THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 115/2024

In the matter between:

SIYABONGA NGCOBO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Ngcobo v The State* (115/2024) [2025] ZASCA 12 (12 February 2025)

Coram: MABINDLA-BOQWANA, WEINER and KEIGHTLEY JJA, and CHILI and MOLITSOANE AJJA

Heard: 6 November 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 12 February 2025.

Summary: Criminal law – conviction – whether the trial court failed to exercise caution when considering the evidence of a single witness – whether the trial court wrongly evaluated and rejected the appellant's *alibi* – whether the appellant's right to a fair trial was violated.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Mlaba and Henriques JJ, sitting as court of appeal):

1 The appeal is upheld.

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

‘1 The appeal is upheld.

2 The order of the Regional Court, Durban is set aside and replaced with the following:

“The accused is found not guilty and is discharged.”.’

JUDGMENT

Chili AJA (Mabindla-Boqwana, Weiner, Keightley JJA and Molitsoane AJA concurring):

Introduction

[1] On 26 July 2021, the appellant appeared before the Regional Court sitting in Durban (the trial court) on a charge of attempted murder. The charge related to a shooting incident that took place on 12 September 2019, in the vicinity of Shoprite at Montclair, KwaZulu-Natal. On 27 August 2021, the appellant was convicted as charged and subsequently sentenced to five years’ imprisonment. He contemporaneously brought an application for leave to appeal which was refused by the trial court.

[2] With the leave of the KwaZulu-Natal Division of the High Court, Pietermaritzburg, on petition, the matter served before Henriques and Mlaba JJ (the high court) on 28 October 2022. On 9 October 2023, the high court dismissed the appellant’s appeal both on conviction and sentence. On 17 January 2024, this Court granted the appellant special leave to appeal against conviction only.

[3] The issues on appeal are as follows:

(a) Whether the trial court was correct in relying on the evidence of the single witness, the complainant (Mr Zulu), to convict the appellant;
(b) Whether the trial court was correct in finding that Mr Zulu's testimony was corroborated;
(c) Whether the trial court committed an irregularity that rendered the trial of the appellant unfair when conducting proceedings; and
(d) Whether the trial court was correct in rejecting the appellant's *alibi* as false beyond reasonable doubt.

[4] The conviction of the appellant was based on the evidence of Mr Zulu, the appellant, and the investigating officer, Warrant Officer Magutshwa. The trial court also considered evidence admitted by consent, namely, a medical report, a ballistics report and a photograph album compiled by Warrant Officer Zungu, being exhibits 'A', 'B' and 'C' respectively. Towards the end of the appellant's case, the trial court admitted in evidence, through Warrant Officer Magutshwa, the statement made by Mr Zulu on 29 October 2019 as exhibit 'D'.

The evidence of Mr Zulu

[5] Mr Zulu testified that on 12 September 2019, he had been travelling in his motor vehicle, a Toyota Hilux double cab, proceeding to the Shoprite store at Montclair. He was alone in the motor vehicle. Along the way, he noticed that he was being followed by a white Golf 7R (the Golf). When he joined the traffic circle near Shoprite, he momentarily lost sight of the Golf. At the traffic circle, he turned towards Shoprite and parked his motor vehicle at the parking area. Shortly thereafter the Golf emerged and stopped on the road that runs parallel to the Shoprite parking area (this is a reference to Kenyn Howder Road), directly in front of his car. A person seated in the back of the Golf rolled the left, back window down. Mr Zulu identified that person as the appellant. For a moment, Mr Zulu thought that the appellant wanted to greet him, and so he rolled his window down. At that moment, the front window of the left passenger door of the Golf was opened, and the next thing Mr Zulu saw were firearms pointed in his direction. Both the appellant and the front passenger fired shots at him. When the shots hit the window (presumably the driver's

side window) of his vehicle, he realised that his assailants were aiming for his head. He took cover, ducking to the floor of the vehicle to avoid being shot in the head.

[6] The shooting continued for about a minute and when it subsided, the Golf drove off. At that moment, Mr Zulu realised that he had sustained a serious injury to his left hip and bruises to his chest. He was unable to move. An Indian man, whose motor vehicle had also been shot, came to his rescue and dragged him out of the motor vehicle. Shortly thereafter, an ambulance and the police arrived at the scene, and he was subsequently conveyed to Inkosi Albert Luthuli Central Hospital.

[7] It was common cause at the trial that the appellant and Mr Zulu knew each other very well. They grew up together at Umlazi, attended the same primary school and subsequently progressed to the same high school. They were long-time friends until 2011 when they were both arrested on allegations of the murder of a local councillor. They each appear to have pointed the finger at the other, as a result of which they went their separate ways. It was also common cause that the incident occurred on a bright sunny day, around 13h30. It was Mr Zulu's testimony that he had had sufficient opportunity to identify the appellant. He added that he had not been mistaken in his identification of the appellant as his assailant. He proceeded to say that he had last seen the appellant at a meeting held at the Riverside Hotel in Durban sometime between 2017 and 2018. He disputed the appellant's *alibi*. After the testimony of Mr Zulu, the State closed its case.

[8] The appellant testified and denied any involvement in the shooting. He resided at Yellowwood Park at the time. When questioned about his whereabouts on the day in question, he told the court that at that time, he had routinely travelled between Umbumbulu, where he was monitoring the construction of a building on his site, and Yellowwood Park, where he resided. He confirmed Mr Zulu's testimony that their friendship ended in 2011 when they were both arrested. He further admitted having attended a meeting held at the Riverside Hotel in Durban but denied having interacted with Mr Zulu at that meeting.

[9] Warrant Officer Magutshwa, who testified for the defence, recorded a statement made by Mr Zulu on 19 October 2019. He confirmed Mr Zulu's testimony that the manuscript version of the statement was recorded at Mr Zulu's place of residence. After recording the statement in writing, he went to his office, typed the statement, and thereafter returned to Mr Zulu's place of residence. Both the written and typed versions of the statement were signed by Mr Zulu. The typed version of the statement was thus admitted in evidence as exhibit 'D'. Warrant Officer Magutshwa further confirmed that the signatures on the statement were his and Mr Zulu's. That sums up the evidence on which the guilt of the appellant was established.

[10] The duty to prove the guilt of the accused person rests on the State.[1] There is no obligation on an accused person to prove his or her innocence. An accused person who advances a version that is reasonably possibly true is entitled to an acquittal.[2] When convicting the appellant, the trial court relied on Mr Zulu's identification of the appellant as his assailant. The trial court further found that Mr Zulu's testimony was corroborated by photographs that were presented to court.

[11] Before us, Mr Howse SC, who appeared for the appellant, raised four issues: firstly, that the trial court misdirected itself when finding corroboration in the photographs that were presented to court; secondly, that the trial court misdirected itself when relying on Mr Zulu's identification of the appellant as one of his assailants; thirdly, that the trial court misdirected itself when rejecting the appellant's *alibi* as false beyond reasonable doubt; and fourthly, that the failure by the trial court to allow into evidence further statements made by Mr Zulu during the investigation amounted to a violation of the appellant's right to a fair trial. I deal with these issues sequentially.

Single witness testimony

[12] The appellant was convicted solely on the evidence of Mr Zulu. Section 208 of the Criminal Procedure Act 51 of 1977 (the Act) empowers a court to convict an accused

[1] *S v Mbuli* [2002] ZASCA 78; 2003 (1) SACR 97 (SCA) para 57.
[2] *Viveiros v S* [2000] ZASCA 95; [2000] 2 All SA 86 (A); 2000 (1) SACR 453 (SCA) para 3.

person on the evidence of a single competent witness. It has been authoritatively decided by this Court that '[t]he absence of the word "credible" [in the section] is of no significance; the single witness must still be credible. . .'.[3] When evaluating evidence of a single witness, the trial court is obliged to exercise caution. In *S v Rugnanan*,[4] this Court made the following remarks:

'. . . The cautionary rule does not require that the evidence of a single witness must be free of all conceivable criticism. The requirement is merely that it should be substantially satisfactory in relation to material aspects or *be corroborated*.' (My emphasis.)

[13] The trial court found the following corroborating evidence:

'The witness's evidence was corroborated to a certain extent by Exhibit C the photo album which was handed in by consent. In photo 4 the motor vehicle that is portrayed was the complainant's motor vehicle and *a long black marker has been placed from the complainant's motor vehicle up until the beginning of the roadway. The complainant testified that that was the angle at which he saw the Golf and at the end of the black marker was where the Golf motor vehicle had been parked.* When one looks at photo 4 *as well as the black marker* it is clear that the driver of the Hilux motor vehicle would have a straight line view of the Golf. One can also note from the photo that point 11 would have been the stopping place of the car. *The complainant's estimate of approximately seven metres would also be in line [with] the measurement[s] that were taken on the day in question, and which* are part of the exhibit by the forensic science team.' (My emphasis.)

[14] What stands out in the above passage are the following factual findings made by the trial court:

(a) Mr Zulu's motor vehicle was parked in the position depicted in photo 4 of the photograph album when Mr Zulu identified the appellant as his assailant;

(b) someone had placed a black marker in photo 4 depicting the point where the Golf was in relation to the appellant's motor vehicle (when Mr Zulu identified the appellant);

(c) measurements were taken of the distance between the Golf and the appellant's motor vehicle; and

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[3] *S v Sauls and Others* 1981 (3) SA 172 (A) at 180D.
[4] *Rugnanan v S* [2020] ZASCA 166 para 23.

(d) given the positions of the two motor vehicles (the appellant's and the Golf), Mr Zulu had a straight-line view of the Golf (when identifying the appellant).

[15] There are several inaccuracies in these findings, which appear to be a direct result of the trial court's decision to rely, of its own accord, on its interpretation of the photographs. It did so without the benefit of the testimony of Warrant Officer Zungu (the photographer) or Captain Naidoo, who was in the company of Warrant Officer Zungu when the photographs were taken.

[16] Mr Singh, for the State, sought to suggest that the argument pertaining to the interpretation of the photographs should be disregarded because it was only raised for the first time on appeal before the high court and not at the trial. I do not agree. The photographs were not new evidence. They were readily available before the trial court. Once the trial court decided to rely on the photographs for corroboration, it had to interpret them correctly. This is particularly so, given the fact that they were the only source of corroboration that the trial court relied on. If the trial court committed a misdirection in its interpretation of the photographs, which is challenged on appeal, then this is not something that an appeal court can ignore.

Was the trial court correct in finding as it did?

[17] That question should, in my view, be answered in the negative for the following reasons. Firstly, the trial court's finding that the marker appearing in photo 4 indicated the spot where the Golf stopped is not supported by the facts. No mention is made in the photograph album of a marker at all. Had the trial court carefully considered all the photographs, including photos 89 and 90, it would have been abundantly clear to it that, what it perceived to be a marker in photo 4, is in fact not a marker. Those photographs clearly show that what was perceived by the trial court to be a 'marker' is the shadow of an object (possibly a broken pole). Secondly, no mention is made in the photograph album of any measurements having been taken, depicting the distance between Mr Zulu's vehicle and the Golf. Again, the trial court's finding that 'the complainant's estimate of

approximately seven metres would also be in line [with] the measurements that were taken on the day in question' is not supported by the facts.

[18] Accordingly, the trial court's finding that Mr Zulu's vehicle was parked in the position depicted in photo 4 when Mr Zulu identified the appellant is clearly an error and a misdirection. The trial court appears to have focused its attention solely on photo 4 as if it was the only photograph depicting the position of Mr Zulu's vehicle. Had it considered the remainder of the photos, in particular photos 87, 88, 91, 92 and 93, the trial court would not have arrived at the conclusion that Mr Zulu's vehicle was 'parked' in the manner described by Mr Zulu. Photos 87 and 88, respectively, indicate that the right-hand side wheels of Mr Zulu's vehicle are beyond a concrete slab that marks the end of the parking area. Photos 90, 91 and 92 indicate that Mr Zulu's vehicle is adjacent to the brick wall that runs parallel to the road. From these photos, it is clear that the right-hand side of Mr Zulu's vehicle is beyond the edge of the parking lot, closer to the wall. Photos 92 and 93 show damage to the front bumper of Mr Zulu's vehicle. This observation is supported by Warrant Officer Zungu, who recorded in the photo album that photos 92 and 93 depict damage to the front of a white Toyota Dakar.

[19] At face value, what was described by the trial court as the position in which Mr Zulu's vehicle was parked when Mr Zulu identified the appellant, is, in fact, the resting place of Mr Zulu's vehicle after the shooting. With that in mind, it was suggested in argument that Mr Zulu's vehicle could have moved when Mr Zulu was under attack. I agree. But that leads to another possibility, namely that Mr Zulu's vehicle was in motion when Mr Zulu identified the appellant, a possibility that was never considered by the trial court. Regard being had to the position of and damage to Mr Zulu's vehicle and the wall that separates the parking area from the road, it is highly probable that Mr Zulu's vehicle was in motion when the shots were fired and not parked. Had the trial court considered this, as it ought properly to have done, it would have regarded it as a relevant factor when assessing Mr Zulu's evidence.

[20] In light of the above, it is my view that the trial court misdirected itself in finding corroboration in photo 4. There was an obligation on the trial court to satisfy itself that the evidence of Mr Zulu was substantially satisfactory in every material respect. I am not persuaded that the trial court succeeded in discharging that obligation. The high court ought not to have confirmed the trial court's finding.

[21] In argument, counsel for the appellant submitted that it was questionable whether Mr Zulu was ever in a position, or had any opportunity, to identify his assailants. As previously stated, it was common cause at the trial that Mr Zulu and the appellant knew each other very well and that the shooting took place in broad daylight. It was therefore not in issue that Mr Zulu would not have mistaken the appellant for someone else. The factors set out in *S v Mthethwa*[5] should not be viewed in isolation but in light of the totality of evidence.

[22] Mr Zulu gave varying answers when questioned about the positions of the motor vehicles, both in examination in chief and cross-examination. He had initially stated, in evidence in chief, that when he entered the Shoprite centre, he had parked his motor vehicle in the parking area next to the main road, adding that his motor vehicle was facing the road. Later, the public prosecutor asked:

'Prosecutor: Was the said Golf vehicle parked next to your vehicle or parallel to your motor vehicle or…. [indistinct] vehicle?'

To which Mr Zulu replied:

'The vehicles were parked parallel to each other.'

During cross-examination, the appellant's attorney asked Mr Zulu the following question:

'. . . There is something that I do not understand, you say the car was parked in front of you or on your side, I am talking about the Golf, the tinted Golf….'

The trial court intervened and reminded the attorney that Mr Zulu had not stated that the Golf had tinted windows. Shortly thereafter, Mr Zulu responded and stated that the Golf was parked next to his car. Mr Zulu's response prompted further questions by the court

[5] *S v Mthethwa* 1972 (3) SA 766 (A) at 768B-D.

as it had become evident that Mr Zulu's testimony regarding the positions of the motor vehicles was confusing:

'Court: Sorry I just want to clear up something. So, the white Golf was parked right next to your vehicle?

Mr Zulu: Yes

Court: In the next parking bay?

Mr Zulu: Your Worship, the situation is this, when I went into the parking area, I went and parked my car parallel to the main road, so the car came and parked right next to my car, while still on the main road, that is the Golf.

Court: So, the car was parked in the road, not in the parking lot, the Golf?

Mr Zulu: Yes.'

To clarify the issue further, the court directed Mr Zulu to the photo album and enquired whether his motor vehicle was parked in the position depicted in photo 4, to which Mr Zulu responded in the affirmative.

[23] Mr Zulu's uncertainty regarding the position of his motor vehicle is of vital importance. Mr Zulu contradicted himself in this respect. He had clearly stated in evidence in chief that his motor vehicle was facing the road and added, more importantly, that the Golf suddenly emerged and 'came to a standstill directly in front of his motor vehicle'. However, when the public prosecutor sought clarity at a later stage, he then changed his version and stated that the motor vehicles were parked parallel to each other. That, in my view, was a material contradiction which the trial court ought to have dealt with in weighing up the evidence. If Mr Zulu's motor vehicle had been facing the road, as he had initially testified, he would have had a clear, unhindered, straight-line view of what was happening directly in front of him. On the contrary, if the cars were parallel to each other, as he subsequently stated, then he would have had to turn his head to the right in order to be able to observe his assailants.

[24] The trial court failed to appreciate the material contradictions in Mr Zulu's evidence. In addition, it was Mr Zulu's evidence that when the shots hit the window, he had ducked in order to avoid being shot in the head. It is highly improbable, in these circumstances, that Mr Zulu would have been able to focus his attention on his assailants rather than

focussing on saving his life. For all of these reasons, the trial court misdirected itself in accepting Mr Zulu's evidence that the appellant was one of his assailants.

Alibi

[25] An accused person's *alibi* defence should not be viewed in isolation but 'in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses'.[6] The appellant's *alibi* defence was unjustifiably subjected to microscopic scrutiny. I do not think that the appellant would have done any better than he did in the circumstances when accounting for his whereabouts on 12 September 2019.

[26] Mr Zulu had testified that he had told the police at the scene on the day of the incident that he was shot by the appellant. He also gave evidence that he subsequently deposed to an affidavit on 19 October 2019 in which he identified the appellant as his assailant. The appellant was only arrested on 4 February 2020, five months after the commission of the offence. The State proffered no explanation for such a lengthy delay in bringing the appellant to court.

[27] As earlier stated, the appellant testified that he routinely travelled between his place of residence at Yellowwood Park and Umbumbulu, where he was monitoring the construction of a structure at his newly purchased premises. Save for Mr Zulu's evidence implicating the appellant as one of his assailants, there was no other evidence to contradict the appellant's explanation of his whereabouts. As I have outlined earlier, the trial court erred in concluding that there was evidence corroborating Mr Zulu's evidence. On closer examination, his evidence was not corroborated and was not satisfactory in all material respects. In the circumstances, the appellant's *alibi* stood uncontested. It could not properly be dismissed as being false beyond reasonable doubt. Consequently, the trial court ought to have found that the State had failed to prove its case.

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[6] *R v Hlongwane* 1959 (3) SA 337 (A) at 341A; see also *S v Khumalo en Andere* [1991] ZASCA 70; [1991] 2 All SA 341 (A); 1991 (4) SA 310 (A) at 327H.

The appellant's right to a fair trial

[28] It was submitted, in argument, that the learned magistrate violated the appellant's right to a fair trial by denying his attorney the opportunity to present two further statements made by Mr Zulu to the police during the investigation. When dealing with the appellant's right to a fair trial, the high court focused its attention only on the argument pertaining to the learned magistrate's interference during cross-examination and ultimately arrived at a conclusion that the interventions were justified in the circumstances. I deal first with the witness statements.

The witness statements

[29] As can be seen from the exchanges below, the issue of the witness statements was a subject of extensive discussion and formed an integral part of the issues on appeal before us. It is, therefore, important to establish whether Mr Zulu made two or three statements to the police during the investigation. Although there seemed to be a suggestion in argument that he only made two statements, it is clear from the record that there were three statements that the defence sought to prove. During cross-examination, the appellant's attorney initially presented two statements to Mr Zulu and enquired from him whether the signatures attached therein were his, to which Mr Zulu responded in the negative.

[30] Towards the end of cross-examination, the appellant's attorney put to Mr Zulu:

'Thank you, Your Worship. Just one more statements (sic), which was handwritten now, it is not a typed one, but the same Magutshwa. Do you see the signature down there?'

Again, Mr Zulu disputed that the signature attached in that statement was his. Towards the end of the trial, shortly before the testimony of Warrant Officer Magutshwa, the appellant's attorney again placed on record that he was in possession of three statements deposed to by Mr Zulu. At that moment, the appellant's attorney conferred with the public prosecutor, who appeared to have impliedly concurred. After a heated verbal exchange between the appellant's attorney and the court, illustrated above, the attorney proceeded to hand into evidence one of the statements made by Mr Zulu to Warrant Officer Magutshwa. Immediately after cross-examination, the appellant's attorney intimated that

he wanted to introduce further statements. However, the court intervened, causing the appellant's attorney to withdraw his intended request and to close the case for the defence, without leading any further evidence. I am therefore satisfied that there were three statements that the defence sought to introduce into evidence or clearly more than one.

[31] I am of the view that the magistrate's refusal to allow the appellant's attorney the opportunity to present Mr Zulu's witness statements amounted to an irregularity for the following reasons. Firstly, the learned magistrate became aware, at the early stages of the trial, of the fact that Mr Zulu had made three statements to the police. Secondly, the appellant's attorney had placed on record that his objective was to show that certain averments made by Mr Zulu, in at least one of the statements, contradicted his testimony in court. Thirdly, the learned magistrate was alive to the fact that she had prevented the appellant's attorney from cross-examining Mr Zulu on the statements on the basis that these had not been proved. Lastly, it had already been established through the testimony of Warrant Officer Magutshwa that Mr Zulu had misled the court during his cross-examination, when disputing the signatures contained in the witness statement altogether.

[32] It seems clear to me that the underlying reason behind the learned magistrate's refusal to allow into evidence the further statements made by Mr Zulu, was the manner in which the appellant's attorney conducted the defence's case. When Warrant Officer Magutshwa testified in chief, the appellant's attorney should have introduced all three statements at once, but he did not. He only attempted to introduce further statements after finalising the cross-examination on the first statement, at which point the learned magistrate lashed out at him, stating the following:

'But you've allowed the court, oh my goodness, Mr…this is not how you conduct a criminal trial. You don't put one statement then sit down, allow cross examination, questions by the Court and then when I am about to excuse a witness you want to start questioning him again.'

[33] At that moment, both the learned magistrate's and the appellant's attorney's tempers had flared to the extent that they were no longer in control of their emotions. Were it not for their emotions, the attorney would not have abandoned the appellant's defence in the manner he did. He simply capitulated without any attempt to persuade the learned magistrate to reconsider her stance. Bearing in mind the fact that the appellant's fate rested solely on the evidence of Mr Zulu, the learned magistrate should have either exercised some patience and allowed the appellant's attorney the opportunity to present further statements, or in the exercise of her discretionary power in terms of section 167 of the Act, recalled Mr Zulu in order to establish whether there were indeed contradictions - either in the statements themselves or between the statements and Mr Zulu's testimony in court.

[34] In the only statement that the appellant's attorney handed into evidence, it was established that, contrary to his testimony in court that he was unable to identify the front passenger, Mr Zulu stated that the front passenger was the appellant's friend. Whether he could identify the front passenger was clearly a line of inquiry related to the broader question of the veracity of his evidence. The various statements made by Mr Zulu could have shed light on this issue, which was critical to the case. I am of the view that the decision of the learned magistrate to deny the appellant's attorney the opportunity to lead evidence of the further statements made by Mr Zulu rendered the appellant's constitutional rights, in particular the right to adduce and challenge evidence, nugatory.[7] This is so in circumstances where the learned magistrate was aware that Mr Zulu had deposed to three statements, yet the appellant's attorney had been denied the opportunity to cross-examine Mr Zulu on them. Moreover, Mr Zulu had misled the court by disputing the signatures in his statements, and his testimony that he had no prior knowledge of the appellant's companion contradicted what he had stated in his written statement.

[35] The manner in which the learned magistrate conducted the trial is to be frowned upon. In *S v Maseko*,[8] the court held that a trial judge should guard against conduct which

[7] See section 35(3)*(i)* of the Constitution.
[8] *S v Maseko* [1990] 1 All SA 532 (A); 1990 (1) SACR 107 (A) at 109C-D in the headnote.

could create the impression that he/she was descending into the arena of conflict between the appellant and the State as such conduct could create the further impression that he/she was partisan, and that he/she pre-decided issues which should only be decided at the end of the trial.

[36] The learned magistrate committed several irregularities, the cumulative effect of which rendered the trial of the appellant unfair. She descended into the arena at a critical stage of the trial, where she should have allowed the public prosecutor the opportunity to prove the State's case. When the public prosecutor sought to call further witnesses after the testimony of Mr Zulu, the court intervened and enquired whether it was necessary for the State to lead further evidence. After an exchange with the learned magistrate in which the appellant's attorney was also involved, the public prosecutor eventually relented and closed the State's case without calling any further witness. During the exchange, the appellant's attorney made comments which could potentially have changed the dynamics of the case had the court not intervened. It is apposite to refer to the exchange that followed after the public prosecutor stated that one of the witnesses she sought to call was the arresting officer.

'Court: Is that necessary? Why? The arrest of the accused is not disputed, Mr. . .

[Attorney]: *Yes, but there is some information that is going to be very interesting if she calls, I don't want to…. [intervention]*

Court: No, no, is it relevant to this trial case, I do not care what is interesting or not. My question is, there are certain essential aspects of this case.

[Attorney]: I agree with the court.' (My emphasis.)

Further on, the appellant's attorney revisited the comment he had earlier made and stated:

'But I can tell Your Worship now, before I disclose it if she calls the arresting officer, *it is going to kill the State's case further*.' (My emphasis.)

[37] It has authoritatively been decided by this Court that a judicial officer should play an active role in controlling judicial proceedings. In *Take and Save Trading CC and Others v Standard Bank of SA Ltd*,[9] this Court held:

'Fairness of court proceedings requires of the trier to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources.'

[38] However, when exercising control of the proceedings, a court should guard against usurping the power of the litigants to conduct their respective cases in the manner they see fit. The core duty of the public prosecutor in criminal proceedings is to assist the court in arriving at a just decision and that entails presenting evidence at the State's disposal. It matters not whether the evidence is favourable to the State or not. What matters is that justice must be seen to be done. In *S v Maliga*[10] this Court authoritatively described the role of the prosecutor as follows:

'The paramount duty of a prosecutor is not to procure a conviction but to assist the court in ascertaining the truth. Implicit herein is the prosecutor's role in assisting a court to ascertain the truth and dispense justice. This, not surprisingly, gels with the stringent ethical rules by which all legal representatives have to conduct themselves in their professional lives.'

It seems clear to me that, were it not for the learned magistrate's intervention, the public prosecutor would have called the four witnesses she sought to call, including the arresting officer. By her conduct, the learned magistrate created an impression that it was no longer necessary for the State to call any further witnesses. At that stage, the only witness who had given evidence was Mr Zulu. The record shows that his evidence was concluded at around 13h00 on the first day of the trial.

[39] With the exception of the arresting officer, whose evidence, according to the appellant's attorney, could potentially have bolstered the appellant's case, there is no

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[9] *Take & Save Trading CC and Others v Standard Bank of SA Ltd* [2004] ZASCA 1; 2004 (4) SA 1 (SCA); [2004] 1 All SA 597 (SCA) para 3.

[10] *S v Maliga* [2014] ZASCA 161; 2015 (2) SACR 202 (SCA) para 20; see also *S v Macrae and another* [2014] ZASCA 37; 2014 (2) SACR 215 (SCA) para 28; *S v Jija and Others* 1991 (2) SA 52 (E) at 67J-68A.

indication, on record, as to who the other witnesses would have been and what evidence they would have presented to court. But had the trial court exercised some patience, it would have allowed itself the opportunity to consider the evidence of the other witnesses, rather than relying solely on the uncorroborated evidence of Mr Zulu, a decision that turned out to be detrimental to the State's case. It seems to me that the manner in which the learned magistrate conducted this aspect of the trial, deprived both the State and the defence the opportunity to present evidence relevant to their respective cases. On the one hand, the State could have presented some corroboratory evidence, and on the other hand, the defence could have explored the arresting officer's evidence it considered to be prejudicial to the State's case. An impression that the learned magistrate had pre-decided that Mr Zulu's testimony was sufficient to prove the State's case is inescapable.

[40] Towards the end of the trial, the learned magistrate and the appellant's attorney became entangled in a very heated exchange that followed on the learned magistrate's discontent with the attorney's unpreparedness. The matter had been adjourned for a week for the defence to lead the evidence of Warrant Officer Magutshwa. On resumption, the appellant's attorney requested a short adjournment to locate the statements that had apparently been temporarily misplaced but the trial court would have none of it. Tempers flared in court when the learned magistrate expressed her displeasure towards the appellant's attorney, resulting in the unpleasant exchange between the attorney and the court. The following exchange that ensued immediately after the attorney located the statements, with the assistance of the public prosecutor, amounts to disreputable conduct that should have been avoided at all costs:

'Court: Yes, those statements haven't been proven but you can proceed.

[Attorney]: Thank you.

Court: *Let's see how far you get:*

[Attorney]: Sure, thank you. Please, Mr Magutshwa, look at this statement, that is one of them is written Cyril Phineas Magutshwa, please look it (sic).

Court: Is that the investigating officer's statement?

[Attorney]: That's correct. No, no, no, it is the statement by the accused but it was signed by the investigating officer.

Court: No, you said that statement that's written Cyril Phineas Magutshwa where it is written, whose statement is it?.

[Attorney]: *Okay, may I tell the court then? I will ask the court not to shout at me. I don't stand…[speaking simultaneously].*

Court: *It's very frustrating.*

[Attorney]*: No, let me tell you, Your Worship; I don't stand that nonsense. I don't allow people to shout at me because when they shout at me I shout back. I've been in this court for more than 30 years, I cannot allow you to shout at me.*

Court: *Well, stop pointing fingers at me and number 2 I haven't yet started shouting at you.*

[Attorney]: *You are shouting at me, I'm telling you now.*

Court: *I'm telling you loudly and in very clear voice that I do not believe for one week that you had these statements you do not – you not even ready, you are not even prepared.*

[Attorney]: I am ready.

Court: And I'm sorry, I cannot waste court time, once we start we just start and we work.' (My emphasis.)

[41] What follows clearly shows that there was a misunderstanding between the learned magistrate and the appellant's attorney, which appears to have been clouded by a fiery temperament that prevailed in court. When the appellant's attorney attempted to put the statement to Warrant Officer Magutshwa, the learned magistrate intervened and unjustifiably attempted to prevent him from questioning Warrant Officer Magutshwa about the statements. This resulted in another unpleasant exchange:

'Court: It is also not this witness's statement so you can't put it to him. . .'

[Attorney]: No I said, if the Court was listening to me, I said in this statement there it is written Cyril Magutshwa and it is there as a fact. I'm not lying.

Court: It is not Cyril Phineas Magutshwa's statement.

[Attorney]: I did not say it's Cyril Phineas Magutshwa's statement. . . *this war seems to be interesting [?] between you and me and let it go on, let it be*.

Court: Written where Mr. . .?

[Attorney]: *Between you and me.*

Court: No, written where on the statement that it says (sic).

[Attorney]: Let me show the Court, give it back to me.

Court: Yes, you don't understand, the Court doesn't have these statements so I don't know where it's written.
[Attorney]: That is why, because the Court is least prepared to listen to me. I am saying that in this statement it is written Cyril Phineas Magutshwa and here is the thing, it is written here.' (My emphasis.)

[42] At that point, tempers had flared to the extent that the learned magistrate's open-mindedness had already been compromised. Were that not the case, the learned magistrate would not have attempted to prevent the appellant's attorney from presenting Mr Zulu's statement to Warrant Officer Magutshwa. The attorney had made his intentions known at the early stages of the trial that he sought to prove the statements made by Mr Zulu to Warrant Officer Magutshwa. Therefore, there should have been no doubt in the court's mind that what the appellant's attorney sought to present was a statement made by Mr Zulu to Warrant Officer Magutshwa, not the other way round. It is clear on record that both the learned magistrate and the appellant's attorney had focused their attention on attacking and defending their respective personalities rather than seeking justice. Comments like 'Oh my goodness. . .let's see how far you get. . .don't shout at me, I do not stand that nonsense. . .stop pointing fingers at me. . .this war between us seems to be interesting, let it go on. . .' are a clear indication that the focus had shifted from seeking justice to settling scores. That explains the reason why the appellant's attorney simply caved in towards the end of the trial and abandoned the introduction of the further statements made by Mr Zulu, when the learned magistrate expressed her dissatisfaction at what she perceived to be incompetence on his part. In my view, the conduct of both the learned magistrate and the appellant's attorney, considered in the light of the totality of evidence, amounted to a material failure of justice.

Conclusion

[43] To conclude, I am of the view that the trial court misdirected itself on the following grounds: it erroneously found corroboration for Mr Zulu's evidence in the photographic evidence, and it erred in rejecting the appellant's *alibi* defence. The high court equally erred in confirming the approach followed by the trial court in how it approached the evidence of Mr Zulu. It ought to have overturned the conviction of the appellant. For this

reason, the submission made by counsel for the State that the matter should be remitted to a differently constituted court for the trial to start *de novo,* in the event that the conviction were to be set aside, has no merit.

[44] In light of the above, it is my view that the appellant was wrongly convicted by the trial court and that his conviction was erroneously confirmed by the high court.

[45] In the circumstances, I make the following order:

1 The appeal is upheld.

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

‘1 The appeal is upheld.

2 The order of the Regional court, Durban is set aside and replaced with the following:

“The accused is found not guilty and is discharged.”.’

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N E CHILI

ACTING JUDGE OF APPEAL

Appearances

For the appellant:	J Howse SC
Instructed by:	Arvina Harricharan Attorneys, Durban
	Blair Attorneys, Bloemfontein
For the respondent:	M Singh
Instructed by:	Director Public Prosecutions, Durban
	Director Public Prosecutions, Bloemfontein.