

SOUTH AFRICA / JUDGMENT

Dan and Another v S (CA294/2014, EL: CC30/2010) [2015] ZAECGHC 143 (27 February 2015)

[2015] ZAECGHC 143

COURT

Eastern Cape High Court, Grahamstown

BEFORE

D Van Zyl, B Sandi, J Roberson

CASE / FILE NUMBER

CA294/2014, EL: CC30/2010

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO: CA 294/2014

(EL: CCJ0/2010)

Not Reportable

In the matter between:

ERIC DAN First

Appellant

LULAMILE MGWEJE Second

Appellant

and

THE STATE Respondent

FULL BENCH APPEAL JUDGMENT

D VAN ZYL ADJP:

- [1] On 17 October 2009 Mr Calvin Fortuin and his friend, Mr Eugene Le Roux, sustained gunshot wounds in the course of a robbery outside the home of Mr Fortuin. Mr Fortuin was shot in the neck and tragically succumbed to his injuries. Mr L Roux on the other hand was fortunate to escape the incident with his life.

- [2] The two men were employed at a well known motor vehicle manufacturer in East London. On the night in question they were

working a late night shift. They came off duty at midnight and drove to the home of Mr Fortuin in Coode Street in Pefferville. Mr Le Roux was the driver and Mr Fortuin occupied the passenger seat of the motor vehicle. On their arrival at Mr Fortuin 's home, Mr Le Roux parked the vehicle in the street in front of the house. Mr Fortuin asked his daughter to go and buy them beer. The two men remained sitting in the vehicle where they were conversing and consuming their drinks.

- [3] Mr Le Roux testified that he noticed two persons approaching them on either side of the vehicle. One of the persons pointed a firearm at him demanding his wallet and cell-phone. A shot was fired that shattered the side window on Mr Le Roux's side of the vehicle. A person then leaned through the opening and got into a struggle with Mr Fortuin. Another gunshot went off whereafter the two persons ran away. Realising that Mr Fortuin was seriously injured, Mr Le Roux, despite having sustained a gunshot wound to his hip, managed to drive to a hospital. The injuries sustained by Mr Fortuin were unfortunately of such a nature that his life could not be saved. Mr Le Roux was treated and discharged two days later.

- [4] Later that same day, and acting on information received from an informant, the two appellants were arrested and charged with murder, attempted murder and robbery. The appellants were tried in the High Court sitting in East London. They were convicted as charged and sentenced to lengthy terms of imprisonment. The trial Judge granted them leave to appeal against their convictions.

- [5] Only one issue was raised by the appellants in their appeal against their convictions, namely that of identification. Mr Le Roux was unable to identify the two perpetrators. Instead, the State had to rely in this regard on the evidence of Mr Fortuin's daughter, namely Ms Maverine Fortuin. Ms Fortuin testified that the first appellant was well known to her. She knew him by his nickname, Bones. They used to socialise together, drinking and playing dominoes. She described him as a friend. The second appellant on the other hand was not well known to her. She knew him as Andy and used to see him on occasion in the area where she stays.

- [6] According to Ms Fortuin, on her way to get the beer her father asked her to buy, she came across the two appellants and an unknown third person. She noticed that the first appellant was in possession of a firearm. She asked him where they were going to at that time, playing with a firearm. The first appellant replied saying that they were on their way to a certain tavern. Ms Fortuin testified that after she had returned home, she went to her room. Unable to sleep she engaged a social network on her phone. She heard the sound of a gunshot. She looked through the window of her room and saw three persons standing around Mr Le Roux's vehicle where it was parked in the street. She ran downstairs and heard another gunshot. She identified the two appellants by the clothing they were wearing earlier that evening. The first appellant was leaning forward with his upper body inside the vehicle and

he was holding a gun to her father's face. The second appellant was on the opposite side of the vehicle. Ms Fortuin testified that she shouted at the first appellant, swearing at him and calling him by his nick name. The first appellant responded by lifting his head and looking in her direction. This enabled her to see his face.

- [7] It is trite that because of the fallibility of human observation, evidence of identification is to be approached with some caution, and the identifying witness must not only found to be honest, but his or her observations must also be reliable. (*S v Mthetwa* 1972 (3) SA 766 (A) at 768A-C) Both appellants denied any involvement in the robbery, that they were in each other's company earlier on the evening, and consequently that Ms Fortuin could have seen them together as testified to by her. It was submitted on behalf of the appellants that although Ms Fortuin may have been an honest witness, her evidence must be assessed in the context of her own admission that she was scared and shocked by the events she was a witness to. Her evidence, it was submitted, must be considered with caution, as even an honest witness may be mistaken in circumstances where she is afraid and traumatised.
- [8] It is evident on a reading of the trial court's judgment that it was appreciative of the need to approach the evidence of Ms Fortuin with the necessary caution, and that it proceeded to do so in its analysis of the evidence. The Court in our view correctly concluded that Ms Fortuin's identification of the two appellants was not only credible, but that it could also safely be relied upon. The honesty and reliability of Ms Fortuin's evidence must be assessed in the context of the evidence as a whole and the probabilities (*S v Mthetwa* at 786C).
- [9] The honesty of Ms Fortuin's evidence was correctly not challenged. Her evidence that she saw one of the persons, whom she identified as the first appellant, leaning into the vehicle on the driver's side was consistent with Mr Le Roux's version of the events. Similarly,

her evidence that although it was dark at the time, there was a nearby street lamp that provided sufficient lighting was consistent

with Mr Le Roux's evidence, whose evidence was not placed in issue. The first appellant's statement to a police officer at the time of a pointing out, that after he had shot the passenger a young lady came screaming down the stairs of a flat, was consistent with Ms Fortuin's evidence that she ran downstairs screaming and swearing at the first appellant. Her honesty as a witness was further confirmed by Ms Fortuin's candid acknowledgement that she did not know the second appellant well, that she was unable to see his face, and that she could only identify him by the clothing she saw him wearing earlier on in the evening.

- [10] With regard to the reliability of Ms Fortuin's evidence, her evidence about the extent of her prior knowledge of the two appellants, and that she had met them earlier that evening, was not seriously challenged. She was in a position to describe the clothing they were wearing and its colour in some detail. When she saw the first appellant's face he was approximately six paces from her. Her evidence that the front gate was closely situated to the street where the vehicle was parked, that the flat and the window of her room overlooked the street; and that there is a street lamp in the vicinity, was confirmed by the observations made and

recorded at an inspection of the scene by the Court during the course of the trial. In the circumstances, and in the light of Ms Fortuin's prior knowledge of the appellants, the trial Court's finding that this witness was in a position, and had sufficient opportunity to observe the appellants, cannot be faulted.

- [11] As stated earlier, the State further presented the evidence of a pointing out made by the first appellant, and, what the trial Court found to have been a confession, made by the second appellant. Counsel for the appellants, and in our view quite correctly so, was unable to advance any submissions with regard to the credibility and factual findings made by the trial Court in the admissibly trials, and was constrained to concede that the finding that the evidence was obtained freely and voluntarily and without undue influence, were correctly arrived at. The first appellant not only pointed out the place where the robbery and the shooting of the deceased

and Mr Le Roux occurred, his knowledge of the events of that night were further confirmed by certain admissions he made in the course of the pointing out. These admissions served to confirm the evidence of Ms Fortuin that the first appellant was at the scene of the shooting; that he was armed with a firearm; that he shot the passenger; and that a young woman emerged screaming from a nearby flat.

- [12] The second appellant in turn admitted to have been in the company of the first appellant on the night in question; that they were armed with a firearm and robbed the occupants of a blue motor vehicle; that he fired a shot through the window of the vehicle; and that when the passenger resisted, the first appellant took the firearm from him and shot the passenger in the head. The second appellant's account of the robbery, and the model and colour of the motor vehicle, corresponded with Ms Fortuin and Mr Le Roux's versions of the events and the photographs admitted into evidence.

- [13] This evidence served as a safeguard to the acceptance of, and provided corroboration for Ms Fortuin's identification of the two appellants as the

persons who robbed and shot her father and Mr Le Roux on the night in question. Counsel for the appellants correctly and understandably did not seek to place in issue the trial Court's rejection of the evidence of the two appellants as being false. Their unsatisfactory

explanations for having made a pointing out and a confession, their vague and unsatisfactory accounts of their whereabouts on the night in question, and the weight of the State's evidence clearly justified the trial Court's findings in this regard.

- [14] Accordingly, and for these reasons, the appeal is dismissed.

D VAN ZYL

JUDGE OF THE HIGH COURT

I agree

B SANDI

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Heard on:

09 February 2015

Judgment

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