REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A243/2020

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

Date: 28 February 2024 JA Kok

In the matter between:

Ditiragalo Mphela APPELLANT

and

The State RESPONDENT

JUDGMENT

Kok AJ

Introduction

[1] This is an appeal against conviction and sentence of the appellant on three counts of robbery with aggravating circumstances in the regional division of Tshwane North held at Pretoria.

[2] The appellant was convicted on all three counts and sentenced to 15 years' imprisonment on each count; the three sentences to run concurrently.

[3] I firstly set out the approach to be taken by an appeal court on a trial court's findings on conviction and sentence. I set out the principles relating to an appeal generally, the identification of the accused , and how to approach contradictions in the evidence. I then briefly set out the facts as they appear from the appeal record. Thirdly I set out the trial court's judgment on conviction and sentence. Lastly, I set out this appeal court's judgment and order on conviction and sentence.

Principles to consider when an appeal is heard

[4] The principles according to which an appeal court must deal with the findings of fact of the trial court are well-known and well-established.

[5] In *R v Dhlumayo* 1948 (2) SA 677 (A) 705-706, it was explained that an appeal court must be careful to not easily overturn a finding of fact of the trial court. The appeal court must be convinced that the trial court was wrong; mere doubt is not sufficient. A misdirection could, for example, exist where the reasons as provided by the trial judge are unsatisfactory, where the reasons as provided are unsatisfactory when the appeal record is considered, or where the trial judge overlooked facts or probabilities.[1]

[6] As will appear below, the trial court did not make explicit credibility findings and did not comment on any of the witnesses' demeanour. As per *Minister of Safety and Security and Others v Craig and Others NNO* 2011 (1) SACR 469 (SCA) par 58:

> [A]lthough courts of appeal are slow to disturb findings of credibility, they generally have greater liberty to do so where a finding of fact does not essentially depend on the personal impression made by a witness's demeanour, but predominantly upon inferences and other facts, and upon probabilities. In such a case a court of appeal, with the benefit of a full record, may often be in a better position to draw inferences.

[1] Also see *S v Robinson and Others* 1968 (1) SA 666 (A) 675G-H; *Taljaard v Sentrale Raad vir Koöperatiewe Assuransie Bpk* 1974 (2) SA 450 (A) 452A-B; *S v Francis* 1991 (1) SACR 198 (A) 204C-F; and *S v Engelbrecht* 2011 (2) SACR 540 (SCA) para 18.

[7] *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15,[2] held that an appeal court must consider if the trial court considered the evidence holistically and if the full picture presented by all the evidence was assessed. The trial court should weigh against each other the parts of the case that point to the accused's guilt and the parts of the case that point to their innocence. This weighing up process must take due account of the "inherent strengths and weaknesses, probabilities and improbabilities" of both parties. For a finding of guilt, the considerations must then be so weighty in favour of the State that there is no reasonable doubt of the guilt of the accused.

Identification of the accused

[8] *S v Mthetwa* 1972 (3) SA 766 (A) 768A-C still sets out the binding law on the identification of an accused:

> 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. 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.

[9] An alibi defence is in essence a denial that the accused was accurately identified - *S v Ngcina* 2007 (1) SACR 19 (SCA) para 18. The Supreme Court of Appeal held that the alibi defence must be assessed against the totality of the evidence and the court's view of the witnesses. The alibi defence must succeed if it might be reasonably true. The probability of the alibi is not considered in isolation; if there is sufficiently strong evidence to the contrary the alibi defence will be rejected.

[2] Referencing *S v Van Aswegen* 2001 (2) SACR 97 (SCA).

[10] *Cupido v The State* (1257/2022) [2024] ZASCA 4 para 31 puts it a little differently but is to the same effect: can the alibi be accepted as being reasonably possibly true or must it be rejected as obviously false.

Contradictions in the evidence

[11] *S v Pistorius* 2014 (2) SACR 314 (SCA) para 27 held that contradictions *per se* is not sufficient to reject a witness's evidence; the number, nature, importance and the bearing of the contradictions on the other evidence must be properly considered. The totality of the evidence must be assessed.

The State's case

[12] The gist of the testimony of the State witnesses was that the appellant and two accomplices robbed the three complainants at gunpoint on 25 July 2013 at different places and times, all in the Orchards area, Gauteng. There were minor discrepancies in the State witnesses' testimony, as one would expect. These discrepancies are described below.

[13] Mr Gunstan testified that he was robbed by about 18:00 by three men of his cell phone, a jacket and some cash. When asked about the visibility where he was robbed, he said that "it was a bit light". After the robbery, he laid a charge at a police station. By about 20:00 the police phoned him to inform him that an arrest had been made. When he arrived at the police station, Mr Gunstan identified the appellant as he saw that the appellant was wearing his jacket with "Hang Ten" on the back, and because he managed to see his face. Mr Gunstan pointed to the appellant in court when asked to identify him. He explained during cross-examination that he never gave the police a description of the suspect because when he arrived at the police station after being informed an arrest was made, the accused was there, and he identified him. He explained during cross-examination that the accused talked to him while he was being robbed. The accused was standing close to him.

[14] Mr Tlhapane was robbed by three men at around 19:00. It was winter, and it was already dark. After the robbery, Mr Tlhaphane went to a police station to lay a criminal charge and was told that an arrest had been made. He was then asked to identify the stolen items. He identified his jacket from the torn side pocket. To identify the phone as his, he provided the sim number and cell phone number. The detectives showed him three photos of the appellant and he confirmed that the appellant was one of the persons who robbed him. He explained that the accused was one of the persons who approached him, and he was walking together with the other person who had the firearm. He testified that although the sun had already set, the visibility was not bad and that he was able to see who robbed him. Mr. Tlhapane provided an explanation for why he was able to see. The reason is not reflected in the record as it is indicated on the record that the last part of the sentence is "indistinct". Of relevance is the fact that the reason provided was not challenged as the cross-examination continued. In court, he pointed to the appellant as one of the people who robbed him.

[15] Mr Masia and his brother were robbed at about 19:45 by three men of their phones, a wallet, a driver's license, a key and a jacket. Mr Masia testified that although it was dark, there were Apollo lights. After the robbery, Mr Masia ran home and informed his father of the robbery. Mr Masia and his father then set out in a vehicle to look for the robbers. They found the robbers. The robbers started to run in different directions. Mr Masia saw the appellant wearing his jacket, ran after him, caught him, and took him to a police station. On the way to the police station, Mr Masia noticed that the appellant had his cell phone. At the police station, keys and a driver's license fell from a pocket of the clothes the appellant was wearing. He noticed later that the appellant was wearing a number of jackets on top of each other. At the police station, other members of the public were also laying charges of robbery.

[16] Mr Masia snr testified that his son informed him that he and his brother were robbed. They both got into a vehicle to look for the robbers. They found the three robbers and identified the appellant based on the jacket that he was wearing that belonged to Mr Masia. Mr Masia snr stopped the vehicle, the robbers ran away,

his son got out of the vehicle, apprehended the appellant, and they then took the appellant to the police station.

[17] Mr Shosha, a constable on duty at the police station when the appellant was brought in, testified that he handed back to Mr Masia a grey Relay denim jean jacket, a cell phone, housekeys, and a driver's license. He found these items in the possession of the appellant. He returned the jacket on Mr Masia's word that it was his jacket. The driver's license had the relevant surname and photo on it. The cell phone was identified by a security code and the photos on the cell phone once opened. The house keys had an identifiable tag. To Mr Gunstan, he returned a "Hemisphere" white jacket with blue stripes that the appellant was wearing. The appellant wore at least three jackets when brought into the police station.

[18] In cross-examination, it was put to Mr Tlhapane that the appellant did not rob him and that stolen items were not recovered from him. It was put to Mr Masia that when Mr Masia and his father approached the appellant, he was himself in the process of being robbed by three people, that the vehicle collided with him and two of the robbers, that all three of them then fell down, that the three robbers then ran away, and that the appellant remained behind. It was put to Mr Masia snr that when he brought the vehicle to a standstill, the appellant was being robbed and that the appellant denies robbing Mr Masia. It was put to Mr Gunstan that the appellant did not rob him of a cell phone. It was put to Mr Shosha that the appellant would deny that any of the stolen items were found on his person by the police.

[19] As referred to above, there were some discrepancies in the evidence. Some contradictions arose during the cross-examination of Mr Masia snr. He first testified that he did not speak to any of the alleged robbers and that his son apprehended the appellant. In the statement Mr Masia snr made to the police, he stated that he greeted the men and chased the appellant. He testified that his son found the cell phone on the appellant, while in his statement to the police he stated that he searched the appellant and found the cell phone.

[20] During cross-examination it was put to Mr Gunstan that the appellant had a gold tooth and that it would have been something that he would have mentioned to the police if he could have identified the appellant clearly. Mr Gunstan replied that it did not come to his mind to mention the gold tooth.

[21] In the cross-examination of Mr Shosha, it was put to him that Mr Gunstan testified that he received back a "Hang Ten" jacket. Mr Shosha replied that it was a "Hemisphere" jacket. Mr Shosha testified in cross-examination that he searched the appellant and found a cell phone, house keys, driver's license and money on the appellant's person. According to him, all these items were found on the appellant's person, not prior to being brought to the police station, and no items fell from the appellant's pockets.

The appellant's case

[22] The appellant's version in his evidence in chief, was that he left a tavern in Orchards sometime in the evening to go home. The tavern was not identified. He said he was at the tavern from around 16: 00 and left before 21:00; maybe at 19: 30. About 20 metres before he reached his house, three men robbed him at gunpoint. While he was being robbed, a car approached. The car moved onto the paving and collided with two robbers and with him. The three of them fell to the ground. As they stood up, the appellant tried to grab onto one of the robbers, but he slipped away and ran away. Two people exited the car and started to kick him. He explained to the two people that he was robbed. He got into their car to find the robbers. They could not find the robbers and then went to the police station to lay a charge. He did not get an opportunity to lay a charge at the police station, as the two people with him in the car explained to the police what had happened, whereafter the police started to assault him. The son (ie Mr Masia) went back to the car and came back with two jerseys and a cell phone and explained to the police that these items were found in the appellant's possession. The police then gave the son (Mr Masia) the phone and two jerseys and took photos of the appellant. Two further complainants came into the police station and said one of the jerseys belonged to them. He was then taken into custody. He denied that he robbed anyone. He denied that he was searched at the police station. He denied

that he was wearing three jackets. This was in essence an alibi defence, in that his version is that he was at a tavern when the robberies occurred.

The trial court judgment

[23] In its judgment, the trial court recounted the testimony and compared the State's version to the appellant's version. The court did not make credibility findings. The court pointed out that the appellant did not deny that he was wearing three or more jackets when he was arrested. His version that the jackets were taken from the vehicle while he was in the charge office, was not put to the State's witnesses during cross-examination. It was not put to the State's witnesses that he did not wear three jackets. It was only during the appellant's evidence that he testified that the jackets (or jerseys) were brought from the vehicle. The court viewed this testimony as an afterthought to explain why more jackets were found. If he had been assaulted by the occupants of the car and the police, there would likely have been evidence of the injuries he sustained.

The appeal

[24] In essence, on appeal the appellant argued that the identification of the appellant was unsatisfactory ("thin") while the state argued that the totality of the evidence had to be assessed.

[25] It is so that the complainants did not provide a clear physical description to the police in respect of clothing or facial features of their attackers when reporting the robberies. The evidence before the court was that streetlights - or Apollo lights - provided sufficient lighting for the witnesses to identify the accused. Mr Masia came to the police station after having apprehended the appellant, whom he identified when driving with his father looking for the perpetrators. The appellant wore his jacket at that stage. Mr Thlapane was informed that the perpetrator was already arrested when he arrived at the police station to report the incident. The goods stolen from him was found in the appellant’s possession and he recognised the appellant as the perpetrator. It was put to Mr Gunstan that the appellant had a

golden tooth and that it is such a striking feature that the witness would have mentioned it when describing the appellant to the police. Mr Gunstan said he saw the golden tooth, but it did not come to his mind to mention it. Mr Gunstan also explained that when he and his friend first arrived at the police station his friend described the appellant to the police, and he described another person who also participated in the robbery. When he was called to the station again, he immediately identified the appellant.

[26] The trial court found that the evidence that the appellant was wearing more than two jackets when he arrived at the police station, was corroborated by several witnesses, and not denied by the appellant when the state witnesses were cross-examined. The court was aware of the contradictions in the state's case but held that contradictions, *per se*, do not lead to the rejection of evidence. The court did not deem the contradictions to be material or to affect the credibility of the witnesses. The trial court found that the accused's evidence supported the state case in certain aspects.

[27] The magistrate properly evaluated the totality of the body of evidence. The trial court adopted a cautionary approach when considering the evidence of the complainants, and correctly so. The trial court also correctly stated that caution cannot replace common sense. *In casu*, the appellant was identified by the three victims shortly after the attacks occurred. There was no effluxion of time that could have clouded their recollection.

[28] On a proper appraisal of the appeal record, the appellant's version cannot possibly reasonably be true. The totality of the evidence must be considered. The evidence should be analysed using common sense,[3] not in a nit-picking formalist manner. I cannot find fault with the trial court's reasoning. The discrepancies in the evidence are immaterial and some discrepancies in evidence are to be expected. If the appellant is to be believed, three complainants, unconnected to each other,

[3] *S v Artman* 1968 (3) SA 339 (A) 341C-D.

all had to conspire to lay false charges of robbery against the appellant, and the police were in cahoots with them. At the police station, the appellant was wearing at least three jackets, belonging to the complainants. This evidence was not challenged in cross-examination. The complainants all identified items belonging to themselves and found on the appellant's person. A cell phone, for example, was identified using a security code and from the photo's that were on the phone. There is no other reasonable explanation for this set of facts than that the appellant was one of the three robbers who robbed the complainants at gunpoint. As a result, the appeal against the conviction stands to be dismissed.

[29] When an offender is sentenced, the appropriate sentence is in the discretion of the trial court.[4] The question on appeal is not whether the appeal court would have imposed a different sentence had it sat as the court of first instance.[5] The appeal court must consider if there was a material misdirection so that the sentencing discretion was not properly exercised.[6] The misdirection must be so serious that it indicates that the trial court did not exercise its discretion at all or did so unreasonably or improperly.[7]

[30] From the trial record, it is clear that the magistrate considered the appellant's personal circumstances, the nature of the offence and community interests. The offences of which the appellant was convicted are serious. Robbery with aggravating circumstances is taken up in Part II of Schedule 2 of the Criminal Law Amendment Act, which prescribes a minimum sentence of 15 years in the absence of substantial and compelling circumstances. The magistrate did not find any such circumstances and sentenced the appellant to the prescribed minimum sentence but considered that the cumulative effect would be too harsh and therefore ordered the sentences to run concurrently.

[4] *S v Giannoulis* 1975 (4) SA 867 (A) 868F.
[5] *S v Salzwedel* 1999 (2) SACR 586 (SCA) para 10.
[6] *S v Blank* 1995 (1) SACR 62 (A) 65h.
[7] *S v Pillay* 1977 (4) SA 531 (A) 535E–F.

[31] The result is therefore that the appellant was sentenced to 15 years imprisonment on three counts of robbery with aggravating circumstances. The appellant could not show how the trial court misdirected itself and I found no misdirection either.

[32] There is thus no basis on which to interfere with the trial court's judgment on the conviction and the sentence.

ORDER

In the result, the following order is granted:

The appeal against the conviction and the sentence is dismissed.

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JA Kok

Acting Judge of the High Court

I agree and it is so ordered.

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E Van Der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be emailed to the parties/their legal representatives.

For the applicant:	H Alberts
Instructed by:	Legal Aid Board
For the respondent:	J Cronjé
Instructed by:	State Attorney
Date of the hearing:	24 January 2024

Date of judgment: 28 February 2024