

SOUTH AFRICA / JUDGMENT

## Vilakazi and Another v S (CAF6/2015) [2015] ZANWHC 52 (13 August 2015)

[2015] ZANWHC 52

COURT

North West High Court, Mafikeng

BEFORE

Landman, Hendricks, Chwaro

CASE / FILE NUMBER

CAF 6/2015

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

### Source record

SAFLII

Note: Certain

personal/private details of parties or witnesses have been  
redacted from this document in compliance with the law  
and SAFLII

Policy

IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST PROVINCIAL DIVISION, MAHIKENG

CASE

NO: CAF 6/2015

In

the matter between:

PRINCE  
VILAKAZI  
1ST APPELLANT  
HARRY  
VICTOR NDUKULA  
2ND  
APPELLANT  
And  
THE  
STATE  
RESPONDENT  
FULL BENCH CRIMINAL  
APPEAL  
HENDRICKS J; LANDMAN  
J; CHWARO AJ

**JUDGMENT**

Landman J:

**Introduction**

[1] Prince Vilakazi, the first appellant, and Harry Victor Ndukula, the second appellant were convicted and sentenced by Gura J on March 2004 as follows:

Count

1. Murder – Life imprisonment;

Count

2. Robbery with aggravating circumstances – life imprisonment;

Count

3. Unlawful possession of a firearm - 5 years imprisonment; and

Count

4. Unlawful possession of an unlicensed firearm – 1 years; imprisonment.

[2] The appellants appeal against their conviction and sentences with leave of the trial court.

Appeal against conviction

The

**facts**

[3] It is undisputed that the complainant Ms [.....] was robbed and the deceased was shot and killed.

[4] The main issue is the identity of the assailants. The complainant was a good honest witness. She testified that while she was serving the deceased at the dry- cleaning depot two men entered the house. The first appellant handed her a dry-cleaning slip, turned and shot the deceased. She said she knew the men by sight but did not know their names. The first appellant used to pass by in the company of his girlfriend. It is common cause that his girlfriend lived nearby. The first appellant accepted that she would know him. The second appellant was a patron of the dry-cleaning depot. She saw the appellants once a month. The first appellant wore a yellow shirt and black trousers. The second appellant wore a check shirt and greyish trousers.

[5] Some hours after the murder and robbery she was in the company of one Mr Ngobeni when she saw the assailants. He also saw them and said they were Prince and Harry. A report was made to the South African Police Service who sought them. It is common cause that the

accused left their homes knowing that the police were looking for them but said that this was on account of another matter. After about seven months the police arrested the appellants who were in custody. No identity parade was held. She pointed them out while they were in the dock.

- [6] Ms Kekana was a passenger in the deceased's van. She remained sitting in the deceased's van which was parked outside the house i.e. the dry-cleaning depot. She saw three boys pass by the house three times. She saw them enter the house. She saw one hand some paper to another. She heard a shot and the three boys ran away. She could not identify the three boys. However, she has known the second appellant, Harry, for years and she did not see him at the scene of the crime.
- [7] The evidence of the appellants is that they were sitting near a Bluegum tree with their girlfriends. They did not enter the depot nor did they commit the crime. They fled from the police when they were sought as they were wanted in connection with another matter.

### Submissions

- [8] Counsel for the appellant's submitted that the conviction of the appellants ought to be set aside. Counsel submitted that:
- (a) The trial court did not make a finding that the State proved the appellant's guilt beyond reasonable doubt;
  - (b) the trial court did not reject the version of the appellants as false and so improbable that it could not be accepted;
  - (c) the trial court misdirected itself by placing too much emphasis on the fact that one, Zondi and another woman said it was Prince and Harry who killed the deceased, because neither Zondi nor the woman testified;
  - (d) the trial court misdirected itself by compartmentalizing the evidence for the State and choosing the evidence of Ms [.....] over that of Ms Kekana. In doing so, the court cherry-picked the evidence for the State.
  - (e) the court chose the evidence of Ms [.....] over that of Ms Kekana, despite the fact that Ms Kekana had ample opportunity to observe the assailants as, she testified, they passed the vehicle which she was in twice and on the third occasion entered Ms [.....]'s house or depot;
  - (f) moreover, Ms Kekana testified that she knew the second appellant prior to the incident. See *R v Dladla and Others* 1962 (1) SA 307 A. The trial court should have had regard to the circumstances under which Ms Kekana made her identification and should have found her to be the more reliable of the two witnesses. Ms [.....] made her identification when the deceased was shot and before she ran away;

- (e) the trial court erred in making a finding that 'what may appear to be like a contradiction in the evidence of Gertrude and Lindi in respect of the identification of accused 2, is actually not a contradiction at all.' It is submitted that there were material contradictions between the evidence of these two witnesses;
- (f) the trial court erred in downplaying the contradictions inherent in the State's case between Ms [.....] and Ms Kekana when the latter testified that she saw three boys entering Ms [.....]'s house whereas Ms [.....] testified that two boys entered the house;
- (g) the trial court erred in making a finding that the evidence of the first appellant (accused no 1), was contradicted by that of the second appellant (accused no 2) and Ms Mabusela. The first appellant said that each man had a firearm. The second appellant said they had a cellphone, a firearm and a wallet. It was submitted that this minor difference was not sufficient to reject the appellants' evidence. Counsel for the appellants had indicated in cross-examination that the appellants did not mention that one of the three boys had a cellphone because, in consultation, they said they could see it was a phone and there was a gun and a wallet.
- [9] Counsel for the respondent, in his well-presented heads, does not support the conviction of the appellants.

#### Evaluation

- [10] The trial court in summarizing the evidence of the appellant's witness, Ms Mabusela, recorded that Zondi and another woman said it was Prince and Harry who killed the deceased. But the trial court did not refer to this again.
- [11] The conviction hinges on the identification of the perpetrators. Both witnesses for the State were good and generally credible witnesses. But, as has often been pointed out in addition to being credible the identification must be reliable. See *S v Mthethwa* 1972 (3) SA 766 (A) at 768A-B, where Holmes JA made it clear that:

'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 be tested.'

- [12] Both Ms [.....] and Ms Kekana had sufficient time and opportunity to identify the perpetrators although Ms [.....] would have been under extreme stress. Both witnesses had seen the appellant in the ordinary course of life before the incident although Ms Kekana knew the second appellant, Harry.

- [12] On the facts of this case both witnesses cannot be correct. The trial court preferred the evidence of Ms [.....] but its reasoning in rejecting her evidence does not have a factual foundation and is somewhat speculative. In fact Ms Kekana was better acquainted with the second appellant than Ms [.....] was. In addition the identification of the two men, pointed out by Ms [.....] to Mr Ngobeni as being the perpetrators, and his response was not subjected to cross-examination as Mr Ngobeni did not testify.
- [13] The dock identification of the appellants by Ms [.....], because Mr Ngobeni did not testify, has little weight. See *S v Tandwa* 2008
- (1) SACR 613 (SCA) para 129, where the Supreme court of Appeal noted that '...[d]ock identification ... may be relevant evidence, but generally, unless it is shown to be sourced in an independent preceding identification ... carries little weight'.
- [14] The appellants testified and, although the trial court disbelieved them, it cannot be said that their version was false. On the contrary their version may be reasonably possibly true.
- [15] In the premises the appellants are entitled to the benefit of the doubt. The conviction and sentences must be set aside.

Order

[16] I make the following order:

The conviction and sentences of both appellants are set aside.

A A Landman

Judge of the High Court

I agree.

R D Hendricks

O K Chwaro

Acting Judge of the High Court

Appearances

Date of hearing:

31 July 2015

Date of Judgment:

13 August 2015

For the Appellant:

Mr Gongxeka instructed

by Legal Aid South Africa, Mafikeng

For the first Respondent:

Adv Jika instructed by the

Director of Public Prosecutions

---

## Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

**ORIGINAL SOURCE**      <https://www.saflii.org/za/cases/ZANWHC/2015/52.html>

**CASE PAGE**              <https://chat.esheria.ai/case-law/south-africa/vilakazi-and-another-v-s-unknown-topic-anwhc-2015>

Prepared on 12 October 2026 · Esheria