

SOUTH AFRICA / JUDGMENT

Maquthu v S (Appeal) (CA57/2024)

[2025] ZANWHC 139 (7 August 2025)

[2025] ZANWHC 139**COURT**

North West High Court, Mafikeng

BEFORE

R D Hendricks, S.W Malane

CASE / FILE NUMBER

CA57/2024

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COURT, MAHIKENG****CASE NO:** CA57/2024**Reportable:** NO
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WILLIAM MAQUTHU
Appellant
AND
THE
STATE
Respondent
DATE
OF HEARING
: 13 JUNE
2025
DATE
OF JUDGMENT
: 07
AUGUST 2025
FOR THE
APPELLANT
: ADV.
HOBDEN

FOR THE
RESPONDENT
: ADV.
NDHLOVU

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via email. The date and time for hand-down is deemed to be 10h00 on 07 August 2025.

ORDER

Resultantly, the following order is made:

- (i) The appeal against conviction is dismissed.
- (ii) The conviction is confirmed.

Summary

Evaluation of evidence in a criminal trial - Appeal - powers of a court of appeal to interfere with the credibility findings of a trial court is limited. Test to be applied.

HENDRICKS JP

Introduction

- [1] Mr. Serame William Maquthu (appellant) was arraigned together with Mr. Modiakgotla Makoro as his co-accused (accused 2) before the Regional Court, Bloemhof, on a charge of murder. It was alleged that they acted in concert with one another and in furtherance of a common goal when they strangled and stabbed Thabang Edwin Motshabi Thizikani to death. Furthermore, that the murder was planned and premeditated. The provisions of Section 51 (1) of the Criminal Law Amendment Act 105 of 1997 (CLAA) read with the provisions of Schedule 1 Part II are applicable and that the prescribed sentence is life imprisonment. They were legally represented during the trial and opted not to exercise their right that assessors be appointed to preside over their matter, together with the Regional Magistrate. They were convicted and sentenced to undergo an effected term of imprisonment of 18 years each. Leave to appeal was refused by the trial court. They thereafter successfully petitioned for leave to appeal against conviction, which was granted; hence the present appeal against conviction only.
- [2] The facts of the matter can be very succinctly summarized as follows. The appellant and his co-accused were detained in a holding cell at Bloemhof police station. The deceased was detained in the same police cell together with other inmates, as awaiting trial detainees. After the door of the cell was locked following an inspection, the appellant and accused 2 attack the deceased. Accused 2 grabbed and throttling the deceased from behind around his

neck, whilst the appellant stabbed him several times. Thereafter, there was a banging of the cell door in order to draw the attention of the police officers. When the police officer opened the cell door and enquired what transpired, the deceased pointed at the appellant and accused 2 and fell down, due to the injuries he sustained. An ambulance was summoned but the deceased had already passed away when the ambulance

arrived. Four witnesses testified for and on behalf of the State. Three of the witnesses were inside the police cell together with the deceased, the appellant and accused 2, as well as other inmates. The fourth state witness was the police officer who visited the cell before the incident, and who also attended when the cell door was banged to draw their attention.

[3] The versions of the appellant, his co-accused, and his witnesses, are to the effect that they make common cause with the fact that they were locked in the same police cell together with the deceased. When the deceased was brought to the police cell, he resisted being placed in the same cell with the appellant and the other inmates. The reason for the resistance was because he was from a rival gangster group as that of the appellant, his co-accused and some of the other

detainees. On their version, the appellant already had injuries when he was placed inside the police cell. Later on, the deceased could not breathe and the attention of the police was drawn to seek assistance for the deceased. When the police arrived and the police cell door was unlocked and open, the deceased pointed at the appellant and accused 2 and fell down. This is in brief the defence version. This version is diametrically opposed to the version of the state witnesses.

[4] The appeal is assailed mainly on the grounds that there are material contradictions in the evidence of the state witnesses; and between their viva voce evidence in court vis-à-vis the witness statements that they deposed to before the police officers. Furthermore, that the trial court erred in failing to call

material witnesses in terms of the provisions of Section 186 of the Criminal Procedure Act 51 of 1997, in the form of the other police officers who received and booked the deceased into the police cell. The credibility findings by the Regional Magistrate in favour of the state witnesses and their reliability is also attacked. It is contended that the Regional Magistrate made a number of erroneous and unsubstantiated findings of fact. The Regional Magistrate also failed to take into account the strong probability of police complicity in the death of the deceased and the failure to report the matter to the Independent Police Investigating Directorate (IPID).

[5] A closer scrutiny of all the evidence tendered is warranted, seeing that they are diametrically opposed versions proffered in this case. The synopsis of the evidence of each of the witnesses who testified is aptly contained in the heads of argument submitted on behalf of the appellant.

[6] The first state witness was Mr Themba Noraka.

At the time of the alleged offence, Noraka was detained and was awaiting trial. Noraka testified that on 11 March 2018 he had been brought from Potchestroom correctional facility to the holding cells of the Bloemhof police station. Upon arrival, the inmates were searched and taken to the holding cell. They waited there, and some time later, the police brought food. Noraka testified that the deceased and the two accused were in the cell. The deceased and the appellant were seated near the door. Suddenly, he saw the appellant take out a knife and stab the deceased. Mokoro held the deceased from behind. The deceased struggled, and broke free. He ran to the door of the cell and began banging on the door. The appellant followed the deceased and began strangling him. The inmates from the neighbouring cell were shouting for the police. Noraka saw a blood stain on the deceased's T-shirt. As the police arrived, the appellant moved away from the deceased. Noraka testified that the appellant walked past him, and he heard the

toilet flushing. The police asked the deceased what had happened. The deceased was unable to talk and pointed to the appellant and his co-accused. According to Noraka's testimony, the deceased died just outside the cell. A number of inconsistencies between the evidence in chief and evidence under cross-examination were pointed out during cross-examination by the representative of accused

2. These included, whether the deceased was stabbed while against a wall, or while running away, where the appellant retrieved the instrument (his jacket pocket or hip). Noraka also conceded that he did not tell the entire truth in his statement to the police and alleged that he was intimidated by the police when making the statement.

[7] The second state witness was Mr Tshidiso George Mtshinyoyo.

Mtshinyoyo was also detained and awaiting trial. He testified that on 11 March 2018, he had been brought from Potchestroom correctional facility to the holding cells of the Bloemhof police station. The inmates were searched upon their arrival at Bloemhof. They entered the cell, unpacked and were given food. Mtshinyoyo testified that he found the two accused and the deceased in the cell when he arrived. He knew the two accused as they belonged to the same gang, and had previously been detained together in Potchestroom. The deceased was “pink here on the cheeks”. After eating he began playing a game of cards with Matthews. While they were playing, Mtshinyoyo heard shouting, and looked up to see the appellant stabbing the deceased with an instrument. Mtshinyoyo says that he then covered his eyes with his hands out of fear. He heard someone banging on the door and screaming for help. Mtshinyoyo testified that the police asked the deceased who had stabbed him. The deceased was unable to speak, but pointed at both the appellant and his co-accused. According to Mtshinyoyo, the deceased pointed to the appellant, and the co-accused and he was merely caught in the crossfire. Mtshinyoyo testified that he was sitting near to the toilet. He testified that he saw the appellant flush the weapon and wash his hands. He did not volunteer this information to the police. Under cross-examination, Mtshinyoyo testified that he was sitting on a folded mattress about 45 cm high, and that there was a wall between him and the toilet.

[8] The third state witness was Mr Boetietjie Henry Matthews.

Matthews testified that he was already in the cell when the deceased entered. The deceased had refused to enter the cell because he knew it was occupied by members of a rival gang. The police pepper-sprayed him and forced him to enter. Matthews' testimony was that the deceased was handcuffed, and already had visible bloodstains on his clothes, his chest and on his wrist. Matthews was focussed on playing a card game, but testified that he heard some commotion, and noticed the deceased going to the door.

[9] The fourth state witness was Sergeant Cornelius Obekeng Mosimane.

Sergeant Mosimane is a police officer at the Bloemhof police station. He testified that he was responsible for the night duty shift on 11 March 2018. At around 17:45, he began the process of counting the inmates. The deceased and the two accused were in cell 3A. He did not observe any injury or complaint from any of the inmates in cell 3A and no visible injuries on the deceased. During this time, the doors of the two cells (3A and 3B) were not locked, but the door to the recreational facility was locked. The inmates in cells 3A and 3B can move around and interact in the recreational facility. To reach the two cells, the police officers have to walk through the recreational facility. While he and two other officers, Khadi and Moghadi, were on their way back to the community service centre, he heard inmates banging on the steel door of one of the cells. Mosimane testified in evidence in chief that the

door was the door of cell 3A. In cross-examination he testified that the inmates had banged on the door of cell 3B. When this inconsistency was put to him, he explained that he had originally made a mistake and confirmed that 3B was the correct cell.

[10] Mosimane immediately returned to the cells, entering through the recreation centre door, and saw the deceased approaching him stained with blood. He testified under cross examination that the blood was not "spraying" from the deceased at that stage. He found the deceased near to the door of cell 3B. Sergeant Mosimane testified that the deceased pointed at both the appellant and his co-accused, who were behind him, and told him that they had injured him. The deceased fell to the ground. Mosimane testified that he moved the inmates back into the cell, and asked the inmates who had banged on the door. Mosimane then left to call for an ambulance. Once the ambulance arrived, Mosimane and the other two officers searched the cell, but did not find the instrument used. The clothing and shoes of both accused persons were taken for blood analysis. Under cross examination, Mosimane testified that he had no knowledge of the results of these forensic tests. Mosimane testified that there was no blood on the floor or on the walls following the incident. Sergeant Mosimane testified that the SAPS charge register records that the

deceased was arrested on 11 March 2018 on the charge of contravention of a protection order and domestic violence. He was detained at the police station the same day. Sergeant Mosimane testified that he had no knowledge as to the state of the deceased when he was detained. He was not present at that time, and he did not check the Occurrence Book.

- [11] The appellant testified that shortly after recreation time he heard sounds from the cell doors and the police entered and placed the deceased in the cell. Recreational time is normally at 15:00. The deceased was covered in blood and cut on the feet and his hands. He refused to enter the cell. The police pushed him into the cell and he fell on his stomach on the floor. He was left there for a short period, and thereafter the police officers came to remove the handcuffs. The appellant and the other inmates asked the deceased his name and why he was injured. He told them that he had been in a fight with his family members. The police then brought food. The deceased said he did not want to eat because he did not feel well. The inmates from Potchestroom arrived. They were given their food. At this time the appellant was sitting next to the deceased to the right hand side of the cell door. Sergeant Mosimane came to the cell, opened the door, and used the torch light to count the inmates. A short while afterwards, the deceased touched the appellant and told him he was having difficulty breathing. The appellant realised that he was unwell and decided to alert the police by banging on the door. Accused 2 assisted him to bang the door.
- [12] When the police arrived they asked who has been hitting the door. The appellant responded that it was him, and that he wanted to alert them to the injured person. The police took the deceased out of the cell. They asked him what was wrong. He indicated that he was feeling weak and pointed to his belly. He then fell on the floor on his back. The appellant and the co-accused were taken to another cell and their fingers and nails were swabbed, and photographs were taken. The appellant's sneakers and clothes were taken for forensic testing. The appellant testified that he did not have a weapon of any kind, and that he did not flush any instrument down the toilet. The appellant testified that he was currently serving a sentence for the murder of a SVK gang member, and that it was likely that the SVK gang members were implicating him in this offence as punishment.

- [13] Mr Makhaya testified for the defence.

Makhaya was one of the inmates who had travelled from Potchefstroom to the Bloemhof police station. He saw the two accused and the deceased in the cell when he arrived. Makhaya testified that while he was unpacking, he asked the other inmates why the deceased was "oozing blood" and why they had not sought assistance for him. He observed that the deceased had bloodstains on his hands and on the front part of his chest. Thereafter the appellant and co-accused began pushing and pulling the door. This was a common way in which inmates would call for a police officer. The door would bang against the wall and get the attention of the police. When the police arrived, they opened the door and asked who had been hitting the doors. The deceased pointed to the two

accused. The deceased said to the police officers “am requesting you to take me to the clinic.” Thereafter the deceased waked forward and fell down. Makhaya testified that the police “made” him sign a statement . At some later stage, the prosecutor provided him with the statement purportedly made by him. After the statement was read to him, he disputed its contents as he did not agree with it. He was asked to attend court during the State's case but was not called as a witness.

[14] In *S v Monyane*[1] the following is stated:

“[15] This court's powers to interfere on appeal with the findings of fact of a trial court are limited. It has not been suggested that the trial court misdirected itself in any respect. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong (S v Hadebe and Others 1997

(2) SACR 641 (SCA) at 645e-f). This, in my view, is certainly not a case in which a thorough reading of the record leaves me in any doubt as to the correctness of the trial court's factual findings. Bearing in mind the advantage that a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with a trial court's evaluation of oral testimony (*S v Francis* 1991

(1) SACR 198 (A) at 204e).”

[15] A court of appeal can only reject the trial court's assessment of the evidence if the court of appeal is convinced that the trial court's assessment of the evidence is wrong. If the appeal court is in doubt, the trial court's judgment must remain in place. It is a fundamental principle in the evaluation of the evidence on the appeal that a court of appeal is not inclined to disturb findings made by the trial court on the evaluation of the evidence. The trial court has the

advantage of seeing and hearing the witnesses. In *Makate v Vodacom (Pty) Ltd*[2] the following is stated:

“[37] In these circumstances, interference with the factual findings made by the trial Court is neither necessary nor justified. Ordinarily appeal courts in our law are reluctant to interfere with factual findings made by trial courts, more particularly if the factual findings depended upon the credibility of the witnesses who testified at the trial.”

In *Bernert v ABSA Bank Ltd*[3] the following is stated:

[106] What must be stressed here, is the point that has been repeatedly made. The principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is not an inflexible rule. It is a recognition of the advantages that the trial court enjoys which the appellate court does not. These advantages flow from observing and hearing witnesses as opposed to reading “the cold printed word.” The main advantage being the opportunity to observe the demeanour of the witnesses. But this rule of practice should not be used to “tie

the hands of appellate courts”. It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is a misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it.”

[16] The Regional Magistrate evaluated the evidence tendered by looking at it holistically. This is indeed the correct approach[4]. The probabilities and improbabilities were also considered. So too, were credibility findings made. Of importance is the evidence as contained in the post-mortem examination report, which was duly considered by the trial court. There were multiple incised stab

wounds of which at least two were very dangerous. One penetrated the heart and the other the lung of the deceased. The ineluctable

conclusions or deductions reached by the Regional Magistrate that the deceased could not have survived for a considerable period of time with such a stab wound in his heart; and that the reason why he could not speak was as result of the perforated stab wound into his lung, cannot be faulted. Although, as the Regional Magistrate conceded, he is not an expert, this is common sense. These wounds must have been inflicted shortly before the door was banged against, in order to draw the attention of the police. That is also the logical reason why the cell door was banged against in such earnest.

[17] In his careful analysis of the evidence tendered by the State, Regional Magistrate also look for corroboration of the evidence of the state witnesses as a cautionary measure to guard against a wrong conviction. Corroboration of material aspects of the evidence of the state witnesses were indeed pointed out by the Regional Magistrate. So too, was the contents of the post-mortem examination report analyses. Corroboration in the content of this report was also found to exist for support of the version of the state witnesses. On this score too, can the reasoning of the Regional Magistrate not be faulted.

[18] Much emphasis is laid on the differences between the viva voce evidence tendered in court during the trial vis-à-vis the statements deposed to by the witnesses. The statements, the correctness of its contents, were disavowed by the state witnesses.

Same applies to the defence witnesses called by the appellant. It was stated that the police only, caused them to sign ‘a piece of paper’, or the contents of the statement is not what transpired or what the witness told the police. That the contents of a statement may differ - even materially - from the viva voce evidence tendered in court was comprehensively dealt with in our caselaw. Furthermore, not every contradiction will necessarily lead to the rejection of a witness’ evidence.

[19] The appellants contention that there are material contradictions in the state case especially when their evidence and the statements they provided to the police cannot be regarded as material. The trial court have dealt with these allegations when giving the judgment. The

respondent further submit that the immaterial contradictions between witnesses emphasizes that the witnesses did not collude with each other to falsely implicate the appellant. The respondent further submits that is not every contradiction which affects the credibility and reliability of a witness. The trial court has evaluated the evidence of those witnesses and found it to be credible.

[20] In *S v Mafaladiso and others* 2003 (1) SACR 583 (SCA), the court remarked as follows:

"The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, inter alia, between her or his viva voce evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness, could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard 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. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Nonmaterial deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. 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 - and the quality of the explanations

- and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into consideration and weighed up. Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against

the viva voce evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings." (At 59e – 59h).

See also: *S v Bruiners and another* 1998 (2) SACR 432.

[21] Much has also been made of the fact that the Magistrate failed to call the police officers who received and booked the deceased into the police cell, so that they could testify about his condition. It is contended that this failure to call the witness(es) in terms of the provisions of Section 186 of the Criminal Procedure Act (CPA)[5] is a material misdirection. I am unconvinced. At first, there is the direct evidence of Mosimane who conducted the cell visit and found everything to be in order. There was no incident and no report by the deceased or any of the inmates that the deceased was fatally injured at that time. He was also the police

officer who attended at the cell when he answered to the banging of the cell door. He then observed the deceased. The deceased could not talk and he was bloodstained. The deceased then pointed at the appellant and accused 2 and thereafter collapsed. In the face of this evidence, coupled with the evidence of the other state witnesses who were eye witnesses to what transpired, there was no need for the Regional Magistrate to exercise his discretion to call other witnesses in terms of Section 186 of the CPA.

[22] Having regard to the totality of the evidence, and looking at it holistically, the Regional Magistrate correctly evaluated the evidence tendered[6]. As court of appeal with our limited power to interfere with the factual findings of a trial court[7], I am of the considered view that the conviction of the appellant is correct, and the factual findings cannot and ought not be disturbed by this Court. Consequently, I am of the view that the appeal against conviction should fail and that the conviction must be confirmed. No appeal lies against sentence.

Order

[23] Resultantly, the following order is made:

- (i) The appeal against conviction is dismissed.
- (ii) The conviction is confirmed.

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

I agree

S.W MALANE

ACTING JUDGE OF THE HIGH COURT,

[1] 2008

(1) SACR 543 (SCA).

[2] (2016) ZACC 13.

[3] 2011

(3) SA 92 (CC).

[4] See: S v Chabalala 2003 (1) SACR 134 (SCA). S v Trainor 2003 (1) SACR 35 (SCA).

[4] See: S v Chabalala 2003 (1) SACR 134 (SCA).

S v Trainor 2003 (1) SACR 35 (SCA).

[5] 51 of 1977, as amended

[6] See: S v Van Der Meyden 1999 (1) SA 447 (W).

[7] See: S v Lekhoana [2024] ZANWHC 113 (16 April 2024).

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