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NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

AR: 300/13

In the matter between:

BANDILE MHLUNGU Appellant

and

THE STATE Respondent

JUDGMENT

Delivered on : 16 MAY 2014

PATEL JP

Introduction

[1] The appellant, Mr Bandile Mhlungu, was convicted of the murder of Nkosinathi Winfred Buthelezi (the deceased) and sentenced to 15 years' imprisonment. He unsuccessfully applied for leave to appeal from the trial court. Leave against conviction was, however, subsequently granted by the Supreme Court of Appeal.

The merits of appellant's conviction

[2] Three witnesses testified for the State: the deceased's wife (N[…]), his daughter (No[…]) and his son (M[…]). M[...] was the State's main witness as he testified that he had seen the appellant shoot the deceased.

[3] First to give evidence for the State was N[…]. She testified that on 11 March 2009 at approximately 9 pm she was watching television with three elderly children and other small children in the bedroom when she heard a sound emanating from the garage. She heard the deceased arguing with someone and then heard two shots being fired. She proceeded to the window in the sitting room where she saw two young men carrying firearms. They went towards the deceased's vehicle, a blue Toyota Tazz. One entered the vehicle. A third man was in the garage. M[…] exited the house but was brought back by the third man. M[…] was instructed to return to the house. She then met M[…] at the back door and ran with him out of the house. They jumped over the fence and into the neighbour's yard.

[4] According to N[…], M[…] said he knew who shot his father, and that it was the appellant. M[…] further relayed this information to the police.

[5] N[…] admitted to knowing a certain P[…], as someone who borrowed money from the deceased. She had known that the deceased had a number of girlfriends. After the deceased's death M[…] told her that P[…] and the deceased had a child together. During cross-examination N[…] said that she was not aware of any problems between P[…] and M[…].

[6] N[…] confirmed that the deceased went to a mechanic to fix his car, but did not know that the repairs were carried out at the appellant's uncle's home. According to her M[…] would sometimes accompany the deceased when the deceased went to repair the cars.

[7] During cross-examination it was put to N[…] that her visibility on the day was not good. N[…] conceded that the window through which she viewed the incident was frosted. Visibility was not good because there was only a small opening in the window from which one could see. There was a light on the veranda and street lights far from house. A pillar further obstructed her view. She could not see properly because it was dark.

[8] No[…] then testified. She was aged 14 and testified through an intermediary. Her version of the events was that she was asleep in the bedroom when she was awoken by the sound of a gunshot. She peeped through a window in the back of the house but did not see anything. She, Nt[…] and N[…] then went to the sitting room and peeped through the window there. She heard the deceased speaking to someone in the garage. He was saying "Bandile, what have I done, brother." Then there was another shot fired. In total she heard two gunshots.

[9] M[…] was on his way to call his grandparents when he was stopped by one of the assailants and ordered to return to the house. She saw M[...] being slapped. This assailant, at all times, had his back towards her. She testified that she did not know the appellant.

[10] Her evidence was that N[…] jumped into the neighbour's yard and returned with the deceased's parents and two others. The police were then contacted. She made a statement to the police on 13 February 2010, approximately a year after the murder.

[11] According to No[…] she also heard people running in the yard but did not see their faces. She noticed that the assailants were wearing dark clothing, with one of them wearing a white cap. She stated that even though it was dark, light was being provided by the electric light from the house and the street.

[12] The last witness to testify for the State was M[…], who was 13 years old at the time of the trial and who also testified via an intermediary. His evidence was that on the day in question the deceased arrived home, opened the gate and switched on the electric light. He then heard a shot being fired. Whist he was still inside the house he heard the deceased say to the appellant: "Brother, why are you killing me?" M[…] then ran to the front of the house through the right hand side of the house. He saw the appellant shoot his father three times in the garage. In total there were three assailants.

[13] M[…] testified that the visibility was good at the time he witnessed the shooting because light was being provided by lights on the street, the veranda of the house and the garage. Furthermore the appellant's face was not covered. M[…] was on his way to go and call his grandparents when the appellant stopped him and slapped him. This gave M[…] a good view of the appellant. M[…] was ordered to return to the house.

[14] M[…]'s evidence was that he and N[…] ran and jumped into the neighbour's yard. Pretty, the neighbour, phoned the police. When the police arrived M[…] told them that the appellant had shot the deceased.

[15] M[…] knew the appellant prior to the shooting because he used to accompany the deceased to the location (Esibongile) which is where the deceased would go to fix his motor vehicle. The repairs were carried out at the appellant's uncle's home. He did not ever speak to the appellant but knew the appellant's name.

[16] He knew P[…] because she used to borrow money from the deceased. He did not know whether the deceased had a relationship or a child with P[…]. He knew that P[…] stayed at the Mhlungu residence. During cross-examination M[…] testified that he did not tell N[...] that the deceased had a child with P[...]. He in fact said that N[...] was lying to the court. He went on to further state that he did not have a good relationship with N[...].

[17] M[...] testified that he had never seen the appellant and P[...] together. It was put to him during cross-examination that he had made a statement to the police wherein he stated that the appellant had assaulted P[...]. He denied having said this to the police. Inspector Mthembu, who was later called as a witness by the defence, testified that he had taken down the statements from M[...] and confirmed that he wrote down everything that was said to him by M[...].

Appellant's case

[18] The appellant's defence was that on the day of the incident he was at home with his girlfriend Ntombenhle Xaba (Ntombenhle). Earlier that day he went to his parental home. He left his parental home at 7:30 pm and returned to his home, with Ntombenhle, at 8 pm. Upon arrival at his home he found Mp[…] S[…], the tenant, and her child S[…] in the kitchen. There was a story playing on the radio. He sat with them for a short while (2 – 3 minutes) and he then went to his bedroom. He said the others, including Ntombenhle, listened to the story but he did not do so because he did not listen to stories.

[19] He was awoken at 2 am the next morning by his brother, Aubrey, who told him that he had heard that he (the appellant) shot someone. Aubrey was with the appellant's sister, Kara Mhlungu. The appellant accompanied Aubrey to the police station. Upon arrival at the police station they found an Inspector Khanyile. They informed him of the allegations against

the appellant. The appellant left his details at the police station. Two days later, on the 13th of March 2009, he was arrested.

[20] The appellant confirmed knowing the deceased but did not know where he lived. Whenever the deceased needed repairs done to his vehicles he would go to Sanele, who would in turn ask the appellant's uncle to use his garage to do the repairs. He further confirmed that M[...] used to accompany the deceased when repairs were being done. He did not speak to M[...] but used to speak to the deceased.

[21] The appellant suggested to the court as to why there may have been bad blood between himself and the deceased. Appellant stated that P[...] was his uncle's girlfriend and she had become the deceased's girlfriend after his uncle passed away. P[...] stayed with the deceased in the uncle's house. The appellant's family was not happy about this. The family did not want the deceased to bring his vehicles to the uncle's house for repairs. The appellant conceded to having assaulted P[...] and chasing her from his uncle's house. The deceased and M[...] were present when he assaulted P[...] and that's the reason for his implication in the deceased's murder.

[22] The appellant denied having shot the deceased. According to the appellant he had been implicated by M[...] because he assaulted P[...]. P[...] opened an assault charge against the appellant. The appellant stated that M[...] was lying to the court when he said that he did not know P[...]. According to the appellant M[...] knew P[...] because M[...] was with her on the day the appellant went to pick up his uncle's death certificate from her.

[23] Ntombenhle, the accused's girlfriend thereafter testified. She said that it is a 15 minute walk from her house to the appellant's home and a 5 minute walk from the appellant's parental home to her home. Her version was that the appellant fetched her from her house carrying a lunch tin. She could not recall the time but remembered that they reached his home at 7:40 pm. When they got to his home they first listened to a story on the radio with Ms C[…] N[…] S[…] (Mp[…]) and her grandchild S[…]. They then listened to the news at 8 pm. They all thereafter retired to bed. It was put to her that the appellant had testified that he did not listen to the story or the news. She denied this.

[24] Mp[…] confirmed Ntombenhle's evidence that the appellant also listened to the story and the news on the radio. She could not comment on the duration of the news. She testified that after the news ended they all went to their respective bedrooms. She was awoken by

the sound of a hooting vehicle and a knock on the appellant's window in the early hours of the next morning. She heard someone speak and then the appellant responding.

[25] Aubrey Ndaba, the appellant's brother confirmed that he drove to appellant's house at 2:45 am the next morning because he heard that the appellant killed the deceased. He tried for some time to wake up the appellant and eventually managed to do so by knocking on the appellant's bedroom window. He proceeded to tell the appellant that it was alleged that he had killed the deceased. They both then proceeded to the police station.

Application of the law

[26] The approach to be adopted by a court of appeal was set out in *S v Leve* 2011 (1) SACR 87 (ECG) para 8 as follows:

> 'The fundamental rule to be applied by a court of appeal is that, while the appellant is entitled to a rehearing, because otherwise the right of appeal becomes illusory, a court of appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record of evidence reveals that those findings are patently wrong. The trial court's findings of fact and credibility are presumed to be correct, because the trial court, and not the court of appeal, has had the advantage of seeing and hearing the witnesses, and is in the best position to determine where the truth lies.'

[27] Whilst there is no statutory requirement that a child's evidence must be corroborated, it has long been accepted that the evidence of young children should be treated with caution. See *R v Manda* 1951 (3) SA 158 (A) at 163C – E. The approach to be taken when applying the cautionary rule was set out by Diemont JA in *S v Sauls & others* 1981 (3) SA 172 (A) at 180E – G as follows:

> 'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in *S v Webber* 1971 (3) SA 754 (A) at 758). The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 may be a guide to a right decision but it does not mean
>
> > "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well-founded"
>
> (per Schreiner JA in *R v Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham* 1955 (2) SA 566 (A) at 569.) It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.'

[28] And in *S v Leve* supra the court went on to state in para 8:

> 'If the trial judge does not misdirect himself on the facts or the law in relation to the application of a cautionary rule, but, instead, demonstrably subjects the evidence to careful scrutiny, a court of appeal will not readily depart from his conclusions.'

[29] The trial court found M[...] to be a trustworthy witness. M[...] was 12 years old at the time of the murder. From a reading of the record there appears to be several contradictions in M[...]'s testimony and that of the other state witnesses. Some of these contradictions include:

29.1 During cross-examination No[...] stated that she was present when M[...] told the police that the appellant shot the deceased but when M[...] testified he said that when he spoke to the police he did so alone, No[...] was not present.

29.2 M[...] testified that he was still inside the house when he heard the deceased speak to the appellant. If this is in fact the truth one would have to question as to why N[...] did not hear anything.

29.3 The version of M[...] and No[...] differed with regards to the words spoken by the deceased to the appellant. No[...]'s statement was taken a year later. It is remarkable that in light of N[...] not having heard the words spoken by the deceased, the only common feature in M[...]'s and No[...]'s statement was the name Bandile.

29.4 One would have considered M[...] as being an eyewitness in regard to certain events because in his evidence he stated that the deceased arrived in his motor vehicle, alighted from the motor vehicle, opened the gate, opened the garage and switched on the electric light. In cross-examination he conceded that he did not see any of these things happening but heard them.

29.5 M[...] gave evidence that the deceased turned around and was then shot by the appellant. This could not have been possible because M[...] testified that he was inside the house when the first shot went off.

29.6 N[...] testified that she heard the two shots fired whilst M[...] was still inside the house. She then ran to the window and it was at this stage that M[...] exited the house. Yet M[...] stated that he was outside and saw the appellant shoot the deceased three times.

29.7 M[...] testified that the streetlight provided light and his visibility was good. N[...] however testified that the streetlight was a bit far from the house and hence visibility was not good. In fact, she added, during cross-examination

that the reason why the visibility was not good was "…because it was dark and it was at night".

[Record: page23 lines 21 -23]

29.8 N[...] said that she and M[...] had a good relationship but M[...] denied this. This contradiction though not directly relevant speaks on the reliability *veh non* of M[...]'s testimony.

29.9 M[...] denied that he told N[...] that the deceased had a child with P[...], as was testified to by N[...].

29.10 M[...] testified that he did not know that the appellant had assaulted P[...] however this was recorded in his statement to the police (see exhibit G2).

29.11 M[...] failed to furnish the trial court with an explanation as to how he knew the appellant's name. When questioned about this his response was that he just knew it.

[30] Further contradictions in the evidence of the State witnesses included:

30.1 No[...], whilst standing with N[...] at the window, heard the deceased speak to the appellant. N[...] on the other hand heard nothing. And as stated earlier M[...] testified that he heard the deceased speak to the appellant whilst he was still inside the house. We are therefore confronted with three different versions.

30.2 N[...] heard two gunshots being fired prior to reaching the window but No[...] testified that she was at the window when the second shot was fired.

30.3 N[...] was adamant that the lighting on the day was bad whilst No[...] stated that the lighting was good.

30.4 N[...] did not see M[...] being slapped. This information was relayed to her by M[...]. Yet No[...] testified that she saw M[...] being slapped. It is difficult to understand how two people who were looking out through the same window saw and heard different things.

30.5 No[...] did not know the appellant yet she was adamant that it was the appellant that the deceased had spoken to before being shot. The deceased did not mention the appellant's surname. There could be many people with the name Bandile yet No[...] insisted it was the appellant. This only confirms No[...]'s version that she was with M[...] when he told the police that the appellant had shot the deceased.

[31] In regard to contradictions, regard should be had to the principles enunciated in *S v Mkohle* 1990 (1) SACR 95 (A) at 98f – g where the court stated:

> 'Contradictions *per se* do not lead to the rejection of a witness' evidence. As Nicholas J, as he then was, observed in *S v Oosthuizen* 1982 (3) SA 571 (T) at 576B – C, they may simply be indicative of an error. And (at 576G – H) it is stated that not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence.'

The learned Judge *a quo* could not have ignored a major contradiction in M[...]'s statement to the police that the appellant shot the deceased in the face three times. This is inconsistent with the post mortem report which was received by consent. The post mortem report clearly shows that the deceased was shot in the thorax area and not in the face.

[32] The trial court further accepted the contents of M[...]'s statements but did not sufficiently deal with the main shortcoming thereof, which is that in one of the statements M[...] mentioned that P[...] was assaulted, but denied this in court. According to the trial court's judgment:

> 'Yes, it has to be appreciated that there has been contradictions in the statements that he made to the police officers but here in court he was able to give what happened on that day and he was also able to give answers to questions put to him.'

The learned Judge did not however properly evaluate these contradictions. It must be remembered that these statements were made immediately after the killing of the deceased.

[33] It is further trite that evidence of identification should be treated with caution. In this regard Holmes JA said in *S v Mthetwa* 1972 (3) SA 766 (A) at 768A - C;

> 'It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities…'

[34] In *casu* there can be no doubt that M[...] knew the appellant. M[...] was adamant that the lighting on the day was good and he clearly saw the appellant. However it cannot be

ignored that there were major inconsistencies between the evidence of M[...] and the other two state witnesses. A further point of concern is that if M[...] did witness the appellant shoot the deceased, the question remains as to why the appellant did not harm or kill M[...]. Surely a slap would not have been enough to 'buy' M[...]'s silence. Further upon being assaulted M[...] would have run away. Upon a conspectus of the evidence there is doubt created by M[...]'s evidence.

[35] The appellant's conviction can only be sustained if on a consideration of all the evidence his version of events cannot reasonably possibly be true. In *S v Shackell* 2001 (2) SACR 185 (SCA) at 194g - i, the learned judge of appeal had this to say:

> 'It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.'

[36] The issue of the time of the shooting was never discussed or argued during the trial. The first time it was raised was when the trial court was being addressed on the merits of the case. The trial court, during its judgment, stated that the '*main issue is the time from eight o'clock until around half past eight*.'

[37] In respect of time the following must be taken into consideration:

37.1 N[...] said she heard shooting at 9 pm. No[...] said that N[...] returned home at 8 pm that night. They then went to the bedroom and watched television, where she fell asleep and then heard shot. Then one has to question what the actual time of the shooting was. Could the trial court then be correct in suggesting that the important time was '*from eight o'clock until around half past eight'?*

37.2 The appellant's witnesses testified that the appellant was with them but he said he wasn't. If the appellant wanted to create a consistent alibi, he could have easily lied and placed himself in their presence throughout.

37.3 Important factors such as the distance of the appellant's home from the deceased's home was not canvassed during the trial.

[38] The appellant's alibi was proferred to the police as soon as he *mero motu* reported to the police. I shall advert to the nature of his alibi evidence after discussing the relevant case law.

[39] Van Der Merwe in the section 'The Evaluation of Evidence' in PJ Schwikkard & SE van der Merwe (in collaboration with DW Collier) *Principles of Evidence* 3ed (revised) (2009) at page 550, refers to *S v Malefo en andere* 1998 (1) SACR 127 (W) at 158a - e where the court set out five principles with respect to the assessment of alibi evidence:

> '(*a*) There is no burden of proof on the accused to prove his alibi. (*b*) If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt. (*c*) An alibi "moet aan die hand van die totaliteit van getuienis en die hof se indrukke van die getuies beoordeel word." (*d*) If there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable ("betroubaar"). (*e*) The ultimate test is whether the prosecution has furnished proof beyond a reasonable doubt — and for this purpose a court may take into account the fact that the accused had raised a false alibi.'

[40] The Constitutional Court in *S v Thebus and another* 2003 (2) SACR 319 (CC) (see paras 64, 65, 67, 68, 90 & 97) held that where the accused does not disclose the alibi timeously, a court does not need to remain neutral when deciding on what weight to give such evidence or defence. The right to silence is not necessarily absolute, and where the accused discloses the alibi defence (or any other defence) at a late stage in the trial, the court may draw any legitimate inference, on an examination of the evidence as a whole, this includes where the accused has been correctly cross-examined on the late disclosure of the alibi defence. The accused will be entitled to an acquittal where the alibi is reasonably possibly true, based on the all the evidence presented to the court. See also *S v Masilo* 2013 JDR 2053 (FB) at para 15.

In casu the appellant disclosed his alibi evidence at the outset and in fact reported to the police station in the early hours of the morning when he was informed by his brother that he was suspected of killing the deceased.

[41] Further to note to the above, the SCA in *S v Liebenberg* 2005 (2) SACR 355 (SCA) at para 15 held that where the evidence for the alibi is accepted as reasonably possibly true then the prosecution's evidence must be accepted as reasonably possibly false:

> "Where a defence of an alibi has been raised and the trial court accepts the evidence in support thereof as being possibly true, it follows that the trial court should find that there is a reasonable possibility that the prosecution's evidence is mistaken or false. There cannot be a reasonable possibility that the two versions are both correct. This is consistent with the approach to alibi evidence laid down by this Court more than 50 years ago in *R v Biya* 1952 (4) SA 514 (A). At 521C - D Greenberg JA said: 'If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime.'"

[42] The SCA in *S v Musiker* 2013 (1) SACR 517 (SCA) at paras 15 – 16 held that once an alibi has been raised, the alibi has to be accepted; unless it can be proven that it is false beyond a reasonable doubt. *S v Burger and others* 2010 (2) SACR 1 (SCA) at para 30 held that it is worth noting that mere lies for an alibi defence or for alibi evidence does not warrant 'punishment for untruthful evidence.' However, where an alibi is presented and it contradicts evidence presented before the court, and the alibi later turns out to be a lie (or falsehood), the lie together with the other evidence of the accused as a whole may point towards his or her guilt in certain cases.

[43] This reiterates the SCA's judgment in *S v Liebenberg* 2005 (2) SACR 355 (SCA) at para 14 where the following was held:

> "Once the trial court accepted that the alibi evidence could not be rejected as false, it was not entitled to reject it on the basis that the prosecution had placed before it strong evidence linking the appellant to the offences. The acceptance of the prosecution's evidence could not, by itself alone, be a sufficient basis for rejecting the alibi evidence. Something more was required. The evidence must have been, when considered in its totality, of the nature that proved the alibi evidence to be false."

[44] In *S v Liebenberg* (para 14) the court quoted the following from *S v Sithole* 1999 (1) SACR 585 (W) at 590g - i with approval:

> "There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has

proffered might be true. These are not two independent tests, but rather the statement of one test, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is not true. The two conclusions go hand in hand, each one being the corollary of the other. Thus in order for there to be a reasonable possibility that an innocent explanation which has been proffered by the accused might be true, there must at the same time be a reasonable possibility that the evidence which implicates him might be false or mistaken."

[45] Further, where alibi evidence is presented, the courts have often held that it should be tested or corroborated. In *S v Carolus* 2008 (2) SACR 207 (SCA) at paras 28 - 31 the SCA pointed out the importance of confirming or verifying the alibi evidence of the accused and that the most important corroborative witness (witnesses) should not merely just regurgitate the accused's version of events. In other words the witnesses should be able to corroborate the actual defence or evidence of the accused; these witnesses must be encouraged to speak to the police or make themselves available to testify at the trial. In *S v Mathebula* 2010 (1) SACR 55 (SCA) at para 11 the SCA further pointed out that the 'vulnerability of unsupported alibi defences is notorious, depending, as it does, so much upon the court's assessment of the truth of the accused's testimony'. The court further stated that the assessment of the 'truth of the accused's testimony' thus relied upon the court's findings of credibility and his reliability as a witness. Thus it is important that alibi evidence is corroborated by other witnesses. In *S v Mohammed* 2011 JDR 0580 (SCA) at para 8, the court further held that the reason presented for its late introduction was also insufficient; the SCA pointed out that the alibi lacked credibility where it was introduced at such a late stage in the proceedings as it was not properly tested.

[46] In summary of the above cases and authorities regarding alibi evidence or defence, the court must look at all the evidence presented before it when considering the alibi evidence or defence and whether it may be reasonably possibly true.

[47] Other guidelines that assist are:

(a) The alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.

(b) Further, the alibi needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.

(c) The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.

(d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail.

The learned Judge in her judgment, failed to properly analyse the alibi evidence of the accused and his witnesses. The aforesaid misdirections creates a doubt not only on the reliability of M[...]'s evidence but a doubt also on whether the State discharged the burden resting on it to prove that the alibi evidence cannot be reasonably possibly true. This doubt must ensure to the benefit of the accused. In the premises, I make the following order:

Order

[48] The appeal succeeds and the conviction and sentence are set aside.

_____

PATEL JP

I agree

_____

MBATHA J

I agree

_____

CHILI AJ

Date of Hearing :	Friday, 02 MAY 2014
Date of Judgment :	Friday, 16 MAY 2014
For the Appellant :	Adv J H Du Plessis
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