Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case number: A329/2019

Before: Mr Justice Binns-Ward
and
Mr Acting Justice Hockey

Hearing: Appeal disposed of in terms s 19(a)
of the Superior Courts Act 10 of 2013.

Judgment: 31 August 2020

In the matter between:

JACO LOTTERING Appellant

and

THE STATE Respondent

JUDGMENT
(Delivered by email to the parties' legal representatives and release to SAFLII)

BINNS-WARD J, (HOCKEY AJ concurring):

[1] In this matter, the appellant, who was accused no. 1 in the trial, appeals against his conviction on a charge of armed robbery. The offence was allegedly committed sometime between 05h00 and 05h30 on Sunday, 27 July 2014. The prescribed minimum sentence in

respect of the offence of which the appellant was convicted is 15 years' imprisonment, but the regional magistrate found that there were substantial and compelling circumstances permitting a deviation from the prescribed punishment, and the appellant was sentenced to 12 years' imprisonment. The appeal, which comes to this court with leave granted by the trial court, is also against the sentence. With consent by the parties' legal representatives, the appeal was adjudicated on the basis of the court's consideration of the record of the trial proceedings and the written heads of argument without an oral hearing, as provided for in s 19(a) of the Superior Courts Act 10 of 2013.

[2] Accused no. 2 at the trial (Sergeant Koikanyang) was a fellow policeman who, it was common cause, had been on patrol with the appellant at the relevant time. The appellant's co-accused was acquitted because he could not be identified by the state witnesses as having been at the scene of the robbery or as having been one of the two perpetrators of the attack on the complainant and his brother in the course of which the robbery was committed.

[3] Much of the material evidence was not in dispute. The validity of the conviction depends on whether the appellant was reliably identified as the perpetrator. The complainant was a single witness as to identifying his attacker. His evidence was not given in a vacuum, however. It was susceptible to evaluation in the context established by the other evidence adduced at the trial. That is significant because the courts traditionally approach evidence on identification with caution, mindful of the vulnerability of human powers of observation to honest mistakenness. It was for that reason that Holmes JA, in *S v Mthetwa* 1972 (3) SA 766 (A) at 768A-C, made the point that it is not enough for the identifying witness to be honest. The reliability of his observation must also be tested. The learned judge of appeal listed a non-exhaustive range of factors that could be relevant, depending on the circumstances of the particular case, such as the witness's opportunity for observation, the accused's dress, voice, gait, build, corroboration, 'and, of course, the evidence by and on behalf of the accused'. The judge summed up his remarks by saying '*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; see cases such as R v Masemang, 1950 (2) SA 488 (A.D.); R v Dladla and Others, 1962 (1) SA 307 (A.D.) at p. 310C; S v Mehlape, 1963 (2) SA 29 (A.D).*'

[4] As to the consideration that the primarily inculpatory evidence against the appellant was that of a single witness, the applicable principles are clear. The competence of

conviction on the basis of the satisfactory evidence of a single witness is expressly provided for by s 208 of the Criminal Procedure Act 51 of 1977. Referring to that provision, Diemont JA held in *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G, in a passage that has consistently been endorsed as definitive on the issue, '*There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness ... . The trial Judge will weigh his evidence, will consider its merits and demerits, and having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told.*'

[5] It is with the aforementioned principles in view that we have approached the adjudication of this appeal; mindful also, that an appellate court should not lightly interfere with a trial court's findings on matters of fact and credibility, and should intervene only if it is convinced on its own consideration of the record that they were wrong. In this matter, somewhat unusually, we must also consider whether the evidence heard by the magistrate after the appellant had been convicted and sentenced gave rise, in the context of all of the evidence, to a reasonable doubt whether the appellant was guilty.

[6] The uncontested evidence of the complainant was that he had gone to an ATM in the town of Saldanha before 05h00 to draw money to give to his daughter who was due to travel somewhere later that day. He was accompanied by his brother. They went to the ATM before sunrise because the transport that his daughter was due to take was scheduled to leave early, and his attempt to draw money on the previous day had been unsuccessful because the payment deposit he had been expecting did not yet reflect in his account. The copy of the statement of account by the complainant's bank that was put in evidence at the trial bore out his evidence that he had made two withdrawals one after the other, and that a total of R2900 had been withdrawn from his account just before 5 o'clock on the morning in question.

[7] It was common ground that shortly after the complainant had made the withdrawals from his bank account, and while he and his brother were walking back towards the local township, they encountered a marked police vehicle. The complainant and his brother both testified that the occupants of the police van had spoken to them and had asked whether they were not aware that there were persons in the vicinity who had been stopping people and robbing them. They also testified that they had asked the policemen if they could give them a lift because it had been raining. Their evidence in those respects was not disputed.

[8] The appellant and his co-accused admitted that they had been in the police vehicle, and that they had spoken to the complainant and his brother. That there had been mention of robberies being committed in the vicinity was confirmed in the appellant's pocketbook. The accused also conceded that they had been asked for a lift by the complainant and his brother. According to the state's version, the appellant's co-accused had demanded money in return for agreeing to assist the complainant and his brother with transport; whilst the appellant maintained that the complainant and his companion were informed that they could not be given a lift because the police were engaged with their duties.

[9] There was also a conflict between the evidence of the prosecution witnesses and the defence witnesses as to who had been the driver of the police vehicle at the time. The state witnesses testified that accused 2 had been the driver, and that the appellant had been seated in the front passenger seat. The complainant testified that the appellant had emerged from the vehicle to speak him, while accused 2 had remained seated behind the steering wheel. He described how the latter had wound down his side window to speak to the him when the question of a lift was being discussed, and that it was from that position that accused 2 had asked for R20 to give them a lift; and had declined their offer of R10, which was the only cash in low denominations that he and his brother had on them at the time.

[10] There is no possibility that the state witnesses might have been confusing the respective identities of the two policemen at the place where their conversation was had at the police van. They identified the appellant as a coloured or brown person who was conspicuous by the Springbok jacket that he was wearing over his police uniform, while accused 2 was identified as a black African. These descriptions corresponded to the actual racial identities of the respective accused, and it was formally admitted at the trial that the appellant had been wearing a Springbok jacket at the relevant time. The context in which the formal admission was made revealed that if it had not been forthcoming, the state would have called a certain Captain van Wyk to confirm what the appellant had been wearing that morning. The complainant also testified that the appellant had been wearing spectacles, which was not contested.

[11] The magistrate accepted the state witnesses' version of their exchange with the police officers at the police vehicle, and there is no basis upon which we can fault him in that regard. Their evidence reads convincingly on the record, and it contains much detail that would be inconsistent with a mistaken or fabricated version. There is no conceivable reason

why they should have insisted that the appellant had been a passenger in the vehicle rather than the driver if that had not been the case. The identity of the driver was a neutral factor as far as the merits of their complaint were concerned. What was particularly striking, however, was that the complainant said that although accused 2 had been the driver of the vehicle at the time of their roadside encounter, it was *the appellant* who had been behind the wheel when he next saw the vehicle when it was driven up to the police station a short time later after he and his brother had gone there to report the robbery. The fact that he noticed that there had been a change in drivers makes it most unlikely, in my view, that he was mistaken when he said that accused 2 had been driving the vehicle earlier. If there had not been a change of drivers, there would have been nothing for the complainant to notice and remark upon.

[12] A further factor that supports the truthfulness and candour of the state witnesses is the fact that the complainant admitted that he had not noticed that there had been a third person in the police vehicle at the time, but that his brother had remarked on that later. It was common ground that the complainant's wife had been seated in the rear of the vehicle at the time. The complainant's candid admission that he had not noticed her is not the sort of evidence that a witness shy of the truth or contriving to portray an enhanced impression of his powers of observation would give. When the complainant was recalled to give further evidence in circumstances that I shall describe presently, he clarified that he had noticed someone sitting on the rear seat, but that he had not realised that the person was a woman until his brother had told him as much later.

[13] The most significant import of the quite detailed evidence adduced concerning the roadside exchange between the state witnesses and the accused is that it establishes that the complainant and his brother had an ample opportunity to take in the appearance of the accused. The uncontested evidence established that it was certainly sufficient to qualify them to identify them if they were to see them again shortly afterwards. In particular, they were able to differentiate between the two policemen by their racial characteristics, their dress and that one of them was bespectacled. They were also able to point to a saliently distinguishing feature about the appellant; viz. that he was wearing a Springbok jacket, by any means something very out of the ordinary about a uniform branch police officer on duty.

[14] It is also significant that the evidence was to the effect that the complainant had informed the police details that he was on his way home after withdrawing money at the

ATM. This evidence was not only unchallenged, but it is also in accordance with the inherent probabilities. It very likely in the circumstances that the police would have enquired of the complainant and his brother why they were on the road at that early hour. The answer they were given would have provided them with the information that the two men, or at least one of them, was carrying a quantity of cash. As they had been asked for a lift, the policemen would also know where the men were headed and, with their local knowledge, would probably be aware of the route that a pedestrian would take to reach that destination.

[15] The uncontested evidence was that when the complainant and his brother proceeded on their way after their conversation with the police officers at the stationary police van, the police vehicle drove past them twice as they continued to walk along the road.

[16] It was after the complainant and his brother had left the formal roadway and taken a path or passageway through a bushy area that they were pounced upon by two men. It would appear that they were separately targeted by the two men. The complainant said he instantly recognised his assailant by the Springbok jacket he was wearing. He did not have the opportunity to identify the second assailant. His brother was also concerned, understandably, only with the individual who was attacking him. He was not able to identify his attacker, but he did have sufficient opportunity to note that his head was covered with a balaclava and that he was wearing police uniform trousers and boots. The brother's evidence, which frankly owned up to his inability to identify his assailant because of his attacker's facial disguise, corroborated the implication in the complainant's evidence that the visibility at the time had been sufficient for him to be able to make out the Springbok jacket. It was undoubtedly good enough for him to see the weapon with which his attacker was threatening him, and there can be little doubt that the intending robbers were counting on their victims' ability to see that they were armed.

[17] The evidence clearly established that the complainant believed that he had identified his assailant as the appellant because he and his brother proceeded directly from where they had been attacked to the police station, where they reported that they had been attacked by a policeman whom the complainant would be able to identify. The fact that the assailant had been identified as a policeman when the report was made is borne out by the immediate summoning of a senior police officer, Captain van Wyk, to come to the station to deal with the situation. It is evident from the appellant's own evidence (and that of his wife) that

Captain van Wyk must have arrived at the police station even before the appellant returned there with the police van after dropping off accused 2 at the latter's house.

[18] The complainant testified that he identified the appellant as his assailant to Captain van Wyk and a certain 'Metlakhulu'[1] at the police station. He said that Van Wyk had then taken the appellant into an office to speak with him.

[19] The appellant did not challenge this evidence, but when it came to his turn to testify he sought to make much of a contention that the complainant had failed to do anything to identify him when he came into the police station, whereas, so the appellant contended, if the complainant had been able to do so one might have expected him to have raised a hue and cry. The magistrate put to the appellant at the time that he should have put his conflicting version to the complainant in cross-examination. In this regard he reminded the appellant of the homily delivered at the beginning of the trial, when the magistrate had explained to the accused the importance of ensuring that their attorney was properly instructed to present their case and advised them of how they should draw to his attention their wish to tell their attorney anything at any stage during the course of the trial. It is evident on the record that accused no. 2, who was represented by the same attorney as the appellant, made frequent use of such opportunity during the hearing. It is also notable that notwithstanding the magistrate's pointed reference to the defence's failure to cross-examine the complainant on that aspect of his evidence, the appellant did not call either Van Wyk or 'Metlakhulu' to rebut the complainant's evidence that he had pointed out the appellant at the police station. It was also not put to the complainant or his brother that the appellant's wife could contest his claim to have identified the appellant to Van Wyk and 'Metlakhulu' at the police station. (I shall treat of the evidence of the appellant's wife, which was adduced in unusual circumstances, presently.)

[20] It was striking that the appellant said very little about the content of the conversation he had with Captain van Wyk. All he disclosed was that Van Wyk had told him that there had been a report that a robbery had occurred and that it had allegedly been perpetrated by police details and that the complainants had said they would be able to identify the culprits. It seems most unlikely that that is all that was said. The most obvious thing that the police would have asked the complainant and his brother was whether they could give any

[1] 'Metlakhulu' seems to be a misrendering of the name of one the police officers on duty at the police station at the time. The name is probably Mehlomakulu, but I shall use the spelling of the name that appears in the record.

identifying characteristics of the policemen they claimed to have been assaulted by. And it is most improbable if they had put that question, that the complainant would not have mentioned the Springbok jacket. It would have been evident to anyone present when the appellant returned to the police station that he matched that description. That seems to me the most likely reason why he would have been called into the office by Van Wyk.

[21] The appellant suggested that Van Wyk had actually put the idea of inculpating the appellant into the complainant's mind because, so the appellant testified, Van Wyk had wished 'to get rid of him'. The suggestion appeared to be that Van Wyk had persuaded the complainant that were he to identify the appellant the person who had robbed him it would assist his ability to obtain compensation for his stolen property from the state. This proposition, which was also not put to the complainant, strikes me as far-fetched.

[22] The appellant, albeit grudgingly, admitted to the magistrate that he had not told his attorney about it. It is most improbable that he would not have done so if there had been any truth to it because, in substance, it boiled down to an assertion that he had been framed at Van Wyk's instance. It is inconceivable that an accused person who believes that he is in the dock only because he has been framed would not inform his legal representative about that. But even if the appellant had reason for reservations about calling Van Wyk, he gave no reason not to call 'Metlakhulu'. There was, of course, no onus on him to prove his innocence, but his failure to lead apparently available evidence to rebut the evidence adduced against him was a factor that could legitimately be taken into account when the trial court weighed which version to prefer.

[23] That then was the evidence upon which the trial court convicted the appellant. I am unable to find any misdirection by the magistrate on the evidence led before him, and there is no reason for us to differ with his conclusion that it established beyond reasonable doubt that the appellant had been the person who had robbed the complainant of the R2 800 that was taken from his wallet when his pockets were rifled as he lay face down on the ground with a gun held to his head.

[24] After the appellant was convicted his attorney sought and was granted a postponement of the hearing to obtain a probation officer's report to be used in evidence in mitigation of sentence. When the trial resumed, the appellant was represented by a different attorney. After the appellant had been sentenced, his new legal representative presented an application for leave to appeal and at the same time applied, in terms of s 309B(5) of the

Criminal Procedure Act, for leave to adduce evidence from the appellant's wife, who had not been called as a witness during the trial. It appears that the prosecution had made the witness available to the defence before the commencement of the trial,[2] but that the appellant's attorney had chosen not to call her.

[25] Subsections (5) and (6) of s 309B provide as follows:

> (5) (a) An application for leave to appeal may be accompanied by an application to reduce further evidence (hereinafter referred to as an application for further evidence) relating to the conviction, sentence or order in respect of which the appeal is sought to be noted.
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> (b) An application for further evidence must be supported by an affidavit stating that-
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> (i) further evidence which would presumably be accepted as true , is available;
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> (ii) if accepted the evidence could reasonably lead to a different decision or order; and
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> (iii) there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial.
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> (c) The court granting an application for further evidence must-
>
> (i) received that evidence and further evidence rendered necessary thereby, including evidence in rebuttal called by the prosecutor and evidence called by the court; and
>
> (ii) record its findings or views with regard to that evidence, including the cogency and sufficiency of the evidence, and the demeanour and credibility of any witness.
>
> (6) Any evidence received under subsection (5) shall for the purposes of an appeal be deemed to be evidence taken or admitted at the trial in question.

[26] I am not aware of any reported judgment in which the provisions of s 309B(5) have been considered,[3] but it seems clear that they are intended to avoid, as far as possible, the disruption of appeal proceedings that sometimes occurred when appellants made application to the appellate court for the admission of new evidence. In many such cases, where the application was granted, the appellate court would set aside the conviction sentence and remit the matter to the trial court for the hearing of the additional evidence. The provision allows for the shortcutting of that laborious process.

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[2] In terms of s 195(1) of the Criminal Procedure Act, the appellant's wife was a competent, but not compellable, witness for the prosecution on the charge that he faced.

[3] The provision was originally introduced into the Act as s 309B(4) by the Criminal Procedure Amendment Act 76 of 1997, with effect from 28 May 1999, and then reintroduced with its current numbering when s 309B was substituted in terms of the Criminal Procedure Amendment Act 42 of 2003 consequent upon the declaration of constitutional invalidity in *S v Steyn* [2000] ZACC 24 (29 November 2000); 2001 (1) SACR 16(CC).

[27] The requirements prescribed in s 309B(5)(b) essentially replicate those that pertain in any application to a superior court to receive further evidence for the purpose of an appeal. See in the latter regard the commentary on s 19(b) and (c) of the Superior Courts Act in Van Loggerenberg, *Erasmus, Superior Court Practice* (Juta) vol 1 at A2-69 ff; and refer, for example, to the remarks of Holmes JA in one of the authorities cited there, *S v De Jager* 1965 (2) SA 612 (A), at 613A-D:

> 'This Court can, in a proper case, hear evidence on appeal; see *R v Carr*, 1949 (2) SA 693 (AD); but the usual course, if a sufficient case has been made out, is to set aside the conviction and sentence and send the case back for the hearing of the further evidence, as was done, for example, in *R v Mhlongo and Another*, 1935 AD 133. However, it is well settled that it is only in an exceptional case that the Court will adopt either of the foregoing courses. It is clearly not in the interests of the administration of justice that issues of fact, once judicially investigated and pronounced upon, should lightly be re-opened and amplified. And there is always the possibility, such is human frailty, that an accused, having seen where the shoe pinches, might tend to shape evidence to meet the difficulty. Accordingly, this Court has, over a series of decisions, worked out certain basic requirements. They have not always been formulated in the same words, but their tenor throughout has been to emphasise the Court's reluctance to re-open a trial. They may be summarised as follows:
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> (a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.
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> (b) There should be a prima facie likelihood of the truth of the evidence.
>
> (c) The evidence should be materially relevant to the outcome of the trial.
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> See *R v de Beer*, 1949 (3) SA 740 (AD) at p. 748; *R v Weimers and Others*, 1960 (3) SA 508 (AD) at pp. 514 - 5; *R v Madikane*, 1960 (4) SA 776 (AD) at p. 780; *R v Nkala*, 1964 (1) SA 493 (AD); and *S v Gert Stynder*, (1 October, 1964).
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> Non-fulfilment of any one of these requirements would ordinarily be fatal to the application, but every case must be decided on its particular merits, and there may be rare instances where, for some special reason, the Court will be more disposed to grant the relief; see *R v de Beer*, supra at p. 748. Such a case was *S v Nkala*, supra, where the accused's explanation was not such as would ordinarily be sufficient but it was accepted, not without some hesitation, in the special circumstance of that case.'

[28] In *R v Carr* supra, at p. 699, it was acknowledged (per Greenberg JA) that the considerations that would guide a court in respect of the admission of additional evidence when a case has gone on appeal in a civil matter might be not necessarily be the same in a criminal case. The learned judge of appeal proceeded '*Although a criminal procedure partakes largely of the quality of litigation, the element of investigation in the interests of justice is by no means absent. (Cf. Rex v Hepworth (1928 AD 265 at p. 277). But while it would be inadvisable to attempt even to outline the kinds of circumstances that the court*

might regard as so exceptional as to warrant the admission of further evidence in a criminal appeal, it must be emphasized that the inadequate presentation of the defence case at the trial will only in the rarest instances be remediable by the adoption of further evidence at the appeal stage. However serious the consequences may be to the party concerned of a refusal to permit such evidence to be led the due administration of justice would be greatly prejudiced if such permission were lightly granted'.

[29] The observation that inadequate presentation of the litigant's case at trial will only in the rarest instances be remediable by the adduction of further evidence at the appeal stage has been reiterated by the appeal court on many occasions. A recent instance was in *De Aguiar v Real People Housing (Pty) Ltd* 2011 (1) SA 16 (SCA) at para 11.

[30] The interests of finality in litigation, irrespective of whether its character is civil or criminal, is a weighty consideration. It is therefore important, in my view, that magistrates who are faced with applications in terms of s 309B(5) of the Criminal Procedure Act are mindful that the applications are brought at what might properly be termed 'the appeal stage', notwithstanding that they are brought to the trial court. This is because they are brought after the trial court has discharged its functions in respect of the conviction and sentencing of the accused and when it is beyond the magistrate's powers to revisit those determinations. The applications should therefore be adjudicated in accordance with the principles formulated in the long line of jurisprudence dealing with applications to adduce additional evidence on appeal. The jurisprudence emphasises the courts' reluctance to reopen litigation, underscores the premium placed on finality, and speaks to the sparing use of the power to permit additional evidence to be adduced. Such applications should therefore not be granted if there has been only token compliance with the requirements of s 309B(5)(b).

[31] In the current matter the appellant explained the failure to adduce his wife's evidence at the trial in the following terms in his supporting affidavit:

> '5. I hereby apply to the above Honourable Court for leave to adduce the evidence of a vital and material witness, namely Myran Odette Lottering, who was not called to testify during the trial phase of the case, same statement is attached "MOL1"
>
> 6. The aforesaid witness had made the statement to the investigating officer and the State regarding the event I am convicted of. Same statement was made available to my erstwhile attorneys by the State, namely Mr Smith.

7. I humbly submit that the further evidence would have the tendency which would be presumably accepted as true and is available to give viva voce evidence (sic).
8. I humbly submit that if the evidence is accepted, the evidence could reasonably lead the honorable (sic) court to a different decision.
9. The evidence was not produced at the close of the trial due to the fact that I trusted and verily believed at all relevant times that my attorney was well trained in the legal field and knew whether it was necessary to produce the evidence of the mentioned witness or not.
10. I submit that I mentioned to my erstwhile attorney that the said witness was willing and available to testify on my defence. I was advised that evidence would not be necessary to prove my innocence on the charge.
11. In retrospect I see it was a material oversight as the said witness evidence (sic) is material to show that I am not guilty of the offence convicted of (sic).
12. I humbly pray to the honorable (sic) court to grant the order as per prayers in the application (sic) in the interests of justice.'

[32] In my judgment, the application did not make out a proper case for further evidence to be led at the appeal stage of the case. It did not adequately explain why the evidence had not been led in the trial. It gave no corroborating detail concerning the circumstances in which a decision was allegedly made not to call his wife as a witness, in circumstances in which the importance of it would have been abundantly apparent even to a layman, and certainly to a policeman of 16 years' experience. The jurisprudence referred to above illustrates that a clear and convincing case must be made out before the courts will be persuaded to allow further evidence on appeal when the reason for not having adduced it at trial is said to be the incompetence of the litigant's legal representative. It is trite that absent proven incompetence on the part of the legal representative, a litigant is bound by decisions taken in his or her presence by counsel as to the conduct of a trial; see e.g. *S v Okah* [2018] ZACC 3 (23 February 2018); 2018 (1) SACR 492 (CC) at para 70.

[33] In *De Villiers v The State & another* [2016] ZASCA 38 (24 March 2016), Majiedt JA (as he then was) made the following observations (at para 19) that are especially pertinent to the current matter:

> It is axiomatic that an accused person's constitutional right to representation by a legal practitioner would be rendered meaningless by incompetent representation or, as is alleged in this case, a complete failure to execute the accused's mandate and instead compelling the accused to act against his or her will in a criminal trial. It is equally well established that a legal representative never assumes total control of a case, to the complete exclusion of the accused. An accused person always retains a measure of control over his or her case and, to that end, furnishes the legal representatives with

> instructions. As Van Blerk [A]JA expressed, it in a separate concurring judgment, in *R v Matonsi*: '. . . die klient dra nie volkome seggenskap oor sy saak onherroeplik aan sy advokaat oor nie'. While the legal representative assumes control over the conduct of the case, that control is always confined to the parameters of the client's instructions. The other side of the coin is that, in the event of an irresolvable conflict between the execution of a client's mandate and the legal representative's control of the case, the legal representative must withdraw or the client must terminate his or her mandate where such an impasse arises. An accused person cannot simply remain supine until after conviction.'(Footnotes omitted.)

(The learned judge of appeal supported his remarks with reference to *R v Matonsi* 1958 (2) SA 450 (A) at 457E-F and 458A-B and *S v Louw* [1990] ZASCA 43; 1990 (3) SA 116 (A) at 124G-H.)

It was not good enough for the appellant to have claimed, without elaboration, that he trusted in the allegedly given advice of his attorney, in circumstances in which it should have been obvious to him that such advice, if it was in fact given, was palpably bad. The content of his supporting affidavit could hardly have been more superficial in purporting to comply with the requirements of s 309B(5)(b).

[34] There was, moreover, no confirmatory affidavit by the appellant's trial attorney. Nor was there any evidence before the magistrate as to the circumstances in which that attorney's mandate had been terminated. It was also not apparent that the attorney had been made aware of the serious allegations made against him by the appellant. That was wholly unacceptable in a situation such as that presented by the appellant's application in terms of s 309B(5).

[35] An accused person making such allegations about his legal representative's conduct must be deemed, at least *pro tanto*, to have waived his attorney- client privilege; cf. *S v Tandwa and Others* [2007] ZASCA 34 (28 March 2007); 2008 (1) SACR 613 (SCA), at para 19-20.[4] See also *S v Mponda* [2004] 4 All SA 229 (C), 2007 (2) SACR 245 (C), at para 41-42, in which the court, having had regard to comparative jurisprudence in England and Australia, directed that if the appellant in that matter intended to pursue his complaint of incompetent legal representation in support of his appeal he should submit an affidavit waiving his privilege in respect of attorney-client communications in the trial court and

[4] In *S v Tandwa*, Cameron JA postulated the development by the courts of a mechanism to determine, when necessary in the context of a factual dispute between the litigant and his or her erstwhile legal representative, which of them is telling the truth; see para 22.

setting out the grounds upon which he alleged that the attorney had been incompetent. It was also directed that the attorney should be given a copy of the affidavit and the opportunity to respond to it. The appellate panel (of which I was a member) also indicated that the attendance of the attorney whose conduct was subject to criticism would be required when any argument about his alleged incompetence was addressed to the court.[5]

[36] I believe that a closer examination of the points of correspondence between the relevant facts in *S v Tandwa* and those in respect of s 309B(5) application in the current matter would be useful for the purposes of the guidance of magistrates faced with such applications.

[37] The appellant in *Tandwa*'s case sought to ascribe his failure to have testified in his own defence in the trial court to the incompetent advice of his legal representative. He made the following averments in support of the proposition:

> 'When this matter was proceeding I didn't elect to remain silent, I did want to speak but I was advised not to speak. I was advised by my attorney saying that he knows what he says because he is an attorney, because he knows the law. I did as he told me thinking that he knew what he was saying.'

The legal representative made an affidavit roundly denying the appellant's allegations.

[38] Addressing the resultant dispute of fact that arose on the affidavits, Cameron JA, having acknowledged that oral evidence might be necessary in some cases to determine where the truth lay, proceeded as follows (at para 23 -24):

> 23. ... [the necessity] will arise only where the accused's allegations raise a real possibility that there was incompetence or that bad advice was given or that misconduct occurred. In the present case the accused's allegations do not in our view pass the minimum threshold. They are so weak, contradictory and inherently improbable that we consider they must be rejected on affidavit without further inquiry. We say this for the following reasons.
>
> (a) The accused was not an unsophisticated or illiterate person. On the contrary, he was a well-educated man who had completed his schooling at St John's College in Mthatha before starting employment with the bank in 1984. At the time of the robbery, he had had more than 14 years' service, and occupied a responsible position as the branch's senior treasury custodian. During his

[5] In the event, the directions given in *Mponda* were not complied with, and the appeal was disposed of without any regard being had to the arguments initially advanced that the fairness of the appellant's trial had been vitiated by his legal representative's alleged incompetence. *Odhiambo v Regional Magistrate, Stellenbosch and Another* [2019] ZAWCHC 109 (27 August 2019); 2020 (1) SACR 266 (WCC) is another case in which it was claimed that the allegedly incompetent legal representative blamed for the applicant's allegedly unfair conviction could not be found. The court's scepticism about the conscientiousness of the efforts to trace him was noted in footnote 6.

> evidence in mitigation he appeared articulate and proficient. This does not mean that he could not have been bullied, misled or misadvised: but it does bear on how likely it was that this happened.
>
> (b) The accused gave evidence and was cross-examined in a bail application not long after his arrest, which led to his being granted bail. He was thus aware of his right to testify, and indeed of the importance of exercising it. This does not mean that he may not have been incompetently persuaded not to give evidence at the criminal trial, or unjustly thwarted in a determination to do so, but again it bears on the likelihood of that happening.
>
> (c) The accused's complaint against his advocate was serious. It was not only that his counsel had overridden his wish and a prior agreement that he would testify, but that counsel had failed to inform him that an inference could be drawn against him should he fail to testify and thus that counsel had 'misled' him about the law. Despite the magnitude of these infractions, and their momentous consequences, the accused made no mention of them on his first post-conviction court appearance on 10 July. It seems to us improbable that if these claims had been true he would not have raised them at this, the first available opportunity.
>
> (d) Likewise, when he terminated the services of his counsel at the next court appearance, before testifying in mitigation, the accused did not explain his reasons for wanting 'to talk on my own', despite having an opportunity to do so. This renders his grave claims implausible.
>
> (e) What is more, the accused presented his complaint in conflicting terms: what he said in court and in his affidavit were materially different. During his evidence in mitigation, he claimed only that though he had wanted to testify, he was 'advised not to speak', and had followed this advice, trusting his lawyer. He made no mention of a prior agreement that he would testify, no mention of being prevented from speaking, and no mention of being misled by errant advice. The first time these latter claims arose was in the affidavit attached to his application for leave to appeal, after sentence was passed. The discrepancy casts further doubt on their veracity and points instead to their inauthenticity.
>
> 24. In short, we find it inherently improbable that a well-educated accused with experience of testifying in previous proceedings would not either insist on giving effect to a previous agreement to testify, or complain immediately and in precise terms, at the first public opportunity, about having been unjustly thwarted in his wish to do so.

[39] In the current matter too, the appellant's averments on affidavit were bald, weak and unconvincing. It was inherently most improbable that a person with his years of service in the police force would have meekly accepted advice from his attorney not to call a witness who was, according to him, able and willing to give evidence that would rebut the complainant's identification of him as the robber and who would support his claim that the complainant had not identified him as the culprit when he came to the police station at the end of his shift. He had at an earlier stage of the trial given a dishonest and evasive response when asked by the magistrate whether he had told his attorney about the allegation that Captain van Wyk had instructed the complainant to identify him by his Springbok jacket

when testifying at the internal disciplinary enquiry. At that stage the appellant had initially tried to meet the question by saying that he had told his attorney about it 'indirectly'. It was only when he was pressed on how one could tell someone something 'indirectly' that he grudgingly conceded that he had not told his attorney about the allegation.

[40] At the very least, the magistrate should not have granted the application without requiring the appellant to supplement his supporting affidavit and make it available to his erstwhile attorney for a response.

[41] It is too late now, however, to undo what was done. The application was granted and additional evidence was consequently adduced, to which we are bound, by reason of s 309B(6) of the Criminal Procedure Act, to have regard as if it had been led in the trial. We cannot revisit the lower court's decision to permit the evidence to be led. I have dealt with the issue of the application in terms of s 309B(5) at some length because, as the magistrate observed at the time, it is a novel procedure in the magistrate's court – certainly one that I have never before encountered in my judicial appellate experience – and therefore a matter in which some practical guidance from an appellate court might be helpful.

[42] Although the application was directed at procuring permission to lead only the evidence of the appellant's wife, in the end the evidence of a cleaner at the Saldanha police station who had acted as interpreter at a related internal disciplinary enquiry into the appellant and his co-accused's conduct was also led. In addition, the prosecutor was permitted to recall the complainant. The whole process caused the proceedings in the magistrate's court to drag on for more than a year after the appellant had been sentenced. It is quite apparent from the record of the further evidence that was adduced that no-one involved - the magistrate, the new defence attorney or the prosecutor - had a clear idea of the bounds of the ambit of the additional evidence that was allowed. The new defence attorney at times seemed to try to use the opportunity to re-run the trial.

[43] The exercise demonstrated the importance, when such applications are allowed, that the ambit of the additional evidence be clearly delineated in the court's order. A clear delineation will have the effect of similarly circumscribing the nature of any rebutting evidence or evidence called by the court as contemplated in s 309B(5)(c)(i).

[44] The appellant's wife confirmed what was common ground, namely that she and the appellant and the latter's co-accused were patrolling in a double cab police vehicle on the night in question. She confirmed that they had encountered the complainant and his brother

on the road. Her evidence was that at one stage of the shift, at a time before the roadside encounter with the complainant, she had dropped off her husband and the other policeman to do some investigations on foot. During the time that they were doing that she had returned to the police station and then gone back to collect her colleagues later. She testified that it was when she and her husband were dropping Sergeant Koikanyang at his house at the end of their shift that Sergeant Koikanyang received a telephone call from someone to tell him that a report had been received at the police station of a robbery allegedly committed by a police officer. Her evidence concerning the telephone call was consistent with the evidence that the complainant had given that after he had made the report at the police station the police telephoned to call in the police that he and his brother had reported. He said (through the interpreter) *'...nadat ons die insident gerapporteer het, het hulle gebel en hulle se goedere gedoen om hulle te kry*'.[6]

[45] Mrs Lottering, who subsequently resigned from the police, reportedly in dissatisfaction with the lack of support her husband had received, said she had returned to the police station with her husband and that she had seen the complainant and his brother in the charge office (or 'the community service centre' as it is called in modern police parlance). This was inconsistent with the unchallenged evidence of the complainant that when the vehicle had returned to the police station after he had made the report, the appellant had been driving it, and that he had been alone. One would have thought, especially with the aforementioned homily from the magistrate fresh in his mind, that the appellant would have caused his attorney to challenge the evidence that he had returned to the station alone if that had not been the case. The complainant in fact twice made the point that the appellant was alone when he returned to the police station. More especially would one have expected the appellant to have that evidence challenged, considering Mrs Lottering's evidence that she had - at the time that evidence was being given - been waiting outside in the expectation of being called as a witness.

[46] It must be said that Mrs Lottering had stated in the affidavit she deposed to, apparently before Captain van Wyk, on the afternoon of 27 July 2014, that she had returned to the police station with the appellant. It is unlikely in my view that she would have fabricated that evidence. This is particularly so because she was probably aware when she made the affidavit that Captain van Wyk had been present there at the time. The

[6] 'After we had reported the incident, they phoned them and did their things to get hold of them'. (My translation.)

circumstances in which she came into the police station should still have been explored with the complainant because the truth and reliability of his evidence that he saw the appellant returning alone to the police station was not necessarily inconsistent with Mrs Lottering's presence there that morning. The complainant would not have recognised Mrs Lottering because he had not been in a position to even make out her gender when she had been sitting at the rear of the police vehicle shortly before the robbery occurred. He would therefore have had no reason to distinguish her from any other police officer working at the police station when she was there later in the morning. He would also have no reason to associate her with the appellant unless they came into the police station together, which his evidence suggested could not have been the case. Had he been questioned on the point, he might even have explained that by 'alone' he had meant that the appellant had not been accompanied by Sergeant Koikanyang.

[47] Mrs Lottering testified that her husband was called into an office to speak with Captain van Wyk. She contended that if the complainant had recognised her husband as his assailant, he would have pointed him out when they came into the police station. Just as her husband had done, she asserted that it was remarkable that he had not done so. Nobody canvased with the witness the complainant's testimony that he had confirmed the identity of the appellant as his assailant to Captain van Wyk and police officer 'Metlakhulu'. Mrs Lottering did mention in passing that Constable 'Metlakhulu' had told her husband that Captain van Wyk wished to see him in office 43. Her evidence in this regard afforded support to the complainant's testimony that he had spoken to a policeman with that name. It, however, contradicted the evidence of the appellant that he and Captain van Wyk met each other in the open office and initially conversed with each other there within sight and earshot of the complainant before moving to a nearby office. In her sworn statement the witness described her arrival back at the police station with the appellant in the following terms:

> Ek en Sgt Lottering is na die GDS (Gemeenskap Dienssentrum) waar die twee (2) swart manspersone op die bankie in die GDS (Gemeenskap Dienssentrum) sit. Sgt Lottering het in die teenwoordigheid van die twee (2) onbekende swart manspersone aan Cst Mehlomakhulo gevra wat die problem is, waarna hy aan Sgt Lottering gesê het om na kamer nr. 43* te gaan. Ek is na ons misdaad voorkoming eenheid se kantoor te kamer nr. 7.[7]

[7] 'Sgt Lottering and I went to the CSC (Community Service Centre) where the two (2) black males were sitting on the bench in the CSC (Community Service Centre). Sgt Lottering, in the presence of the two (2) unknown black males, asked Cst Mehlomakhulo what the problem was, at which he told Sgt Lottering to go to room 43. I proceeded to our crime prevention unit's office in room 7.' (My translation.)

* The number 43 appears to have been inserted in a different hand and with a different pen to the rest of the body of the affidavit.

[48] Mrs Lottering's evidence followed the content of her sworn statement closely. Her memory of matters not dealt with in the statement was less impressive. She was, for example, unable to remember why she had not testified in her husband's defence at the subsequently held internal disciplinary enquiry. The proposition was not put to her, but an evident reason for her not to have wanted to be involved in the proceedings is that the big question, when her two patrolling colleagues were being charged with misconduct, would obviously have been what *her* role in the events had been. That would also have been the case when the appellant was facing the charge in court with Sergeant Koikanyang. She may well have been emboldened to make herself available after Koikanyang's acquittal. In my view, her failure to be able explain why she had not testified at the disciplinary enquiry was more likely ascribable to evasiveness than lack of recall.

[49] She said that she had been sitting in a car in a parking lot outside the court during her husband's trial ready to be called as a witness if required. It was not explored with her why she would have waited in the car rather than in the court building outside the courtroom, where she would have been more readily available if called, and where, as one knows from the common practice, it is more usual for persons expecting to be called as witnesses to wait. I think it most unlikely that Mrs Lottering would have waited at court if there had not been a prior discussion with her husband's attorney that she would be called as a witness. On the other hand, if there had been such a discussion it is all the more unlikely that the appellant's case would have been closed without calling her without at least a pause for discussion on the matter between the appellant and his attorney.

[50] The record shows no such pause; not even the slightest hesitancy. The transcript at the close of the appellant's evidence reads as follows:

> HOF: Goed, dankie sersant [dws die appellant], u kan afstaan.
> HOF: Is daar enige getuies vir beskuldigde 1?
> MNR SMITH: Ekskuus, Edelagbare?
> HOF: Enige getuies vir beskuldigde 1?
> MNR SMITH: Nee, Edelagbare.
> HOF: Is dit beskuldigde 1 se saak?
> MNR SMITH: Dit is korrek, Edelagbare.

SAAK VIR BESKULDIGDE 1 [8]

The attorney then proceeded immediately, and advisedly, to close accused 2's case without leading any evidence.

[51] This begs the question as to when the alleged exchange with his attorney, described in paragraph 10 of the appellant's supporting affidavit in the application in terms of s 309B(5), could have occurred? It could only have been *before* the appellant testified because his evidence at the trial was completed in a single sitting without any adjournment. That being the case, the advice that Mrs Lottering would not be called as a witness must have been given at an early stage of the trial, or even before it commenced, because there was also not a break between the closure of the state's case and the commencement of the appellant's oral testimony. Mrs Lottering's evidence that she was sitting in a car outside the court waiting to see if she would be called as a witness, rather than outside the courtroom as might ordinarily have been expected, was therefore not only unusual, it was also impossible to reconcile with the inescapable import of the appellant's affidavit that a decision had already been made that she would *not* be called. I am driven to conclude that they were probably both being dishonest. In my view it is likely that Mrs Lottering did not testify earlier because of the obvious risk of exposure concerning her own role in the events.

[52] In the circumstances the magistrate's scepticism about the role of Mrs Lottering, although it was not articulated in the way that I have done, was justified. She also plainly had an interest in obtaining her husband's acquittal.

[53] I think that in the context of the magistrate's finding that the complainant was an honest and straightforward witness – a finding amply borne out by the record – he was justified in his stated view that the evidence of Mrs Lottering, even if it had been led during the trial, would not have altered his decision that the appellant's guilt was established. I say this not only because of demonstrable indications that Mrs Lottering's evidence had been

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[8] 'Court: Very well, thank you sergeant [i.e. the appellant], you may stand down.
Court: Will there be any witnesses for accused 1?
Mr Smith: Pardon, Your Worship?
Court: Any witnesses for accused 1?
Mr Smith: No, Your Worship.
Court: Is that accused 1's case?
Mr Smith: That is correct, Your Worship
THE CASE FOR ACCUSED 1'.
(My translation.)

ineptly tailored to support her husband's explanation of his failure to have called her to give evidence during his case, but more pertinently because the effect of the totality of the evidence made the accuracy and dependability of the complainant's identification of the appellant as his assailant overwhelmingly convincing. It was indisputable that the appellant had been wearing a Springbok jacket and armed with a handgun at the material time. It was established that he was in the vicinity of the robbery very shortly before it occurred. What were the chances of there having been another person in that locality at more or less the same time also wearing a Springbok jacket and armed with a handgun and in the company of another male at least partially clothed in police uniform? The odds against his innocence are just too overwhelming. I am in no doubt that he was correctly convicted and that the appeal against conviction must fail.

[54] For completeness, I record that I agree with the magistrate that the testimony of William Molelekwa, the police station cleaner who acted as interpreter at the appellant's internal disciplinary hearing in 2015 contributed nothing of substance to the body of evidence. He said that he had overheard the complainant telling his brother that Captain van Wyk had stressed that he should be certain to point out in his evidence to the disciplinary tribunal that the coloured policeman who had been wearing the Springbok jacket had been his assailant. The evidence was disputed, but on any approach it would be difficult to attach any significance to it in the context of the complainant having already, long before the disciplinary proceedings, identified his assailant in those terms when he reported the matter to the police immediately after the incident and subsequently again pointed out the appellant at an identification parade held in August 2014.

[55] As mentioned, the complainant was also recalled to give further evidence. Suffice it to say that nothing in his further testimony materially added to or detracted from his evidence in the trial.

[56] Turning to the appeal against sentence. It is trite that the determination of an appropriate sentence is within the discretion of the trial court. An appellate court cannot rightly interfere with the sentence imposed unless it appears that the trial court has materially misdirected itself in the exercise of its discretion.

[57] In the current matter the conviction attracted a prescribed minimum sentence of 15 years' imprisonment. As mentioned, the magistrate found that there were substantial and compelling circumstances that justified the imposition of a less onerous sentence. It has

been held that the determination of whether substantial and compelling circumstances are present does not entail the exercise of a discretion, certainly not in the true or narrow sense of the concept; see e.g. *S v GK* 2013 (2) SACR 505 (WCC), at para 5-7 and *S v Tafeni* [2015] ZAWCHC 150; 2016 (2) SACR 720 (WCC) (16 October 2015) at para 4-9. In my judgment, the appellant can count himself fortunate that the trial court found good reason to depart from the prescribed sentence. My own assessment is that the commission of the crime of armed robbery by an on-duty policeman is an extremely serious matter, if anything, deserving of an aggravated sentence rather than one less onerous than the prescribed minimum. No good reason has been shown in the circumstances why we should intervene in the appellant's favour to lighten further a sentence that very arguably errs too far on the side of leniency. The appeal against sentence will therefore also be dismissed.

[58] In the result, the following order is made:

The appeal against conviction and sentence is dismissed.

A.G. BINNS-WARD
Judge of the High Court

S. HOCKEY
Acting Judge of the High Court

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