



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

**JUDGMENT**

Case No: A98/2023

In the matter between:

**KWANELE CUBA  
SIBUSISO FIHLA**

**FIRST APPELLANT  
SECOND APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Kwanele Cuba & Sibusiso Fihla v s State*(Case no A98/2023)

**Coram:** Wille, J et O'Brien, AJ

**Heard:** 6 February 2026

**Delivered:** 17 February 2026

**Summary:** Evidence-Circumstantial-Evidence-Assessment - Cumulative effect of Evidence – Evidence Unassailable – Appeal Dismissed.

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## ORDER

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1. The appeal is dismissed, and the convictions are confirmed.
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## JUDGMENT

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### **O'Brien, AJ (Wille J concurring):**

1. In a home-invasion murder on 6 July 2016, two-armed men entered the residence of the deceased and his family in Zwelihle, Hermanus. On that evening, the deceased, his wife, children and grandchildren were in the comfort and safety of their home, watching a program called Generations on television. While watching the program, two men, one tall wearing a black jacket, the other short wearing a brown jacket, knocked at the front door. One of the children, AB, who was busy in the kitchen, opened the door and saw the two men. These men requested to see the deceased, and as AB turned around to call the deceased, the two men followed her to the bedroom.
2. In the bedroom, both men drew firearms, and one pointed it at the deceased. The occupants were instructed to lie face down on the floor. The deceased wife was on the bed lying face down.
3. The men demanded the deceased's firearm, which he denied possessing, even after repeated requests. While responding, the deceased called his son M, who lived in an attached room. The evidence shows that M found his father's call unusual, suggesting that something out of the ordinary was occurring.

4. As the deceased rose from the bed, the shorter man shot him. He fired a second shot as the deceased again denied having a firearm. AB pleaded with the men not to kill her father. A third shot was fired, and the deceased fell to the ground.
5. AB was forced to show one of the men the location of the firearm, which was in a safe in the sitting room. The deceased's wife gave AB the keys, and AB handed them to one of the men, who opened the safe and took the firearm, which was in a bag inside the safe.
6. M entered the house, saw the two perpetrators in the bedroom, and left. In a panic, he asked the next-door neighbour to contact the police. He then went to the neighbour on the opposite side and saw the two men leaving the premises. Upon returning home, he found his mother and siblings distraught over the deceased's death.
7. Unable to console himself or his family, M left and followed the perpetrators. He went to FM's house, informed him of the incident, and kept the perpetrators in sight as they entered a white Quantum minibus taxi.
8. The minibus taxi had an Eastern Cape registration number, and a name was on the back window. FM saw the White minibus with 'Fishla Tours' written on the back windscreen. He confirmed these details and reported the incident to the police.
9. That evening, Warrant Officer Desville Hurne and Constable Tracy Stellenberg, stationed at Caledon, were on duty in Botriver when they received a radio call about a shooting in Hermanus. They were informed that a white Quantum minibus taxi with registration FMG was heading toward Cape Town.

10. Hurne observed the white Quantum with registration FMG on the N2 national road and requested assistance from nearby police stations. At approximately 20:30, the minibus was stopped at the Kromco apple factory.
11. Hurne approached the minibus taxi, and both the passenger and the driver exited. They were ordered to lie on the ground. He searched both the driver and the passenger and found black gloves and a cellphone in the latter's jacket pocket.
12. Warrant Officer Hurne inspected the minibus taxi and found two firearms. These firearms were lying exposed and unconcealed at the driver's feet. He also saw a small red box containing ammunition. The witness found a black 9mm pistol with 12 rounds in the magazine. The other firearm was a black-and-silver Norinco pistol with eight rounds in the magazine. He found another cellphone at the armrest on the driver's side. He confirmed the registration number as F[...] and the name Fishla Tours written on the back windscreen. The officers arrested the two occupants of the vehicle and took them to the Grabouw police station.
13. At the police station, all evidence was sealed in forensic bags in the presence of the appellants. Both appellants were tested for firearm residue on their hands.
14. The deceased was murdered in his home that evening. His son followed the perpetrators as they left and entered a taxi marked Fihla Tours with an Eastern Cape registration. Police stopped the vehicle around 20:30 and found two firearms, including the deceased's firearm. The time and distance between the shooting and the appellants' arrest were minimal. Except for the question of whether the appellants were present when the exhibits were sealed and whether the firearms were found in the minibus driven by them, the facts above are undisputed.

15. The state charged the appellants with murder, the unlawful possession of firearms and ammunition, the pointing of a firearm (AB being the complainant) under the Firearms Control Act, 60 of 2000 and robbery of the deceased's firearm. They were charged under the Criminal Law Amendment Act 105 of 1997, the so-called minimum sentence act. After a lengthy, protracted trial, both were sentenced to life imprisonment on the murder charge. The unlawful possession of firearms and ammunition was taken together for the purposes of sentencing, and the appellants were sentenced to 10 years' imprisonment. Regarding the pointing of a firearm, they were sentenced to 6 months' imprisonment. On the last robbery count, they were sentenced to 10 years' imprisonment.
16. Due to the life sentences, the matter proceeded to automatic appeal under [section 309\(1\) \(c\)](#) of the Criminal Procedure 51 of 1977.
17. Mr Van der Berg, representing both appellants (though not at trial), argued that AB, a teenager at the time, experienced trauma that made her dock identification unreliable. She described the first appellant as having a facial scar under his left eye, but the magistrate confirmed there was none, undermining her identification. The defense contends that the magistrate failed to exercise the necessary caution in respect of identification. Additionally, they argue that the cell phone evidence showing contact between the appellants before the incident was wrongly accepted.
18. Dock identification is the procedure in which witnesses are asked to point out the accused while the accused is seated in the dock during trial. While such identification is admissible, our courts have consistently treated it with caution, recognising that this method is susceptible to error, especially in situations involving traumatic events or brief encounters. The prevailing legal standard requires the court to consider the

circumstances under which the witness first observed the accused, including lighting, the witness's opportunity to observe, duration, distance, and whether the witness's description of the perpetrator corresponds to the accused. The courts emphasize the need for attentive, considered evaluation of identification evidence, recognizing the risk of honest but mistaken identification. Proper judicial caution demands that dock identification should be treated with caution.

19. A Court of Appeal is hesitant to interfere with the factual findings of a lower court unless there was a misdirection regarding the law or the facts. See *R v Dlumayo* 1948 (2) SA 677 (A). The case for standard appellate review by appellate courts is that they should defer to trial courts on factual findings unless there is clear error or a misapplication of law. In this way, *R v Dlumayo* guides the approach to considering evidence and decisions by ensuring respect for the trial court's advantage in assessing witness demeanour and credibility.

## **Discussion**

20. Circumstantial evidence is not lesser evidence. In *R v De Villiers*, the following was said about circumstantial evidence:

21. As was memorably stated in *R v De Villiers* regarding the probative value of circumstantial evidence:

*“Not to speak of greater numbers; even two articles of circumstantial evidence- though each taken by itself weigh but as a feather – join them together you will find them pressing on the delinquent with the weight of a millstone....It is of the utmost importance to bear in mind that, where a number of independent circumstances point to the same conclusion, the probability of the justness of that conclusion is not the sum of the simple probabilities of those circumstances, but is the compound result of them.”*

22. When analyzing circumstantial evidence, a court must consider the totality of the evidence rather than treating each piece in isolation. The court must determine whether the combined evidence points to the appellants' innocence or guilt. See: S v Reddy 1996 (2) SA 1 (A).

23. The approach to circumstantial evidence was established in R v Blom 1939 AD 188 at 202. The two cardinal rules of logic, which must be considered, are as follows:

*First, the inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn. Second, the proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.*

24. The circumstantial evidence against the appellants is overwhelming. This case presents circumstances where the circumstantial evidence is particularly strong.

25. The appellants claim that they met for the first time on the day of the incident, stating that the first appellant was driving a minibus taxi and picked up the second appellant near Hermanus. However, the cell phone records clearly contradict this version of events. The call data leads to the following logical conclusion:

26.

- a. If two individuals have been in contact over the phone and know each other's phone numbers before an alleged meeting, they must have known each other prior to that meeting.

- b. The cell phone evidence shows that the appellants communicated with each other before the day of the incident and had prior contact while at different locations in the Western Cape.
- c. Therefore, the appellants' claim that they met for the first time on the day of the crime is false.

27. This syllogism directly undercuts their narrative and supports the reliability of the circumstantial evidence presented.

28. After they shot the deceased, both the appellants left the scene in each other's company, got into a white Quantum minibus taxi with the registration number F[...]. On the back of that vehicle, the name "Fihla Tours" was written. That vehicle was stopped opposite the Kromco factory. In the vehicle, the police found two firearms, one of which belonged to the deceased. The appellants were arrested at 20:30. After the arrest, the appellants were taken to Grabouw police station, where they were assessed for gunshot residue on their hands. That test came back as positive. The appellants' claim that they were not aware of or handled the firearms is clearly false. Cartridges found at the murder scene were linked to a Vektor pistol, which showed that the pistol was used in the killing of the deceased. In other words, the Vektor firearm discharged bullets at the murder scene. The timeline between the death of the deceased and the arrest of the appellants is so close, which indicates that they were in the vicinity of where the offences were committed and where they were arrested.

29. The evidence in the preceding paragraph points to the appellants as the perpetrators of this heinous deed. The proved facts also show that only the appellants could have committed it. Any inference that two other unknown men committed the offences is excluded by the evidence of M, who followed the appellants from his home to where the latter drove

away in the minibus taxi in which they were later found. If it were not for M's persistent following of the appellants, they might not have been arrested. In any event, any suggestion that the police planted the firearms is so untenable that it must be rejected. The offences were clearly planned in the way they were committed. The appellants knew where the deceased lived; they approached his house together, insisted on the firearm, and left the scene in a minibus taxi with an Eastern Cape registration.

30. The criticism by the appellants that the dock identification of them by AB pales into insignificance, having regard to the totality of the circumstances. If the appellants' dock identification had been the only evidence implicating them, it would have been a different matter.

31. Another point taken by the appellants was that the learned magistrate should not have considered the evidence of the bail proceedings. During those proceedings, the presiding magistrate warned them that they had a right not to say anything regarding the merits of the case against them. Notwithstanding that warning, the magistrate went ahead and asked the first appellant whether he knew the second appellant. The first appellant answered in the affirmative. During those proceedings, the appellants were legally represented, and their representatives did not object to the magistrates' questioning. Without any objection, those bail proceedings were admitted into evidence during the trial. The appellants now contend that their right to a fair trial was infringed; therefore, they should be acquitted of the offences.

32. The submission is misconceived. Regarding the court's exclusionary discretion, section 35(5) of the Constitution determines:

*“Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.”*

33. In *S v Van Deventer* 2012 (2) SACR 263 at para 59, the court said:

*“... This principle is that, if the evidence would in any event have been discovered by lawful means, the exclusion thereof would generally be detrimental to the administration of justice.”*

34. During the bail proceedings, the magistrate asked the first appellant whether he knew the second appellant. The second appellant answered in the affirmative. This contradicts the evidence that they do not know each other. However, that evidence is false, having regard to the overwhelming circumstantial evidence which implicates the appellants. Having regard to the no-difference principle, the evidence would in any event have been admissible given the fact that both appellants were legally represented during the bail proceedings. Their legal representatives did not object to the questioning of the magistrate, nor did they request that the evidence be struck from the record as unfair, which would be prejudicial to the fair trial. Therefore, it would not be in the interest of justice to exclude the evidence of the bail proceedings as it would be detrimental to the administration of justice.

35. In my judgement the court a quo considered all the evidence in finding the appellants guilty. The learned magistrate did not misdirect herself.

36. I propose that the appeal against the convictions be dismissed.

**Order:**

I propose that the appeal be dismissed and the convictions be confirmed.

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**O' BRIEN, AJ**  
**Acting Judge of the High Court of South Africa**  
**Western Cape Division, Cape Town**

**Wille J (concurring)**

I agree, and it is so ordered.

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**WILLE, J**  
**Judge of the High Court of South Africa**  
**Western Cape Division, Cape Town**

Appearances

For appellants: Adv Van Der Berg

Instructed by: BEG Attorneys

For respondent: Adv Peter-John Damon

Instructed by: National Prosecuting Authority