



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable / Not reportable

Case no: A144/2024

In the matter between

LUCKY NKOSI

FIRST APPELLANT

LUCKY KHUMALO

SECOND APPELLANT

and

THE STATE

RESPONDENT

Coram: Naidoo J *et* Ntanga AJ

Heard: 3 March 2025

Delivered: 6 March 2025

Summary: criminal law - appeal against conviction – attempted murder and robbery with aggravating circumstances – circumstantial evidence – single witnesses - sufficient corroboration for version of state witnesses - Appeal dismissed.

ORDER

1. The appeal against the convictions is dismissed.
 2. The convictions imposed on the appellants are confirmed.
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JUDGMENT

Naidoo J (Ntanga AJ concurring)

[1] The appellants were convicted on 30 August 2019 on one count of attempted murder and one count of robbery with aggravating circumstances in the Frankfort Regional Court. The appellant approaches us with the leave of the trial court. The appeal lies only against their convictions.

[2] The appellants did not file a notice of appeal in this matter and request this court to accept the grounds of appeal as set out in the notice of leave to appeal filed in the court a quo, and on which it granted leave to appeal. The appellants seek condonation for the failure to file a notice of appeal. The respondent (the state) appears not to oppose the granting of condonation, and made no mention of it at all. In the interests of justice, condonation is granted to the appellants for their failure to file a notice of appeal. The appellants' grounds of appeal, as set out in the application for leave to appeal, against their convictions are, in essence, that the court a quo erred in:

- a. finding that there were no improbabilities in the state's version and rejecting the evidence of the appellants as not being reasonably possibly true;

- b. failing to properly analyse or evaluate the evidence of the state and finding that there are no improbabilities in the state's version;
- c. rejecting their versions as false;
- d. not considering the improbabilities in the state's version; and
- e. finding that the evidence of Thabo Philip Mapisa was satisfactory.

[3] The incidents relevant to this matter occurred in the early hours of 24 September 2017. However, in order to give context to these incidents, the state led the evidence of Thabo Philip Mapisa (Mr Mapisa), who is acquainted with a person called Duduzi Nyembe (Duduzi). The latter, who lives in the same area as Mr Maphisa, bought a car from Mr Maphisa. They had other business dealings with each other and became better acquainted. Duduzi thereafter frequently engaged Mr Maphisa to drive his (Duduzi's) vehicle and take him where he needed to be. Duduzi apparently could not drive well. Mr Mapisa testified about three instances when he was requested by Duduzi to transport him (Duduzi) and the two appellants to certain locations. He did not know the appellants and met them for the first time while transporting the them, as requested by Duduzi. The first time that Duduzi asked him to drive him was around September 2017, and he asked Mr Mapisa to drive to Secunda, where they picked up the two appellants and drove back to Heidelberg. He left the three men at Duduzi's house and returned to his home.

[4] About three or four days later, Duduzi called him again and requested him to drive him and the two appellants, this time to the road in Frankfort, leading to Reitz. They showed him a house in Villiers where he was instructed to wait for them until they needed him to fetch them from where he had dropped them off. He did as instructed, and found female persons in the house in Villiers. He ran some errands for the women and then waited for Duduzi and the appellants. Duduzi called him sometime between 22h00 and 23h00, he fetched the appellants and Duduzi and then all four of them headed back to Heidelberg where he left the three men at Duduzi's house and went back to his home.

[5] On or about 23 September 2017, Duduzi called Mr Maphisa and requested him to drive to Secunda, where the two appellants were picked up. They then proceeded, via Vrede, to Frankfort, where they asked to be dropped off, which Mr Mapisa did. He then proceeded to the house in Villiers where he went a few days earlier to wait for Duduzi and the appellants. He testified that he had dropped off the three men in Frankfort at around 23h50 that evening. Finding no one at home in the house at Villiers, he fell asleep

in the car. After waiting a while, he decided to leave and return home. Shortly thereafter he received a call from the first appellant, who was introduced to him as 'Dumisani' when he first met him. The first appellant requested him to meet the appellants and presumably Duduzi in Standerton. Mr Mapisa drove to Standerton, and the first appellant approached the vehicle he was driving and boarded the vehicle. He noticed the second appellant driving an Isuzu light delivery vehicle, commonly referred to in South Africa as a 'bakkie'. The second appellant was alone in the bakkie. It was now approximately somewhere between 2h00 to 3h00. It seems that the second appellant parked the bakkie near a shop and also boarded the vehicle that Mr Mapisa was driving. They instructed him to drive to Standerton where they live. He wanted to leave but they made him stay the night. Thereafter Duduzi called him and instructed him to pick up his (Duduzi's) girlfriend and return to Villiers, where he was.

[6] The reason for setting out Mr Mapisa's evidence in such detail is that the court a quo's assessment of the evidence was based on what he said, especially with regard to time frames, and the details of events that unfolded, which are relevant to the commission of the offences in this matter. The evidence of other state witnesses also became significant in the light of Mr Mapisa's testimony. While it seems that Mr Mapisa may be a single witness there was corroboration for his evidence. This was conceded by Mr Reyneke who represented the appellants. The complainants in counts 1 and 2, Mr John Leonard Muller and Mrs Maria Magdalena Muller were attacked at their farm in the Frankfort area, around midnight on 23 September 2017, and the incident lasted until after midnight, which became the morning of 24 September 2017. Mrs Muller was confronted in the house by a man she could not identify and he was robbed of her firearm. Outside, Mr Muller had been shot in the eye, and while he lay unconscious, his bakkie was stolen and driven away by the assailants. The time that Mr Mapisa said he dropped of Duduzi and the appellants in the Frankfort area on the evening of 23 September 2017 was a few minutes before the Mullers were attacked.

[7] The arresting officer, Sergeant (Sgt) Sibusiso Hendry Mahlangu, in the course of pursuing the Polo motor vehicle in which the appellants were found, saw an orange coloured object together with something shiny being thrown out of a window on the left hand side of the vehicle, in the vicinity of a coal conveyor bridge, ostensibly belonging to SASOL. After the three occupants of the Polo vehicle were apprehended, they searched

for this orange object but could not find it. About six weeks later, on 5 November, Mr David Joubert Steenkamp (Mr Steenkamp), an employee of SASOL who was performing routine duties with his colleague, discovered the firearm in the gravel road on the conveyor belt bridge. They reported this to the police who retrieved the firearm from Mr Steenkamp. The firearm was later identified by Mrs Muller as belonging to her and that it was the firearm of which she was robbed on 24 September 2017.

[8] The evidence of the various independent state witnesses therefore formed a picture of what occurred on the night that the Mullers were attacked and robbed, and which the court a quo took account of. Perhaps a more important aspect of the state case was the evidence of Daniel Bierman (Mr Bierman), who is a warrant officer in the South African Police Service and stationed at the Directorate for Priority Crime Investigation. He is a cellular telephone (cellphone) analyst. He was requested to analyse the cellphone records relating to the cellular number provided by the second appellant to the investigating officer, Captain Ndamane Daniel Moshoadiba, as well as the cellphone records of Mr Mapisa's cellular telephone. Mr Bierman read the cellular data relating to both numbers and was able to track the movements of the second appellant's cellular telephone on 23 and 24 September 2017, and the data corresponded with Mr Mapisa's evidence with regard to the places he had been to with Duduzi and the appellants, and the times that they had travelled.

[9] Furthermore, the cellular data showed that there was contact between the second appellant's number and that of Mapisa at approximately 2h41, such contact having been made from the second appellant's telephone while at Sakhile in Standerton, where Mr Muller's bakkie was found. Mr Mapisa testified that he saw the bakkie being driven by the second appellant and was parked by him at a shop in Standerton. He identified the bakkie and the location where it was found, when he was shown the photographs from the album which was handed in as an exhibit. For the reasons set out above, the evidence of Mr Mapisa was significant, and I cannot fault the examination and analysis of the evidence by the court a quo, including the weight it attached to the evidence presented to it. The appellants' versions amounted to a bare denial, without any substantial evidence to corroborate their versions.

[10] With regard to the warning statements made to Captain Moshoadiba by the appellants, the state and the defence agreed that these statements did not amount to

confessions but were in fact admissions. The defence attacked the credibility of the witness, Captain Moshoadiba, and not the admissibility of the statements. Both warning statements were handed in as exhibits. The court a quo clearly accepted that the appellants were bound by the actions of their legal representative in making the concessions he did in this regard. The subsequent allegation that the warning statements were pre-completed prior to their signing of same, was correctly rejected by the court a quo. From the warning statements, both appellants place themselves at the scene, being the farm of the Mullers. They confirmed that Mr Mapisa drove Duduzi's vehicle and dropped them off along the road. They went on foot to the farm.

[11] The rest of the warning statements corroborated the evidence of the Mullers as to how the events unfolded that evening. The appellants indicated that it was Duduzi who had the firearm, that he shot Mr Muller, that he went into the house and emerged with another firearm. The first appellant said he took possession of this latter mentioned firearm, and he also said that he had an orange hat that evening. Sgt Mahlangu saw an orange object with something shiny in it being thrown out of the Polo vehicle that he was pursuing. The second appellant took the keys of the bakkie from an unconscious Mr Muller and drove off with it. Mr Mapisa saw the second appellant driving the bakkie in Standerton, and saw him park the bakkie where it was eventually found and identified as belonging to Mr Muller. I pause to mention that accused 3 before the court a quo was a Mduduzi Jacob Nyembe. I believe there is no dispute that he is the 'Duduzi' that Mr Mapisa and the appellants referred to in the course of the trial. On 2 May 2019, the prosecutor withdrew charges against accused 3 and informed the court that the state will be calling him as a witness in terms of s 204 of the Criminal Procedure Act 51 of 1977 (the CPA).

[12] After the charges were withdrawn against him, accused 3 declared that he is an accused and not a witness in the case. The matter was thereafter remanded to the following day. From the record it appears that accused 3 was not called as a witness. During the defence case, the appellants indicated that they would be calling accused 3 (Mduduzi) as a witness, but that too appears not to have materialized. The prosecutor clearly did not understand or know what s 204 of the CPA entailed or how deal with a witness in terms of s 204. This is indeed regrettable as accused 3 appeared to have been a key player in the events leading up to and subsequent to the attack on the Mullers. This

was, however, not raised as an issue, and it need not detain this Court any further.

[13] An appeal court will be very slow to interfere with a trial court's findings on fact and its credibility findings as it is accepted that the trial court was in a better position to see and hear the witnesses and assess the evidence against those observations. In *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705 the majority, per Greenberg JA and Davis AJA (Schreiner dissenting) said:

'The trial court has the advantages, which the appeal judges do not have, in seeing and hearing the witness and being steeped in the atmosphere of the trial. Not only has the trial court the opportunity of observing their demeanour, but also their appearances and whole personality. This should not be overlooked.'

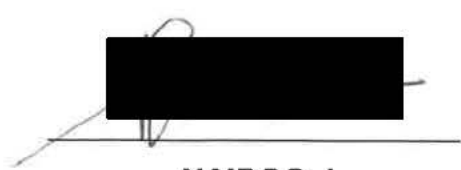
A similar view was adopted in *S v Pistorius* [2014] ZASCA 47; 2014 (2) SACR 315 (SCA) para 30, which cited, *inter alia*, *Dhlumayo* with approval:

'It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong. *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 706; *S v Kebana* [2010] 1 All SA 310 (SCA) para 12. It can hardly be disputed that the magistrate had advantages which we, as an appeal court, do not have of having seen, observed and heard the witnesses testify in his presence in court. As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, *this court* is not at liberty to interfere with his findings.'

[14] The trial court clearly considered all the above evidence, including discrepancies and contradictions, such as that in Mr Mkonde's evidence, where he said that the first appellant had an orange hat and then contradicted himself. The trial court in this matter demonstrated a fair-minded and balanced approach to the evidence, and in view of what I have said above, the trial court committed no misdirection or irregularity in arriving at the conclusions it did. I cannot fault the reasoning of the trial court. In considering the grounds of appeal against the evidence presented to and considered by the court *a quo*, it is clear that those grounds lack merit, and that the appeal cannot succeed.

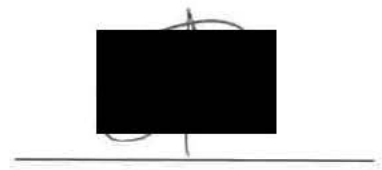
[15] In the circumstances, I make the following order:

1. The appeal against the convictions is dismissed;
2. The convictions imposed on the appellants are hereby confirmed.



NAIDOO J

I concur.



NTANGA AJ

Appearances

For the Appellant:

Adv JD Reyneke

Instructed by:

Legal Aid South Africa
Bloemfontein

For the Respondent:

Adv S Giorgi

Instructed by:

Director of Public Prosecutions
Bloemfontein