

**IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG  
REPUBLIC OF SOUTH AFRICA**

**Case No: AR208/2009**

In the matter between

**Siphiwe Sibusiso Maphumulo**

**Appellant**

and

**The State**

**Respondent**

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**JUDGMENT**

Delivered on: 29 January 2010

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**STEYN J**

[1] This is an appeal against a judgment delivered by Hugo J in the court *a quo*, who found the appellant, Siphiwe Maphumulo, guilty of the offences murder and attempted murder. The appellant was sentenced to life imprisonment and five (5) years imprisonment respectively. An application for leave to appeal was lodged and the learned trial judge granted the appellant leave to appeal to the full bench of this division.

[2] On behalf of the Appellant, Mr S Matthews, *inter alia* submitted in his written heads of argument that the

respondent's case in the court *a quo* was dependant on a single witness, Mr Mtolo, whose evidence should not have been accepted as satisfactory in every material respect. Mr Magwanyana, acting on behalf of the Respondent, submitted that the testimony of the said witness was satisfactory and that the Court *a quo* was not misdirected when it accepted the testimony of the single witness and held as follows:

*"In our view, he is clearly lying when he raises this alibi, he would have been much better off without it. If he had told the Court, for example, that on that night he did not know where he was but he certainly was not at the tavern, it would have been difficult to disbelieve him. As it was, he chose to lie and his lie, I believe, must indicate that he has something to hide about what happened on that evening. I believe that the credibility of Mr Mtolo's evidence, coupled with his own lying evidence, provides proof beyond a reasonable doubt that he was the person involved in the shooting of the deceased on that afternoon."*

In our view the credibility of the witness, Mr Mtolo, is important and his testimony should be critically analysed and considered to determine the outcome of this appeal.

- [3] In analysing Mr Mtolo's testimony, this Court shall be mindful of the fact that the cautionary rule finds application. This was also duly recognised by learned trial judge. In the present case, it cannot be ignored that the Court *a quo* in its judgment solely relied on the testimony of Mr Mtolo, to identify the

appellant. It is trite that in cases involving identification the possibility of an error looms large and that such evidence should therefore be sufficient to rule out any mistake as to the identity of a perpetrator. (See *Stevens v S* 2005 (1) All SA (SCA) at 5d-e and *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G).

- [4] The record shows that the Court *a quo* was impressed with the testimony of Mr Mtolo and was satisfied that he was an honest witness, whose observations regarding identity should be accepted as reliable and credible.

*Ex facie* the record it is evident that the appellant was not previously known to Mr Mtolo when he observed the appellant, who with another man was asking the owner of the tavern for loose cigarettes. The two men therefore first walked to the house next door and thereafter walked further down the road out of the witness's sight. The second time he observed them was when the men returned. How he managed to observe them is not clear from the record because they approached the group from the back and then opened fire. Despite the fact that Mr Mtolo ran for cover he managed to

notice the two men approaching a third person standing at a corner. At that stage he was +- 12 metres away from the three men. According to him the faces of the assailants were never covered, nor were they wearing any hats.

- [5] In appraising Mr Mtolo's evidence it is clear that it differs from the other State witnesses, Mr Mzimela and Mr Buthelezi. His *viva voce* evidence also contradicts the statements he had made to the police shortly after the incident. In his police statement he stated that they were all drinking on the day of the incident, whilst he denied such when he testified. In his first statement to the police he referred to two men, who arrived at the tavern and asked them where they could get loose cigarettes whilst in his testimony in court he contradicted that version. In cross-examination he also placed a third person in the company of the appellant and the co-accused. When he was however confronted with his first statement made to the police he insisted that he mentioned the third accused to the police but that they failed to record the information. In light of the contradictions I am not convinced that the evidence adduced in the Court *a quo* went far enough to exclude the possibility of mistaken identity.

- [6] It is clear from Mr Mtolo's testimony, that the attack on them was unexpected and came as a total surprise. The attackers, according to him, were coming from behind which left him with little opportunity to observe and identify. This aspect was reluctantly conceded to by the witness when he answered the following question in cross-examination:

*"Did you all amongst yourselves discuss what had – what you all had experienced? --- That is true, because we asked one another and all of us we did not know what had happened." (my emphasis)*

- [7] Given the prevailing circumstances at the time of the attack, wherein the deceased was killed and Mr Buthelezi injured, it is quite probable that the witness could have been mistaken about the identity of those attacking them. I am not convinced that the false testimony of the accused could have served, as sufficient corroboration of the State's case. In *S v Dladla* 1980

(1) SA 526 (A) Miller JA stated as follows:

*"That an innocent person may falsely deny certain facts because he fears that to admit them would be to imperil himself, is well known and has often been recognised by the Courts. (Cf R v Nel 1937 CPD 327; R v Du Plessis 1944 AD 314 at 323; R v Gani 1958 (1) SA 102 (A) at 113B-F; S v Letsoko and Others 1964 (4) SA 768 (A) at 776.) The warning in those cases against the drawing of a possibly erroneous inference from the circumstance that an accused person lied in certain respects or performed some other act which raises suspicion of his guilt ought to have been specially heeded in the circumstances of this case."*

[8] I am not persuaded that there was sufficient evidence to have established the appellant's guilt beyond a reasonable doubt.

[9] In the result I consider that the appellant's appeal against his convictions should succeed and that the convictions on both counts should be set aside.

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Steyn, J

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Govindasamy, AJ: I agree.

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Koen, J: I agree and it is so ordered.

Date of Hearing: 25 January 2010

Date of Judgment: 29 January 2010

Counsel for the Applicants: Adv S Matthews

Instructed by: P B Ndlela and Company

Counsel for the Respondent: Adv M Magwanyana

Instructed by: The Director of Public  
Prosecutions, Pietermaritzburg