

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: A48/2022

DPP REF NUMBER: 10/2/5/1-2022/28

DATE OF APPEAL: 9 OCTOBER 2023

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

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SIGNATURE

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DATE

In the matter of:

BIYELA, SAKHISENI

1ST APPELLANT

BIYELA, ZOTHINI

2ND APPELLANT

versus

THE STATE

RESPONDENT

JUDGMENT

COERTSE AJ

INTRODUCTION

1. The Appellants stood trial on various charges in the Protea Regional Court, Johannesburg, where they were legally represented, and they pleaded not guilty to all of the charges against them on 13 August 2018. No plea explanation was provided at the trial. On 16 April 2019 both Appellants were found guilty by the trial court on various charges whilst the 2nd Appellant was acquitted on counts 6 and 7.

2. Both Appellants were prosecuted on the following charges:
 - 2.1. Count 1, Robbery with aggravating circumstances as intended in section 1 of the Criminal Procedure Act 51 of 1977 as amended (CPA), read with the provisions of section 51(2) (a) of the Criminal Law Amendment Act 105 of 1997.
 - 2.2. Count 2, Attempted Murder, read with the provisions of 51(2) (c) of the Criminal Law Amendment Act 105 of 1997.
 - 2.3. Count 3, Attempted Murder, read with the provisions of section 51(2) (c) of the Criminal Law Amendment Act 105 of 1997.
 - 2.4. Count 4, Attempted Murder, read with the provisions of section 51(2) (c) of the Criminal Law Amendment Act 105 of 1997.
 - 2.5. Count 5, Attempted Murder, read with the provisions of section 51(2) (c) of the Criminal Law Amendment Act 105 of 1997.
 - 2.6. Count 6, Contravention of section 3 of the Firearms Control Act 60 of 2000 unlawful possession of firearm.
 - 2.7. Count 7, Contravention of section 90 of the Firearms Control Act 60 of 2000 – unlawful possession of ammunition.

3. Biyela, Sakhiseni, the 1st Appellant, and Biyela, Zothini, the 2nd Appellant were found guilty, except that the 2nd Appellant was found not guilty on counts 6 and 7.

4. The First Appellant was sentenced as follows:
 - 4.1. Count 1, 13 years' imprisonment,
 - 4.2. Count 2, 5 years' imprisonment.
 - 4.3. Count 3, 10 years' imprisonment.
 - 4.4. Count 4, 5 years' imprisonment.
 - 4.5. Count 5, 5 years' imprisonment.
 - 4.6. Count 6, 4 years' imprisonment.
 - 4.7. Count 7, 1 year imprisonment.

5. It was further ordered that the sentences in counts 2, 4 and 5 should be served concurrently with the sentence in count 3. The total effective sentence was 28 years' imprisonment.

6. The Second Appellant was sentenced as follows:
 - 6.1. Count 1, 13 years' imprisonment,
 - 6.2. Count 2, 5 years' imprisonment.
 - 6.3. Count 3, 10 years' imprisonment.
 - 6.4. Count 4, 5 years' imprisonment.
 - 6.5. Count 5, 5 years' imprisonment.
 - 6.6. The trial court once again ordered that the sentences in counts 2 and 4 be served concurrently with the sentence in count 3, and that 3 years' imprisonment of the sentence in count 5 be served concurrently with the sentence on count 1. Therefore, the effective total sentence was 25 years' imprisonment.

FACTS

7. The facts of this matter fall into three distinct parts and yet these three parts are inseparable and completely interrelated and I will refer in this judgment to:
 - 7.1. The first part as the Mofolo-incident.
 - 7.2. The second part is the highway chase of the vehicle with registration number 111SSKGP.
 - 7.3. The third part is the scene where 111SSKGP was recovered and the appellants were arrested in Parktown, Johannesburg.

8. These three parts played out on the same day 18 November 2017 starting at about 18h30 and culminating later the same evening when the two Appellants were arrested in the immediate vicinity of 111SSKGP where this vehicle was recovered and identified by its owner as his vehicle.

9. THE MOFOLO INCIDENT

9.1. Mr. Zondo was driving vehicle with registration number 111SSKGP operating it as a taxi, and whilst doing so, he picked up various passengers in Mofolo Soweto. Doing so he picked up *inter alia* Ms Margaret Nkhombeni and her sister. Other people boarded 111SSKGP as well. Three men came on board and sat behind them. At one point Ms. Nkhombeni heard someone speaking and all of a sudden, she saw an arm extended past her pointing a gun at the driver and the person holding the firearm started shooting. She got out while the taxi was in motion and so did the driver.

9.2. They were shot at and her sister, Ms. Silvia Nkhombeni, was left a paraplegic, as a result of the gunshot wounds she suffered.

9.3. The driver of the taxi also got out while this vehicle was in motion and fled to a nearby house where he phoned the owner of the taxi and that set the ball rolling for the highway chase which culminated in the recovery of the vehicle in Parktown, Johannesburg.

10. THE HIGHWAY CHASE:

10.1. Soon after the robbery the driver of the taxi 111SSKGP, Mr. Siphon Zondo, found himself with police officers travelling in a police vehicle and certain reports were made to them that the taxi was on the M1 freeway driving in a northerly direction towards Johannesburg. The

owner of the taxi Mr Solomon Khumalo confirmed the evidence of Mr Zondo; Khumalo saw his vehicle with a number of people inside driving on the freeway. When he arrived on the scene where the taxi was recovered, he inspected his vehicle and found some bullet holes in it. That was in Parktown where the taxi was recovered.

11. THE ARREST OF THE APPELLANTS AND RECOVERY OF 111SSKGP:

11.1. Neither of the Appellants before the trial court disclosed their defences, nor did they provide plea explanations to the trial court. During the trial it became clear that their defences were alibis.

11.2. Briefly, Ms Silvia Nkhombeni informed the court that she was the complainant in respect of count 3. She informed the court that on 18 November 2017 about 18h30 in the evening she was in the taxi 111SSK GP with her sister.

11.3. The photographs in Exhibit F before the magistrate were taken on the scene where the taxi was recovered. Photograph 19 clearly shows the registration number of the taxi 111SSKGP. These photographs were taken in Parktown where the appellants were arrested. This is the taxi that was hi-jacked in Soweto and on photos 13, 14, 16 & 19 the bullet holes described by the owner are clearly visible on the body of the vehicle 111SSKGP. The trail of 111SSKGP from the scene in Soweto to where it was recovered in Parktown is so vividly described by the witnesses that there can be no doubt at all that this is the very vehicle that was involved during the hi-jacking where the complainants were shot.

11.4. The passengers on board 111SSKGP sustained injuries as a result of the shooting during the robbery, one of them is now permanently disabled and in a wheelchair. Her sister Ms. Margaret

Nkhombeni sustained injuries to her ankle. The passenger in front next to the driver was shot in the back and his left shoulder blade was fractured.

ISSUES

12. The identities of the Appellants were put in issue and it eventually became clear during the trial that the defence of both Appellants was in essence an alibi for each one. The first Appellant alleged that he was walking in Parktown when the police encountered him and arrested him. The second Appellant alleged that he was walking in Parktown when he was shot and he fled and took refuge in a police van. The two Appellants denied that they were together that evening in Parktown.

13. It has been stated that neither Appellant offered any plea explanation at all.

14. The issue in respect of the hi-jacked vehicle:

14.1. The swift actions of both the driver of 111SSKGP and the owner thereof and the efficient and effective action of the different police officers dove-tailed perfectly culminating in the recovery of vehicle 111SSKGP that was hi-jacked in Mofolo Soweto from Mofolo Soweto to where the vehicle was found in close proximity of the two accused in Parktown.

14.2. There can be no doubt that the vehicle that was hi-jacked in Mofolo Soweto on the day in question, that was driven during a shoot-out between the occupants of the taxi and the Police, and that collided with another vehicle in Parktown is the same vehicle that was hi-jacked in Mofolo a couple of hours earlier being vehicle 111SSKGP.

- 14.3. The clothing of the hijackers described by the witnesses in the taxi in Mofolo matched the clothing of the men who were arrested in Parktown in close proximity to the vehicle 111SSKGP.
- 14.4. The second Appellant admitted wearing a grey hooded sweatshirt with the word UZZI on the top, on the evening in question.
- 14.5. The versions of the two Appellants are materially the same in that they were innocently walking in Parktown where suddenly they were “harassed” by the Police and eventually they found themselves under arrest. The State evidence was that the police found the second Appellant in the police van, in an injured condition. He alleged that he had been shot out of the blue. Can these versions reasonably possibly be true? I am of the view that they are so farfetched and a wild flight of their imaginations that they cannot reasonably possibly be true and should be rejected.

LEGAL PRINCIPLES

15. Where there is an alibi defence one of the factors that may be taken into account by a trial court, is that the accused did not take the court into his confidence by providing a plea explanation. This court is aware of the constitutional right to remain silent. In essence each Appellant had an alibi defence. They could have disclosed their alibis to the court at the start of the trial in plea explanations. This would have given the investigation officer a fair chance of following them up and providing the trial court with an opportunity to assess them.
16. Neither Appellant called any witnesses to support his alibi and that may be a factor that should be taken into consideration as well. The trial court rejected these alibis as false.

17. In *Thebus v State 2003 (6) SA 505 CC* the Constitutional court took a close look at the defence of an alibi. I am of the view that this court should apply the principles set out therein.
18. At para 4 of that case, it is stated that neither appellant disclosed his alibi beforehand and only did so during the trial. The Constitutional court had to decide if a court could draw a negative inference from an accused's failure to disclose an alibi defence prior to trial, in violation of his right to silence as contained in the Constitution [see para. 9 of the judgement]. It is clear from this case that there is no definitive and easy answer to these questions and it should be assessed with regard to the totality of the evidence that is presented to a trial court.
19. The Court said at para [65] "The rule of evidence that the late disclosure of an alibi affects the weight to be placed on the evidence supporting the alibi is one which is well recognised in our common law." Applying this passage to this case it is clear that the alibis could not stand, in the light of the chain of evidence from the moment of the hi-jacking of the taxi, to the highway chase and the eventual recovery of the taxi where the Appellants were found still wearing the clothes described by witnesses, at the Mofolo scene.
20. The failure of the Appellants to disclose their alibis until the State witnesses were called, and the failure to call witnesses in support of the alibis, were items of circumstantial evidence to be taken into account, together with the rest of the evidence, in determining the veracity of the alibis. The direct evidence as set out above is beyond reasonable doubt and the identity of the Appellants was also proven beyond reasonable doubt.

21. This court is satisfied that the State proved its case beyond reasonable doubt, and that the Appellants versions are far-fetched and a figment of their imaginations. The magistrate was correct in finding that the only inference to be drawn from the circumstantial evidence was that the Appellants were the hijackers.
22. This court is further satisfied that the trial court weighed the evidence in its entirety and came to the correct conclusion that the guilt of the Appellants was proved beyond reasonable doubt.

SENTENCE

23. The First Appellant was convicted on counts 1 to 7 and the Second Appellant was convicted on counts 1 to 5. Terms of imprisonment were imposed in respect of all the offences. The effective total sentence for the First Appellant was 28 years imprisonment, and 23 years for the second Appellant.
24. The provisions of the Criminal Law Amendment Act no 105 of 1977 were applicable to this case. The prescribed minimum sentence for count 1, the robbery, was 15 years imprisonment. For counts 2,3,4 and 5, the attempted murders, 5 years imprisonment, and for count 6, the unlawful possession of a firearm, 15 years imprisonment.
25. The magistrate applied these provisions in considering the question of sentence, and he also applied section 51 (3) of Act No 105 of 1997 relating to substantial and compelling circumstances. It is clear that he applied his mind to all the mitigatory and aggravating facts before him and that he accorded each factor due weight. He took into account the nature of the crimes, the interests of the Appellants and the interests of society.
26. Punishment is pre-eminently a matter for the discretion of the trial court. The test on appeal is whether the sentence is vitiated by irregularity such

that the trial court did not exercise its discretion reasonably, or whether the sentence is disturbingly inappropriate, or totally out of proportion to the gravity or magnitude of the offence. ***S v Salzwedel 1999 (2) SACR 586 SCA.***

27. In cases of serious crime, the personal circumstances of the offender, by themselves, will necessary recede into the background. ***S v Vilakazi 2009 (1) SACR 552 SCA at [58].*** This is such a case.

28. This court is of the view that the magistrate was not misdirected in coming to the conclusions he reached, such that no reasonable court would have imposed the sentences imposed in this case. The effective sentences imposed on the Appellants were appropriate in all the circumstances and not disproportionate to the crimes, the criminals and the legitimate needs of society. The appeal against sentence accordingly fails.

THE ORDER

- [1] The appeal of both Appellants against the convictions and sentences of the magistrate is dismissed, and
- [2] The convictions and the sentences are hereby confirmed.

G.Y SIDWELL
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

I Agree

C.J COERTSE
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

Date of Hearing: 09 October 2023

Judgment was delivered:

Appearances:

For Appellants: **Adv. T.P Ndlovu**

Legal Aid Board Johannesburg

For Respondent: **Adv. P.T Mpekana**

Office of the Director of Public Prosecutions
Gauteng Local Division Johannesburg

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on ... November 2023.

