Reportable:	NO
Circulate to Judges:	NO
Circulate to Magistrates:	NO
Circulate to Regional Magistrates:	NO

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION – MAHIKENG

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

Case no: CA 49/23

Regional Court case number: SRC 60/2022

In the matter between:

LLOYD WILLIAMS **APPELLANT**

AND

THE STATE **RESPONDENT**

CORAM: REDDY J, MOTSATSI AJ

Date Heard: 18 June 2024

Judgment is handed down electronically by distribution to the parties' legal representatives by e-mail. The date that the judgment is deemed to be handed down is **12 September 2024** at 10h00.

ORDER

(i) The appeal against conviction is dismissed.

(ii) The appeal against sentence is upheld. The sentence of fifteen (15) years imprisonment is replaced with a sentence of:

"Eight (8) years imprisonment."

(iii) In terms of section 282 of the Criminal Procedure Act 51 of 1977, the sentence is ante-dated to 29 May 2023.

(iv) The order in terms of 103(1) of the Firearms Control Act 60 of 2000 is confirmed.

JUDGMENT

REDDY J

Introduction

[1] The appellant was charged before Acting Regional Magistrate Van der Walt at Stilfontein, on a charge of robbery with aggravating circumstances as defined in section 1(b)(i) and (iii) of the Criminal Procedure Act 51 of 1977 ('the CPA) read with section 51(2) of the Criminal Law Amendment Act 105 of 1997 ('the CLAA'). The State alleged that the appellant had unlawfully and intentionally dispossessed the complainant of a cell phone and that aggravating circumstances as aforesaid were present.

[2] On 11 May 2023 the appellant duly represented by Mr Kok from Legal Aid South Africa, pleaded not guilty to the charge. In terms of section 115(1) of the CPA, the appellant disclosed that he was home alone when the offence was committed. On 29 May 2023 after a full-blown trial, the appellant was convicted as charged. On the latter date, Acting Regional Magistrate found that no substantial and compelling circumstances existed to deviate from the mandatory sentence. Resultantly the appellant was sentenced to fifteen (15) years imprisonment. In terms of an ancillary order in terms of section 103(1) of the Firearms Control Act 60 of 2000, the appellant was

declared *ex lege* unfit to possess a firearm. On 03 August 2023 the appellant was granted leave to appeal his conviction and sentence.

Grounds of appeal

[3] The appellant assails the conviction and sentence on the following grounds:

AD CONVICTION

1. The Court erred in finding that the state proved the guilt of the appellant beyond a reasonable doubt.
2. The Honourable trial court failed to properly apply the cautionary rule on identification evidence and evidence of a single witness.
3. The trial court erred in how it evaluated evidence or approached the evidence in compartments.

AD SENTENCE

4. The seriousness of the offence was over-emphasized over the personal circumstances of the appellant and the interests of society.
5. The trial court misdirected itself in that it allowed perceived expectation of the community to dictate that it cannot deviate from the prescribed sentence.

[4] Both Counsel acquiesced to hearing of the appeal on the papers within the tenets of section 19(1)(a) of the Superior Courts Act 10 of 2013.

Background facts

[5] On 09 September 2021, around midnight, Mr Thato Ishmael Befo ('Befo'), was proceeding from a Civic Centre *en route* to his abode. He noticed two males approaching from the front. Without uttering a word, both males started to search him by patting him down. Befo reacted by pushing both from him, causing them to produce knives. Befo pushed the one away and fought with the other. Whilst engaged in this struggle, Befo's cell phone, which was in his trouser pocket, fell to the ground. The appellant picked up the cell phone and ran off, with the other male following suit. Befo pursued these two males. The presence of artificial light made it possible for Befo to see the appellant. As he shouted out that he knew the appellant, the appellant turned around and Befo was able to see his face.

[6] The appellant was known to Befo by sight as he used to see him sitting under the canopies which were near the Civic Centre. The appellant was wearing a black long sleeve jersey or T-shirt. Later that day, Befo proceeded to this location but was unsuccessful in identifying any of the perpetrators. Befo, however secured information that led him and his friend to the home of the appellant.

[7] On arriving at the given address the appellant was found exiting, in the possession of a bicycle. He was wearing the same black top. Befo questioned the appellant about his cell phone, but he denied any knowledge thereof. Befo suggested that the appellant accompany him to the South African Police Services ('SAPS').

Noting, that the appellant was reluctant to assent to his suggestion, Befo seized control of the bicycle and began pushing it in the direction of SAPS. The appellant then made an about face and proposed that the issue of the police station be jettisoned. To this end, his proposition was based on two scores. First, he would present the cell phone and second, he would expose his co-perpetrator.

[8] Notwithstanding the proposition of the appellant, Befo proceeded to SAPS, where he made a statement. The appellant who was present was behaving in an unruly fashion which caused him to be arrested and placed in the holding cells. When the appellant was searched in the presence of Befo, a knife was recovered. The cell phone was not recovered. Befo left the bicycle in the possession of the police.

The defence case

[9] The appellant in his evidence maintained that he was not present when Befo was robbed. He testified that he had slept alone at his home at [redacted] G[redacted] Street, S[redacted]. He denies any incriminating admissions that were made. Furthermore, he refutes that he is the owner of any black clothing.

An appeal court's discretion on factual findings

[10] In *Sebidi and others v S* [2023] ZANWHC 151 with reference to *S v Francis* 1991 (1) SACR 198 (A) at 204c–e; and *S v Mkohle* 1990 (1) SACR 95 (A) at 100e summarised the position as follows:

> 'It is settled law that a court of appeal will not likely interfere with credibility and factual findings of the trial court. In the absence of an irregularity or misdirection, the court of appeal is bound by such findings, unless it is convinced that the findings are clearly incorrect or unless an examination of the record reveals that those findings are patently wrong.' See also S v *Hadebe* 1997 (2) SACR 641 (SCA) at 645e – f. *S v Naidoo and others* 2003 (1) SACR 347 (SCA) at para 26; *Beukes v Smith* [2019] ZASCA 48; 2020 (4) SA 51 (SCA) para 22.

[11] The authors *Schmidt and Rademeyer CWH Schmidt and H Rademeyer Law of Evidence* (Service Issue 21, May 2023) at 3-40, summarised how evidence is assessed on appeal, as follows:

> 'When an appeal is lodged against a trial court's findings of fact, the appeal court takes into account that the court a quo was in a more favourable position than itself to form a judgment because it was able to observe witnesses during their questioning and was absorbed in the atmosphere of the trial from start to finish. Initially, therefore, the appeal court assumes that the trial court's findings were correct, and it will normally accept those findings unless there is some indication that a mistake was made.' (footnote omitted).

[12] Our jurisprudence operates from the premise that no judgment is perfect and the fact that certain issues were not referred to does not necessarily mean that these were overlooked. It is accepted that factual errors do appear from time to time, that reasons provided by a trial court are unsatisfactory or that certain facts or improbabilities are overlooked. However, to prevent a convicted person's right of appeal to be illusionary, the court of appeal has a duty to investigate the trial court's factual findings to ascertain their correctness and if a mistake has been made to the extent that the conviction cannot be upheld, it must interfere.

Discussion

[13] A fundamental principle in our criminal proceedings is that the State bears the onus to prove the guilt of an accused beyond reasonable doubt: *S v Mbuli* 2003 (1) SACR 97 (SCA) at 110D-F; *S v Jackson* 1998 (1) SACR 470 (SCA) and *S v Shackell* 2001 (4) SACR 279 (SCA). No onus rests on the accused to prove his or her innocence: *S v Combrinck* 2012 (1) SACR 93 (SCA) at paragraph 15. An 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: *S v V* 2000 (1) SACR 453 (SCA) at 455B. The corollary is that, if the accused's version is reasonably possibly true, the accused is entitled to an acquittal. Equally trite is that the appellant's conviction can only be sustained if, after consideration of all the evidence, his version of events is found to be false: *S v Sithole and Others* 1999 (1) SACR 585 at 590.

[14] The Acting Regional Magistrate correctly assessed the single evidence of Befo with reference to the relevant legislation and judicial precedence. I elucidate each of these findings in turn.

[15] In dealing with the evidence of a competent witness the judgment of the Acting Regional Magistrate reads as follows:

> "The state only called a single witness. In terms of section 208 of the Criminal Procedure Act 51/77 an accused may be convicted on the single evidence of any competent witness. In S v Sauls and Others 1981 (3) SA 172 (A) the Appellate Court discussed this section and the evaluation of a single witness and on page 181 C to H submitted the following with regard to the evidence of a single witness:
>
> "Section 256 has now been replaced by section 208 of the Criminal Procedure Act 51/77. This section no longer refers to the single evidence of any competent and credible witness. It provides merely that an accused may be convicted on the single evidence of any competent witness. The absence of the word credible is of no significance. The single witness must still be credible but there are as Wigmore points out indefinite degrees in this character we call credibility. There is no rule of thumb to test or formula to apply when it comes to the consideration of the credibility of a single witness. See remarks of Rumpff in S v Weber 1971 (3) SA 7458 at 758. The trial Judge will weigh this evidence, will consider its merits and demerits and having done so will decide whether it is trustworthy and whether despite the fact there are shortcomings or defects or contradictions in the testimony he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 may be a guide to the right decision but it does not mean that the appeal must succeed if any criticism however slender of the witness's evidence were well founded. It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

[16] The Acting Regional Magistrate embarked on a similar exercise in dealing with the issue of identification. It is apparent that the seminal judgment of *S v Mthetwa* 1972 (3) SA 766(A), was appositely applied. The contention by Mr Kekana that the Acting Regional Magistrate paid lip service to fundamental legal principles relating to the evaluation and assessment of the evidence of a single identifying witness is misplaced. The record buttresses this finding.

[17] Afore an exposition on the burden of proof and the law the Acting Regional Magistrate reasoned as follows:

> "The Court refers to other case law just after those specific quotations. The Court will then use all of these factors mentioned to assess the evidence of the complainant. The Court did have the privilege of observing the complainant while he testified not only during his evidence, my I will repeat that sentence. Not once during the evidence he hesitated to answer any questions and he did not contradict himself in any way. He testified that he knows the accused. That he saw him before this incident several times at the canopies walking on the streets with dogs and by his street name Jozy. The accused also confirms that he knows the complainant. He even knows where the complainant is residing. He recognised the person at his gates on the morning of the 9 September as the complainant."

[18] The Acting Regional Magistrate continued to deal with criticism regarding the name Floyd that was used by Befo and found that this was unfounded. The judgment continues as follows:

"The complainant made a very good impression on the Court and that the Court find that he was an honest witness. However this is not enough in terms of *Mthetwa* what the Court just earlier quoted above the Court must also find that this was, the complainant was a reliable witness in his identification of the accused as one of the people who robbed him. The complainant agreed that the place where the robbery took place was or could have been in the shadows of a tree. He did not see the persons who robbed him at that stage but he followed them, after running after them.

Then he had the opportunity to see one of them in the light. The complainant testified that if the, I just want to repeat that, if the complainant testified he could identify his attackers in the shadows then there would have been doubt as to the reliability of his identification. The complainant also did not try to point out a second attacker and this part of his evidence where he testified only about the person he could clearly see in the light the Court find confirmation of the reliability of his evidence...."

[19] As alluded to in paragraph [12] *supra*, a judgment can never be all encompassing. Whilst the Acting Regional Magistrate carefully applied her mind in the assessment of the evidence, material issues were not adequately addressed. This related to the physical evidence, which was the knife that was recovered in the possession of the appellant. Befo was emphatic about his identification. Notwithstanding the limited time he had to identify the appellant, Befo remained adamant that he had correctly identified the appellant. His identification was based on prior knowledge, and the black top that the appellant was wearing at the time of the robbery. Furthermore, Befo's undisputed evidence is that the appellant and his co-perpetrator used knives to ward off his resistance. To this end, within hours of the robbery having been committed the appellant was found in possession of a knife. The ineluctable conclusion given

the direct evidence of Befo, and the physical evidence is that the appellant had indeed robbed Befo of his cell phone and that aggravating circumstances existed.

[20] The appellant was correctly convicted. It follows that the appeal against the conviction must fail.

Appeal against sentence

[21] It is trite that the imposition of sentence is pre-eminently within the discretion of the trial court. An appeal court will be entitled to interfere with the sentence imposed by the trial court only if one or more of the recognized grounds justifying an interference on appeal has been shown to exist. (See *S v Mtungwa en 'n Ander* 1990 (2) SACR 1 (A)). The grounds on which a court of appeal may interfere with sentence on appeal are that the sentence is:

(i) disturbingly inappropriate.

(ii) so badly out of proportion to the magnitude of the offence.

(iii) sufficiently disparate.

(iv) vitiated by misdirection showing that the trial court exercised its discretion unreasonably.

(i) is otherwise such that no reasonable court would have

imposed it.

(See *S v Giannoulis* 1975 (4) SA 867 (A) at 873G-H; *S v Kibido* 1998 (2) SACR 213 (SCA) at 216g-j; *S v Salzwedel & others* 1999 (2) SACR 586 (SCA) para [10].)

[22] In *S v Sadler* 2000 (2) All SA (SCA) at paragraph 6 Marais JA, writing for a unanimous court, had occasion to re-state the aforesaid grounds, when he said:

"The approach to be adopted in an appeal such as this is reflected in the following passage in the judgment of Nicholas AJA in S v Shapiro 1994 (1) SACR 112 *9A) at 119 J-120C:-*

It may well be that this Court would have imposed on the accused a heavier sentence than that imposed by the trial judge. But even that be assumed to be the fact that would not in itself justify interference with the sentence. The principle is clear: it is encapsulated in the statement by Holmes JA in S v Rabie 1975 (4) SA 855 *(A) at 875D-F:*

" In every appeal against sentence, whether imposed by a magistrate or judge, the Court hearing the appeal-

1. should be guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial Court', and

2. should be careful not to erode such discretion: hence the further principle. that the sentence should only be altered if the discretion has not been: judicially and properly exercised'.

3. The test under (b) is whether the sentence is vitiated by irregular or misdirection or is disturbingly inappropriate."

[23] In respect of the courts sentencing discretion where a mandatory sentence finds application, the guidance provided in *S v Malgas* 2001 (2) SA 1222 where the following was stated, is instructive:

> *" [12] The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be a just and appropriate sentence. A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate". It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation. "*

[24] Having convicted the appellant of robbery with aggravating circumstances as intended in section 1 of the CPA, it was mandatory for the appellant to demonstrate substantial and compelling circumstances as evinced in section 51(3)(a) of the CLAA. It is trite that in instances where the prescribed minimum sentences find application a finding must be made whether the facts and circumstances of the individual who falls to be sentenced, meets the threshold that these can be viewed as substantial and compelling. See: *S v PB* 2013 (2) SACR 533(SCA) at 539F-G.

[25] The appellant presented the following personal circumstances at the time of sentencing. He was born on [redacted] 1989 and was thirty-three (33) years old. His highest level of education was the former Standard 9. Although he is the father of a child who was two (2) years old, the appellant was not the primary care giver as his child resides with the biological mother. He was self-employed, accruing and income from the buying and selling of second-hand goods. The appellant has two previous convictions. On 18 December 2014, he was convicted of contravening section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 and sentenced to a fine of R500-00 (five hundred rand) or 30(thirty) days imprisonment. On 07 December 2017, he was convicted of malicious injury to property and sentenced to nine (9) months imprisonment. Subsumed within the personal circumstances of the appellant, a sentencing court is duty bound to take due cognizance of mitigating circumstances.

[26] It is commonplace in our law that when it comes to sentencing, a court has to take into account the triad consisting of the crime, the

offender and the interests of society, as illustrated in *S v Zinn* 1969 (2) SA 537 (A) at 540G-H. The upshot of this is that punishment should not only fit the criminal as well as the crime, but must also be fair to society, whilst being blended with a measure of mercy according to the facts and circumstances of each case. See: *S v Rabie* 1975(4) SA 855 (A).

[27] The proper approach of appellate courts regarding sentences imposed in terms of the CLAA, is whether the facts which were considered by the sentencing court are indeed substantial and compelling or not. See: *S v PB* 2013 (2) SACR 533 (SCA). The pivotal test as to whether there are any substantial and compelling circumstances to deviate from minimum sentences was laid down in *S v Malgas* 2001 (2) SA 1222 (SCA) at paragraph 25:

> *"If the sentencing court on consideration of the circumstances of a particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime; the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence."*

[28] There is no underscoring the seriousness of the crime that the appellant was convicted of. This much was conceded by the appellant. The mandatory minimum sentences that find application for a crime of robbery with aggravating circumstances are a clear indicator of the Legislature's view on this category of crime. Significantly, it bears mentioning that the CLAA was enacted by

parliament to curb violent crime. This species of crime encroaches on the right to freedom and security.

[29] In *S v Myute and Others* 1985 (2) SA 61 (CK) at 62D – F, the following remark was made:

> *"Magistrates should never lose sight of the fact that robbery is a most serious crime. The offence consists of the two elements of violence and dishonesty. Normally an individual can avoid situations which lead to violence and the danger of his being assaulted by taking the necessary precautionary measures. Similarly, he can take steps to guard against his property being stolen. It is, however, a different matter when it comes to robbery. The victim cannot take precautions against robbery. In his day-to-day living he visits friends, goes to work and goes shopping. This is usually when robbers strike. Robbers often roam the townships in gangs, attacking innocent people, depriving them of their property and almost invariably injuring the victims, sometimes seriously. The persons robbed are more often than not women or elderly people who cannot defend themselves. It must also be remembered that robbery is always a deliberately planned crime."*

[30] In the *S v Gardener and Another* 2011 (1) SACR 570 (SCA), the following was pertinently stated:

> *"[68] True justice can only be meted out by one who is properly informed and objective. Members of the community, no matter how closely involved with the crime, the victim or the criminal, will never possess either sufficient comprehension of or insight into what is relevant, or the objectivity to analyse and reconcile them, as fair sentencing requires. That is why public or private indignation can be no more than one factor in the equation which adds up to a proper sentence and why a court, in loco parentis for society, is responsible for working out the answer."*

[31] The final factor that must be considered in the triad of sentencing is the interests of society. Society has a legitimate expectation that apprehensible criminal activities should not be left undetected and unpunished. It demands and commands that serious crimes warrant serious sentences, and society expects that the courts send out a clear and strong message that serious acts of criminality will not be tolerated and will be dealt with effectively. See: *S v Holder* 1979 (2) SA 70 (A).

[32] In *R v Karg* 1961 (1) SA 231 (A) at 236B Schreiner JA stated that:

> *"It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may be inclined to take the law into their own hands."*

[33] Where a mandatory sentence applies, a sentencing court may not deviate from the prescribed sentence unless it finds that substantial and compelling circumstances exist that warrant such a departure. It is impossible to give an all-embracing definition of what substantial and compelling circumstances means. Such a finding is undoubtedly dependent on the exigencies of each case. What stands out is that a sentencing court may not deviate from a mandatory sentence for flimsy reasons. There must be some weighty justification before a lesser sentence is imposed.

[34] On a balanced consideration of all the facts, mitigating and aggravating, I am of the view that the imposition of the mandatory sentence was unjust and harsh. This constitutes a misdirection in the sentencing discretion of the trial court which makes it permissible for this Court to interfere. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence. In the premises, the sentence imposed by the court a *quo* is set aside. A fair and balanced sentence of eight (8) years imprisonment would suffice.

Order

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

(i) The appeal against conviction is dismissed.

(ii) The appeal against sentence is upheld. The sentence of fifteen (15) years imprisonment is replaced with a sentence of:

"Eight (8) years imprisonment."

(iii) In terms of section 282 of the Criminal Procedure Act 51 of 1977, the sentence is ante-dated to 29 May 2023.

(iv) The order in terms of 103(1) of the Firearms Control Act 60 of 2000 is confirmed.

[redacted]

A REDDY
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

I agree

[redacted]

N MOTSATSI
ACTING JUDGE OF THE HIGH COURT
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APPEARANCES

For the Appellant:	Mr M V Kekana
Instructed by:	Legal Aid South Africa No 742 Dr James Moroka Drive Borekelong House Mmabatho
For the Respondent:	Advocate F. Tlatsana
Instructed by:	The Director of Public Prosecutions, North West