REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

CASE NO A105/2015

(1) REPORTABLE: Yes / No: Choose an item.
(2) OF INTEREST TO OTHER JUDGES: Yes / No Choose an item.
(3) REVISED.

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DATE SIGNATURE

In the matter between

BUTHELEZI, SIBUSISO **FIRST APPELLANT**

KHUMALO, SENZO **SECOND APPELLANT**

And

THE STATE **RESPONDENT**

J U D G M E N T

CORAM: MODIBA, J and MOOSA, AJ

MOOSA, AJ (MODIBA, J concurring):

[1] The appellants, Sibusiso Buthelezi and Senzo Khumalo were tried and convicted in the Regional Court sitting at Protea on a charge of robbery with aggravating circumstances as defined in Section 1 of Act 51 of 1977, read with the provisions of Section 51 and Schedule 2 of the Criminal Law Amendments Act 105 of 1997. For convenience, I refer to the appellants as the first and second appellants respectively.

[2] The appellants pleaded not guilty to the charge. They were both legally represented during the trial. In his plea explanation, the first appellant denied any knowledge of the offence. The second appellant exercised his right to remain silent.

[3] On 7th December 2009 both the appellants were convicted as charged and subsequently sentenced to sixteen (16) years imprisonment. They successfully applied for leave to appeal against both their conviction and sentence. The appeal on conviction is premised on two grounds namely, whether the state proved its case beyond reasonable doubt and whether the court a quo erred by rejecting the appellants' version as not reasonably possibly true.

[4] The issue to be determined on appeal is whether the court *a quo* erred by accepting the identification of the second appellant by Mr Chake Molepo "Molepo" who witnessed the hi-jacking incident given the contradiction in his evidence and considering that his evidence on what transpired at the scene of the hi-jack is that of a single witness. Furthermore, whether the court *a quo* erred by accepting the evidence of Mukonyama given that he too was a single witness in respect of the events that took place at the scene of arrest.

[5] When determining the above issues, I am guided by the following principles:

[5.1] Due to the fallibility of human observation, courts normally approach the evidence of identification with some caution.[1]

[5.2] The identifying witness must be honest. The reliability of his observation must be tested bearing in mind factors such as lighting, visibility, 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 as well as the evidence by or on behalf of the accused. These factors must be weighed one against the other, in light of the totality of the evidence and the probabilities.

[5.3] Caution must be applied when evaluating the evidence of a single witness by considering its merits and demerits. Despite shortcomings, defects or contradictions in her evidence if any, if the trial court is satisfied that the witness has told the truth, it ought to accept it. The exercise of caution must not be allowed to displace the exercise of common sense. [2]

[6] It is trite that the court of appeal is bound by the factual findings of the court *a quo* and that it may only depart therefrom in the event of misdirection.[3] On the factual findings of the court *a quo,* the facts underlying the conviction are briefly as follows. On 9 July 2009 at approximately 23h00 at night in London Road at Alexandra, the complainant, one Godfrey Moeng, was robbed of his Volkswagen Velocity Golf motor vehicle. When the incident occurred, the complainant's motor vehicle was parked outside the tuck shop of Molepo, the state's second witness.

[7] A Venture motor vehicle, arrived, parked the complainant's motor vehicle in, making it impossible for the complainant to move his motor vehicle forward or backwards. There were 4 (four) occupants in the Venture motor vehicle. Two of the occupants went to Molepo to talk to him and pretended to buy something.

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[1] *S v Mthethwa* 1972 (3) SA 766 AD at 768D.
[2] *S v Sauls and Others* 1981 (3) SA 172 (A).
[3] *R v Dlumayo and Another* 1948 (2) SA 677 (A) at 706; *S v Pistorius* 2014 (2) SACR 314 (SCA) at par 10.

Two of these men were armed with firearms. One of the attackers hit the complainant on the head with a firearm when he tried to start his motor vehicle. The attackers assaulted the complainant and the complainant then jumped out of his motor car and ran into a little passage behind the tuck shop. Two of the attackers got into his car and the other two drove off in the Venture.

[8] The complainant's motor vehicle was fitted with a matrix tracking device which facilitated the easy recovery of the motor vehicle. The motor vehicle was found approximately two hours after the hi-jacking incident, parked outside a house in Dobsonville where the appellants were arrested. Mukonyama and his crew had been patrolling the area when they encountered the matrix crew looking for a hi-jacked motor vehicle. They decided to support them in their pursuit.

[9] When they located the motor vehicle, there were two (2) people standing outside the vehicle. The moment the police stopped these individuals standing next to the car ran into the house. They followed them into the house where they found four (4) people three (3) males and one (1) female.

[10] The appellants were two of the four individuals in the house. Mukonyama then searched them physically. He first searched the first appellant and he found the Venture keys in his pocket. When he asked the first appellant about the keys, the first appellant said that he did not know how these keys came to be in his pocket. These keys fitted the car parked outside and the immobilizer for the car was activated by these keys. There was no sign that the car had been tempered with or that another immobiliser box had been fitted.

[11] The Complaint went to identify the hijacked motor vehicle in police custody a week or two after the incident. The car was still in good condition. There was no damage. However, some of his personal belongings which were in the motor vehicle when it was hijacked were missing, inter alia; a cell phone, driver's license, money and his identity document.

[12] The complaint was later informed that his cell phone was recovered and was at the Police Station. However, he never got to identify the cell phone. In his evidence, it was confirmed that the complainant had the original box of his cell phone and that the EMI number of the recovered cell phone matched the complainant's box. Further, the numbers on the cell phone matched the evidence of the complainant about the contacts saved on the complainant's phone. That the recovered cell phone is his was not disputed at the trial.

[13] On the second appellant Mukonyama found two cell phones. He asked him who the cell phones belong to. The second appellant responded that one cell phone is his and that he does not know who the second cell phone belongs to. Mukonyama dialled one of the numbers appearing on the recent calls list on the latter phone. One "Penny" answered the phone and advised him that the cell phone belongs to her friend, the complainant, who had been robbed of his car, cell phone and other personal belongings.

[14] At a subsequent identity parade, Molepo positively identified the second appellant as one of the hi-jackers. The complainant could not identify anyone at the identity parade. The identity parade was not found to be irregular.

[15] Molepo and Mukonyama's evidence was pivotal in the conviction of the appellant. Molepo's evidence is that of a single witness in respect of the events that transpired at the scene of the hi-jack. In respect of the reasons for the arrest of the appellants, Mukonyama's evidence is also that of a single witness.

[16] Molepo's evidence has several contradictions. During his examination in chief, he said that he had seen one of the robbers before but later in cross examination he denied this. He confirmed that the complainant was pushed out of his vehicle, assaulted by armed men and that he was pursued and ran away. Molepo initially stated that he saw 4 men leave the complainant's vehicle but later changed his evidence that he only saw the one man leave in the complainant's vehicle whilst the others left in the Venture.

[17] His identification of the second appellant is also fraught with difficulties. He testified that there was an Apollo light that illuminated the area and therefore his observation was unhindered. He observed the face of the second appellant who he later pointed out in the ID parade. The person he pointed out was the second appellant. He stated that he saw the tall one jumping into the driver's seat. Whilst Molepo's evidence and explanation in identifying the second appellant was contradictory in the respect set out above. He was clear that it was the second appellant who jumped into the driver's seat. At the ID parade he stated that he identified the second appellant due to his complexion and that he was the same person who had asked him for a cigarette.

[18] He denied that he had pointed out the second appellant out due to the fact that he was very tall. He stated that he had asked for divine intervention to help him point the correct person out. The learned Magistrate explored the allegation of divine intervention with Molepo who then stated that even if God didn't help him he would have been able to identify the second appellant by his facial features. The facial features that he relied on were not explored further during the trial.

[19] Molepo's evidence in respect of his prior knowledge of the second appellant is also contradictory. Initially, he testified that he does not know the people who came to the spazashop to buy cigarettes after the complainant parked his car outside but he once saw one of them. When asked how and by what would he still be able to point this person out – he said 'it is the manner in which I saw him.' He recognised him as the person who came to him and asked him for the cigarette. When asked if it was the way he looked, his answer was in the negative. He elaborated that he is the person he had seen. He is the same person who entered the golf. It was the first time in his life that he saw him that evening. When asked under-cross examination if he would be able to point out the other people who came out to the spazashop he said no.

[20] Under cross examination he mentioned that in his statement to the police, he said he will be able to identify the person who asked for the cigarette because he is around Alexandra. When asked what he meant he said it was his first time

seeing him. When asked further how he was able to identify the second appellant and specifically how was he able to distinguish him from the other robbers, he insisted that he saw him without giving any identifying features.

[21] He could not identify the others because they never came to the side of the car where he could see them. Then he changed his version again to say they were on the side where the compliant was – the driver's side. The second appellant is the one who pushed the complainant out of his car. Then he changed his version to say the second appellant is the only person who drove off in the complainant's car.

[22] The court *a quo* rejected the appellants' contention that Mukonyama made a second statement confirming possession of the cellphone by the second appellant because he had no evidence to link the second appellant to the hi-jack incident; in my view correctly so. Mukonyama clearly testified that he found two cell phones on the second appellant. Mukonyama's second statement was made on the same day as his first statement. There was no reason for him to fabricate his evidence. His explanation for the need for the second statement is that he omitted to mention the cell phone in the first statement. I find nothing sinister about this explanation.

[23] The primary thrust of the appellants' attack against conviction is bare denial of the state's allegations. The first appellant testified that he did not know the second appellant before his arrest and that he got to know him only thereafter. He further denied having been on the scene in Alexandra or being in possession of the Volkswagen's key. He raised an alibi as a defense by stating that he was at the place where he was arrested from 17h00 together with his friend, Sipho and his girlfriend.

[24] The first appellant testified further that Sipho, his girlfriend and the first appellant were at her house drinking. At approximately 22h00 Sipho and his girlfriend left and they were supposed to return. When Sipho and his girlfriend had not

returned by 2h00am in the morning [when he was arrested], he was not concerned as he thought they may have fallen asleep and that he would take a taxi when the taxis start operating around 5h00 in the morning. Given the time of the day the first appellant would have had to wait hours before taxis started operating at approximately 04h00 or 05h00 in the morning and would have had to wait in a tavern which had already closed. I find this improbable.

[25] The second appellant's defence is that he was arrested at his place of employment. He testified that he was employed by the owner of the house, Moses and that at the time of the arrest he was seated with his friend, Thabang and that he occasionally sleeps over at his place of employment. The second appellant denied being involved in the robbery and also denied being in possession of the complainant's cell phone.

[26] Under cross examination, the second appellant was asked about the phones and he responded by asking "which phone". He was told that the police found two phones after which he testified that he only had one phone. He testified that he had never been to Alexandra and that he only shops in Sandton and therefore passes Alexandra on his way, yet after the ID Parade, he confirmed that he knew Molepo. Under cross examination he denied knowing Molepo. Notwithstanding Captain Raymond Lebetse's "Lebetse" uncontested evidence that there were 6 other people of similar height at the ID parade, the second appellant testified that he was the tallest person in the line-up. His version was not put to Lebetse and thus not tested.

[27] When weighed against the totality of the evidence, the alibis raised by the appellant's cannot be sustained. The second appellant's testimony that he was pointed out because of his height is without substance, particularly in the light of the absence of evidence that the ID parade was irregular. second At the end of the identity parade, when he was asked whether he had any complaints, he answered in the negative.

[28] I find no reason why the police would fabricate a story that the keys of the Volkswagen were found in the first appellant's possession. It is also improbable on the proven facts why the police would falsely implicate the second appellant.

[29] Despite several contradictions in the evidence of these witnesses the court, *a quo* accepted their evidence and rejected the evidence of the appellants.[4] Molepo's evidence is not satisfactory in every respect. However, the materiality of his identification of the second appellant at the ID parade is not negated by the contradiction in Molepo's evidence, particularly because the ID parade was not irregular. When viewed against the totality of the evidence, I have no reason to doubt the truthfulness of Molepo's evidence.

[30] The court *a quo* did not solely rely on Molepo and Mukonyama's evidence when convicting the appellants. It also placed reliance on circumstantial evidence. It is trite that the test for the admissibility of circumstantial evidence is whether the inference to be drawn is consistent with all the proven facts and whether the proven facts are such that they exclude every reasonable inference, save the one to be drawn.[5]

[31] The appellants were arrested in Dobsonville Soweto, approximately two hours after the complainant's car was hi-jacked from the complainant at gun point in Alexandra. They were arrested in a house where the hi-jacked motor vehicle was packed outside. Two personal possessions of the complainant which were in the motor vehicle when it was robbed were found on the appellants. The key found on the first appellant was the key used to drive the hi-jacked motor vehicle to the police station.

[32] There is no reason to doubt that that key is the key for the hijacked motor vehicle. Two other males were at the scene of arrest. The appellants were arrested because they were linked to the hi-jacked through the items found on

[4] S v Sauls 191 (3) SA 172(A) at 180.
[5] *R v Blom* 1939 AD 188 at 202 and 203.

them. Only the appellant's were arrested. It is unclear why on the appellant's version only the two of them were arrested and not the other two males on the scene. This supports Mukonyama's version that he arrested them because they could be linked to the hi-jack incident through the cell phone and the motor vehicle keys. The probability that the appellant's were not involved in the hi-jacking of the motor vehicle under the circumstances of this case is very remote.

[33] I battled to find an explanation how the motor vehicle could have ended up in Soweto and how the complainant's cell phone and car keys could have found its way into the pockets of the appellants other than that they were two of the four males who participated in the hi-jack. Therefore on the proven facts, the inference that the appellants are two of four males who hi-jacked the complainant in Alexandra on that fateful morning is the only inference to be drawn.

[34] The circumstantial evidence outlined above, the second appellant's identification by Molepo, as well as Mukonyama's evidence is sufficient to establish the guilt of the appellant's beyond reasonable doubt. I find no misdirection by the court a quo for relying on this evidence to convict the appellants. The court a quo correctly rejected the evidence of the appellants as not reasonably possibly true. In assessing the evidence in its totality, in my view the state has discharged the onus of proving that the appellants had committed robbery with aggravating circumstances as charged.

[35] In the premises, the appeal against sentence stands to fail.

[36] I now turn to the question of sentence. The court below found no substantial and compelling reasons to deviate from the prescribed minimum sentence for robbery with aggravating circumstances and imposed a sentence of 16 years imprisonment respectively for the appellants.

[37] The appellants' personal circumstances were placed before the court *a quo.* The first Appellant was 25 years old at the time of sentencing, he is single, he has no children, was unemployed, lived with his parents, had a diploma in office assistance, was a first time offender and had been in custody for almost six months. The second appellant was 20 years old at the time of the incident, there was no loss, the vehicle was recovered immediately, the complainant sustained no injuries and the second appellant had been in custody for 5 months.

[38] In assessing whether substantial and compelling circumstances exist the Court is guided by the approach laid down by the Supreme Court of Appeal in ***SV Malgas 2001 (1)(SACR) 469 (SCA)***. In assessing all of the circumstances viz the crime was committed in an organized manner. There was premeditation to take the Volkswagen to Soweto. Firearms were wielded to threaten the complainant. The complainant was assaulted. The appellants showed no remorse for their actions and did not take the court into their confidence. It is because of these aggravating factors that the court found it appropriate to impose a sentence higher than the prescribed minimum sentence.

[39] Accordingly I am of the view that the Court a quo correctly found that the prescribed minimum sentence of 15 years was disproportionate to the offense and that the aggravating factors justify the imposition of a higher sentence. I align myself with the reasoning of the court *a quo.* The appeal against sentence stands to be dismissed.

[40] In the result, I propose that the following order be made:

1. The Appeal against both conviction and sentence is dismissed.

2. The conviction for robbery with aggravating circumstances in respect of both accused is confirmed.

3. The 16 years imprisonment sentence in respect of each accused person is confirmed.

T MOOSA
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered

MODIBA J
JUDGE OF THE HIGH COURT

COUNSEL/LEGAL REPRESENTATIVE FOR THE APPELLANTS:

Adv. M Mzamane - Johannesburg Justice Centre - first Appellant
Attorney SW Van Der Merwe – second Appellant

COUNSEL/LEGAL REPRESENTATIVE FOR THE RESPONDENT:

Adv. P Nel – National Prosecuting Authority Innes Chambers

DATE/S OF HEARING: **11 August 2016**

DATE OF JUDGMENT: **6 September 2016**