

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: A252/23

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
SIGNATURE	<u>14 May 2026</u> DATE

In the matter between:

MZWANDILE EMMANUEL MKHWANE

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 14 May 2026 and is handed down electronically by circulation to the

parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 10h00 on 14 May 2026.

MNISI AJ (KUBUSHI J Concurring)

Introduction

- [1] This appeal has its origin in the Magistrates' Court for the Regional Division of Gauteng, Tsakane (trial court), where Mr Mzwandile Nkwane (the appellant), was arraigned on two counts of robbery with aggravating circumstances (counts 1 and 2), one count of housebreaking with intent to rob (count 3) and one count of attempted murder (count 4). He was found not guilty on counts 1 to 3, however, he was found guilty on count 4.
- [2] The State alleged that on or about 1 January 2019 and at or near Tsakane, in the Regional Division of Gauteng, the appellant unlawfully and intentionally attempted to kill Mpho Mulaudzi (complainant), a male person by shooting at him with a firearm. The appellant pleaded not guilty to the charge. He claimed that he was not present on the crime scene on the date and time the alleged offence took place.
- [3] The trial court convicted the appellant on 11 November 2022 and sentenced him to eight years direct imprisonment on 13 December 2022. The trial court made no order regarding the appellant's fitness to possess a firearm under section 103 of the Firearms Control Act 60 of 2000. He brought an application for leave to appeal both conviction and sentence on 13 December 2022. On 30 January 2023 the appellant's application for leave to appeal was dismissed by the trial court. The present appeal is with leave of this court, obtained on petition, against the appellant's conviction and sentence.

Background facts

- [4] The matter emanates from the events which took place on 1 January 2019 at Raymond's place (tavern), Tsakane, Gauteng. The complainant, who was in

the company of two friends (Nhlanhla Mnisi and Bongani Vilakazi), was drinking alcohol when he allegedly had an altercation with another man. They both started fighting inside the tavern until a security officer intervened and ordered them to move outside. The altercation between the complainant and the man, who was later described as Vajela by the complainant, continued outside the tavern, where they slapped each other. The complainant suddenly heard a gunshot and he immediately realised that he was shot in the stomach. he did not see where the gunshot came from. He ran to Nhlanhla's uncle's house where he reported the incident and he was taken to hospital for medical care.

- [5] The complainant further testified that he received a phone call from a certain police officer from Tsakane police station who advised him to attend an identification parade on 14 December 2019. At the police station he was taken to a certain room where he identified the appellant who was number six in a group of approximately six or seven people.
- [6] Mr Nhlanhla Mnisi (Mnisi) testified that on 1 January 2019, he was in the company of the complainant and Bongani Vilakazi at his uncle's place of residence celebrating the new year's festivities. They decided to visit Raymond's place where they continued to drink alcohol. The appellant, came with his girlfriend and sat next to them. At some point when he came back from visiting the toilet he noticed the complainant and Vajela having a quarrel and he managed to separate them. He was not present when the shooting incident took place outside the tavern. He only realised later when they went back to his uncle's place that the complainant was injured.
- [7] Bongani Vilakazi materially corroborated the evidence of Mnisi and the complainant. They all visited Raymond's place on 1 January 2019 in order to drink alcohol. Whilst they were seated inside a certain gentleman who was in the company of a lady came to sit next to them. The complainant and the said gentleman had an altercation after he accused the complainant of stepping on his feet. Bongani further testified that he followed Mnisi when the later left to buy more alcohol. When they came back the complainant and the gentleman were no longer there. They later found the complainant at Mnisi's uncle's place

and he was wounded on the stomach. They organised an ambulance which took the complainant to hospital.

- [8] The appellant's version is diametrically opposed to that of the State. He alleged that he was nowhere near the Raymond's place on that day. On 31 December 2019 he was with his friends from 18h00 until the following morning. He alleged that he has seen the complainant during 2018 around August or September when the complainant physically abused his sister on the street. He assaulted the complainant in defense of his sister. The complainant ran away leaving behind his bag which contained dagga inside. He never saw him again until he was arrested and he was pointed out by the complainant at an identification parade held at Tsakane police station.
- [9] Ms Nhlanhla Nkwane, the appellant's sister testified that they have been living together since she was born. She was with the appellant and their friends from the evening of 31 December 2018 until the following day. The appellant only left the premises around 21:00 to purchase alcohol and remained in the yard until the following morning.

Proceedings in the trial court

- [10] The trial court identified the identity of the perpetrator as a key issue and accepted the evidence of the identification parade as a fair process despite the fact that the identification parade form was never produced in court. The court was of the view that the evidence regarding the appellant's identity as the assailant was correct.

The legal principles

- [11] It is necessary to restate some basic principles.
- [12] The first is that the State bears the onus to prove the guilt of the accused beyond reasonable doubt. In the matter of *S v T 2005 (2) SACR 318 (E)* at paragraph 37 this Court, per Plasket J held the following, at paragraph 37

"The State is required, when it tries a person for allegedly committing an offence, to prove the guilt of the accused beyond a reasonable

doubt. The high standard of proof – universally required in civilised systems of criminal justice – is a core component of the fundamental right that every person enjoys under the Constitution, and under the common law prior to 1994 to a fair trial. It is not part of a Charter for criminals and neither is it a mere technicality. When a Court finds that the guilt of an accused has not been proved beyond reasonable doubt, that accused is entitled to an acquittal, even if there may be suspicions that he/she was, indeed, the perpetrator of the crime in question. That is an inevitable consequence of living in a society in which the freedom and the dignity of the individual are properly protected and are respected. The inverse – convictions based on suspicion or speculation – is the hallmark of tyrannical systems of law. South Africans have a bitter experience of such a system and where it leads to.”

- [13] Since the onus of proof rests on the State to prove the guilt of an accused beyond reasonable doubt, there is no onus on the accused to prove their innocence. In *Sithole v S* (868/2011) [2012] ZASCA 85 (31 May 2012) it was held:

*“[8] The State bears the onus of establishing the guilt of an accused beyond reasonable doubt and he is entitled to be acquitted if there is a reasonable doubt that he might be innocent. The onus has to be discharged upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt nor does it look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true. The correct approach is set out in the following passage from *Mosephi and others v R* LAC (1980 – 1984) 57 at 59 F-H:*

‘The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful guide to a proper understanding and evaluation of it. But, in doing so, one must

guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees’.

In weighing the evidence of a single State witness a court is required to consider its merits and demerits, decide whether it is trustworthy and whether, despite any shortcomings in the evidence, it is satisfied that the truth had been told. It must state its reasons for preferring the evidence of the State witness to that of the accused so that they can be considered in the light of the record. In applying the onus the court must also, where the accused’s version is said to be improbable, only convict where it can pertinently find that the accused’s version is so improbable that it cannot be reasonably possibly true.”

- [14] In order to be acquitted, the version of an accused need only be reasonably possible true. Nugent J explained the position as follows in *S v Van de Meyden* 1999 (1) SACR (W) at 448 F - G:

“The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent ... these are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent

explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other."

- [15] In *S v V 2000 (1) SACR 453 (SCA)* the Court stated as follows at paragraph 3:

"It is trite that there is no obligation upon an accused person, where the State bears the onus, "to convince the Court". If his version is reasonably possible true, he is entitled to an acquittal even though his explanation is improbable. A Court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is impermissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other Courts the test is whether there is a reasonable possibility that the accused's version may be true."

- [16] In *Otto v S [2017] ZASCA 114* the Supreme Court of Appeal held:

"The onus rests on the State to prove all of the elements of the offence of rape, including the absence of consent and intention. That is so even where, as in this case, the version put to the complainant by the appellant's legal representative was a denial of any sexual contact with her."

- [17] As this is a court of appeal, I may interfere with the factual findings of the trial court if on examination of the record I can find material misdirection. In the absence of a misdirection I am not entitled to interfere.

- [18] In *S v Hadebe & Others 1997 (2) SACR 641 (SCA)* at 645 E – F it was held:

"In short, in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct, and will only be disregarded if the recorded evidence shows them to be wrong."

Was the trial court correct in finding the appellant guilty

- [19] As outlined above, the Magistrate found the appellant guilty of attempted murder. What stands out in the Magistrate's findings are the following remarks:

"The Court will state further that even if the Court had accepted this alibi defence and found it to be reliable the probabilities still are clear as I have already indicated in both incidences that on 31 December 2018 to 1 January 2019 and 2 December 2019.

The probabilities are clear that it is probable that accused could have left and returned without being noticed, even if the Court had accepted but the Court has rejected it in any event."

- [20] That question whether the trial court was correct in its findings should, in my view, be answered in the negative for the following reasons: The Magistrate relied only on probabilities and improbabilities in her evaluation of the evidence. Her findings do not state that the State proved its case beyond a reasonable doubt, a test required in criminal proceedings. The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. In light of the above, it is my view that the trial court misdirected itself in making its findings based on an incorrect standard of proof.

The evidence of Identification parade

- [21] *Du Toit and Commentary* refer to 18 Rules of Practice with regards to identification parades. These are not rules of law, but are rules of Police practice to ensure a fair identification parade, and rules gleaned from reported cases.¹ In *R v Kola* 1949(1) PH H100 (A) the Court cautioned as to regards the value of an improper identification parade:

¹ See *R v Masemang* 1950(2) SA 488 (A) 493-4.

"But an identification parade, though it ought to be a most important aid to the administration of justice, may become a grave source of danger if it creates an impression which is false as to the capacity of the witness to identify the accused without the aid of his compromising position in the dock. Unsatisfactory as it may be to rely upon the evidence of identification given by a witness not well acquainted with the accused, if that witness has not been tested by means of a parade, it is worse to rely upon a witness whose evidence carries with it the hall-mark of such a test if in fact the hall-mark is spurious. Of course, an identification parade is not necessarily useless because it is imperfect. In some respects, the quality of the parade must necessarily be a question of degree."

[22] In *S v Mohlathe* 2000(2) SACR 530 (SCA) at 541a-d the following was held:

"Common sense dictates that the non-suspects participating in an identification parade should be similar to the suspect in general appearance. Indeed, as appears from the identification parade form which was used on this occasion, it is a matter of police practice that the non-suspects be 'of about the same height, build age and appearance' as the suspect and that they be similarly dressed. Where the parade includes several suspects, whose general appearance is markedly different, whether on account of height, build, age or otherwise, care should be taken to ensure that there are sufficient non-suspects whose general appearance approximates that of each of the suspects. In such circumstances it may be advisable to hold more than one parade, particularly if the number of non-suspects that would be required would result in the parade being unduly large and cumbersome. If the number of non-suspects whose general appearance approximated that of each suspect is too few or if there were other features of the parade which may materially influence an identifying witness, the probative value of the identification will be greatly reduced. The danger in such a case is, of course, that, because the identification is made at a parade, it carries with it an assurance of reliability which is unjustified."

- [23] In *Nkomo and Others v The State*² the Supreme Court of Appeal confirmed that:

"The potential risks of mistaken identification require a thorough assessment of the reliability and credibility of such evidence before placing significant weight on it. Factors that impact the reliability of the identification evidence are, amongst others, the lighting, visibility, mobility of the scene, proximity of the witness and their opportunity for observation and ... prior familiarity ...".

- [24] During the State's case, Constable Maphanga, the investigating officer (in relation to counts 1 to 3), testified that he arranged an identification parade conducted by his colleague Constable Da Gama. Constable Da Gama also testified and corroborated this evidence. However, no evidence was placed on record that an identification parade, which is a legal procedure, was ever conducted in respect of count 4.
- [25] In my view, the Magistrate's assertion that the identification parade was conducted in a fair manner is misdirected. There is no record that the identification parade was conducted in compliance with the provisions of section 37(1)(b) of the Criminal Procedure Act. Such record would include *inter alia*, the name of the investigating officer who arranged the identification parade, the date of the parade; the name of officer who guarded the witness(es) before he/ they attended the parade; the name of the officer who escorted the witness(es) to the parade; the name of the officer who escorted the witness(es) from the parade; the number of persons who attended the parade (including the appellant), and that they were of the same height and built.
- [26] The identification parade, if any, was not conducted fairly. In my view, the admission of such evidence has adversely affected the rights of the Appellant to a fair trial, guaranteed in section 35 of the Constitution.

² (Case no 130/2022) [2024] ZASCA 61 (26 April 2024) at par. 17.

[27] Furthermore, the witness for the State, Nhlanhla Mnisi, testified that he knew the assailant as Vajela. No one confirmed under oath on behalf of the State that Vajela is the same person as the appellant.

[28] What is more concerning is the complainant's evidence in chief where the following exchange took place:

"Prosecutor: Yes proceed you are at Raymond's place you bought four beers with Ntantla [sic] and Bongani then what happened.

Mr Mulaudzi: While we were seated I just felt pressed I then went out to go and pee. When I came back I stepped on the, on the gentleman by mistake."

Prosecutor: Okay proceed you stepped on the gentleman by mistake and what happened.

Mr Mulaudzi: After I stepped on the gentleman by mistake and when I tried to apologise to the gentleman he started hitting me with an open hand."

[29] The complainant later testified that he knew the appellant as Vajela. The prosecution provided no explanation for this change of name, as the complainant had initially described him only as a gentleman. His witness Mnisi denied that he informed the complainant of the appellant's name.

[30] The complainant provided hearsay and speculative answers during the identification parade, both in examination in chief and cross-examination. The following exchange is illustrative:

"Prosecutor: And how did you know that you are supposed to attend an ID parade on that day at Tsakane police station.

Mulaudzi: I received a phone call from a certain police officer from Tsakane police station.

Prosecutor: Okay then on your arrival at the police station here in Tsakane then what happened.

Mulaudzi: Upon my arrival I found a police official who took me to a certain room. After I was sitting and waiting in that room another police official came and took me to where I was supposed to identify.

Prosecutor: Yes

Mulaudzi: Upon my arrival I then identified Mzwandile the very same police official took me to where I was waiting."

- [31] The Prosecutor did not request the witness to name the police officers involved in the aforementioned process. Furthermore, the complainant testified that he knew the appellant's name "*from the police station*" without specifying who had informed him.
- [32] In evaluating this evidence, the Magistrate found that "*although the form is not before this court it is not even one the court would rely on regarding identity. I just had to explain that it is also being corroborated by the accused that it indicates the fairness of that parade.*"
- [33] It is a well-established legal principle that when identification is in question, the evidence purportedly identifying the person accused of the crime should be examined with caution. The frequently cited words of Holmes JA in *S v Mthetwa*³ remain relevant:

'Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such

³ 1972 (3) SA 766 (A) at 768 A-C

of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities ... '

- [34] In my view, the Magistrate erred in failing to consider that the complainant's evidence was unreliable as no weight can be attached to the identification of the accused during such an identification parade.

The single witness testimony

- [35] The evidence regarding the shooting is one of a single witness. It is trite that in terms of section 208 of the CPA, an accused may be convicted on the evidence of a single witness provided same is satisfactory in all material respects. In *S v Sauls and others* 1981 (3) SA 172 (A), the following *ratio decidendi* was set out:

"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in S v Webber 1971 (3) SA 754 (A) at 758. The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded."

- [36] During his evidence in chief, the Complainant made contradictory statements. The following exchange occurred:

"Prosecutor: Now I am going to ask you do you know who fired this shot and who wounded you.

Mr Mulaudzi: Yes

Prosecutor: Please indicate to us who fired this shot or who wounded you.

Mr Mulaudzi: It is brother Mzwandile.

Prosecutor: Now did you see Mzwandile firing this shot at you.

Mr Mulaudzi: As I have explained before Your Worship that we were fighting I did not notice that he is the one who took out the firearm and shot at me."

- [37] The appellant's attorney asked questions regarding the same incident. The following exchange took place:

"Ms Magayi: And then you did not see or noted where that shot was coming from.

Mr Mulaudzi: No I did not see Your Worship.

Ms Magayi: So it could have come from anywhere because when the gunshot went off you did not, you only realised that you were shot.

Mr Mulaudzi: Correct so Your Worship."

- [38] The complainant also testified during cross-examination that the assailant was in the company of two people. This directly contradicts Mnisi's evidence that a man arrived with his girlfriend and sat next to them.
- [39] It is also concerning that Bongani Vilakazi, who was in the company of the complainant and Mnisi, was allowed to complete his evidence without being asked to identify the individual who had an altercation with the complainant.
- [40] Instead of evaluating the contradictions, the Magistrate held: *"The probabilities are that if the shot was fired by someone else somewhere it would be impossible for the shot to injure the, [sic] to injure Mr Mulaudzi on his abdomen entering in his abdomen without injuring the accused person because they were facing each other."* She proceeded to remark that *"It would have gone through him, through the accused to get to Mr Mulaudzi."* I consider this finding to be speculative.

- [41] In these circumstances, I should question whether the state has proven the appellant's guilt beyond reasonable doubt. I am not satisfied that it has.

Alibi

- [42] An accused person's *alibi* defence should not be viewed in isolation but 'in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses'.⁴ The appellant's *alibi* defence was unjustifiably subjected to microscopic scrutiny. I do not think that the appellant would have done any better than he did in the circumstances when accounting for his whereabouts on 1 January 2019.
- [43] The investigating officer in this case was never called to testify. It is unclear whether the appellant informed him of his whereabouts when arrested in relation to count 4. Furthermore, no witness testified regarding the circumstances that led the police to believe the appellant arrested by Maphanga for counts 1 to 3 was also the same suspect wanted in relation to count 4. The complainant further testified that he knew the appellant "*through another guy who resides in the same vicinity with me Your Worship. They used to play chess together*".
- [44] The appellant's evidence that he was at his residence at the time of the incident that resulted in the complainant's shooting was corroborated by his sister. Moreover, the appellant was only arrested on 13 December 2019, more than 11 months after the commission of the offence. The State proffered no explanation for such a lengthy delay in bringing the appellant to court.
- [45] Except for the complainant's evidence regarding the shooting incident, there was no other evidence to contradict the appellant's account of his whereabouts. As I have outlined earlier, the complainant himself testified that it is possible that someone else could have pulled the trigger. On closer examination, the complainant's evidence regarding the shooting incident was not corroborated and was not satisfactory in all material respects. In the

⁴ *R v Hlongwane* 1959 (3) SA 337 (A) at 341A; see also *S v Khumalo en Andere* [1991] ZASCA 70; [1991] 2 All SA 341 (A); 1991 (4) SA 310 (A) at 327H.

circumstances, the appellant's *alibi* stood uncontested. It could not properly be dismissed as being false beyond reasonable doubt. Consequently, the trial court ought to have found that the State had failed to prove its case.

Conclusion

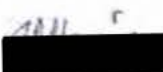
[46] In conclusion, I believe the trial court erred on the following grounds: it erroneously accepted Mr Mulaudzi's evidence of the identification parade, failed to approach his single witness evidence with caution, and it erred in rejecting the appellant's *alibi* defence. Furthermore, the trial court erred in failing to take into consideration that the State failed to prove its case beyond a reasonable doubt.

[47] In light of the above, it is my view that the appellant was wrongly convicted by the trial court.

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

- 1 The appeal is upheld.
- 2 The order of the trial court is set aside and replaced with the following:

"The accused is found not guilty and is discharged."


MNISI AJ

Acting Judge of the High Court

Gauteng Division, Pretoria

I Agree and it is so ordered


KUBUSHI J

Judge of the High Court

Gauteng Division, Pretoria

Date of hearing: 21 April 2026

Date of judgment: 14 May 2026

Appearances:

For the Appellant: Adv MG Botha

Legal Aid South Africa, Pretoria

For the Respondent: Adv A Coetzee

Director of Public Prosecutions, Pretoria