’; there was only a fleeting glance of a person whose features were partially obscured by the hood of a jacket; the witness admitted to being traumatized, with a lot of thoughts going through his mind, making it difficult for him to concentrate on identity; and most tellingly, the fact that the

witness conceded under cross-examination that he was not certain of the identity of the wrongdoer.

68. In *S v Sithole* (unreported, GSJ case no A234/2013, 22 October 2013) the negatives of the identification evidence were these: the light was ‘a bit dark’; the observation was for a mere two seconds; the witness was, at the time, surrounded by three assailants, one being behind him; there was confusion as to the position of the appellant; the witness was frightened; he had lost sight of the assailants for a considerable period of time; he did not refer to any facial or physical features of the appellant; and he had no prior knowledge of him.

69. Lastly, in *S v Gade* (unreported, ECG, case no CA&R85/2013, 1 October 2013), which involved an attempted robbery, the court’s reasons for

dissatisfaction of the identification evidence included (at para [27]) the facts that: people were, after the attempted robbery, running in all directions; the accused ran past the person identified, thus shortening the time for a close observation; the witness was unable to refer to any distinguishing features of the person, referring only to his clothing and a firearm that he had seen; events happened so quickly, leaving room for error.

70. Returning to the facts of the present matter, Kobani’s evidence is that his focus was on the driver of the motor vehicle and that the person who could positively identify the passengers in the motor vehicle was Kama. Kama’s evidence was that he saw the second appellant fall and drop his cap, giving him an opportunity to observe his face. He later testified that he recognized him at the back of the police vehicle through his clothing. The time that Kama had to identify the face of the person who had fallen and picked up his cap, could not have been more than a second or two. Kama, also having just been shot in the hand, must have had heightened feelings and emotions. He failed to identify any distinguishing facial or other features of the person he observed, which could explain why he is adamant that he had pointed out the second appellant at the back of the police van, whilst the evidence of Kobani[11] and the two appellants is that Kama had pointed out the first appellant at the back of the police van. Neither Kama or Kobani testified that they had known either of the appellants prior to the robbery in question. And lastly, there is a notable lacuna in the evidence as far as the clothing is concerned as set out above.

71. This leads one to the inescapable conclusion that the State has failed to prove the appellants’ guilt beyond a reasonable doubt.

72. The appellants' versions however were not without difficulties, such as, inter alia, (a) the improbability of them not hearing gunshots being fired in their near vicinity, even with music playing, or (b) their knowledge of the presence of another person on the property and requesting the police whether they had properly searched it, and (c) them not seeing anyone running past them whilst they were sitting outside.
73. These difficulties however do not change the fact that the onus is on the State to prove guilt beyond a reasonable doubt. This remains the position even if the version of the accused is found to be improbable or even if the Court subjectively disbelieves the accused, he will still be entitled to an acquittal provided his version is reasonably, possibly true. See *S v V* 2000
- (1) SACR 453 (SCA) and later, *S v Mafiri* 2003
- (2) SACR 121 (SCA).
74. For all the above reasons, I am of the view that despite the improbabilities of the appellants' versions, there was reasonable doubt in respect of their guilt.

ORDER:

75. In the circumstances, I propose the following order:

74.1 The appeal is upheld.

74.2 The conviction and sentence are set aside.

74.3 The order of the court a quo is substituted with the following order:

"The first and second accused are acquitted and found not guilty on the charge of robbery with aggravating circumstances."

NEL AJ

I agree and it is so ordered.

BAARTMAN J

- [1] In the trial court first appellant was the first accused and second appellant the second accused.
- [2] In the trial court referred to as accused 3. He shall similarly be referred to as accused 3 in this judgment.
- [3] The court a quo found that there were substantial and compelling circumstances which justified a deviation from the prescribed minimum sentence as provided for in section 51(2) of the Criminal Law Amendment Act 105 of 1997.
- [4] Da Silva initially testified that it was 5 to 6 men that entered the store and then later testified that it was 3 to 4.

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- [5] The one leaning against the wall had a leather jacket on.
- [6] It is indeed common cause that the second appellant did not attend the identity parade.
- [7] Which from his earlier evidence was one of the two people in the back of the motor vehicle.
- [8] Although the evidence of the police officials appears to be that it was after 4pm.
- [9] See in this regard *S v Moti* 1998 (2) SACR 245 (SCA) at 257h.
- [10] See photographs 37 to 44 of Exhibit “1”.
- [11] Which in and of itself is problematic as he at one point testified that he did not look in the back of the police van.
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