



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 1232/2021

In the matter between:

ZWELITHINI MAXWELL ZONDI

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Zwelithini Maxwell Zondi v The State* (1232/2021) [2022]
ZASCA 173 (7 November 2022)

Coram: ZONDI, NICHOLLS, MOTHLE JJA and MJALI and
MASIPA AJJA

Heard: 7 November 2022

Delivered: 1 December 2022

Summary: Criminal law and procedure – appeal against conviction – credibility and reliability of the witnesses’ identification of the appellant – appellant’s conviction based on unexplained, untested and uninvestigated bald

statements of the witnesses – whether the State succeeded in discharging the burden of proof – appellant entitled to benefit of doubt – conviction and sentence set aside.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Ismail, Mahalelo JJ and Van Veenendaal AJ, sitting as a full court):

- 1 The appeal is upheld.
- 2 The order of the full court is set aside and replaced by the following order:
‘The appeal is upheld and the conviction and sentence of the appellant are set aside.’

JUDGMENT

Mjali AJA (Zondi, Nicholls, Mothle JJA and Masipa AJA concurring):

[1] Prosecutors play a critical role in the criminal justice system in response to crime. They generally represent the authority of the State in ensuring that perpetrators of crime are held accountable for their actions and in that way communicate a strong message to the community that crime will not be tolerated. In line with the burden of proof that rests on their shoulders, it is essential that they meticulously ensure that the matters that they bring before courts have been properly investigated and when that has been done, ensure that the evidence is properly presented in court. Sadly, what follows is a model

of the very opposite and depicts a picture of a matter that was badly investigated and badly prosecuted.

[2] The appellant, Mr Zwelithini Maxwell Zondi (Zondi), was prosecuted in the Gauteng Division of the High Court, Johannesburg on two charges of murder, three counts of attempted murder as well as unlawful possession of firearm and ammunition respectively. He pleaded not guilty to all the charges and proffered a plea explanation of an alibi, contending that he was nowhere near the scene of crime on the day as alleged, but was at his home with his girlfriend. He was convicted on all counts as charged and sentenced to life imprisonment in respect of each count of murder, 10 years' imprisonment in respect of each count of attempted murder, 5 years' imprisonment in respect of the charge of unlawful possession of firearm and 3 years' imprisonment in respect of the charge of unlawful possession of ammunition. The court ordered that the sentences in respect of counts 2 to 7 run concurrently with the sentence in respect of count 1. Effectively, the appellant was to serve a term of life imprisonment. The court also declared him unfit to possess a firearm.

[3] He unsuccessfully applied for leave to appeal against his conviction and sentence in the court of first instance. On petition to this Court, the appellant was granted leave to appeal to the full court of the Gauteng Division of the High Court, Johannesburg. The full court dismissed his appeal. Aggrieved by the dismissal of his appeal by the full court, the appellant again petitioned this Court and was granted special leave to appeal to this Court against his conviction.

[4] The main grounds of appeal were as follows. Firstly, that the full court erred in accepting the evidence of the state witnesses identifying the appellant as their attacker, as true beyond reasonable doubt, whereas it was palpably untruthful and should have been rejected as false. Secondly, that the full court must have entertained reasonable doubt in the light of the fact that the state witnesses must have colluded to falsely implicate the appellant. Further, that the full court erred in placing too much reliance on the failure of the appellant to disclose earlier in the trial and to put to the witnesses that his vehicle was fitted with a tracking device. Accordingly, the full court erred in evaluating the appellant's alibi defence, but rather drew an adverse inference against him for not disclosing early during the trial that his vehicle was fitted with a tracker device.

[5] The issues to be decided in this appeal are whether the witnesses' identification of the appellant was credible and reliable; whether the appellant's alibi and his denial of complicity in the commission of the offences are reasonably possibly true. Before doing so, it is apposite to first set out briefly the background facts in this matter.

[6] On 3 July 2016, in the early evening at approximately 18h00, a group of men arrived at the Mall of Africa taxi rank in Midrand in a white VW Polo motor vehicle and fired gunshots at the taxi drivers/owners who were waiting to load passengers. There is no further description of the VW Polo motor vehicle beyond it being a white sedan. Notably, however, Morris Kazamule Machekecheke, a state witness, described it as a white VW Polo hatchback. The significance of this will become apparent later in this judgment. The

appellant is alleged to be amongst the four occupants of that VW Polo and is the one who purportedly fired gunshots at the witnesses and the deceased.

[7] Lungisani Hlongwane and Mkhacani Terris Yingwani were the two taxi drivers that were fatally wounded by the gunshots and were certified dead at the scene. Penny Shirinda (Shirinda), Phati Shadrack Mlangeni (Mlangeni) and Morris Kazamule Machekecheke (Machekecheke) successfully ran for cover and were the only witnesses that were led by the State during the trial to prove its case against the appellant. There is no dispute as to how the events evolved. The identity of the deceased, the cause of their deaths, the correctness of the procedure of the pointing out, the post-mortem reports as well as the correctness of the doctor's findings were all admitted in terms of s 220 of the Criminal Procedure Act 51 of 1977 (the CPA).

[8] What is in dispute is the identity of the perpetrator, as the appellant's defence is that of an alibi. The three state witnesses are all members of the Alexandra, Randburg, Midrand and Sandton Taxi Association (ARMSTA). They operate from the Mall of Africa taxi rank to Olievenhoutbosch, Midrand, Alexandra as well as to Johannesburg CBD. The appellant is a member of the Alexandra Taxi Association (ATA). It is common cause that at the time of the incident there was a conflict between these associations regarding their operating routes.

[9] The state witnesses testified that the appellant was the one who fired gunshots at them and that they were certain about his identity, as they were not seeing him for the first time on the day of the shooting. They stated that they had seen him on 27 June 2016, approximately six days prior to the

shooting of 3 July 2016. They alleged that he was one of four men that arrived on 27 June 2016 at their taxi rank in a Toyota Corolla which bore ATA stickers on the sides. On their arrival, the appellant informed them and the other taxi operators that they, as members of ATA, were sent to work with them. At that moment, a certain Toyota Quantum minibus taxi arrived and the appellant, pointing at the Quantum, informed them that it would operate at their rank. Further, that it had to be loaded with passengers immediately after the minibus taxi that was loading at the time was full. The witnesses and their group objected and a verbal altercation ensued. It is then that the appellant is alleged to have uttered some threatening words.

[10] The state witnesses were certain that the person who threatened them on 27 June 2016, was the one that fired gunshots at them on 3 July 2016 and that person was the appellant. Shirinda testified that he saw the appellant for the first time on 27 June 2016 and when the appellant made the threats, he requested his driver to take pictures of the appellant using his (Shirinda's) cellphone. He then kept the pictures. On the day of the shooting he had already enquired about the appellant's name from other taxi operators, using the pictures he had on his cellphone¹ and already knew the appellant's name as Zondi. Yet, he never mentioned this when he made a statement to the police immediately after the incident of 3 July 2016. All that he stated was that he could identify the perpetrator. He gave four different reasons for his failure to provide the police with the name of the appellant as the perpetrator. Firstly, that he was paralysed with fear when the statement was obtained from him immediately after the incident. Secondly, that he feared for his life, as he did

¹ The cellphone was lost on the day of the shooting.

not know who else was present when he made the statement. Thirdly, that it did not occur to him that he should inform the police about the name of the perpetrator. The fourth reason was that he did not trust the police, as some of them are members of taxi associations. Shirinda pointed out the appellant at the second identification parade. He did not point out anyone at the first identification parade since the appellant was not part of it.

[11] Machekecheke, on the other hand, pointed out a certain Sibusiso Cornelius Mkhize (Mkhize) in the first identification parade as the shooter. In a statement made to the police immediately after pointing him out, Machekecheke stated that he remembered his face very well, as he was in close proximity to him and that he had taken a good look at him. Further, that Mkhize was the one that approached Machekecheke and started shooting at them. Machekecheke also stated that, that person was later known to him as Sibusiso Cornelius Mkhize. He subsequently made a second statement stating that he erroneously pointed out Mkhize and that the charges against Mkhize should be withdrawn. When cross-examined on this aspect, Machekecheke explained that he was confused when he gave the statement at the first identification parade. Significantly, he went further to state that when he looked at the person during the trial he got confused. His subsequent statement is undated, but was clearly made after the first identification parade, as it sought to correct the alleged error made there. It is worth noting that the change of mind as to the identity of the perpetrator was prompted by Machekecheke learning from his other colleagues in Midrand that the person who threatened them on 27 June 2016 was Zondi.

[12] Mlangeni testified that he had known the appellant for a period of five years at the time of the incident, as they both drove on the same route. When he made a statement to the police, Mlangeni stated that he did not know the perpetrators and could not identify them. Despite him having indicated in his statement that he did not know and could not point the perpetrators out, Mlangeni was invited to the second identification parade where he pointed out the appellant. There was no explanation provided as to why he was invited to the identity parade in view of his expressed inability to identify the perpetrators in his statement to the police. The appellant took issue that all the state witnesses knew him at the time of the incident, yet in their statements to the police, they never mentioned his name. Also, that except for Shirinda, the two other state witnesses told the police that they did not know who fired gunshots at them and could not identify him.

[13] Their belated ability to identify the appellant appears to be based solely on the fact that they had seen him for the first time on 27 June 2016, when he arrived at their taxi rank and threatened them with violence. When they again saw the perpetrator on 3 July 2016, they realised that he was the man who threatened them on 27 June 2016, approximately six days before the shooting incident. It is this evidence that deserves some close scrutiny, particularly in the light of the pliability of their versions from not being able to identify and not knowing the perpetrator to later knowing his name and being able to identify him at an identification parade. In *S v Mthetwa*,² Holmes JA set out the proper approach when dealing with the evidence of identification as follows:

² *S v Mthetwa* [1972] 3 All SA 568 (A); 1972 (3) SA 766 (A) at 768A-C.

‘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; see cases such as *R v Masemang*, 1950 (2) SA 488 (AD); *R v Dladla and Others*, 1962 (1) SA 307 (AD) at p 310C; *S v Mehlape*, 1963 (2) SA 29 (AD).’

[14] Identification must not only be credible, but must also be reliable. Bearing in mind the version of the state witnesses that they saw the appellant for the first time on 27 June 2016 as well as the circumstances pertaining to the day of the shooting, of a moving scene akin to a war zone, the reliability of their identification of the perpetrator is doubtful. The circumstances were uncondusive to reliable cognisance, particularly when one considers that it was in the early evening and that when the shooting started the witnesses ran for their lives. As such, the court below ought to have entertained serious reservations as to the reliability of the identification of the appellant as the perpetrator especially where the identifying witnesses had initially indicated their inability to identify the perpetrator. Their bald statements that the appellant was the person who committed the crime is not enough. It has been held that such statements unexplained, untested and uninvestigated, leave the door wide open for possibilities of mistake.³ In this matter, the prosecutor

³ *R v Shekelele and Another* 1953 (1) SA 636 (T) at 638.

seems to have been satisfied with their evidence that the person they saw firing at them was the one that they had seen on 27 June 2016. The prosecutor failed to elicit sufficient evidence to establish the credibility and reliability of the state witnesses' identification of the appellant.

[15] The state witnesses' credibility was destroyed when they admitted to knowing the appellant as well as his name prior to the incident on 3 July 2016 and yet failed to disclose his identity at the earliest opportunity to the police. That, in my view, was fatal to the State's case, particularly in the light of the fact that the reasons given by the state witnesses under cross-examination for such failure kept changing as if tailored to meet the circumstances. A situation that is akin to the suggestive benefit that our case law cautions the courts to be vigilant of.⁴ That, in my view, casts serious doubt on the reliability of the state witnesses' identification of the appellant as the perpetrator. On the contrary, it lends credence to the argument advanced by the appellant that there must have been collusion between the state witnesses to falsely implicate him. The history of differences between their associations, makes this possibility real and, considered with all the other factors, renders their evidence as not reliable beyond reasonable doubt.

[16] During his testimony, the appellant maintained that he was not involved in the commission of the offences. His alibi defence was disclosed very early during the trial and his version put to the state witnesses. It is trite that there is no onus on the accused person to establish his alibi. In evaluating the

⁴ See *S v Mthethwa* [1972] 3 All SA 568 (A); 1972 (3) SA 766 (A) at 768A-C.

defence of an alibi, the dictum in *R v Hlongwane*,⁵ where the accused denied complicity, is instructive:

‘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.’

[17] Despite there being no duty to prove his alibi, it is apparent from the appellant’s testimony that he informed the police that his VW Polo motor vehicle was fitted with a tracking device. By implication, he must have informed them about his alibi defence. It was, therefore, incumbent upon the police to conduct investigations fully, and upon the State to prove its case beyond reasonable doubt. The State should have led evidence linking the appellant to the crime, which evidence must be sufficient and credible to discharge the onus that rests on it. Yet, the State failed in that regard. Instead, it led evidence of the identification of the appellant, which should have been found by the trial court as well as the court below to be unreliable in the light of the numerous problems highlighted earlier in this judgment. There is no detailed description of the VW Polo that was involved in the shooting other than it being white. The witnesses differed as to whether it was a sedan or a hatchback. Consequently, there is absolutely no connection of that white VW Polo to the appellant. Under the circumstances, there is no justification for associating the appellant with that white VW Polo, bearing in mind his evidence that his white VW Polo vehicle was parked at his home on the day of the incident and that the State’s evidence does not prove any evidence to the contrary.

⁵ [1959] 3 All SA 308 (A); 1959 (3) SA 337 (A) at 339C-D

[18] Similarly, the rejection of the appellant's alibi purely on the basis of his failure to disclose early during the trial that his vehicle was fitted with a tracking device finds no justification on the facts and in law. On the contrary, it seeks to reverse the onus onto the appellant to prove his innocence; a situation which would be contrary to the right that is enshrined in the Constitution of being presumed innocent until proven guilty.⁶ It was never part of the appellant's alibi defence that his vehicle was fitted with a tracker. The trial court as well as the full court failed to properly evaluate the evidence holistically. As stated by this Court in *Combrinck v S*:⁷

'It is trite that the State must prove its case beyond reasonable doubt and that no onus rests on an accused person to prove his innocence. The standard of proof on the State and the approach of a trier of fact to the explanation proffered by an accused person has been discussed in various decisions of this Court and of the High Court (see *R v Difford* 1937 AD 370 at 373; *S v Van der Meyden* 1999 (1) SACR 447 (W) at 448F-I). It suffices for present purposes to state that it is well settled that the evidence must be looked at holistically.'

[19] The explanation proffered by the appellant that he was home with his girlfriend at the time of the shooting is corroborated by his girlfriend. In rejecting the appellant's evidence, the trial court placed heavy reliance on the fact that the appellant was identified in the identification parade by witnesses who knew him. I have already in this judgment alluded to the numerous problems with such identification and found same to be unreliable.

⁶ Constitution, s 35(3)(h).

⁷ [2011] ZASCA 116; 2012 (1) SACR 93 (SCA) para 15

[20] The trial court also relied on the fact that the appellant only mentioned during re-examination that his VW Polo was fitted with a tracking device. That reliance is misplaced for the following reasons. The appellant disclosed his defence timeously. There was no duty on him to prove his alibi. In the light of the uncontroverted evidence that the police had knowledge of the fact that a white VW Polo was involved and that the appellant owned a white VW Polo, it was then incumbent upon them to properly investigate this aspect so as to exclude the appellant's alibi defence. Moreover, they were informed about this tracking device as well as the company that would assist with the tracking records of the vehicle, yet they did nothing to investigate this aspect. Neither did the State lead any evidence linking the white VW Polo that was at the scene to the appellant. There was no justification for the rejection by the trial and the full court of the appellant's alibi, purely from the alleged failure to disclose the presence of the tracking device in the appellant's vehicle.

[21] Similarly, the reliance by the State on the dictum in *Thebus and Another v S*,⁸ for the proposition that the appellant was shifting the goalposts by his late disclosure of the presence of the tracking device in his VW Polo vehicle is misplaced. That argument loses sight of the fact that the appellant disclosed his alibi in his plea. Further, that it was never part of the appellant's alibi defence that his vehicle was fitted with a tracking device. Even if it were, it was still incumbent upon the police to investigate as well as the prosecution to ensure that proper and sufficient evidence is placed before court to refute the alibi. The evidence led in this matter, at best for the State, simply creates a suspicion that the appellant could have been one of the perpetrators, but

⁸ 2003 (2) SACR 319 (CC)

certainly does not refute the appellant's alibi. As such, it also cannot be said that the appellant's alibi is not reasonably possibly true. It is a trite principle of our law that suspicion, however strong, cannot replace proof beyond a reasonable doubt.

[22] In *Thebus*, the Constitutional Court makes it plain that the late disclosure of an alibi is one of the factors to be taken into account in evaluating the evidence of the alibi. Thus, it is not the only factor to be considered, as, standing alone, it does not justify an inference of guilt. Further, that it is a factor which is only taken into consideration in determining the weight to be placed on the evidence of the alibi. By the same token, the alleged failure of the appellant to disclose that his VW Polo was fitted with a tracking device, standing alone, could not justify the rejection of the appellant's alibi defence. This Court in *Musiker v S*,⁹ held that once an alibi has been raised, the alibi has to be accepted, unless it can be proven that it is false beyond a reasonable doubt. On a conspectus of all the evidence in this matter, the State failed to discharge the burden of proof beyond reasonable doubt that the appellant was the one who fired gunshots at the deceased and the witnesses. There is, thus, no justification for rejecting the appellant's alibi. It is a well-established principle in our law that in search for the truth it is better for a guilty person to go free than for an innocent one to be convicted. On this basis, the accused is given the benefit of doubt and must the appeal must succeed.

[23] In the result, the following order is made:

- 1 The appeal is upheld.

⁹ *Musiker v S* [2012] ZASCA 198; 2013 (1) SACR 517 (SCA) paras 15-16.

2 The order of the full court is set aside and replaced with the following:

‘The appeal is upheld and the conviction and sentence of the appellant are set aside.’

G N Z MJALI
ACTING JUDGE OF APPEAL

Appearances

For appellant: J C Kruger SC

Instructed by: BDK Attorneys, Johannesburg
Symington De Kok Attorneys, Bloemfontein

For respondent: J M K Joubert

Instructed by: Director of Public Prosecutions, Johannesburg
Director of Public Prosecutions, Bloemfontein