IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Appeal number: A59/2021

In the matter between:

PASEKA ISSACS SALMAN	**APPELLANT NO.1**
THABO ANDY SONDAG	**APPELLANT NO. 2**
LEBOHANG MOKGETHI	**APPELLANT NO.3**

and

THE STATE	**RESPONDENT**

CORAM:	MBHELE, DJP *et* MPAMA, AJ
HEARD ON:	31 OCTOBER 2022
DELIVERED ON:	03 NOVEMBER 2022
JUDGMENT BY:	MPAMA, AJ

[1] The appellants appeared in the Regional Court sitting in Excelsior, on a charge of robbery with aggravating circumstances as defined in s 1 of Act 51 of 1977 and read with the provisions of section 51(2) of Act 105 of 1997. They pleaded not guilty and despite their plea, they were convicted on 01 August 2017 and sentenced, each to fifteen years imprisonment.

[2] Aggrieved by their conviction and sentence they applied for a leave to appeal their conviction and sentence in the court a quo and were partially successful as they were only granted leave to appeal their conviction only.

[3] The appeal essentially raises the following issues whether the court a quo:

(i) Was correct in accepting the version of the State and rejecting that of the appellants when the appellants had given a chronological and reasonable explanation regards their presence at complainant's place.

(ii) Correctly applied the cautionary rule in the evidence of the complainant as a single witness.

(iii) The court erred in finding that the discrepancies which existed between the evidence of the complainant and his statement were not material contradictions which affected his credibility.

[4] The evidence of the State can be summarised as follows: On 30 May 2016 the complainant, Mr Degefa Temesgen Dobamo was at his place where he ran a tuck shop. At about 14h30, three male persons entered his shop. All three of them demanded money from him. The complainant identified his assailants as the three appellants. I deem it appropriate to mention at this stage already, that the identity of the appellants was not in dispute as they admitted being at complainant's shop.

[5] The complainant further testified that the appellant no. 3 proceeded to the till and removed a cash amount of R900.00. He also took his cellphone valued at R500.00. The appellant no.1 at the time was wielding a knife and was threatening to kill the complainant. The appellant no.2 stood there and demanded money from the complainant. When they were done robbing him the appellant no.1 and 2 ran out of the shop simultaneously and were then followed by the appellant no.3. He chased them but that yielded no results. After a while police arrived. The complainant denied that he was in the business of repairing phones and that he took the appellant no.3's phone.

[6] Ms Modiehi Mabokwane received a call from Mapaseka at about 14h00 reporting that the complainant was being robbed. She rushed to the

complainant's shop. As Ms Mabokwane was approaching, she could hear that someone was swearing inside the complainant's shop. Two male persons immediately emerged out of the complainant's place running. Complainant also came out chasing after them. Ms Mabokwane identified the two persons she saw running as appellant no1 and 2.

[7] A SAP 329 pertaining to identity parade proceedings was handed in as Exhibit "A". The appellants formally admitted the contents of this document. According to this document, the appellants were positively identified by the complainant during the identification parade.

[8] This concluded the State's case.

[9] The appellants' version as put to the witnesses and testified on by the three appellants is as follows: On this day, they were at the complainant's place at appellant no.3's instance. The appellant no.3 had informed them that complainant owed him R1000.00 for a Blackberry phone that he had sent to him for repairs. The complainant's boss, Zalek took this phone from the complainant and promised to pay the appellant no.3 an amount of R1000.00 in return for his phone. However, the payment was not forthcoming.

[10] The appellants arrived at the complainant's tuck shop on this afternoon. The appellant no.3 approached the complainant and conversed with him. at the time the appellant no.1 and 2 stood inside the shop, just few metres from them. The complainant gave appellant no.3 a cellphone and they left. The appellant no.3 informed them that the complainant handed him the cellphone so that he can be able to get hold of him when his boss has arrived in order for him to come and collect his money.

[11] Appellant no.3 handed over this cell phone to the appellant no .2 so that he can charge it as he was still proceeding to his girlfriend's place and he wanted the phone to be charged whilst he was at his girlfriend's place. They parted ways. Later that day they were individually arrested by the police and the complainant's cellphone was recovered from the appellant no.2.

[12] It is trite that a court of appeal will be hesitant to interfere with the factual findings and evaluation of the evidence by a trial court. See **R v DHLUMAYO AND ANO 1948 (2) SA 677 (A)** at 705.

[13] The appeal court is not at liberty to depart from the trial court's findings of fact and credibility. A court of appeal will only interfere with the court a quo's findings if it is satisfied that the trial court has made a wrong finding of fact and there are material misdirections. See **S v FRANCIS 1991 (1) SACR 198 (A)** at 204 C - E. See also **MAKATE v VODACOM LTD 2016 (4) SA 121 (CC)** at paras [37] - [41].

[14] The issue to be decided is whether the trial court was correct in accepting the version of the State and rejecting that of the appellant. The question is whether the appellants' version is reasonably possible true.

[15] The trial court dealt with the evidence of a single witness. It is the appellants' contention that the court *a quo* failed to apply the cautionary rule that apply to the evidence of a single witness, as the complainant was not a satisfactory witness. On their heads of argument, the appellants contended that there were material contradictions between the complainant's viva voce evidence and his statement made to the police. It was argued that the court a quo should have rejected the evidence of the complainant because of these contradictions. Before us the appellants' counsel was asked to point out the material contradictions in the evidence of the complainant. Appellants' counsel, in my view correctly conceded that there were no material contradictions in the evidence of the complainant.

[16] It is so that the complainant was a single witness. In **S v SAULS 1981 (3) SA172 (A)** at 180 D-F the following was held with reference to section 208:

> "The absence of the word 'credible' is of no significance; the single witness must still be credible, but there are, as *Wigmore* points out 'indefinite degrees in this character we call credibility'. (Wigmore on Evidence vol III para 2034 at 262.) There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see

the remarks of RUMPFF JA in S *v Webber* 1971 (3) SA 754 (A) at 758). The trial Judge will weigh his evidence; will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings, contradictions and defects in the testimony, he is satisfied that the truth has been told."

[17] The Supreme Court of Appeal further determined in **S v MAHLANGU 2011 (2) SACR 164 (SCA)** at para [21] that a finding can be based on the evidence of a single as long as such evidence is "*substantially satisfactory in every material respect, or if there is corroboration".*

[18] The court a quo was correct to find that the complainant was a credible and honest witness. The complainant gave a clear account of what took place at the time of robbery. He was able to explain in satisfactory terms the role played by each appellant during the robbery. The complainant's evidence regards what happened after the robbery finds corroboration in the evidence of Ms Mabokwane who testified that as she approached complainant's shop, appellant no 1 and 2 came out of the shop running. I am unable to find any material contradictions or discrepancies in his evidence. Complainant's evidence was clear and satisfactory in all material respects.

[19] The record shows that the complainant was cross-examined at length by the defence attorney on the previous statement he made to the police. Of note is the fact that the defence cross-examined the complainant on the aforementioned statement without laying a basis. When this occurred, the prosecution did not raise an objection, and unfortunately, the court allowed the defence to confront the complainant with a statement previously made to the police whereas no basis was laid.

[20] In **S v JOLINGANA 2016 (2) SACR 404 (ECB)** Mbenenge J, as he then was expressed as follows:

> "Our courts set out guidelines in determining whether a witness maybe cross examined on a previous statement made to the police. In *S v Govender and Others* Nepgen J, in relation to whether a state witness had owned a previous statement made to the police, held as that:
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> '(I)n the present matter the cross- examination of the State witnesses, insofar as it was directed at the contents of their police statements was done properly. In each instance, the witness was asked to confirm that he made a statement to the police.

> The witness was then asked whether that which he told the policeman was written down ; whether it was read back to him ; whether he was asked to confirm the correctness thereof ; and whether , having done so , he was asked to sign, or place his mark, or thumb-print on the statement. The witness was then asked to identify, with reference to his signature or mark (except, obviously, where a thumbprint had been placed on the statement), that the statement in question was in fact the statement he made. Once confirmation of this has been obtained, the counsel proceeded to go through the whole statement with the witness. After each sentence, or on occasion after a whole paragraph, had been read to him (and therefore written down). Sometimes the answer was in the affirmative, other times not. Having gone through this exercise, the witness was then referred to differences between such witness' earlier evidence and those portions of the police statement, which he had confirmed, reflected what he had told the police. In some instances, these differences were marked, in others the differences could be described as subtle. Where appropriate, the witness was asked why certain facts mentioned during his evidence did not appear in the statement, with it being suggested that the reason for it was that he has not told the police. The witness was asked why there were such contradictions and/or omissions".

[21] The approach adopted in the aforementioned case offers a guideline as to how cross-examination on a statement previously made to the police should be dealt with. The defence attorney had a duty to lay the basis for cross-examination on complainant's statement. It remained the duty of the judicial officer to see to it that the cross examiner first laid the basis for cross-examination and the judicial officer failed on its duty.

[22] It was contended by both counsels that evidence arising from cross-examination of the complainant on his statement should be ignored. I am inclined to agree with this submission; no probative value can be attached to this evidence, as the complainant did not acknowledge ownership of the statement.

[23] The court a quo rejected the version of the appellants. First, the appellants were at the complainant's shop at the instance of appellant no.3. They testified that when they arrived at the complainant's shop, the appellant no.3 had a conversation with the complainant. There was no argument or hostility between the complainant and appellant no.3. The appellant no.3 was even given a

phone in order to facilitate a meeting with the complainant's boss. There was absolutely no reason for the complainant to falsely implicate the appellants.

[24] Second, the complainant handed over the cellphone to the third appellant so that when his boss was available, he should be able to reach the third appellant. The third appellant was desperately in need of his money and he needed to meet the complainant's boss. However, he decided to leave the cellphone with the second appellant, thereby thwarting all the complainant's efforts to help him recover his money from his boss. With the phone left with the second appellant, the complainant would not be able to reach the third appellant when his boss was available.

[25] The trial court was therefore correct to reject the appellants' version as being inherently improbable and not reasonably possibly true. The trial court's finding that the State proved the guilt of the accused beyond reasonable doubt is correct and cannot be faulted.

[26] In my view the appeal must consequently fail.

[27] In the premises, I would make the following order:

1. The appeal against the conviction is dismissed.

MPAMA, AJ

I agree and it is so ordered:

MBHELE, DJP

On behalf of the appellant:	Ms S. Kruger
Instructed by:	Legal Aid South Africa Bloemfontein
On behalf of the respondent:	Adv. D Pretorius
Instructed by:	Office of the DPP Bloemfontein