



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case no: A201/24

In the matter between:

FAHIEM CAROLUS

First Appellant

LUCIANO THOMAS

Second Appellant

and

THE STATE

Respondent

Coram: **SALDANHA J & JONKER AJ**

Heard: **8 August 2025**

Delivered: **11 August 2025**

JUDGMENT

JONKER AJ (SALDANHA J concurring):

INTRODUCTION

[1] This is an appeal by the appellants against both conviction and sentence. The appellants were convicted in the regional court on 31 March 2023 of murder with *dolus directus*, and sentenced to life imprisonment on 20 April 2023. The central issue for determination in this appeal is whether the state discharged its burden of proving the appellants' guilt beyond a reasonable doubt, particularly in light of their defence that they were not present at the scene when the incident occurred.

RELEVANT FACTS

[2] The relevant factual background is briefly as follows. The deceased was fatally wounded in an incident that occurred on 17 December 2018 at Manenberg.

[3] Both appellants were arrested and first appeared in court on 30 July 2019. They pleaded not guilty on 26 August 2020. They remained in custody throughout the trial and subsequent sentencing.

[4] After a lengthy trial, marked by numerous postponements and delays, the court convicted the appellants of murder and sentenced them to life imprisonment.

[5] During the trial, both accused consistently maintained that they were not present at the scene of the crime. Their version, as put to the state witnesses and confirmed under oath during their respective testimonies, was one of complete denial of presence at the scene of the crime.

[6] The second appellant, in particular, raised a defence of alibi only during cross-examination. He stated that at the relevant time he was with Mr Nombo, his probation officer. He further testified that he informed the arresting officers at the time of his arrest that he had been with Mr Nombo and that Mr Nombo was present when he was arrested.

[7] It is common cause that the state did not investigate this alibi nor called Mr Nombo, or any other arresting officers, to testify. At the point of the proceedings where the second appellant mentioned Mr Nombo by name, the trial was ongoing

and the evidentiary process was at that stage dealing with the admissibility of certain hearsay evidence.

ALIBI AS DEFENCE AND ONUS

[8] In criminal proceedings, where an accused raises an alibi as a defence, the legal position is well established: the onus does not shift to the accused to prove the alibi.¹ The burden of proof remains squarely on the state to establish the accused's guilt beyond a reasonable doubt.² An alibi constitutes a simple denial of presence at the scene of the crime and, if it is reasonably possibly true, it must be accepted.

[9] A court may not reject an alibi solely because it is raised late or appears improbable. In *S v Gcam-Gcam*,³ the Supreme Court of Appeal criticised the trial court for erroneously placing the burden on the appellant to prove his alibi. The court further criticised the state for failing to lead any evidence to disprove the alibi. As Cachalia JA observed:

“[62] The appellant raised a concrete verifiable alibi, the details of which he disclosed during the State case. The prosecution failed to adduce any evidence to disprove the alibi. It could and should have applied for an adjournment to investigate the alibi and in particular the existence and entries of the Emergency Medical Services register before concluding its cross-examination. And if necessary it could have applied to reopen the State case once the appellant had furnished more detail of the alibi during his cross-examination. Its failure to do so meant that the appellant's alibi could not have been summarily rejected, and the court erred in doing so. So, the conspiracy conviction against the appellant also falls to be set aside.”

THE EVIDENCE AT THE TRIAL RELATING TO THE ALIBI

¹ *S v Shabalala* 1986 (6) SA 734 (A).

² *S v Musiker* 2013(1) SACR 517 (SCA) para 15-16.

³ 2015 (2) SACR 501 SCA.

[10] At the trial, the state failed to make any effort to investigate or challenge the alibi defence raised by second appellant. No explanation was provided as to why this was not done, despite the state having sufficient time and opportunity to do so before the defence closed its case. It would have been both reasonable and practical for the state to call Mr Nombo - who is a state employee and the second appellant's probation officer - as a witness to confirm or refute the alibi. Given that the second appellant identified Mr Nombo by name and placed him at the centre of his defence, and further indicated that he had informed the police of this alibi at the time of his arrest, the state had a clear opportunity and duty to investigate and, if necessary, call Mr Nombo to testify. The state's failure to do so, despite its resources, the accessibility of the witness and that it has ample time to do so, is a material omission.

[11] The trial court does not appear to have engaged meaningfully with the defence of alibi or considered the implications of the state's failure to call Mr Nombo as a witness. Instead, the trial court criticised the accused for failing to present corroborative evidence and the trial court, in turn, proceeded to convict without properly engaging with the evidentiary implications of the untested alibi. In doing so, the trial court overlooked the fundamental principle that the onus rests on the state throughout, and that an accused's version, including an uncorroborated alibi, must be accepted if it is reasonably possibly true.

[12] The court may not reject an alibi solely on the basis that the accused failed to call a witness to corroborate it. The burden of proof in criminal trials always rests with the state, and it is not for the accused to prove their innocence or to establish the truth of the alibi. The fact that the accused does not call a potential alibi witness does not relieve the state of its obligation to prove guilt beyond reasonable doubt.

[13] The court is satisfied that the state did not discharge the burden resting on it. The appellants' version, and in particular the alibi advanced by second appellant, raised a reasonable doubt which ought to have been resolved in their favour. Counsel for the state correctly conceded that the state failed to discharge this burden and that the trial court erred in finding that it had.

[14] In the result, I propose that both appeals against conviction and sentence is upheld and that the convictions and sentences be set aside.

It is ordered:

The appeals against the convictions and sentences of both appellants are upheld.

E JONKER
ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

V SALDANHA
JUDGE OF THE HIGH COURT

Appearances:

For Appellants: Adv L Adams

For Respondent: Adv K Uys