



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

Not reportable

Case no: A149/2024

In the matter between:

TEBOGO STEVEN KHUZELA

JAPPIES BOIKIE MOKISI

and

THE STATE

FIRST APPELLANT

SECOND APPELLANT

RESPONDENT

Neutral citation: *Khuzela and Another v The State* (A149/2024) [2025] ZAFSHC 264
(28 August 2025)

Coram: Daffue *et* Opperman JJ

Heard: 25 August 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 16h00 on 28 August 2025.

Summary: Appeals against convictions and sentences – whether the State witnesses' identification of the perpetrators known to them was reliable and credible – no misdirection by court *a quo* – convictions upheld – no substantial and compelling circumstances to deviate from life sentences imposed.

ORDER

- 1 Condonation is granted for the late filing of the notice of appeal.
 - 2 The appeals of both appellants against their convictions and sentences are dismissed.
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JUDGMENT

Daffue J (Opperman J concurring)

Introduction

[1] In November 2018 gangsterism yet again raised its ugly head in Mangaung. On 16 November 2018 a former gang member was brutally killed by a mob of gangsters in the face of his mother and niece. His sin? He terminated his gang membership earlier and in doing so imposed a life sentence onto himself. The gang members that took centre stage in the events are two former members of the BTK gang (BTK), as well as three of their erstwhile colleagues and co-members. BTK is an acronym for Born To Kill.

The dramatis personae

[2] The *dramatis personae* during the dramatic events of 16 November 2018 and thereafter are:

- a. a former gang member, Sello Petrus Magwaga, who was brutally killed by a mob outside his RDP house during the night, herein later referred to as 'the deceased';
- b. Baptista Shemane (Baptista, as he was referred to in the trial and with no disrespect to him), a former gang member and a friend of the deceased who stayed in a shack behind the deceased's house;
- c. Palesa Rakosa (Palesa, as she was referred to in the trial and with no disrespect to her), the life partner of Baptista and a niece of the deceased;
- d. the three accused persons and BTK gang members, Teboho Stephen Khuzela, Morenanyane Jeffrey Senoge and Jappies Boikie Mokisi;
- e. the investigating officer, Warrant Officer Morena Machalotsa, to whom the identity

of the accused persons was communicated and who eventually arrested them; and

f. Warrant Officer JC Lombaard, a Crime Information Management Officer, who testified in aggravation pertaining to the purpose and activities of BTK.

The charges and ultimate convictions

[3] The three accused were charged with three crimes, to wit:

- a. housebreaking with the intent to commit a crime unknown to the prosecutor;
- b. robbery with aggravating circumstances; and
- c. murder.

[4] On 17 March 2020 they were convicted as charged. The learned regional magistrate found that the murder was planned and premeditated; therefore, s 51(1) of the Criminal Law Amendment Act 105 of the 1997 (Act 105 of 1997) became applicable.

[5] On 19 May 2020 the accused were sentenced to 20 years' imprisonment on counts 1 and 2, these having been taken together for purpose of sentence. They were sentenced to life imprisonment in respect of murder.

The appeal

[6] On 19 June 2024 the accused persons filed a notice of appeal, *ie* four years late. In terms hereof they appealed against the convictions and sentences in respect of all three counts. They had an automatic right of appeal in respect of the sentences of life imprisonment in respect of count 3,¹ but they failed to obtain leave from the learned regional magistrate to appeal in respect of counts 1 and 2. Notwithstanding the automatic right of appeal in respect of count 3, the notice of appeal has been filed hopelessly out of time. An application for condonation was filed. Scant reasons were submitted and no reasonable explanations were provided, but in order to obtain finality, the appeals should be considered on the merits.

[7] Khuzela and Mokisi, cited as the first and second appellants respectively in the parties' heads of argument, are the only appellants before us. The whereabouts of Senoge, the second accused, cited as second appellant in the notice of appeal, are unknown. Ms Kruger mentioned during oral argument that legal aid had not been granted

¹ Section 309(1)(a) of the Criminal Procedure Act 51 of 1977.

to him and that she did not hold any instructions from him.

[8] The grounds of appeal can be summarised as follows:

- a. the learned regional magistrate erred in finding that the State's witnesses properly identified the appellants as members of the mob that killed the deceased;
- b. the learned regional magistrate erred in rejecting the appellants' versions as false and improbable; and
- c. the learned regional magistrate erred in making a credibility finding in favour of the State's witnesses against the appellants.

Evaluation of the court a quo's findings and the submissions on behalf of the parties

[9] The only relevant consideration in this appeal is whether the learned magistrate was correct in accepting the State witnesses' versions about the identity of the perpetrators. I shall return thereto in a moment.

[10] A court of appeal's powers to interfere with the findings of the trial court on identity and credibility are limited. In *S v Francis*² the Supreme Court of Appeal relied on the *locus classicus*, *R v Dhlumayo and Another*³ and held as follows:

'This Court's powers to interfere on appeal with the findings of fact of a trial Court are limited (*R v Dhlumayo and Another* 1948 (2) SA 677 (A)). Accused No 5's complaint is that the trial Court failed to evaluate D's evidence properly. It is not suggested that the Court misdirected itself in any respect. In the absence of any misdirection the trial Court's conclusion, including its acceptance of D's evidence, is presumed to be correct. In order to succeed on appeal accused No 5 must therefore convince us on adequate grounds that the trial Court was wrong in accepting D's evidence - a reasonable doubt will not suffice to justify interference with its findings (*R v Dhlumayo* (*supra*); *Taljaard v Sentrale Raad vir Koöperatiewe Assuransie Bpk* 1974 (2) SA 450 E (A) at 452A-B). Bearing in mind the advantage which a 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 a trial Court's evaluation of oral testimony (*S v Robinson and Others* 1968 (1) SA 666 (A) at 675G-H).'

[11] Therefore, it is trite that 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

² *S v Francis* 1991 (1) SACR 198 (A) at 204c-d.

³ *R v Dhlumayo and Another* 1948 (2) SA 677 (A).

trial court's findings of fact and credibility are presumed to be correct. The trial court had the advantage of seeing and hearing the witnesses and is therefore usually in the best position to determine where the truth lies. The State did not have to prove the guilt of the accused persons beyond the shadow of a doubt.⁴

[12] It is accepted that even credible witnesses may make mistakes pertaining to their observations and identification of perpetrators. The trite principles set out in *S v Mthetwa*⁵ (*Mthetwa*) are still applied today. Baptista and Palesa experienced the dreadful events during the killing of the deceased from different angles. It is accepted that visibility cannot be described as ideal. The mobility of the crime scene and a mob in an excess of 20 people would make it difficult to identify the perpetrators. The learned regional magistrate duly accepted this and considered the evidence with caution. In my view, the acceptance of Baptista and Palesa's versions that they had sufficient opportunity to make a proper identification cannot be faulted, notwithstanding their evidence that the closest street mast light did not function properly all the time. Furthermore, Palesa observed the appellants whilst they were in the RDP house whilst the lights in the house were switched on. An aspect that confirms the veracity of their identification is contained in their witness statements. This cannot be ignored. These statements were made within a few hours after the commission of the crimes. The statements were handed in by the defence legal representative in order to show their different versions. More about the difference later herein. In their statements both witnesses referred to the observed perpetrators by their nicknames. This allowed the police to start searching for them soon, but by then they had fled from their residences. They could only be apprehended months later as the investigating officer testified.

[13] The most important aspect to be considered in regard to identification in this case is the witnesses' prior knowledge of the perpetrators identified by them. The court acknowledged in *Mthetwa* that such prior knowledge is one of the factors to be considered. Recently, the Supreme Court of Appeal evaluated prior knowledge of a perpetrator in *Abdullah v S*⁶ and commented as follows:

'[13] . . . Much was made of the fact that Mr Carelse only had between 2-4 seconds in which to

⁴ *S v Ntsele* 1998 (2) SACR 178 (SCA) at 182b-h.

⁵ *S v Mthetwa* 1972 (3) SA 766 (A) at 768A-C.

⁶ *Abdullah v S* [2022] ZASCA 33 para 13; See also *Arendse v S* [2015] ZASCA 131 para 10 and *Machi v The State* [2021] ZASCA 106 para 27.

observe the appellant. Had the appellant been a stranger to him, this could have been a significant factor. However, when seeing a person who is known to you, it is not a process of observation that takes place but rather one of recognition. This is a different cognitive process which plays a vital role in our everyday social interaction. The time necessary to recognise a known face as opposed to identifying a person for the first time, is very different. It has been recognised by our courts that where a witness knows the person sought to be identified, or has seen him frequently, the identification is likely to be accurate.' (Emphasis added.)

[14] This is not a case of a victim who had merely a fleeting moment to observe an unknown robber, taking their property at gunpoint only to vanish instantaneously. Baptista was a member of BTK. He knew the accused for about two years. They were friends who gathered and socialised on a regular basis. Surely it would be easy for a gang member, either former or present, to identify his co-members in situations that are less than ideal and when it might be impossible for third parties, not knowing the perpetrators, to identify them. Palesa, being the life partner of Baptista, also saw Khuzela and Mokisi, the two appellants, frequently at her uncle's RDP house, situated just in front of the shack where she and Baptista were staying. Both of them would visit the uncle and smoke together. She denied in cross-examination Khuzela's version that he only knew the deceased because he (the deceased) was selling cakes/cookies, which were later referred to as 'space cookies', ie cakes stuffed with drugs, although she admitted that a tuckshop was run from the premises by Ethiopians.

[15] Baptista and Palesa corroborated each other on crucial aspects. The brutality of the attack, the number of people who participated in the attack and the different weapons used are demonstrated by the admitted medico-legal post-mortem examination report prepared by Dr Jansen van Vuuren. His chief post-mortem findings were:

'multiple sharp, and sharp-blunt injuries including;

- a. Head injury with stab wound and subsequent sub arachnoid haemorrhage.
- b. Chest injury with stab wound to the heart through the septum of the heart.
- i. Minimal haemorrhage was noted with this and other internal injuries.
- c. Abdominal injury with multiple stab wounds and subsequent injury to the liver and intestines.'

Over and above the aforesaid chief post-mortem findings, numerous other stab wounds, cuts, puncture wounds, lacerations and bruises were documented, indicating that the injuries were caused by different weapons.

[16] It is clear from the evidence of Baptista and Palesa that the mob that was looking for Baptista, but could not find him as he was hiding behind a door, eventually killed the deceased. These people were 'baying for their blood' as Baptista testified. His version could not be denied. When he and the deceased resigned from BTK and removed their gang tattoos, members of the BTK gang started planning to kill them. It was not denied that once a member of BTK, always a member thereof.

[17] One aspect not pertinently dealt with by the learned regional magistrate in her judgment is the differences between the witness statements and the *viva voce* evidence of Baptista and Palesa. In *S v Mafaladiso en Andere*⁷ the Supreme Court of Appeal held that where there are material differences between the witness' evidence and their prior statement, the final task of the judge is to weigh up the previous statement against *viva voce* evidence, to put all the evidence together and to decide which is reliable and whether the truth has been told despite any shortcomings. This means that the court is enjoined to consider the totality of the evidence to ascertain if the truth has been told. The statements were taken within hours after the traumatic event. The State witnesses were in a severe state of anxiety and probably still confused. It is also possible that they conveyed information received from one another or even the deceased's mother who also witnesses the killing, without actually observing everything. However, there is no reason to reject their evidence tendered in the trial. Also, if they wanted to team up to falsely incriminate the accused persons, they would have ensured that Palesa identify accused 2 as one of the attackers. Instead, she did not do it and explained that he was not known to her before the incident.

[18] Warrant Officer Machalotsa testified that the three accused persons admitted to being BTK gang members. However, when they testified, they denied that. He explained that he was informed of the identity and residential addresses of the accused persons, but notwithstanding several visits to their homes, he only managed to arrest accused 1 and 2 on 25 February 2019 and accused 3 in April 2019. The accused persons never presented him with information about their alleged alibis as claimed by them during his cross-examination. There is no reason to disbelieve him.

[19] The three accused persons relied on alibis during the trial. It is accepted that they

⁷ *S v Mafaladiso en Andere* 2003 (1) SACR 583 (SCA) at 593e-594h.

had a right to remain silent and that it was not necessary to inform Warrant Officer Machalotsa of their alibis at the time of their arrest. They were also within their rights to remain silent during the plea proceedings, but such silence had its consequences and could eventually be duly considered by the learned regional magistrate during the evaluation of the evidence. This is such a case. The right to remain silent and the disclosure of an alibi defence were thoroughly discussed and considered in *S v Thebus and Another*.⁸ Moseneke J stated the following:⁹

'A distinction may properly be made between an inference of guilt from silence and a credibility finding connected with the election of an accused person to remain silent.'

He continued:¹⁰

'The late disclosure of an alibi is one of the factors to be taken into account in evaluating the evidence of the alibi. Standing alone it does not justify an inference of guilt. Secondly, it is a factor which is only taken into consideration in determining the weight to be placed on the evidence of the alibi.'

Finally, the learned justice concluded:¹¹

'The failure to disclose an alibi timeously is therefore not a neutral factor. It may have consequences and can legitimately be taken into account in evaluating the evidence as a whole. In deciding what, if any, those consequences are, it is relevant to have regard to the evidence of the accused, taken together with any explanation offered by him or her for failing to disclose the alibi timeously within the factual context of the evidence as a whole.'

[20] On Khuzela, the first appellant's version, he and Senoge, the second accused who is not an appellant before the court, attended a party at a certain Tseliso's place. After having received a call that his house has been attacked, they went home. Having discovered the damage, they noticed police vehicles coming from the deceased's home. They stopped these vehicles and reported the loss to the police. At that stage they were informed by the police that they (the police) were on the hunt for a group of murder suspects who had just killed a person. The police advised them to file their complaint at the police station which was done by one Lerato. Neither Lerato, nor any of the people who also attended the party that night, testified on their behalf and no proof has been provided of a case docket being opened.

⁸ *S v Thebus and Another* 2003 (6) SA 505 (CC) at 533 and further.

⁹ *Ibid* para 59.

¹⁰ *Ibid* para 67.

¹¹ *Ibid* para 68.

[21] All three accused people and the appellants in this appeal in particular, changed their versions during the hearing more than once. They eventually confirmed knowing the deceased and visiting the premises. Palesa earlier denied their version that they had bought 'space cookies' from the deceased, but it is evident that a tuckshop was run from the premises by Ethiopians. Their versions that they did not try to evade being arrested are false in light of their identification communicated to the police hours after the murder. The evidence of the investigating officer is clear and supported by the objective facts.

[22] I am satisfied that the learned regional magistrate has properly evaluated the evidence and carefully examined the merits and demerits of the State and defence cases in line with the following principles summarised by Heher AJA in *S v Chabalala*:¹²

'The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.'

[23] Consequently, there is no reason to interfere with the learned regional magistrate's judgment. The appeals against convictions should be dismissed.

[24] There is also no reason to interfere with the sentences of life imprisonment. For what it is worth, bearing in mind that no leave to appeal was granted in respect thereof, there is also no reason to interfere with the sentences of 20 years' imprisonment imposed in respect of counts 1 and 2.

[25] Warrant Officer Lombaard's uncontested evidence in aggravation is an eye-opener. He has studied the BK gang activities and testified in many cases involving its gang members. He confirmed that once a gang member resigns from BTK, he shall be killed as the resignation is seen as humiliating the gang. In most cases, large numbers of members will be organised to kill the former member. Usually, the person will not be shot with a gun, which is often an instantaneous death where not much blood is spilled. The victim must be killed by infliction of multiple stab wounds. Blood must be drawn. This is exactly what occurred in this case. A barbaric, brutal killing took place. A mob was

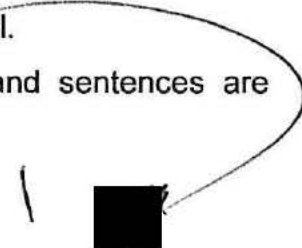
¹² *S v Chabalala* 2003 (1) SACR 134 (SCA) at 139i-j.

involved, including the appellants.

[26] In *S v PB*,¹³ in line with *S v Matyityi*,¹⁴ the Supreme Court of Appeal emphasised that prescribed minimum sentences should not be departed from lightly, or for flimsy reasons. I am conscious that life imprisonment is the ultimate penalty that the courts can impose and should not be imposed lightly, but there is no reason to interfere with the discretion exercised by the learned regional magistrate. They deserve the ultimate penalty. The personal circumstances of the appellants are not out of the ordinary and there is no reason to accept that these either individually, or cumulatively, should be regarded as substantial and compelling circumstances. The barbaric killing by a mob of people which was clearly planned and premeditated deserves one sentence only and that is life imprisonment. Bearing in mind the seriousness of the offences, it is required that the elements of retribution and deterrence should come to the fore and that the rehabilitation of the appellants should be accorded a smaller role as emphasised by the Supreme Court of Appeal in *S v Kekana*.¹⁵

Order

- 1 Condonation is granted for the late filing of the notice of appeal.
- 2 The appeals of both appellants against their convictions and sentences are dismissed.



J P DAFFUE

JUDGE OF THE HIGH COURT

I concur.



M L OPPERMAN

JUDGE OF THE HIGH COURT

¹³ *S v PB* 2013 (2) SACR 533 (SCA) para 20.

¹⁴ *S v Matyityi* 2011(1) SACR 40 (SCA) para 23.

¹⁵ *Kekana v S* (37/2018) [2018] ZASCA 148 (31 October 2018); *S v Kekana* 2019 (1) SACR 1 (SCA) paras 39-42.

Appearances

For the Appellants:

S Kruger

(the heads having been drafted by PL Van der Merwe)

Instructed by:

Bloemfontein Justice Centre, Bloemfontein.

For the Respondent:

S Tunzi

(the heads having been drafted by S Mdazuka)

Instructed by:

Director of Public Prosecutions, Bloemfontein.