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: A20/2022

In the matter between:

GODFREY MALIA Appellant

and

THE STATE Respondent

CORAM:	MBHELE, J *et* MPAMA, AJ
HEARD ON:	07 NOVEMBER 2022
DELIVERED ON:	25 NOVEMBER 2022
JUDGMENT BY:	MPAMA, AJ

[1] The appellant was convicted in the Regional Court sitting in Welkom, on a charge of robbery with aggravating circumstances as intended in s 1(1) (b) of the Criminal Procedure Act, read with the provisions of section 51(2) of Act 105 of 1997. The appellant pleaded not guilty to the charge and despite his plea he was convicted and on 02 November 2021 sentenced to seven (07) years imprisonment.

[2] The appellant successfully applied for leave to appeal his conviction in the court a *quo*.

[3] The appellant's appeal is premised essentially, on the following grounds:

That the court a *quo* erred:

1. In finding that the State proved their case beyond reasonable doubt.
2. In not applying the cautionary rule to the State's single witness' evidence adequately.
3. In rejecting the alibi of the appellant and finding defence witness's contradictions material.
4. In finding the evidence of the State witnesses were material and satisfactory in all instances despite the discrepancies between the viva voce evidence of the complainant and his statement.
5. In accepting the version of the State and rejecting that of the appellant.

[4] It is common cause that at about 15h00 on 18 February 2019 the complainant, Mr Welcome Dlamini was accosted by three male persons at G-Hostel in Welkom and robbed an amount of R3100.00. Mr Dlamini had just alighted from his vehicle when three males appeared behind him. They were between 8-10 metres away from him. He could only identify the appellant. He knew the appellant as a taxi driver with a grey Cressida vehicle conveying people from Shoprite in Thabong. The complainant further testified that he had seen the appellant for between two and three years even though he had never spoken to him or gotten into his car.

[5] The appellant approached him and pointed him with a firearm. The complainant grabbed the appellant's hand and pointed the firearm downwards. The appellant shot the complainant twice on the leg.

[6] When shots were fired people who were nearby came to the scene. The other assailant took out a firearm and fired at the people in order to dissuade them from coming to the scene. Indeed people ran back leaving the complainant

behind with his assailants. The third male person approached the complainant, searched his pockets and removed an amount of R3100.00 from one of his pockets. Thereafter, the three males left the scene. People came to the complainant's rescue as he was bleeding profusely and took him to hospital. The J88- Medico Legal Report pertaining to the complainant was handed in as Exhibit "A" and the contents were formally admitted in terms of section 220 of Act 51 of 1977. The examination was performed at Bongani Hospital, Welkom, on 18 February 2019 at 21h10. It was recorded that the complainant sustained two gunshot wounds.

[7] During cross examination it was put to the complainant that the appellant is not a taxi driver; however he does some work as an assistant mechanic on a casual basis and does not own a grey Cressida vehicle. It was denied that the appellant was at the scene of the incident. An alibi was raised, being put to the complainant that at the time of the incident he was at her wife's sister's place who was unwell. The complainant refuted these claims and in amplification said he knows the appellant so well, he is nicknamed Mazet. The appellant was questioned on the statements he made to the police. It was put to him that on the statement he first made on 19 February 2019 he did not mention that he was able to identify his assailants and his response was that he described the appellant to the police.

[8] Mr Bertus Maritz Olivier is a member of SAPS, holding a rank of a Warrant Officer with 22 years' experience and an investigating officer of the case. Mr Olivier interviewed the appellant and obtained his warning statement on 15 March 2019. When he was taking down appellant's statement he used a proforma document which required an accused to disclose his personal details. The appellant informed him that he was Thabiso Godfrey Malia, nicknamed Dawie and Mazet, a taxi driver and that he resides at no.18828 Thabong. The appellant also gave him his ID number and his cellphone numbers. Mr Olivier recorded all these details in the appellant's warning statement which was handed in as Exhibit D.

[9] During cross examination the appellant denied ever providing his personal information. It was put to Mr Olivier that on March 2019, the appellant was about to appear in court when Mr Olivier informed him to sign a certain document. He agreed and signed the document without reading it. It was further put to Mr Olivier that he did not take any statement from the appellant and that the appellant has never provided his personal details to him. Mr Olivier denied that he has falsified all this information about the appellant and said he was not privy to appellant's personal details; it is the appellant who favoured him with the information when he was taking his warning statement.

[10] This concluded the State's case.

[11] The appellant testified and called his wife as a witness. His evidence is as follows: On the day in question he was never at the scene of the incident. The appellant testified that on this day he was at home when his wife came to him at about 08h30 and informed him that her sister was indisposed. Together they proceeded to the sister's place in another section of Thabong. To reach this place they had to take a taxi. On arrival they found his wife's sister unwell. The appellant's wife gave her some medication and she fell asleep. They remained in the house until 17h30 when they proceeded home. Appellant's wife corroborated this version of events.

[12] The appellant categorically denied that the complainant knew him, he was a taxi driver, owned a Cressida vehicle, he is nicknamed Mazet and that he provided his personal information to Mr Olivier.

[13] It is trite law that the onus rests on the State to prove the guilt of the accused beyond reasonable doubt. If the version of the appellant is reasonably possibly true, he must be acquitted.

[14] 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.

[15] In **S v HADEBE AND OTHERS 1997(2) SACR 641(SCA)** at 645 it was held:

"In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong".

See also **S v FRANCIS [1991] 2 ALL SA 9 (C).**

[16] At issue in this appeal is whether the appellant was properly identified as one of the perpetrators of the robbery. In addition the court must consider if the court a *quo* was correct in rejecting the appellant's alibi. The court must determine if the guilty of the appellant has been proven beyond reasonable doubt by the State.

[17] It is common cause that the court a *quo* dealt with the evidence of a single identifying witness. The evidence of a single witness needs to be approached with caution. Where the single witness is also an identifying witness the evidence needs to be approached with more caution.

[18] Section 208 of the Criminal Procedure Act 51 of 1977 provides that 'an accused person may be convicted of any offence on the single evidence of any competent witness'. However, the court must be satisfied that the evidence of a single witness is clear and satisfactory in all material respects.

[19] 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."

[20] The Supreme Court of Appeal further determined in **STEVENS v S 2005 (1) ALL SA 1 (SCA)** at para 17 that:

" As indicated above, each of the complainants was a single witness in respect of the alleged indecent assault upon her. In terms of s 208 of the Criminal Procedure Act 51 of 1977, an accused can be convicted of any offence on the single evidence of any competent witness. It is, a well-established judicial practice that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility (see, for example, *S v Webber* 1971 (3) SA 754 (A) at 758G-H)".

[21] In the case of **S v RAUTENBACH 2014 SACR 1 (GSJ)** the court expressed itself as follows:

"The courts have on more than one occasion noted the difficulties and dangers associated with uncritically accepting the evidence of a single witness, especially one who may have every reason to implicate the accused, in convicting the accused. Thus the need to tread cautiously. However, there is no rule that the evidence, whether critical to the case or not, has to be rejected because it is that of a single witness. Only that it has to be treated with caution. Consequently, the State is entitled to rely on the evidence of a single witness, and the court is obliged to give due weight to it if the evidence is competent and compelling"

[22] The complainant was not only a single witness but also an identifying witness. It is trite that a court must exercise caution when dealing with the identity of an accused. In the classic case of **S v MTHETHWA 1972 (3) SA 766 (A)** at 768 Holmes JA held:

"Because of the fallibility of human observation, evidence of identification is approached by the courts 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. "

[23] In **S v NGCINA 2007(1) SACR (SCA)** it was held:

"The identification of the appellant as the armed robber is based on the evidence of a single witness. As correctly pointed out by DT Zeffert, AP Paizes and A St Q Skeen The South African Law of Evidence (2003) p 143, appellate Courts have frequently remarked upon the danger of relying on the identification of a single witness."

[24] The court a *quo* was alive to the aforesaid cautionary rules and it found the evidence of the complainant credible .I am unable to fault the court *a quo's* finding. The complainant had ample opportunity to observe his assailants. The incident took place at broad daylight; therefore there was good lighting. The appellant was the first to pounce on the complainant and he pointed him with a firearm. A scuffle ensued between the appellant and the complainant when the complainant grabbed the appellant's hand holding a firearm. The complainant was without any doubt focussed on the appellant and nothing obstructed his view at the time of the incident. The commission of the offence took place over a period of time. He had a prior knowledge of the appellant; he knew the appellant as a taxi driver at Thabong and in addition he knew that he was nicknamed 'Mazet'.

[25] The complainant's evidence finds corroboration in the evidence of Mr Olivier who recorded on appellant's statement that the appellant was a taxi driver and nicknamed "Mazet". Mr Olivier did not thumb suck this information or falsify it; he received same from the appellant.

[26] The complainant admitted during cross examination that his first statement to the police did not describe the appellant. However, he was adamant that he had provided such description to the police when he made his statement. In my view I find what was expressed almost 29 years ago in **S v XABA 1983 (3) SA 717(A)** at 730B-C still applicable even today:

"…. that the police statements are, as a matter of common experience, frequently not taken with the degree of care, accuracy and completeness which is desirable…."

Furthermore, as it was pointed out in **S v BRUINNERS EN 'N ANDER 1998(2) SACR 432 (SE)** 'the purpose of a police statement is to obtain details of an offence so that a decision can be made whether or not to institute a prosecution, and the statement of a witness is not intended to be a precursor to that witness' evidence in court.' Despite this shortcoming, the evidence of

the complainant cannot be faulted. It is not uncommon for the court to be confronted with the same situation, where a witness is adamant that he narrated everything to a police officer obtaining his statement but essential information is found lacking in the witness' statement. Despite a loud outcry for more training to be provided to police for the purposes of improving the taking of statements, nothing much has improved.

[27] The version of the appellant is that he was not one of the perpetrators of robbery. The appellant raised an alibi. It is a well-established principle of our law that where an alibi is raised by an accused, there is no onus on him to prove his alibi. If the accused's alibi evidence is reasonably possibly true he must be acquitted.

[28] In the case of **R v HLONGWANE 1959 (3) SA 337(A)** at 340H-341B the court set out the legal position with regard to proof of an alibi as follows:

"The legal position with regard to an alibi is that there is no onus on an accused to establish it, and if it might reasonably be true he must be acquitted. *R v Biya* 1952 (4) SA 514 (A). But it is important to point out that in applying this test; the alibi does not have to be considered in isolation. I do not consider that in *R v Masemang* 1950 (2) SA 488 (A) , Van Der Heever JA , had this in mind when he said at pp 494 and 495 that the trial Court had not rejected the accused's alibi" independently " independently. In my view, he merely intended to point out that it is wrong for a trial court to reason thus: "I believe the Crown witnesses, *Ergo,* the alibi must be rejected". See also *R v Tusini and Another 1953 (4) SA* 406 (A) at p414. The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses."

[29] It is my respectful finding that there is corroborative evidence in this case identifying the appellant as one of the perpetrators who committed the robbery against the complainant. The appellant's alibi is false. I am satisfied that the court a *quo* correctly found that the State has proven the identity of the appellant beyond reasonable doubt and that the appellant's alibi is false. The guilty of the appellant has been proven beyond reasonable doubt.

[30] I now wish to comment on two aspects I find disturbing in this case. First, the manner in which the regional magistrate (the magistrate) conducted herself

during the trial calls for a formal expression of disapproval. The magistrate, at the close of the State's case commented as follows:" you can change your plea, either way" directing this comment to appellant's attorney. The magistrate did not end there; when the appellant and his witness testified during examination by the court she asked the appellant and his wife more than 50 questions, to be exact 53. The tone, length, form and content of the court's questions conveyed an impression that the presiding officer did not believe the truthfulness of appellant's alibi or version. The appellant's wife was asked to recount the dates upon which she attended the case. When she could not give the exact dates, the presiding officer commented that she was in court two months before the date of her testimony and cannot recall that, however she is able to recall what happened two and half years ago. The appellant was asked several questions about a cellphone. At some instance the appellant indicated that he does not follow the court's question and apologised for that. The presiding officer responded as follows:" no, no, I do not want your apology; I am just asking you why", which according to me displays a sign of irritation or impatience with the appellant.

[31] Before us the issue of the presiding officer's conduct was raised with both counsel. The appellant and respondent's counsel submitted that the trial court's questions were improper, however, it cannot be said that the appellant did not receive a fair trial.

[32] The following has been expressed by my sister, Mbhele J, as she then was in **S v SIMBONGILE JACOB SEALE R204/2017** delivered on 22 June 2018:

> "The court may at any stage of the proceedings examine any person. Such examination must be done in such a way that it does not bring the court's open mindedness and impartiality into question. Officers of the court must at all times protect the dignity and decorum of the court."

[33] The presiding officer's conduct was indeed uncalled for and improper, nonetheless, it is trite that not every shortcoming or point of criticism in the conduct of a trial supports the conclusion that the proceedings were not conducted substantially in accordance with justice. I am inclined to agree with

the submission made by counsel that despite the magistrate's improper conduct, it cannot be said that the appellant did not receive a fair trial.

[34] Second, the presiding officer having convicted the appellant of robbery with aggravating circumstances sentenced the appellant to seven years imprisonment. I raise the issue of sentence mindful of the fact that the appellant (took a smart move) is not appealing his sentence. The prescribed sentence for the offence the appellant has been convicted of is fifteen years imprisonment. The court has discretion to increase this sentence with a period not exceeding five years if the interest of justice demands so. The court is allowed to deviate from this sentence if it is satisfied that there are substantial and compelling circumstances warranting deviation. It has been said in **S V MALGAS 2001 (1) SACR 469 (SCA)** that the specified sentences are not to be departed from lightly and for flimsy reasons. The test for deviation is whether on consideration of the circumstances of the particular case the court is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of the society, so that an injustice would be done by imposing that sentence.

[35] The magistrate referred to the case of Malgas in her judgment. Further, she expressed herself as follows":

"After weighing all the factors the court concludes that in this case the accused can be rehabilitated".

Without any further ado, the magistrate proceeded and imposed a sentence of seven years imprisonment.

[36] The court is in terms of section 51(3) of Act 105 of 1997 required to place on record the reasons for deviating from the prescribed sentence. As expressed in the case of Malgas these prescribed sentences are not to be departed from for flimsy reasons. The magistrate provided no reasons for deviating from the prescribed sentence. It is also very difficult to comprehend what persuaded her to deviate from the prescribed sentence. This was a gruesome robbery where the complainant was shot at twice and injured in broad daylight. When members of the public came to intervene more shots were fired to scare them

away. This is one example of a court having deviated from the prescribed sentence for flimsy reason or no reason at all. This conduct needs to be discouraged. A court must conduct a proper enquiry to determine if there are substantial and compelling circumstances warranting deviation from the prescribed sentence and should it arrive at a conclusion that such circumstances exist, it must record those circumstances.

[37] In my view the appeal against conviction must consequently fail.

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

1. The appeal against the conviction is dismissed.

L. MPAMA, AJ

I agree and it is so ordered:

N.M. MBHELE, DJP

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