In the High Court of South Africa
(Western Cape Division, Cape Town)

Case No: A70/22

In the matter between:

ASHWIN PHILLIPS	**First Appellant**
DENZIL NOBELS	**Second Appellant**
ISMAEL HAMMERS	**Third Appellant**

and

THE STATE	**Respondent**

JUDGMENT DELIVERED ELECTRONICALLY ON 15 SEPTEMBER 2022

LEKHULENI J

INTRODUCTION

[1] The three appellants were convicted in the Regional Court sitting in Strand on a charge of Robbery with Aggravating Circumstance read with section 51(2) of the Criminal Law Amendment Act 105 of 1997. The Regional Magistrate found that there were compelling and substantial circumstances meriting a deviation from the prescribed minimum sentence and imposed a sentence of 12 years direct

imprisonment in respect of the first appellant, 10 years imprisonment in respect of the second appellant and 8 years imprisonment in respect of the third appellant. In terms of section 103(1)(g) of the Firearms Control Act 60 of 2000, the court declared the three appellants unfit to possess a firearm. Subsequent thereto, the appellants applied for leave to appeal against their conviction and sentence and their application was refused by the trial court. However, on petition to the Judge President in terms of section 309C of the Criminal Procedure Act 51 of 1977 (*"the CPA"*), the appellants were granted leave to appeal to this court against their conviction only.

[2] The charge against the appellants was that on 08 September 2016 and at or near Main Road in Strand, they unlawfully and intentionally assaulted Tolgah Chotia and Ayoob Wentzel and took the following items from them: one Samsung J5 Cell phone, R20 cash, Gold chain and R200 cash. The appellants pleaded not guilty to the charge and exercised their right to remain silent and provided no plea explanation. The applicable penal provisions in terms of the Criminal Law Amendment Act were properly explained to them before the commencement of the trial. At the trial, Mr Hancook from Legal Aid South Africa represented the appellants and Ms Swartz appeared for the State.

THE FACTUAL MATRIX

[3] At the trial, the state's case rested principally on the evidence of four witnesses namely, Mr A Wentzel, Mr T Chotia, J Lewis and Mr Y Harris. The accused testified and did not call any witnesses to corroborate their version. The

evidence led at the trial can be summarised briefly as follows: Mr Wentzel testified first and stated that on 11 September 2016, just after 24h00, he was in a Nightclub called Locomotion in Somerset West. He was with his friends, Junaid Lewis, Yusuf Harris, Tolga Chotia and Cherelle Meyer. They went to this place with Junaid in the latter's green Uno motor vehicle. Early that evening, before their departure to the nightclub, he smoked dagga with his friends; however he was sober and was aware of what was going on around him. On their way home, Junaid was the driver, and Cherelle Meyer was seated in the front passenger seat. He testified that he was sitting with Mr Chotia and Yusuf at the back seat of the Uno. They were all sober he stated. As they were driving, his companions in the car told him that there was a car that was driving very close behind them and he looked back to see the car, and suddenly, their car overturned. He identified the car that drove very close behind them as a white BMW. After their car overturned, they all got out of the vehicle, and he then saw the white BMW stopping a distance away from them. The three men alighted from the BMW and approached them. According to him, those three men are the appellants in this matter. He had seen the first appellant earlier at the Locomotion Club and was seeing him for the first time in the club. He stated that the first appellant had asked him who he was and where he lived when they were at the club.

[4] He stated that as a result of the accident, he was injured and bleeding on his nose and left eyebrow. Cherelle Meyer suffered a concussion. The first appellant approached him and told him that he is going to take him (Mr Wentzel) to the hospital. However, Mr Wentzel told the first appellant that he did not want to go to the hospital but the first appellant insisted that he would take him to the hospital and

pulled him to the BMW and caused him to sit in the back seat. He stated that when he was pulled to the car, he just went with him because the first appellant told him they were taking him to the hospital. He was however not happy, but they forced him to get into the BMW. As this was happening, he asked Ismael Hassan who was with him in the Uno to go with him to the hospital, and as Ismael was getting into the BMW, the first appellant drove off leaving Ismael behind. After driving a short distance, the person seated with Mr Wentzel in the back seat demanded his phone. Mr Wentzel testified that he could not remember what the person at the back looked like. As he held on to his phone in his pocket, the person at the back hit him on the face with a fist three to four times and successfully pulled the phone from his pocket. He also took his four finger rings. At that time, the first appellant demanded Mr Wentzel's silver chain and the man sitting on the front passenger seat told the first appellant to shoot Mr Wentzel. The first appellant then took out a firearm, hit Mr Wentzel randomly on the face, and then pulled the chains off him. The man at the backseat also wanted to take off Mr Wentzel's shoes, and as the latter opened the door, the man at the back kicked him out of the car.

[5] The first appellant and his friend immediately drove off. Mr Wentzel then walked a distance of about half a kilometre to where the Uno was and told his friends what happened to him. They decided to walk home, leaving the Uno behind. On the way, a bouncer from Locomotion Club came and gave them a lift to the nightclub where they were earlier. Shortly thereafter, an ambulance was called, and Mr Wentzel was taken to the hospital. He testified that both his cheekbones were broken and he spent a month and a half in hospital. On 20 October 2020, after he was discharged from hospital, he gave a statement to the police and also attended a

photo identification parade at the Police Station. At the identification parade, the police showed him several photos, and he could only identify the first appellant. He stated that he identified him instantly because he saw his face at the nightclub and he also saw his face again at the accident scene.

[6] Under cross-examination, he admitted that he could only point the first appellant at the photo identification parade, and could not remember anything about the other two persons who were with the first appellant. He testified further that despite him sitting at the back and speaking to the man seated with him at the back seat, he could not identify that person. He also stated that he did not know the second and the third appellants. He denied that he voluntarily asked them to stop and to drop him off shortly after they left the accident scene. He denied that he told the appellants that he wanted to be with his friends whom he had left behind at the Uno.

[7] Tolga Chotia was the second witness to testify and he corroborated Mr Wentzel's evidence as to how they drove to the nightclub and how the accident occurred. In addition to the evidence of Mr Wentzel, Mr Chotia testified that when they left the nightclub, the front two tyres of their vehicle were flat. He testified that after their car rolled, it came to a standstill on its side and not the roof. Thereafter, two men came out of the BMW while one remained seated on the front passenger seat of the BMW. One of the two men stood at a distance while the first appellant came closer to them and asked them if they needed help. He testified that they asked the first appellant to assist them to roll the vehicle onto its wheels. Indeed, the

first appellant assisted them. He could not identify the person who was standing at a distance.

[8] The first appellant asked him to phone the police. When he took out his phone to call the police, the first appellant pressed something which the witness thought was a firearm against the witness's stomach and demanded that he hand over his phone and all his belongings. Out of fear, he gave the first appellant his J5 Cell phone worth R3000. He also gave the first appellant R20, which was in his pocket. The man standing at a distance took Mr Wentzel to the car alleging that they were taking him to the hospital. He also saw the person who was standing at a distance taking Ms Meyer's bag which was laying close to the road against the curb. They then left with Mr Wentzel and a few minutes later, Mr Wentzel returned with his face swollen and full of blood. His rings and chains were taken from him. Mr Wentzel told them that he was assaulted and robbed of his money. He also testified that the robbers took the front loader and Ms Meyer's tog bag. After the incident, he attended a photo identification parade at the Police Station, and could only identify the first appellant. He could not identify the other appellants.

[9] Junaid Lewis who was the driver of the Uno on the night in question also testified. His evidence mirrored the evidence given by Mr Wentzel and Mr Chotia. In addition to the evidence given by the other two witnesses, he testified that the BMW that drove behind them literally touched the rear bumper of the Uno. After their vehicle overturned, three people from the BMW came out, and the first appellant approached them. The first appellant told them to call the police. He then saw the second appellant removing speakers, a black Nike bag, a red eagle jacket, and a

front loader from the Uno. According to him, three people came out of the BMW, but he could not identify the third person as the latter was a distance away from him. The first appellant saw that Mr Wentzel was bleeding, and offered to take him to the hospital. He did not see when Mr Chotia was robbed of his phone, however, Mr Chotia told him that he was robbed of his phone. He supported the evidence of the other two witnesses that Mr Wentzel left with the first appellant and his friends and shortly thereafter, he came back and his face was swollen and his eyes were closed and he could not speak properly. After this incident, he also attended a photo identification parade at the Police Station where he could only identify the first appellant. He testified that he could not identify the second and the third appellant as he did not see their faces.

[10] Yusuf Harris also testified. He agreed with the other witnesses on the sequence of events; however according to him, after their vehicle overturned, two men approached them from the BMW. He testified that the first appellant was one of the two persons from the BMW. He could not identify the other person who was with the first appellant. He saw the person he could not identify holding Ms Meyer's bag in his hands. He did not see where he got the bag from. He did not see when Mr Chotia was robbed of his phone. It was his testimony that the first appellant left with Mr Wentzel and shortly thereafter, Mr Wentzel came walking towards them and his face was covered with blood and was swollen. Mr Wentzel told them that they robbed him and also beat him. Mr Chotia took a cloth and wrapped it around Mr Wentzel's face.

[11] The three appellants also testified. The first appellant's evidence was that on the evening in question, he was together with his fiancé Monique Thomas at the

Lane, where young people gather to relax. It is a place where there are always parties, braais, and the cooking of potjiekos. Around 19h00, they then went home. He spent some time with his girlfriend drinking, and later went looking for more Ciders to drink. He could not find any in the area where they stay and decided to go to a nightclub called Wild West in Somerset West, to buy the Ciders there. He used a BMW 320 motor vehicle. The vehicle belonged to his wife. Upon arrival at the club in Somerset West, he found that it was closed, and he decided to go home. On his way home and at a robot intersection, he saw the second and the third appellants walking. He knew them very well as they stayed in the same neighbourhood. He essentially gave them a lift home. Whilst driving, the second appellant alerted him of a vehicle that had overturned and was lying on its roof. He stopped and the three of them got out and observed that it was an accident. He saw three young men and a lady standing outside the vehicle. One of the young men was severely injured. The three of them assisted in pushing the vehicle to stand on its wheels.

[12] The complainants thanked them and asked the appellants to take Mr Wentzel to the hospital, and he obliged. Mr Wentzel got in his vehicle and had an empty bag. He sat on the front passenger seat, and as they were on their way to the hospital, Mr Wentzel informed them that he could not leave his friends alone at the place where the accident occurred. He testified that Mr Wentzel told him to stop. First appellant stopped the vehicle and Mr Wentzel opened the door, got out of the vehicle and ran down the road back towards where his friends were. He then turned around and drove home. He went home and upon arrival, he had some drinks with his fiancé. On the Monday of that week, his wife went to work and looked in the car and found Mr Wentzel's bag under the front passenger seat. He did not look to see what was

inside the bag. He kept the bag in his place. He was later arrested for this incident. During cross-examination, he testified that at the scene, Mr Wentzel was seriously injured, his face was seriously swollen, and he could not speak. He testified during cross-examination that Mr Wentzel exited his vehicle possibly because he was afraid of them as they have a lot of tattoos and this is associated with gang violence and gangs in prison. He denied that he assaulted Mr Wentzel with a firearm. He also informed the court that he wanted to keep the bag that was found in his vehicle.

[13] The second and the third appellants also testified. They both testified that on the night in question, they were in a place called Halfway looking for scraps. It was around 22h00 in the evening when they were looking for scraps and wine bottles to sell and make money. They later got a lift home from the first appellant. They have known the first appellant for a very long time. Second appellant sat on the front passenger seat, and the third appellant sat at the back seat. As they were driving, the second appellant alerted the first appellant of the Uno that had overturned. Both second and third appellants supported the evidence of the first appellant that they assisted the complainants in getting their Uno back onto its wheels. They also testified that at the request of the complainants, they obliged to take Mr Wentzel to the hospital. On the way to the hospital, Mr Wentzel told the first appellant to stop the vehicle as he said he could not go without one of his friends. The first appellant stopped the vehicle and Mr Wentzel alighted. The first appellant turned right there and took them to their respective homes and went home as well. During cross-examination, the second appellant testified that when Mr Wentzel alighted from the vehicle, he walked out with his rings and jewellery. They denied that they robbed the

complainants as alleged or at all. That was in brief, the evidence that was before the trial court.

GROUNDS OF APPEAL

[14] The appellants' grounds of appeal can be summed as follows: First, the appellants contends that the trial court erred in finding that the state had proved their guilt beyond reasonable doubt because the court *a quo* failed to take sufficient consideration to the many contradictions of the state witnesses. The appellants contend that the contradictions in the State's case were material in nature, specifically in the light of the defence preferred by the appellants that the complainants had fabricated the robbery in order to lessen the consequences they were to face as a result of attending a party without the permission of their parents and thereafter being involved in an accident where property was lost. Secondly, it is was submitted that the court below erred in finding that the appellants' version was not reasonably possibly true because the appellants did not deviate from their version during the trial and gave a plausible explanation as to how the bag from the Uno came to be inside the white BMW. Thirdly, the appellants contend that the court *a quo* failed to attach sufficient weight to the global testimony of the complainants regarding a motive to mislead their parents and the court as to what happened on the night in question.

APPLICABLE LEGAL PRINCIPLES AND ANALYSIS

[15] This appeal is mainly on the facts. Of importance in this matter is that, it is common cause that the complainants' vehicle overturned and that there was an encounter between the appellants and the complainants. The only issue in dispute before the trial court was whether the appellants robbed the complainants of their property and assaulted them as alleged or at all.

[16] It is trite law that a court of appeal should be slow to interfere with the trial court's findings of fact in the absence of a material misdirection. See *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705-706. An appeal court's powers to interfere on appeal with the findings of fact of a trial court are limited. See *S v Francis* 1991 (1) SACR 198 (A) at 204E. In the absence of a demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. When an appeal is lodged against the trial court's findings of fact, the appeal court should take into account the fact that the trial court was in a more favourable position than itself to form a judgment because it was able to observe the witnesses during their questioning and was absorbed in the atmosphere of the trial. See *S v Monyane and Others* 2008 (1) SACR 543 (SCA).

[17] In criminal proceedings, the state bears the onus to prove the accused's guilt beyond reasonable doubt. See *S v Mbuli* 2003 (1) SACR 97 (SCA) at 110D-F; *S v Jackson* 1998 (1) SACR 470 (SCA) and *S v Schackell* 2001 (4) SACR 279 (SCA). However, the State does not need to prove the guilt of an accused person beyond any shadow of a doubt. On the other hand, no onus rests on the accused to prove his or her innocence. See *S v Combrinck* 2012 (1) SACR 93 (SCA) at para 15. The accused's version cannot be rejected only on the basis that it is improbable, but only

once the trial court has found, on credible evidence, that the explanation is false beyond a reasonable doubt. See *S v V* 2000 (1) SACR 453 (SCA) at 455B. The corollary thereof is that, if the accused's version is reasonably possibly true, the accused is entitled to an acquittal.

[18] At the heart of this appeal is the correct approach to the evaluation of evidence by the trial court. I must mention though that the version proffered by the State and that of the appellants at the trial are diametrically opposed to each other as far as the alleged robbery is concerned. The complainants aver that the appellants robbed them of their cell phones, cash and other items. On the other hand, the appellants deny these allegations and contend that they did not rob the complainants as alleged or at all. Instead, they aver that they assisted the complainants in pushing the Uno to stand on its wheels. The two versions in my view, are mutually destructive.

[19] The approach to resolving two irreconcilable, mutually destructive factual versions is well-established in our law and requires no repetition. See *Stellenbosch Farmers' Winery Group Ltd and another v Martell & Cie SA and others* 2003 (1) SA 11 (SCA) para 5. Applying these principles to the evidence above, it is common cause that the State relied on the evidence of four witnesses who all testified on what happened on the night in question. While on the other hand, the appellants testified and gave a different version from that proffered by the State witnesses. Notwithstanding, there are several common cause issues between the State and the defence case. As explained above, it is common cause that the complainant's vehicle overturned on the night in question. It is also common cause that the first

appellant and his two companions came to the scene where the accident happened. It is common cause that the first appellant assisted the complainants in rolling over the vehicle to stand on its wheels. It is also common cause that the first appellant and his companions drove off with Mr Wentzel purportedly taking him to the hospital. It is not in dispute that the first appellant was positively identified at the photo identification parade and in court by all the State witnesses who came to testify at the trial. Against this backdrop, I turn to consider an anomaly that occurred during the trial at the court below.

FAILURE TO DISCHARGE THE THIRD APPELLANT IN TERMS OF SECTION 174 OF THE CPA

[20] Before I can consider whether the court *a quo* was correct in its evaluation of the evidence and findings against the three appellants, I deem it necessary to address an irregularity that happened in this matter in the court below, which in my view, is dispositive of the appeal in respect of the third appellant. Gleaning from the court's record of proceedings, it is worth noting that throughout the course of the trial, none of the State witnesses identified the third appellant. There was no evidence whatsoever adduced by the state witnesses that proved or suggested that the third appellant was at the crime scene or in the BMW on the night in question. There was also no evidence whatsoever that implicated the third appellant. The State witnesses did not identify the third appellant at the crime scene, at the photo identification parade and even in court.

[21] Notably, the third appellant was placed at the crime scene particularly, in the first appellant's vehicle by his legal representative during cross-examination. From the record, the evidence against the third appellant was deficient and fell short of the required threshold for the third appellant to be put on his defence at the closure of the State case. At the hearing of this appeal, Both Mr Snyman who appeared on behalf of the State, and Ms Kuun who appeared for the appellants, conceded that there was no evidence against the third appellant at the closure of the State's case.

[22] In my view, the trial court should have discharged the third appellant in terms of section 174 of the CPA at the closure of the State case. In a case like this, it is crucial in my view to revisit the provisions of section 174 and determine how it engages the constitutional right of an accused person to a fair trial. For the sake of brevity, section 174 provides as follows:

> "If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty."

[23] This section gives a court a discretion in deciding whether to discharge an accused person at the conclusion of the State case. The discretion must be exercised constitutionally and judicially within the ambit of the law. The words "no evidence" in the section have been interpreted to mean no evidence upon which a reasonable person acting carefully may convict - that the accused committed the offence with which he is charged, or an offence which is a competent verdict on that charge. See *S v Khanyapa* 1979 (1) SA 824 (A) at 838F-G; See also *S v Swart and Another* 2001 (1) SACR 334 (W). However, suppose in the opinion of the trial court, there is evidence upon which the accused might reasonably be convicted, in that

event the duty of the trial court is straightforward. In that case, the accused may not be discharged and the trial must continue to its end. See *S v Lubaxa* [2002] 2 All SA 107 (SCA) at para 11.

[24] It is interesting to note that notwithstanding the deficiencies in the State's case, the legal representative appearing for the appellants did not apply for the discharge of the third appellant in terms of section 174 of the CPA at the closure of the case for the prosecution. The court as well did not deem it prudent *mero motu* to discharge the third appellant at the closure of the State case. Even in this appeal, this issue was not raised by the parties on the papers. The appeal court raised it *mero motu* with the parties. I deem it necessary to emphasise that there is a constitutional duty on a judicial officer to discharge an accused person at the closure of the State case where there is no evidence at all implicating an accused person.

[25] From the reading of the record, it seems to me, the reason why the court *a quo* did not consider the invocation of section 174 of the CPA at the closure of the State's case in respect of the third appellant was because of the version that was put to the State witnesses that the appellants would come and say that they were at the crime scene and assisted the complainants to bring the car on its wheels. In my view, the statements made by a legal representative on what the accused would say if called to testify does not amount to evidence at all. It does not relieve or exonerate the State to make a *prima facie* case against the accused before the accused can be put to his defence.

[26] It must be emphasised that an accused person has a right to a fair trial as envisaged in section 35(3) of the Constitution. This right, among others, encompasses the right to be presumed innocent, the right to remain silent and the right not to be compelled to give self-incriminating evidence. Where the evidence at the closure of the State case is inadequate and falls below the required threshold, that should be the end of the matter in respect of that accused. It must be stressed that the failure by a trial court to discharge an accused person in circumstances where there is no evidence connecting the accused to the charge or, at the very least, implicating him, amounts to an irregularity that vitiates a resultant conviction. In *S v Lubaxa* at para 18, Nugent AJA, as he then was, stated as follows:

> "I have no doubt that an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself. The failure to discharge an accused in those circumstances, if necessary *mero motu,* is in my view a breach of the rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively upon his self-incriminatory evidence."

[27] I am aware that this matter involved multiple accused and that the trial court had to be careful and meticulous in invoking section 174 of the CPA. However, from the version of the appellants which was put to the State witnesses, it could not be suggested that the appellants were going to implicate each other to supplement the State case. There was no conflict of interest. They were all represented by one attorney, and they all raised a bare denial to the commission of the alleged offence. In my view, the invocation of section 174 would not have compromised the proper administration of justice. It is further my view that the court *a quo* should have acted *mero motu* and discharged the third appellant in terms of section 174 of the CPA. More so, in *S v Legote and Another* 2001 (2) SALR 179 (SCA), the Supreme Court

of Appeal indicated that it was the duty of the trial court to ensure that an unrepresented accused against whom a *prima facie* case had not been made is discharged before giving evidence. In my view, this approach applies with equal force to cases where an accused person is represented and no *prima facie* case is made out at the closure of the State case.

[28] To my mind, the third appellants' rights to a fair trial was infringed when he was called to the witness' stand, notwithstanding that no cogent evidence was adduced against him. To this end, I find that the appeal of the third appellant should succeed.

APPEAL IN RESPECT OF THE FIRST AND SECOND APPELLANT

[29] I now turn to consider the appeal on the merits, particularly in respect of the first and second appellant. The two appellants argued that the trial court erred in finding that the State had proved their guilt beyond a reasonable doubt because the court *a quo* failed to take sufficient consideration of the many contradictions of the state witnesses. It is common cause that there were contradictions in the State's case. The State witnesses contradicted each other on several issues, for instance, the position of the vehicle after it overturned, how many people came from the BMW to assist them and whether Mr Wentzel was forced to aboard the first appellant's vehicle. In its judgment, the trial court found that the differences in the State case were not essential, especially when considering that the witnesses were traumatised

and shocked by the accident. I can't agree more with the findings of the trial magistrate.

[30] It must be stressed that contradictions *per se* do not lead to the rejection of a witness' evidence; they may simply be indicative of an error. See *S v Mkohle* 1990 (1) SACR 95 (A) at 98E. In *S v Oosthuizen* 1982 (3) SA 571 (T) at 576B-C, the court observed that 'not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation, taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence'. In my view, the trial court was alive to this judicial injunction. The magistrate cannot be faulted with her conclusion that the inconsistencies and the differences in the State's case were of a relatively minor nature and were to be expected from the witnesses.

[31] Significantly, the incident happened in September 2016. The witnesses were called to testify two years after the occurrence of the incident. In my view, the State witnesses were frank, open, and candid with the court. They did not want to implicate the appellants falsely. They testified that they did not identify the second appellant during the photo identification parade. Even during the hearing, all the state witnesses, except for Mr Lewis, testified that they did not know the second and the third appellant. The argument that the State witnesses laid the charge against the appellants in order to gain the sympathy of their parents as they went to a nightclub without permission, is devoid of substance and was correctly rejected by the trial court.

[32] In my view, the contradictions were of insignificance viewed from the totality of the evidence. I must emphasise that all the State witnesses corroborated each other that their vehicle overturned. They were in a state of shock and traumatised. Notwithstanding, the second appellant was seen by Mr Lewis taking the speakers and a Nike backpack from the complainants vehicle. Mr Lewis' evidence was corroborated by Mr Harris who testified that he saw a man from the BMW in possession of Cherelle's blue handbag in his hand. All the State witnesses agreed that Mr Wentzel left the scene with the first appellant and his friends. They all corroborated each other that shortly thereafter, Mr Wentzel returned and, his face was bloodied and swollen, and his rings and necklaces had been taken from him. The first and second appellants to a greater extent, corroborated this version in my view. In addition, the first and the second appellant confirmed under oath that Mr Wentzel entered their vehicle. They only denied that they assaulted or robbed the complainant as alleged or at all.

[33] The appellants raised a bare denial to the charges levelled against them. The version proffered by the first appellant did not make sense at all. The first appellant wanted the court to believe that Mr Wentzel, who requested them to take him to hospital as he was seriously injured, suddenly decided that he no longer wanted to be taken to the hospital and wanted to alight from the vehicle for no cogent reason. According to the first appellant, Mr Wentzel alighted shortly after they left with him and told them that he no longer wanted to go to the hospital, but instead, wanted to be with his friends despite his serious injuries. The first appellant suggested that Mr Wentzel was probably scared by their tattoos which may have made him think they are gangsters.

[34] This in my view, is improbable, does not make sense and is devoid of truth. The Regional Magistrate was quite correct in rejecting this version. It must be borne in mind that it was during the night, and Mr Wentzel was alone. I find it very strange that Mr Wentzel would want to return to his friends notwithstanding the fact that he was injured, and the Good Samaritans were taking him to the hospital to receive medical attention. Furthermore, if that was the case, the first and the second appellants could not explain why they did not drive Mr Wentzel back to his friends, but instead decided to leave him in the middle of nowhere during the dangerous hours of the early morning. This version, with respect, is illogical and inconsistent with rationality. In my view, the court *a quo* was correct in finding this version implausible.

[35] It was also argued that Mr Wentzel was a single witness regarding what transpired in the vehicle and that the court *a quo* should have approached his evidence with caution. It is well established in our law that the evidence of a single witness must be approached with caution and should be clear and satisfactory in all material aspects. A conviction will typically follow only if the evidence of a single witness is substantially satisfactory in every respect or if it is corroborated by other evidence. However our courts have stressed that the exercise of caution must not be allowed to displace the exercise of common sense. *See S v Artman and Another* 1968 (3) SA 339 (SCA).

[36] Accordingly, it behoves a court in evaluating such evidence to determine whether, having regard to its shortcomings, defects or contradictions the truth has been told. See *R v Mokoena* [1956] 3 AII SA 208 (A); *S v Sauls and Others* 1981 (3)

SA 172 (A) at 180 E – F. In my view, the trial court in this matter was alive to the fact that it was dealing with the evidence of a single witness and the applicable cautionary rule. The court below evaluated the evidence of Mr Wentzel with caution and found that Mr Wentzel's evidence was forthright and beyond reproach. The trial court found that despite the thorough and extensive cross-examination that Mr Wentzel was subjected to, there were no discrepancies or improbabilities in his version to disregard his evidence. In my view, these findings cannot be faulted.

[37] Furthermore, in addition to the findings of the court *a quo*, I do not doubt that Mr Wentzel was a truthful and credible witness. His evidence was forthright and to the point. He was emphatic that he did not identify the person seated with him at the back who robbed him of his cell phone and the cash amount. He identified the first appellant as the person who assaulted him with the firearm on his face. His version was corroborated by the other State witnesses who testified that on his return after the first appellant dropped him, his face was swollen, he was bleeding and he could not talk.

[38] In my view, there was overwhelming evidence against the first and second appellants. The first appellant was a poor witness and gave a mendacious account of what transpired that evening. He was very evasive in answering simple questions put to him by the Prosecutor. He could not explain to the court why he said Mr Wentzel was afraid of them when he allegedly requested to get out of the vehicle. He also could not explain why he said he felt he was a hero when he failed to take Mr Wentzel, who was seriously injured, to the hospital. His intention to rob the complainant was evidently manifested by his admission that he wanted to keep the complainant's bag for himself, even though he knew it was not his. His evidence that he did not open the bag to see

what was inside it despite the fact that he personally kept the bag in his shower, is so incongruous and bereft of rationality and truth. The second appellant on the one hand, could not explain why he was looking for scrap and beer bottles in the streets at 24h00 in the morning. To my mind, the version of the first and second appellants that they did not rob Mr Wentzel is contrived, far-fetched, and it cannot be said to be reasonably possibly true.

[39] In the light of the evidence presented to the trial court, I am satisfied that on the conspectus of the evidence, the factual findings made by the trial court were correct and that there was no misdirection in this regard. In my judgment, the trial court was correct in finding that the state succeeded to prove the guilt of the first and second appellants beyond reasonable doubt.

ORDER

[40] In the result, I would propose the following orders:

40.1 That the appeal in respect of the first and second appellants be dismissed and their conviction confirmed.

40.2 That the appeal in respect of the third appellant be upheld and his resultant conviction and sentence be set aside.

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LEKHULENI J

JUDGE OF THE HIGH COURT

I agree and it is so ordered

_____

KUSEVITSKY J

JUDGE OF THE HIGH COURT

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Counsel for the Respondent: Adv L Snyman

Instructed by Office the Director of Public Prosecutions: Western Cape