



DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED. YES

3 December

2021

.....

DATE

SIGNATURE

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

Appeal No.:A314/2016

Case No. SS 129/2003

DPP Ref No: JPV 2003/107

Date of Appeal: 15 November 2021

In the matter between:

KHOZA, SAMUEL

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

This appeal was, by consent between the parties, disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

This judgment will be handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 3 December 2021.

KARAM, AJ:

A. INTRODUCTION

1. The Appellant, Accused 4 at the trial, was indicted in this Court on the following charges:-
 - 1.1 count 1 – robbery with aggravating circumstances;
 - 1.2 count 2 – murder;
 - 1.3 count 3 – unlawful possession of a firearm; and
 - 1.4 count 4 – unlawful possession of ammunition.
2. On 29 September 2004 he was convicted as charged.
3. On 13 October 2004 he was sentenced as follows:
 - 3.1 count 1 – 15 years imprisonment;
 - 3.2 count 2 – life imprisonment;
 - 3.3 counts 3 and 4 taken together for purposes of sentence – 3 years imprisonment.

4. Leave to appeal having been refused, the Appellant (as well as Accused 3 at the trial, one Patrick Siphon Gumbi (“Gumbi”) approached the Supreme Court of Appeal applied for leave to appeal. On 8 March 2016 leave to appeal was granted against both conviction and sentence.
5. This matter forms part of the Delayed Criminal Appeals Project, where matters are finalized, where possible, without the full record of the proceedings being available.

B. THE FIRST FULL COURT APPEAL

6. The appeal was set down for hearing before the Full court of this Division on 3 March 2017 and judgment was delivered on 28 March 2017.
7. The unanimous finding of that Court, correctly in my view, was to the following effect:

7.1 The Appellant was convicted by the trial court based on the following evidence:

7.1.1 The warning statements made by his co-accused (Accused 1 and Gumbi) which statements were ruled admissible against him

pursuant to the State having successfully brought an application that same be received as an exception against the rule against hearsay;

7.1.2 The evidence of Mr Mokoena; and

7.1.3 The evidence of Inspector Moses.

7.2 The State having conceded that in terms of the judgment of the Constitutional Court in the matter of Mhlongo v S; Nkosi v S¹, extra curial statements made by one co-accused against another are inadmissible, that the remaining evidence against the Appellant consisted of that of Mr Mokoena and Inspector Moses.

7.3 Inspector Moses' evidence does not directly implicate the Appellant.

7.4 The only evidence directly implicating the Appellant and the sole basis for his conviction is the evidence of Mr Mokoena. (The Appellant did not testify). The trial court, having regarded Mr Mokoena's evidence as "corroboration" for the hearsay evidence, did not assess Mr Mokoena's evidence as self-standing or as a single witness. Accordingly, the Court of Appeal is to assess or determine whether the evidence of Mr Mokoena, as a single witness, is satisfactory in all material respects so as to sustain his conviction.

¹ 2015 (2) SACR 323 (CC)

8. As Mr Mokoena's evidence was entirely absent from the record, the Court ordered that his evidence be reconstructed and postponed the appeal in respect of the Appellant. (The appeal against conviction and sentence in respect of Gumbi was upheld).

C. THE CURRENT FULL COURT APPEAL

9. Mr Mokoena's evidence was reconstructed from the notes of the State counsel who appeared at the trial and confirmed by the Appellant as a true record of his evidence. Mr Mokoena's evidence was to the effect that:

- 9.1 He sold liquor without a licence. In late December 2000 the Appellant approached him to purchase beer on credit, advising him that he, the Appellant, was in possession of stolen goods. Mr Mokoena asked to see the stolen goods and the Appellant brought him a guitar case. Mr Mokoena gave the Appellant 12 beers and told him to keep the guitar case and pay for the beer when he had sold the guitar case. Mr Mokoena then reported the matter to the police.

- 9.2 Later that day Mr Mokoena again saw the Appellant and the Appellant reported to him that a truck had been hijacked, that he, the Appellant had shot an Indian man, and that he was in the company of Dumi and Patrick at the time. Mr Mokoena returned to the police station and reported this information. In the early hours of the following morning, he pointed out the Appellant to the police and the Appellant was arrested.

- 9.3 The police had advised him that there was a matter where guitars had been found and an Indian had been killed.
- 9.4 He and the Appellant were not friends. He knew the Appellant as the Appellant had purchased alcohol from him on credit in the past.
- 9.5 Whilst he was out of pocket for the R60,00 in respect of the dozen beers purchased on credit, the police had reimbursed him with R100,00.
- 9.6 He, Mr Mokoena, was incarcerated for unlawful possession of a firearm.
10. It is trite that a court can convict on the evidence of a single witness if such evidence is satisfactory in all material respects. The evidence must not only be credible, but must also be reliable².
11. On an evaluation of his evidence, I am of the view that his evidence does not satisfy the aforesaid test, more particularly for the following reasons:

² R v Mokoena 1932 OPD 79, S v Webber 1971 (3) SA 754 (A), S v Sauls & Others 1981 (3) SA, S v Stevens 2005 1 All SA 1, S v Gentle 2005 (1) SACR 420 (SCA)

- 11.1 It is improbable that the Appellant would unilaterally and voluntarily simply divulge to an acquaintance that he was involved in a robbery wherein he had shot a person.
- 11.2 The fact that he was selling liquor without a licence and was serving a sentence for unlawful possession of a firearm, militates against his allegation that he was simply being a good citizen and was willing to lose the R60,00 in reporting the matter to the police.
- This is further muddied by the fact that whilst he stood to lose R60,00 by reporting the matter to the police, he received the sum of R100,00 from the police.
- 11.3 The lack of proof that the guitar case allegedly shown to him by the Appellant in fact emanated from this robbery.
- 11.4 The lack of proof that the Indian man the Appellant allegedly claimed to have shot, in fact died and is in fact the deceased in this matter.
12. Inspector Moses' evidence relates to the contents of the hijacked vehicle as informed and there is no objective proof as to what those contents were.
13. Having regard to the aforesaid, I am of the view that the State failed to discharge the onus resting upon it of proving the guilt of the Appellant beyond reasonable doubt.

14. In the circumstances, I propose the following Order:

14.1 The appeal is upheld.

14.2 The convictions and sentences are set aside.

W KARAM
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

I AGREE,

A MILLAR
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

I AGREE AND IT IS SO ORDERED

R STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG