



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

CASE NO: AR 717/97

In the matter between:

SELBY NDEKU KHUMALO

Appellant

and

THE STATE

Respondent

Coram: Koen J (Sishi et Masipa JJ concurring)

Heard: 29 January 2018

Delivered: 16 February 2018

ORDER

- (a) The appeal against conviction and sentence is upheld.
- (b) The conviction of the appellant and the sentences imposed on him are set aside, and substituted with a finding that 'the first accused is found not guilty and discharged.'

J U D G M E N T

KOEN J

[1] On 23 April 1997, the court *a quo*¹ convicted the appellant, who was accused no. 1,² of:

- (a) Robbery with aggravating circumstances (count 1);
- (b) The murder of Buyisiwe Malevu (count 2); and
- (c) The attempted murder of Masibakela Zondi (count 3).

On 30 April 1997, the appellant was sentenced to:

- (a) Twenty years' imprisonment on count 1;
- (b) Twenty years' imprisonment on counts 2 and 3, which were taken together for the purpose of sentence, of which a period of ten (10) years was directed to run concurrently with the sentence on count 1.

On the same day the appellant was granted leave to appeal by the trial court to the full court of this division against the convictions and sentences.

[2] On 27 February 1998, the appellant's appeal was struck off the roll by the full court due to his non-appearance at the appeal, it being recorded that he had escaped from custody and was a fugitive from justice. The appellant has accordingly in a substantive application, now applied that:

- (a) This appeal be enrolled for hearing; and
- (b) His failure to prosecute the appeal timeously be condoned.

¹ Hurt J sitting with two assessors.

² There were three accused. Accused no 2 was also convicted on all three counts and received the same sentence as the appellant. His subsequent appeal against conviction and sentence is reported *sub nom* as *S v Khumalo and another* [1998] 2 All SA 294 (N) and was refused by Thirion J, with McLaren and Magid JJ concurring. Accused no 3 was acquitted by the trial court.

[3] The factual basis upon which such condonation is sought, as appears from the affidavit of the appellant, is as follows:

(a) After his conviction he was detained in the New Prison Pietermaritzburg;

(b) During July 1997 he fell ill and was admitted to the Edendale Hospital in Pietermaritzburg where he was kept under guard and chained to a hospital bed;

(c) On 12 July 1997 he was released from custody by the prison officials who unchained him and informed him that his appeal had been successful. They left him in hospital unguarded;

(d) With the assistance of hospital staff, he contacted his wife who then fetched him from Edendale hospital. He returned to his home in Newcastle where he lived and remained up until 2015. During this time he became a successful businessman which included inter alia owning a successful tavern. At no stage did he hide away. He lived a normal life;

(e) During 2015 an unlicensed firearm was discovered in his tavern, resulting in his arrest. When his fingerprints were taken, he was informed that he was sought on a charge of escaping from custody, it being alleged that in 1997 he had escaped from Edendale Hospital. He was charged in 'F' Court Pietermaritzburg under case number: 9987/15; Plessislaer CAS 260/7/1997. That case was subsequently withdrawn in court for reasons undisclosed;

(f) As he was leaving 'F' Court, he was apprehended and taken away to prison having been told that he now had to start serving the thirty (30) year sentence;

(g) He accepts that he was probably released erroneously;

(h) He has requested the senior public prosecutor to make available, copies of the docket relating to the escaping charge, but according to an email received from Lieutenant Colonel S Chetty of Plessislaer police station such docket cannot be found;

(i) He denies that he was advised of the date of his appeal and hence that he was given the opportunity to be present when his appeal was initially set down.

[4] The application for condonation was not opposed by the State. Whatever cynical view one may hold as to the correctness of the allegations advanced, there is nothing in rebuttal and the State has accepted that the appeal should be heard. I am disposed to granting such condonation, particularly in view of the conclusion to which I have come, regarding the merits of the appeal.

[5] Turning then to the merits of the appeal, the record is an extensive one, exceeding one thousand pages. In brief terms, the evidence incriminating the appellant upon which the State relied, included that of: ³

- (a) Mr Kingrose Ramthekeng Ramuthloa, an accomplice in the robbery;
- (b) Mrs Rachael Letuma, the wife of a co-perpetrator, Doctor Sithole, who was shot and killed on the day of the robbery;
- (c) Messrs Mandla Ntuli and Bonginqaba Zondi, who at an identification parade allegedly identified the appellant as the driver of the getaway vehicle used in the robbery, a blue Laurel with an NKR registration number.

[6] The appellant raised an alibi that on the day in question, namely 25 May 1990, he was at home. In support thereof, he referred to a criminal case which was opened against him in respect of an alleged assault by him on one Ms Nonqele Maqume, which according to the police Occurrence Book and Criminal Register⁴ is recorded to have occurred at about 10h45 at the appellant's home, namely house number 3613, Section 3, Madadeni District, Newcastle (it being common cause that the robbery resulting in the murder and attempted murder convictions having occurred around midday on that day).

[7] The trial court did not rely on the alleged identification at the identity parade, accepted the evidence of Mr Ramuthloa and Mrs Letuma, and rejected the alibi of the appellant.

³ I do not intend summarizing the evidence of the witnesses in any great detail. The material evidence of Mr Ramuthloa and various other witnesses relevant to this appeal is accurately and succinctly summarized in the judgment of Thirion J in *S v Khumalo* (supra) fn2. I cannot improve thereon.

⁴ Copies of the relevant pages of these official police records were handed in as exhibits. The authenticity thereof is not in dispute.

[8] The trial court's findings in regard to Mr Zondi and Mr Ntuli are somewhat ambivalent. It found that:

'The witness, Bonginqaba Zondi, who with Mandla Ntuli attended an identification parade where accused no. 1 was pointed out on the 23rd August 1990, we found to be not entirely reliable as a witness. He was plainly embarrassed in relation to his statement to the police to the effect that he recognised accused no. 1 because of his light complexion when, in giving evidence, he had indicated to us that it was the beard worn by accused no. 1 which had been the fundamental aspect by which he recognised him at the identification parade. However, I may say that we have had regard to the manner in his evidence as to what occurred in the course of the robbery fits in with the evidence of Mandla Ntuli and the other witnesses who testified to that aspect of the matter. Apart from his evidence about the identification of accused no. 2, we were inclined to regard him as a fairly good witness.'

No specific observation was made regarding the evidence of Mr Ntuli. The trial court however remarked that:

'Although we were not satisfied with the evidence which accused no. 1 gave about whether or not he had a beard on the occasion of the 25th May 1990 and whether or not that feature could have been used by the witness, Zondi, to identify him, we feel that it is unsafe, to have regard to the evidence of the identification parade, for the purposes of assessing the state case against accused no. 1.

Nevertheless, and even without that identification, we consider that the evidence which accused no. 1 tendered in support of his alleged alibi, is unsatisfactory and unconvincing and that, as a matter of fact, the evidence given by Kingrose Ramuthloa and other witnesses as to his involvement in the event which formed the subject matter of the charges is the truth.'

[9] It is trite law that:

- (a) The State has the onus of proving the guilt of an accused person beyond a reasonable doubt;
- (b) An accused raising an alibi has no onus to discharge, it being for the State to negative such alibi;
- (c) That if the version of an accused person is reasonably possibly true, he is entitled to the benefit of any doubt;

(d) If on a conspectus of all the evidence, the State case is so overwhelming that it cannot be said that the version of the accused could be reasonably possibly true, that a conviction could then follow.

[10] The trial court found that the appellant had given his evidence 'confidently and fluently and that there were not any signs of discomfort in the course of dealing with cross-examination.' It found however that unlike accused no. 2, the appellant attempted to disassociate himself entirely from any of the *dramatis personae* implicated by Mr Ramuthloa. It remarked further that there were several unsatisfactory features in the appellant's evidence inter alia relating to the frequency with which he visited the home of Mrs Letuma and her deceased husband Doctor Sithole, that it had not been put to any of the state witnesses that the appellant had been incapacitated by having plaster of Paris on his leg on 25 May 1990 (this only being referred to when he gave evidence), that he adjusted his answers and the degree of his incapacity to meet the exigencies of the questions being directed to him at the time, and that notwithstanding his alibi,⁵

'He made no mention of this during the period when he was incarcerated before being given bail [and] ...we nevertheless consider it curious, and at the lowest level, improbable that he would not have directed the police to their own records to establish that he could not have taken part in the robbery, which had been committed a mere month or so before he was arrested.'

[11] As much as the criticism of a failure to disclose an alibi might be valid if true, the learned Judge committed a misdirection in ignoring a crucial piece of the evidence, which was to the effect that the appellant had in fact informed the court of his alibi at the original bail application after the charges were initially proffered in 1990.⁶ On that occasion according to his uncontroverted evidence the senior prosecutor, Mr De Klerk, had in fact told the appellant to

⁵ That a charge of assault alleged to have occurred at about 10h45 at the appellant's house number 3613, Section 3, Madadeni District, Newcastle was opened with the police by Ms Nonqele Maqume is confirmed beyond doubt by extracts from the Occurrence Book and Criminal Register relating to CR number 224/05/1990 of 26 March 1990, being exhibits 'O1' and 'O2'. The original registers have subsequently been mislaid.

⁶ That was before the initial charges were withdrawn in 1992 but subsequently instituted afresh when the appellant was recharged in 1995.

go and make copies of the 'information' which was held by the police. It was as a result of that injunction that the police at his request had then made photocopies, in preparation for the trial which was to have taken place in 1992, of respectively the Occurrence Book entry and the entry in the Criminal Register, which were retained by him and became exhibits 'O1' and 'O2'.

[12] In evaluating the alibi of the appellant, it is so that neither exhibit 'O1' or 'O2' identified the appellant as the alleged assailant. However, the evidence of the appellant and his wife, Dawn Khumalo and a further defence witness, Mr Simanga Mdakane, who were present at his home on 25 May 1990, confirmed the assault on Ms Nonqele Maqume and her stated intention to report the appellant to the police. It was correctly accepted by the State that the entries in the Occurrence Book and Criminal Register could not be backdated and were probably made at or about the times indicated, as part of the completion of the registers maintained by the police. The chronological sequence in which the entries are made is also confirmed by the Criminal Register numbers in subsequent entries unrelated to this matter following consequentially after number 224/05/1990. The entries are plainly genuine and objective evidence of an assault at the appellant's home at around 10h45 on or about 25 May 1990 having been reported to the police on Saturday, 26 May 1990. That this might have been an assault by somebody else on Ms Maqume, which has now fortuitously been seized upon by the appellant to fabricate an alibi, as suggested by the State, can safely be discounted as improbable. The reporting of the incident and the recorded details relating thereto corroborate the evidence of the appellant, his wife and Mr Mdakane regarding his alibi in material respects.

[13] It is so that the appellant did not refer to the extent of his alleged incapacity due to his leg being in plaster of Paris until he gave evidence. He might not have been able to deliver the meat and beer to Mr Mdakane and others who had called at his home on the morning of 25 May 1990, after the feast of the previous day, and he might not have been able to carry out the assault, if indeed completely incapacitated to the extent that he was totally immobile. The impression I however gained from reading his evidence was

that any immobility due to his leg allegedly having been in plaster was probably overstated and an afterthought, and to that extent untruthful and constituting an attempt to gild the lily and distance himself even further from the crimes. That would probably explain his evidence in this respect being raised almost as an afterthought.

[14] Alive to those criticisms, including that his contentions were not raised specifically in his plea explanation, but only generally,⁷ having regard to the onus being on the State to negative such alibi once raised, one cannot but agree with the view expressed by Colonel van Tonder that the docket relating to CR224/05/1990 which would contain the first information of the crime against the appellant, should have been obtained. That was never done, presumably also because the docket was by the time of the trial no longer available. The appellant in his evidence further confirmed that both the complainant to his alleged assault, Ms Maqume, as well as the lady who had reported her conduct to him resulting in the assault, were still available. They were not called. No adverse inference should however in my view be drawn from that, as the appellant, his wife and an independent witness, Mr Mdakane had all testified as to the assault. The appellant is entitled to consider that evidence as sufficient. The issue is accordingly not one of an adverse inference being drawn, but one of the sufficiency of evidence and the probative value of their evidence.

[15] On the evidence relating to the alibi, it cannot be said that the version of the appellant was not reasonably possibly true. That evidence, however, must not be seen in isolation, but in the totality of all the evidence relating to the case. It might be argued that even if that evidence relating to an assault on Ms Maqume at the appellant's home at approximately 10h45 is accepted that it would not necessarily exclude the appellant's presence at a robbery which occurred around noon. The difficulty with that argument, however, firstly is that it was never explored as to whether there would be sufficient time for

⁷ His statement in terms of section 115 of the Criminal Procedure Act 51 of 1977 simply recorded that 'On 25th May 1990, I was at home in Madadeni during the course of the morning.'

the appellant to move from his home at Madadeni to where the crimes were committed at the pension pay out point at Nqutu. Distances and travel time were canvassed with Constable Ndebele, the first State witness, but the evidence remained fairly inconclusive and of a general nature. Secondly and more importantly, however, is that this was not the State case which the appellant had to meet. Mr Ramuthloa's evidence had been that he, Jerry, and the appellant in a Laurel motor vehicle, and the appellant's sister, left early in the morning, at about 3am. They proceeded to a point where the appellant's sister was allegedly requested to park her vehicle and keep the bonnet of the car open. The rest of them then went to the area where the robbery was to take place and in Mr Ramuthloa's words: '...waited there for some time for the car carrying the pay to arrive' (my emphasis). This version is in total conflict with any notion of the appellant being at his home and then leaving some time after 10h45 to participate in a robbery.

[16] The only other evidence is that of Mr Mandla Ntuli and Mr Bonginqaba Zondi. The trial court did not rely on the evidence relating to the identification parade. The reasons for that conclusion are not clear from the judgment. The propriety of the identification parade will always suffer from the fact that the officer in charge of the identification parade could not testify as he had passed away. Mr Ntuli and Mr Zondi, on their own evidence, had not been cautioned that the suspects involved in the robbery might not be included in the parade, but were simply told that they had to see whether they could identify those who were involved in the robbery from those present in the parade. That is an undesirable approach to adopt. Nevertheless Mr Ntuli allegedly identified the appellant, but without reference to any objectively identifiable features. Mr Zondi sought to justify his identification of the appellant with reference to the complexion of the appellant, which it turned out was not a particularly distinguishing feature, resulting in him thereafter relying on the appellant having had a beard. The further questioning which this elicited ended largely inconclusively depending on how one defines a 'beard'. I was left with the impression that the appellant in fact had some hair growth on his face at the time which could have been categorised as a beard. No such particular distinguishing features were listed by Mr Ntuli, but as the learned trial judge

correctly pointed out, identification is not always necessarily dependant on specific, unique and distinguishing features.

[17] There was nothing to suggest that Mr Ntuli and Mr Zondi were not honest. Their opportunity for observation was also adequate, the blue Laurel vehicle having driven past their parked vehicle allowing them to look at the driver, albeit mainly from a side view perspective. The only danger relating to their evidence resides in whether it was not possible, as a result of a suggestion by the police or others, that they might not have become convinced that the driver they observed was in fact the appellant when it was not.

[18] In the ordinary course, one would not speculate on such an issue in the absence of a clear factual foundation for doing so. There are however disquieting features about this case relating to the *modus operandi* which had been adopted by the police. These include the following: the matter was investigated by the notorious KwaZulu-Natal police, who, in the early nineties, had the benefit of also invoking draconian emergency regulations which allowed the detention of persons for up to ninety (90) days without judicial oversight; further during the pre-trial stage statements were taken from witnesses, who subsequently at the trial spontaneously exclaimed that these statements had been prepared for them by the police, and that they had to sign them on pain of being detained for up to ninety (90) days if they did not do so. The denial of invoking any such a threat by, amongst others Colonel van Tonder, was disputed by inter alia Mrs Dawn Khumalo. A subsequent statement obtained from Mr Ramuthloa and his evidence before the trial court differed in a number of respects from an earlier confession he had allegedly made. A subsequent statement contradicting earlier statements were made by a number of witnesses. The originals of these statements were also not available but unsigned typed up versions were often presented. There were also disquieting features such as Sergeant Swanepoel, the investigating officer, who cautioned Mrs Rachael Letuma after she had testified in chief but immediately before she was to be cross-examined, to adhere to what was contained in her statement.

[19] Not surprisingly witnesses, like Dawn Khumalo, but also others, stated that the contents of their statements which had been prepared for them by the police, and with which they were confronted for signature, were false.

[20] Mrs Rachael Letuma, like some of the other witnesses had made new statements to the police after the charges were reinstated. Not surprisingly these second statements added crucial information implicating the appellant. Bob Cebekhulu, Dawn Khumalo, and Bafana Hadebe all gave evidence that Colonel Van Tonder had cajoled and threatened them, supplied information to them, and that certain portions of their statements were false. The reason for Mr Ramuthloa making a second statement namely that he claimed that he had minimised his own complicity in the initial statement was false, as the contents of the second statement did not increase the role he had played in any material respects. It is also a disquieting feature that the police apparently negotiated with him over an extended period to persuade him to become a State witness. At that stage he had already been convicted in respect of another robbery and was incarcerated. He therefore potentially faced a further long period of imprisonment which he no doubt would want to avoid, and ingratiating himself with the police was one way to achieve that. It has been recognised that a cautionary approach is already required in respect of accomplice witnesses, but that special caution must be applied where a court has to deal with accomplices who have done a complete about turn and changed their statements, as these witnesses are self-confessed liars. Such evidence must be scrutinised with extreme caution.⁸

[21] Mrs Rachael Letuma also did not corroborate Mr Ramuthloa as the learned trial judge found. Indeed there were serious contradictions between their versions, Mr Ramuthloa having said that he had not told her about the robbery, but had lied and stated that her husband had gone to Nelspruit to get his driving licences. Her evidence was that the appellant had told her the same story Mr Ramuthloa had told her when she enquired from him, but when asked about what had been told to her, it was not that the appellant had gone

⁸ *S v McBride* [2013] ZAGPPHC 109 para 7.

to Nelspruit, but that there had been 'some shooting and they scattered, that he believed he had been arrested'. The learned judge had therefore erred in finding corroboration for Mr Ramuthloa's version in the evidence of Mrs Rachel Letuma.⁹ Furthermore, Mrs Rachel Letuma had received her deceased husband's proceeds of the robbery from Mr Ramuthloa¹⁰ which potentially made her an accomplice. Although this was raised by the trial court during her testimony, nothing further came of it, nor did the trial court when assessing her evidence recognise that she was an accomplice whose evidence would have to be treated with caution and would require corroboration.

[22] Leaving aside the alleged identification of the appellant by Mr Ntuli and Mr Zondi which the trial court did not seemingly seek to rely upon, the remainder of their evidence relating to the presence of the blue Laurel, is only confirmation of peripheral issues and would not be an adequate safeguard to Mr Ramuthloa after his negotiations with the police over an extended period and it becoming apparent that he could escape additional imprisonment, possibly substituting the appellant for the true culprit. Mr Ramuthloa is after all a self-confessed liar and not a stranger to the criminal world from previous experience.

[23] As regards credibility, the trial court favoured the demeanour of Mr Ramouthloa, although it remarked that the appellant gave his evidence confidently.¹¹ Demeanour is however a fallible guide to credibility.¹² As much as the trial court had the benefit of observing the witnesses when they testified, in the light of the trial court's remark that the appellant gave his evidence confidently, it would be dangerous to reject his evidence completely

⁹ The full court in *S v Khumalo* (supra) at 306a also concluded that the trial court had misdirected itself in concluding that certain evidence given by Mr Ramuthloa was corroborated by early statements made to the police by Bob Cebekhulu and Dawn Khumalo.

¹⁰ Not the appellant.

¹¹ There were certain unsatisfactory features in the evidence of the appellant, for example relating to the extent of his incapacity arising from his leg being in plaster of Paris, but even if he was dishonest in those respects, his mendacity in those regards do not detract from the evidence relating to his alibi as confirmed peripherally by the police Occurrence Book and Criminal Register entries.

¹² *R v Masemang* 1950 (2) SA 488 (A).

and/or base the conviction of the appellant solely or mainly on the demeanour of Mr Ramouthloa.

[24] On a conspectus of all the evidence, the State's evidence was not so overwhelmingly cogent that it negated the evidence relating to the alibi of the appellant altogether, or at least, that it cannot be said that reasonable doubt exists as to whether evidence relating to the alibi of the appellant, could not be reasonably possibly true.

[25] The appeal of the erstwhile accused no. 2 was unsuccessful, that being reported as *S v Khumalo*.¹³ The erstwhile accused no. 2 was implicated mainly by Mr Ramuthloa, without any additional evidence from Messrs Ntuli and Zondi. The trial and also the appeal of accused no. 2 however proceeded in the early days of our new Constitutional dispensation, when the jurisprudence relating to what constitutes a fair trial was still in its infancy. The requirement of a fair trial now plainly also extends to the pre-trial procedures when statements are taken by the police from State witnesses. The circumstances relating to these must be scrutinized very carefully, particularly where conflicting statements were obtained and/or there are repeated claims from more than one witness, as in casu, that they were presented with statements, pre-prepared by the police which they were simply required to sign, and which were signed because of threats of imprisonment in terms of the 90 day detention laws then current, but which would not have survived in our present Constitutional dispensation. I have misgivings as to the reliability of the evidence given by the many State witnesses, and this gives rise to a reasonable doubt which the appellant must be given the benefit of. To that extent, I therefore with the greatest respect, disagree with the conclusion reached in the appeal of the erstwhile accused no. 2, insofar as it may be contended, with reliance on that judgment, that a similar conclusion should follow in respect of the appellant. Plainly further, the respective legal position of the appellant and the erstwhile accused no. 2 are dissimilar inter alia

¹³ See footnote 2 above.

having regard to the evidence relating to the alibi of the appellant, which did not feature in respect of the erstwhile accused no. 2.

[26] The appeal against conviction and sentence is accordingly upheld. The conviction of the appellant and the sentences imposed on him are set aside, and substituted with a finding that the first accused is found not guilty and discharged.

Koen J

I agree

Sishi J

I agree

Masipa J

Appearances

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