




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: A121/2020

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
	
.....	22 FEBRUARY 2022
SIGNATURE	DATE

In the Appeal of:

MUZIWENDODA SIKHONA KUNENE

APPELLANT

And

THE STATE

RESPONDENT

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her secretary.

JUDGMENT

LESO AJ

INTRODUCTION

- [1] The accused faced three charges. In the first count, the state alleged that on 16 November 2007 at or near Pretoria, Gauteng Province, the appellant unlawfully and with intent to defeat or obstruct the course of justice pretended that he was injured when he was attacked and assaulted while in fact his injury was self-inflicted. The second count against the appellant was that on 16 November 2007 he made a false statement under oath before the Commissioner of oath. In the third count the state alleges that on 21 November 2007 at or near Johannesburg the appellant did unlawfully and with intent attempted to kill Muziwendoda Kunene by shooting him with a firearm.
- [2] Appellant appeals against his conviction and sentence for the offences of defeating or obstructing the ends of justice, section 9 of the Justice of Peace and Commissioners of Oaths Act, No. 16 of 1963 and the offense of attempted murder. The Regional Court Magistrate Makhoba presided over the matter under case number 14/2493/2008 at the Gauteng Division, held at Hatfield, Pretoria. and he found the appellant guilty as charged on all the counts.
- [3] On 16 October 2013 the appellant was sentenced to serve two years imprisonment on count 1, on count 2 he was sentenced to serve two years imprisonment and ten years imprisonment on count 3. The appellant was to serve an effective period of 14 years imprisonment and the sentences were ordered to run concurrently with the sentence of life imprisonment which the appellant was already serving in relation to another offence.

BACKGROUND

- [4] It is common cause that on 14 November 2007 the appellant opened a case at Garsfontein police station wherein he made a statement to the effect that he was attacked and shot on the hand by two assailants at or near Lynnwood Road while he was on his way to attend an interview. It is also common cause that between 16 and 27 November 2007 the appellant used a vehicle he was considering to buy from Mahomed Kadeir of Inkosi Auto at Durban. He was driving this vehicle from Durban to Pretoria on 29 November 2007 and he was arrested by police at

Durban. The complainant is the appellant's son who suffered a gunshot injury in the face on 27 November 2007.

PRELIMINARY ISSUES

- [5] In the heads of argument, the appellant's counsel raised the legal issue relating to the practical effect of the conviction in light of the fact that the appellant is already serving a sentence of life imprisonment. In the oral argument, counsel conceded that the conviction and sentence remain relevant and this argument was never pursued further.
- [6] It is common cause that the record of the trial proceedings is incomplete particularly the reconstruction pertaining to the judgment. The appellant's counsel argued that an adequate record of trial court proceedings is a key component of the right to a fair trial and he further stated that "when a record is inadequate for proper consideration of an appeal it will, as a rule lead to the conviction and sentence being set aside". Respondent's counsel argued against the above proposition by submitting that it is indeed so that the record that is before the court is incomplete however the available record is adequate for the proper consideration of this appeal. The respondent's counsel submitted that the reconstruction of the record in this matter was done properly.
- [7] Both parties cited the case of *S v Chabedi 2005(1) SACR 415 SCA*, where the court said that when dealing with an incomplete record, a defective record need not be perfect it only needs to be adequate for the purposes of appeal. It is common cause that the reasons for the judgment do not form part of the record and the appellant challenged the decision of magistrate Makhoba inter alia on the ground that the magistrate failed to give reasons for his decision to convict the appellant.
- [8] The respondent's counsel argued that the appeal courts' powers to interfere on appeal with the findings of fact of a trial court are limited. Counsel referred to the cases of *S v Francis 1991(1) SACR 198(A)* and *R v Dhlumayo and Another 1948(2) SA 677(A)* where the Court held that the court of appeal will be very reluctant to upset the factual findings and the evaluation of evidence by a trial

court, and will only interfere where the trial court materially misdirected itself insofar as its factual and credibility findings are concerning. In this instance, it will not be appropriate to set aside the conviction on the basis of the incomplete record. The Court did evaluate all the evidence and concluded that it was possible to determine the appeal even in the absence of cogent reasons by the learned magistrate.

[9] It was argued that the appellant was not afforded a fair hearing and this was based on the long delays. It is clear from the record that the proceedings took six years to finalise however it is clear from the record that the delays were primarily caused by the appellant's actions inter alia when the appellant could not secure the aid of a legal representation. The matter was postponed several times because the appellant was embroiled in another matter at Kroonstad which coincided with this matter on appeal. From 19 February 2009 to October 2009 the matter was postponed at the request of the appellant and his legal representative. Sometime in 2010 the appellant was on hunger strike and he refused to go to court, at one stage he wrote a letter to the court explaining the reasons why he would not appear. The delay cannot be attributed to the state consequently the conviction and sentence of the appellant cannot be set aside on this basis.

[10] Counsel for the appellant also attributed a violation of the appellant's right to a fair trial to the appellant's legal representative. Having gone through the record this court could not identify any fault in the manner in which the legal representative conducted the appellant's defense, consequently the conviction and sentence of the appellant cannot be set aside on this basis.

THE MERITS

[11] We now proceed to deal with the merits of the appeal.

The evidence relating to count 1

[12] Complainant testified that on 14 November 2007 in the morning at Pretoria at the house of Mr and Mrs Bouwer when he was about to wash the white BMW vehicle which the appellant was using all the time, he heard a gunshot coming from the

vehicle. When he went to the vehicle he found the appellant had shot himself while sitting inside the vehicle. He said that the appellant was at the left passenger seat bleeding from his left hand and there was a hole in the dashboard of the car on the left-hand side of the door near the cubbyhole. He testified that he saw a revolver in the motor vehicle before he went back to the house to fetch a cloth to stop the bleeding. Thereafter the appellant told him that he shot himself to protect himself. He said that the appellant did not want to go to a doctor and insisted that he had an important interview he had to attend that morning. That evening he saw a report on the television that the appellant was shot.

[13] Jojo Kubayi testified that he was patrolling at the corner of Mary and Frank street from 06h30 to 18h00 and he was guarding a construction site which was an open veldt. He said that on 13 November he did not see or hear anything while he was patrolling the area. His statement that was admitted as evidence supports the witness testimony relating to the events of 13 November 2007.

[14] Charles Steyn testified that on 14 November 2007 he was working in the area at Rosslyn with inspector Goosen when they were called to attend a scene at Lynnwood. He testified that at 10h00 they found the reporter, the paramedics and a certain lady talking to 702 or ETV journalists. He said that they interviewed the security guards, the other security guard at the construction site and the motor vehicle guards and all of them confirmed that they did not see or hear anything of relevance to the case in the morning on that day. He confirmed that there was a lady from the shop who spoke to the journalist however he did not interview her. During the cross-examination, the witness became evasive about his investigations at the scene on 14 November 2007. He admitted that when he arrived at the scene he found journalists who were going in and out of the coffee shop but he did not interview anyone at the coffee shop. He then made a turnaround and said that he did not interview people at the coffee shop because the crime scene was not at Willow Way Sentrum but it was at the construction site which was two kilometers away from Willow Way Sentrum. The witness later agreed that there was a witness who was interviewed by the Citizen newspaper whom he could have interviewed.

- [15] Pakisa Masegela was the investigating officer who was investigating the incident of the alleged shooting of the appellant in the BMW. He testified that on 10 or 11 December 2007 the complainant told him that the appellant shot himself in the white BMW and there was a bullet hole and blood in the car. The Ballistic officer and DNA experts did the investigations and gave him a report. The DNA analysis was inconclusive and the ballistic report indicated that there was a bullet hole in the dashboard, another bullet hole below the left handle and the speaker on the passenger door with no speaker frame.
- [16] Mahommed Kadeir testified that on 4 December 2007 the appellant's wife returned BMW and the salesman checked it and he told him that the speaker was missing. He testified that the vehicle was put in the showroom to be sold because it was in a good condition.
- [17] Jube Macousele testified that she was working at the coffee shop at Lynwood and she remembers the appellant because the appellant come towards the shop slowly then she went to him and asked if he was sick and the appellant told her he was shot. She said that she realised that the appellant's jacket was full of dust and she removed the dust and asked the manager to give the appellant some pain killer pills.
- [18] Revendra Tilakdharee testified that on 19 February 2008 he was requested to conduct a ballistic examination on a vehicle that was parked at Durban SAPS pound and he was shown a white BMW with registration number ND67540P. He noted one bullet hole in the dashboard below the cubbyhole and one speaker frame on the passenger door without a speaker. He said that he compiled a report regarding his observations.
- [19] Appellant's testified that his wife, the complainant and himself stayed at the Bouwer's house in Wapadrand Pretoria because he had scheduled interviews for 13 November 2007 with a radio 702 journalist and on 14 November with a Mail and Guardian newspaper journalist and he was attending court on 15 November 2007 in the Free State. On 14 November 2007 in the morning he traveled by taxi to Lynnwood to attend an interview with a journalist. While he was walking from a nursery along Lynwood Street he was accosted by two unknown males who

shot him in the hand. He testified that the incident occurred at the corner of Mary and Frank street and he ran to a coffee shop to seek help. A lady from the coffee shop helped him to cover his hand with a cloth. The appellants said the area was not busy and he did not notice anyone in the area. He then reported the incident to the Garsfontein police where he was assisted by a police officer to make a statement and open a case.

[20] Peter and Yolandi Bouwer testified on behalf of the appellant. Peter Bouwer said that it was improbable if not impossible that the complainant and the appellant could have been up before 8h00 and went out of the house as there was an alarm that activated the whole property. Should there be movement in the house the alarm would go off. He said his house was split into two areas which was the sleeping area with a security burglar gate which he locked and he kept the keys himself. He normally de-activated the alarm just before 8h00 because the helper came in at that time. He further testified that if anyone in the house wanted to go out they would have to wake him up so he could open the gate and de-activate the alarm. On that day no one woke him up to open the security gate or to deactivate the alarm.

[21] Peter Bouwer further testified that his place was a security complex with security guards patrolling around the place day and night. He said that he had five neighbours, one was on the side of his road; two were across the road and the other two were very close to his property on the left and the appellant's vehicle was parked 8 meters from the other neighbours bedrooms. He testified that they had two dogs that would react to any stranger or suspicious activity. He testified that he normally left home for work at 8h30 in the morning because of heavy traffic and he disputed the possibility of a gun having been fired in the car. He said that the dogs would have barked if the alarm went off, or a gun was fired, furthermore, neighbours would have heard and alerted the security. Peter Bouwer's evidence was corroborated by his wife in all material aspects.

The evidence relating to count 2

- [22] Phakisa Masela testified that the appellant made a statement under oath on 16 November 2007 following the incident on 14 November 2007. The witness confirmed that he commissioned the statement after the appellant took an oath and after affixing his signature. The appellant did not testify nor did he call witnesses to testify in respect of this count, but the count is closely related to count one and if the appellant's appeal is upheld on count one, it must follow that the same would apply to count two.

The evidence relating to count 3

- [23] The evidence of the complainant relating to the incident of 21 November 2007 was briefly that on 20 November the complainant and the appellant went to Coca-Cola Dome where the appellant taught him to use a firearm. On 21 November 2007 between 18h00 to 19h00 they left for Johannesburg to collect money from people unknown to him. While they were waiting in the forest not far from Total garage the appellant asked him to go to the car to get the phone so that the appellant could call the people they were waiting for. When he was about to get to the car the appellant shot at him and he fell on the ground. While on the ground the appellant fired another shot at him, but he missed him. A struggle ensued while the appellant was standing on top of him he pointed a firearm at him and during a struggle between them, he shot him. He testified that the appellant fired a shot at him again but he missed and he managed to run away and sought help at a nearby plot.
- [24] The complainant further testified that the appellant wanted to kill him because he refused to take him back to Durban. On 20 November 2007 he drove with the appellant around Johannesburg the whole night. During the cross-examination, he was asked why he did not leave on his own if he suspected that the appellant wanted to kill him and he responded that he had to risk his life and stay because he was waiting for his share of R1 Million which the appellant had promised him. The appellant denied that he agreed to take the complainant back to Durban by indicating that he could not have left for Durban because he had to appear in another case in the Free State. He also denied that he drove the car after 14

November 2021 because his hand was injured and he could not drive with one hand from Pretoria to Johannesburg or drive around the whole night as the complainant testified.

- [25] Thabo Letlake Ntlaka who was an ambulance attendant on 21 November 2007 testified that he received a call that a person was injured at plot 85 Marais Street. When they arrived the injured person did not say anything when they put him in the ambulance. When they were leaving the injured person said there was a BMW that was following them. He mentioned the BMW three times.
- [26] Kobus Hoek who was a dentist at Steve Biko Hospital treated the complainant at the hospital. He testified that on 22 November 2007 he saw the complainant with gunshot wounds at the back of the ear and on the cheek and two open wounds on the face. The complainant said that the people in a BMW shot him and refused to give him information on how he was shot even though he could converse.
- [27] The appellant testified that on 19 November 2007 he attended court in the Free State then he went back to Bouwer's place in Pretoria. He said that on 20 November 2007 he went to Cresta in Johannesburg with the complainant and his wife who was driving because he could not drive due to the injury on his hand. He testified that a friend picked him up and he went to Katlehong. On 21 November 2007 he went back to Cresta and he was told the complainant had left with his friends hence he did not worry because the complainant knew Johannesburg very well. He said between 10h00 and 11h00 on 21 November 2007 he went back to Pretoria to the Bouwer's home with his wife. They had a braai with the Bouwers in the evening to celebrate the anniversary of the appellant and his wife. He testified he spent the night at the Bouwers with his wife and on 22 November 2007 his wife and he drove back to Durban. He never heard of his son again nor, was he aware that his son was shot until 29 November 2007 when he was arrested for allegedly shooting him.
- [28] The Bouwers confirmed that on 21 November the appellant and his wife came back from their trip from Johannesburg and they had a braai in the evening and the next morning the appellant and his wife left for Durban. The witnesses

testified that on the above date they did not see the complainant and on 22 November the appellant and his wife left in the absence of the complainant.

ANALYSIS OF EVIDENCE

[29] In *S v Monyane and Others 2008(1) SACR 543(SCA)* the court said the following: “bearing in mind the advantage that the trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with the trial court’s evaluation of oral testimony”. The issues that had to be determined by the court a quo were how the appellant was injured on 16 November 2007 and whether the appellant shot the complainant on 27 November 2007. The court had to analyse all the evidence to determine the probabilities and improbabilities of the witnesses versions the inconsistencies and corroborating testimonies and the credibility of the witnesses which the court found not being the case in this matter.

[30] The evidence of Kadeir, Lee and Tilakdharee on the issue of the identity of the vehicle was crucial for the state to prove the allegations against the appellant in counts 1 and 2. The above two witness’s evidence however has some glaring material contradictions as follows:

- a) Kadeir testified that on 11 November 2007 the appellant took a white BMW 320 of 2002 model with registration number ND48929 which he was considering buying from him. Tilakdharee testified that on 19 February 2008 he examined a white BMW with registration number ND67540P which was parked in Durban police pound. Lee testified that when he arrived at Nkosi Auto he investigated a vehicle without registration number plates.
- b) Tilakdharee testified that he examined the BMW at the pound and noted one bullet hole on the dashboard below the handle, another hole on the cubbyhole on the left of the handle and one speaker on the passenger door did not have a speaker frame. Lee confirmed that he made a statement wherein he stated under oath that he investigated the BMW 3 series and found the left speaker missing, the statement was admitted as exhibit “I”. During examination in chief, he changed his testimony and testified that he also saw a hole in a cubbyhole.

- c) Kadeir refuted the evidence that Lee informed him that the reason he was at his garage was to investigate if there was evidence that could prove that there was a shooting in the BMW which was driven by the appellant.
- d) Lee testified that a sniffer dog was summoned to examine the BMW at Kadeir's garage however six years later the results were not available while Tilakdharee conducted the investigations three months after the complainant had opened a case.

[31] Besides the brief contradictions the Court has highlighted in the above paragraph, it is clear from the record that the two officers that testified on the identity and the damage to the BMW were not reliable. It is against this background that the Court finds that the credibility of the state witnesses are questionable and the evidence of the complainant as a single witness should have been treated with caution.

[32] The complainant made three statements. In the first statement, he made on 26 November 200 he did not report that the appellant shot himself. In the second statement, he did not report that there were bullet holes in the BMW as a result of the appellant shooting himself and only after a month he made a third statement where he stated that there were bullet holes in the motor vehicle. When he made the last statement the vehicle was already removed from display at Kadeir's garage taken to SAPS pound in Durban.

[33] From the above evidence, it is without a doubt that these witnesses did not only contradict each other but were also not reliable nor credible as witnesses. There is absolutely no chain of evidence linking the BMW the appellant obtained from Kader to the BMW which Lee and Tilakdharee examined. The appellant's version was corroborated by the lady who worked at the coffee shop. Consequently the state has failed to prove that the appellant lied about being attacked and shot at Lynwood.

[34] From the totality of the evidence on record on count 3, it is clear that the complainant was not a good witness nor was his evidence impressive because of the following

[a] The complainant failed to disclose that it was the appellant who shot him even though he had ample opportunities to disclose or report the crime to the paramedics, the doctor who treated him to the police. The first time the complainant reported that the appellant shot him was when he made a statement to the police at Amanzimtoti, Durban on 30 November 2007.

[b] In the middle of the trial proceeding the complainant wanted to withdraw the case against the appellant claiming that he had reconciled with the appellant.

[c] During the cross-examination the complainant could not remember most of the evidence he gave in chief as he could not remember what happened after he was shot or whether he told the nurse that his father shot him. When the doctor at Pretoria Academic hospital asked him who shot him he refused to answer. His explanation for refusing to disclose who had shot him was that it was his right not to answer questions.

[35] It is improbable that there were gunshots that were fired and no one from the garage heard the shot. It is improbable that the appellant drove a motor vehicle from Pretoria to Johannesburg for two days in succession when his hand was in plaster because of the gunshot injury.

[36] The above summary of complainant evidence point to a lack of credibility on the side of the complainant that the court a quo failed to consider.

[37] Importantly the Bouwers testimony, which was not contradicted or found not to be credible corroborated the evidence of the appellant on both counts.

CONCLUSION

- [37] In the case of *Bernert v ABSA Bank Ltd 2011 (4) BCLR 329 (CC)* the Constitutional Court held as follow: “where there is a misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts and come to its own conclusion on the facts as they appear on the record”. It is trite that the court of appeal expects the court a quo not only to give its findings on the facts but also its reasons for those findings. There were no reasons advanced by the learned magistrate to reject the appellant’s evidence in favour of the State or why the appellant’s alibi was rejected.
- [38] The finding of the court a quo that the appellant is an intelligent man is irrelevant in determining whether the appellant’s version is improbable or that his evidence is true or false. The principle of analysing the testimony of witnesses dictates that the court does not have to be convinced that every detail of the accused version is reasonably true in substance as it was held in *Shackell 2001(4) SA (1)SCA*. In any event, it is not for the appellant to prove that he is innocent but it is for the state to prove that the appellant is guilty beyond a reasonable doubt.
- [39] There is no independent corroboration for the complainant’s version that the appellant’s wound was self-inflicted similarly there is no independent evidence that the complainant was shot by the appellant.
- [40] Having analysed all the evidence and the findings of the court a quo on record and having heard both counsels, the court has no doubt that the state failed to prove its case beyond a reasonable doubt on all counts, consequently, the conviction of the appellant was incorrect and the appellant must be acquitted on all charges.

AS A RESULT, I PROPOSE THAT THE FOLLOWING ORDER IS MADE:

ORDER

- 1] The appeal against the convictions and sentences are upheld.
- 2] The convictions and sentences imposed by the court a quo are set aside.



J T LESO
ACTING JUDGE OF THE HIGH COURT

TOLMAY R.
JUDGE OF THE HIGH COURT

I AGREE AND IT IS SO ORDERED

DATE OF THE HEARING: 9 November 2021

DATE OF JUDGEMENT: 22 February 2021

APPEARENCES

FOR THE APPELLANT : L Shein

Lawley Shein attorney

Tel : 082 4210 0987

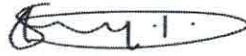
E-mail: lawley@mazansiweb.co.za

FOR THE RESPONDENT: R.N SIBANDA

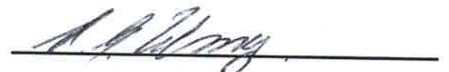
State Advocate

Director of Public Prosecutions Gauteng: Pretoria

E-mail:



J T LESO
ACTING JUDGE OF THE HIGH COURT



TOLMAY R.
JUDGE OF THE HIGH COURT

I AGREE AND IT IS SO ORDERED

DATE OF THE HEARING: 9 November 2021

DATE OF JUDGEMENT: ²²
~~18~~ February 2021

APPEARENCES

FOR THE APPELLANT : L Shein

Lawley Shein attorney

Tel : 082 4210 0987

E-mail: lawley@mazansiweb.co.za

FOR THE RESPONDENT: R.N SIBANDA

State Advocate

Director of Public Prosecutions Gauteng: Pretoria

E-mail: