



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case no: 451/2022

In the matter between:

ROLSTON PILLAY

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Rolston Pillay v The State* (451/2022) [2023] ZASCA 113
(27 July 2023)

Coram: SALDULKER, CARELSE and HUGHES JJA and
NHLANGULELA and MALI AJJA

Heard: 2 May 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representative via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time of hand-down is deemed to be 10:00 am on 27 July 2023.

Summary: Evidence – assessment of evidence of a single witness – cautionary rules – contradictions in the evidence of a single witness – onus of proof where accused pleads self-defence – appeal against conviction and sentence upheld.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Phahlane J and Motha AJ sitting as a court of appeal):

- 1 The appeal is upheld.
- 2 The order of the full bench in respect of the conviction and sentence is set aside and replaced with the following order:
‘The appellant is found not guilty and discharged’.

JUDGMENT

Nhlangulela AJA (Saldulker, Carelse and Hughes JJA and Mali AJA concurring)

Introduction

[1] On 12 June 2020, Rolston Pillay (the appellant) was convicted by the regional court, Benoni for murder read with s 51(2) of the Criminal Law Amendment Act 105 of 1997, further read with Part II of Schedule 2 to the Criminal Procedure Act 51 of 1977 (the CPA). Pursuant thereto, on 13 August 2020, the regional court found no substantial and compelling circumstances 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,¹ and leave to appeal against both conviction and sentence which was granted, in both instances. The regional court also admitted the new evidence. The full bench of the Gauteng Division of the High Court, Pretoria, per Phahlane J and Motha

¹ The provisions of s 309B(5)(a) reads as follows:

‘An application for leave to appeal may be accompanied by an application to adduce further evidence (hereafter referred to as an application for further evidence) relating to the conviction, sentence or order in respect of which the appeal is sought to be noted.’

AJ (the full bench) dismissed the appeal both in respect of the conviction and sentence. This appeal is with the leave of this Court, special leave having been granted.

The background facts

[2] It is not disputed that on 19 May 2017, at or near Benoni, the appellant shot Veli Molala (the deceased), a male aged 17 years, who died as a result of a gunshot wound. He pleaded not guilty and submitted a written plea explanation in terms of s 115(1) of the CPA.

[3] On 19 May 2017, the appellant, attached to the Ekurhuleni Metro Police Department (EMPD), was engaged in patrol duties. He 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.

[4] The appellant gave a detailed account of the chase in pursuit of the alleged robbers. He explained that the alleged robbers ran into Bunyan Street, a one-way street, where he 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.

[5] The alleged robbers ran towards the railway line. He stopped his vehicle along the embankment which was covered with tall grass. As he alighted from

his vehicle, one of the alleged robbers fired a second shot in his direction. He took cover underneath a metal barrier 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. It was not disputed that the body of the deceased did not sustain any further injuries between 19 and 27 May 2017 when the post-mortem was conducted.

[6] The crisp issue before us in this appeal is 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. He denied that the deceased or the other alleged robber fired any shots at the appellant. He said that the appellant fired the first gunshot, and a further gunshot when 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 is known to him and has on occasion provided him with food. He disputed the appellant's version that he fired gunshots at the alleged robbers in self-defence.

[7] Mr Kubeka denied that he was coached by Ms Burnell Motshepe (Ms Motshepe), who is a constable, to tailor his evidence in order to implicate the appellant in the commission of the murder. 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.

[8] 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. She found half a brick lying on the bonnet of the appellant's motor vehicle, which was denied by the appellant and her colleague, Mr Magagula. 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. Since it involved a colleague, the delay in submitting her statement was unusual, so she conceded.

[9] The plea explanation of the appellant was confirmed by him during his testimony. Importantly, the nub of his 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 was unable to confirm which of the two alleged robbers were in possession of a revolver and which of the two fired shots at him. 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.

[10] 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. Mr Naicker confirmed Mr Kubeka's version that he was forced to attend court but denied assaulting Mr Kubeka.

[11] These revelations are common cause accounts. Ultimately, the magistrate granted leave to appeal against the conviction largely on the strength of the further evidence that was placed before him. In terms of the provisions of s 309B(6) of the CPA,² further evidence becomes part of the evidence to be taken into account in the determination of the appeal.

² Section 309B(6) of the CPA reads:

'Any evidence received under subsection 5 shall for the purposes of an appeal be deemed to be evidence taken or admitted at the trial in question.'

Before the full bench

[12] The grounds upon which the appeal was noted were *inter alia* that the full bench erred in accepting the veracity of the evidence adduced by Mr Kubeka in the face of the uncontested evidence of the appellant, that one of the alleged robbers was in possession of a firearm and fired at the appellant who in turn fired two shots in self-defence. This resulted in the death of the deceased. The trial court admitted the contradictory evidence of the eyewitness, Mr Kubeka. This evidence has a direct bearing on the credibility of the single eye witness.

[13] Counsel for the appellant submitted that the full bench materially erred when it accepted the evidence of Mr Kubeka, who materially contradicted his evidence in chief, cross-examination and pertinently his statement that he made to the police. In sum, the appellant's complaint is that the full bench did not treat Mr Kubeka's single evidence with caution.³

[14] The thrust of the submissions advanced on behalf of the respondent was that the evidence of Mr Kubeka, a single witness, is credible and reliable to sustain a conviction for murder, notwithstanding the fact that he contradicted himself in material respects. The respondent contended that it was improbable that an influence was exerted upon Mr Kubeka to falsely implicate the appellant in the commission of the murder and that no objective evidence existed to draw an inference that the alleged robbers had a firearm.

[15] In matters of this nature, this Court is not at liberty to interfere with the findings of fact made by the trial court unless the manner in which the evidence

³ Section 208 of the CPA provides that:

‘An accused may be convicted of any offence on the single evidence of any competent witness.’

However, the power of the court to do so must be guided by the principles stated in *S v Webber* 1971 (3) SA 754 (A) at 757H that the single evidence must be clear and satisfactory and in *S v Sauls and Others* 1981 (3) SA 172 (A) at 180F where it was stated that if the evidence is flawed, its merits and demerits must be evaluated closely to establish if it is trustworthy or not.

was evaluated is proved to be wrong.⁴ In determining the question of whether the full bench committed an error, of fact or law, the findings of fact made by the trial court must be evaluated against the entire evidence that was led at the trial. That much was stated by this Court in *S v Trainor*.⁵ That exercise has to be undertaken against the legal principle that the duty to prove that the accused is guilty lies squarely within the domain of the prosecution, and that duty does not shift to the accused even if they have raised a private defence.⁶ Where, in the performance of that exercise, it is found that it is reasonably possible that the accused might be innocent, the accused must be acquitted.⁷

[16] There are fundamental errors committed by the full bench in this matter. The record indicates that the full bench: (a) accepted the evidence of Mr Kubeka that he saw the boys running and being chased by the appellant; (b) the appellant fired a total of four gunshots towards the two boys; (c) that the boys did not have a firearm in their possession at all. In my view on the probabilities, the position of the cartridges indicated in photographs clearly support the appellant's version that he fired shots at different places and not all at once in the same vicinity. It is highly improbable that the appellant fired the shots all at once in the same vicinity because the photographs indicate that cartridges were found at different places.

[17] The view held by the full bench that the version of self-defence 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

⁴ *Rex v Dhlumayo and Another* 1948 (2) SA 677 (A) at 706; *S v Francis* 1991 (1) SACR 198 (A) at 204C-F; *S v Hadebe* 1997 (2) SACR 641 SCA at 645E-G.

⁵ *S v Trainor* [2003] 1 All SA 435 (SCA) para 9.

⁶ *S v De Oliveira* 1993 (2) SACR 59 (A) at 63H-64A.

⁷ *R v Difford* 1937 AD 370 at 373 and 383.

firearm in his possession is 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, has a material effect on his credibility as a witness and as such, the full bench committed a material misdirection and ought to have tilted the scale of justice in favour of the appellant. The full bench was correct in finding that the evidence of Ms Motshepe and Mr Naicker was unhelpful to the State's case.

[18] 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, are 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 is not satisfactory in every material respect.⁸

[19] 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. This Court stated in *S v De Oliveira*⁹ concerning *S v Ntuli*,¹⁰ that where the defence of self-defence has been specifically pleaded by the accused or emanates from the evidence, the onus

⁸ *R v Mokoena* 1932 OPD 79 at 80 as refined in *S v Webber* 1971 (3) SA 754 (A) at 758 and *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G. See also especially in *S v Ffrench-Beytagh* 1972 (3) SA 430 (A) at 445-446.

⁹ Op cit fn 6.

¹⁰ *S v Ntuli* 1975 (1) SA 429 (A) at 436D-437G.

nevertheless remains on the State to prove beyond reasonable doubt that the accused acted unlawfully and that he realised, or ought reasonably to have realised that he was exceeding the bounds of self-defence. The full bench ought to have found that the defence as pleaded by the appellant was reasonably possibly true in its essential features.¹¹ The appellant did not have a duty to convince the court of the truthfulness of his version that he acted in self-defence.¹²

Conclusion

[20] In light of 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.

Order

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

- 1 The appeal is upheld.
- 2 The order of the full bench in respect of the conviction and sentence is set aside and replaced with the following order:
‘The appellant is found not guilty and discharged’.

Z M NHLANGULELA
ACTING JUDGE OF APPEAL

¹¹ *S v Van der Meyden* 1999 (1) SACR SA 172 at 448F-G.

¹² *S v V* 2000 (1) SACR 453 (SCA) at 455B.

Appearances:

For appellant: M van Wyngaard

Instructed by: Leonnie Naude Inc, Benoni
Hendre Conradie Inc, (Rossouw Attorneys), Bloemfontein

For respondent: M Jansen van Vuuren

Instructed by: Director of Public Prosecutions, Pretoria
Director of Public Prosecutions, Bloemfontein.