

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)

CASE NO.: A347 / 2012



DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED:

..... (DATE) _____

In the matter between:

NTULI BHEKISGCINO

Appellant

and

THE STATE

Respondent

J U D G M E N T

THE COURT:

[1] The appellant appeals to the Full Court, with the leave of the trial court (*per* Maluleke J), against his conviction only. The appellant, having pleaded not guilty, was convicted on the following charges on 29 August 2006:

1.1 Count 1 – Murder, read with provisions of section 51 of Act 105 of 1997;

1.2 Count 2 – Attempted Murder read with the provisions of section 51 of Act 105 of 1997;

1.3 Count 3 – The unlawful possession of a firearm; and

1.4 Count 4 – Unlawful possession of ammunition.

[2] Having convicted the Appellant, the trial court imposed the following sentences:

2.1 Count 1 – 18 years imprisonment;

2.2 Count 2 – 7 years imprisonment;

2.3 Counts 3 and 4 (taken together) – 3 years imprisonment;

[3] On the same day as conviction, the trial court went on to order that 5 years of the sentence on count 2 would run concurrently with the sentence imposed in respect of Count 1. The sentence imposed on Counts 3 and 4 would run concurrently with the effective sentence of 20 years on Counts 1 and 2 taken together, making the total effective sentence one of 20 years' imprisonment.

[4] The grounds of appeal are that:

4.1 The court a quo misdirected itself when evaluating the evidence relating to the identification of the appellant by the complainant; and

4.2 The court a quo erred by dismissing the alibi defence of the Appellant.

- [5] Briefly, the facts of this case are that on the evening of the 29th January 2005 at approximately 20H00 at George Goch Hostel, the complainant, Simon Ndwandwe, and his friend, Richard Khoza were standing and chatting when they were approached by two men who started shooting them when they were about two metres from where they stood.
- [6] Khoza sustained several gun shots and died. Nwandwe managed to escape with several gun wounds but was eventually rescued and later admitted to the Johannesburg Hospital where he was detained while receiving treatment for three weeks before he was transferred to South Rand Hospital.
- [7] After his discharge from hospital, the appellant went to live with his uncle, Musa Ntuli, in Hilbrow. One day whilst walking around he saw the Appellant washing vehicles whereupon he immediately telephoned Inspector Moletsane. Upon Inspector Moletsane's arrival Ndwandwe took him to the place where he had spotted the Appellant. The Appellant was subsequently arrested.
- [8] It is common cause that Ndwandwe and the Appellant are from Mahlabathini In Kwa-Zulu Natal and that the two knew each other very well albeit that they were never friends.

[9] The conviction of the Appellant is premised on the evidence of one witness and this is Ndwandwe. The cautionary rule that the evidence of a single witness must be approached with great circumspection is thus triggered.

[10] In convicting the Appellant the court a quo was comfortable that the evidence of Ndwandwe notwithstanding that he was a single witness was reliable and satisfactory in material respects. In the case of *R v Mokoena* 1932 OPD 79 at 80, which has been followed many times and affirmed in the Appellate Division (see *S v ffrench-Beytagh* 1972 (3) SA 430 (A) at 446A) it was said that:

The uncorroborated evidence of a single competent and credible witness...should only be relied upon where the evidence of the single witness is clear and satisfactory in every respect.

See, also: *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E – G

[11] The trial court sought support for this conclusion that the evidence as to identity of this single witness was sufficient by stating that:

11.1 When the first investigating police officer visited Ndwandwe on the night of his admission, 29 January 2005, to Johannesburg Hospital he identified one of his assailants as the accused and Mageba Ntuli;

11.2 The complainant repeated this identification of both Mageba Ntuli and the accused on two other occasions when he met with the police.

- [12] The record reveals that Ndwandwe mentioned the name of Mageba Ntuli on the night of his admission to Johannesburg Hospita but said nothing about the Appellant. The Appellant referred to two assailants who live in Denver Hostel when he met Inspectors Moletsane and the investigating officer, Singh. Indeed the first time that the name of the Appellant came up is after his arrest on the 12th of September 2005 and this is captured in his sworn statement.
- [13] The trial court appears to have been content to resolve that there was no purpose, albeit not in so many words, for Ndwandwe to falsely implicate the Appellant. Ndwandwe's evidence-in-chief in at least on three instances was, that he knew that his assailants lived at Denver Hostel yet he failed for approximately eight months to take the police to Denver Hostel. He also contradicted himself as to when he had know that the appellant lived in the hostel.
- [14] In *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645E: it was held that generally in the absence of demonstrable and crucial misdirections by the trial court its findings of fact are presumed to be correct and will only be disregarded if the record shows them to be clearly wrong. In light of the obvious incorrectness the court has no choice but to intervene.
- [15] In fact, Ndwandwe never took the police to Denver Hostel and there is no evidence that the police ever requested Ndwandwe to take them there. The actions of the police and Ndwandwe in this respect are unsatisfactory.

[16] The appellant claimed that he left the area of Johannesburg for Mahlabathini with his uncle on 15 December 2005 for Christmas holidays. He and his uncle only returned to Johannesburg during the first week of February 2005. There are problems with the appellant's alibi defence. We need not deal with these by reason of what follows.

[17] The evidence *aliunde* in this case corroborates no more than the fact that the deceased was killed and the complainant injured. It does nothing to corroborate the fact that the appellant was one of perpetrators of the crime.

[18] The evidence of the single witness, the complainant is not 'clear and satisfactory in every respect'. A legitimate question arises as to whether the complainant may have reconstructed events as to the perpetrator (by reason, for example, of the family feud and his own inner trauma) even though he may have been *bona fide* and knew the appellant well.

[19] Accordingly, the appeal has to succeed. The order of the trial court is set aside and substituted therefor:

'The Accused is acquitted on all four counts'.

DATED AT JOHANNESBURG THIS 7th DAY OF FEBRUARY 2013

N.P WILLIS

JUDGE OF THE HIGH COURT

J.P. HORN

JUDGE OF THE HIGH COURT

B. MASHILE

ACTING JUDGE OF THE HIGH COURT

Counsel for the Appellant: Adv *E. Tlake*

Counsel for the Respondent: Adv. *J.M. Tloubatla*

Date of hearing: 31 January 2013

Date of judgment: 7 February 2013