



## SUPREME COURT OF APPEAL OF SOUTH AFRICA

### MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

**From:** The Registrar, Supreme Court of Appeal

**Date:** 12 May 2025

**Status:** Immediate

***The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal***

*Gilchrist v The State* (1153/2021) [2025] ZASCA 57 (12 May 2025)

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Today the Supreme Court of Appeal (SCA) dismissed the application for leave to adduce further evidence and the appeal against the convictions of Mr B S Gilchrist, the appellant, by the Magistrates' Court for the Regional Division of Gauteng, Benoni (trial court), as confirmed by the Gauteng Division of the High Court, Johannesburg, sitting as court of appeal (high court).

In the trial court the appellant faced a count of murder and a count of possession of an unlicensed firearm in contravention of the Firearms Control Act 60 of 2000. The State's evidence against the appellant was that on 26 January 2016 around 21h00 he shot and killed Mr T Khuzwayo (the deceased), in full view of the two State witnesses, Ms L Motaung (Ms Motaung Jnr) and her grandmother, Ms M Motaung (Ms Motaung Snr), at the Motaung's house situated in Etwatwa. After the appellant shot the deceased, Ms Motaung Jnr pushed him out of the house where they wrestled. The relationship between the appellant and Ms Motaung Jnr was marked by violence. They cohabited for a period of approximately 10 years and have two children. Ms Motaung Jnr terminated that relationship two days prior to the shooting incident and moved out of their communal home in Reiger Park to live with her grandparents. The appellant pleaded alibi. His evidence was to the effect that at the time of the shooting he was in Reiger Park and nowhere near Etwatwa. He visited his neighbour to purchase and consume alcohol and would return to his and his mother's house to check his children and his mother. His mother testified in support of his alibi. She intimated that on 26 January 2016 around 20h30 to 21h00 the appellant spent some time with her chatting, having coffee and watching television. According to his mother's evidence, the appellant did not consume alcohol and neither smelled of liquor.

The trial court found that the evidence of the State witnesses was reliable and was unpersuaded that they had any motive to falsely implicate the appellant. The trial court held that the key issue, ie, the identity of the perpetrator, required the application of the cautionary rules. The trial court upheld the identification evidence on the basis that the State witnesses and the deceased had an unimpeded view of the appellant when he entered their house. Although the visibility outside the house was poor, Ms Motaung Jnr had ample opportunity to observe the assailant when they wrestled, and he throttled and pinned her down. In addition, she recognised his voice. The trial court dismissed the appellant's version, which it found was interspersed with discrepancies. He was found guilty on both counts. On appeal to the high court the trial court's findings and convictions were upheld, but the sentence reduced. The appeal before the SCA was with special leave of the Court against the appellant's conviction only.

The issues before the SCA were the following: Firstly, whether the trial court failed to explain the provisions of s 93*ter*(1) of the Magistrates' Court Act 32 of 1944 (MCA) to the appellant which question involved the interpretation of that section. Secondly, whether the appellant could introduce new evidence on appeal in terms of s 316(5) of the Criminal Procedure Act 51 of 1977 (CPA), because a

State witness, after the conclusion of his trial, made a statement in which she recanted her previous evidence implicating the appellant to the commission of the offences. Thirdly, with regard to his conviction, whether the trial court erred in applying cautionary rules regarding the identification evidence and in rejecting the appellant's alibi defence. Fourthly, whether the State had to prove that the appellant was not the holder of a permit which entitled him to possess a firearm. And fifthly, whether the State's failure to call a witness identified as a State witness earlier in the proceedings to testify, called for an adverse inference to be drawn against the State.

The SCA noted on the first question, that compliance with s 93ter(1) of the MCA had never been an issue in the trial court or in the high court and was raised for the first time on appeal. However, the SCA held that an appeal court can deal with an issue that was not raised and not considered by the lower courts only in exceptional circumstances, and proceeded to consider it. With regard to the construction to be placed on s 93ter(1), the SCA recited the concurring minority judgment in *Director of Public Prosecutions, KwaZulu-Natal v Pillay* where it was held, inter alia, that 'as long as it appears from the record of the proceedings that an accused has been informed of the proviso by the magistrate or the accused's legal representative and that there is a formal request that the trial proceed without assessors, there will be compliance with the proviso.' The SCA then held that, on the entry that had been made on the trial record, the appellant's legal representative in the trial court was alive to the requirement of the employment of assessors and had confirmed with the magistrate that the assessors were not required.

The appellant attested to an affidavit in terms of which he sought leave to lead new evidence on appeal in terms of s 316(5) of the CPA. He stated that Ms Motaung Jnr paid him a visit in prison and confessed that she had given false evidence against him in the trial court. She recanted the evidence that the appellant had committed the offences for which he was convicted and sentenced in an affidavit. The SCA held that what was crucial was the consideration of whether the evidence would probably be true, reliable and lead to a substantive reversal of the conviction. Where reliance was placed solely on the recantation affidavit what had to be considered was some credible evidence *aliunde* which suggested that the evidence originally given was false. In this case there was no other independent evidence apart from Ms Motaung Jnr's affidavit whose veracity was incapable of being verified as Ms Motaung Snr could not rebut the allegations because she passed on during 2019. On further analysis of the evidence the SCA found that there is no reasonable possibility of Ms Motaung Jnr's recantation affidavit being the truth and accordingly dismissed the appellant's application to lead fresh evidence.

On the third issue the SCA held that the high court correctly found that the trial court could not be faulted for having concluded that the appellant was positively identified as the assailant. The SCA further held that the appellant's alibi was a complete fabrication, which the trial court justifiably rejected. With reference to the case of *S v Shabalala*, the SCA confirmed that the effect of a false alibi was that the trial court should treat the accused's evidence as if they had never testified.

The SCA held, with regards to the fourth issue, pertaining to the count of possession of an unlicensed firearm, that the witnesses observed the appellant holding a firearm and shooting the deceased. On the evidence, the trial court correctly convicted him on the count of possession of an unlicensed firearm.

The SCA further held, as to the fifth issue, regarding the failure of the State to call a particular witness, that it was within the discretion of the prosecutor to decide which witnesses to call as part of the State case. The duty of the prosecutor, stated the SCA, 'to see that all available legal proof of the facts is presented', was discharged by making the evidence available to the accused's legal representatives. The State made the witness available to the defence.

As a result, the SCA held that no cogent criticism could be sustained on the high court's dismissal of the appeal against the conviction on both counts and accordingly the SCA dismissed the appeal.

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