THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 776/2018

In the matter between:

LEBOHANG MOKOELE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Mokoele v The State* (776/2018) [2026] ZASCA 57 (22 April 2026)

Coram: KGOELE and KOEN JJA and VALLY AJA

Heard: 19 February 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and release to SAFLII. The date and time for hand down is deemed to be 22 April 2026 at 11h00.

Summary: Appeal – against refusal by high court of petition for leave to appeal against convictions by regional court – State applying for postponement of appeal – insufficient explanation for State's failure to file practice note and heads of argument – postponement refused – whether appellant's application for condonation for late filing of the record and notices ought to be granted and appeal reinstated – whether appeal to full bench has reasonable prospects of success –

whether another court could reasonably find that State failed to prove the guilt of the appellant beyond a reasonable doubt.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Modiba J and Moloto AJ) refusal of petition for leave to appeal against convictions by a Regional Court:

1 The State's application for postponement of the hearing is dismissed.

2 The late filing of the record is condoned and the appeal is reinstated.

3 The late filing of the appellant's heads of argument is condoned.

4 The appeal is dismissed.

5 The registrar of this Court is to forward a copy of this judgment to the Director of Public Prosecutions, Gauteng who is to look into the conduct of Mr V Mongwane.

JUDGMENT

Koen JA (dissenting):

Introduction

[1] The appellant, Mr Lebohang Mokoele, and his two co-accused, Mr Thulani Dlamini (accused 1) and Mr Bafana Radebe (accused 2), were convicted by the Protea Regional Court, Soweto (the trial court) of two counts of robbery with aggravating circumstances. The robberies, which were both committed on 28 June 2014, in Naledi Extension 2, Soweto, are not in dispute.

[2] The first count involves four males having robbed Ms Philiswa Zukuswa Mabutho (Ms Mabutho) of her motor vehicle, a silver Volkswagen Polo Classic with registration number ZCN 428 GP, a lap top computer and a Blackberry cell phone. The second count entails four males having robbed Mr Lwazi Nkomo (Mr Nkomo) and his wife, Ms Moiketsi Thato Mphuthi (Ms Mphuthi) of their motor vehicle, a Toyota Run X with registration number RZH 546 GP, two laptop

computers and four cell phones. The trial court concluded that the appellant and the two co-accused were among the four males who committed the robberies.

[3] Following his conviction the appellant was sentenced to ten years' imprisonment on each count. The trial court granted him leave to appeal against the sentences. His petition to the Gauteng Division of the High Court, Johannesburg (the high court)[1] in terms of s 309C(2) of the Criminal Procedure Act 51 of 1977, for leave to appeal against his convictions was unsuccessful. Special leave to appeal against the refusal of the petition by the high court was granted by this Court on 11 June 2018.[2]

[4] In his heads of argument the appellant seeks an order that the trial court's decision to convict him on the two counts be set aside. That prayer for relief is misconceived. It is trite that the issue before this Court at this stage of the appeal process is whether leave to appeal should have been granted by the high court to a full bench against the appellant's conviction by the regional court: not whether the appeal against the conviction should succeed.[3] If this appeal against the refusal of the petition succeeds then the full bench of the high court will decide whether the appeal against the convictions should succeed.

[5] The pertinent issue is whether an appeal to the full bench would have a reasonable prospect of success.[4] It is necessary, to that extent, to have regard to the reasons for the trial court convicting the appellant and whether a full bench reasonably could come to a different conclusion, but without this Court expressing

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[1] Per Modiba J and Moloto AJ.
[2] Per Swain JA and Nicholls AJA.
[3] *S v Khoasasa* 2003 (1) SACR 123 (SCA); [2002] 4 All SA 635 at 125D-I. See also *Matshona v S* [2008] ZASCA 58; [2008] 4 All SA 68 (SCA); 2013 (2) SACR 126 (SCA) *(Matshona)* para 4-5; *Tonkin v S* [2013] ZASCA 179; 2014 (1) SACR 583 para 2-3; *De Almeida v S* [2019] ZASCA; 2019 JDR 0987 (SCA) 84 para 5; *Van Wyk v S, Galela v S* [2014] ZASCA 152; [2014] 4 All SA 708 (SCA); 2015 (1) SACR 584 paras 20-21; *S v Ntuli* 2023 [2023] ZASCA 150; JDR 4306 (SCA) para 6; *S v Treasure* [2025] ZASCA 137; 2025 JDR 4229 (SCA) para 2.
[4] *S v Smith* 2012 (1) SACR 567 (SCA); [2011] ZASCA 15 para 2-3; *Matshona* para 8.

any definitive views on the merits of the convictions so as not to fetter the full bench's reasoning.

The applications for postponement of the appeal hearing and condonation

[6] Having been granted special leave to appeal, the appellant failed to file the record of appeal within three months and to file the notice of appeal timeously, as a result of which the appeal lapsed.[5] He also failed to file his practice note and heads of argument timeously.

[7] An application for condonation for the late filing of the record of appeal and the notice of appeal, was subsequently filed and served on the State at the National Prosecuting Authority, in Johannesburg, on 11 December 2024. On 15 April 2025, the appellant similarly served his practice note and heads of argument together with an application for condonation for the late filing of the heads of argument, practice note and chronology on the National Prosecuting Authority. Finally, on 7 July 2025, he served an application for reinstatement of the appeal and for condonation for the late filing of the heads of argument, practice note and list of authorities on the National Prosecuting Authority.

[8] No steps were taken by the National Prosecuting Authority to file its practice note or heads of argument. The appeal was proceeding unopposed.

The application for a postponement of the hearing of the appeal

[9] On the day of the hearing, Mr Mongwane appeared for the State.[6] He applied for a postponement of the appeal to file heads of argument. This application was made orally from the bar and was not supported by a substantive written

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[5] Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa Rule 12(6) determines that 'if the applicant fails to comply with a direction by the Court or the registrar or to complete the application within the period prescribed, the application shall lapse'. The appellant concedes that he failed to comply with Rule 8, 10 and 10A.

[6] The hearing proceeded virtually by means of Teams as the court rooms at the Supreme Court of Appeal in Bloemfontein were unavailable.

application. He explained that he was only reminded of the hearing when the registrar of the presider in this appeal contacted him on the day before the hearing, to obtain his details to set up the Teams platform for the hearing.

[10] He explained that he had not filed heads of argument on behalf of the State because he was waiting for the appellant's heads of argument. It was pointed out to him that the appellant's heads had been served on 15 April 2025. He confirmed having received the heads of argument and the notice of reinstatement of the appeal.

[11] He admitted that he had not familiarised himself with the Rules of this Court, that he acknowledged the default on his part, and that he appreciated the importance of the matter. After having received the appellant's heads of argument, further documents (which he was not able to identify but presumably included the applications for condonation and reinstatement) were served. He then spoke to an appeals' clerk, who he did not identify, at the Office of the Director of National Prosecutions. This person told him that he need not do anything further but await the appellant's heads. When exactly this discussion occurred and how that advice could be given, is not clear. It could not have been considered advice. Although he is an admitted advocate, Mr Mongwane did not undertake research of his own to determine what was required of him. Nor did he request assistance from his seniors as to what the next procedure in the appeal would be.

[12] As regard the practice in this Court, Mr Mongwane said that he presumed it was the same as the practice in the high court, but that he had not verified this for himself. He however had no answer when it was pointed out to him that the practice in this Court is indeed substantially similar to that in the high court, at least insofar as the State is required to file its heads of argument within a set time after having received the heads of argument of the appellant. He had failed to act in accordance with his understanding. He did not tender the costs of any postponement, if there

was to be a postponement and sought to avoid any personal costs order against him on the basis that he would not be able to afford it.

[13] Regarding prejudice, Mr Mongwane was unaware whether the appellant was in custody. As it turned out, after an exchange between the bench and appellant's counsel, the appellant had been released on bail sometime during the second quarter of 2025.

[14] Mr Modumaela for the appellant stressed that: there was no full explanation for the State's failure to have filed its heads of argument; the prejudice to the appellant if the matter was to be delayed by a postponement; that it is an old matter going back to 2014 and should long have been finalised;[7] that the appellant will be financially prejudiced, as the costs of the day would be wasted; and that the appellant's right to a speedy judicial process would be impaired.

[15] In *Namibia Airports Company v IBB Military Equipment and Accessory Supplies Close Corporation (2)*,[8] it was held that the granting of a postponement lies within the discretion of the court and that 'a postponement is not had for the asking,' the applicant bears the onus to make out a proper case supported by a full and satisfactory explanation. A postponement of judicial proceedings is an indulgence which must be judicially justified. *Myburgh Transport v Botha t/a SA Truck Bodies*[9] held that when a postponement is sought, the trier of fact has a discretion to exercise, and that such '… discretion ought to be exercised judicially. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons'. The Court went on to stress that the fundamental consideration

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[7] The judgment of the trial court was handed down on the 16th of March 2016. The subsequent petition was dismissed by the high court on the 8th of November 2018.

[8] *Namibia Airports Company v IBB Military Equipment and Accessory Supplies Close Corporation (2)* [2019] NAHCMD 495 para 10.

[9] *Myburgh Transport v Botha t/a S A Truck Bodies* 1991 (3) SA 310 (NmS) at 314-315. This case was approved by the Constitutional Court in *The National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) para 11 and also applied in *Shilubana and Others v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality) as Amici Curiae* [2007] ZACC 14; 2007 (5) SA 620 (CC); 2007 (9) BCLR (CC) para 3 and 10-12.

in such an application is whether it is in the interests of justice to grant the postponement.

[16] The State failed dismally in attending to this appeal. There was no substantive application to which the appellant could respond to dispute any factual premise on which the application for postponement is founded. Even accepting what was submitted from the bar as correct, the State did not advance a satisfactory explanation: why the State failed to file its heads of argument; why it was not ready to proceed with the appeal; and why it should be indulged by a postponement being granted to do what it should have done a long time ago. The State was grossly negligent and acted in a manner not conducive to the proper administration of justice. Every accused person is constitutionally entitled to have court proceedings brought to finality with expedition.

[17] As regards prejudice to the State and the general public if the postponement is not granted, this appeal, if successful, will not result in an acquittal of the appellant. A full bench will still have to decide whether the convictions should be set aside. Before such a verdict could be reached, the State will have an opportunity to place its submissions before the full bench. Any possible prejudice to the State, if the postponement is refused, is thus not irredeemable in the overall scheme of the Criminal justice system. Such possible prejudice as there might be if this appeal was to succeed without the State being heard, pales into insignificance when compared to the prejudice to the appellant, if he was to endure yet a further delay at his costs.

[18] The prospective merits of the appeal play an important role in deciding whether a postponement of the appeal hearing should be granted or refused, and also whether condonation should be granted. The merits of the appeal favour the appellant and are compelling. They are addressed below.

[19] This Court was accordingly unanimous that the postponement should be refused. Such an order was issued and it was directed that the appeal proceed.

Condonation for late filing of the record and heads of argument and for reinstatement of the appeal

[20] In *The National Director of Public Prosecutions v Victor N O and Others*[10] it was said that:

'Factors which usually weigh with this court in considering an application for condonation and reinstatement of a lapsed appeal are trite. They include a reasonable and full explanation covering the entire period of the delay and the prospects of success on the merits of the appeal. … But as this court said in *Valor IT v Premier, North West Province and Others* [2021 (1) SA 42 (SCA) [2020] ZASCA 62 (SCA); [2020] 3 All SA 397 (SCA); para 38] "very weak prospects of success may not offset a full, complete and satisfactory explanation for a delay; while strong merits of success may excuse an inadequate explanation for the delay (to a point)".'[11]

[21] The standard principle to apply in any condonation application is the 'interests of justice', a flexible concept without an exhaustive definition. In *Van Wyk v Unitas Hospital and Another*[12] the Constitutional Court said:

'This court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.'[13]

The Court has a discretion which must be exercised judicially.[14]

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[10] *The National Director of Public Prosecutions v Victor N O and Others* [2025] ZASCA 31; 2025 (1) SACR 561.
[11] Ibid para 8. See also generally *Cele v The State* [2025] ZASCA 199; 2025 JDR 5383 (SCA), *Mabena v The State* [2024] ZASCA 89; 2024 JDR 2305 (SCA).
[12] *Van Wyk v Unitas Hospital and Another (Open democratic advice centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC).
[13] Ibid para 20. See also *Grootboom v National Prosecuting Authority and another* [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) para 22. Dictum applied in *Ekurhuleni City v Rohlandt Holdings CC and Others* [2024] ZACC 10; 2025 (1) SA 1 (CC) para 25.
[14] *Mosselbaai Boeredienste* (Pty) Ltd v OKB Motors CC 2023 JDR 2033 (SCA); ZASCA [2023] 91 para 11.

[22] An application for condonation must be fully motivated.[15] This Court in *Uitenhage Transitional Local Council v South African Revenue Service*[16] explained that:

'…[C]ondonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.'

Good prospects of success may compensate for an inadequate explanation.[17]

[23] The appellant's reason for the record not being filed timeously and the appeal lapsing was mainly a lack, on his part and on the part of his family, of sufficient financial resources.[18] The late filing of the practice note and heads of argument was due, inter alia, to the appellant's attorney having been involved in a motor collision at the relevant time, which prevented him from preparing the practice note and heads and arranging for the filing thereof timeously. The appellant has good prospects of success in the appeal. The applications for condonation and reinstatement were not opposed. Having regard to the explanations tendered, and it being in the interests of justice[19] that the appeal be

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[15] *Mulaudzi v Old Mutual Life Assurance Co (South Africa) Ltd and Others* 2017 (6) SA 90 (SCA); [2017] ZASCA 88; [2017] 3 All SA 520 (SCA); 2017 (6) SA 90 (SCA) para 26 see also *National Department of Public Works v Fani and Another* [2024] ZASCA 43; 2024 JDR 1466 (SCA) para 7 which stated that '[c]ondonation applications are not a matter of formality. There is an onus on the applicant to provide a full and satisfactory explanation for its failure to comply with the Rules of this Court. This court has recently confirmed the following requirements for reinstatement of a lapsed appeal: "(a) The applicant must provide a proper explanation of the causes of the delay and explain each of the periods of delay. (b) It is not sufficient for an applicant to set out a number of generalised causes without an attempt to relate them to the time-frame of its default or to enlighten the court as to the materiality and effectiveness of any steps taken . . . to achieve compliance with the Rules at the earliest reasonable opportunity. (c) The court has a discretion which the applicant must show should be exercised in its favour." See also *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* [2013] ZASCA 5; [2013] 2 All SA 251 (SCA) para 11.

[16] *Uitenhage Transitional Local Council v South African Revenue Service* [2003] ZASCA 76; [2003] 4 All SA 37 (SCA); 2004 (1) SA 292 (SCA); 66 SATC 265 para 6. Dictum applied in *Mulaudzi* fn 14 para 25; *Commissioner, South African Revenue Service v Van der Merwe* [2016] ZASCA 138; 2017 (3) SA 34 (SCA); [2017] 2 All SA 335 (SCA); 79 SATC 283 para 11.

[17] Fn 10 above, referring to *Valor IT* para 38 that '… strong prospects of success may excuse an inadequate explanation for the delay (to a point).'

[18] The explanation is not inadequate or absent – see *Member of the Executive Council for Health, Eastern Cape Province v Y N obo EN* [2023] ZASCA 32; 2023 JDR 0965 para 14.

[19] Fn 11 above.

determined, this Court was unanimous that the condonation requested should be granted and the appeal reinstated. Such an order was granted.[20]

Discussion

[24] The issue for determination by the trial court was whether the State had discharged the onus of establishing beyond a reasonable doubt that the three accused were amongst the males who committed the robberies. The high court was not persuaded that another court would reasonably come to a different conclusion to that reached by the trial court. Whether the high court erred in coming to that conclusion involves an examination of the relevant evidence.

[25] In its endeavour to discharge the onus upon it, the State had adduced the evidence of Mr Nkomo, Ms Mphuthi, Ms Mabutho and two policemen, Sergeant Justice Tevorabe Mawela (Sergeant Mawela) and the investigating officer, Sergeant Sello Agri Ladimo (Sergeant Ladimo). The appellant testified and he also called his mother, Hendrika Mokwele (Mrs Mokwele) in support of his alibi.

[26] It is competent to convict an accused on the evidence of a single witness.[21] Such evidence must however be clear and satisfactory in every material respect.[22] A cautionary rule is applied in respect of the evidence of a single witness. The cautionary rule is one of practice in terms of which an adjudicator of facts should be vigilant in the evaluation of evidence, which practice has shown to require circumspection.[23] It entails that courts treat evidence as to the identity of an alleged perpetrator with caution, as eyewitness identifications are notoriously fallible and prone to error.[24] In *S v Sauls*[25] it was explained that:

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[20] Compare *Moloto v The State* [2025] ZASCA 169; 2025 JDR 4801 para 2.
[21] Section 208 of the Criminal Procedure Act 51 of 1977 provides that 'an accused may be convicted of any offence on the single evidence of any competent witness'.
[22] *R v Mokoena* 1956 (3) SA 81 (A) 85G-H. See also *Cupido v S* (1257/2022) [2024] ZASCA 4; 2024 JDR 0034 (SCA) para 19.
[23] *Kapa v S* [2023] ZACC 1; 2023 (4) BCLR 370 (CC); 2023 (1) SACR 583 (CC) para 29.
[24] Ibid para 35.
[25] *S v Sauls* and Others 1981 (3) SA 172 (A) at 180E-G. See also *S v Banana* 2000 (3) SA 885 (ZS) 894I.

'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in *S v Webbe*r 1971(3) SA 754 (A) at 758). The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told.'

[27] As regards evidence of identification, it was held in *S v Mthetwa*[26] that:

'It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence…'.[27]

[28] Having regard to the aforesaid principles regarding the evaluation of evidence, there are some disquieting aspects in the evidence of the witnesses relied upon by the State and the trial court, which at the level of reasonable prospects of success could have had a bearing[28] on the verdict. These aspects warranted greater attention by the trial court in its judgment and when refusing leave to appeal, and by the high court when refusing the petition. Some of the concerns are highlighted below to explain the conclusion reached in this judgment. No definitive view is expressed as to whether these considerations should vitiate the appellant's convictions, so as not to bind the full bench. The list of instances below is also not exhaustive.

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[26] *S v Mthetwa* 1972 (3) SA 766 (A) 768A.
[27] Ibid at 768.
[28] *S v Ntuli* supra para 8.

Count 1 – Ms Mabutho's evidence

[29] Ms Mabutho did not know the accused before court. She said she did not have a sufficient opportunity to actually observe the robbers clearly. Although she gave a brief description of some of their clothing, she could not describe any facial features. She did not implicate any of the accused.

Count 2 – Ms Mputhi's evidence

[30] Ms Mputhi sought to convey the impression in her evidence that she could identify the accused as the robbers, saying she saw all three of them on that day and explaining the role each played, the appellant allegedly being the one who instructed her to alight from their vehicle and who took her bag. Although she did not know the accused previously, she testified that she was able, before she became unconscious, to identify one of them. In her evidence she described that he was dark in complexion, slightly built or thin and dressed in a grey hoodie. However, in her written statement to the police Ms Mputhi inexplicably, if that was the state of her knowledge, failed to give a description of any of the robbers and recorded that she would not be able to identify the people who had robbed them.

[31] The statement to the police was made at a time when the events were fresher in her mind than when she testified. Had she disclosed in her statement that she would be able to identify the assailants, then an identification parade could have been held after the accused were arrested to test her powers of identification when faced with a random assembly of persons of similar description.

[32] It appears that it was only after she had seen the accused at court that she was in a position, when called to testify, to identify them. This amounts to a dock identification. A dock identification generally carries no or little evidential weight unless sourced in independent knowledge preceding the identification.[29] Ms Mputhi had not known the appellant before the robbery.

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[29] *S v Tandwa and Others* [2007] ZASCA 34; 2008 (1) SACR 613; [2007] SCA 34 (RSA) paras 129-131.

[33] There could also be some doubt as to the reliability of any observation she could have made when the crime was committed. On her own version the robbery was at approximately 21h30 and the visibility 'was not that clear.' There were only streetlights, not the brighter Apollo lights her husband spoke of. A careful analysis will be required to be undertaken as to what probative weight should properly be accorded to her evidence, if it is approached with the required caution.

Count 2 – Mr Nkomo's evidence

[34] If the evidence of Ms Mputhi with respect to count 2 is to be disregarded, then Mr Nkomo was a single witness in respect of the identification of the accused on count 2. His evidence would have to be approached with caution and would have to be clear and satisfactory in every material respect. His evidence is also not free from criticism for other reasons set out below.

[35] He testified that the three accused before the trial court were amongst the persons who robbed him and his wife, thus conveying that he was able positively to identify them. There are however a number of potential contradictions in his evidence, and between his evidence and that of other witnesses, which could impact on the reliability of his evidence. The veracity of portions of his evidence was furthermore dependent on the truthfulness of third persons, who were not identified and not called to testify. Finally, the adequacy of the opportunity he had to make a reliable identification must be assessed carefully. These aspects are briefly considered in turn below.

[36] As regards the reliability of his evidence, there was simply his say so that it was the three accused that he observed at the scene of the crime and that he was able to positively identify them. He did not explain, if that was so, why he failed to give a description of them and to provide the names of accused 1 and 2, which he

had allegedly overheard while the robbery was in progress, to the police in his written statement dated 30 June 2014, with which he was confronted in court.

[37] Faced with that difficulty, Mr Nkomo then insisted that he had provided a description of the accused and that this was recorded in a written statement to the police, which he had made prior to the written statement of 30 June 2014. He maintained that this prior written statement must have been lost or misplaced. The issue here is not whether the recordal of what he told the police might have been incomplete. His unequivocal evidence was that not only had he provided such descriptions, but that it was recorded in the earlier written statement.

[38] The written statement dated 30 June 2014 was filed in the police docket as the first information of crime statement. There could be no prior statement as Mr Nkomo contends, because then the statement of 30 June 2014 would not have been the first statement. This was confirmed by the investigating officer. The veracity and weight to be attached to Mr Nkomo's evidence regarding his identification of the appellant will have to be carefully evaluated.

[39] Further, after the robbery Mr Nkomo went to Emdeni to conduct an investigation of his own.[30] He was allegedly provided with the appellant's name and contact details by a person(s) who were never called to confirm or corroborate what he said in court. His evidence in this regard is hearsay evidence.[31] In *Kapa v S*,[32] it was held that:

'Hearsay evidence is inadmissible, unless the court is of the opinion that it is in the interests of justice for it to be admitted, taking into account the factors referred to in s 3(1)*(c)*(i) – (vii).'

There was no application for this hearsay evidence to be admitted.

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[30] According to the evidence of the appellant during a trial within a trial, Mr Nkomo's involvement went beyond conducting his own investigation and he was present when the accused were assaulted and took part in the assault. It was never put that this would be denied by Mr Nkomo and Mr Nkomo did not testify to deny these allegations.

[31] In terms of s 3(4) of the Law of Evidence Amendment Act 45 of 1998 hearsay evidence is defined as evidence, whether oral or in writing which probative value depends on the credibility of another person other than the person giving such evidence.

[32] *Kapa v S* fn 22 para 32. Dictum applied in *Ntuli* fn 3 para 44.

[40] It is further not clear whether Mr Nkomo was advised of the name and contact details of the appellant, or only his contact details. The information Mr Nkomo obtained could have emanated from a person who might be ill disposed to the appellant. The appellant would not have the opportunity to properly contradict such information, unless confronted by the originator thereof. In *S v Ndhlovu and Others*,[33] it was held that:

'Aside from the importance of these cautionary words, a trial court in applying the hearsay provisions of the 1988 Act, must be scrupulous to ensure respect for the accused's fundamental right to a fair trial. Safeguards including the following are important: First, a presiding judicial official is generally under a duty to prevent a witness heedlessly giving vent to hearsay evidence. More specifically under the Act, "It is the duty of a trial Judge to keep inadmissible evidence out, [and] not to listen passively as the record is turned into a papery sump of "evidence".'[34]

Allowing this evidence could also impact on the appellant's right to a fair trial.[35]

[41] There is no explanation as to what connection the appellant's cell phone number has to the robbery, or in linking the appellant to the robbery. If Mr Nkomo had identified the robbers and conducted his own investigation simply to obtain the cell phone number of the appellant as one of the persons he had identified, then the question arises as to why he did not give a detailed description of the appellant to the police. They could then arrest the appellant without any need to get the cell phone number from an unidentified person. In that event there would have been no need for Mr Nkomo to have had telephonic contact with the appellant. The police would have arrested the appellant and he could have been identified independently by Mr Nkomo on an identification parade.

[42] Mr Nkomo also gave evidence that he engaged in a phone call conversation wherein the appellant allegedly promised to meet with him and return to him the

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[33] *S v Ndhlovu and Others* [2002] 3 All SA 760 (SCA); 2002 (6) SA 305 (SCA); 2002 (2) SACR 325 (SCA).
[34] Ibid para 17.
[35] Ibid paras 17-18 and 29.

items from the robbery – a claim that was denied by the appellant and could be viewed as improbable. The appellant's version was that he was phoned by Mr Nkomo and asked about Bafana (accused 2). This evidence should be assessed together with Mr Nkomo contention that his USB memory stick was retrieved and confiscated by the police at the appellant's place. The arresting officers, Sergeants Ledimo and Mawela, both testified that they did not recover or seize any items linked to the robberies. They heard of the USB for the first time at court. If such an item was retrieved, it would constitute crucial incriminating evidence. They would have seized the USB, retained it and recorded the details thereof in the SAP 13 exhibit register. There was no such record and the USB was not produced. Indeed, Sergeant Ledimo testified that all the State had against the accused was the information received from Mr Nkomo.

[43] It seems that the information which Mr Nkomo obtained during his investigation also included information implicating accused 2. Accused 2 had at some stage played soccer with his (Mr Nkomo's) younger brother. Mr Nkomo also testified that accused 2 was referred to during the robbery by his nickname 'Skusha'. This nickname would be known to him if he knew accused 2 as having played soccer with his brother. If he knew accused 2 from having played soccer with his brother, then one could expect him to have advised the police and to have named accused 2 to the police. And if the nickname had been used during the robbery, he would have mentioned it to the police and recorded it in his statement to the police. He failed to do so. This omission will need to be weighed carefully as it could affect whether Mr Nkomo's evidence is reliable and complete and regular in every material respect.

[44] Finally, as regards whether there was an adequate opportunity for a reliable observation to be made, Mr Nkomo contended that he was able to identify the accused because the area was lit by Apollo lights. This was contradicted by his

wife's evidence. She said there were only streetlights in the vicinity of the crime and the illumination and the opportunity for observation was not that good.

[45] Mr Nkomo's identification could, at best, be considered as tantamount to a dock identification. He provided a description of the physical appearance of the three accused only after he had observed them subsequent to their arrest, an event where he was present.

[46] Regarding demeanour, the trial court, having the benefit of observing Mr Nkomo when testifying, concluded that he was 'not the best of witnesses'. From the brief synopsis above, it is reasonably arguable, with a good prospect of success, that Mr Nkomo's evidence might not be clear and satisfactory in every material respect.

The defence

[47] The appellant testified that he was not present at either of the robberies. He raised, as an alibi that, at the time of the commission of the robberies, he was at home with his child and his mother. His mother's evidence could be viewed as corroborating his alibi. She testified that she was busy with house chores on the evening of the robbery until 23h00 and her son was there and never left the house during that time. Her cross examination was brief and without much success in disputing the evidence she gave.

[48] In *R v Hlongwane***,** this Court stated:

'The legal position with regard to an alibi is that there is no onus on an accused to establish it, and if it might reasonably be true he must be acquitted. *R v Biya,* 1952 (4) SA 514 (AD). But it is important to point out that in applying this test, the alibi does not have to be considered in isolation.'

… The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses. In the Biya's case supra, Greenberg J.A., said at p. 521…

"[I]f on all the evidence there is a reasonable possibility that his alibi evidence is true it means that there is the same possibility that he has not committed the crime".'[36]

This was again emphasised by this Court in the case of *S v Shabalala* where the Court stated:

'It is trite law that where an alibi is raised there is no burden on the accused to prove his alibi. The onus rests on the State to prove his alibi is false… [T]he effect of the falseness of an alibi on an accused's case is to place him in a position as if he had never testified at all.'[37]

[49] In *S v Liebenberg*[38], this Court stated the following:

'Once the trial court accepted that the alibi evidence could not be rejected as false, it was not entitled to reject it on the basis that the prosecution had placed before it strong evidence linking the appellant to the offences. The acceptance of the prosecution's evidence could not, by itself alone, be a sufficient basis for rejecting the alibi evidence. Something more was required. The evidence must have been, when considered in its totality, of the nature that proved the alibi evidence to be false.'

[50] To summarise, there is no onus on an accused to prove his alibi.[39] The alibi must be negatived by the State. If the alibi is reasonably possibly true then the accused must be acquitted.[40] That is consistent with the general principle that a court does not have to be convinced that every detail of an accused version is true, but if reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. The accused's version must be tested against the inherent probabilities. It cannot be rejected merely because it is improbable, on the basis of inherent probabilities, unless it is so improbable that it cannot reasonably be true.[41] There is a reasonable prospect of success that a full bench considering

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[36] *R v Hlongwane* 1959 (3) SA 337 (A) at 340H.
[37] *S v Shabalala* 1986 (4) SA 734 (A) at 736B. This position was recently confirmed by this Court in *Gilchrist v S* [2025] ZASCA 57 para 31.
[38] *S v Liebenberg* 2005 (2) SACR 355 (SCA) para 14.
[39] Fn 35 above.
[40] *R v Hlongwane* 1959 (3) SA 337 (A) at 340H.
[41] *S v Shackell* 2001 (2) SACR 185 (SCA) para 30 (at 194 G-I). Dictum applied in *Director of Public Prosecutions Eastern Cape v Coko* 2024 (2) SACR 113 (SCA) para 36; *S v BM* 2014 (2) SACR 23 (SCA) para 27; *S v Scott-Crossley* 2008 (1) SACR 223 (SCA) para 28; *S v Heslop* 2007 (1) SACR 461 (SCA) para 10 and *S v Mafiri* 2003 (2) SACR 121 (SCA) para 11.

whether the appellant's alibi should have been rejected, could come to a different conclusion to that of the trial court.

Conclusion

[51] To summarise, the appellant has, in my view, established reasonable prospects of success that the convictions could be set aside, when considered by a full bench and has satisfied the test for this appeal to succeed. The appeal should accordingly succeed. Whether the appeal against his convictions will ultimately succeed will be for the full bench to decide.

The second judgment

[52] I have had the benefit of reading the judgment of Kgoele JA (the second judgment). I adhere to the facts and conclusions expressed above in my judgment.

[53] The sole point in contention is whether there is a reasonable prospect that a full bench of the high court could conclude that the State failed to prove, beyond a reasonable doubt, that the appellant was one of the assailants in the two robberies. I do not take issue with the suggestion that the same assailants might have been involved in both robberies, or that the appellant's brother, the former accused 2, referred to as 'Skusha', might have been involved in both robberies. But those are not, with respect, relevant to the primary issue raised in the appeal.

[54] The fact that the Polo was used, that the house keys of Ms Mabutho were found in Mr Nkomo's car, or that the appellant lives in the same area where the robberies were committed and his former co-accused live, do not constitute proof of, nor corroboration that the appellant was correctly identified, beyond a reasonable doubt, as one of the assailants. The issue remains one of the credibility of the identifying witnesses, the adequacy and quality of their evidence and the opportunity they had for a reliable observation.

[55] The reality is that notwithstanding Ms Mphuthi and Ms Mabutho, when confronted with the appellant in the dock, maintaining that they were able to identify him, they previously reported differently to the police. Ms Mphuthi's evidence was unequivocal that she would not be able to identify the people who robbed her and Mr Nkomo. Ms Mabutho was clear that she did not have a sufficient opportunity to actually observe the assailants and could not take notice of their facial features. Indeed, the prosecutor correctly conceded that Ms Mabutho did not implicate the accused. There accordingly was no evidence against the appellant on the first count whatsoever. He should, *mero motu*, have been discharged by the trial court at the end of the State case in respect of that count.

[56] That similar clothing was worn by some of the assailants during the two robberies simply meant that the same assailants were possibly involved in the two robberies, although the number of assailants involved varied and was not confined to only three persons. No distinguishing personal bodily features positively identifying the appellant were referenced. Credibility does not only involve whether a witness deliberately lies to falsely implicate an accused person. It will also extend to an error, such as where a witness, having been subsequently confronted on a number of occasions with a particular person, might come to believe that the person is indeed one that had robbed her. If Ms Mphuthi and Ms Mabutho were always able to clearly identify the appellant, then one would have expected them to have said unequivocally, that they would be able identify him, when the events were still fresh in their minds and were reported to the police. This failure remains unexplained.

[57] Similar considerations apply to Mr Nkomo. The fact that he had not shared details of his own 'investigation' remains a cause for serious concern. The absence of disclosing what transpired during his investigation and led to him being provided with the name and contact particulars of the appellant, is a crucial issue, which needs to be argued fully and considered by a full bench on appeal. He was provided

with the name and cell phone number of the appellant, but without explaining any nexus between the robberies and what he was informed. Having received the appellant's contact details, the appellant was traced and arrested, an occasion where Mr Nkomo was present, would see the appellant and observe his features. This was repeated at subsequent court appearances, and ultimately culminated in a dock identification.

[58] It was not for the appellant to clarify any issues remaining hanging regarding his alleged identification. It was for the State to do so. If it failed to do so, the relevant witnesses could be recalled by the trial court. It was also for the State to adduce evidence from the Occurrence Book regarding the alleged first statement made by Mr Nkomo. It failed to do so and an adverse inference might be drawn from such failure by the full bench on appeal, that the Occurrence book might not have supported the version of Mr Nkomo. This is particularly an issue of concern where a large question mark hangs over the reliability of Mr Nkomo's evidence generally, where he testified as to the alleged retrieval of a USB from the possession of the appellant, but this is simply not borne out by the evidence of other state witnesses, who would have been aware thereof if it was true, or the facts and probabilities.

[59] The liberty of an individual being compromised by the prospect of, possibly wrongly, facing 10 years' imprisonment should not depend on what is potentially a paucity, if not a lack of acceptable, admissible and reliable evidence. The trial court's unqualified acceptance of some of the evidence, after having acknowledged that the evidence of Mr Nkomo was problematic, and not adopting a holistic approach to all the evidence, could persuade a full bench that the trial court had committed a demonstrable and material misdirection. Leave to appeal to a full bench should be granted for these short comings in the judgment to be fully ventilated and considered.

[60] If I commanded the majority, I would have granted the following order:

1 The appeal is upheld.

2 The order of the high court refusing the appellant leave to appeal against the convictions is set aside and replaced with the following:

'The applicant is granted leave to appeal against the convictions on counts 1 and 2 to a full bench of the Gauteng Division of the High Court, Johannesburg.'

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P A KOEN

JUDGE OF APPEAL

Kgoele JA (Vally AJA concurring):

[61] I had the benefit of reading the first judgment. I agree with the summary of the evidence that was before the trial court; the approach to the pertinent issue before this Court; the order refusing the application for a postponement of the appeal; including the reinstatement of the appeal.

[62] However, whilst I agree that the appeal should be reinstated, I part ways with the first judgment on its reasoning and the final order it granted. The first judgment's view is that the appeal should be reinstated as there are prospects of success. It thereafter concludes that the application for leave to appeal to the full court of the Gauteng Division of the High Court, Johannesburg, should be upheld. I take the view that, irrespective of the fact that there appears to be no prospect of success in the envisaged appeal, the reinstatement of the appeal ought to be granted

in the interest of justice. I conclude that appellant's appeal against the high court's dismissal of his petition should be dismissed.

[63] There is no need to reiterate the evidence previously presented before the trial court, as summarized in the initial judgment. However, it is pertinent to note at the outset that the approach I take to the analysis of the issues before this Court will elucidate instances of inaccuracies identified in the evidence that was before the trial court. In the main, I fundamentally disagree with the first judgment's analysis of the evidence on the merits. It is therefore essential to set the tone by delineating the facts that are common cause in this appeal, most of which were likewise, recognised by the trial court. They are as follows:

(a) The two robberies took place on the same evening of 28 June 2014.

(b) The complainants met each other when they were laying charges at the police station on the same evening.

(c) When Mr Nkomo was robbed, the assailants were driving a Polo that had been hijacked from the other complainant, Ms Mabutho.

(d) The two vehicles that were robbed were discovered on the same night.

(e) The Polo came to a stop after hitting an Apollo light when the tracker team was chasing it, and the occupants ran away.

(f) Both complainants also reside in Emdeni, the same village where the vehicles were robbed.

(g) Ms Mabutho's house keys were discovered in Mr Nkomo's car.

(h) Mr Nkomo had a telephonic conversation with the appellant on the following day, 29 June 2014.

(i) The appellant, who was previously accused number 3, lives in Emdeni along with his two former co-accused.

(j) Some of the robbed items were found at a house where a person emerged and ran away. That is also the house where the appellant's car was found, and it is also not far from where the Polo came to a stop.

[64] Based on the aforementioned facts, it is evident that the sole point of contention was the identification of the assailants, particularly that of the appellant, in view of the alibi defence pleaded by him. The State relied on the direct evidence of the witnesses, dock identification, admissions and pointing out made by the appellant to prove the appellant's identity, all of which pertain to the factual finding of the trial court.

[65] To answer the question of whether there are prospects that any other court would reach a different conclusion than that reached by the trial court, it is apparent that the trial court's factual and credibility findings, confirmed by the high court, stand scrutiny. And if found to be sound, whether the evidence adduced by the State was sufficient for the trial court and the high court to accept it as a basis for the conclusion that the appellant was present at the scene of the crime and was accurately identified by Mr Nkomo as one of the robbers. Simply put, whether an appeal to the full bench of the high court could be successfully sustained on the facts of this matter.

[66] Recently, this Court in *S v Machi*[42] re-emphasised the law regarding the approach to be taken when dealing with a trial court's findings of fact. It remarked:

'It is trite that in the absence of demonstrable and material misdirection, a trial court's findings of fact are presumed to be correct and that they will only be disregarded on appeal if the recorded evidence shows them to be clearly wrong.

It is against this principle that the credibility and factual findings made by the trial court, and decried by the appellant, must be considered. In particular, this Court is called upon to determine whether this principle was correctly applied by the full court. It is important to first deal with the contradictions as they cut across the two bases of this appeal.'[43]

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[42] *S v Machi* 2021 JDR 1741 (SCA); [2021] ZASCA 106.
[43] Ibid paras 17 and 18.

Identity

[67] It is not necessary to restate the law concerning the approach to the evidence of identity, as the first judgment addressed it adequately. It suffices to emphasise that the law regarding identity issues is settled, highlighting the need for courts to guard against conflating the reliability of such evidence with the credibility of the witness. A clear distinction must be made between the reliability of a witness's evidence and his or her credibility.[44] The honesty, conviction, and credibility of a witness must never influence the separate investigation into the reliability of that witness's evidence. It is the fallibility of human observation (danger relating to reliability) that forms the basis of the existence of the cautionary rule applicable to evidence on identification.[45]

[68] In my opinion, several critical aspects of the principles outlined in *Mthetwa* substantiate a positive factual identification of the appellant by Mr Nkomo. Furthermore, the record of the proceedings does not demonstrate any evidence that would point to the fact that the trial court's findings in this regard are clearly wrong. First, with regard to lightning, visibility, and eyesight, it is common cause that there was some source of lightning. The difference stemming from the witnesses' evidence regarding the source of the visibility does not advance the appellant's matter. Mr Nkomo said the source was an Apollo light, and it was vividly clear. Ms Mphuthi testified that it was from streetlights that were not very clear. In my view, this is not a contradiction as the appellant claims because, this issue relates to a relative observation informed by an individual's strength of his/her eyesight or viewpoint. Sight should not be lost that the second complainant, Ms Mabutho, testified that visibility was clear at the front of the gate where her vehicle was robbed, and the source of light was streetlights.

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[44] *S v Nango* 1990 (2) SACR 450 (A) at 451C-D and E-F; *S v Zitha* 1993 (1) SACR 718 (A) at 720J-721A-B.
[45] *S v Mthetwa* 1972 (3) SA 766 (A) at 768A-B (*Mthetwa*). See also *S v Magadla* 2011 JDR 1553 (SCA); [2011] ZASCA 195 para 26-30 and *S v Khumalo en Andere* 1991 (4) SA 310 (A); [1991] 2 All SA 341 (A) at 328C-D and E-F.

[69] Regarding proximity, the evidence from Mr Nkomo and Ms Mphuthi indicated that the assailants were close to them during the hijacking. It should also be noted that both Mr Nkomo and Ms Mphuthi stated that they could identify the assailants if they saw them again. Ms Mphuthi was able to identify the appellant only amongst other assailants, particularly his clothing, as he was very close to her despite the streetlight being the only source of illumination. The same applies to the other complainant, Ms Mabutho.

[70] The proximity issue is closely linked to the opportunity to observe. Mr Nkomo, in particular, although the appellant alleges that he did not provide the descriptions or nicknames of the assailants in his initial statement – allegedly referred to as 'A1' – which allegation I will address in detail below, consistently maintained, both throughout and in the statement used for his cross-examination, that he was capable of identifying the assailants if he saw them again. The same applies to the second complainant, Ms Mabutho. She consistently insisted that she could identify them. It was put to her during cross-examination that the police did not call her for an ID parade because she stated in her statement that she was unable to identify the assailants, a fact she vehemently denied. Her reluctance to participate in the identification parade, as she explained, should not be held against her because she provided a plausible reason – fearing for her life since she believed the assailant knew her, given that they are staying in the same area.

[71] The evidence of Ms Mphuthi is also relevant to the issue relating to the opportunity to observe. She also stuck to her evidence throughout, stating that she could identify one assailant if she saw him again, that is, the assailant who snatched her handbag. It is furthermore worth noting that Mr Nkomo also testified that he memorised the registration number of the Polo, which we now know was robbed from the second complainant, and that he gave it to the police. This registration number alerted Ms Mabutho to realise that Mr Nkomo was talking about her vehicle. This aspect clearly shows that he had enough opportunity to observe.

[72] A further key aspect of their opportunity to observe is that all the witnesses, Mr Nkomo and Ms Mabutho, and to a limited extent, Ms Mphuthi, were able to identify their features, clothing, and the roles they played. This aspect leads me to deal with the issue of corroboration at the same time. What enhances the reliability of their observation is that, despite the two incidents occurring at different locations, they all corroborated one another regarding the number of the assailants involved in the attacks. Ms Mphuthi pointed the appellant out in court as the assailant, in addition to the description she gave during her evidence in chief, which was that he was dark in complexion and wearing a grey hoodie. Although her evidence included a dock identification, which was frowned upon by the appellant's Counsel, it also corroborated that of Mr Nkomo on the aspect that the appellant is the one, amongst all five, who went to her side and snatched her handbag.

[73] There is further corroboration of the evidence of Mr Nkomo and Ms Mphuthi concerning the description of the colour of the clothes of the assailants. She describes one of the assailants as wearing a black tracksuit with a hoodie; Mr Nkomo describes one of the assailants as wearing a grey jacket with a hoodie. Further corroboration of their evidence on this aspect stems from the testimony of Ms Mabutho, who said that one of the assailants was wearing black clothes and the other, grey ones.

[74] The presence of the tracking team is another factual averment where the evidence of Mr Nkomo and Ms Mabutho corroborates each other. Mr Nkomo indicated that when he went to search for his vehicle with his brother that same evening, they noticed the tracking team's vehicle chasing a Polo and drove alongside it. Corroboration of this analysis can be found in their independent testimony regarding the tracker team's involvement in the recovery of the second complainant's car. In addition, Ms Mabutho's evidence that, when her Polo was

recovered, it was damaged as if it had hit something, corroborates Mr Nkomo's evidence that the Polo came to a standstill after hitting a pole. This strengthens their version and depicts that the two complainants did not make up a story to implicate the assailants.

[75] A lot of criticism was made by the appellant that none of the tracker team was called to corroborate whether shots were fired or not. In *S v Ngobeni* [46] this Court remarked:

'Some 86 years ago, this court described the function of a judge conducting a criminal trial succinctly as follows in *R v Hepworth* 1928 AD 265 at 277:

"A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done".'

[76] The criticism is irrelevant, as it neither advances nor detracts from the core issue in dispute in this matter: the identification of the appellant. No negative inference can thus be drawn from this failure. The criticism cannot diminish the reliability of Mr. Nkomo's identification that he recognized the assailants exiting the Polo and running away. The crucial part of his testimony was that he clearly saw the driver of the Polo at that time, who was the appellant. I paused here to note that this was his second opportunity that evening to observe the appellant, and, importantly, that he was still wearing the same clothes. It was also the second time he saw him in the same vehicle. This was the person who was close to him some hours ago and whom he saw snatching his wife's bag. The upshot of all the above is that the evaluation by the trial court concerning the reliability of the identification of the appellant is unassailable.

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[46] *S v Ngobeni* 2014 JDR 0884 (SCA); [2014] ZASCA 59 para 37.

[77] An inescapable conclusion is that the assailants were the same people who were seen, on that night, by the two complainants and eventually identified by them. This is also strengthened by the fact that Mr Nkomo's car was found at a house not far from where the Polo was found. The man known as 'Skusha' ran out of that house. We now know that this is a nickname of the former accused 2.

Admissions and Pointing out

[78] It is important to preface the analyses in this paragraph with the note that the trial court ruled the admissions and the pointings out admissible, and that ruling was not challenged. In addition, the appellant conceded in his evidence in chief that he spoke to Mr Nkomo on his (appellant's) cell phone. It is also common cause that the number Mr Nkomo called when the police found the appellant inside a locked room is the same number that Mr Nkomo used to communicate with him. As proof of this, it rang from the room where the appellant was found hiding. This room was dark as it had no lights, and according to his mother, it was not used at all as it is a storeroom. The phone from which it rang was also recovered from him.

[79] All of these constitute very strong circumstantial evidence against the appellant, but the need to infer from them falls away because the appellant admitted talking to Mr Nkomo over the phone. This factual evidence strengthens the reliability of the appellant's identification, particularly by Mr Nkomo. The same can be said about the fact that he was able to recognise him and pointed him out as one of the assailants after the appellant came out of that room, where he was hiding behind a shower curtain in a bathtub. Of note is that this pointing out occurred before the dock identification that the appellant bemoaned. In addition, the appellant accompanied the police and pointed out the other former accused who had been arrested in this matter.

The 'A1' statement; and inaccuracies

[80] Regarding the alleged lost statement made by Mr Nkomo, which the appellant's counsel put the colour of his mast on, my observation is that this submission is one of the several factual inaccuracies found in the appellant's heads of argument, which were also relied upon by the first judgment. In his heads of argument, the following appears:

'When a *follow up question to 3.3.1.6* was put to him by the defence as to why the statement of 30th June 2014 *was marked "A1"*, meaning it was the first statement he made to the police, because if it was the second statement, it would have been marked "A2", he became evasive and failed to answer, and also maintained that the police might have lost his statement.' (Emphasis added.)

[81] First, I found no follow-up question of this sort when I trawled through the transcript of Mr Nkomo's cross-examination during the trial. Secondly, the only reference to the 'A1' statement was made when two other statements made by Mr Nkomo were handed in as exhibits. Reference to the word 'A1' spontaneously sprang out during the engagement between the trial court and the appellant's counsel at that specific time. What makes matters worse is that counsel representing the appellant was not sure if it was 'A1' and or 'A3'. In this regard, it is best to quote the engagement from the record. The answer was: 'I think it is "A1" and "A3". A proper perusal of this statement, which was handed in as an exhibit, reveals that it was made on 30 June 2014 by Mr Nkomo, and does not bear any inscription of 'A1' on it. Only an inscription 'Exhibit A' appears. The statement relied upon cannot, therefore, be the one Mr Nkomo alleged he made to the police upon laying a charge on the date of the incident, as it is not dated 28 June and cannot be said to be an 'A1' statement.

[82] The second factual inaccuracy concerns the absence of any record indicating that the investigating officer confirmed that the statement dated 30 June 2014 is an 'A1' statement. His cross-examination concerning the statement made by Mr Nkomo on 30 June 2014 solely pertains to his awareness of a statement made

on 28 June 2014, which Mr Nkomo asserted was lost. His response was that 'I do not have that knowledge, that was brought to my attention yesterday …'. A follow-up question put to him concerned the scanning of the docket's contents, to which he replied that, when he received the docket, the contents had already been scanned. He was asked, if '… there is a missing document, inside the actual or the physical docket, would it be easier for you to look at the scan or in the system of that particular missing document?' His response was: 'Yes, if the document is scanned I can …'. After this, the appellant's counsel informed the trial court that he would prefer that the witness return later to clarify the missing statement, but the appellant's counsel did not follow this up, and the investigating officer was also never called back to testify.

[83] The issue regarding the statement does not end here. The record of proceedings indicates that Mr Nkomo testified that he made a statement on the same day of the incident, 28 June 2014; upon arrival at the police station, it was reduced to writing, and he signed it. He also testified that the second complainant arrived while the police were still taking down his statement, and that the police officers, upon realising that the two robberies were related, separated the two complainants so they could make their statements independently. It therefore appears that the 30 June statement he was cross-examined on was an additional statement he made, which accords with what he said, as it will be demonstrated hereunder.

[84] The only follow-up question that the appellant's counsel asked Mr Nkomo was in regard to how many statements he made supplementing the first statement of 28 June 2014. He confirmed and insisted that he had deposed to the second statement (the one he was cross-examined on), and, when he was prompted for the date thereof, he said, on his own, 'if my memory serves me well, I stand to be corrected, your Worship, I think it was the 30th. … The 30th of what; June --- Yes, June'. This is where the issue of what happened to the first statement of 28 June

2014 began, and he was steadfast that he made it; left it at the police station; does not know what happened to it; and maybe it is lost. This is the statement in which he testified that the description and names or nicknames of the assailants were provided. The submission that the police or investigating officer vehemently denied this statement and that he (the appellant) failed to answer when shown the 'A1' statement is therefore not justified.

[85] It is a well-known fact that anyone laying a charge at a police station is required to make and sign a written statement under oath at the time the charge is laid. The statement would also contain all the details – name, telephone number, and address – of the maker. The statement is then left with the police. The statement-maker thereafter has no dealings with it and no obligations are placed on him regarding its safekeeping. Therefore, a lack of knowledge of what happens to it thereafter is understandable.

[86] It is also a well-known fact that no charge can be laid without a complainant making a statement. In this case, Mr Nkomo laid a charge. He narrated to the police of what happened to him and Ms Mphuthi and what of their belongings were taken. All this was done while his memory was fresh. It is most probable that, as is usual practice, this was recorded in a statement, as he testified, to enable the police to open and register the docket. The statement, once left with the police, may disappear for any number of reasons. The fact that it cannot be located does not allow for the conclusion that the statement was never made.

[87] The upshot of all the observations made above is that the factual averment that he made the first statement on 28 June 2014, on the same day, has not been, and could not be, disputed by the appellant or the investigating officer. The police officer who assisted him on that day is the one who can or could confirm or dispute his averments in this regard. His testimony remains uncontested because the appellant's counsel left the issue hanging during cross-examination of the

investigating officer. In addition, no attempts were made to check the occurrence book at the police station, which could have helped identify which police officer assisted him. There is therefore no justification that he did not give a detailed description of the appellant and or assailants to the police. That will be a quantum leap to make if the issue of a missing statement stands uncontested.

[88] The third factual inaccuracy relates to the statement in the heads of argument of the appellant's counsel that 'Ms Mphuthi [Mr Nkomo's wife] and Ms Mabutho [the second complainant] failed to give any description of their robbers in their respective statements …'. It is only 'pure dock identification' they are relying on. Whilst this proposition is true insofar as it relates to the statement of Ms Mphuthi, the same cannot be said with Ms Mabutho, as the record does not support this. Ms Mabutho, as already indicated above and acknowledging the risk of repetition, described almost all the assailants by build, clothing, and complexion in her evidence-in-chief. She vehemently denied the allegation that she was not taken for an identification parade because the police realised that she could not identify them. She instead gave a plausible reason for not attending the parade, as already indicated above. But what is significant is that she was never tested on the contents of her statement during cross-examination, nor was her statement handed in as an exhibit. It remains a mere speculation from the appellant's counsel, and he had no legal basis to make a submission that Ms Mabutho failed to give any description of her robbers in her statement, except after seeing them in court.

[89] The last factual inaccuracy regarding the evidence before the trial court concerns the appellant's version of events. It is contended by the appellant's counsel, and the first judgment also accepted this, that his version regarding the phone call he received from Mr. Nkomo related solely to him being questioned by Mr Nkomo about Bafana Radebe (former accused 2). The contention overlooks the fact that, during cross-examination, the appellant conceded that, before the police arrived, he (a) already knew that Mr Nkomo and the police were looking for the

stolen items that had been hijacked from him, and that (b) he had spoken to Mr Nkomo in respect of the robbery.

[90] In my view, the explanation about Bafana Radebe cannot be seen in isolation as 'the' only version from the testimony of the appellant. Unfortunately, the concession appears to indicate a contradiction on the side of the appellant's version. The fact that the concession was made during cross-examination does not detract from it being evaluated as evidence stemming from the appellant, as he made it under oath. It forms part of the whole evidence to be evaluated by the court. If regard is had to the principles emphasised by this Court in *S v Trainor*[47] that, courts must evaluate evidence holistically rather than in isolation, it will then be incorrect for a court to disregard evidence simply because it arose during cross-examination. A further contradiction can also be found in the appellant's evidence in chief, where he admitted that he was hiding when he was found, but claimed that he did so because he thought that the police were coming to arrest him for assaulting his girlfriend.

[91] The upshot of all the inaccuracies casts a dim light on the evaluation of the evidence by the appellant's counsel, in that it is apparent that its evaluation of all the evidence is in a piecemeal fashion. Lastly, on this issue of piecemeal evaluation of the evidence, I cannot conclude without noting that there is a startling silence on the part of the appellant regarding the house keys belonging to the second complainant, Ms Mabutho, and these factual averments cannot be overlooked. She testified that the only other time she had contact with Mr Nkomo was when he called her because her house key was found in his car. This corroborates what Mr Nkomo said. This crucial evidence was not challenged at all. It remained a piece of independent evidence that the assailants who robbed her are the same people who robbed Mr Nkomo.

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[47] *S v Trainor* 2003 (1) SACR 35 (SCA); [2003] 1 All SA 435 (SCA) para 9. See also *S v Kapa* [2023] ZACC 1; 2023 (4) BCLR 370 (CC); 2023 (1) SACR 583 (CC) para 104 and *S v Ntshongwana* [2023] ZASCA 156; [2024] 1 All SA 345 (SCA); 2024 (2) SACR 443 para 65.

Contradictions

[92] As far as contradictions in the oral evidence of witnesses and also in their written statements, I can do no better than quote the following trite principles from the decision of this Court in *Haarhoff and Another v Director of Public Prosecutions, Eastern Cape*,[48] which decision affirmed an earlier decision of this Court:

'…The fact that a witness has contradicted himself or herself should not, in and of itself, warrant that the proverbial baby be thrown out with the bathwater.

The correct approach to be followed by a court evaluating evidence that bears contradictions was laid down as follows in *S v Sauls and Others*:

"The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told."

In *S v Mafaladiso en Andere*, this court emphasised that the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. It behoves the courts to keep in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Contradictory versions must be considered and evaluated on a holistic basis. Furthermore, the circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions, the quality of the explanations and the connection between the contradictions and the rest of the witness's evidence are among other factors to be taken into consideration and weighed up.' (Footnotes/citations omitted.)

[93] Another attack on Mr Nkomo's credibility was that he lied to the court when he said his USB stick was found at the appellant's home. Sergeant Ledimo testified

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[48] *Haarhoff and Another v Director of Public Prosecutions, Eastern Cape,* [2018] ZASCA 184; [2019] 1 All SA 585 (SCA); 2019 (1) SACR 371 (SCA) paras 40-42.

that nothing, apart from the telephone used to communicate with Mr Nkomo, was found there. It was submitted that Sergeant Ledimo told the truth, whereas Mr Nkomo did not. This submission is made despite the fact that Mr Nkomo was never given an opportunity to respond to the evidence of Sergeant Ledimo. The fact that Mr Nkomo gave a different version does not mean that he was dishonest. In our matter, as will be seen later after all the evidence has been analysed at the conclusion of this judgment, contradictions in Mr Nkomo's evidence were relatively few, if any, and were not material. Like this one, they related to peripheral issues rather than the appellant's identity.

Hearsay evidence

[94] As to the hearsay evidence, the appellant bemoaned that the information obtained by Mr Nkomo from unknown people who were not called is hearsay. In addition, the first judgment's criticism of this evidence is to the effect that '[t]he information Mr Nkomo obtained could have emanated from a person who might be ill disposed to the appellant'. This Court ought not to fall into the trap of speculating too. It is better to emphasise the following exposition instead: Mr Nkomo maintained he could identify the assailants. He maintained he was only looking for the information regarding where the assailants stay and their proper names. One need not be a rocket scientist to fathom that it would not have been easy for him, without the description of their features and the nicknames he heard during the robbery, to easily obtain the number of the appellant's phone and their respective places of abode from the people he enquired from. It is quite clear he did these investigations for this purpose.

[95] It is also highly improbable that he could have said to these people, 'I was hijacked last night,' and then asked, 'Who do you think these people could be?' If, for some reason, we accept that the information he received from these people was hearsay, which finding I decline to make, the hearsay will therefore only relate to the contact number of the appellant, the name, and where he stays, and not to the

identifying features of the appellant. To this end, the trial court asked him: 'How did you get the contact details of accused no. 3 [appellant]?' He replied: 'I did my own investigation, and I found contacts of accused no. 3 after my own investigation'. In my view, the appellant's concession confirming the conversation with Mr Nkomo about the robbery, as already indicated above, overcomes or takes away the perceived hearsay nature of the evidence.

***Alibi* defence**

[96] Regarding an *alibi* defence this Court held in *S v Liebenberg*:[49]

'Once the trial court accepted that the alibi evidence could not be rejected as false, it was not entitled to reject it on the basis that the prosecution had placed before it strong evidence linking the appellant to the offences. The acceptance of the prosecution's evidence could not, by itself alone, be a sufficient basis for rejecting the alibi evidence. Something more was required. The evidence must have been, *when considered in its totality*, of the nature that proved the alibi evidence to be false' (Emphasis added.)

In *R v Hlongwane*[50] the court stated that '…the alibi does not have to be considered in isolation'.

[97] The *alibi* defence of the appellant was correctly rejected by the trial court as false. The high court cannot be faulted for confirming the trial court's finding. The nature of the evidence of the State, considered in its totality, proved the evidence of the *alibi* to be false. His *alibi,* in my view, was not reasonably possibly true. His mother's supporting evidence is not helpful at all. Given her earlier dishonesty, her candour, is in serious doubt. She, according to Sergeant Ledimo and Sergeant Mawela, lied to them about the appellant not being at home when they arrived and about the room being a storeroom. She clearly was protecting him when the police arrived early in the morning to look for him.

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[49] *S v Liebenberg* 2005 (2) SACR 355 (SCA) para 14. See also *S v Musiker* [2012] ZASCA 198; 2013 (1) SACR 517 (SCA) para 16.

[50] *R v Hlongwane* 1959 (3) SA 337 (A) at 340H. See also *S v Thebus and Another* [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC); 2003 (2) SACR 319 (CC) para 79 (at 540H).

[98] The following account of the policer officers' evidence against her mother is telling: They proceeded to the appellant's house. When they got there, Sergeant Ledimo knocked at the door and at the window. The mother of the appellant came to the door and spoke to him through a burglar gate. He told her he was a police officer looking for the appellant. She told him that the appellant was not there and that he did not sleep there that night. He insisted on being allowed into the house. Once inside, he asked the mother to show him the appellant's bedroom. She obliged. He got in, noticed that the bed was not made. He put his hand on the bed or underneath the blanket, and he could feel that it was warm, indicating it had just been occupied. The mother told him that the appellant's cousin had slept in the bed, but that he had gone to work. He then saw the locked room in the house. Upon enquiring, the mother told him she uses it as a storeroom. He demanded that it be opened. The mother opened it. He found that there was another room therein. He found a bath and shower, with a shower curtain in the bath. Upon removing the curtain, he found the appellant lying there. The appellant was using the curtain to conceal himself. He asked the appellant why he tried to hide from them. At first, the appellant denied hiding but later admitted it. He said that he thought the police were looking for him because he had assaulted his girlfriend. Sergeant Ledimo then asked Mr Nkomo to dial the number of the telephone used to communicate with accused 3, which he did. The phone rang. It was found in the appellant's possession. Mr Nkomo identified the appellant as one of the assailants and confirmed that he was in telephonic communication with him. Once arrested, the appellant, unaware that accused 2 had also been arrested, decided to take them to the home of the former accused 1.

Conclusion

[99] There is overwhelmingly reliable evidence of identification linking the appellant. There is a link between the identification of Mr Nkomo regarding the appellant and that of Ms Mabutho. The other link is circumstantial evidence which is common cause linking the two robberies. This relates to Mr Nkomo's evidence

that some items stolen from his vehicle were found at the house from which former accused 2 emerged running; the pointing out by Mr Nkomo is another form of circumstantial evidence linking the appellant; dock identification, which cannot be totally ignored in terms of our law adds value; circumstantial evidence in respect of Ms Mabutho's key cannot be overlooked. The State also relied on overwhelming corroborations regarding a number of aspects, as highlighted above, regarding the evidence of all the other witnesses, including that of the appellant, circumstantial evidence relating to the conduct of the appellant before his arrest, the admissions he made during cross-examination, and the pointing he made in respect of former accused 2.

[100] The conclusion by the trial court that the identity of the appellant was proven beyond a reasonable doubt cannot be faulted. The sum total of all the pieces of the proven facts from the evidence of all the witnesses called by the State, when sewn together, creates an impregnable mosaic of proof that the appellant is one of the assailants who robbed Mr Nkomo, Ms Mphuthi and Ms Mabutho of their belongings. I therefore agree with the two judges who heard the petition in the high court that no other court would reasonably come to a different conclusion than the one reached by the trial court.

[101] In my view, the high court's refusal of the petition in respect of the conviction ought to be confirmed, as there are no reasonable prospects that an appeal to the full bench would succeed.

Order

[102] The following order is made:

1 The State's application for postponement of the hearing is dismissed.

2 The late filing of the record is condoned and the appeal is reinstated.

3 The late filing of the appellant's heads of argument is condoned.

4 The appeal is dismissed.

5 The registrar of this Court is to forward a copy of this judgment to the Director of Public Prosecutions, Gauteng who is to look into the conduct of Mr V Mongwane.

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A M KGOELE

JUDGE OF APPEAL

Appearances:

For the appellant:	M B Modumaela
Instructed by:	MB Modumaela Attorneys, Johannesburg
	Mayet & Associate Attorneys, Bloemfontein
For the respondent:	V Mongwane
Instructed by:	Director of Public Prosecutions, Johannesburg
	Director of Public Prosecutions, Bloemfontein.