

SOUTH AFRICA / JUDGMENT

S v Dingela and Others (CC25/18)

[2019] ZAECHHC 12 (10 May 2019)

[2019] ZAECHHC 12**COURT**

Eastern Cape High Court, Bhisho

BEFORE

Stretch

CASE / FILE NUMBER

CC25/18

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, BHISHO

CASE NO.: CC 25/18

THE STATE

Versus

BAPHIWE DINGELA

Accused no. 1

MFUNDO GWEJELA

Accused no. 2

FEZEKILE BOOI

Accused no. 3

JUDGMENT

STRETCH J.:

[1] The three accused stood trial on charges of statutory conspiracy to murder, murder, and possession of firearms and ammunition, it having been alleged that they conspired to murder Welile Ndevu (a taxi owner

and operator), and indeed did so on Wednesday, 2 August 2017 by shooting him where his taxi was stationary at a T-junction in Daba in the Peddie district.

- [2] The accused, who each had his own lawyer throughout the trial, pleaded not guilty and reserved the bases of their defences.
- [3] Nontembeko Bangani testified that on that Wednesday at about 7.50am she was on her way to Ayliff Primary School when she saw the deceased lying next to his combi. The driver's door was open.
- [4] At about 8am that morning one Sgt Njokweni was called out to the scene. He found the deceased (whom he knew from church and as a person who transported children to and from school) lying on his back in a pool of blood on the driver's side of his Quantum taxi.
- [5] The witness was present when photos were taken of the scene and referred to these in his evidence.
- [6] He said that the scene was riddled with empty cartridges and it appeared that the deceased's vehicle had been struck a number of times, particularly on the driver's side. The individual cartridges were sealed and secured for forensic testing.
- [7] Warrant Officer Mati (who was on the scene between 11am and 2pm that day, and who collected exhibits, secured them and took photos at the scene), confirmed his evidence in all material respects. Mati collected 11 cartridge cases and three projectiles. The cartridge cases appeared to have been fired from a 9mm firearm and from a rifle.
- [8] The prosecution sought to prove inculpatory statements made by accused nos 2 and 3 to police officers.
- [9] In particular it was alleged that accused no. 2 made a written statement to one Captain Fose. It was recorded on accused no. 2's behalf that the admissibility of this statement would be disputed by him on the following bouquet of grounds:
- a. That the statement was not made freely and voluntarily;
 - b. That the accused was assaulted by the investigating officer (WO Gcabani Maqhubela), Sgt Mazwana and five other members of the Hawks;
 - c. That that which is reflected in the statement was spoon-fed to the accused by the police.
- [10] With respect to the third accused, it was alleged that he had made a statement to one Captain Bixa. He disputed the admissibility of the statement on the following grounds:
- a. That he is not the author of the statement but that it consists of a pre-recorded document which was read out to him;
 - b. That he was assaulted by the same persons who assaulted accused no. 2 (and by others apparently) who then forced him to sign this pre-recorded statement;
 - c. That his rights in terms of the constitution were not explained to him.

- [11] In view of the somewhat complex and symbiotic grounds for challenging the admissibility of the statements to be tendered as evidence against accused nos 2 and 3, I directed that the evidence pertaining to admissibility be presented in a single trial within a trial.[1]

The trial within a trial

- [12] I intend making short shrift of what transpired thereafter. The prosecution called a number of police witnesses who dealt with these accused from the time of their arrest. These witnesses included Cpt Fose who took accused no. 2's statement and Cpt Bixa, who, on his version, recorded in writing a warning statement deposed to by

accused no. 3. I digress to mention that the averment that accused no. 2 had been spoon-fed the information which he had relayed to Captain Fose was mentioned for the first time during the cross-examination of this witness. During re-examination the prosecutor accordingly applied for the contents of the statement to be introduced on the understanding it would seem, that the State was in a position to prove that that which was reflected in the statement could not have emanated from the police, and by so doing, to

challenge the credibility of accused no. 2. It was on this basis that I provisionally allowed the contents of the statement to be placed before me.

- [13] From what I was able to glean from the evidence of one Cst Ncinitwa, accused nos 2 and 3 were initially arrested by the Queenstown Flying Squad for being in possession of a suspected stolen motor vehicle at 6pm on Wednesday, 21 February 2018, whereafter they were detained at the Queenstown Police Station. According to Ncinitwa, they both acknowledged receipt of a written notice of constitutional rights just after 11 the following morning (ie Thursday, 22 February). Ncinitwa testified that throughout this period there were a lot of policemen wanting to question the accused about other cases, especially the Hawks from the provincial office. In his own words: "When we arrived with them it was chaotic as many people were looking for them". He was unable to dispute that the accused were only physically detained the next day, and that

in the interim they had been taken by members of the Hawks to an old army base. The fact that they were only booked into the cells the next day is corroborated by entry 1195 in the occurrence book ("the OB") which reflects that Ncinitwa detained them at 11.15am that Thursday.

- [14] The accuseds' warning statements taken with respect to the possession of a stolen motor vehicle charge simply added to the confusion. According to his warning statement, accused no. 2 was warned for having been in possession of this vehicle at 9.20am on 22 February (which, on Ncinitwa's version was impossible as he had already been arrested the night before). Significantly, accused no. 2 is recorded to have said the following in his warning statement:

'I understand the allegations against me. I will make my statement at court.'

[15] Accused no. 3's warning statement for possession of the stolen vehicle (which purports to only have been taken at 5pm on Saturday the 24th) reflects that he said the following:

'I understand the allegation against me. I will make my statement to my lawyer.'

[16] It was put to Warrant Officer Xakayi who was the investigating officer with respect to the vehicle theft charges, that accused no. 3 had told him that that he and accused no. 2 had been tortured at the police barracks, and that he (warrant officer Xakayi) had in fact remonstrated with these officers and had told them not to take his suspects away from the station and torture them. Significantly his response was not a denial as one might have expected. Instead he merely said:

'I can't recall that'.

[17] Detective Sergeant Ndzima from the provincial organised crime unit in Port Elizabeth booked the accused out of the Queenstown cells on Friday, 23 February 2018 in order to question them about a shooting incident at Ngcobo police station. According to the occurrence book he booked accused no. 2 out at 11.50, booked him out again at 13.25 (without returning him) together with accused no. 3, and returned him twice: at 13.55 and again five minutes later at 14.00.

[18] In my view the only purpose of his evidence was to illustrate that the occurrence book could not be used as corroboration for testimony regarding the whereabouts of the accused at any given moment.

[19] Warrant Officer Mbiko, who was also apparently investigating the Ngcobo shooting incident booked both accused out again at 11.00 on Saturday, 24 February. According to the occurrence book accused no. 3 was returned at 14.50 and booked out again by Warrant Officer Xakayi at 16.50. The occurrence book reflects that both accused were charged by Xakayi in respect of the stolen vehicle matter at 17.50 that same day and were booked back into the cells at 18.10. However, according to Mbiko, accused no. 2 had reported that there were firearms at his home at Peddie, so he escorted accused no. 2 there together with three members from the Hawks (the East London Organised

Crime Unit). He was adamant that accused no. 2 spent the entire Saturday with them. They left for Peddie between 16.00 and 17.00 and he completed the Peddie SAP14 at 18.15.

[20] He said that both accused were warned in terms of their rights when he booked them out and again at the Hawks offices at the military base. At the Peddie police station he warned accused no. 2 in writing regarding his constitutional rights. That night it was too late to return accused no. 2 to the Queenstown cells so he was detained at King William's Town and booked back into the Queenstown cells on Sunday, 25 February at 13.05.

[21] Several difficulties arise from the checks and balances that the occurrence book is intended to provide. I mention but a few:

- a. The book reflects that persons who have not been booked in are being booked out and vice versa.
 - b. According to Mbiko accused no. 2 was on his way to Peddie at the same time that the occurrence book suggests he was being charged with his co-accused at the Queenstown police cells.
 - c. According to Mbiko accused no. 2 was not at the Queenstown police station or the cells from 11.00 on that Saturday until 13.05 that Sunday (that is for a period of 25 hours), whereas the occurrence book reflects that Xakayi charged both accused at the Queenstown cells at 17.50 that Saturday.
 - d. The occurrence book reflects that accused nos 2 and 3 were charged together at the Queenstown police cells, whilst simultaneously reflecting that this could not have been the position, because accused no. 2 was on a mission to Peddie with Mbiko (which Mbiko confirms) and accused no. 3 was with Xakayi during the same period.
- [22] These inconsistencies pose serious problems for the State, particularly in the light of accused no. 2's version. According to him, Mbiko and other members of the Hawks took both him and accused no. 3 to their military base on Saturday the 24th. There their hands were cuffed behind their backs. Plastic bags were pulled over their heads. Pepper spray was then released into the bags. This process was repeated on the Sunday until accused no. 2 agreed to confess. Mbiko was present and participated in these assaults on the Saturday, and the first investigating officer (Sgt Mazwana) as well as the second investigating officer (Warrant Officer Maqhubela) were both present during the assaults on the Sunday. When accused no. 2's version was put to Mbiko, the highwater mark of his response to these serious allegations was the following statement:
- 'We as the Hawks don't use pepper spray'.
- [23] It was put to him on accused no. 3's behalf that the accused was tortured in his presence by Mazwana and Maqhubela. His response was that he left as Mazwana and Maqhubela were arriving on the 24th at about 13.00. Indeed, he repeated this statement no less than seven times during his evidence.
- [24] The prosecution persevered and led the evidence of Captain Bixa who managed to extract an alleged confession in the form of a warning statement from accused no. 3 shortly after having booked accused no. 3 out of the cells for alleged questioning that Sunday. Curiously, it was Bixa's evidence that they had already tried to make arrangements for a senior officer to take accused no. 3's confession before they had even interviewed him. It is also significant that according to Bixa accused no. 3 was only formally charged after he had confessed. He also conceded that he had been actively involved with the investigation of the case from the outset, but maintained that he was still "independent". It was put to him that accused no. 3 had been tortured in the same manner as his co-accused, the method of torture having been referred to by Bixa as "Skhumbuzo" (when translated means a reminder). He denied this. He

also denied that after the assaults he gave a document (purportedly the warning statement) to accused no. 3 and just told him where to sign.

- [25] Upon questioning by the court, he could not really explain why two suspects who had just elected to speak to an attorney and to speak in court when charged with possession of a suspected stolen motor vehicle, would readily waive these rights and make murder confessions to the Hawks without any influence whatsoever.
- [26] These extraordinary responses to questioning were by and large repeated by Warrant Officer Maqhubela when he testified. Indeed, the gist of his evidence was that they only felt “compelled” to inform accused no. 3 of his constitutional rights after he had revealed inculpatory knowledge of the case. He denied having assaulted the accused or that they were spoon-fed what to say.
- [27] Accused no. 3’s attorney produced undisputed medical records from Grey Hospital in King William’s Town, it being alleged that at his first appearance in the Peddie court on Monday 26 Feb 2018, he had told his legal aid attorney (Ms Jakavula) that he had pain around his eyes, and she instructed that he should be taken to the hospital. Correctional Services officers Jokweni and Klaas took him to hospital. His clinical record dated 27 Feb 2018 reads as follows:

“Presented with alleged history of assault by police officers between Friday the 23rd and Sunday 25 February 2018.”

- [28] The clinical record stated that the accused presented with a red traumatic left eye. The witness to my mind deliberately distanced himself from this evidence which, standing alone, is totally destructive of the State’s case on the issue of voluntariness.
- [29] This evidence was also corroborated in most of these bizarre respects by the previous investigator, Sgt Mazwana. He said that accused no. 3 had a bloodshot eye on the 25th. When asked about it, accused no. 3 said that he had been assaulted by the flying squad police. Mazwana did not do anything about this. He made a note in his pocket book which he has unfortunately lost. When asked whether it was usual for assaults to be reported to him, he said:

“They always say that they were assaulted when that did not happen. Se we were not surprised”.

- [30] He was unable to explain why the OB would reflect that accused no. 3 was free from visible injuries despite having had an obvious injury to one of his eyes. When it was put to him that the accused had been sprayed with pepper spray and that he actively participated in the process, he too, did not simply deny the allegation as one would have expected. No. What he said was the following:

‘No ... pepper spray is so scarce’.

- [31] The occurrence book also reflects that on that Sunday Cpt Bixa himself booked accused no. 2 out at 13.15 and accused no. 3 at 14.40 and returned with them both at 18.10.
- [32] On Monday, 26 February 2018 at 08.30 the accused were taken to the magistrates' court for the first time.
- [33] At the close of the State's case in the trial within a trial accused nos 2 and 3 applied for a ruling which would be analogous to a s174 discharge. This section may be utilised in the main trial dealing with issues of guilt when there is no evidence at the close of the state's case that the accused committed the offence. The trial within a trial deals with issues of voluntariness and not guilt. I accordingly made the following order which I now repeat:
- "I am not at this stage inclined to make a ruling which is in any way analogous to a section 174 discharge, despite having been invited to do so. Insofar as it may be necessary to mention however, accused nos 2 and 3 are reminded of the test which has applied since the declaration of unconstitutionality of the reverse onus originally set forth in section 217 of the Criminal Procedure Act, the resultant paradigm shift in the burden of proof, the non-derogable and ultimate right to silence which the accused enjoy in terms of section 35(3)(h) of the Constitution and the dicta as set forth in the locus classicus in this regard being S v Zuma and Others [1995] ZACC 1; 1995 (2) SA 642 CC."*
- [34] Thereafter both accused nos 2 and 3 closed their cases in the trial within a trial without testifying and without calling any witnesses.
- [35] The prosecution, notwithstanding the State's insurmountable problems which I have already alluded to, prevailed upon me to nevertheless rule these statements admissible despite having admitted that the state witnesses were not shining beacons of credibility. To my mind that was putting it mildly. Credibility is but one of the State's problems. The absence of the most basic knowledge of how to deal with suspects, arrested persons and detainees (either through lack of training or deliberate incompetence) is the other. Indeed my comments would not have differed were this Court sitting in a pre constitutional setting.
- [36] The members of the police who dealt with the accused blatantly ignored their basic rights to a fair trial and the rule of law. It does not help them to improve upon this when prosecutors who are here to assist the court, insist on attempting to justify their conduct and their disregard for the most basic notions of justice and fairness.
- [37] For all these reasons I ruled the statements made by accused nos 2 and 3 to these policemen inadmissible as evidence in the main trial.

The main trial

- [38] Thereafter the State called the evidence of one Siyabonga Sixaka whose attendance it managed to secure only by having the witness arrested. Not surprisingly, not one iota of this man's evidence

implicated any of the accused in the commission of the offences with which they had been charged, or in respect of any other offences for that matter. The witness was clearly hostile from the outset and I do not know why more of this Court's time was being wasted by the dominis litis party insisting on calling him only to apply for him to be declared hostile, which I did without any difficulty. Not yet ready to admit defeat, the State, having handed in the witness's police statement, embarked on an energetic and pointless attempt to resuscitate the witness. This attempt only served to alienate the witness even further, the main thrust of his evidence being similar to that of accused nos 2 and 3: that he was assaulted at times by the police, at other times he was told what to say, and also that he was currently experiencing severe pain in his side. The fact that it was extracted from him with gentle coaxing from accused no. 3's attorney, that the police did not administer the oath to him when the impugned statement was taken, but that he was now speaking the truth in court under oath and with the support of his family who were encouraging him to speak the truth, once again did not assist the prosecution.

[39] The State thereafter called one Sgt Ntebele whose testimony was riddled with hearsay evidence regarding what one Ntabithemba Ntuthu had said to him. The evidence was provisionally allowed on the understanding that Ntuthu would be called to confirm it. Ntuthu, for whom a warrant had also been issued, not surprisingly, could not be traced, and I accordingly indicated that I would disabuse my mind of what Ntebele had said and ruled that his evidence was to be expunged from the record.

[40] In all the circumstances, there being no evidence against accused nos 2 and 3 at all, they were both granted a discharge at the close of the State's case.

The remaining case against accused no. 1

[41] That then leaves me with the position of accused no. 1.

[42] During the State's case the prosecution had called one Nobathembu Koli as a single eye-witness to the attack on the deceased. Ms Koli told this court that she had been living in Peddie since she was four years old. During August 2017 she used to hitch from Peddie to Grahamstown court where she was employed. On Wednesday, 2 August 2017 she was walking along the road between Ayliff Primary School and Numpumelelo Hospital hoping to catch a lift. The deceased drove towards her coming from the direction of the school. He stopped his taxi and alighted therefrom to urinate. She asked whether he could give her a lift to the hospital. A man came jogging towards them from the direction of the hospital. He was wearing a tight black leather jacket, black faded trousers and a navy hoody, the hood of which partially covered his forehead. She had seen him wearing the jacket and trousers before. His hands were in the pockets of the hoody. When he was closer to them, she saw that it was Baphiwe Dingela (accused no. 1).

[43] The deceased, who had completed his ablutions, greeted her and got back into his vehicle.

- [44] The accused stood in front of the vehicle, pointed a firearm (which he held with his arm outstretched at an angle in front of him) towards the front of the vehicle and opened fire in the direction of the driver's side where the deceased was seated. When he opened fire it sounded like a zipper being pulled (the witness made a "grrrrr" sound to describe what she had heard).
- [45] At this point the accused was close to her and his face was clearly visible. He also saw her. Thereafter the accused ran towards the open field behind the vehicle and in the direction of Mhlabone, and she (the witness) ran to her home to recompose herself as she was in a state of shock. After she had regained her composure she hiked back to work.
- [46] She was unable to work. She was shaking and worried because she and the accused were known to each other. He also knew where she was working. She went to the doctor and asked for a sedative as she was suffering from a terrible headache and insomnia. She did not tell anyone what she had witnessed. She remained at her flat in Grahamstown and slept there in order to calm down.
- [47] Sometime thereafter she attended a prayer meeting for the taxi violence which was ongoing and had become an integral part of their daily lives. She decided to confide about what she had witnessed to one Mr Mpofu who was addressing the issue of the violence. Mpofu called a policeman who held some position of authority in Grahamstown. Initially she was hesitant to speak to this policeman as she did not really know where he hailed from, but eventually she opened up. She deposed to an affidavit with respect to the incident. This was about two months after the incident had taken place. He told her that he would liaise with the Zwelitsha detectives, but they gave her no assurance regarding her safety. She realised that she was putting herself in "boiling water". That was when she was housed in a place of safety. This was still during 2017.
- [48] Ms Koli explained her previous links and relationship with the accused in detail. His father and her mother had been best friends and were involved with the UDM together. As a result the accused and his father had frequented her parental home. As a further result the accused befriended her younger siblings and visited them regularly at her home. Sometimes he would carry her bags for her in exchange for R5. His father was always at the taxi rank. Sometimes she saw the accused at the taxi rank as well. At times she saw him driving small cars (later referred to as "cockroaches") to Peddie extension. His parental home is at Feni which is beyond Daba where her parental home was, but in close proximity to it.
- [49] Reasons for her reluctance to immediately come forwards, or even to summons an ambulance, were elicited in the main from her during cross examination on behalf of accused no. 1. She explained them in the following terms:
- a. The taxi violence was ongoing and had become a part of their daily existence.
 - b. The major taxi owners were:

Mr Gwejela (accused no. 2's father, who was buried a couple of months before she witnessed the deceased being shot at).

Mr Mhlayifani Mtanjana

Mr Ndevu (the deceased)

Mr Nonjukela

Mr Mpofu.

These were known to be the members of the border alliance. They owned all the local taxi routes. Many "incidents" were committed by taxi owners in the same association. People were saying that accused no. 2's father was behind it all. They were frightened of him. The incident which she had witnessed and was testifying to was another taxi violence incident. The manner in which it took place was similar to the other taxi violence incidents.

- c. Consequently she legitimately feared for her life and the lives of her children.
- d. She knew of many incidents where people were murdered. Witnesses stayed mum. People simply did not volunteer information. There were dead bodies. People who dared to report to the police were either killed or injured. She personally knew of a witness who had told the police that she had seen accused no. 2 and his father committing an offence. This woman was injured for speaking out.
- e. On another occasion she was in her office at the Peddie court when accused no. 2's sister (Thabisa) said that she would kill anyone who dared to testify with her own hands. She even recorded the conversation and sent it to one Mr Mzwala who was in court at the time. She considered herself fortunate that these people were not aware of the fact that she had witnessed the shooting on 2 August 2017.
- f. Even the magistrate presiding over a bail application was threatened by one of accused no. 2's family members (the witness demonstrated by drawing her index finger across her throat). The magistrate sought protection and body guards were appointed. "How can I not fear for my life if a magistrate feared for her's?" she added spontaneously.
- g. Witnesses at large could not rely on the police for protection.
- h. She herself was afraid that accused no. 1 would hunt her down and kill her.
- i. She was ultimately placed in a witness protection programme.

[50] When it was put to her during cross-examination that according to the State's summary of substantial facts accused no.1 was not alone when he shot at the deceased, her response was: "I don't know this". It was also put to her that at the time she alleges she saw the accused he was sleeping with his girlfriend and only woke up at 10am that day. It was further put to her that the accused's sister (Thabisa), who buys his clothes, would testify that the

accused did not own the jacket she had described. When it was put to her that accused no.1 did not know her brother, she laughed and said: “He is lying. He is lying a lot!”

[51] When it was put to her that accused no. 1 never visited her home with his father she said: “Baphiwe is lying.”

[52] During cross-examination she reiterated that she had a clear recollection of the events and could even “see it in my head.” The last she saw of the deceased was when he was still in the motor vehicle. She never saw him lying in a pool of blood as depicted in the photo album. She also did not see what his car looked like after the shooting. She did not see another car or another person at that moment. This she candidly conceded.

[53] In a nutshell, this was the high water mark of the prosecution’s case against accused no. 1.

[54] Accused no. 1 testified in his defence, after his application for a discharge at the close of the State’s case was refused. He said that on the night of 1 August 2017 he slept at his home with his girlfriend. He was woken at ten the following morning and accompanied his sister Thabisa and one Nomathemba to Ayliff Primary School. On

the way to the school the road was blocked off in the vicinity of what I gather was the crime scene and they used a detour to the

school. On the way back the road was still blocked. Their car was searched and they were told about the incident. He was wearing Adidas slip on shoes, Puma shorts and a blue Uzzi t-shirt. He said that although he had a lot of clothes he could always remember what he wore on a daily basis. He was however unable to say what he had worn on a daily basis during July 2017. He slept and later that day they went to East London airport to fetch his brother. On the way back he was telephonically advised that the police were looking for him and for Thabisa. Apparently the police had searched his home and the garage in connection with a certain car. They were summoned to the police station. He was arrested in connection with this case a few weeks later. He was questioned about his relationship with accused nos 2 and 3 and his relationship with accused no. 2’s uncle who had disappeared. He said that he knew accused no. 2 and that he and accused no. 2’s brother were friends. He knew accused no. 3 by sight.

[55] It was not disputed that his father and Koli’s mother were bosom friends and together in the UDM. He said that he only really knew Koli by sight and had no idea why she would falsely implicate him. He denied having visited her home or that he was friends with her siblings. He admitted though that Koli used to work at the Peddie magistrates’ court and that they had seen each other there in 2013 when he was arrested for another matter. Ultimately, he conceded that Koli knows him. He knew the deceased by sight and had also seen him at the taxi rank. He said that accused no. 2’s family were

taxi owners like the deceased. When asked whether he was aware of the raging taxi feud at the time that the deceased was killed he said “I would like not to respond to that. I will not tell what happens in accused no. 2’s family as I don’t talk about my family as well.” He said that he had heard that accused no. 2’s brother was shot in March 2017 and his father in June 2017.

[56] Accused no. 1 did not impress me as a witness. He vacillated from one extreme to the other. It is highly improbable that he knew nothing about the ongoing taxi violence and I reject his version in that respect. His attempts to distance himself from Koli and her family were fickle, transparent and blatantly dishonest.

[57] Accused no.1 called Nosipho Gwejela with whom he was living on the day of the incident and with whom he still lives. She said that accused no. 1 had been living with them since 2011 when his father died and that she viewed herself as his provider, his sister and his carer and mother. She said that she used to buy his clothes and (and not Thabisa) that he did not possess a lumber jacket and black jeans during August

2017. He also did not possess a hoodie. She confirmed his evidence as to what he was wearing on 2 August 2017. She could not recall however what he wore the day before but could remember that he wore trousers the following day as they were going on an outing to King William’s Town. She said that he accompanied her sister Thabisa and Thabisa’s friend Nomathemba to the school on 2 August. She said that he normally wakes up at about 9am and on that day it was after nine when they left for the school. That was the first time she saw him that day. Clearly, although she could only assume that he was sleeping before that, she could not vouch with certainty regarding his whereabouts at 7.30 that morning, when Koli said she saw him shooting at the deceased’s car. Indeed, she stated in no uncertain terms that she did not know what he had been doing before he boarded the motor vehicle that morning, or whether he was the one who had opened fire on the deceased. She said that she knew Koli from

the Peddie area. Coincidentally, Nosipho also just happens to be accused no. 2’s biological sister. She confirmed that her dad was a taxi owner and that he was shot that same year, shortly before the deceased. She said that she and two of her cousins were also shot. She began to weep bitterly at having to recollect these experiences. She said that no one had been arrested for these crimes that had been committed against her family. She added that even while she was testifying, she still felt unsafe. She did not know whether the deceased had been her father’s rival. She confirmed that her brother (accused no. 2) was a taxi driver for a short time. She herself was operating a driving school and a bed and breakfast.

[58] After her evidence, accused no. 1 closed his case.

Evaluation

[59] Koli is, for all intents and purposes, a single witness. In terms of section 208 of the Criminal Procedure Act an accused may be convicted of any offence on the single evidence of any competent witness. It is not in dispute that Koli is a competent witness. The danger of relying exclusively however on the sincerity and the perceptive powers of a single witness has evoked a judicial practice that such evidence be treated with the utmost care.[2] This is generally referred to as the application of the cautionary rule.

[60] Koli made a good impression on me as a witness. She had no reason to falsely implicate the accused. It is clear that they knew each other well, and had known each other for a long time before this incident. There was no bad blood between them. Neither Koli nor her family were involved in the taxi violence. As such she was an independent witness

with no motive to falsely implicate accused no. 1. I find that her identification of the accused was both reliable and credible. She knew him well and there were no issues regarding poor lighting or anything else which could have affected her opportunity for accurate observation. I agree with the prosecution that she could not have been better placed for accurate identification and observation. She saw the accused shooting at the deceased's taxi. She saw him running around the taxi. She left the scene after the accused and after the entire process of identification had been completed.

[61] I accept her explanation for not raising a hue and cry immediately after she observed this. It is both plausible and realistic. Under cross examination she provided numerous examples of people who had been threatened, injured and killed during the taxi violence just for coming forward. Her evidence in this regard was materially corroborated by the accused's own witness. It was nothing more or less than genuine fear that caused her to delay in reporting. A reasonable and well grounded apprehension of imminent and real danger. She built up the courage at a prayer meeting and after she was offered proper protection. It is vitally important to her evidence that before she attended this meeting she remained mum about

what she saw. In the premises, there was no opportunity for her to collude with others to fabricate a case, and then to do so only

against accused no.1 and not accused no. 2 who appears to have been the main person who had an axe to grind for loss of family members in the taxi war. She has had absolutely no incentive to lie. The fact that two sets of cartridges were found at the scene have no bearing on the reliability of her evidence and in fact fortifies her credibility. She testified only to what she saw in her frame of reference that day. She did not speculate about vehicles or people who may have been on the other side of the vehicle, also firing shots at it as the ballistic evidence and the reconstruction of the scene would seem to suggest. She also did not say that the deceased's body was struck while he was in the vehicle. She simply saw one person firing shots at the vehicle after the deceased had already boarded it. I am inclined to agree with the prosecutor that the limits within which she described her observations are an objective guarantee for her reliability.

[62] In essence what is expected from this court is to apply a common sense approach to this type of evidence. It is also so that where the evidence of the single witness is corroborated in any way which tends to indicate that the whole story was not concocted, the caution enjoined may be overcome and acceptance facilitated. But corroboration is not essential. Any other feature which increases the confidence of the court in the reliability of the single witness may also overcome the caution[3]. There are a number of these features for eg:

- a. The fact that the accused lived within walking distance from the scene and was home before and after the commission of the offence.
- b. The fact that he was living with accused no. 2's family who were clearly centrally involved in the taxi warfare.
- c. The fact that the deceased was indeed a taxi owner and driver.
- d. The fact that a number of spent cartridges were found around the taxi, and particularly on the driver's side.
- e. The fact that the cause of death was multiple gunshot injuries.
- f. The fact that Koli knew the accused well and was not hostile towards him. Indeed he seemed to have been near and dear to her and to her family.
- g. The fact that she had no motive to falsely implicate him.

[63] All these factors support the prosecution's contention that this was a conducive setting for a conclusion that the accused participated in the planning of and the murder of the deceased. These factors strongly support the probability that he did so. Koli's observation and her reliable identification is supported by these factors, the objective facts and also then, the circumstantial setting.

[64] In the premises I am satisfied that the state has proved beyond a reasonable doubt that the accused participated in the planning of and the murder of the deceased, and that he fired shots from a firearm at the deceased causing the deceased's death, alternatively, making common purpose with others to do so. By the same token I am also satisfied that the state has not proved statutory conspiracy or incitement, or that the accused was at any stage in possession of

a prohibited firearm as described in count 5 of the indictment.

[65] I make the following order with respect to accused no. 1:

On counts 2, 3 and 4 (murder and the possession of a firearm and ammunition), I find him guilty.

In respect of counts 1 and 5 (contravention of section 18 of the Riotous Assemblies Act and the possession of a prohibited firearm), he is found not guilty and he is discharged.

I. T. STRETCH

JUDGE OF THE HIGH COURT

10 May 2019

For the State: Mr Willemse

Director of Public Prosecutions

For accused no. 1: Mr Mhlaba

Instructed by the Justice Centre

For accused no. 2: Mr Erasmus

For accused no. 3: Mr Magqabi

Instructed by the Justice Centre

[1] See Director of Public Prosecutions, *Transvaal v Viljoen* 2005

(1) SACR 505 (SCA) at [41] and [42]

[2] See *R v Mokoena* 1932 OPD 79 at 80

[3] *S v Banana* 2000 (2) SACR 1 (ZSC)

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