



THE 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

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Pillay v The State (451/2022) [2023] ZASCA 113 (27 July 2023)

Today the Supreme Court of Appeal (SCA) upheld an appeal from the full bench of the Gauteng Division of the High Court, Pretoria (the full bench) and further replaced the order of the full bench with an order that the appellant, Rolston Pillay, is found not guilty and discharged.

The facts were as follows. On 12 June 2020, the regional court, Benoni convicted Mr Pillay for murder and sentenced the appellant to 15 years' imprisonment. On the same day, the appellant applied for leave to lead further evidence in terms of s 309B(5)(a) of the CPA, and leave to appeal against both conviction and sentence was granted, in both instances. The regional court also admitted the new evidence. The full bench dismissed the appeal both in respect of the conviction and sentence.

It was not disputed that on 19 May 2017, the appellant shot Veli Molala, the deceased, a male aged 17 years, who died as a result of the gunshot wound. The appellant, who was attached to the Ekurhuleni Metro Police Department (EMPD), was engaged in patrol duties, and attended an accident scene in Great North Road, situated at the corner of 5th Avenue and Tom Jones Street, where he was informed by unidentified members of the community that a robbery was taking place at the nearby Wordsworth School, Farrarmere. He noticed two young men running from the direction of the school towards Bunyan Street and gave chase. According to the appellant, shots were fired at him by the alleged robbers, who ran into Bunyan Street, a one-way street. The appellant pursued the alleged robbers while driving in the direction of the oncoming traffic. As he approached the alleged robbers he shouted at them to stop, but they did not. Instead, one of the alleged robbers pulled out a revolver and fired a shot at him. In turn, he fired a shot in the direction of the alleged robbers. The alleged robbers ran towards the railway line. The appellant stopped his vehicle along the embankment, and alighted from his vehicle. One of the alleged robbers fired a second shot in his direction. He took cover on the side of the road where he fired two gunshots in the direction of the alleged robbers. One of the alleged robbers fell to the ground and the other ran away. He then called for backup. When the paramedics arrived at the scene they declared that the alleged robber, who had been injured by the gunshot, was deceased. The appellant testified that he acted in self-defence when he fired the fatal shot.

The crisp issue before the SCA was the credibility of a single eyewitness, Mr Mpilo Kubeka (Mr Kubeka), who was seated at the corner of Bunyan Street and the N12 highway when the shooting took place. His initial testimony was that he observed two boys walking towards the school situated in Farrarmere. After thirty minutes, he noticed the two boys running away, being pursued by the appellant, who was driving

a police vehicle. According to Mr Kubeka, he did not see the two alleged robbers in possession of a firearm, nor did the deceased or the other alleged robber fire any shots at the appellant. He said that the appellant fired the first gunshot, and a further gunshot while the two alleged robbers were running up the embankment along the railway line, fatally shooting the deceased who fell to the ground. Mr Kubeka said that the appellant was known to him and had on occasion provided him with food.

Ms Motshepe, who was attached to the Internal Affairs Unit of the EMPD attended the scene of the crime with Mr Thulani Magagula (Mr Magagula), the investigating officer who was attached to the Independent Police Investigative Directorate (IPID), Benoni. Other officers on the scene included Mr Naicker, the detective sergeant who was attached to the EMPD, who was tasked to investigate the crime. Ms Motshepe testified that Mr Kubeka told her that the deceased and his companion did not have a firearm in their possession, including the time when the deceased was shot at and fell near the railway line. Because no one wanted to get involved, she did not take any written statements at the scene of the crime. After receiving information from Mr Xolani Mabunda, statements were only taken a 'few weeks' later at the Benoni police station by Mr Naicker, in her presence. For some inexplicable reason, she only caused the statements to be made available on 12 July 2017. Ms Motshepe only submitted her statement to Mr Naicker on 14 August 2018, instead of May 2017.

Importantly, the nub of the appellant's defence was that he feared for his life after a shot was fired at him. This caused him to stop his vehicle, jump out, and lay on the ground underneath a metal barrier next to the road. Despite him seeking cover, a second gunshot was fired in his direction. In return, he fired one shot using his service firearm in the direction of the alleged robbers who were walking alongside the railway line, some ten metres from him. After firing two further shots to prevent the alleged robbers from returning fire, he saw that one of the alleged robbers had fallen to the ground. The second alleged robber ran away. He reiterated that he fired the shots in the direction of the alleged robbers in self-defence because he feared for his life and that he had fired in the direction of the two alleged robbers without having specifically aimed at any one of the two alleged robbers.

The further evidence led by the appellant in terms of s 309B(5)(a) of the CPA which was admitted by the regional court materially contradicted Mr Kubeka's previous testimony. Contradicting his earlier evidence and the evidence of Ms Motshepe, Mr Kubeka's evidence revealed that he had seen a firearm tucked in the trousers of one of the two suspects. He stated that he did not mention this during the trial because he was persuaded by Ms Motshepe who convinced him that he should put himself in the position of the deceased. It was therefore necessary for him to give evidence that would implicate the appellant. He conceded that he fabricated a material fact (ie that none of the alleged robbers were in fact in possession of a firearm) in order to assist the deceased. In addition, he also gave an account of an incident in which he had been assaulted and forced to attend court by Mr Naicker in order to give false evidence to implicate the appellant in the commission of the murder.

The SCA held that there were fundamental errors committed by the full bench in this matter. The SCA found that the view held by the full bench that the version of self-defence of the appellant was not true cannot be correct. The admitted evidence in terms of s 309B(5)(a) of the CPA where Mr Kubeka stated that he saw one of the two alleged robbers with a firearm in his possession was a material contradiction that should have been taken into account in the determination of the appellant's guilt or innocence. The acceptance of such contradictory evidence, especially in the absence of corroborating evidence adduced by Mr Kubeka, had a material effect on his credibility as a witness. Furthermore, the consultation with witnesses after a few weeks, or after more than two months, and the presence of two witnesses together with Ms Motshepe in one room when the witness statements were recorded by Mr Naicker on 12 July 2019, were matters that ordinarily ought to have been found by the full bench to undermine the reliability of Mr Kubeka's evidence. The full bench should have rejected the evidence of Mr Kubeka on the basis that it was not satisfactory in every material respect.

The SCA held that the further evidence of the presence of a firearm in the hands of one of the two alleged robbers supported the appellant's defence. It ought to be so because the prosecution anchored the State's case firmly on the proposition that the service firearm of the appellant was the only firearm that was present at the scene of the crime. On the contrary, the State presented no evidence, other than the evidence of Mr Kubeka, to show that the appellant had not been threatened in any manner at the time when he shot and killed the deceased. The full bench ought to have found that the defence as pleaded by the appellant was reasonably possibly true in its essential features. The appellant did not have a duty to convince the court of the truthfulness of his version that he acted in self-defence.

The SCA further held that the fact that the further material evidence was not taken into account and the approach to the evidence concerning self-defence was improper, the full bench misdirected itself. For those reasons the State failed to discharge the onus of proof that the appellant is guilty of murder beyond reasonable doubt. In the circumstances, the conviction and sentence cannot stand. The SCA upheld the appeal, and Mr Pillay was found not guilty and discharged.