Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case number: CA&R 58/2022
Date Heard: 14 / 08 / 2023
Date delivered: 27 / 10 / 2023

In the appeal of:-

EDMUND SEAN BHIMA **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: ***Nxumalo, J et Stanton, J***

JUDGMENT

Stanton J

INTRODUCTION:-

[1] The appellant, Mr Edmund Sean Bhima, appeared before Magistrate Mabaso in the Regional Court, held at Kimberley ("the trial court") on a charge of robbery with aggravating circumstances, read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997 ("the CLAA"). The State alleged that the appellant on or about 09 October 2019 and at or near Kimberley, unlawfully and intentionally and in concert with another, assaulted one Mr FM da Silva and with force and violence, took a 2017 Landcruiser 4.8 diesel white single-cab with registration number […], valued at R469 900.00; and a 2016 Landcruiser 4.2 diesel white single-cab, with registration number […], valued at R498 900.00. The aggrevating circumstances being that Mr FM da Silva was threatened with a firearm.

[2] The appellant was legally represented in the trial court and had been advised, prior to commencement of the trial, that he could be sentenced to a minimum sentence of 15 years imprisonment, if he is convicted on the charge; absent any substantial and compelling circumstances.

[3] On 25 July 2022, the appellant was convicted of robbery with aggravating circumstances, read with the provisions of section 51(2) of the CLAA. On 26 July 2022 he was sentenced to 15 years imprisonment as contemplated in section 51(2) of the CLAA.

[4] On 15 August 2022, the trial court granted the appellant's application for leave to appeal his conviction and sentence.

AD GROUNDS OF APPEAL:-

[5] According to the appellant, the trial court:-

5.1 Committed a gross irregularity by not making a ruling at the end of the State's case on whether the hearsay evidence was to be admitted or not, in which event the conviction cannot stand;

5.2 Erred in finding that the State proved the charge of robbery with aggravating circumstances; and at most, proved theft of the motor vehicles;

5.3 Erred in rejecting the appellant's evidence as not reasonable possibly true; and

5.4 Imposed a sentence that is disturbingly inappropriate, which created a sense of shock.

AD RULING ON HEARSAY EVIDENCE:-

[6] Sergeant B Sonderson testified that he arrived at the scene and found Mr FD da Silva, a security officer, with taped legs and arms and his mouth covered with Sellotape. Mr FM da Silva informed him that he was tied up by two men who took the vehicles and his cellular phone. During Sergeant B Sonderson's evidence-in-chief, a written statement by Constable T Magoiwa, who took the photographs at the scene and prepared the sketch plan and photo album, was admitted into evidence with the consent of the defence. According to Constable T Mogoiwa's written statement, Mr FM da Silva pointed out the place where the suspects were allegedly standing when they approached him and pointed a firearm at him.

[7] Neither Constable T Mogoiwa nor Mr FM da Silva was called to testify.

[8] According to Mr IJ Nel, counsel for the appellant, neither parties objected to the hearsay evidence when it was tendered as all the

parties believed that Constable T Mogoiwa and Mr FM da Silva would be called to testify during the trial. The trial court was also not requested to rule on the admissibility of the statements against the appellant, when Sergeant B Sonderson testified.

[9] The trial court, in its judgment in respect of the conviction, and without dealing with the question of admissibility of the hearsay evidence on the basis of the provisions of the Law of Evidence Amendment Act 45 of 1988 ("the LEAA"), made an explicit ruling on the admissibility and concluded that the hearsay evidence was inadmissible.

[10] The evidence pertaining to Constable T Mogoiwa's statement and Mr FM da Silva's pointing-out is clearly hearsay evidence and was therefore correctly excluded by the trial court.

[11] In ***S v Ndlovhu and Others*** [1] the Supreme Court of Appeal, *per* Cameron JA(*"Ndlovhu"*) expressed itself as follows in respect of the timing of a ruling on the admission of hearsay evidence:

> *"... The trial court must be asked timeously to consider and rule on its admissibility. This cannot be done for the first time at the end of the trial, nor in argument, still less in the court's judgement, nor on appeal. The prosecution must before closing its case clearly signal its intention to invoke the provisions of the act, and the trial judge must before the state closes its case rule on the admissibility, so that the accused can appreciate the full evidentiary ambit he or she faces".*

[12] The Supreme Court of Appeal, in the matter of ***S v Molimi*** [2] however, confirmed that the relevant passage of ***Ndhlovu*** was clearly not laying down an inflexible rule and that the overall concern was one of fairness to an accused who is confronted with hearsay evidence. The Court held that:-

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1 2002 (6) SA 305 at paragraph [18].
2 2006 (2) SACR 8 (SCA) at paragraph [14].

"...The real question therefore is not whether the 'rule' formulated by Cameron JA was strictly complied with. Patently it had not been. What this court must ask itself is whether, in the circumstances of this case, the reception of the hearsay evidence was unfair to the appellants and therefore not in the 'interests of justice'.

[13] Given the fact that the evidence was ultimately found to be inadmissible, it cannot be said that the appellant's trial was unfair. There is accordingly no merit in this ground of appeal.

AD CONVICTION ON THE CHARGE OF ROBBERY WITH AGGREVATING CIRCUMSTANCES:-

[14] Despite the trial court's finding that the hearsay evidence was inadmissible, the appellant was convicted on the charge of robbery with aggravating circumstances.

[15] The appellant pleaded not guilty during his trial and did not provide any plea explanation. The State accordingly bore the *onus* to prove all the elements of the offence of robbery with aggravating circumstances beyond reasonable doubt.

[16] The trial court, however, in its judgment found that it is "common cause" that a robbery occurred on 09 October 2019.

[17] It is trite that the crime of robbery consists of the theft of property by intentionally using violence or threats of violence to induce submission to the taking of it.[3]

[18] The Constitution Court, in the matter of ***Minister of Justice & Constitutional Development v Masingili*** [4] confirmed that,

3 R v Magao 1959 1 SA 489 (A). See also Milton Criminal Law and Procedure 2 642.
4 2014 1 BCLR 101 (CC) at paragraph 34.

in spite of the practice of treating armed robbery as what sometimes appears to be a separate crime, it is not. It remains the crime of robbery and the aggravating circumstances are relevant for sentencing.

[19] No evidence, save for the inadmissible statements of Mr FD da Silva and Constable T Magoiwa, was presented by the State to prove that the theft occurred by violence or threats thereof. The State hence failed to prove the appellant's guilt in respect of the charge of robbery beyond reasonable doubt and the trial court accordingly erred in convicting the appellant of robbery with aggravating circumstances. It follows that the appeal against the conviction of robbery must succeed.

CONVICTION:-

[20] The question that now remains is whether the appellant can be convicted of theft.

[21] The trial court convicted the appellant on the basis of the doctrine of recent possession, which doctrine Mr IJ Nel and Mr JJ Cloete, on behalf of the State, confirmed finds application in this matter.

[22] The doctrine of recent possession permits a court to make the inference that the possessor of the property had knowledge that the property was obtained in the commission of an offence and in certain instances was also a party to the initial offence. The court must be satisfied that the accused was found in possession of the property and that same was recently stolen. When considering whether to draw such an inference, a court must have regard to factors such as the length of time that passed between the possession and the actual offence, the rareness of the property, the readiness with which the property can or is likely to pass to another person. [5]

5 S v Skweyiya 1984 (2) All SA 569 (A) at page 570.

[23] The Supreme Court of Appeal in the matter of ***Mothwa v S*** [6] reaffirmed that the doctrine of recent possession must not be used to undermine the *onus* of proof which always remains with the State. It is not for the accused to rebut an inference of guilt by providing an explanation. All that the law requires is that having being found in possession of property that has been recently stolen, he gives the court a reasonable explanation for such possession.

[24] Mr IJ Nel submitted that if this court rejects the appellant's evidence as reasonably possibly true, the appellant should be convicted of theft.

AD EVIDENCE:-

[25] The following facts are common cause:-

25.1 The two Toyota Landcruiser vehicles ("the two vehicles") were the property of Sovereign BMW, Kimberley ("BMW");

25.2 The two vehicles were unlawfully taken and removed from BMW on 09 October 2019;

25.3 The appellant attended at BMW twice on 09 October 2019;

25.4 He misrepresented himself to BMW's employees as the intended purchaser of the two vehicles;

25.5 Both vehicles were recovered in Bloemfontein, within approximately 2 hours of same being taken in Kimberley; and

25.6 The appellant was found driving the one vehicle. He was the only occupant of the vehicle.

6 [2016] JOL 34192 (SCA) at paragraph [10].

[26] In his defence, the appellant stuck to his version that he was merely the driver of the vehicle. He persisted that he did not steal the vehicle and that he was unaware that the same was in fact stolen. According to the appellant's evidence, when examined in chief, he entered into an oral agreement with one Mark Ntsia, for the purpose of driving a vehicle from Kimberley to Bloemfontein. He does not reside in Kimberley, but in Gauteng. He attended BMW on 09 October 2019, with another person who informed him that they are at BMW to negotiate a better deal. The appellant informed the sales assistant that he intends to purchase two vehicles, one for himself and one for his farm workers, in cash. He negotiated the purchase price and was provisionally informed that he would qualify for a discount of approximately R10 000.00.

[27] He returned later the same day with his "boss" to enquire about the discount. Only the appellant communicated with the BMW employees as his employer did not speak Afrikaans. His employer left him at the mall or information centre in Kimberley when he went to First National Bank. Later on, he was again met by his employer and another driver, one Andries, with the two vehicles. He was instructed to drive the bakkie to Bloemfontein. He was given R1 300,00 and had to use R300 for petrol and the remainder for accommodation and food. Mark Ntsia handed him the Natis document, a copy of an ID and a proxy, which he put in his bag.

[28] On entering Bloemfontein, he noticed police vehicles. When he entered a turn in the road, he was pulled over by one police vehicle, he alighted and was instructed to get down on the ground, whereafter he was handcuffed. The police officers enquired where the other bakkie was. A police officer took his cellular phone and made a few calls from it as he informed them that "his boss" was driving behind him. The police did not make telephonic contact with Mark Ntsia despite several attempts to phone him from the appellant's phone. The appellant was then

and there arrested and taken to a police station. He thereafter asked the police officials if his Nike bag was still in the vehicle.

[29] When cross-examined, the appellant confirmed that he did not enter into a written agreement and he was not paid the amount of R4 500.00 for his services. He could not explain why the salesperson called him “Chris” at BMW, save to state that he did not want to embarrass her by correcting her error. When questioned on the contents of his written statement, he confirmed that he did not make any mention of his version that he was employed as a delivery person for the transport of the vehicle. He could not provide a satisfactory explanation as to why he was also employed as a driver when Andries, the other driver, was joined by his employer as passenger in the one vehicle. He initially testified that he did not know the exact location where he had to deliver the vehicle to and that he would have received confirmation of the address in due course. Later on, he testified that he had to take the vehicle to the Sun One Hotel. He did not see any police official removing his Nike bag from the vehicle. The other vehicle was found abandoned at the Sun One Hotel in Bloemfontein, the place where the appellant testified they would overnight. Despite being on bail from 22 October 2019, he did not attempt to locate his Nike bag or his cellular phone. He stated that he does not intent calling the security guard or his employer as they had “disappeared”.

[30] The State called eight witnesses to testify. Anel Steyn, the finance and insurance assistant employed by BMW testified that the appellant informed her on 09 October 2019, that he intends purchasing the two vehicles, but that he does not have his identity document, driver’s licence or proof of residence with him and that he would return the following day with the necessary documents. When cross-examined, she confirmed that she is not aware of a second visit by the appellant, for the purpose of negotiating a lower price on behalf of his employer. Sonia Paulson,

a BMW salesperson, testified that on 09 October 2019 at BWM, she met with the appellant, accompanied by a black man who introduced himself as Steve. Steve did not utter a word. The appellant introduced himself as Chris and informed her that he wants to purchase the two vehicles, in cash, on Friday. The appellant informed her that he is a farmer on his way to Beaufort West and that he intends to buy the one vehicle for his personal use and the other vehicle for his farm workers.

[31] Sergeant M Khene, Constable MC Faba and Constable C Nkone, three of the police officers who attended the scene when the appellant was arrested, testified and confirmed that the appellant informed them that he was just a "delivery man". However, all three were adamant that the appellant never informed them that another driver was following behind him or that they attempted to contact his employer from the appellant's cellular phone. Sergeant M Khene also testified that he chased after a Toyota Land Cruiser, driving at a high speed on Walter Sisulu Street, which vehicle came to a standstill when it was blocked in by other vehicles.

[32] The Supreme Court of Appeal in the matter of ***S v Chabalala***,[7] reiterated the proper approach to assessing evidence as follow:-

"*. . . 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 strengths 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.*"

[33] The trial court found that the appellant did not provide a reasonable explanation for his possession of the vehicle.

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7 2003 (1) SACR 134 (SCA) at paragraph [15].

[34] The fundamental principle on the evaluation of evidence on appeal is that an appeal court is not inclined to disturb findings by the trial court on the evaluation of the evidence. The advantage of seeing and hearing the witnesses is difficult to surpass. The Supreme Court of Appeal reiterated this stance in its judgment in ***AM and another v MEC Health, Western Cape***,[8] where it held that such findings are only overturned if there is a clear misdirection or the trial court's findings are clearly erroneous.

[35] The State's case was based on circumstantial evidence. A careful reading of the

record, however, shows that the trial court adjudicated the evidence with scrutiny; weighed up all the elements which point towards the appellant's guilt against all those which are indicative of his innocence, and took proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides. I am not persuaded that the appellant's version is reasonably possibly true in view of the fact that the appellant's explanation was riddled with numerous falsehoods, inconsistencies and improbabilities. The facts of the matter do establish beyond a reasonable doubt that the appellant committed an offence of theft. It follows that a conviction on the competent verdict of theft can be sustained.

[36] This brings me to the sentence which this Court is required to consider afresh. I believe that we are sufficiently informed of the relevant considerations to impose sentence ourselves. The appellant is unmarried with 4 children and had a clean criminal record. He was in steady employment as a courier. He was a breadwinner of his family and earned approximately R7500.00, per month. I am, however, also mindful of the seriousness of the offence and in particular the prevalence of the theft of motor vehicles.

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8 2021 (3) SA 337 (SCA) at paragraph [8].

[37] Mr IJ Nel argued that a that a period imprisonment of 8 years would be appropriate in the circumstances. I agree.

In the premise, the appeal succeeds to the extent that-

1. The conviction of robbery with aggravating circumstances is altered to
a conviction of theft; and

2. The sentence of 15 years imprisonment is set aside and substituted
with a sentence of 8 years imprisonment.

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STANTON, J

I concur.

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NXUMALO, J

<u>On behalf of the appellant:</u>	Adv. IJ Nel (o.i.o Kenneth Juries Associates)

On behalf of the respondent:	Adv. JJ Cloete (DPP, Northern Cape)