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

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.

SIGNATURE DATE: 12 April 2022

Case No: SS132/2016

In the matter between:

BANDILE MTHUNJWA Applicant

and

THE STATE Respondent

JUDGMENT

WILSON AJ:

1 The applicant, Mr. Mthunjwa, seeks leave to appeal against his conviction and sentence on charges of murder, attempted murder, robbery with aggravating circumstances and illegal possession of firearms and ammunition. The conviction and sentence were returned by my brother Monama J, who sadly died just a few weeks ago. I have decided Mr.

Mthunjwa's application in terms of section 17 (2) (a) of the Superior Courts Act 10 of 2013.

The record before me

2 When the matter was called on 4 April 2022, Mr. Mosoang, who appeared for Mr. Mthunjwa, applied for a postponement, on the basis that the record was incomplete. The State opposed the application.

3 The record made available to me consists of the trial court's judgments on conviction and sentence, and the exhibits handed up at trial. It is the practice of this court that an application for leave to appeal against one of its judgments is disposed of on a record of the orders appealed against and the reasons given for those orders. Because leave to appeal is normally sought from the Judge who issued the relevant orders and reasons, it will rarely be necessary for a full record of the trial to be transcribed, but there is no doubt in my mind that any Judge seized with an application for leave to appeal may require a full record of the proceedings to be made available if necessary. This principle is recognised, in the context of renewed and special applications for leave to appeal to the Supreme Court of Appeal, by Rule 6 (6) (b) of the Supreme Court of Appeal Rules. That rule provides for Judges seized with application for leave to appeal to request "the record or portions of it" before disposing of the application.

4 In this case, I was *prima facie* satisfied that the matter could be argued on the trial court's judgments on conviction and sentence. I provisionally refused the application for a postponement, but notified the parties that the application could be renewed if, before judgment, either party considered

that the record should be placed before me. I also indicated that I would postpone the application myself if it became clear to me that sight of the record was necessary.

5 Ultimately, the parties left matters in my hands. Having considered the parties' submissions, I am satisfied that leave to appeal against both conviction and sentence should be granted on the face of the judgments as they stand, and that it is not necessary for me to have regard to the trial record. I have reached this conclusion for two principal reasons, which I shall set out below.

Absence of corroboration of single witness evidence

6 Mr. Mthunjwa was convicted of the premediated murder of a police officer. Mr. Mthunjwa was allegedly stopped at a roadblock in Mayfair, Johannesburg. It was said that, during a search of the vehicle in which he was travelling, and its occupants, Mr. Mthunjwa pulled out a firearm. He was then alleged to have shot and killed Constable Msibi, one of the police officers conducting the search. Constable Msibi's partner on the night, Constable Maswanganye, testified at Mr. Mthunjwa's trial, and identified Mr. Mthunjwa as Constable Msibi's assailant.

7 The trial court accepted Constable Maswanganye's evidence. The trial court also held that Constable Maswanganye's identificatory evidence was corroborated by Bongani Sekhale, a security guard on duty in the area at the time. Mr. Sekhale says he saw Mr. Mthunjwa a short distance from the incident when he went to investigate the source of gunfire he heard in Mayfair at 1am on the night of the shooting.

8 On the face of the trial court's judgment, Mr. Sekhale's evidence does not directly corroborate Constable Maswanganye's identification of Mr. Mthunjwa as the man who shot Constable Msibi. Where two people identify a third person as committing an act that they witnessed directly, then they corroborate each other on the point that the third person committed that act. However, where, as in this case, two people say they saw the same person in the same area at around the same time, they corroborate each other only on the point that the person was in that area at that time.

9 Mr. Mthunjwa's defence was that he was nowhere near the scene of the crime at the time it was committed. Mr. Sekhale's evidence was accordingly relevant to the question of whether Mr. Mthunjwa was telling the truth about that. Having accepted Mr. Sekhale's evidence, the trial court was entitled to reject Mr. Mthunjwa's alibi, but it does not follow that Constable Maswanganye's identification of Mr. Mthunjwa as Constable Msibi's assailant is corroborated.

10 All of this might seem academic, were it not for the facts that, Mr. Sekhale admitted having failed, initially, to pick Mr. Mthunjwa out of an identity parade; that the identity parade was held over a year after the incident; that Constable Maswanganye did not mention in her first statement the identifying features she later relied upon in court, and which the trial court recorded in its judgment; that Mr. Sekhale appears himself to have been arrested, possibly in relation to the incident (the trial court's judgment does not say); that neither Constable Maswanganye nor Mr. Sekhale appear to have seen Mr. Mthunjwa before the night of the incident; that the trial court

did not explore how long either witness would have had to gain an impression of the features of Constable Msibi's assailant; and that the trial court did not record its conclusions as to the lighting conditions at the scene of Mr. Sekhale's alleged sighting of Mr. Mthunjwa. In these circumstances, there is, in my view, enough room for what Holmes JA called the "fallibility of human observation" to have given the trial court some pause (*S v Mthetwa* 1972 (3) SA 766 at 768A).

11 The trial court took solace in the fact that Mr. Sekhale could describe Mr. Mthunjwa's clothing at the time of the incident. But reliance on clothing to identify a person presents obvious dangers, against which the trial court ought to have warned itself, given the other difficulties I have outlined. The trial court also appears to have found that it was not disputed that Mr. Mthunjwa and Mr. Sekhale met near the scene of Constable Msibi's death at the time of the incident. But I do not think that can be true, given that the trial court's judgment records Mr. Mthunjwa's defence as one of alibi.

The conviction on premeditated murder

12 The trial court found that Constable Msibi's murder was premeditated. However, the trial court's judgment does not record the facts from which an inference of premeditation can be drawn. On the face of it, the circumstances of the incident point away from premeditation. There was an apparently unexpected stop and search operation, during which Mr. Mthunjwa was said to have drawn a weapon and killed a police officer. If he did not expect to be stopped, it seems to me that he cannot, without more, be presumed to have planned to kill Constable Msibi.

13 It is true that a plan to kill can be formed quite quickly. It was not necessary for the trial court to have been satisfied that a plan to kill Constable Msibi was long in gestation or particularly well thought through. But, it seems to me that, because the surrounding circumstances suggested spontaneity, the trial court ought to have recorded the facts on which it found that Constable Msibi's killing was premeditated.

14 Ms. Ranchod, who appeared for the State, argued that this was not such an important issue, since, for the purposes of sentencing, the murder of a police officer while discharging their duty attracts the same penalty as premeditated murder of anyone else. That is true, but what concerns me is not so much whether the outcome would have been the same even if the killing had not been premeditated, rather than the absence of the primary facts in the trial court's judgment from which a conclusion of premeditation could be drawn. That, it seems to me, goes to the paucity of detail on the trial court's judgment about the incident itself, the reliability of the evidence in general, and, accordingly, the safety of the convictions that the trial court returned.

Order

15 It follows from all this that there is, in my view, a reasonable prospect that a court of appeal will conclude that Mr. Mthunjwa's conviction and sentence are unsafe. There are grounds for concluding that the identificatory evidence ought not to have been accepted. If that is so, then the charge of murder (whether or not it was premediated), and the charge of attempted murder cannot be sustained. It is not entirely clear to me from the trial court's judgment what the substrate of the charge of robbery with aggravating

circumstances was, but insofar as it seems to have inhered in the stealing of a police firearm at the scene, that charge would also have to be rejected if the identificatory evidence was insufficient.

16 Finally, there are the charges arising from Mr. Mthunjwa having been found in possession of guns. It appears from the tenor of the trial court's judgment that these guns were linked to the killing of Constable Msibi, but the exact nature of the link is not spelt out. Mr. Mthunjwa says that the guns were planted on him, and that his admission that the guns were his was beaten out of him by police officers keen to apprehend Constable Msibi's killer. If the identificatory evidence is bad, then Mr. Mthunjwa's version in these respects ought, perhaps to have been evaluated with more sympathy than the trial court thought appropriate.

17 I have come to these conclusions on an evaluation of the trial court's judgments and Constable Maswanganye's statement. I have not found it necessary to have regard to the rest of the trial record. There is enough, on the face of the judgment, to conclude that there may be errors of fact or of law that might lead an appeal court overturn the conviction and sentence. For the reasons I have given, I am satisfied that the matter warrants a full hearing on appeal.

18 Having not myself seen and heard the evidence led at trial, or read the trial record, I do not wish to limit Mr. Mthunjwa's room for argument on appeal. I will grant leave to appeal against the whole of the trial court's judgments on conviction and sentence.

19 Accordingly, the applicant is granted leave to appeal to the Supreme Court of Appeal against the whole of the judgments of the trial court on both conviction and sentence.

S D J WILSON
Acting Judge of the High Court

HEARD ON:	4 April 2022
DECIDED ON:	12 April 2022
For the Applicant:	L Mosoang Instructed by Legal Aid SA
For the State:	P Ranchod Instructed by the National Prosecuting Authority