REPUBLIC OF SOUTH AFRICA

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

CASE NO: A353/2017

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

.....
SIGNATURE

5/3/2021
.....
DATE

In the matter between:

SHABANGU, MISHACK MBULWO First Appellant

SHELEMBE, MBULENI Second Appellant

and

THE STATE Respondent

JUDGMENT

Delivered: *By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered. The date for hand-down is deemed to be 05 March 2021.*

A. INTRODUCTION

[1] The first and second appellants were arraigned and appeared in the Regional Magistrates Court held in Alexandra and faced the following charges.

(a) Count 1: Robbery with aggravating circumstances in terms of section 1 of the Criminal Procedure Act 51 of 1977 ("CPA") read with the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997 ("CLAA").

(b) Count 2: Kidnapping.

(c) Count 3: Robbery with aggravating circumstances in terms of section 1 of the CPA read with section 51 of the CLAA.

(d) Count 4: Kidnapping.

(e) Count 5: contravention of section 4(1) (a)) of the Firearms Control Act 60 of 2000 ("FCA") read with section 51 (2) of the CLAA.

(f) Count 6: contravention of section 90 of the FCA.

[2] Counts 1 and 2 related to the robbery and kidnapping on 1st May 2015 where Sipho Malese was robbed of his VW Golf 7 GTI motor car ("VW Golf") and deprived of his freedom of movement.

[3] Counts 3 and 4 related to the robbery of Mr Mandla Nkomo and Mr Phineas Chipu who on 4th May 2015 were robbed of an Isuzu truck and its contents and deprived of their freedom of movement .

[4] Counts 5 and 6 related to the possession of an AK47 and ammunition during the execution of the robbery and the kidnappings in counts 3 and 4.

[5] Both appellants were found guilty of counts 1 to 4, with accused 2 also, in addition, being found guilty of counts 5 and 6. They were sentenced to an effective period of 20 years imprisonment on the 16th October 2017 by the Regional Magistrate's Court held in Alexandra, Johannesburg.

[6] On the 1st May 2015, Sipho Malese was returning to his home at around 3.30 in the morning. He was approached by three men armed with a firearm and they forced him into his VW Golf motor car and made him sit in the back seat where he was ordered to lie down and face downwards. The three robbers drove away with him. After being tied up with his shoelaces, he was released in the veld in Eesterus, east of Pretoria. The robbers left with his motor car. He identified his recovered motor car on the 6th May 2015.

[7] Mandla Nkomo and Phineas Chipu were lawfully in possession of an Isuzu delivery truck containing Samsung products during the morning of the 4th of May 2015. They were stopped at Glen Austin by what appeared to be the metro police officers, who then robbed them of the Isuzu truck and its contents. The robbers used a BMW and the VW Golf which was robbed from Malese in the execution of the Isuzu truck robbery.

[8] Nkomo was forced into the BMW and Chipu into the VW Golf and they were both ordered to lie down at the back seat of each vehicle. Nkomo was released from the BMW by the armed robbers at around 13h00 that afternoon in Olievenhoutbosch, Midrand.

[9] The VW Golf was spotted by law enforcement officers on the N3 route and they gave chase. The VW Golf had four occupants including Chipu, the other three

were robbers.

[10] During the chase, the VW Golf came to a standstill after colliding with a palisade fence at a construction site in Linbro Park. The three robbers alighted from the VW Golf and fled on foot to evade arrest. Chipu remained in the VW Golf and it should be stated that he had lied down as ordered during his ordeal.

[11] One of the robbers who alighted from the VW Golf was in possession of an AK 47 assault automatic rifle described in counts 5 and 6 to the charge sheet.

[12] The AK47 rifle was recovered in the vicinity of the VW Golf by Daniel van Heerden, one of the metro police officers who were in hot pursuit of the VW Golf.

[13] All the victims of the two robberies were not able to identify the robbers. The appellants were convicted on the evidence of two witnesses who each linked each appellant to the charges.

B. THE ISSUE FOR DETERMINATION

[14] The only issue for determination is whether the State had proven its case beyond a reasonable doubt to sustain the convictions.

C. SUBMISSIONS ON BEHALF OF THE APPELLANTS

[15] Counsel on behalf of the first appellant submitted that this appeal raises six important issues of law on merits, namely:

(a) The single witness

(b) Admissibility of a confessions/s admissions;

(c) The requirement that the trial be fair

(d) Discharge at the end of the state's case in terms of section 17 of

the CPA;

(e) Bail pending appeal and

(f) The presumption of innocence

These six issues will be dealt with below but before we deal with them, we need to summarize the evidence of each witness.

[16] It has to be stated that when Chipu and Nkomo were robbed and kidnapped, the alleged robbers did not conceal their faces. Despite this fact, Chipu and Nkomo were not able, as already stated before, to identify the appellants on two identification parades held. This is understandable as they were ordered to lie down and not to look up when they were both sandwiched at the back seat of each car.

[17] The conviction of the appellants was based on circumstantial evidence.

D. EVIDENCE

[18] The State called Sipho Malese who testified about the robbery and kidnapping that took place on 1 May 2015 at about 3h30 in the morning. He was not able to identify the robbers. He was, however, called by the police to identify his VW Golf on the 6th May 2015. His car was crashed by the robbers during the police chase. He was not cross-examined because when he was robbed at gunpoint and kidnapped he was placed at the back seat of his car and ordered not to look up by his assailants. He could not identify the assailants. His account of the events as they unfolded was unchallenged.

[19] When Chipu testified, he also gave an account of how he was robbed of the truck and its contents and how he was ordered into the car and instructed not

to look up. When the chase happened, he was still told not to look up by the three assailants. He was able to remember that three assailants ran out of the VW Golf after the crash. He remained in the car and later the police returned to the car with one of the alleged assailants who had been shot, namely the first appellant. Chipu was also arrested. He could not identify any of his assailants. His evidence was also not disputed. The truck was eventually recovered.

[20] Mandla Nkomo, the driver of the truck, who was in the company of Chipu was the third State witness to testify. He testified in respect of count 3 and 4 that on the 4th May 2015 at about 9h00-10h00, when he was driving an Isuzu delivery truck, he was stopped by what appeared to be metro police and robbed at gunpoint of his truck. There were two cars involved in the robbery. The robbers used the JMPD uniforms and after rifles were pointed at him, he was ordered to lay down on the ground. He was forced to drive the truck and they came across a VW Golf 7. He was taken into a grey BMW and still ordered not to look up. He was driven around for a long time. Eventually, he was dropped in the veld next to Olievenhoutbosch. The truck was later recovered from another location.

[21] The fourth witness to testify was Daniel van Heerden. He is an employee of the Ekurhuleni Metro Police, High Chase Unit. On the morning of the robbery, he was called by his colleague, Officer Jacob for backup at R21 Olifantsfontein. They had information about the BMW that was involved in a robbery. He heard police sirens and saw a SWAT motor vehicle came past. It was Officer Schultz who was in pursuit of a white VW Golf. That is when Officer van Heerden also joined the chase in pursuit of the VW Golf which was travelling at a high speed.

[22] Van Heerden testified that as they gave chase, the VW Golf drove into a fence

in Linbro Park. Three occupants jumped out of the car and started running away. He chased one who at the time was wearing a black t-shirt and blue jeans. He testified that the robber crossed the road and he saw him throw away a rifle into the bush. He estimated that he was 20 meters away. He then ordered the robber to stop and when the robber complied, he proceeded to handcuff him. This was the second appellant. He walked him to the bushes where he had seen him throw away a rifle moments earlier and found it to be an AK47. At first, he could not see him because of a building that was between them but when he re-emerged, the second appellant still had a firearm in his possession, an AK47.

[23] Three individuals who alighted from the vehicle and ran away were arrested, this included the State witness Chipu. Van Heerden could not identify the driver of the white VW Golf. Under cross-examination, Van Heerden stated that Schultz was the leader of the chasing police cars. He described how he got to the other side of the fence. Van Heerden conceded that he lost sight of the second appellant but stated that when he re-appeared, he still had a firearm. It was put to the witness in his evidence in chief that he stated that he saw the second appellant throw away an AK47 rifle into the bushes. He conceded to this. It is not in dispute that the firearm was recovered in the bush, about 10 metres away from where Van Heerden was. Van Heerden was challenged that the arrest did not take place where he said it did but that the witness placed the rifle in the bushes intending to frame the second appellant and this was denied.

[24] The fifth State witness to testify was Mr Robert Schultz. He testified that he was part of the SWAT team. They were on the lookout for a white VW Golf, a BMW, and a white Ford Fiesta with no number plates and a truck which were involved

in a robbery. He testified that on the morning the robbery had taken place the same white VW Golf was spotted and it indicated to turn left on the R101 road, that is, Old Johannesburg road before Alexandra. At one stage, the VW Golf overtook another car on the barrier line.

[25] He further testified that as the white VW Golf was picking up speed he tested whether it was registered on the NATIS system. The results were negative which meant that the number plates were false. They continued to pursue the vehicle at high speed with sirens and blue lights on. He realised that the white VW Golf was the same vehicle that had been robbed three days earlier at Moretele, Hammanskraal.

[26] The VW Golf lost control and collided with a fence in Linbro Park. Three men jumped out of the vehicle and one remained behind in the car. When he approached the car, he found that one man was lying down in the back seat. He identifies the witness as Chipu, the State witness. The other suspects ran away, two to the far right, one t the bush area. He searched Chipu who told him he was the truck driver. During that time Schultz heard gunshots being fired. Officer Maleka, one of his colleagues brought one of the suspects to the motor vehicle and went back to look for the other suspect. The first appellant was brought back by Officer Maleka and had been shot. Schultz told the trial Court that the first appellant asked him why the driver of the truck was not arrested and according to Schultz, he said this freely and voluntarily. Schultz asked the first appellant why and the response was that the robbery was a handover. He said the truck driver handed the truck over and that it was not a hijacking. This was denied by the first appellant. Schultz did not know who arrested the second appellant.

[27] Bongani Maleka testified as to the sixth State witness. He testified that he was in a marked metro police vehicle and uniform when the incident took place. He corroborated the evidence of the chase of a white VW Golf. The VW Golf crashed into a fence and three suspects jumped out of the car and he chased after them. He testified that the second appellant had a rifle in a bag which he had in his possession. He testified that he fired a shot at the first appellant who then fell. He ran to him and proceeded to handcuff him. The first appellant was taken back to Schultz. Maleka went back to look for the second appellant. At this stage it not likely that this witness did not lose sight of the second appellant as he made his way back to make a handover of the first appellant to Schultz. The trial Court correctly accepted the proposition by Ms Mpeke on behalf of the second appellant that he lost sight of the second appellant.

[28] Maleka denied the first appellant's version that he was not in the car. He also denied that the first appellant was a job seeker at a construction site. He confirmed that the clothing the first appellant had on was the same as in the photos under cross-examination. Maleka revealed that the first appellant had a plastic bag that contained muti, a balaclava, and cell phones. Maleka denied that there was a lunch box in the plastic bag.

[29] Moela Makwa then testified as a photographer who compiled a report on the firearm and the ammunition which was handed in. His evidence was not disputed and the State closed its case.

[30] The appellants applied to be discharged at the end of the State’s case. The application was refused.

[31] Having not offered a plea explanation and having exercised their right to remain silent, the appellants then testified in their defence. Both appellants denied any

role in robberies.

[32] In his testimony, the first appellant denied he knew anything about the VW Golf that was stolen. He also denied the kidnapping charges. He also denied that he had anything to do with the robbery of the Isuzu truck and its contents. He furthermore denied that he kidnapped Nkomo and Chipu.

[33] He further testified that he lives in Orchards, Pretoria. On the day he was shot, he was a jobseeker at the construction site. He testified that there was a lot of dust and he could not see clearly what was happening and that he only heard shots being fired randomly and he was also shot even though he had raised his arms to surrender. He did not know why he was shot.

[34] In his testimony under cross-examination by the State, he said he had visited the construction site to look for work as a bricklayer and tiler. Although he was a panel beater jobs were too hard to come by as his customers did not have the money to pay him. Furthermore, he admitted that in relation to Orchards, Pretoria, Moretele, Hammanskraal was not that far as compared to a distance from Johannesburg CBD to Pretoria.

[35] The first appellant testified that he went to the construction site due to information provided to him by one Mr Mahlangu and Sipho. He did not know Sipho's surname. Mahlangu was from Vlaklaagte, Kwa-Nadebele and Sipho was from Moloto. He intended to call the two witnesses. As a consequence, the case was remanded to 28 September 2017. When the matter resumed, the first appellant, through his counsel Mr Bapela, indicated that he had a death certificate for Mr Mahlangu who had died of natural causes. The other witness Sipho, so said counsel for the first appellant at trial, was working somewhere in Burgersfort and could not attend court. No witnesses were called to corroborate

the version of the first appellant.

[36] The first appellant also denied any knowledge of the AK47 rifles. He denied that his fingerprints were found on the VW Golf and then he closed his case.

[37] The second appellant also testified. He said that prior to his arrest he was not working. He testified that he was staying in Germiston and that the arrest took place in Linbro Park, next to Alexandra. He also said he was looking for a job to mix cement at a construction site. He arrived in Linbro Park at around 10h00 in the morning because the area has many factories. He lives in Germiston but upon being confronted by the State in cross-examination about an address he gave to the police in Joubert Park, Johannesburg, he conceded that he gave three addresses as the police were not willing to accept his Germiston address.

[38] On the morning of his arrest, he was looking for a job when he heard gunshots and saw people running. He also started running and was ordered by the police to stop. He complied and was arrested and taken to a certain spot where he was shown a gun which he was ordered to pick up. He complied and was told he was under arrest for a robbery that took place on that day. He did not see the first appellant's arrest. He only saw him for the first time at the police station. On the day of his arrest, he had not spoken to anyone about the job. The defence closed its case.

[39] After considering the evidence the trial Court convicted both the first and second appellants for the robberies and kidnappings and sentenced them to effective 20 years imprisonment term.

[40] At the hearing of this appeal, Mr Shapiro on behalf of the first appellant was critical of Mr Bapela's handling of the first appellants' defence. He pointed out, after being allowed by this court to file supplementary heads of argument that

Mr Bapela did not do a good job of representing the first appellant at trial.

[41] I disagree with Mr Shapiro. The record shows that at the instruction of the first appellant, Mr Bapela brought two recusal applications against the presiding Magistrate. These applications were both refused and reasons provided for the refusals. The record of the trial shows Mr. Bapela not only acting in the interests of the first appellant and even protesting when he needed to. For instance when his client told the court he had two witnesses to call Bapela protested at the suggestion of securing the witnesses at one day's notice and eventually, he secured a two weeks adjournment.

[42] Mr Shapiro furthermore argued that the trial court misdirected itself by not correctly applying the cautionary rule on the single witness evidence being Mr Sipho Maleka, whose evidence led to the conviction of the first appellant.

[43] The further criticism levelled against the court *a quo* was the evidence of Schultz that the first appellant told him that Chipu was also involved in the robbery as he has to handover the truck. The trial Court correctly assessed this admission that it was made freely and voluntarily. In *S v Lange*[1], in dealing with the admission of a statement made freely and voluntarily it was held as follows: "*No grounds exist for properly excluding evidence, which serves … the purpose of corroborating and implicating the … appellant".*

[44] Counsel for the respondent conceded that it is accepted that Schultz should have, after the first appellant's initial admission, warned the first appellant of his rights. Counsel for the first appellant contended that the first appellant's rights were infringed by the presiding officer during cross-examination when the presiding officer said that he arrested him after that the admission statement

[1] [1997] ZASCA 74 at para 10

was made. He contends that such interference is a material misdirection.

[45] Mr Shapiro furthermore criticises Mr Bapela and avers that he had not properly consulted with the first appellant. I do not agree with this criticism against Mr Bapela. I am of the view that he did the best he could to represent the first appellant during the trial. It is not proper for the appeal Court to involve itself with the strategy that the State or Defence ought to have adopted to prove or disprove the case. The real issue in my view should be whether based on the evidence before it, the court *a quo* properly considered the evidence before it comes to the conclusion to convict.

I find no basis for the proposition that the trial was unfair. If, however, I am incorrect for holding this view, the record shows that court *a quo*, did analyse the evidence and confirmed that there were contradictions between the evidence of Maleka and Van Heerden with regards to the count on possession of a firearm.

[46] Counsel for the appellant furthermore submitted that Chipu lied to Schultz when he said he was the driver. It is common cause that Chipu was a truck driver's assistant. It is not appropriate in my view, to argue at appeal that Schultz fabricated his evidence to corroborate that the first appellant was the one who crashed the vehicle. In fact, the record shows that the first appellant denied that he drove the crashed VW Golf. The only inference to be drawn is that when the first appellant purportedly told Schultz that the hijacking of the truck was a "handover" by Chipu, he was somewhat linked to the crashed VW Golf.

[47] Counsel for the first appellant furthermore submitted that the learned Magistrate was biased against the first appellant. He referred to various pieces of the interjections by the court during the trial which he submits point towards bias. It

should be recalled that both appellants were represented by the advocates who are admitted to practice law.

[48] In dealing with the allegations of bias, Harms JA in *S v Halgryn*[2] said the following:

> "*The constitutional right to counsel must be real and not illusory and an accused has, in principle, the right to proper, effective, or competent defence. Cf S v Majola 1982 (1) SA (A) 133 D-E. Whether a defence was so incompetent that it made the trial unfair is once again a factual question that does not depend upon a degree of ex post facto dissatisfaction of the litigant. Convicted persons are seldom satisfied with the performance of their defence counsel. The assessment must be objective, usually, if not invariably, without the benefit of hindsight. Cf S v Louw 1990 (3) 116 (A) 125 D-E. The Court must place itself in the shoes of the defence counsel, bearing in mind that the prime responsibility on conducting the case is that counsel who has to make decisions, often with little to reflect (CF R v Matonis 1958 (2) SA 450 (A) 456 C) as explained by S v Louw supra. The failure to take certain basic steps, such as failing to consult, stands on a different footing from failure to cross-examine effectively or the decision to call or not to call a particular witness. It is relatively easy to determine whether the right to Counsel was rendered nugatory in the former type of case but in the latter instance, where the counsel's discretion is involved, the scope of the complaint is limited. As the US Supreme Court noted in Strickland v Washington 466 US 688 at 689 " Judicial scrutiny of counsel*

[2] 2002 (2) SACR 211 (SCA) at para 14

performance must be highlighted deferential. It is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defence after it has been unsuccessful to conclude that a particular act or omission of counsel was unreasonable". Not everyone is a Clarence Darrow or F. E. Smith and not every trial has to generate into an OJ Simpson trial."

[49] The contention about the incompetence of Mr Bapela is the first appellant's submission that he failed to take the question of whether the first appellant was warned of his rights prior to making the admissions as stated by Schultz. The record of the proceedings at the Court *a quo* shows that the rights of the first appellant were read to him after making the admission. In my respectful view, this cannot be the basis for holding that the trial at court *a quo* was unfair. Counsel for the first appellant had clearly consulted and this is the reason he was able to cross-examine all the State witnesses. Therefore there is no evidence to support the contention that the trial was unfair based on the attack of how Bapela conducted the defence of the first appellant.

[50] Regarding the alleged bias of the presiding officer at the trial court, the Constitutional Court held and commented on what the approach of the Court hearing an appeal should be in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[3] as follows:

"The question is whether a reasonable, objective and informed person

[3] 1999(4) SA 147 CC at 177 B-E

would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case that is a mind open to persuasion by the evidence and submissions of counsel. The reasonableness of the apprehension must be assessed in light of the oath of office taken by the Judges to administer justice without fear or favour, and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or pre-dispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental pre-requisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reason, was not or will not be impartial."

[51] The first appellant has raised in detail what he believed to be signs of lack of impartiality. The role of a judicial officer is to ensure that the parties' cases are presented fully and fairly and the truth is established.

[52] In *S v May* [4]Lewis JA had the following to say on the role of presiding officer in a trial:

"*Even if the magistrate did play a more active role than is usual for a judicial officer, in itself that is not unfair. Judicial officers are not umpires. Their role is to ensure that the parties' cases are presented fully and fairly and that the truth is established. They are not required to be*

[4] [2005] 4 All SA 334

passive observers in a trial; they are required to ensure fairness and justice, and if that requires intervention then it is fully justifiable. It is only when prejudice is caused to an accused that intervention will become an irregularity."

[53] In *S v Rall* the Court held that the following principles should determine whether the judicial intervention goes too far.

(a) The trial must be so conducted that the judicial officer's open-mindedness, his impartiality, and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused. The Judge should consequently refrain from questioning any witnesses or accused in a way that, because of its frequency, length, timing, form, tone, contents, or otherwise, conveys or is likely to convey the opposite impression.

(b) A Judge should refrain from indulging in questioning witnesses or accused in such a way or to such an extent that it may preclude him from detachedly and objectively appreciating upon the issues being fought out before him by the litigants. As Lord Greene MR observed in *Yuill v Yuill* (1945) 1 All ER 183 (CA) at 189B, if he does indulge in such questioning:

"he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict. Unconsciously, he deprives himself of the advantage of calm and dispassionate observation."

(c) A judicial officer should refrain from questioning an accused or a witness in a way that intimidates or disconcerts or unduly influences the equality or nature of his replies.

[54] It is also trite that where the judicial officer breaches any of the injunctions one must still ask whether the irregularity is such as to cause prejudice. I find no evidence to demonstrate the alleged unfairness on the part of the presiding officer in the court *a quo* that led to prejudice of the first appellant. The presiding officer interjected both on the State and the defence witnesses in order to clarify issues. As a consequence, I hold the view that the presiding officer was not biased against the first appellant.

[55] The first appellant contends, with the benefit of hindsight *ex post facto* that the application in terms of section 174 of the CPA ought to have been granted. The legal principles governing this application have been restated many times.

[56] It is trite law that the guiding principle has always been whether after the closing of the State's case there exists evidence on which a reasonable man, acting reasonably would convict. If no such evidence exists, then the application must be granted. The Court has discretion in considering the application and that discretion must be exercised judicially.

[57] In *R v Mall and Others*[5] Caney J held that:

> *"it would not be a judicial exercise of discretion to refuse to discharge an accused person if the case against him depended sorely upon the evidence of an accomplice in the circumstances in which corroboration*

[5] 1960 (2)SA 340 (N) at 342

was required, but that corroboration was lacking."

In the present appeal, the conviction did not depend on the evidence of the first appellant or his accomplice but depended on the evidence of Maleka and Van Heerden instead.

[58] It is also trite that the accused person's right to remain silent and not to incriminate himself is guaranteed in the Constitution. In *S v Mathebula* [6] Claasen J held as follows:

"… *must ask himself how the Constitution had influenced the exercise of discretion which section 174 affords a presiding officer the discretion."*

If at the end of the State's case there is no evidence tendered on which a reasonable man can convict, the Court cannot refuse a section 174 application with the hope that the accused person would incriminate himself if the trial proceeds.

[59] There is no evidence on record from the court *a quo* that the conviction of the first appellant was as a result of his testimony after the application for discharge in terms of section 174 was refused. I, therefore, hold the view that the refusal by the presiding officer in court a quo to discharge the first appellant is irrelevant to this appeal.

[60] The second appellant contends that the court *a quo* misdirected itself by holding that the State proved beyond reasonable doubt that he was involved in both robberies. The second appellant was arrested by Van Heerden who testified

[6] 1997(1) SACR 10 (W)

that he saw him throw a rifle into the bushes as he was giving chase. Van Heerden admitted that he lost sight of the second appellant at one stage but that when he re-emerged he had the rifle in his hand which he threw down after being ordered to stop. The witness conceded that there were building in the area. He saw the second witness jump the fence.

[61] The second appellant contends that due to the buildings in the area and the fact that Van Heerden did lose sight of him, the trial court misdirected itself by not seriously considering this part of the evidence. I do not agree with the submission made. The trial Court considered this evidence and acknowledged the discrepancies between Maleka's evidence that the rifle was in the bag and Van Heerden's evidence which said the rifle was thrown down by the second appellant. The learned Magistrate ascribed these discrepancies to the volatility of the chase and the situation. The trial court held that the discrepancies were indicative that Maleka and Van Heerden were not coached on a version to say at court. After evaluating the totality of the evidence, the court concluded that there was enough circumstantial evidence proving the guilt of the second appellant as charged beyond a reasonable doubt.

[62] In leading their evidence, the accused person is not required to prove his or herinnocence. In *Schackell v S*[7] Brand AJA held as follows:

> "*It is a trite principle that in criminal proceedings… a court does not have to be convinced that every detail of an accused version is true. If the accused's version is reasonable possibly true in substance the Court must decide on the acceptance of that version. Of course, it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected based on inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.*"

[7] 2001 (4) All SA 279 (SCA) at para 30

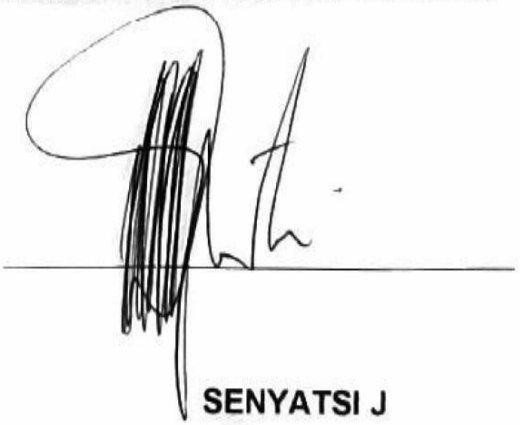
[63] In regard to the convictions, the trial court considered the circumstantial evidence after evaluation thereof and concluded that based on recent possession of the VW Golf car, it was satisfied that both appellants were involved in the two robberies.

[64] Based on the record of the proceedings and the evidence the court a quo considered, I find no misdirection on the facts and the law. As a consequence there is no basis to interfere with the judgment of the trial Court on conviction and sentence.

ORDER:

[65] Therefore the following order is made:

(a) The appeal against the conviction and sentence is dismissed

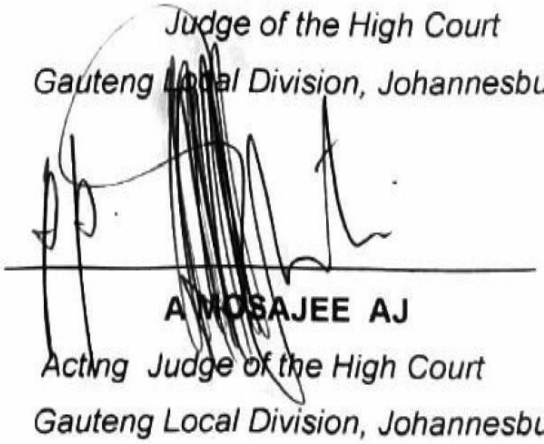


SENYATSI J

Judge of the High Court

Gauteng Local Division, Johannesburg

I concur,



A MOSAJEE AJ

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

Date of appeal: 29 October 2020

Date appeal judgment delivered: 05 March 2021

First and Second Appellants' Counsel: Mr. P. Shapiro

Instructed by: S Shapiro Attorneys

Respondent's Counsel: Adv. SH Ruben

Instructed by: Director Public Prosecutions, Johannesburg