

SOUTH AFRICA / JUDGMENT

Nkosi and Another v S (A161//2017) [2019] ZAGPJHC 394; 2020 (1) SACR 206 (GJ) (25 October 2019)

[2019] ZAGPJHC 394

COURT

South Gauteng High Court, Johannesburg

BEFORE

Spilg, Broodryk, Johnson

CASE / FILE NUMBER

A161//2017

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GAUTENG

LOCAL

DIVISION,

JOHANNESBURG

APPEAL

CASE NO: A161//2017

TRIAL

COURT CASE NO: SS 82/2014

In

the matter between:

NKOSI, DAVID
MPHO
First Appellant
SIPHORO,
REMEMBER
Second Appellant
And
THE
STATE
Respondent

JUDGMENT

SPILG, J:

INTRODUCTION

1. This appeal concerns the killing of the late Mr Lawrence Moepi who was a forensic accountant. At the time of his death Mr Moepi had been working on cases on behalf of, among others, the Public Protector's office and the then Scorpions. His killing therefore attracted media attention and speculation.
2. It was common cause that the deceased had been followed by two occupants of a white Volkswagen Golf motorcar ("the Golf") into his office parking lot. The passenger of the Golf alighted, approached the deceased, who was still in his motor vehicle, and fired two or three shots at him through the door. The vehicle's door then opened and the shooter fired several more shots at the deceased. He then ran towards the Golf but saw Mr Sewpersad who had alighted from his own car. Sewpersad had entered the grounds just after the Golf and had parked his car a short distance away from the other two cars. As the shooter ran back towards the Golf he saw Sewpersad standing at his car, pointed the firearm at him, and entered the Golf which then drove off.
3. As the trial proceeded before Barn J, it was evident that the murder was unrelated to the deceased's forensic work. Firstly Mr Siphoro, who is cited in the notice of set down as the second appellant, and who was the second accused in the trial, pleaded guilty to a charge of assaulting his ex-partner with intent to do grievous bodily harm, being count 1 of the charge sheet. This offence had occurred in late August 2013, which was just two months prior to the murder. The second accused was identified, by another witness at the scene, as the driver of Golf from which the shooter had alighted. It was common cause that at the time the second accused's ex-partner had formed an intimate relationship with the deceased.
4. Both the first and second accused were found guilty of murdering the deceased.
5. The Supreme Court of Appeal granted the first accused leave to appeal against conviction only. At the time the matter was enrolled it was contended by one of the second accused's legal representatives that the SCA had not finally determined the fate of his petition.

RIGHT TO APPEAL

6. The notice of set down signed by the Registrar of the Criminal Appeals Administration on 24 June 2019 identifies two appellants.

7. Last week this court was provided with the SCA order of 30 July 2015. It reflects that Maya JA (at the time) and Leach JA considered the petitions of both accused, granted the petition of the first accused in respect of conviction only and dismissed the second accused's petition on the grounds that "there are no reasonable prospects of success and there is no other compelling reason why an appeal should be heard".
8. This court is entitled to assume that the latter ground for refusing the petition meant that the court had considered and rejected the possibility that granting leave to the one accused may have warranted granting it to the other.
9. The second accused however contended that his petition was still outstanding as it was subject to an application for reconsideration.

In heads filed on behalf of the second accused by Adv Kolbe on instructions from Fiona Marcandonatos Attorney it was submitted that this court, sitting on appeal in respect of the first accused's conviction, should consider being seized of the second accused's appeal as well. It was urged that this court has inherent power to regulate its own process in the interests of justice as both

accused's fair trial rights have been infringed. Reliance was placed on s 173 of the Constitution and *Sefatsa and others v Attorney-General, Transvaal and ano* 1989 (1) SA 821 (A).

10. The first difficulty with this proposition is that it is cast too wide. The appellate jurisdiction of this court is derived from statute and *Sefatsa* at 834E is direct authority for that proposition.
11. Even if the SCA was still reconsidering the matter at the time the second accused's heads were filed it would be incompetent if this court were to step in while that process was still before a court of superior

jurisdiction. The usurpation of the SCA's function by this court would be vividly demonstrated if this court were to have acceded to the second accused's request and the SCA at the same time concluded its reconsideration by refusing leave.

12. All this court could have done was await the outcome of the leave to appeal in an appropriate situation where the fate of the one accused is, either on the facts or in law, inextricably intertwined with that of the other.

This is not such a case. Here the only issue is whether each accused had been positively identified by unrelated witnesses each of whom had claimed to observe the incident from a different vantage point. The one witness could only see the driver of the white Golf while Sewpersad claimed to have observed the shooter and later claimed that there were characteristics of the driver which he recalled.

13. In the premises the only appeal properly before us is that of the first accused who will be referred to from now on as the appellant. The insertion of the second accused as an appellant in the notice of set down appears to have been a genuine error on the part of the Registrar.
14. If there is indeed some process still pending before the SCA in relation to the second accused it cannot affect the appeal of the other and there is no good reason to delay the hearing of the appeal which is before us, bearing in mind that ultimately at issue is the question of the appellant's liberty.

GROUND OF APPEAL

15. A number of heads of argument have been filed; one set by counsel engaged by the appellant directly and two by counsel from Legal Aid. Both the private firm and Legal Aid hold powers of attorney from the appellant to prosecute his appeal. Since we had read all sets of heads filed and because it was not possible to obtain instructions from the appellant, we decided to hear both counsel for the appellant, with Adv Kolbe presenting argument before Adv Robertse. The State had no objection to this course, which ensured that the appeal was not delayed while overcoming the possibility of prejudice to the appellant.
16. The appellant contends that the court erred in finding that the State had established his identity as the shooter beyond a reasonable doubt.
17. In support of this submission, and leaving aside the usual generalised submissions the appellant essentially contends that:
 - a. Mr Sewpersad was a single witness and although s 208 of the Criminal Procedure Act 51 of 1977 allows a conviction in such circumstances, the court failed to subject his evidence to proper scrutiny. See *S v Pi/lay* [2016] ZASCA26.
 - b. The court could not have been satisfied as to the honesty or reliability of the witnesses' evidence and failed to carefully scrutinise his evidence because in his first statement the witness said that he would not be able to identify the shooter yet he claimed to have done so in court which meant that he was prepared to make a false statement under oath.

The appellant also contends that the witness's identification of him as the shooter amounted to a dock identification. Indeed one of the key criticisms is that "Mr Sewpersad only identified appellant ... in court More than a year after the event in circumstances where the involvement of the appellants was suggested to him by their presence in court"

SINGLE EYEWITNESS

18. Many serious offences such as rape, assault, hijackings and "smash and grabs" are committed on a daily basis where only the victim is present. Similarly there may only be a single eyewitness who had an unobstructed view of the assailant.

19. As appears from *S v Mthetwa* 1972 (3) SA 766 (A) at 768A-C the real issue is whether the court can discount "... the fallibility of human observation". This seems to be the reason why in the judgment Holmes JA was not prepared to limit the considerations which might be taken into account, despite a rather extensive list of possibilities being mentioned in his judgment. Each case will depend on its own facts and circumstances.

WITNESS' HONESTY AND RELIABILITY

20. Sewpersad made a statement to the police in which he said that he would not be able to recognise the shooter. During his evidence he pointed the appellant out as the shooter.
21. It is accepted that once a court is made aware of a material discrepancy between a witness's testimony and the statement he or she made to the police then a court must be careful in weighing that person's credibility.
22. The defence asked Sewpersad why initially he had told the police that he would be unable to identify the shooter. Sewpersad replied that "I was scared for my life at that stage when I was pointed with the firearm by the accused".
23. Attorney Leisher, who then represented the appellant put to the witness whether it was correct that he did not tell the truth when the police took down his statement. The reply again revealed the witnesses professed state of mind at the time. He said; "I was actually under stress at the time and feared the hell in my life that I did not want to give the correct statement to the police on site, because I feared for my life."
24. While there is no doubt that the evidence of a witness on identity who first claimed that he would not be able to identify a suspect is to be treated with great circumspection, it does not per se render his evidence on identity untruthful. That is to be determined by broader considerations, such as the explanation given for the statement, whether it was retracted and if so the circumstances prevailing at the time of its retraction, the credibility of the explanations and the overall credibility of the witness bearing in mind that the contradictory statements made under oath must a fortiori count against him or her. Other variables may come into consideration in appropriate cases such as what is put to the witness but is in fact contradicted by an accused's own testimony.
25. There will also be the need to test the basis on which the witness claims to have recognised the accused, whether it is consistent with anything else contained in the police statement regarding features, apparel, posture, voice or the like; particularly if the only occasion when the witness claims to have identified the accused was in the witness box (with all its inherent dangers as correctly submitted by Adv Kolbe). At this stage I am only considering the honesty of the witness, although it may impact on his or her reliability.
26. The trial court was well aware of the issues arising about the honesty of the witness and confronted them (at pp 162 to 163 and 165 to 166).

27. Since one cannot simply reject the evidence out of hand because a person states shortly after the incident that he would not be able to identify a suspect, the first question that arises is whether there is an acceptable explanation for the statement. A witness may be unduly cautious, may still be traumatised, or when confronted by the accused in a line up may recall some facial characteristic or particular mannerism. In the present case the witness claimed to be scared for his life and if that is to be believed then the follow up enquiry must be the circumstances which led to a change of mind.
28. In the present case Sewpersad had witnessed what would have appeared to be the actions of a cold blooded killer who with an accomplice had tracked his victim down to his offices, who did not conceal his identity but had no compunction to kill in broad daylight in the proximity of others and who not only would be able to recognise the witness but had in fact pointed the firearm he had just used to kill someone else.
29. Accordingly the explanation for not being willing to identify the shooter because he was scared for his life is understandable. But something more must be required before one can conclude that the witness can still be regarded as trustworthy after changing his version.
30. Sewpersad changed his statement less than a week after the first statement was made. In his subsequent statement of 23 October 2013 he claims that he would be able to identify the shooter. I juxtapose the significant portions of the two statements.

In the first statement the witness said in regard to the appellant that:

"I can 't be able to identify the tall guy He is a black male he was wearing a "white jacket and blue jeans."

In the second statement he said:

"... by the time he was pointing me with the gun I saw his face and build. He was tall, light complexioned and also the shape of his shoulders. The black male who fired the shots was wearing a white jacket with a white hoody (hat) and a blue jean. I can be able to identify the tall guy I can see him"

31. Three things are significant about the second statement. Firstly the witness provides more detail regarding the appearance of the shooter. Secondly the statement was taken nine months before the appellant was apprehended. Accordingly the witness was able to add to the original description well prior to seeing the appellant for the first time and without any external influence since not even the co-accused had been detained by that time.

Thirdly in the second statement the witness does not claim that he can identify both the shooter and the driver. On the contrary he states that he did not manage to see the driver whereas in the first statement no mention is made of whether or not he had seen the driver. The only reasonable inference is that the witness was requested to make the second statement in order to provide further information to provide the investigation team with leads.

32. One can eliminate the possibility of duress or coercion since there is no suggestion of that, nor is it likely where the police had no apparent leads at the time the second statement was taken.
33. Nonetheless something more is required for a court to be able to rely on the witness' second statement that he could now identify the shooter. In the present case I believe it is to be found in Sewpersad providing quite definitive details regarding the shooter's features and distinctive clothing some nine months before the appellant was arrested, the fact that the appellant did have the features described and the witness' unchallenged testimony that he recognised the appellant as the shooter from a photograph in The Star newspaper of 17 March 2014 (which was admitted into evidence).
34. This is particularly significant because the accompanying article describing the person in the photograph as someone who "can assist us in identifying the second suspect"; not that the person was in fact the suspect. It required the independent mental process of the witness, unaided by any external factor, to link the person in the photograph as the person he saw shooting the deceased and not as a person described in the article who could assist the police to locate the shooter.

In this respect the reliability of the identification of the appellant well prior to his arrest reinforces the otherwise discreet enquiry of the witness' honesty, even if this is not necessarily so in other cases. A further factor is that on 20 September 2014 the witness made a third statement which explained why the investigating officer, Warrant Officer Heyns who was a very experienced detective of some 33 years' service aborted the identification parade to which he was taking Sewpersad. The statement reads:

On 2014.09.20 ... I was picked up at my place of residence ... by investigating officer W/O Heyns to attend an ID parade at SAPS Germiston.

While on our way ... I was asked by the investigating officer whether I have seen the suspect's picture in the newspapers. I informed ... that I did see the suspect's picture in the Star newspaper. The picture I saw ... is the same person who shot and killed the deceased"

35. The statement therefore confirms that the witness had seen the accused's photograph in the newspaper. Moreover an independent factor going to the veracity of the witness' credibility is that the identification parade was aborted. The curtailment of the identification parade goes to the credibility of the claim Sewpersad made in the second statement about being able to identify the shooter and to his evidence that he did identify the appellant on seeing his photograph in the newspaper some five months later. It also goes to the genuineness of the witness' explanation that he was in a state of fear when he made the first statement on the afternoon of the incident.

36. Eye witnesses are generally ordinary people caught up in situations not necessarily of their making, who may believe that fate dealt them a cruel hand on the day in question and would dearly love to distance themselves from the events. Eyewitnesses do not come with a particular sense of civic responsibility nor will they necessarily be fearless of possible consequences. They can be family men or women who would have preferred not to be involved and who may genuinely be fearful of repercussions.
37. Accordingly the court cannot expect a higher standard by requiring them to react in a civic minded or fearless manner where, unlike the case of a loved one, they may have no particular association with the victim. In short they did not select themselves for the job by reason of possessing any particular attributes-some may have a connection with either the alleged perpetrator or the victim but others may have been at the scene through entirely random circumstances.
38. I therefore do not consider it a sufficient criticism of Sewpersad, when all relevant factors are taken into account, that he did not promptly contact the police with information, as advanced by Adv Kolbe. After all the article asked for people who could assist in locating the appellant to contact the police, and his whereabouts certainly were not known to Sewpersad.
39. I am satisfied on the facts of this case that there are sufficient externally objective facts and circumstances to accept the explanation of the witness as to why he was not prepared initially to state under oath that he could recognise the shooter.

IDENTIFICATION BY REFERENCE TO A NEWSPAPER PHOTOGRAPH

40. Once the court is satisfied as to a witness' credibility in claiming to be able to identify an accused it becomes necessary to consider the probative value of such evidence by which I include the reliability of the identification.
41. Clearly the probative value of evidence as to identity is greatest where a suspect is apprehended immediately at the scene of the crime. At the other end it may be problematic where there is only a dock identification.

Adv Kolbe correctly pointed out that a properly held identification parade provides certain safeguards and in particular, for present purposes, that an identification parade may not even include the suspect. This ensures that a witness cannot be influenced into believing that the suspect must be among those he is asked to point out in a line-up.

42. Adv Kolbe submitted that the court was dealing with a dock identification. This is not so. The credible evidence received by the trial court and with which it was satisfied was that the witness identified the appellant at the time he saw the photograph. He simply confirmed this observation at the trial, as every other witness is asked to do whether or not he or she had attended an ID parade.

43. The evidence was corroborated by not only the evidence of W/O Heyns and the witness' third statement which was put to him by the defence but also by the undisputed objective fact that W/O Heyns had already set up an ID parade to which he was taking Sewpersad and which he then aborted. The only rational explanation was the one provided; it would be a pointless exercise for the witness to attend an ID parade if he already had identified the shooter by reference to the photograph in the newspaper. Indeed the investigating officer could have been criticised by the defence if he persisted with an ID parade in the face of such information.
44. It may also have watered down the veracity of Sewpersad's testimony about recognising the shooter from the photograph if still had attended the ID parade. Indeed Adv Kolbe accepted that the investigating officer was correct not to proceed with the ID parade in such circumstances.
45. This brings the court to consider the reliability of Sewpersad's identification of the appellant. I believe that the earlier analysis with regard to Sewpersad's credibility, the description he gave to the police in his first two statements which was done months prior to the appellant being apprehended all lead to the reliability of the identification.
46. Something further ought to be said about the sufficiency of an identification based on a newspaper photograph that finds its origins in a media release by the police requesting assistance in locating a person. There is the risk as pointed out by Adv Kolbe that a person seeing the photograph may be influenced in believing that the photograph is that of the suspect and therefore an essential safeguard of an ID parade is absent. That may be so, but in the pursuit of apprehending an alleged criminal in the interests of justice it may be the only course.
47. In the present case there can be no doubt that the appellant was on the run. He had fled the area in which he had been staying. Moreover neither his partner, with whom he had a child, nor his friends knew of his whereabouts. When he was tracked down to Ladysmith by the investigating officer, the unchallenged evidence of W/O Heyns was that the appellant attempted to flee.
48. There will be more and more occasions where the only reasonable means of locating a suspect is by circulating his or her photograph or police sketch in the printed or electronic media. It would be absurd to suggest that the only means of apprehending a suspect has in it the very seed by which that person will comfortably escape justice.

Nonetheless it does require a court to be satisfied as to the veracity of the witness' evidence regarding the circumstances in which he or she came to see the image, the reaction if any, the circumstances under which the witness disclosed this to the police, the wording of the article in which the image appeared, the description that the witness gave of the suspect in any prior statement and of course the actual opportunity to observe the person concerned at the scene of the crime.

There may be other factors as well which either militate against, or reinforce, accepting the witness' evidence, including the overall credibility of the witness and the accused as well as the version put to the witness or given by the accused when testifying. In this case an additional factor is that the appellant's partner was the sister of the second accused. Despite these links the appellant claimed that he had no contact with her, even though they had a child together.

The appellant also claimed not to have had contact with the second accused, one of whose vehicles he was using, save for one occasion during the entire nine months until his arrest. This was said to have taken place with the second accused in the presence of W/O Heyns yet its contents were not put to him in circumstances where it clearly should have.

49. In the present case the trial court, which had the advantage of assessing all the witnesses while they were testifying accepted the evidence of Sewpersad as honest and reliable, was satisfied with the explanation tendered and found the appellant's version to lack credibility and that it was untruthful.
50. In my respectful view the trial court's acceptance of Sewpersad's identification of the appellant as the shooter must stand. And having regard to the other evidence presented, including that of the appellant, the conviction is sound.

ORDER

51. In the circumstances the appeal is dismissed.

SPILG, J

We agree

BROODRYK, AJ

JOHNSON, AJ

DATE OF APPEAL: 21 October 2019

DATE OF JUDGMENT: 25 October 2019

FOR APPELLANT: Adv M Kolbe SC

Fiona Marcandonatos Attorneys in association with Heather Pretorius

Adv W Robertse

Adv IB Mthembu had also presented heads of argument

Legal Aid South Africa

FOR THE STATE: Adv Z Peck

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