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

Case Number: A101/2021

In the matter between:

RICARDO SYSTER Appellant

and

THE STATE Respondent

Date of hearing: **4 August 2023**
Judgment delivered: **23 August 2023**

JUDGMENT DELIVERED ELECTRONICALLY

PANGARKER AJ (SALIE J CONCURRING)

Introduction

1. This appeal against conviction emanates from the Mossel Bay Regional Court. The appellant was charged with robbery with aggravating circumstances read with section 51 of the Criminal Law Amendment Act 105 of 1997. The State alleged that on 30 July 2018 at Vodacom, Heiderand, Mossel Bay, the appellant unlawfully and intentionally assaulted Murishia Maart and/or Natasha Lucas and took with force several cell phones and R15 556 cash, with a combined total of R60 069, 05, being their property or in their lawful possession.

2. The State alleged that the aggravating circumstances were that the appellant threatened the complainants with a knife and slapped Ms Maart. In her judgment, the regional magistrate convicted the appellant as charged. He was sentenced to 15 years' imprisonment.

3. The appellant was legally represented throughout the trial. The State called six witnesses and also relied on a photographic album (Exhibit A) depicting the interior of the Vodacom store in Mossel Bay Mall. The record also indicates that after conclusion of the last State witness's evidence, an inspection *in loco* was conducted at the Vodacom store, whereafter the State closed its case. The appellant testified in his defence and called no witnesses.

Grounds of appeal

4. The grounds of appeal are that the magistrate erred in finding that the State had proved beyond reasonable doubt that the appellant robbed the Vodacom store as alleged. The second ground is that the magistrate erred by not finding that the appellant's version was reasonably possibly true and that the robbery was staged by employees of the store.

Evidence for the State

5. The first three witnesses for the State were employees of Vodacom. The following common cause facts emanate from the evidence of Murishia Maart, Natasha Lucas and her sister Yolande (Landi) Lucas (as the sisters share the same surname, I refer to them in this judgment by their first names): The three women were employed at the store at the time of the incident and Ms Maart was known to the sisters for 10 years prior to the incident. Furthermore, Yolande was in a relationship with Faizel Messier who was the appellant's friend. The appellant was known to Yolande.

6. On 30 July 2018, the women arrived at the store after 08h00 and proceeded to commence their store duties. They testified that the store opened for business at 09h00. Natasha Lucas unlocked the store and the roller door remained partially open while Ms Maart was to cash up at the back office, Yolande attended to washing the dishes at the back and Natasha cleaned the front of store, which included mopping the floor. They explained that it was usual practice to leave the roller door slightly raised in order for the floor to dry. The women testified that the store's lights were dimmed so as to discourage the public from entering prior to 09h00.

7. Natasha testified that her back was facing the roller door as she busied herself tying a garbage bag, and felt someone behind her and an object being pushed against her back. It is common cause that the man who entered the Vodacom store on that morning, was the appellant. According to Natasha, the man demanded cash and cell phones and forced her toward the back office where her colleagues were.

8. As Natasha and the man moved to the back, he snatched a black laptop bag from the wall, handed it to her and she was forced to open the free standing safe and place cell phones into the bag, which she proceeded to do. The women

testified that Natasha passed the bag to Ms Maart so that she could place the money into it, but Ms Maart hesitated, and during this time, the man slapped her face. Ms Maart then proceeded to place the money into the bag.

9. The witnesses testified that the back office area was very small and after Ms Maart placed the money in the bag, they were all forced together at the sink, instructed to remain there and not to raise an alarm. The man then left them and according to Natasha everything happened very quietly. None of the women could indicate how he left the store. A minute or two lapsed after which Natasha ran from the store and raised the alarm with the security guard who came to their assistance. The witnesses testified that they were in shock after the incident.

10. Quite significantly, none of the employees could identify the man and were unable to describe him to Ms Gwaba, the security guard, and Constable Mathea, the police officer, who arrived at the store shortly after the incident. Yolande stated that the man wore a beanie low over his eyes. As regards the issue of lighting inside the store, Ms Maart testified that she could not identify the man as the store lights were dimmed. The witnesses testified that the back part of the store was lit by computer monitors which were switched on at the time.

11. The women testified that the owner had not done banking the weekend prior to the incident, hence there was a large amount of cash still in store on the Monday morning. On this aspect, Ms Maart's evidence was that the owner does the banking and she does the cashing up every morning, though Natasha testified in cross-examination that the owner normally did the cashing up every morning but on that specific Monday morning, he had contacted Ms Maart to cash up.

12. It was common cause that there was no security camera inside the store but there was one mounted at the Spur restaurant opposite. In response to the appellant's version put to them, all the employees denied that the roller door was closed when he entered the store and that the robbery was a fabrication. They

confirmed that they attended a braai at Mr Messier's house the evening before the incident but that they never saw the appellant at the premises. In addition, Ms Maart and Natasha testified that they did not know the appellant.

13. Natasha testified that an object was held against her back, yet when it was put to her that the State alleged that a knife was held against her neck, she then stated that the object was held to her neck and that she had forgotten this. According to her, there was enough light at the back of the store to be able to see where Ms Maart was seated and she did not know why her colleague could not describe the assailant as he stood very close to her when the bag was passed to place the money inside it.

14. Yolande testified that Mr Messier was previously convicted of theft from the Vodacom store, and was not allowed to enter it. She also stated that he would know the layout of the store. As regards the lighting, her evidence was that there was sufficient light at the back for Ms Maart to count the money, but she was also unable to identify the person who had entered the store. She denied the appellant's version that she had requested him to collect a bag from the store.

15. Constable Malusi Mathea testified that he arrived at Vodacom to find the lights switched on but the back office was dark. He found all three employees crying and traumatized and from the limited information he obtained from them, he gathered that two of the women were slapped during the robbery. The Constable had viewed the video footage of the store's entrance, which showed a male entering the main entrance and later calmly exiting the Mall entrance with a black laptop bag in his possession.

16. The State called Jesslyn Jantjies, the appellant's girlfriend. She testified that she received information on the day in question that the appellant was at the bush where drugs were purchased and she was informed that Mr Messier should be advised of the appellant's whereabouts. She recalled that shortly thereafter she

saw Mr Messier and the appellant approach the latter's house. The appellant was carrying a black laptop bag which he proceeded to take to his room and cover with a cushion and she was instructed not to scratch in the bag. The appellant then followed Mr Messier to his house, taking the laptop bag with him. In cross-examination, Ms Jantjies testified that the appellant never opened the bag in her presence.

17. The security guard, Babalwa Gwaba testified that she was doing patrols on the morning of the incident and noticed a coloured male enter the Vodacom store which had its roller door partially up. She did not find this suspicious as the women always allowed their friends to enter the store in this fashion. She also noticed that blue lights from the cell phone accessories shed light in the store. Sometime thereafter, a colleague alerted Ms Gwaba to the Vodacom employees who were traumatized and crying, and when she attended on them, they informed her that they were slapped and that a man had entered and taken everything in the store.

18. Ms Gwaba testified that none of the women were able to provide a description of the man, nor did they scream either during the incident or afterward to alert security. She viewed the Mall's CCTV footage and recognized the person she saw enter the store by his clothes. The police were alerted and she relayed the information to Constable Mathea.

The appellant's evidence

19. The appellant testified that he was friends with Faizel Messier and attended the braai at his friend's house. He knew Yolande Lucas for more than 10 years and she requested him to collect a bag at her workplace the next day (Monday), which he agreed to do as he was to be remunerated for his efforts. He furthermore testified that he was unaware why Mr Messier could not collect the bag himself.

20. On Monday morning, the appellant met Yolande in the road outside his residence after being informed by Mr Messier that she was waiting for him to accompany her. *En route* to Vodacom, Yolande informed him that he should wait at the laundromat for Ms Maart, and he complied. Ms Maart eventually arrived and the two walked further toward the Mall, however, she requested that he should wait for a few minutes as she had to purchase electricity.

21. Thereafter the appellant followed Ms Maart to the Mall and she entered the Vodacom store. He testified that he noticed the roller door was partially opened. He looked through the store windows, and saw Yolande wink at him which indicated that he may enter the store. The appellant explained that he entered the store and found all three women behind the counter. Once he had entered, the roller door was closed via a remote. He testified that Yolande asked for the bag, which was brought from the back of the store. The black laptop bag was handed to the appellant with Yolande's instruction that he needed to take it to Mr Messier. The appellant took the bag from the women and proceeded to exit the store and the Mall. He maintained that he was unaware of the content of the bag.

22. The appellant's further evidence was that he purchased drugs at a bush nearby his home and as he was smoking mandrax, he sent someone to find Mr Messier and the two men proceeded to walk to the appellant's house. The appellant retained the bag until Mr Messier retrieved it, placed it on his bed and instructed Ms Jantjies not to open it as it was not his. He added that when Mr Messier returned, they left together for his friend's house. The bag was handed to Mr Messier and the appellant given R50 for his efforts, which went toward purchasing drugs.

23. The appellant denied throughout the trial that he had robbed the Vodacom store. Furthermore, he denied being at the back section of the store, and did not know

why Mr Messier had not collected the bag himself. In cross examination, he stated that he was unaware why Yolande would ask him to collect the bag when she worked at the store. Later in the trial, he testified that Mr Messier was on parole at the time of the incident for the Vodacom theft conviction.

24. The appellant admitted to contacting Yolande telephonically while he was in prison awaiting trial because he wanted determine why it was stated that he robbed the store and she had responded that he knew what had happened. The appellant's explanation as to why he had not questioned the need to wait for Ms Maart *en route* to the Mall, was that he was only interested in the reward for collecting the bag, hence he asked no questions.

25. In a long-winded manner, the appellant explained that the reason he went to the bush was that he wished to smoke drugs before taking the bag home. He denied Ms Jantjies' evidence that he covered the bag while it was on his bed but also explained that Ms Jantjies had a tendency of scratching in his belongings and selling them for drugs. The appellant denied that he was part of the planning of a staged robbery.

The judgment of the Court *a quo*

26. In her judgment, the magistrate found the evidence of the Vodacom employees to be truthful and honest and that they had corroborated each other on the material aspects related to the robbery. She also found that the employees had stuck to their versions during the trial and that she had no reason to disbelieve that the store was robbed as they had testified to.

27. As for the appellant's evidence, the magistrate dealt with the inherent improbabilities in his version and emphasized that he had placed himself on the scene. In the result, she rejected his version as lies and stated that he had

insulted the Court's intelligence with his explanation as to how he came to enter the Vodacom store on 30 July 2018.

28. The magistrate found that the State had proved that the appellant was indeed in possession of a knife and committed the offence as charged. The appellant's version was found not to be reasonably possibly true.

Issues on appeal

29. The issues in the appeal are whether the State proved its case beyond reasonable doubt and whether the appellant's version was reasonably possibly true. In consideration of these issues, the question of credibility and reliability of the witnesses arises in the appeal. Considering the evidence presented during the trial, the main witnesses for the State were Ms Maart, and Yolande and Natasha Lucas, and it is their credibility and reliability which bear closer scrutiny. Furthermore, the magistrate's approach to the appellant's version and finding that he lied, is discussed below.

The parties' submissions

30. During argument, counsel for the appellant submitted that the three State witnesses (the employees) were not completely honest and that it must be remembered that none of them identified the appellant, notwithstanding that the store was not in darkness. Furthermore, it was submitted on behalf of the appellant that Natasha Lucas was not forthcoming about information regarding Mr Messier and had also forgotten that the knife was held against her neck.

31. The respondent's counsel conceded that the Vodacom employees were not completely honest and that they should have been able to identify the man who

entered the store. Furthermore, counsel submitted that she could not take the argument further as there were too many questions which arose from the evidence of the three employees but argued that in view of the fact that Ms Maart was slapped, the offence still amounted to robbery.

32. As an alternative argument, the respondent's counsel submitted that the appellant should at least have been convicted of the competent verdict of theft, which is a continuing crime. In support of this view, she argued that on the appellant's version, this Court should find that the appellant left the store with the bag containing stolen cash and cellphones.

Discussion

33. It is accepted that the employees knew that there was a substantial amount of cash in the store on the Monday, and they knew, at the very least, that Mr Messier had stolen from the store previously and was not allowed to enter it subsequent to his conviction of theft. It is furthermore common cause that the appellant admitted entering the store and was placed on the scene by Ms Gwaba and video footage depicting him entering and leaving the Mall.

34. Thus, the main issue in the trial was the reason why the appellant was in the store on 30 July 2018, and in addition, the inability of the employees to identify him. The evidence of the employees was that the store was dimly lit and the back office was lit by light emanating from computer monitors which were switched on. Constable Mathea's evidence that he observed the back section to be dark supports the employees' version but to an extent, as he did not enter the back section as he did not wish to disturb any evidence.

35. From the evidence presented by the State, it is fair to conclude that there was certainly light in the front of store as the area was dimly lit, but there was an

additional light source from accessories, which Ms Gwaba described as blue light. On the State's version, Natasha would in all probability not have had an opportunity, while in the front of the store, to see who had entered and approached her from behind, nor been able to see the object pressed against her neck.

36. The accepted fact is that the back office space was small and contained a sink, free-standing safe and desk with a chair. All three women were in the same space with the appellant and there was sufficient lighting from (at least) the monitors which were switched on, for him to see Ms Maart sitting at the desk. This was as much stated by Natasha when she was questioned about the lighting in the store.

37. Furthermore, no evidence was presented that Ms Maart had insufficient light to attend to counting the money, or that Yolande was unable to see what she was doing at the sink. Thus, the conclusion from the employees' evidence, in my view, is that the back office area was sufficiently well lit to enable the two women to attend to cashing up and washing dishes. That being the case, the question which arises is why none of these employees were able to identify and/or describe the appellant to Ms Gwaba or constable Mathea.

38. It must be remembered that Natasha testified that the man stood close enough to Ms Maart (who was seated) to be able to slap her and that she did not know why her colleague was unable to describe the man's features in those circumstances. Furthermore, the evidence was that Ms Maart was seated at the desk, with the safe door blocking her view. Yet, despite her view being blocked as she described, Ms Maart testified in examination in chief that the man was holding a knife at Natasha's neck.

39. If Ms Maart, notwithstanding that she was seated at the desk and had her view blocked by the safe door, on her version, was still able to see that the man held a

knife at her colleague's neck, then the most logical conclusion is that Ms Maart must have looked upward, in the man's direction, as he was on her left. She was the only person seated, and it would make sense that she would have had to look upward and to her left to have been able to see a knife at Natasha's neck. That being the most reasonable, logical and probable deduction to make from the employees' evidence, I thus have to ask how it is that Ms Maart did not see the man's face and could not describe him to Constable Mathea and Ms Gwaba?

40. While Ms Maart's explanation was that she was scared and did not look at the man, this explanation does not accord with her evidence that she saw a knife against her colleague's neck. Given the small area that the role players found themselves in, the appellant's very close proximity to Ms Maart, the sufficient lighting in the back area, Ms Maart's hesitation when the bag was passed to her and that she saw a knife against Natasha's neck, on the State's version, Ms Maart had sufficient time, visibility and opportunity to see the appellant in order to provide a description of him later.

41. Having regard to the above finding, I am of the view that it is thus improbable that Ms Maart did not look at the man and/or did not see his face. The only other reasonable explanation is that the events in the store did not unfold as Ms Maart and her colleagues had testified to.

42. As regards Yolande's inability to describe the man or identify him, she testified that he wore a beanie pulled low over his eyes, hence obscuring her view of his face. This version was dissimilar to that of her colleagues who never stated that the man wore a beanie, which would have been an important fact to remember in a store robbery. As for Natasha, she testified that when Ms Maart was slapped, she was standing at the sink. She did not testify that her view was obscured in any way and thus the probabilities would indicate that from her vantage point at the sink, in a compact area, Natasha would also have had an opportunity to see the man's face, yet she too provided no description to the officials who arrived

later.

43. Even accepting that the back area was small, the impression created by all the women was that Natasha was at the front of the opened safe, with an object or knife against her back or neck, placing cell phones into the bag, whereafter it was passed to Ms Maart, who was then slapped. At no stage was evidence presented by Yolande and Ms Maart that Natasha had moved from the safe to the sink area. In addition, Ms Maart's evidence about seeing the knife at her colleague's neck while Natasha was at the safe, also does not correspond with Natasha's version of standing at the sink (when Ms Maart was slapped). Thus, on the aspect of visibility and the opportunity to see the man's face and identify him, the women do not corroborate each other and their evidence is characterized by improbabilities and inconsistencies.

44. The next material aspect relates to the knife. Natasha's version of the man having pressed an object against her back continued during cross examination until she was confronted by the appellant's legal representative who put to her that she had made no mention of a knife. It was at that stage of the trial, on the 'object versus knife' issue, that Natasha stated that there was something against her neck, but she did not know what it was.

45. However, when it was put to her in cross examination that she never testified about anything against her neck, Natasha then stated the following:

> *"It is something that I forgot, Your Worship"*
> (Record, line 23, p146)

46. In my view, Natasha's responses during cross examination are telling. It is inconceivable and improbable that as a victim of an aggravated robbery, she would simply forget that a knife was held to her neck. When I have regard to the charge sheet and record, a period of a year had lapsed from the date of the

incident to Natasha's appearance in Court at trial. While it may seem that it would make no difference whether a knife or object was held against her neck or back, in the context of the evidence in this matter, Natasha's explanation that she forgot that a knife was held to her neck is circumspect.

47. I say this also because Natasha was very clear about the details regarding her collection of a trolley in the Mall, working with refuse bags and her cleaning duties on the day, yet she forgot that a man held a knife to her neck. In my view, the sudden change of her version on this important aspect, should have caused the magistrate to view Natasha Lucas' evidence more critically. The contradictory nature of her evidence regarding a knife, added to the problematic and at times, improbable version of Ms Maart, lend credence to the view that their versions were unreliable, and accordingly, the magistrate should have found that the State had failed to prove the existence of a knife in the commission of the offence.

48. Having regard to the above discussion and findings, I find that the appellant's submissions regarding the unreliability and the questionable credibility of the three employees, have merit. To illustrate, on the material aspects related to how the robbery occurred and why they were unable to identify and describe the man who entered the store, the employees' evidence was tainted with certain improbabilities and they were unreliable witnesses.

49. The test in a criminal case was aptly explained by Nugent J in ***S v Van der Meyden 1999 (1) SACR 447 WLD 449 j – 450 b***:

> *'The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind,*

however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored'.

See also ***S v Trainor [2002] ZASCA 125 paragraphs 8-9***

50. Considering the above *dictum*, and the evaluation of the evidence of the employees regarding the robbery, I am of the view that the learned magistrate failed to take account of the witness' inconsistencies, the improbabilities and their failure to corroborate each other in respect of the presence/use of a knife, the scene in the back office and their reasons for failing to identify the man. Furthermore, the difference in the employees' evidence that only Ms Maart was slapped, compared to Constable Mathea's evidence that he was informed that two of the women were slapped, was also not addressed in the judgment.

51. The magistrate also did not consider that the evidence of Ms Jantjies ultimately did not support the State's version, but rather corroborated the appellant's version of events. I accordingly disagree with the magistrate, as in my view, the employees were not credible nor reliable witnesses, and too many unanswered questions remained after the conclusion of their evidence.

Inspection *in loco*

52. The record reflects that after the inspection *in loco* was held, the prosecutor and legal aid attorney placed certain observations and the content of a discussion held with the store owner during the inspection, on record. During closing argument, the defence submitted that the content of the discussion with the store owner was admitted as hearsay evidence by agreement with the State.

53. The record further indicates that the magistrate did not place her observations made at the inspection *in loco*, on record after the Court had reconvened. Furthermore, in her judgment, the magistrate referred to observations regarding the desk, the safe and where Ms Maart was seated and concluded that Ms Maart *"cannot see what is happening on the other side of this safe"* (Record, lines 9-10, p334).

54. At the hearing of the appeal, counsel were invited to make submissions on the inspection *in loco.* Both counsel held the view that it was difficult to determine from the record, what procedure was adopted by the court *a quo* in conducting the inspection *in loco*. Having regard to the record and with respect to all the role players in the Court *a quo*, the approach adopted regarding the inspection *in loco* warrants a comment on appeal.

55. In ***Abdulla v S [2022] ZASCA 33 at par 24***, Nicholls JA, referring to ***Kruger v Ludick 1947 (3) SA 23 (A) at 31*** and ***Bayer South Africa (Pty) Ltd and Another v Viljoen 1990 (2) SA 647 (A) at 659-660****,* stated that:

> *"[24] An inspection in loco achieves two purposes, the first being to enable the court to follow the evidence. The second is to enable the court to observe real evidence which is additional to the oral evid*ence."
> (Footnote excluded)

56. Section 169 of the Criminal Procedure Act 51 of 1977 grants a Court hearing a criminal matter, the power to hold an inspection *in loco*. Having regard to the authorities and academic work, it is perhaps prudent to revisit the correct procedure and guidelines when conducting an inspection *in loco.*

57. Firstly, the record of the trial Court should contain or disclose the observations which the magistrate made, and this should be done as follows:

"It is important, when an inspection in loco is made, that the record should disclose the nature of the observations of the court. That may be done by means of a statement framed by the Court and intimated to the parties who should be given an opportunity of agreeing with it or challenging it, and, if they wish, of leading evidence to correct it. Another method, which is sometimes convenient, is for the Court to obtain the necessary statement from a witness, who is called, or recalled, after the inspection has been made. In such a case, the parties should be allowed to examine the witness in the usual way."
(Kruger v Ludick supra 31)

58. Furthermore, the parties may prepare a joint memorandum or Minute setting out their agreed observations (***Abdullah supra, par 25)***. Where any person points out places and items during the inspection, he/she should be called to provide evidence as to what was indicated at the inspection *in loco* ***(Principles of Evidence, Third Edition, PJ Schwikkard et al, p401; R v Van der Merwe 1950 (4) SA 17 (O) 20A)***. Real evidence is received once the observations have been recorded by the Court.

59. From the record of the Court *a quo*, it is apparent that the magistrate did not place her observations on record after the inspection *in loco* was concluded, and only referred to and relied on her observations during her judgment. In doing so, no opportunity was afforded to the parties to challenge or comment on those observations, and this unfortunately falls foul of *audi alteram* principle. Thus, in those circumstances where the incorrect procedure was followed and contrary to the abovementioned principles, it cannot be said that the Court *a quo* received real evidence pursuant to holding the inspection *in loco*.

60. In such instance, I am of the view that the magistrate was therefore not at liberty to take account of and rely upon observations made at the inspection as though it indeed amounted to real evidence. However, in view of my earlier findings in the

judgment regarding the lighting in the store, that there was no cameras, in-store and the general lay-out of the back of the store, the magistrate's oversight in respect of the inspection *in loco,* does not vitiate the trial proceedings nor affect the outcome of the appeal.

61. As a final comment on the inspection *in loco*, it seems from the record that the parties sought to rely on comments made by the store owner*,* presumably in terms of section 3(1)(a) of the Law of Evidence Amendment Act 45 of 1988, although it is not evident from the record that any reliance was placed on this legislation, nor what the basis was for contending that statements made by the store owner at the inspection could be admitted into evidence in this manner. As illustrated above, the correct procedure was to have noted the comments by the store owner on the scene and to have called him as a witness. Lastly, it bears emphasizing that the store owner's comments and/or observations would only become evidence once he confirmed it under oath in the trial (*Van der Merwe supra*, *20A*)

Appellants' version

62. This brings me to the appellant's version, which is set out above and which is indeed a long and convoluted explanation of how he came to be in the store on 30 July 2018. While the magistrate questioned the inherent improbabilities in his version, and correctly so in her evaluation of the evidence, it was common cause that the appellant was present at the braai at Mr Messier's house, admitted that he used drugs, maintained throughout that he was only interested in his cut for collecting the bag and was not interested in opening the bag. He remained consistent on these aspects and his denial that he robbed the employees and knew about a staged robbery.

63. Having regard to the magistrate's judgment, I respectfully differ from her finding

that the appellant should have called Mr Messier to corroborate his version. As stated above, Ms Jantjies, who was called by the State, corroborated the appellant's version and had withstood stern cross examination.

64. The magistrate dealt in some detail with all the questions a normal person would have had in circumstances where he was asked to collect a bag from the store. While I fully agree with the magistrate that the questions would be relevant and pertinent to the situation the appellant found himself in (such as why Ms Maart would need to purchase electricity), I must point out that he maintained throughout that he was asked to collect a bag, to ensure that Mr Messier received it and that he was only interested in what he was to receive in return for his efforts. The appellant's evidence clearly established that he was more interested in purchasing drugs than in the content of the bag.

65. The magistrate rejected the appellant's version and found that he had lied and that his version was not reasonably possibly true. Yet, in reaching this conclusion, she had also unequivocally accepted the version presented by the three Vodacom employees without consideration of their inconsistencies and improbabilities on the material aspects, as discussed above. The evidence considered holistically is that the appellant and at least Yolande, were well known to each other, and the indications were that all or some of the employees were not entirely forthcoming and truthful when testifying.

66. The test is not whether the appellant's version was true or even believable. His version was certainly fraught with some questions which the magistrate correctly identified, but his version can only be rejected *"on the basis of inherent improbabilities if it can be said to be so improbable that it cannot be reasonably possibly true"* ***(S v Shackell [2001] ZASCA 72 par 30).*** The appellant's version was corroborated by a State witness, and it must further be considered against the following facts: he was known to Yolande and Mr Messier; all the role players were together on the Sunday evening; on the day of the incident, none of the

employees identified the appellant even though they had the opportunity to do so; none of the employees raised an alarm or shouted while the appellant was in the store; video footage showed him walking calmly from the Mall, and Mr Messier knew the lay-out of the store.

67. Having considered the submissions, I am in agreement with the appellant's counsel that the magistrate misdirected herself by not attaching proper weight to Ms Jantjies' evidence and that it could not be excluded that one or more of the employees could have orchestrated or planned the supposed robbery. Certainly, there are too many questions which arise from the employees' evidence. In view of all these factors, it thus cannot be said that the appellant's version, that he was asked to collect a bag from the store, was so improbable that it could not be reasonably possibly true. In view of the above, I find that the magistrate misdirected herself in finding that the appellant's version was a lie and rejecting it as false. Thus, the appeal against the conviction should be upheld.

Alternative submissions and competent verdicts

68. Counsel for the respondent argued that if the appeal is upheld on the basis that the appellant's version was reasonably possibly true, the appellant is still guilty of the charge of robbery with aggravating circumstances as the charge sheet alleges that he slapped and/or threatened Ms Maart and Natasha Lucas. The argument was not presented with great conviction. That said, my comments and findings above regarding the evidence of Ms Maart and Natasha on the incident in the store, refer. Neither were reliable nor convincing on the material aspects and the appellant's version is found to be reasonably possibly true, thus the alternative argument is unconvincing.

69. Lastly, counsel for the respondent also submitted that at the very least, the appellant is guilty of the competent verdict of theft, as he remained in possession

of the bag containing cash and cellphones as he left the store with it in his possession (see ***S v Cassiem 2001 (1) SACR 489 (SCA) par 8***). It bears repeating that the appellant was consistent that he had not opened the laptop bag, was not interested in its content and was only after his reimbursement for collecting the bag. Ms Jantjies confirmed that the bag was never opened in her presence, and the appellant denied being part of a plan to rob the store. In conclusion, given the facts, evidence, and findings already made in this judgment, I am therefore not convinced that the State managed to prove theft or any other competent verdict referred to in section 260 of the Criminal Procedure Act.

Order

70. In the result, I would propose the following order:

The appeal against conviction is upheld. The conviction is set aside.

_____

M PANGARKER

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

_____

G SALIE

JUDGE OF THE HIGH COURT

For Appellant:	**Ms S Kuun**
Instructed by:	**Legal-Aid**
For Respondent:	**Adv S M Galloway**
Instructed by:	**Director of Public Prosecution: Cape Town**