



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

**CASE NO: AR74/2024**

In the matter between:

**PHILANGAYE NKATHALELO SITHOLE**

Appellant

and

**THE STATE**

Respondent

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**JUDGMENT**

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**LENNARD, AJ (with OLIFF, AJ concurring)**

[1] On the date that the matter was to be heard (the 24<sup>th</sup> July 2025) the court received a request by Mr Mkhwanazi on behalf of the appellant seeking an adjournment as the appellant wanted to raise an issue relating to the “constitution of the lower court” and to that end the matter was by agreement adjourned to the 1<sup>st</sup> July 2025. The appellant and state undertook to deliver further heads on this issue and the court is grateful for such assistance.

**IN LIMINE:**

[2] The appellant argues and contends that section 93ter of the Magistrate’s Court (Act 32 of 1944) makes it compulsory for such assessors to be

present/available and only the appellant's election not to want them present could serve to alleviate the consequences of the trial otherwise being a nullity. In this regard we are referred to the judgment of *S v Gayiya* 2016 (2) SACR 165 (SCA). Section 34 of the Magistrate's Court had since been substituted by section 1 of the Magistrates' Courts Amendment Act, Act 67 of 1998.

[3] The court view the above determination a pure question of law as envisaged by section 309(2) of the Criminal procedure Act, Act 51 of 1977 (hereinafter referred to as "the Act").<sup>1</sup>

[4] Section 304(2) of the Act makes it clear that ".....provided that, notwithstanding that the provincial or local division is of the opinion that any point raised might be decided in favour of the appellant, no conviction or sentence shall be reversed or altered by reason of any irregularity of or defect in the record or proceedings, unless it appears to such division that a failure of justice has in fact resulted from such irregularity or defect." It can only be considered by this court on a very narrow basis if there is an irregularity or defect in the record or proceedings. The in limine argument appears to be a technical attack on the Regional Magistrate predicated on an alleged failure to comply with the provisions of sec 93, but in order to assess same a court is obliged to revisit the transcribed proceedings in this regard.

[5] It does not appear from any pre-trial notice or minute that the appellant had intimated that he would required to have two assessors present. At trial the appellant was represented by Mr Magubane, who was present when the court requested whether the appellant required assessors and whether he required same. The court further asked whether the appellant understood what the court was referring to.

[6] In response to the appellant being asked whether he wanted assessors he replies in the affirmative, immediately thereafter Mr Magubane is requested to approach the appellant and advise him that the trial would have to be adjourned for same, at which point Mr Magubane immediately states that the appellant has confirmed that he "....has no need for the assessors."

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<sup>1</sup> Director of Public Prosecutions, *KwaZulu Natal v Pillay* 2023 (2) SACR 245 (SCA) at para [2]

[7] This should be the end of the need to make further enquiries from the appellant. He has made his election on record and there is nothing to suggest that he did not understand the consequences of such election, the trial ultimately proceeded with no assessors and there were no further complaints.

[8] The state has argued that the issue has been dealt with at trial and that the rejection of assessors on the part of the appellant is not fatal, and the court is in agreement with same.

[9] The record does not indicate that this resulted in any injustice or prejudice and it cannot simply be that in these circumstances the election made by the appellant in the presence of his attorney should be ignored. This in itself would lead to absurd results. Although the magistrate had not explained these rights in so many words, it appears that the appellant's legal representative was quite au fait with the terminology and consequences of such election, and this was not raised again on reflection at any later stage either. I do not agree therefore with the findings in the judgment of *Monyapheng v s* (CA 08/2023) [2024] ZANWHC 59 (16 February 2024) and the in limine point is dismissed.

[10] Gayiya requires only that the magistrate presiding at the trial bring to the attention of an 'accused' person the provision of section 93ter(1) and establish whether the 'accused' had made a request to proceed without assessors, in the event that such a request is made by an accused, the presiding magistrate may exercise a discretion regarding the appointment of assessors.

### **MERITS – CONVICTIONS:**

[11] The matter comes before us the Appellant having been charged (in the Ngwelezana Regional Court) and found guilty of one charge of murder (count 1) read with the provisions of section 51(1) of Part I of Schedule 2 of Act 105 of 1997, and (count 2) contravening section 3 (rape) of the Criminal Law Amendment Act, Act 32 of 2007, read together with the provisions of section 51(2) Part II of Schedule 2 of Act 105 of 1997.

[12] The Appellant was legally represented throughout trial and sentencing and pleaded not guilty to both charges.

[13] The Appellant argued for leave to appeal was argued in respect of count 2 and leave to appeal was granted on the 29<sup>th</sup> November 2023 and we today heard argument as to why the sentences in both should be reduced.

[14] In order to determine the veracity of the evidence one accepts that the Complainant in count 2 was also the main state witness in count 1. She is accepted to be a single witness on both counts and it was suggested by the state that that she was a reliable and credible witness and that her evidence ought to be accepted.

### **SINGLE WITNESS EVIDENCE:**

[15] In matters where one is confronted with the evidence of a single witness, it is accepted that the cautionary rule relating to such evidence should apply. In *S v Leve* 2011 (1) SACR 87 (ECG) at para [18] the court pointed out that, if the trial court does not misdirect itself on the facts or the law in relation to the application of the cautionary rule, but instead demonstrably subjects the evidence to scrutiny, the court of appeal would not readily depart from the trial court's conclusions. In terms of section 208 of the CPA (Act 51 of 1997) a conviction is sustainable based on the evidence if such evidence is clear and satisfactory in all material respects.

[16] I pause to add that the cautionary rule does not require the evidence must be free from all conceivable evidence, but the requirement is that it should be substantially satisfactory in relation to the material aspects to be corroborated. There is no perfect witness and minor discrepancies on immaterial issues, not pertinent to the matters at hand, cannot render such evidence tainted or compromised. The law even establishes that a portion of a witnesses' evidence may be rejected without clouding the balance of what was credible and reliable.<sup>2</sup>

[17] Two of the main criticisms against the complainant's/state witnesses' evidence was that it was not corroborated in material respects and secondarily that it was not easy and straightforward. We are of the view that in these circumstances a court should be satisfied not only that the identifying witness is honest but also that her evidence in this instance was reliable in the sense that she carried out proper and

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<sup>2</sup> *R v Mokoena* 1932 OPD 79 at 80; *Rugnanan v S* (259/2018) [2020] ZASCA 166 (10 December 2020) (unreported judgment SCA); *S v Manicum* 1998 (2) SACR 400 (NPD) at 404 e-j; *Baisley v S* (CA & R 244/2022) [2024] ZAECHGHC 37 (28 March 2024)

prudent observations (relating to count 1) in order to establish beyond a balance of probabilities that the person who entered the shack, kicked down the door and then proceeded to repeatedly shoot the deceased was her ex-partner, someone that she was familiar with to the point that she could even recognize his voice in the shack.

[18] Upon close scrutiny of the Complainant's/state witnesses'/Mrs N[...]s evidence it is clear that at the time of the commission of both these offences she was residing together with the deceased (and at some earlier stage both her children then thereafter with the deceased's daughter) in an area that is referred to in the transcript of proceedings as Myeni homestead at Thandaza area, and this area was for all intents and purposes the Complainant/ state witnesses' home.

[19] Ms N[...] (the complainant and state witness) was 37 years old when she gave evidence and disclosed so impediment testifying in an open court under oath to the truth that had transpired. From her initial evidence it appeared that her relationship with the Appellant was tumultuous and riddled with violent outburst but I could find nothing in the record to caution me against some undisclosed vendetta or agenda that she might have against the Appellant. Initially she had stayed at the appellant's homestead but moved to Myeni when the relationship was over and she became involved with the deceased.

[20] When questioned about the years of assault (my understanding this was abuse), she simply stated that she had reported this to the Appellant's mother and as it appears nothing much came of these cries for help. In our system of law the state is not established to establish a motive for committing a crime and accordingly I simply take notice of Ms N[...]s abuse and complicated past. I do so to ensure that I assess her evidence at a level of higher scrutiny and to ensure that she might not have been incentivized to bring these allegations against the Appellant. Having carefully scrutinized the record there are no indications that her evidence is anything but the truth and that she testified open and truthfully – I see no basis to question her motives or credibility.

[21] It appeared that Ms N[...] moved on with her life since the breakup with the Appellant, but the same could not be said for the Appellant. In one way or another he ensured that he kept contact with her (despite her wishes) and that he would contact

her regularly and know precisely her whereabouts. Her evidence was further that he would threaten her, and her evidence in all respects were coherent and clear.

[22] The rape incident that occurred on the 11<sup>th</sup> June 2022 can be found at volume 1 of the record at page 28 onwards, and her evidence is telling of an angry and jealous man that came to her shack that day in order to meet out some revenge presumably based on jealousy and raped her in front of her small child at knife point. Ms N[...] took a bath to get rid of the smell on her and this additionally cannot be question, her motivation was to distance herself mentally from this gruesome event – although this in retrospect would have minimized her forensic evidence, but her conduct does not raise any concerns – she had just been violated in the most deplorable fashion and her reaction was consistent with that of thousands of sexual victims across the country.

[23] Ms N[...] had admitted that when she was first asked about the rape incident by the deceased she admitted to him the identity of her assailant, in fact he gave her money to go and report the incident. At the Kwambonambi police Station they criticized her for having a bath and then took her to the Thuthuzela Centre to be examined. After having submitted her statement the police advised her to apply for a protection order and on her version thereafter she did not disclose the identity of the Appellant to anyone else due to the fact that she feared she would be blamed for having brought the Appellant “into” the deceased home.

[24] Her conduct in electing to do so was neither curious nor indicative of a lack of candor, it is a simple fact that she would have feared for a backlash from the deceased's family, suggesting that she might not be the best suited girlfriend for the deceased as she was permitting a harmful individual into an otherwise peaceful area.

[25] There was further evidence on record as to how the Appellant continued threatening Ms N[...] and the deceased and this as he was never served with the protection order, which I may add holds cold comfort to any victim of sexual abuse. Ms N[...] identified the number she was receiving these threats on as “0[...]”.<sup>3</sup>

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<sup>3</sup> Volume 1 Page 44 line 7

[26] Ms N[...] testified that she had moved to the deceased's homestead because of these threats. When she was asked by the prosecutor how she was able to identify the man who had killed the deceased, she stated that she was able to identify the Appellant by "his eyes" and "his hands" and "his nose". The evidence was presented in a coherent and logical fashion and I do not question her ability to identify a partner of some years, on whom she lived with and born a child from that same union.

[27] I would have been more circumspect had this witness identified the Appellant only after a once-off introduction, but this is far from the case. Courts of appeal have greater liberty to disturb findings of a court a quo when dealing with inferences and probabilities. I am not obliged to zealously look for points upon which to contradict the trial court's findings and conclusions and the fact that something has not been mentioned does not mean that it has necessarily been overlooked.<sup>4</sup>

[28] The Appellant entered the home and was holding a gun, she was even able to identify the fact that the deceased was shot four times and where he was shot (Volume I page 50). In her evidence Ms N[...] stated that when she left the home after the deceased was killed she encountered the deceased's sister and told her what had happened, but did not disclose to her who had committed the murder. The deceased's family was called but even after such meeting Ms N[...] did not state or disclose the identity of the assailant (although as per her evidence she clearly knew who he was). This is most certainly not as I see matters a defect in her evidence or a tell of untruth – she had every reason to fear the repercussions of a family that had just lost a brother or son and would have been confronted with the news that she had effectively brought this evil into the deceased's home so to speak.

[29] Her election not to make that initial disclosure is not evidence of any lack of candor or good faith, she proceeded to proceed her very vulnerable position in an area that was not her original home and where she might very well be treated thereafter as the outsider she was. I therefore do not find her conduct in not disclosing the Appellant's identity initially to the deceased's family matter as Ms

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<sup>4</sup> R v Dhlumayo 1948 (2) SA 677 (A); S v Robinson 1968 (1) SA 666 (A) at 675H; Minister of Safety and Security v Craig 2011 (1) SACR 469 (SCA) at [58]; S v Stevens (417/03) [2004] ZASCA 70; [2005] 1 ALL SA 1 (SCA) (2 September 2004)

N[...]’s rationalized applied logic and not a factor that would sway me on concluding otherwise that I agree that she was a good and believable witness in all material aspects (Volume 1 pages 58 to 64).<sup>5</sup>

[30] Ms N[...] had made all the necessary disclosure later to the police and I deem this to be appropriate – there is no suggestion in her conduct, reasoning or logic that she attempted to be evasive or dishonest. On the identification of the accused issue Ms N[...] withstood vigorous cross-examination and she did not alter her version nor was she sued by various propositions put to her (vol I pages 78 to 79), and as such I see no basis upon which her evidence can either be criticized least of all rejected.

[31] I now turn to the evidence of the other state witnesses, the second of whom was **Lt. Col A.B. Gumede** commencing at Volume I at page 109 of the record. At the stage that he had taken over the investigation and the docket from Sgt K.M. Mthethwa the investigations had either not commenced or were not completed (that issue is immaterial to a determination hereof). This witness confirmed that Ms N[...] had identified the Appellant to him, she however went further and also revealed the rape allegations she had made against the Appellant (Vol I page 112).

[32] The witness introduces the sec 205 subpoena’s wherein the cellphone tower evidence was secured with and confirms that the deceased’s cellular telephone number was “071 8002 391”. It is stated that the deceased resided in the Thandaza area and that the appellant resides in the Nozambulo area which are areas at a distance of one another (Vol I page 114). Lt. Col Gumede explains (satisfactorily) that on the 1<sup>st</sup> July 2022 as from 13h00 to 20h00 the Appellant’s cellular phone was picking up a network signal from the Kangelani tower in the Nkiyankiya area (the area within which the deceased’s home were at) and thereafter from 01h00 to 20h00 on the 2<sup>nd</sup> July 2022 the Appellant’s cellular phone was picking up a network signal from the Kwazini tower (the area within the deceased homestead) (Vol I pages 115 to 116). The call logs then pinned the appellant to certain areas at certain times.

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<sup>5</sup> S v Mehlahe 1963 (2) SA 29 (A); S v Mthethwa 1972 (3) SA 766 (A); Osman v Attorney-General, Transvaal [1998] ZACC 14; 1998 92) SACR 493 (CC) (Osman); S v Cupido (1257/2022) [2024] ZASCA 4 (16 January 2024)

[33] A significant portion of this evidence is the fact that when Lt. Col Gumede asked the Appellant where he was on the 2<sup>nd</sup> July 2022 (and inadvertently whether he had an alibi defense) he replied by stating that he elected to remain silent (Vol I page 120 line 23 to 24). A further relevant statement made by the appellant to Lt. Col Gumede is that he always had his cellular phone with him (Vol I page 122 lines 17 to 19). The evidence in this regard was not seriously challenged and as it pinpointed the exact whereabouts of the Appellant at certain stages.<sup>6</sup>

[34] Ms N[...] the identifying witness was honest and reliable in her observations. In both situations (the rape that she had to endure) and the murder (she was a witness to) she conducted herself with impeccable restraint knowing that her child could become the next victim if she resisted or attempted to fight the appellant off. The circumstances in which both these crimes were committed were horrendous at best.<sup>7</sup>

[35] The court in *Rugnanan v S* in the Supreme Court of Appeal ((259/2018) [2020] ZASCA 166) remarked that the cautionary rule of a single witness evidence does not require that such evidence must be free of all conceivable criticism, but the requirement is that it should be substantially satisfactory in relation to material facts corroborated.

[36] The court does not see any basis in law or fact to interfere with the conviction or sentencing in the lower court and accordingly in the result the following order is issued:

a. The appeal is dismissed.

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**U. LENNARD AJ**

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<sup>6</sup> *S v Dlamini & 2 Others* (In the High Court of Pietermaritzburg, Southern Circuit Local Division Held at Scottburgh – Moodley J, case number: CC66/2016P ; *S v Molimi* 2008 (2) SACR 76 (CC)) *S v Ganiel* 1967 (4) SA 203 (N); *S v Webber* 1971 (3) SA 754 (A) at 758 G-H

<sup>7</sup> *R v Masemang* 1950 (2) SA 488 (AD); *R v Dladla and Others* 1962 (1) SA 307 (AD) at page 310; *S v Mehlape* 1963 (2) SA 29 (AD); *Ribisi v S* (A306/2023) [2024] ZAGPPHC 1301 (4 December 2024)

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**M. OLIFF AJ**

I agree

**APPEARANCE DETAILS:**

For the Appellant : Mr DC Mkhwanazi  
Instructed by : Legal Aid South Africa (Durban Office)

For the Respondent : Mr SJ Ntombela  
Instructed by : Office of the Director of Public Prosecutions

Matter heard on : 24 June 2025  
Judgment delivered on : 25 October 2025