

SOUTH AFRICA / JUDGMENT

Chonco v S (A30/2019) [2021] ZAGPJHC 65 (9 June 2021)

[2021] ZAGPJHC 65

COURT

South Gauteng High Court, Johannesburg

BEFORE

T P Mudau, N P Mngqibisa-Thusi, C Swanepoel

CASE / FILE NUMBER

A30/2019

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

CASE NO: A30/2019

SS 67/2014

DPP REF NO: JPV 10/2/11/1-14/20

In the matter between:

CHONCO, SIPHO MSANENKOSI APPELLANT

and

THE STATE

RESPONDENT

J U D G M E N T

MUDAU, J:

- [1] This is an appeal against conviction only with leave of the trial court (per Karam AJ). The appellant was indicted on 16 serious charges that included counts of murder read with the provisions of section 51(1) of Act 105 of 1997 related to minibus-taxi feuds. The appellant was

acquitted for lack of adequate evidence in respect of a significant number of the charges but for count 7 (murder), count 8 (murder) as well as counts 9 to 11 (attempted murder charges), which are the subject of this appeal. He was subsequently sentenced to life terms in respect of the murder charges and to 10 years' imprisonment for each of the attempted murder charges. The sentences in counts 9,10 and 11 were ordered to run concurrently with the life sentence imposed for counts 7 and 8. In issue in this appeal is whether the appellant was correctly placed and identified at the scene where the offences were committed.

- [2] The background facts are largely common cause. The appellant, the deceased in counts 7 and 8 as well as the complainants cited in

counts 9, 10 and 11 were members of rival taxi associations, being Reiger Park Taxi Association and Vosloorus Boksburg Taxi Association

("VBDDTA"), respectively. The appellant was a member of VBDDTA but had formed a breakaway group operating under Reiger Park Taxi Association. A dispute arose regarding one of the taxi routes serviced by both associations at Holomisa, Windmill Park, Boksburg.

- [3] The history of the dispute was outlined by Mr. Lucky Mbatha, the secretary of VBDDTA. In 2010, approximately 15 members led by the

appellant formed a splinter group. In 2012 members of the splinter group resigned from VBDDTA to join the Reiger Park Taxi Association.

During the relevant period there was taxi related violence and casualties on either side in a series of separate incidents that

ensued until 2014, when the deceased were murdered. The complainant in count 11 did not testify in the matter as the state could not secure his attendance, the appellant was however convicted of attempting to murder him as well.

- [4] The complainant in respect of count 9, Mr. Shadrack Ngubo ("Mr. Ngubo") was a taxi owner and a member of the VBDDTA. He testified that he had known the appellant for more than 10 years. He also knew the deceased in counts 7 and 8 as well as the complainants in the remaining charges as they were all members of the VBDDTA. In the morning of 5 May 2014, he received information that taxis belonging to the VBDDTA had been stopped from operating in the Holomisa informal settlement area. He and other members proceeded to the area only to establish that that was indeed the case. They then proceeded to Boksburg and discovered that the taxis there were operating without hindrance.

- [5] Later the same day, before the sun could set, all five of them, being Ngubo, Ncube, Khoza, Mazibuko and Skosana travelled in a Toyota Tazz Corolla motor vehicle from Boksburg to Vosloorus along Heidelberg Road. He was a front seat passenger. The driver of the Tazz was the deceased in count 8, Mr. Mncube. The complainant in count 10, Mr Mazibuko was a rear seat left passenger. The complainant and surviving victim in count 11 was Mr. Skosana who was seated in the middle of the back seat. The deceased in count 7, Mr. Khoza occupied the

rear right seat.

- [6] Mr. Ngubo testified that they were not traveling at a high-speed. As they approached the right side junction, where Boundary Road intersects with Heidelberg Road, he heard a series of shots being fired. Out of fear he bent down to take cover but looked up at a distance of 20 to 25 m away in a 45° angle and saw two men, this being the appellant and one Mdunge (since deceased in a separate incident in the company of the appellant) who was also involved in the taxi business. Both were in possession of rifles and stood next to a white sedan. The appellant had on a powder blue shirt and stood at the passenger's side of the white sedan whereas Mdunge was on the driver's side much closer to the headlamp.
- [7] The deceased, Khoza cried out that he had been shot. As he looked back through the window where Khoza was seated, he noticed the white sedan was at that stage following them, with the appellant and Mr. Mdunge firing further shots at them. At some stage Mr. Ncube tried to overtake another vehicle in an attempt to speed away, the car in which the appellant and his companion traveled overtook theirs on their left-hand side firing further shots. The deceased, Ncube, lost control of the car which veered off the road to the right in the open field. Ncube and Khoza died at the scene and the remaining 3 survivors were hospitalized for an extended period of time.
- [8] During cross-examination, Mr. Ngubo was adamant that the incident occurred during daylight and that the sun had not yet set. On his version, he and the others with whom he travelled in the Toyota Tazz left Boksburg at about 5 PM, and that the shooting happened about 10 minutes later. He disputed that 5 May 2014 was in the middle of winter as suggested by counsel of the appellant. However, he was not in a position to identify the driver of the assailants' car since the windows were tinted. He disputed any conspiracy to falsely implicate the appellant whom he had known for many years.
- [9] The complainant in count 10, Mr. Mazibuko testified and confirmed Mr. Ngubo's testimony. He too was a taxi owner and had known the appellant since 2003. On his version, he described the white sedan that the appellant travelled in as a Toyota Corolla. He noted the Toyota Corolla in the proximity of another vehicle, a red VW Golf at the intersection of Kingfisher and Rondebult Streets. Three unknown males stood outside the two cars as he and his companions drove past. The white Toyota Corolla sedan with four occupants proceeded to follow and overtook them. This all happened before sunset. The sun was still bright. From the white Toyota Corolla, he identified the appellant who was seated on the left back passenger's seat and Mdunge who was on the front passenger seat. The windows of the Toyota Corolla sedan though tinted, were half open.
- [10] As the Toyota Corolla overtook theirs, the appellant and Mdunge had turned their heads to look at them, consequently, he had sufficient

opportunity to look at the whole of the appellant's face. The appellant's head and that of his companion, Mdunge were not covered. He confirmed that it was at the intersection of Boundary and Heidelberg Roads that he saw the barrels of two rifles through the open windows of the front

and the rear left seats where the appellant and Mdunge sat, after Khoza had said to Ncube that they were being shot at. He confirmed that the Toyota Corolla followed them, that they were further shot at during the chase but had his head down. He confirmed that they were all struck by bullets but he survived the shooting.

- [11] During cross-examination, Mr. Mazibuko's statement to the police about the incident was put to him. The statement recorded that it was at 6:30 PM when he was on duty watching the movement of the taxis that day. Mazibuko was adamant that reference to 6:30 PM was an error on the part of the police official who took down the statement. The statement had to correctly reflect 6:30 am, as the time he arrived at the taxi rank for duty. He could not recall whether the statement was read back to him as it was taken from his hospital bed. He never read the statement as English was not his language. He refuted suggestions that he was falsely implicating the appellant. On his version, he had previously been shot at Holomisa informal settlement, and easily could have implicated the appellant had it been his desire to do so. Further on his version, he did not see the appellant and Mdunge standing outside their car at the Boundary Road intersection as he was looking down at the time. After their motor vehicle landed in the veld, he lost consciousness and only regained it in hospital.
- [12] It is a trite principle that in criminal proceedings the prosecution has to prove its case beyond reasonable doubt, on a conspectus of all the evidence. If the accused's version was reasonably possibly true in substance, the court had to decide the matter on the acceptance of that version. The accused's version could only be rejected on the basis of inherent probabilities; not because it was merely improbable but because it was so improbable that it could not reasonably possibly be true.[1]
- [13] The appellant raised an alibi as a defence. It is trite that an alibi defence is not to be treated as a separate issue to the issue of identification. An alibi defence is essentially a denial of the prosecution's case on the issue of identification. As the Appellate

Division stated in *R v Hlongwani*[2], the correct approach is to consider the alibi in the light of the totality of the evidence and the court's impression of the witnesses.

It is sufficient if it might reasonably be true.[3]

- [14] The appellant was the sole witness to testify in his defence. He testified that at the time of the incident (5 May 2014), he had

relocated his residence from Benoni to Tsakane as he feared for his life from the taxi feuds. This residence was more of a hideout. He did not walk about and never left the house except to attend meetings on Tuesdays during some weeks. He also visited his wife in the North West province for 3 to 4 days at a time. He denied that he was involved in the commission of the offences. It was brought to his attention that they were experiencing problems in that they were being chased away and forbidden by mainline operators, VBDTA members to pick up passengers which he relayed to all other members of the splinter group, including the late Mr. Mdunge on the day of the incident.

- [15] During cross-examination, he confirmed that he is known the state witnesses for a long-time. He was constrained to concede that these witnesses could easily identify him. He had resigned from VBDTA on 27 February 2012 but continued operating his taxis at Holomisa, which was a VBDTA pickup point. He was constrained to concede that VBDTA tried to prevent him from operating from Holomisa which had become a lucrative route, as a result of which violence ensued. On his version, he had no permit to operate from Reiger Park Taxi Association and did so illegally. He previously had no problems with the complainants who testified. Regarding the events of 5 May 2014, he confirmed that three of his taxi drivers were operating from the rank at the high school in Holomisa, also known as Windmill Park. He had no independent recollection of what day of the week that was or what transpired on the day in question, but lived with one Khumalo.
- [16] On his version, he had no personal knowledge on who was responsible for the violence on the day in question but opined that it could have been the drivers themselves. The Holomisa pickup point, the source of the conflict, was not registered as a separate route from VBDTA. However, the appellant, as the trial court found, had difficulties in pointing out the taxi pickup point at the high school in Holomisa. On the common cause evidence, the appellant and other members of the splinter group still had permits to operate from all routes of VBDTA. Yet, the appellant had difficulty in explaining why they were not permitted to operate on the main route.
- [17] The gravamen of the appellant's attack against his convictions lies with the evidence of Mr. Ngubo who testified that the appellant and his companion were standing beside a motor vehicle when they started shooting at them. Mr Mazibuko on the other hand made no mention of this, according to him the appellant and Mr. Mdunge started shooting at them whilst they were in the vehicle following them. The criticism is devoid of any merit as the scene was not static. It was a moving scene. Accordingly, there is nothing inherently improbable with the version of the state that both Ngubo and Mazibuko watched the developing scene at different intervals and evidently, from different vantage points.
- [18] Significantly, the state witnesses corroborated each other that the incident took place in broad daylight with no confusion as to who the participants were. Furthermore, as the appellant rightly conceded, he was well known to them for many years and they could positively identify him. The possibility for a mistaken identity under the circumstances is too remote and can safely be discounted. It is clear that the trial judge approach this evidence cautiously.[4] To the credit of the state witnesses, the so-called contradictions in their evidence clearly shows that it has not been rehearsed.

[19] It is generally accepted that a court of appeal would not be inclined to reject the factual findings of the trial court in the absence of demonstrable and material misdirection by the trial court. The findings of fact by the trial court are presumed to be correct and would only be disregarded if the recorded evidence showed them to be clearly wrong. I have not been able to find any demonstrable errors on the part of the trial court to justify interference with its credibility findings.[5]

[20] To the contrary, the record proves that the trial court was correct in its credibility findings, and that the appellant and his companion had motive to commit the crimes for which he was convicted. His alibi defence was nothing more than generalities. Given the conspectus of the evidence, I am unable to find that the trial court erred in finding that the appellant's version is so inherently improbable as not to be reasonably possibly true. The court a quo, for sound reasons, found the appellant to be an untruthful witness. His protestations of innocence cannot reasonably possibly be true. In my view he was rightly convicted, as in the court below, on all the relevant counts. His appeal against these convictions must accordingly fail.

[21] In the result, the appellant's appeal against conviction is dismissed.

T P MUDAU

[Judge of the High Court,
Gauteng Local Division,
Johannesburg]

I agree

N P MNGQIBISA-THUSI

[Judge of the High Court,
Gauteng Local Division,
Johannesburg]

C SWANEPOEL

[Acting Judge of the High Court,

Date of Hearing:

31 May 2021

Date of Judgment:

9 June 2021

APPEARANCES

For the Appellant:

Adv. L L Makoko

Instructed by:

Legal Aid South Africa-JHB

For the Respondent:

Adv. P Schutte

Instructed by:

DPP – JHB

[1] S v Shackell 2001 (4) SA 1 (SCA).

[2] 1959

(3) SA 337 (A) at 340H.

[3] S v Ngcina 2007 (1) SACR 19 (SCA).

[4] S v Mthetwa 1972 (3) SA 766 (A).

[5] Livanje v S 2020 (2) SACR 451 (SCA) at para18.

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