

SOUTH AFRICA / JUDGMENT

Mkhwanazi v S (AR 309/2021)

[2024] ZAKZPHC 43 (24 May 2024)

[2024] ZAKZPHC 43**COURT**

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Balton, Mossop

CASE / FILE NUMBER

AR 309/2021

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Source record**FLYNOTES:****CRIMINAL**

– Identity – Alibi

defence –

Attack

and burning of dwellings at night – Appellant convicted in

Regional Court – Lengthy silence of two witnesses

as to

identity remained unexplained – One witness had brief

glimpse in moonlight – Other witness was 70 metres

away at

night in conditions of smoke from burning dwellings –

Appellant advanced his alibi, underwent cross-examination

and

called his witnesses, who confirmed his alibi and withstood

cross-examination – Appeal allowed and conviction and

sentence set aside.

IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

Appeal

no: AR 309/2021

In

the matter between:	LINDOKUHLE MKHWANAZI APPELLANT and THE STATE RESPONDENT
Coram:	Balton J and Mossop J
Heard:	10 May 2024
Delivered:	24 May 2024 ORDER On appeal from: Mtubatuba Regional
Court (sitting as the court of first instance):	The appeal is upheld and the conviction and sentence are set aside.

JUDGMENT

MOSSOP J (Balton J concurring):

[1] The meaning of the Latin word ‘alibi’ is:
‘elsewhere, other where, somewhere else, in, or at another place.’[1]

The appellant raised such a defence, unsuccessfully, to the five counts that he faced when he stood trial in the Mtubatuba Regional Court. Those five counts comprised of three counts of murder, a count of arson, and a count of attempted murder. He was convicted on all the counts and sentenced to an effective 30 years’ imprisonment. He appeals against both his conviction and sentence with the leave of the trial court.

[2] The facts of the matter are horrific. At around 20h00, on the evening of 29 October 2016, the extended Gumede family were at their homestead, which comprised of six dwellings. Three younger members of the family, namely Sifiso Nkosi (Sifiso), Njabulo Sithole (Njabulo), and Mbekezeli Mtshali (Mbekezeli), occupied one of those dwellings, together with their grandfather, Thengabantu Gumede (the grandfather). The four of them were in bed with the electric light switched off, and were talking in the dark before dropping off to sleep, when the locked door to the dwelling was unexpectedly kicked in. An unknown number of people entered the dwelling in the dark and began assaulting Sifiso and the other occupants, initially with stones. The room was then sprayed with petrol and the dwelling was set alight. Njabulo and Mbekezeli, who I shall refer to collectively as ‘the young men’, managed to get out of the burning dwelling through a window and fled in different directions. Sifiso and the grandfather were not as fortunate, and perished in the burning dwelling.

- [3] Besides the dwelling occupied by the young men, two other dwellings in the homestead were torched by the attackers and the sister of the grandfather, Ms Nyanyekile Gumede, a grandmother, was also burnt to death. The young men did not escape their burning dwelling unscathed: Njabulo had his right foot burnt by the flames and Mbekezeli was struck in the head with a panga, causing a gaping wound that ultimately required stitching and his hospitalisation for six days.
- [4] The young men both testified at the trial of the appellant. They were the only witnesses called to testify about the events on the evening of 29 October 2016. It is therefore their evidence that the trial court relied upon to convict the appellant and his co-accused.[2] In his evidence, Njabulo identified the appellant as being part of the murderous group that descended upon the Gumede homestead.

Mbekezeli made a passing reference to the appellant in his evidence. The appellant denied that he was at the Gumede homestead on the evening of 29 October 2016. The critical issue in this appeal is accordingly that of identity.

- [5] Where identification is an issue, the evidence that allegedly establishes the identity of the person alleged to have committed the crime should be considered cautiously. The oft quoted words of Holmes JA in *S v Mthetwa*[3] remain apposite more than 50 years after he penned them:

‘Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. 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, and the probabilities...’

- [6] I turn to consider the evidence tendered by the State on the identity of the appellant. The principal witness in this regard was Njabulo. Njabulo stated that after he managed to escape from the burning

dwelling, he found his way to an area of the homestead that he described as ‘the garden’, being an area where crops

would be planted when the growing season came around. He said that he sat there and observed what was occurring. He then left that position and headed for a neighbouring homestead, being the Ngema homestead, where a traditional police officer resided. Despite he and Mbekezeli having run in different directions, Njabulo came across the injured Mbekezeli, and they both then proceeded to the Ngema homestead together. It appears that independently of each other,

for on their version they did not discuss it, they decided not to disclose the identity of their attackers to the neighbours because they believed that the neighbours were related to their attackers. When they reached the Ngema homestead, the South African Police Services (the SAPS) were summoned by the neighbours, but upon their arrival, the young men still did not disclose the identity of their attackers to them. They did not make this disclosure until eight and a half months later.

[7] During the course of his evidence in chief, Njabulo was asked the following convoluted question by the prosecutor:

‘Okay, before we go any further once inside the house – the people that were inside the house, that broken open the door – were they known to you? Were you able to identify them, inside the house? Okay, my question goes further: Inside the house, were you able to identify them? Inside the house? ---- No.’

[8] It was a poorly constructed question, but the answer is reasonably clear and certain. The attackers could not be identified by Njabulo when they burst into the dwelling. That stands to reason: the attack

was entirely unexpected and occurred in the dark, it was a mobile, fast moving scene, and, moreover, it must have been a singularly

terrifying experience.

[9] It appears, therefore, that Njabulo’s principal observations about the identity of the attackers had to have been made after he had escaped the burning dwelling and had taken up a position in the garden. It was agreed during the trial that this area was approximately 70 metres from the attacked homestead.[4] Asked by the prosecutor in another convoluted question what assisted him to make the identification at night, Njabulo stated:

‘It is the fire that assisted me to identify them because two grass thatched houses had already been set alight.’

Where those houses were situated relative to each other was never canvassed at the trial. In addition, it was later established that there was a quantity of either grey or black smoke billowing from the burning dwellings.

[10] What was of importance is what Njabulo could see from his vantage point. He stated the following regarding his identification of the appellant:

‘He was just standing, facing my grandmother’s house.’

That response did not clarify whether Njabulo could observe the facial features of the person that he identified as being the appellant. He explained further that he had made his observations over a period of five minutes and that the appellant had been wearing a blue two-piece overall. Njabulo testified further that he knew the appellant, having grown up in front of him.

- [11] Under cross-examination, Njabulo agreed with two propositions: firstly, that he made his observations from a considerable distance (70 metres), and secondly, the conditions for making those observations were not optimal because of the presence of the smoke from the burning dwellings.
- [12] There were aspects of Njabulo's evidence that, in my view, were unsatisfactory. He contradicted his earlier evidence that he had been seated in the garden when making his observations, when he agreed with a proposition put to him in cross-examination that he had, in fact, been lying down. That appears to be more likely, for he would surely be trying to hide himself based on what had just occurred. But that would also have changed his viewing perspective. In addition, his evidence on whether he had seen Mbekezeli being struck on his head was equivocal and troubling. He initially said that he had not seen it, then said that he had seen it and, finally, conceded that he had not seen it. When the statement that he had ultimately made to

the SAPS was proved and was put to him, it revealed that he had stated that he had seen it. When asked to explain this, Njabulo said that he had seen it.

- [13] The second of the young men to testify at the trial was Mbekezeli. He testified that whilst in the dwelling:

'They entered and assaulted Sifiso, who was on the bed.'

Asked who had entered he answered as follows:

'I'm talking about Thembinkosi Nkosi, Mdu Mkwanaazi and Mdavu Mthethwa'.

It was established that 'Mdu Mkwanaazi' was a reference to the appellant. The prosecutor put the following question to Mbekezeli and received the following response:

'Okay. So you could identify them when they entered the house where you were? ---- I saw them when I was exiting to the outside. Mdavu appeared and came to me.'

- [14] Apart from that single reference to the appellant, Mbekezeli never again mentioned his name in his evidence in chief. In cross-examination, he was asked how he managed to identify him in the circumstances. Mbekezeli stated that:

'I managed to identify him because when they opened the door, there was moonlight outside, emitting light to the house.'

Mbekezeli was confident that there was sufficient light from the moonlight to permit him to identify the persons in the split second within which they kicked down the door and entered the dwelling. However, his opinion in this regard must be open to some doubt because it was at odds with his evidence in chief that he had only made this identification when he was exiting the dwelling.

[15] It seems to me that the evidence of Njabulo is more likely to be correct, namely that no identification was possible within the

dwelling. He made no mention of the moonlight. However, if, as Mbekezeli testified, there was moonlight outside when the door to the dwelling was kicked in, whoever stood in the doorway would be standing with the moonlight behind him. In other words, whoever stood in the aperture left by the open door would appear in silhouette.[5] It is doubtful that in such circumstances the identifying features of the intruders would be capable of being discerned.

[16] In argument, Mr Chetty, who appeared for the State, very fairly conceded that the issue of identification was of some concern in this matter. He indicated that the young men only had a fleeting moment to make their respective observations. In my view, that was a proper concession to make.

[17] I turn now to consider the alibi defence raised by the appellant. The appellant testified and stated that on the day of the attack on the Gumede homestead, he had been in Durban and had arrived in Hluhluwe between 11h00 and 12h00. He was travelling with others but was the first person to be dropped off at a place called Madulini to proceed to his homestead in the Dakaneni area. He arrived there at between 17h00 and 18h00, having had to walk a distance of about six to eight

kilometres from Madulini to Dakaneni. At his homestead, he had been forced to remain in his grandmother's dwelling because of stormy weather, in the company of his mother, the mother of his children, and his brothers. He explained that one of the reasons that he had made the journey from Durban to his homestead was to see his newly born child. At around 23h30, those in his grandmother's

dwelling separated and went to their respective rooms. Before separating, the appellant asked his mother to wake him in the morning. He spent the night in a room with the mother of his children. Having retired to their room, the appellant slept on the bed and the mother of his children, identified as being Ms Nompumelelo Dlomo (Ms Dlomo), slept on a sponge mattress on the floor with the young child, who was less than a month old at the time. His mother did wake him the next morning at 04h00, but he was already awake when she telephoned him from her room. He then left the homestead at about 04h30, en route back to Durban.

[18] The appellant then called Mr Thanduxolo Thembinkosi Nkosi in support of his evidence regarding the journey from Durban. He confirmed the appellant's evidence, in particular, that he had been the first of the travellers to be dropped off. A cursory attempt at cross-examination was made by the prosecutor but not much of relevance emerged from this brief exercise.

[19] Ms Dlomo, the mother of the appellant's children, also testified in support of his alibi. She testified that on 29 October 2016, she was at the appellant's parental homestead in the Dakaneni area. She estimated that the appellant arrived there at around 19h00. She described that day as being 'the Sabbath', and stated that they had all remained together

until approximately 23h00. They then went to their room, and she spent the night on a sponge mattress on the floor. She confirmed that the appellant's mother had woken him the next morning.

[20] When cross-examined by the prosecutor, Ms Dlomo said that she had been telephoned by the appellant's attorneys to come and give evidence. She had spent the night with the appellant before coming to court to testify and had travelled to court in the same motor vehicle as the appellant. She confirmed that the appellant had been with them at approximately 20h30 and confirmed, unsolicited, that there was stormy weather that they were waiting to pass. In his evidence, the appellant had said that his intention that evening had been to watch a soccer match on television. Ms Dlomo was asked if the appellant had done so: she said that he had not because when there is stormy weather about, they had been taught that the television was not to be switched on, a perfectly sensible answer.

[21] The final witness called by the appellant in support of his alibi was his mother, Ms Zandile Mnikeziwe Mkhwanazi (Ms Mkhwanazi). She testified that the appellant had arrived at her homestead at around 17h00 on 29 October

2016. The weather was thundering. She had been cooking for the Sabbath. When retiring for the night at 23h00, the appellant had requested her to wake him early the next morning, which she had done at 04h00. Under cross-examination by the State, Ms Mkhwanazi was asked how she knew the times that she mentioned. She said that when she was asked by the appellant to wake him the next morning, she had accessed her cellular telephone to set the alarm for the next morning and had seen the time. She estimated that the appellant had arrived at the homestead at the time that she stated because she had commenced cooking for the Sabbath at about 18h00. Her cross-examination was largely ineffectual.

[22] It is so that there is no onus on an accused to establish an alibi. It is the task of the State to disprove it. In *R v Mokoena*,^[6] the court held that:

'If the onus is upon the Crown to rebut the alibi, as it certainly is, then the evidence as a whole must be considered and the fact that the accused and his witness told stories, which in some respects disagree, does not mean that the Crown case has been proved beyond reasonable doubt.'

[23] The Supreme Court of Appeal in *S v Musiker*^[7] observed that once an alibi has been raised, it must be accepted unless it is proven that it is false beyond a reasonable doubt. The correct approach is to consider the alibi in the light of the totality of the evidence presented to the court, as stated in *Mokoena*. In evaluating the defence of an alibi, in *R v Hlongwane*,^[8] Holmes AJA stated as follows:

'At the conclusion of the whole case the issues were: (a) whether the alibi might reasonably be true and (b) whether the denial of

complicity might reasonably be true. An affirmative answer to either

(a) or (b) would mean that the Crown failed to prove beyond reasonable doubt that the accused was one of the robbers.’

[24] It is so that the appellant’s alibi was extremely simple and was supported, inter alia, by the mother of his children and his own mother. I do not lose sight of the fact that both these witnesses may have an interest in whether the appellant is incarcerated. But the truth of the matter is that if it was a contrived story, falsely put together to prevent the appellant from being convicted, then that was not demonstrated to be the case by the State.

[25] The regional magistrate found that there were shortcomings in the evidence of Njabulo. In that she was correct. She correctly identified his unsatisfactory evidence relating to the wounding of Mbekezeli. She then found that the evidence of Mbekezeli had corroborated Njabulo’s evidence and concluded that the evidence tendered by the State witnesses was credible and that those witnesses were honest witnesses. I do not have any difficulty with the proposition that they were honest witnesses. Most witnesses who testify are honest. The question is, more importantly, are they correct in that to which they testify? In convicting the appellant and his co-accused, the regional magistrate found that they had correctly described what had occurred and who had committed the crime.

[26] I cannot share that certainty. The silence of the young men after their terrible experience remains unexplained. I cannot accept that they both came to the same conclusion that they should remain silent when arriving at the Ngema homestead without previously discussing their silence. They must have discussed the position for them to both hold the identical view. The regional magistrate found that their explanation that they believed the occupants of that homestead were related to their attackers was sound. The trial court found that that there was no evidence that the accused were not related to the occupants of the Ngema homestead. In fact, the appellant’s legal representative was precluded from asking that question by the trial court. But the only evidence of this fact was the evidence of the young men, and the basis for their supposition in this regard was never explored nor confirmed.

[27] I have a further difficulty with the evidence of the young men. Their explanation, which was accepted by the regional magistrate, that they did not mention the names of the attackers to the SAPS because they were not asked who had attacked the Gumede homestead, likewise cannot be accepted. It was put to Njabulo in cross-examination that upon arrival at the Ngema homestead, the young men must have been peppered with questions by their neighbours about who had done this to them. That would appear to be even more likely when the SAPS arrived there and I cannot accept that this is something that was of no concern to the SAPS. Which leaves the silence of the young men as to who attacked the Gumede homestead unexplained.

[28] But the principal difficulty that I have lies in the evidence of Njabulo. The regional magistrate appears not to have placed sufficient emphasis on the fact that his observations occurred from a distance of approximately 70 metres, at night, and at a scene obscured with smoke. His evidence was that the appellant wore a blue two-piece overall. That is a very

common mode of attire amongst working men and is not distinctive. Indeed, it was alleged that another attacker also wore an identical coloured garment. The distance at which the observations were allegedly made by Njabulo is considerable. The conditions under which he made them were less than optimal and it was a scene of some mobility. Contrary to the finding of the regional magistrate, Mbekezeli did not corroborate Njabulo's evidence as to identity, apart from a single reference to the appellant.

[29] And then there is the appellant's alibi. He advanced it, underwent cross-examination and called his witnesses, who confirmed his alibi. They all withstood cross-examination and did not falter in their versions. The regional magistrate found that the evidence placing the appellant at the scene of the crime was 'so strong'. I have explained why I believe that she was incorrect in that conclusion. She concluded that the version of the appellant was not reasonably possibly true. To reach this conclusion, there would have to be a basis for the rejection of the witnesses who supported the appellant's alibi. The judgment of the trial court is bereft of any such reasoning. In my view, the appellant's alibi was not refuted by the State.

[30] I am mindful of the following dicta in *S v Francis*,^[9] where the court observed that:

'The powers of a court of appeal to interfere with the findings of fact of a trial Court are limited. In the absence of any misdirection the trial court's conclusion, including its acceptance of a witness' evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial Court was wrong in accepting the witness' evidence - a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the Court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony.'

In my view, this is a matter where this court must interfere with the evaluation of the young men's evidence and come to a different finding.

[31] I am acutely aware of the seriousness of the allegations against the appellant. The murders that occurred on the evening in question were carried out in a merciless and barbaric fashion. Those who committed them need to be severely punished for their actions. But we are a civilised country with a well-established justice system. Our citizens would not want persons punished if their guilt had not been properly established according to the standards developed by that justice system. After anxious reflection, I come to the conclusion that the guilt of the appellant was not established beyond reasonable

doubt and that it would be unsafe to allow his conviction to stand.

[32] I would accordingly propose that the appeal be allowed and that the conviction and sentence of the appellant be set aside.

MOSSOP J

I agree and it is so ordered.

BALTON J

APPEARANCES

Counsel for the appellant: Mr H N Mlotshwa Instructed by: Legal Aid South Africa Durban

Counsel for the state: Mr T Chetty Instructed by: Director of Public Prosecutions Durban

- [1] C T Lewis and C Short A Latin Dictionary (1879) (accessible at <https://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.04.0059%3Aentry%3Dalib>).
- [2] The appellant and one other, Thembinkosi Mgadeleni Nkosi, stood trial together. The accused's co-accused was convicted but has not appealed his conviction or sentence.
- [3] S v Mthetwa 1972
- (3) SA 766 (A) at 768A--C.
- [4] Bizarrely, before agreeing that the distance was 70 metres, one of the legal representatives estimated the distance to an identified point in the vicinity of the court room in which the trial was proceeding as being 350 metres and another estimated it to be three metres.
- [5] The Oxford Online Dictionary: 'Silhouette: A dark outline, a shadow in profile, thrown up against a lighter background.' (<https://www.oed.com/search/dictionary/?scope=Entries&q=silhouette>).
- [6] R v Mokoena 1958
- (2) SA 212 (T) at 217G-H ('Mokoena').
- [7] S v Musiker [2012] ZASCA 198; 2013
- (1) SACR 517 (SCA) para 15.
- [8] R v Hlongwane 1959
- (3) SA 337 (A);
- [1959] 3 All SA 308 (A) at 339C-D.
- [9] S v Francis 1991
- (1) SACR 198 (A) at 198j-199a in the headnote.

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