IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

DATE **SIGNATURE**

CASE NO: A41/2021

In the matter between:

MZWANDILE MANDLA NDLOVU First Appellant

SICELO NXUMALO Second Appellant

And

THE STATE Respondent

Coram: Mahalelo J et Graf AJ

Date of hearing: 10 September 2021- In a 'virtual hearing' during a videoconference on Microsoft Teams digital platform.

Date of Judgment: 14 October 2021- This judgment is deemed to have been handed down electronically by circulation to the parties' representatives via email and by being uploaded to CaseLines.

JUDGMENT

GRAF AJ

INTRODUCTION

[1] The appellants were arraigned in the Regional Court, Johannesburg on the following charges:

- Count 1 - Housebreaking with the intent to rob and robbery with aggravating circumstances as intended in section 1 of Act 51 of 1977.
- Count 2 - Contravening section 4(1)(f) of the Firearms Control Act 60 of 2000 –possession of a prohibited firearm.
- Count 3 - Contravening section 90 of the Firearms Control Act 60 of 2000- possession of ammunition.
- Count 4 - Robbery with aggravating circumstances as intended in section 1 of Act 51 of 1977.
- Count 5 - Robbery with aggravating circumstances as intended in section 1 of Act 51 of 1977.
- Count 6 - Robbery with aggravating circumstances as intended in section 1 of Act 51 of 1977.

[2] The first appellant was convicted on counts 1, 4, 5 and 6. The second appellant was convicted on all counts as charged. The first and second appellants were sentenced to effective terms of 28 years imprisonment each.

[3] The appeal is against the convictions only. The court *a quo* granted the appellants leave to appeal against the convictions.

[4] This court already granted both appellants condonation for the late filing of their heads of argument.

GROUNDS OF APPEAL

[5] The appellants essentially rely on the following grounds of appeal:

- The court *a quo* erred in accepting the evidence of the police witnesses as to where the incriminating items that linked the appellants to the various robberies were found.

- The court *a quo* erred in convicting the appellants on all counts on the basis of inferential reasoning, in circumstances where other conclusions could reasonably be drawn from the proven facts.

- The court *a quo* erred in rejecting the appellants' versions as false beyond reasonable doubt.

EVIDENCE PRESENTED IN THE TRIAL COURT

[5] It is common cause that the state's case against the appellants comprised circumstantial evidence only. Before considering the principles applicable to the evaluation of circumstantial evidence it is apposite to consider the evidence that was placed before the trial court. The background facts, which are common cause are summarised hereunder.

[6] During the afternoon of 27 August 2017 Louis Valentine ('Valentine') and his wife Theresa, the complainants in count 4, arrived at OR Tambo Airport on a flight from Angola. A friend gave them a lift from the airport to their home in Bedfordview. Upon their arrival at the house, Valentine opened the gate and they drove in. They were boxed in from behind by another motor vehicle. Three or four black men alighted, and they surrounded the motor vehicle that Valentine was travelling in. These men were in possession of firearms. They opened the boot and took suitcases and hand luggage from the boot. They also took a watch, purse, cell phones, wallet and a ring from Valentine and his wife. Amongst the items taken was a USB stick that was kept inside Valentine's laptop bag. This USB stick contained Valentine's medical aid information, copies of their identity documents and photographs. The USB stick was later recovered by the police. Valentine was unable to identify the robbers, but he noticed that they were well-versed in English.

[7] During the afternoon of 1 October 2017 Umberto Destifanis ('Destifanis'), the complainant in count 1, arrived at his home in Waverley, after he had taken his children to the Lanseria Airport. Destifanis, a 76-year-old man was accompanied by his wife, aged 72. They were travelling in Destifanis' white Mercedes Benz ML. When Destifanis opened the gate with a remote control, a small motor vehicle stopped behind them. Three armed men alighted and

approached them. These men threatened to kill Destifanis and his wife. They took jewellery, a watch, credit cards and a driver's licence from them, before forcing them to open the garage door to enable entry into the house. The men entered the house, but they did not take anything from the house. They hit Destifanis with a firearm and they kicked Destifanis and his wife. Destifanis lost consciousness and he only discovered later that the robbers had taken his white Mercedes Benz ML. Destifanis spent approximately 3 weeks in hospital after the incident. The police recovered the Mercedes Benz more than two months after the incident.

[8] On 28 October 2017 William Ford ('Ford') and Michael Hughes ('Hughes'), the complainants in count 5, were travelling from Lanseria Airport to Northcliff. Ford and his wife had flown in from Ballito to visit Hughes, Ford's brother-in-law. Hughes and his wife fetched the Fords from the airport. Upon their arrival at Hughes' house in Northcliff, and while they were waiting in the driveway for the garage door to open, two armed men ran into the yard. The two men robbed the Hughes and Fords at gunpoint of their luggage, jewellery, and wallets, before getting into a white Mercedes Benz ML that was parked at the gate. Ford and Hughes were unable to identify the robbers, but they noticed that the robbers were well-versed in English. Ford's bank card and one of his suitcases were later recovered by the police.

[9] On 4 November 2017 Mongashi Khabemba ('Khabemba'), the complainant in count 6, was travelling in an Uber taxi from Lanseria Airport to his house in Northwold. While Khabemba and the Uber driver were waiting for the driveway gate to open, a white Mercedes Benz ML parked behind the Uber taxi. Two men alighted from the white Mercedes, and they robbed Khabemba at gunpoint of his luggage, wallet, and wristwatch. The police recovered Khabemba's wristwatch, driver's licence, bank card, leather laptop bag and suitcase at a later stage.

[10] On 10 December 2017 and while following up on information received, Captain Odendaal ('Odendaal') from the National Investigations Unit of the police, assisted by members of the Flying Squad, arrested the appellants. The appellants were passengers in the white Mercedes Benz ML that was taken from Destifanis during the robbery at his house. The first appellant was seated in the front passenger seat and the second appellant was seated directly behind him. The driver of the Mercedes, one Sylvester Machaba ('Machaba'), alighted whilst wielding a firearm. He attempted to flee but was shot and killed by the police. The police searched the vehicle and found another firearm in the pocket behind the front passenger seat.

The serial numbers of both firearms had been obliterated and both firearms contained ammunition.

[11] The appellants took Odendaal, Sergeant Meyer ('Meyer') and other members of their team to a house in Soweto, where several items linked to the so-called airport robberies were found. Amongst these items were Valentine's USB flash drive, a bank card and suitcase belonging to Ford, and a bank card, driver's licence, wristwatch, laptop bag and suitcase identified by Khabemba as his property. The house belonged to the first appellant's family. The first appellant shared a room with his girlfriend and their minor child and the second appellant rented another room in the house. The police also went to Machaba's house. Photographs of the recovered items were admitted into evidence.

[12] Both appellants testified in their own defence. They denied any involvement in the robberies or any knowledge of the complainants' items that were recovered by the police. According to the appellants they were merely passengers in the white Mercedes Benz ML. They said that the driver, Machaba, fetched them from Germiston Lake and they were on their way to a stokvel party in Alexandra, when they were stopped by the police. Machaba was their acquaintance. The appellants denied that they knew that the Mercedes was stolen, or that there were firearms in the vehicle. They denied that any of the complainants' items were recovered from their rooms. According to the first appellant the police found approximately seven flash drives that belong to his children and a pink vanity bag that belongs to his wife or children. The second appellant stated that he shared his room with one Nkanyiso and Nkanyiso might have hidden some of the recovered items under the matrass. The police also recovered luggage and other items from the garage. According to the appellants numerous other people stay in the house and even in the outside rooms and all of them have access to the garage and use the garage to store some of their possessions.

[13] The state's case against the appellants, as crystalised through the evidence of the police witnesses, coupled with the photographs that were admitted into evidence, and the uncontested evidence of the complainants, is based on the following salient facts:

- During separate incidents that occurred over a period of approximately three months towards the end of 2017 the complainants in counts 1, 4, 5 & 6 were followed home from airports in Johannesburg by a group of two - four robbers.

- The robbers stopped behind the complainants in their driveways and robbed them at gunpoint of their luggage, jewellery, bank cards and other belongings. The robbers were well versed in English.

- On 1 October 2017 the robbers drove away with a white Mercedes Benz ML which they took from Destifanis.

- During the incidents of 28 October 2017 and 4 November 2017 the robbers were traveling in a white Mercedes Benz ML.

- On 10 December 2017 the appellants were passengers in the white Mercedes Benz ML that belonged to Destifanis. They were travelling on the R21 close to the Barbara offramp, coming from the direction of OR Tambo International Airport.

- The police recovered two loaded firearms from the scene of arrest: to wit the firearm that Machaba alighted with, and another firearm from inside the Mercedes, in close proximity to where the second appellant was seated.

- Odendaal found Valentine's USB flash drive, numerous watches (including the TAG Heuer identified by Khabemba), several bank cards and other cards (including Machaba's bank card and driver's licence), several bags, female purses, jewellery, sunglasses, a boarding pass, and a voice recorder in the first appellant's room.

- Odendaal found bank notes from Ghana, Ford's Nedbank card, Khabemba's driver's licence and a passport in the name of Nkanyiso Ncube in the second appellant's room.

- Numerous expensive travelling bags and suitcases, including a suitcase belonging to Ford and a suitcase and leather laptop bag that belonged to Khabemba, were found in the garage. There is a door in the house, next to the first appellant's room, that leads to the garage.

EVALUATION OF THE COURT *A QUO'*S JUDGMENT

[14] It is trite that a court of appeal will not easily interfere with the factual findings arrived at by the trial court, in the absence of misdirection.[1] The trial court's findings of fact are presumed to be correct and will only be disregarded, if the recorded evidence shows them to be clearly wrong. This court's powers to interfere with the findings of fact of the court *a quo* are accordingly limited, unless it is established that there was a 'demonstrable and material' misdirection.[2] In *Malebo v S* [3] Daffue J explained that:

> 'Where an appeal is lodged against a trial court's findings of fact, the court of appeal must take into account that the court *a quo* was in a more favourable position than itself to form a judgment. When inferences from proven facts are in issue, the court *a quo* may also be in a more favourable position than the court of appeal, because it is better able to judge what is probable or improbable in light of its observation of witnesses who have appeared before it. Therefore, where there has been no misdirection of fact a court of appeal assumes that the court *a quo*'s findings are correct and will accept these findings unless it is convinced that the trial court is wrong'.

[15] The Regional Magistrate correctly accepted the evidence of the complainants relating to the way the robberies were committed and the subsequent identification of their belongings that were recovered by the police. The complainants' evidence was generally not disputed by the defence. Although Khabemba's evidence regarding the value of his watch was clearly unreliable, his evidence in respect of the robbery was corroborated by video footage that was viewed in court.

[16] The Regional Magistrate, whilst acknowledging the few minor discrepancies between the evidence of the police witnesses involved in the arrest of the appellants, was satisfied that the state's evidence in respect of the appellants' arrest was credible and reliable. We cannot fault his finding in that regard. The evidence relating to the arrest of the appellants and the recovery of the two loaded firearms at the scene of the arrest remained mainly uncontested.

[17] Odendaal and Meyer's evidence relating to the search of the appellant's rooms and the recovery of certain items linked to the robberies was carefully scrutinised by the court *a quo*. The Regional Magistrate was alive to the fact that Odendaal and Meyer were in all likelihood not completely honest about their motivation in visiting the appellants' place of residence. He concluded, however, that this issue did not destroy their credibility, as there was no indication

[1] R v Dhlumayo & Another 1948 (2) SA 677 (A) at 705-706
[2] S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645 e-f
[3] Malebo v S (A226/2014) [2015] ZAFSH 61 (19 March 2015) at [10]

that they were falsifying evidence against the appellants. We align ourselves with this conclusion. Odendaal and Meyer did not know the appellants prior to this incident, and we cannot think of any reason for them to fabricate evidence against the appellants. They made numerous concessions favourable to the appellants. For example, Odendaal conceded that the appellants were travelling in the direction of Alexandra. Both Odendaal and Meyer conceded that the outside rooms were possibly occupied by other people and the garage could also be accessible to those other people. The Regional Magistrate correctly observed that Odendaal and Meyer could easily have strengthened the case against the appellants by saying that all the recovered items were equally distributed between the appellants' rooms, instead of testifying that some items were recovered from the communal garage.

[18] The court *a quo* rejected the appellants' evidence in as far as it differed from the evidence of the state witnesses. The Regional Magistrate provided detailed reasons for this decision. He correctly considered that the appellants' version had to be assessed, not in isolation, but against the totality of the evidence. He identified some inherent improbabilities in the appellants' evidence and concluded that they were not credible witnesses. We are unable to find that the court *a quo* misdirected itself in this regard. Inherent probabilities and improbabilities may be considered in evaluating the evidence.

[19] It remains, however, to be considered whether the state has succeeded in proving the guilt of the appellants beyond reasonable doubt. In *S v Chabalala*[4] it was stated that:

> ' … the correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strength and weaknesses, 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's guilt'.

[20] As already alluded to, the state's case against the appellants comprised circumstantial evidence only. However, it is a folly to think that circumstantial evidence necessarily means some sort of weaker or less reliable evidence.[5] In the present case there was compelling circumstantial evidence linking the appellants to the various robberies.

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[4] 2003(1)SACR 134 SCA at [15]
[5] Jantjies v S (871/13)[2014] ZASCA (29 September 2014)

[21] The court *a quo* was fully aware of the fact that it had to apply the test applicable to circumstantial evidence. The Regional Magistrate referred to the applicable principles as set out in the *locus classicus*, *R v Blom* [6]:

> 'In reasoning by inference there are two cardinal rules of logic which cannot be ignored: (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct'.

[22] The Appellate Division, as it was then known, referred to the above test with approval in *R v De Villiers*, but clarified that not each proved fact had to exclude all other inferences, but that the facts as a whole had to do so. It explained that a court must:

> '…carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonable be drawn…'

and that

> '…A number of circumstances, each individually very slight, may so tally with and confirm each other as to leave no room for doubt of the fact which they intend to establish…Not to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the weight of a millstone'.

[23] Counsel for the first appellant submitted that the trial court impermissibly drew inferences from inferences in arriving at the conclusion that the appellants were involved in the robberies. He referred us to the unreported decision of the SCA, *S v Mahlalela*[7], where Dlodlo AJA mentioned that the 'proved facts' envisaged in *Blom* were 'facts proved beyond reasonable doubt' and 'intermediate inferences' too, had to be based on such 'proved facts'. Moreover, it was said that, for an inference to be permissible, it 'not only had to be based on proved facts, but also had to be the only reasonable inference from those facts to the exclusion of all other reasonable inferences'. Ultimately the question was 'whether, in light of

[6] 1939 AD 188 at 202- 203
[7] (396/16) [2016] ZASCA 181 (28 November 2016

all the evidence adduced at trial, the guilt of the appellant was established beyond reasonable doubt'.

[24] In considering whether the court *a quo'*s conclusion, based on inferential reasoning, that the state's evidence established the guilt of the two appellants beyond reasonable doubt, was justified, it is important to bear in mind that the state did not need to prove its case beyond all doubt. In *S v Pallo and Others*[8] Oliver JA followed the approach that was laid down in *R v Mlambo*[9] where it was said:

> 'In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused. An accused's claim to the benefit of the doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case'.

[25] The court *a quo* carefully analysed all the evidence. It had regard to other inferences that could reasonably be drawn from the proven facts, if the evidence connecting the appellants to each individual count were to be viewed in isolation. However, it correctly accepted that it was the totality of evidence that had to be considered in determining the reasonableness of the ultimate conclusion. The court *a quo* took the striking similarities between the various robberies into account to justify its finding that the robberies were in all probability committed by the same people.

[26] The contention of the first appellant that inferences were drawn from other inferences is not supported by the record. The court a quo's reliance on similar fact evidence was permissible in light of the particular circumstances of this matter. In *S v Sole*[10] the SCA in admitting similar fact evidence, stated the following:

> 'As earlier stated, similar fact evidence is exceptionally admissible, not to show that the accused is of bad character and is likely to have committed the relevant offence, but, for example, in a

[8] 1999 (2) SACR 558 (SCA) at [10]
[9] 1957 (4) SA 727 (A) at 738 A-C
[10] 2004 (2) SACR 599 (SCA) p675 B – E

> case such as this, where different counts are involved, to establish design or system, if its probative force is sufficiently strong to warrant its exceptional reception (see Hoffmann and Zeffertt (op cit at 55) and Phipson (op cit at para 17-32 at 380)). In the present case, while each count must be considered separately, nonetheless they are similar in nature, and reflect a system over an extended period …. Indeed, it is true to say that the transactions involved are inextricably bound together and the facts of this case are such that it is difficult to do otherwise than look at the global picture: To do otherwise would seem to be an exercise in unreality. In particular I see nothing prejudicial or unfair in doing so'.

[27] The Regional Magistrate's conclusion that the appellants were involved in the robberies is unassailable, if regard is had to the totality of evidence that was presented during the trial. We are satisfied that there is no factual or legal basis to interfere with the convictions.

ORDER

[28] In the circumstances I propose the following order:

- The first and second appellants' appeals against their convictions are dismissed.

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A. GRAF

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree and it is so ordered.

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M.B. MAHALELO

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Digitally submitted by uploading on Caselines and emailing to the parties)

Date of delivery: 14 October 2021

Appearances:

On behalf of the first Appellant: Mr JP Venter (David H Botha, Du Plessis & Kruger Inc.)

On behalf of the second Appellant: Adv M Milubi (Legal Aid South Africa)

On behalf of the Respondent: Adv R Barnard (Director of Public Prosecutions)