

SOUTH AFRICA / JUDGMENT

Mtungwa v S (A117/2020)

[2021] ZAGPJHC 67 (27 May 2021)

[2021] ZAGPJHC 67

COURT

South Gauteng High Court, Johannesburg

BEFORE

T P Mudau, S Yacoob, M Moleleki

CASE / FILE NUMBER

A117/2020

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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: NO

CASE NO: A117/2020

SS 102/2018

DPP REF NO: JPV 2017/212

In the matter between:

MNTUNGWA, SIPHUMELELE APPELLANT

and

THE STATE

RESPONDENT

J U D G M E N T

MUDAU, J:

- [1] The appellant was convicted in the High Court, Johannesburg of murder (count 1), attempted murder (count 2), unlawful possession of a firearm (count 3) as well as ammunition (count 4). Following the conviction, the trial court (per Mabesele J) sentenced

the appellant to 20 years, 5 years, 3 years and 12 months of imprisonment, respectively. The sentences imposed in respect of counts 2, 3 and 4 were ordered to run concurrently with the sentence imposed in respect of count 1. Consequently, the effective sentence was 20 years of imprisonment. The appellant now appeals against his conviction only, with the leave of the court a quo. The crisp issue for determination in this appeal is the adequacy of the evidence regarding identification.

- [2] It is trite that a court of appeal is not at liberty to depart from the trial court's findings of fact and credibility unless the findings are vitiated by irregularity or unless an examination of the evidence reveals that those findings are noticeably wrong. The trial court's findings of fact and credibility are presumed to be correct. This follows because the trial court, and not the court on appeal, has had the advantage of seeing and hearing the witnesses and is best positioned to determine where the truth lies.[1]
- [3] What are the facts in this case? At the trial, the state led evidence placing the appellant in the vicinity of the shooting. A witness for the state, Mr. Nhlanhla Shezi ("Mr. Shezi") testified that on Saturday 4 November 2017, between 18h30 and 19h00, he received a call from his friend, the deceased, to meet the latter at a residential building, Vannin Court in Hillbrow. Mr. Shezi walked and met the deceased there. The deceased requested Mr. Shezi to accompany him to buy a pregnancy test for the deceased's wife. They proceeded on foot to purchase same and en route, the deceased changed his mind as it was late. The deceased suggested that they go and bid farewell to some of their "home boys" who resided in Vannin Court. They proceeded to Vannin Court. Near the entrance to the building, Mr. Shezi saw an unknown male that he later identified as the appellant, seated on the concrete entrance steps smoking a cigarette at a distance of about 3 meters away. The appellant then threw away his cigarette, stood up and producing a firearm, a police standard issue from the front of his trousers, fired some three shots at the deceased who was walking alongside him. The deceased fell and thereafter the appellant pointed the firearm at Mr. Shezi and continued firing.
- [4] Mr. Shezi was not struck and ran away to a distance of about 7 meters away. Attempts to scale over a palisade fence were to no avail as he fell. He noticed the appellant leaving the scene in the company of two or three other males and jumping over to the nearby Quartz Street. He returned to the scene to be met by the police traveling in a marked van. On his version, he assured the police that he could point out the person who shot the deceased. A lookout for the appellant and his companions by the police with the help of Mr. Shezi in the surrounding area was however, unsuccessful.
- [5] During cross-examination, Mr. Shezi was adamant that he was hundred percent sure that the appellant shot and killed the deceased. Initially out of shock, he "stood still" when the appellant drew the firearm and only turned to run away after the deceased had fallen and after the firearm was pointed at his direction. He explained that the area was well lit and as clear as the lighting inside the courtroom wherein he testified. That the area was well lit from an electric lamppost at the entrance, is clear from the photographs taken at the scene

shortly after the incident of the crimes, as counsel for the appellant was constrained to concede. On Mr. Shezi's version, he had observed the appellant for a period of approximately three minutes as he and the deceased were walking towards him before the incident happened. He described the appellant as medium built, light in complexion and slightly tall. From the photographs exhibited, these physical attributes cannot be faulted.

- [6] Acting upon information received, on 8 December 2017 the police arrested the appellant. The appellant was later identified by Mr. Shezi as the shooter at an identification parade. It is common cause that there were two identification parades conducted on 10 and 11 December 2017 respectively. On both occasions, Mr. Shezi identified the appellant as the culprit. During the first parade, the undisputed evidence is that the appellant refused to have his photograph taken after he was identified through a one-way mirror. It was as a result of the appellant's conduct that a second identification parade was arranged and Mr. Shezi once again identified the appellant. The processes of identification were not disputed but admitted.
- [7] As against the above version, the appellant pleaded an alibi. The appellant testified in support of his alibi defence and called a witness. Both witnesses testified that on the date and at the time of the shooting, the appellant was at a place other than the scene of the shooting.
- [8] On the appellant's version, he spent the weekend from late afternoon on Friday 3 November 2017 with the alibi witness, Magwaza

and only returned home on Sunday, 5 November 2017 at about 1 PM. The appellant testified that the deceased was known to him, they were acquaintances who grew up together. Further, he testified that he often visits his sister at Vannin Court building, the place of the incident in Hillbrow. He remembered the day of the incident, 4 November 2017 as it was on the same day that his alibi witness's

brother was also shot (in a separate incident) but survived, in Hillbrow.

- [9] During cross-examination, the appellant testified that he learned of the deceased's demise the day after the incident, from a casual chat over the phone with one of his homeboys. According to the appellant they spent the weekend, occasionally having drinks, did not go anywhere else, except to the shops in the vicinity. The alibi witness, who worked as a driver also "never took a long journey... He was the just going out and coming back... in the vicinity".
- [10] Magwaza testified that the deceased was not only his cousin, but his "homeboy" as well in that they grew up together and were from the same area in KwaZulu-Natal. He testified that, after receiving the news that his brother had been shot, he never went to visit him. Furthermore, he and the appellant never left his residence throughout the entire weekend. The reason he remembered the day so well was because his brother was also shot in the early hours of 4 November 2017. He too confirmed hearing about the deceased's demise in

this matter, but was noncommittal with regard to who conveyed the news to him, as he was disturbed by the news of his own brother's shooting. He could not confirm whether he received the news on the day of the incident or the next day, which was a Sunday. On his version he spent the entire weekend with the appellant playing cards, watching TV as well as playing music.

- [11] Contrary to the version by the appellant, Magwaza testified that he never left his yard for the duration of the weekend, but only left his room to cook. Neither did he visit his girlfriend who resided in the same building but a separate flat, during the appellant's stay. On Magwaza's version, they never consumed alcohol. However, upon being confronted with the appellant's version that they in fact did so, Magwaza was non-committal in that regard but further testified that he always kept beer dumpies in his residence, but could not confirm whether they consumed alcohol. The trial judge also asked him clarifying questions. It was established that the witness had access to the company motor vehicle which he could make use of, in case there was a need. He was asked why he did not use the company car to visit his injured brother. He explained that the motor vehicle was not for private use.
- [12] The trial court rejected this alibi defence and rejected as untrustworthy the alibi evidence put up by the appellant and his witness. The trial court cast doubt on its credibility. The trial court found that the evidence of the state witness, Mr. Shezi, placing the appellant at the scene of the shooting was satisfactory and adequate to secure a conviction against the appellant.
- [13] The appellant's primary attack against his conviction was directed at his identification by Mr. Shezi, the differences between the latter's oral evidence and his witness statement.
- [14] It is generally accepted that the statement of a witness reduced to writing by a police officer may often be far from an accurate

representation of what that witness actually said to the police.[2] The Court is accordingly required to deal with the discrepancies between different versions of the same witness with circumspection.

- [15] The Court must ascertain first, what the witness meant to say in order to determine whether there was a discrepancy and the extent of the discrepancy. The Court must take into account the following: the fact that a statement to the police was not subject to cross-examination and the fact that the police did not require any explanation of the statement. Secondly, not every error by, or discrepancy in the statement of a witness affects the witness's credibility. Thirdly, the different versions must be evaluated holistically. This evaluation includes the circumstances in which the versions were given, reasons for the discrepancies, the effect of the discrepancies on the witness's credibility and whether the witness had sufficient opportunity to explain the discrepancies. Lastly, the witness's statement to the police has to be weighed up against the witness's viva voce evidence.[3]

[16] The discrepancy between Mr. Shezi's oral testimony and his police statement was raised with him for comment. In his statement to the police, which was put to him during cross-examination at the trial, the witness alleged that: "[O]n Saturday 4 November 2017, I was on my way from shops to Vannin Court together with Malibongwe Ndlovu, the deceased. When we were at the entrance of Vannin Court, a certain guy just came from nowhere and he started to shoot at Malibongwe Ndlovu". Mr. Shezi disputed that statement was accurately captured by the police officer who reduced it in writing and was adamant that his version before court, was what he conveyed when the statement was taken. I deal with this aspect further below.

[17] The identification of the appellant as the murderer is based on the evidence of a single witness. However, section 208 of the Criminal Procedure Act 51 of 1977 allows for a conviction of an accused on the evidence of a single witness, such evidence must be clear and satisfactory in every material respect. In *S v Sauls and others*[4] the following was said about single witnesses:

"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 Webber 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."[5]

In *R v J*[6] Macdonald AJP expressed the view that the cautionary rules are "no more than guides, albeit very valuable guides, which assist the court in deciding whether the Crown has discharged the onus resting upon it" (at 89F). Moreover, he added, "the exercise of caution should not be allowed to displace the exercise of common sense," and once a judicial officer has anxiously scrutinised the evidence of a single witness he should not be "swayed by fanciful and unrealistic fears" (at 90E–F).

[18] It has repeatedly been stated by the courts that evidence of identification must be approached with caution. In *S v Mthetwa*[7] Holmes JA made the following observation with regard to the approach to be adopted when considering the evidence of identification:

"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 . . ."[8]

[19] It is trite that the state has to prove its case against an accused beyond reasonable doubt and the evidence of a single identifying

witness must be clear and satisfactory in all material respects. But it must not be forgotten that the court must have regard to all the evidence including that of an accused.[9] In *S v Chabalala*[10] Heher AJA held that:

“...The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and,

having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.”[11]

[20] The correct approach for the evaluation of an alibi defence was set out by Holmes AJA in *R v Hlongwane*[12] as follows:

“...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. I do not consider that in R v Masemang 1950

(2) SA 488 (AD) Van den Heever, JA had this in mind when he said at pp 494 and 495 that the trial Court had not rejected the accused's alibi evidence 'independently'. In my view he merely intended to point out that it is wrong for a trial Court to reason thus: 'I believe the Crown witnesses. Ergo, the alibi must be rejected.' See also *R v Tusini and Another*, 1953 (4) SA 406 (AD) at p 414. 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.”[13]

[21] The main thrust of the appellant's contention is that the identification of the appellant as the murderer was less than adequate. An acquaintance with the history of criminal trials reveals that gross injustices are not infrequently done through honest, but

mistaken identification.[14] However, on the facts, the possibility of mistaken identification can be eliminated. The offences were committed in a well-lit area as counsel for the appellant was constrained to concede. Mr. Shezi was able to give physical attributes of the appellant with which he identified him.[15] This is supported by the photographs taken during the identification parade. Evidently, the trial court had an independently verifiable

and objective evidence to determine the reliability of Mr. Shezi's evidence of identification.

[22] Significantly, Mr. Shezi told the police who arrived shortly thereafter that he would be in a position to point out the assailant. The contention that he did not have enough opportunity to identify the perpetrator has no merit and is accordingly rejected. The lighting conditions were good and accordingly Mr. Shezi had more than enough time to observe the face and features of the assailant who was involved. In my judgment, the witness had ample opportunity to make a proper and reliable observation of the appellant. It was summer time. Between 18:30 and 19h00 it is hardly dark.

[23] As to the alleged discrepancy in Mr. Shezi's statement to the police and his oral testimony, the discrepancy complained of, is in my view of the type which suggests absence of manufacture rather than unreliability. It is trite that not every error by a witness and not every contradiction or deviation affects his or her credibility.[16] Before us, counsel for the appellant, who is well experienced, conceded that the statement complained of made before the police

officer is capable of being given more than one interpretation, in this case, that the shooting of the deceased was for no apparent

reason.

[24] I find the following evidence by the appellant and his alibi witness to be destructive to their credibility and reliability as witnesses.

According to the appellant and as indicated, Magwaza left the residential building for short trips. In addition, that the two of

them only left when they were to conduct shopping. In contrast, Magwaza testified they never left his residence for the entire

weekend. This does not accord with the probabilities. This is a conspicuous and material contradiction on a solid aspect of the case.

[25] Before us, counsel for the appellant conceded that this court could take judicial notice of the fact that the address where the incident happened, and Magwaza's address are in neighbouring suburbs within a radius of not more than 6 kilometers. The trial court took a dim view of the fact that the alibi witness made no attempts to visit his injured brother, whereas he was affected by the incident and had the means to do so.

[26] The unacceptable evidence which was tendered by the appellant and his alibi witness and the cogency of the evidence tendered by Mr. Shezi taken together, entitled the trial court to return a verdict of guilty against the appellant. The alibi had to be rejected as a fabrication. In all the circumstances, I am of the view that there is no valid basis for concluding that the state did not discharge the onus of proving the guilt of the appellant beyond reasonable doubt. I am accordingly not persuaded that the trial court should have rejected or doubted the evidence given by Mr. Shezi. The trial court was justified in accepting as truthful the evidence by the eye-witness, Mr. Shezi. The appellant's alibi had been proved to be false beyond reasonable doubt. I am satisfied that the eyewitness, Mr. Shezi was shown to be a credible, reliable and trustworthy witness. The evidence tendered by the state suggests no motive for the identifying witness to falsely implicate the appellant.

[27] 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

S YACOOB

M MOLELEKI

[Acting Judge of the High Court,

APPEARANCES

For the Appellant:

Adv. W A Karam

Instructed by:

Legal Aid South Africa-JHB

For the State:

Adv. H H P Mkhari

Instructed by:

DPP – JHB

Date of Hearing:

17 May 2021

Date of

Judgment:

27 May 2021

[1] Rex v Dhlumayo 1948 (2) SA 677 (A) at 705; also S v Francis 1991 (1) SACR 198 (A) 204C-F.

[2] R v Steyn 1954 (1) SA 324 (A) at 335F–H; S v Bruiners en 'n ander 1998 (2) SACR 432 (SE) at 437H.

[3] S v Mafaladiso en andere 2003 (1) SACR 583 (SCA).

[4] 1981

(3) SA 172 (A).

[5] At 180E-F.

[6] 1966

- (1) SA 88 (SR).
- [7] 1972
- (3) SA 766 (A).
- [8] At 768A-C.
- [9] S v Trainor 2003 (1) SACR 35 (SCA) at para 9.
- [10] 2003
- (1) SACR 134 (SCA).
- [11] At para 15.
- [12] 1959
- (3) SA 337 (A).
- [13] At 340H–341B.
- [14] See generally S v Shekelele 1953 (1) SA 636 (T).
- [15] Contrast with the complainant in Magadla v S
- [2012] JOL 28415 (SCA)) in a rape matter, where there were no physical attributes given. See para 49
- [16] S v Govender and Others 2006 (1) SACR 322 (E).
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