

SOUTH AFRICA / JUDGMENT

S v Tshuma (SS11/2022) [2022] ZAGPJHC 543 (10 August 2022)

[2022] ZAGPJHC 543

COURT

South Gauteng High Court, Johannesburg

BEFORE

Bhoola AJ

CASE / FILE NUMBER

SS11/2022

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA,
GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO. SS11/2022

REPORTABLE:

YES / NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED:

YES/NO

10

August 2022

In

the matter between:

THE

STATE

And

TSHUMA,

DERRICK ANDILE

JUDGMENT

Coram: BHOOLA AJ

Introduction

- [1] The accused, Mr. Derrick Andile Tshuma, is arraigned with five (5) counts: one count of murder (count 1), one count of Contravention of section 4 of the Firearms Control act 60 of 2000, unlawful possession of a firearm (count 2), one count of Contravention of section 3 of the aforesaid Act, unlawful possession of ammunition (count 3) and two counts of robbery with aggravating circumstances (Counts 4 and 5).
- [2] The State alleges that count one of murder is read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997, counts two and three are read with the provisions of section 250 of the Criminal Procedure Act 51 of 1977 (the Act) and counts four and five, the robberies are committed with aggravating circumstances as defined in section one (1) of the Act are read in terms of section 51(2) of the Criminal Law Amendment Act 105 of 1997.
- [3] The State is legally represented by Advocate Marule from the Office of the Director of Public prosecution and the accused is legally represented by Advocate Mosoang from the Johannesburg Justice Centre. There were no assessors appointed.
- [4] Before the accused pleaded to the charges, the import and implications of the provisions of the sections 51(1) and 51(2) of the Criminal Law Amendment Act 105 of 1997, as well as the provisions of section 250 of the Act were fully explained him. Additionally, he confirmed that the competent verdicts in terms of section 258 of the Act were explained to him by his legal representative. The accused understood the impact of all those rights.

Amendment to the Indictment

- [5] The state requested an amendment of the indictment in terms of section 186(7) of the Act, for the place where the incident occurred to be amended from Olifantsfontein River to Kliprivier river. There was no objection from the defence and the indictment was accordingly amended.

Plea

- [6] Mr. Tshuma confirmed that he understood all five counts that were preferred against him and he pleaded not guilty to all the counts in terms of the provisions of section 115 of the Act.
- [7] Mr. Mosoang confirmed that the accused's plea was in accordance with his instructions and offered no plea explanation in terms of section 115.

Admissions

[8] The following formal admissions were recorded in terms of section 220 of the Act, and marked as exhibit “A”:

8.1 The identity of the deceased is C [...] D [...];

8.2 The deceased died on 13 September 2019, as a result of multiple gunshot wounds which he sustained on 13 September 2019 at or near Kliprivier river in the sub- district of Soweto (crime scene);

8.3 The body of the deceased sustained no further injuries from the time at which the wounds were inflicted on 13 September 2019 until the autopsy was conducted on the 16th September 2019;

8.4 The medico- legal post mortem reports and the affidavits in terms of section 212 of the Act marked Exhibit “B”, containing the analysis and findings of Doctor Sajija Medar in respect of the deceased person is true and correct;

8.5 The cause of death of the deceased is multiple gunshot wounds;

8.6 L Langa, an emergency health care practitioner declared the deceased dead on the on the 13th September 2019 marked Exhibit “C”;

8.7 The photograph album with photographs 1- 30 by Constable Vincent Mashele, correctly depicting the crime scene marked Exhibit “D”;

8.8 Additionally, the defence admitted that Sergeant Thulani Knowledge Msibi, on the 26th September 2019, seized two spent cartridges (exhibits) from the crime scene, which he duly sealed in a forensic bag and were subsequently booked for as exhibits and into the SAP 13 register, and subsequently handed them over to Sergeant NP Mosieleng on 27th September 2019.

8.9 On the 22nd October 2019, Warrant Officer George Masimula booked out the exhibits from the storage and later transported them to the Ballistic Section of the Forensic Laboratory where they were received intact.

8.10. The correctness and findings in respect of the analysis of the exhibits in the ballistic report compiled by Warrant Officer Pariksha Govender, marked exhibit “E”.

[9] Further admissions and witness statements were also handed in by agreement as exhibits during the proceedings:

9.1 Exhibit “F” is admitted in relation to the description provided by the complainant, Z [...] Y [...], of the accused in her statement;

9.2 Exhibit “G1” which related to the SAP 329 and

9.3 Exhibit “G2”, the photograph album in respect of the identification parade was also, formally admitted by the defence in terms of section 220 of the Act;

9.3 Exhibit “H1” is the statement of Constable Mgiba, who escorted the complainant after the identification parade;

9.4 Exhibit “H2” the statement of Thulani Knowledge, the sergeant who retrieved two spent cartridges from the crime scene on the 16th September 2019, booked them and handed them to the SAP 13. Attached to the affidavit, was the SAP 13.

The Factual Matrix

The State Case

[10] During the morning hours between 11h00 and 12h00 of 13th September 2019, at Kliprivier River, in th sub- district of Soweto, Pastor M [...] (deceased) and Ms Z [...] Y [...], (complainant)

went to conduct prayers at Kliprivier in Eldorado Park. Whilst looking for running water, at the river, they met the accused, who

was in possession of a firearm. The accused subsequently instructed them to proceed to a dilapidated building, they were instructed to hand over their bags to the accused. The deceased threw his bag to the accused and fled from the dilapidated building. The accused gave chase and the complainant heard three shots been fired, which resulted in the death of the deceased.

[11] The complainant and the deceased were, robbed at gun point of their belongings, which consisted of cellular phones, a wallet, a wrist watch, wedding ring, bank cards and money. After the incident, the accused instructed the complainant to flee the scene and he subsequently disappeared from the scene.

[12] A total five (5) witnesses testified on behalf of the state and only the accused testified for the defence.

[13] The state commenced by calling Mr Nhenha Phineas Nkanyani, a police officer who is ranked as a warrant officer, who was the first to arrive at the scene of the crime after the incident occurred. He testified when he arrived at the scene with his crew, they found a female person who introduced herself as Z [...] Y [...]. She pointed out the deceased to him. The deceased, was lying down with his head on the rock. He secured the crime scene and proceeded with his investigations. Sergeant Mashele, subsequently, arrived at the scene to take photographs of the said scene. Mr. Langa, from Gauteng emergency services certified the deceased as dead at the crime scene at 15h07. The ambulance subsequently transported the deceased from the scene.

[14] When he inspected the body of the deceased, he saw three (3) open wounds which looked like gunshot wounds. The body sustained no further injuries whilst in his possession, and was received from him by the paramedics.

[15] He did not find any exhibits at the crime scene, no cartridges, no bullets and no firearm.

- [16] Ms Z [...] Y [...], (complainant), an adult female testified that on the 13 September 2019, she met with the deceased. They met at Bara and boarded a taxi to Orange Farm in search of a waterfall to perform some prayers. They alighted at Kliprivier river.
- [17] When they reached Kliprivier river, they followed the footpath in search for a waterfall. They discovered that the waterfall was blocked and no water was flowing from it. They stopped next to a bridge and were talking, when the accused, approached them. Whilst tying her shoe laces, the accused, pulled out a firearm, and raised the firearm in the air. With the firearm in his hand, he directed them to proceed in the direction where the water was blocked. They did as he had instructed. The deceased lead the way, the complainant was in the middle and the accused was behind them. The complainant, did not see where he took the firearm from and described the firearm as being black and about 10 cm in length
- [18] The accused then instructed them to proceed in another direction which was in the bush. They continued in that direction until they reached a dilapidated house. The accused ordered them to enter the said house and instructed them to sit in such a manner, that they each faced the wall in opposite directions and they were sitting back to back. He subsequently then instructed the complainant, to hand over her handbag and informed her not to look at him. The complainant obliged and did not look at him when handing her bag over to him. He searched her bag and removed the contents, which consisted of a cellular phone, and cash money, which less than a R100 in cash money and a watch.
- [19] The accused, thereafter, instructed the deceased to hand over his bag to him. The deceased threw his sports bag to the accused and ran in the direction that they entered into the building. The accused, chased after the deceased whilst he was running. The complainant suddenly, heard a gunshot and a cry from the deceased which sounded as if he was in pain. She then heard a second shot, after which, the accused uttered to the deceased that he wanted to die. This was followed by the complainant hearing a third shot.
- [20] The accused thereafter called the complainant to the crime scene. When she got to the crime scene, she found the deceased on the ground, and his head was on a rock where he was shot. The accused was searching the deceased's bag. He instructed the complainant to search the deceased. The deceased was not breathing; the complainant was shaking him so that he would not die. The accused, paid no attention to her and he removed the deceased's ring band from his finger. She beckoned for help and the accused ignored her. The deceased eventually stopped breathing altogether. He continued, searching the deceased's wallet, removing the deceased's cards and money. He eventually found the deceased's two cell phones, which was already switched on. He was scrolling the phones looking for banking apps. He requested the complainant to show him the banking apps and provide him with the pin numbers. It was then, that the complainant informed the accused, that she did not know what the pin numbers were, because the deceased is her pastor and not her husband. At this stage the complainant was facing the accused.

- [21] Thereafter, he took the complainants phone, acquired her pin, which was a pattern, removed the sim cards from the complainant's phone, threw it on the floor and directed the complainant to go back to the river where there was water. When they reached the wall beyond the pre-cast wall, the accused instructed the complainant to jump the wall.
- [22] When the complainant jumped the wall, he instructed her to run. She continued running until she was tired. The complainant thereafter, started to walk. She heard the accused scream at her to continue running. As she continued running, she heard yet another gunshot being fired. She could not say whether the gun shot was directed at her or it was fired in the air.
- [23] As the complainant continued running, there came a point when she started to walk. Eventually, she returned to the crime scene. She found both the bags. She kept her bag with her and gave the deceased's bag to the police. Eventually, she managed walking out of the bush onto the roads trying to stop cars until a taxi driver eventually stopped.
- [24] The complaint boarded the taxi. The taxi driver had a passenger in the vehicle. She reported the incident to them and informed them that she required assistance. They all returned to the scene, and the complainant pointed out the deceased. The taxi driver thereafter phoned the police. The police arrived which was thereafter followed by the paramedics. The three of them left the scene and returned to the road. The taxi driver and his passenger left the crime scene. The complainant, returned to the crime scene to the police officials. One of the police officials took down her statement at the scene and when he finished, they headed for Eldorado Park police station. Eventually she was taken home.
- [25] Under cross- examination, the complainant was asked specific questions by the defence. She described the accused without a disguise, being dark in complexion and handsome. She described his eyes as being unusual and beautiful. He had a clean "cut", combed his hair and was clean. He had no beard but had a moustache that was nicely trimmed. He was not slim, and he was not chubby. He was wearing a navy blue lumber jacket and a blue denim trouser. According to the complainant, he looked presentable, and, did not look like a murderer, or someone who will rob people. She thought he was a security, guarding that place or area. She described the accused as taller than herself, approximately 20 cm taller than her.
- [26] According to exhibit "F", which is the complainant's statement, at paragraph 23, she described the accused "as good looking, dark in complexion, with short hair. His body is small and he was speaking in Zulu language."
- [27] When photograph number 8 was shown to the complainant regarding the identity parade, which was taken on 26/02/2020, the she conceded, that the accused is small, she conceded that he has a beard. She conceded, that the witness does not have Chinese eyes, he does not have big eyes, one of his eye is not big and the other is not small. She conceded that his eyes are small and not big. She also conceded that the accused's ears were small.

- [28] The accused's version of an alibi was put to the complainant that the accused will say he was not at the crime scene, that he did not shoot the deceased, that he did not rob the deceased and the complainant, that he does not possess a firearm, that he was at Hillbrow during the time of the incident, he does not know the complainant and that she had mistakenly pointed out the wrong person. She responded by saying that he was there.

The arrest

- [29] Captain Sheldon Chris Moses, testified that he is stationed at the Orlando police station with 34 (thirty-four) years' service. During 2019 he was stationed at Eldorado Park police station and he was the investigating officer in this matter. He received information telephonically from an informer that the accused was attending Johannesburg court for a case of armed robbery. The informer provided him with the accused's name, surname and the court that the accused was appearing in. He proceeded to the Court, approached the accused, who was still a suspect at the time, introduced himself to the accused, the accused confirmed his identity and he then informed the accused that the accused was a suspect in a murder case.
- [30] He then arranged for the transfer of the accused from the court to Eldorado Park police cells as per a J7. He informed the accused, that his plan was to conduct an identification parade. He also explained to the accused that he had a right to have his legal representative present at the identity parade and the accused requested him to proceed with the identification parade without his legal representative being present. He then proceeded to make arrangements for the identification parade to be held.
- [31] During the investigation he made contact with the investigating officer in the Yeoville case and ascertained that no firearms were handed in the Yeoville docket. He also obtained the accused address from the investigating officer, he thereafter, conducted a search at the accused residence and did not find any weapons or items relating to this case. After the suspect was positively identified he charged him with murder.
- [32] After being adamant that the incident occurred at Olifantsfontein river, he was unsure where Kliprivier river was situated. Finally, he testified that he was unsure about the name of the crime scene, as people refer to it by various names. He heard the crime scene also being referred to Orange Farm river, and Fun Valley river. He was of the view that it is possible the crime scene could also be referred to Kliprivier river.
- [33] After rigorous cross- examination, he confirmed that his statement did not contain averments about him informing the accused about the identification parade, nor does it contain information about him explaining to the accused his right to legal representation. He testified, that the accused was not linked to the offence by DNA, ballistics, fingerprints or any residual.
- [34] He had no comment when he was informed that the accused would testify that according to the statement of the complainant, the description provided by her of the accused, could not assist in finding the accused.

[35] When he was confronted with the fact that the accused was arrested at Westgate Court on the 17th February 2020 when in fact there was nothing in the docket that links the accused to the incident that occurred on the 13th September 2019, the witness responded that the accused was positively identified at the identity parade.

[36] The witness denied having taken the accused's sim and smart card, his identity document and memory card. He testified if he had taken it, it would have been in his pocket book.

The identification parade

[37] The complainant Captain Moses fetched the complainant for the identification parade on the 26th February 2020. When she arrived at the police station, two other police officers fetched her. She was wearing civilian clothing. Whilst in the office with the two female officers, another female officer came into the office and explained to her how the identification parade will be conducted. Thereafter, they proceeded to the identification parade room.

[38] When they reached the identification parade room there was another female police officer conducting the identification parade. She was informed by the police officer that when she was ready to do the pointing out, she must inform her and that if she could not identify the accused, she may request the person to speak up if she knew the voice.

[39] The complainant pointed out the person holding number 6 at the identification parade. She testified she was certain of the accused identity. She did not identify the accused immediately and neither did it take her very long. When asked what made her certain that number six (6) was the person who committed the crimes on the 13th September 2019, her response was she could not explain in words and could not forget him because she saw him when he requested the pin numbers from her.

[40] She was not shown any photograph or picture to point out the accused. Prior to the pointing out, the accused was not known to her. When the complainant was shown exhibit "D", photograph 1 and 2 of the photo album, she confirmed that photograph numbers 1 and 2 referred to the dilapidated building and the deceased.

[41] Sergeant Ngwenya, attached to the FCS unit, with thirteen (13) years' service, was requested by Captain Moses, to conduct the identification parade. She was the officer in charge of the identification parade. Her testimony was that she received instructions from the investigating officer on the 24th February 2020 to conduct the identification parade on the 26th February 2020 at the Eldorado Park police station. The day after she received instructions, she went to the accused at Eldorado Park police station and explained to him that Captain Moses, requested her to conduct an identification parade. She explained to him his right to legal representation to which, he informed her that he did not require a legal representative. When all the members who were participating in the identity parade, including Lieutenant Colonel Mhlanhlo, the photographer, arrived, she went to the cells to pick people of similar height and colour as the accused. She took them from the cells, and

placed them in the identity parade room with the accused. She provided each of them with numbers. The accused, requested to change his number and place in the line-up. After the line-up, the photographer took pictures. Constable Madida guarded the complainant prior to the identification parade, and escorted her to the parade room where the parade was to be held.

- [42] When the complainant entered the parade room, Constable Ngwenya, noticed that she was a bit fringed. She requested the complainant to look at her and she informed her that when she sees the person, she must point him out. When the complainant looked at the line-up of the identification parade, she screamed and started crying, informing her that number 6 was the one that committed the crime.
- [43] She then went to the box, requested number 6 to come forward, the complainant confirmed the pointing out. They took pictures of him. She thereafter, handed the complainant over to Sergeant Mgiba and requested that the complainant be taken to victim empowerment as she is traumatised.
- [44] She thereafter, completed the SAPS 329 which was handed in as exhibit "G1" According to the SAPS 329, she received instructions to conduct the identification parade on the 25th February 2020 of the accused who spoke isiZulu. She informed the accused on the 24th February 2020 of the intended identification parade to be conducted on the 26th February 2020 at 12h30 at the Eldorado Park Police Station. On the 24th February 2020, she informed the accused of his right to legal representation he did not desire legal representation. Lieutenant Colonel Mhlanhlo was the photographer and no interpreter was used. The identification parade commenced at 14h20. Detective Constable Maake guarded the complainant and escorted her to the identification parade and Detective Constable Mgiba escorted the complainant from the identification parade. Eight persons attended the identification parade. The accused was satisfied with the set up of the identification parade including the persons on the parade. The accused occupied position number six (6) in the parade. The

complainant took two (2) minutes to positively point out the accused. During the pointing out she was nervous, shaking and was crying.

- [45] Under cross examination, when the accused's version was put to Sergeant Ngwenga that he was informed about the identification parade on the 26th February 2020, she denied that and was adamant that she met with the accused on the 25th February 2020 and not the 24th February 2020. Her response to the date of receiving instructions according to the SAP 329 was that she made an error regarding the dates in paragraphs 4 and 6 as she could not go and see the accused before receiving instructions.
- [46] When confronted whether the witness who fetched the complainant from the room where she was kept under guard was supposed to explain the procedure of the identification parade to the witness, she responded that was not supposed to have happened.

[47] Warrant Officer Caroline Maake, who is stationed at Eldorado Park Police Station with five (5) years' service testified that the complainant was in her company prior to the identification parade. She took the complainant to the venue of the identification parade and handed her over to Sergeant Mgiba and Sergeant Ngwenga.

[48] That concluded the evidence for the state.

Defence case

[49] Mr. Andile Derrick Tshuma, the accused, elected to testify. His version was that of an alibi. He is 32 years old and prior to his arrest, since 2018 he was living at 94 Kingslanglay flat, in Hillbrow, Johannesburg which is in Paul Nel and Quasi Street. He understands the five (5) counts that he is facing and he knows nothing about it. He does not know where Olifantsfontein river, nor does he know where Kliprivier river is located. He does not know the complainant Ms Y [...], and did not know her prior to the date of 13th September 2019. On the date in question, although he cannot remember specifically where he was, he lived in and was in Hillbrow. He does not possess a licence for a firearm nor does he possess a firearm and was not carrying a firearm on the day in question.

[50] His version regarding his description was that he is not very dark in complexion and he does not possess a navy jean and a navy blue jacket. He described himself as having normal eyes, just like everybody else. He always had a moustache and a beard. He described himself as having a small body and disagreed with the complainant's version that he is not small and not chubby, she was describing a different person and not him.

[51] He was arrested by Captain Moses on the 17th February

2020. He testified that Captain Moses informed him that he is arresting him for murder and took him to Eldorado Park Police

Station. When they got to the police station, he was kept in a single cell. When he was arrested, nothing was found in his possession

belonging either to the complainant or the deceased. They also searched his residence and nothing was discovered.

[52] With regard to the identification parade, he was only informed of the identity parade by Sergeant Ngwenya, on the 26th February 2020 and not on the 24th or the 25th of February 2020. He confirmed that he was pointed out at the identification parade and is adamant that it was a mistaken identity

and the complainant made a mistake and mistook him for somebody else.

[53] That concluded the evidence for the and the defence closed their case.

The issue in dispute

[54] What remains in dispute in this matter, is the reliability of the complainant's identification of the accused.

The law, analysis and evaluation of evidence.

The burden of proof and onus

[55] It is trite law that the state bears the onus of the proving the accused guilt beyond reasonable doubt and the corollary is that the accused is entitled to be acquitted if it is reasonably possible, that he might be innocent[1].

[56] In *R v Difford*, [2] it was held "it is equally clear that no onus rests on the accused to convince the Court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.

[57] In *S v M* 2006 [3] the court held, taking into consideration the aforementioned and having regard to the evidence in this matter this Court is duty bound, not only to look at the evidence implicating an accused person in isolation, to determine whether there is proof beyond reasonable doubt; and conversely it cannot look at the exculpatory evidence in isolation to determine, whether it is reasonably possible that it might be true. It must look at the totality of evidence as a whole to make a determination regarding the guilt or not of an accused person.

[58] It is common cause between the parties that the state must prove its case beyond a reasonable doubt.

[59] In assessing evidence in a criminal trial according to *S v Chabalala* [4] the trial court must , "..... weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the state to exclude any reasonable doubt about accused's guilt."

[60] In *S v Hadebe* [5] the Supreme Court of Appeal followed the approach set out in *Moshephi and Others v R* [6] where the following was said.

"The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the Appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual parts of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not

to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees."

[61] In *S v Meyden*[7] , the court held

that "the proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored."

[62] In *S v Trainor*,[8] the court held

"a conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence must of course be evaluated against the onus on any particular issue or in respect of the case in its entirety. The compartmentalised and fragmented approach of the magistrate is illogical and wrong."

Evidence of a single witness

[63] Section 208 of the Act, regulates the conviction of an accused by a single witness and states that an accused may be convicted of any offence on the single evidence of any competent witness.

[64] In *Stevens v State*[9] , the SCA at 5d-e

it is, however, a well established judicial principle that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility. The correct approach to the application of the so-called 'cautionary rule' was set out by Diemondt JA in *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G. At paragraph 6a-d the judgment illustrates the dangers of what has been called "a compartmentalized approach" to the assessment of evidence, namely on approach which separates the evidence before the court into compartments by examining the 'defence case' in isolation from the 'State case' and vice versa. In the words of Nugent J in *S v Van der Meyden* 1999 (1) SACR 447 (W) at 449c - 450b, it was held 'Purely as a matter of logic, the prosecution evidence does not need to be rejected in order to conclude that there is a reasonable possibility that the accused might be innocent. But what is required in order to reach that

conclusion is at least the equivalent possibility that the incriminating evidence might not be true. Evidence that incriminates

the accused and evidence which exculpates him, cannot both be true – there is not even a possibility that both might be true – the one is possibly true only if there is an equivalent possibility that the other is untrue. ...The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logic corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether to convict or acquit) must count for all the evidence. Some of the evidence might be found to be false; some of it might found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none may simply be ignored.”

[65] In *S v Sauls and Others* [10] Diemondt JA held:

“There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness... The trial judge will weigh his evidence, will consider its merits and demerits and, having done so will decide whether there are

shortcomings or defects or contradictions in his testimony, he is satisfied that the truth has been told. The cautionary rule referred

to by De Villiers JP in 1932 (in *R v Mokoena*), may be a guide to a right decision but it does not mean “that the appeal must succeed if any criticism, however slender, of the witnesses’ evidence where well founded” It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.

[66] I am cautious and mindful that I am dealing with the evidence of a single witness. I am also mindful that I may convict of the evidence of a single witness, provided that the witness is clear and satisfactory in every material aspect.

Identification

[67] Where the identity of the perpetrator of a crime depends on human observation and is in dispute, the court must carefully consider all the surrounding circumstances before deciding whether the state has proved beyond reasonable doubt that the accused is the perpetrator.

[68] The correct approach, or the *locus classicus* with regard to identification, is set out in *S v Mthetwa*[11] where Holmes JA warned that:

‘Because of the fallibility of human observation, evidence of identification is approached by courts with some caution’. It is not enough for the identifying witness to be honest: the reliability of his observation must be tested. This depends on various factors such as lighting, visibility, and eyesight; the proximity of the witness, his opportunity for observation; both as to time and

situation; the extent of his prior knowledge of the accused; the mobility of the scene, corroboration, suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any, and, of course, the evidence by or on behalf of the accused, the list is not exhaustive. These factors, or such of them as are applicable in a particular case are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities;

[69] In *R v Dladla*[12], Holmes JA, writing for the full court referred with approval to the remarks by James J – delivering the judgment of the trial court when he observed that: ‘one of the factors which in our view is of greatest importance in a case of identification, is the witness’ previous knowledge of the person sought to be identified. If the witness knows the person well or has seen him frequently before, the probability that his identification will be accurate is substantially increased ... In a case where the witness has known the person previously,

questions of identification ..., of facial characteristics, and of clothing are in our view of much less importance than in cases where there was no previous acquaintance with the person sought to be identified. What is important is to test the degree of previous knowledge and the opportunity for a correct identification, having regard to the circumstances in which it was made.’

[70] In the present matter the accused was identified by the complainant as the one who had shot the deceased and robbed the both of them. The complainant was vehement throughout her testimony that her identification of the accused was precise and accurate. She testified that she did not know the accused prior to the incident.

[71] The complainant, in her evidence in chief, testified that she spent a long time with the accused, it did not happen very quickly. However, neither the state nor the defence, took the issue any further. The court, on questioning the accused to seek clarify on how much time the complainant spent with the witness, in the interest of justice, ascertained that according to the complainant, the ordeal lasted for approximately one hour.

[72] In establishing the principles laid down in *S v Mthetwa*[13], the complainant narrated her contact with the accused during the incident as follows:

72.1 When the accused instructed her and the deceased to walk to the dilapidated building, the deceased, led the way, she was in the middle and the accused was behind her. During this scenario, she did not have sight of the accused.

72.2 When they reached the dilapidated building, the accused instructed them to sit and face the wall, back to back. The accused then instructed the complainant to hand over her handbag, and not to look at him when she did so. She complied, and did not have sight of him at during this time.

72.3 When the third shot was fired, the accused called the complainant to the scene where he had shot the deceased. When she went to the crime scene, she found the accused searching the deceased's bag and removing the deceased's wrist watch and wedding band. Her testimony was that at this stage she spent two to three minutes next to him. She remarked, during this stage, she did not think of looking at the accused's face intently, because she was surprised and shocked that the deceased was shot at and lying on the ground.

72.4 He instructed her to lift up the body of the deceased, she managed to look at his face for approximately nine (9) to ten (10) seconds.

72.5 When the accused requested the pin numbers of the banking apps from the complainant, they were standing facing each other and she managed to observe his face for approximately ten (10) minutes. When she could not provide him with the pin numbers, the accused directed the complainant to walk towards the precast wall, whilst he followed her and that was the last that she saw him.

72.6 In total the complainant observed the accused for ten (10) minutes and ten (10) seconds.

[73] Approximately, five (5) months later, on the 26th February 2020, the complainant positively identified the accused at an identity parade line – up held at Eldorado Park Police Station, where she pointed him out. The reason she pointed him out when she saw him was she had a flashback of the incident. There was no other explanation provided regarding the identification of the accused to Sergeant Ngwenga at the identification parade.

DISCREPANCIES

Ballistics and cartridges found at the crime scene

[74] It is common cause that the state was only relying upon identification to proof its case. There was no physical

evidence, not a fingerprint, not any recovered cell phones, nor watch, nor ring, nor DNA, nor firearms.

[75] Section 220 admissions were made to the effect that two spent cartridges were seized at the crime scene on the 26th September 2019 by Thulani Knowledge Msibi and handed over to Sergeant N.P. Mosieleng on the 27th September 2019.

[76] According to exhibit H2 the cartridges were seized on the 16th September 2019, three (3) days after the incident and was entered into the SAP 13 on the 26th September 2019.

[77] The witness was not called to testify to clear up this discrepancy and disparity with the witness's statement, the section 220 admissions and the entry into the SAP13 register.

- [78] Furthermore, Sergeant Nkanyani who was the police official to arrive on the scene first, testified that there were no exhibits found at the crime scene. I find that the section 220 admission, contradicts exhibit H2 and the state failed to call the witness to testify and clear the discrepancies.
- [79] There is nothing in the ballistics report to link the cartridges to the crime scene. Both the investigation and the manner in which this evidence was tendered is frowned upon.
- [80] There is no evidence before this court to connect the accused to the crime and thus to provide a measure of objective assurance against the pitfalls of subjective identification. The greatest assurance of guilt must lie in such evidence, rather than in identification on its own, which as this case shows can be beset by error and misdescription and doubt, in which case possibly and even presumably guilty persons must walk free. [14]
- [81] When it came to the identification of the accused, the complainant described the accused as follows:

81.1. In her statement to the police, marked exhibit “F” she describes him as good looking, small bodied, wearing a blue jean and navy jacket,

81.2 in her evidence in chief, she described him as handsome, not small and not chubby, with a moustache, clean, looks like a security guard, taller than her, unusual eyes and wearing navy jean and a navy blue jacket.

81.3. At the identification parade, there was no description provided to Constable Ngwenga about the accused. She looked at him, screamed and cried, had a flashback and knew it was him at the crime screen.

81.4 When it came to the dock identification, the only evidence led by the state was the complainant pointed out the accused as the person whom was present at the crime scene and whom she identified at the identification parade.

81.5 Under cross – examination she conceded that there was nothing unusual about the accused’s eyes. On the courts clarity as to what she meant was unusual about the accused’s eyes, she responded that the eyes were not big or small, she could not tell if he was intoxicated or normal, because his eyes were almost closed when she was talking to him. Additionally, she conceded, that the accused ‘s nose was different and she described him as having an English nose; which she explained was pointed. When questioned about the accused’s beard, she testified that he did not have a beard on the day of the incident, but only a moustache. She testified the possibility exists that he grew a beard thereafter. She also conceded that on the 13th September, 2019, she did not have sufficient time to look at the accused properly.

Identification parade

[86] Section 37(1)(b) of the Act, regulates the availability of witnesses to participate in identification parades. This section empowers any police official to make an arrested person available or cause such person to be made available as the police officer may determine for identification parade in such condition, position as the police officer may determine.

[87] The procedural aspects of the identification parade were challenged by the defence in the following respects:

87.1 Captain Moses, in his evidence in chief, could not remember the date when he gave Sergeant Ngwenya instructions to conduct the identification parade. He could also not recall many things in his statement. His statement, exhibit “G3” is also silent in this regard.

87.2 Sergeant Ngwenya in her evidence in chief indicated the instructions were given to her by Captain Moses on the 25th February 2020, she informed the witness of the identification parade on the 24th February 2020 and the identification parade was held on the 26th February 2020. This version is supported by the SAP 329 exhibit “G1”.

87.3 When the discrepancy was pointed out to her under cross examination that she could not have consulted with the accused on the 24th February 2020 when she only received the instructions to hold the identity parade on the 25th February 2020, she informed the court that she made a mistake, that Captain Moses gave her instructions to conduct the identity parade on the 24th February 2020 and she informed the accused of the identification parade on the 25th February 2020.

87.4 The accused’s version was that Constable Ngwenya contacted him on the morning of the 26th February 2020 to conduct the identity parade.

[88] According to the complainant, the identification parade was held on the 26th February 2020. She was fetched by Captain Moses, handed over to two other female police officers dressed in civilian clothing and another police officer came into the office and explained the procedure to her. The officer who explained her rights thereafter took her to the identification parade room. After she pointed out the accused, another police officer fetched her from the identification room

[89] According to Sergeant Ngwenya, both in her evidence in chief and in cross examination, the complainant was brought to the identification parade by Constable Modiba, and in re-examination she changed her evidence to indicate that the complainant was brought to the identification room by Sergeant Maake, this then corroborated what is mentioned in the SAP329 in exhibit “G1”.

[90] Constable Maake, stationed at Eldorado Park police station with five years’ experience, testified that on the 26/02/2020, she was requested by Captain Moses to guard the witness, which she did. There was a brief moment when the witness was left in the company of Colonel Mashaba and Colonel Ngwenya. She took the witness to the identity parade room and handed the witness over to Detective Constable Ngwenya.

- [91] The State, by agreement with the defence, handed in exhibit “H”1, which is the statement of Detective Sergeant Tebogo Trever Mgiba. According to the statement, he testified that he was to guard the witness at the identity parade on the 25th February 2020 and escort her back to the room she was in.
- [92] It remains in doubt whether Constable Modiba or Seargent Maake took the witness to the identification parade. The complainant’s version was that the police officer explained the procedure for the identity parade whilst she was in the office being guarded. It was also conceded by Constable Ngwenya that the witness who brought complainant to the identification room, ought not to have discussed the procedure of the identification parade with the complainant.
- [93] Sergeant Ngwenya testified that the accused requested that she proceed with the identification parade in the absence of his legal representative and the accused testified that he requested his legal representative to be present. The states version in this regard is corroborated in the SAP 329, exhibit “G1”
- [94] A legal representative present at a parade can enjoy no greater rights than those of the accused, his client. He cannot advise him not to participate, nor can he proffer advice as to the position the accused might take in the line-up, nor offer advice as to the clothing that he should wear, unless permitted to do so by the police officer in charge. He may, if present, obviously make suggestions to the police as to the conduct of the parade but these can legitimately be ignored. At best, he can advise the accused to remain silent or not draw attention to himself but this at a properly conducted parade will be achieved by the policeman in charge of the parade.[15]
- [95] I am satisfied that the identification parade was properly constituted but was not properly conducted. I am not satisfied that the procedural aspects of the identification of the accused is both reliable and credible. There are just too many discrepancies present and instead of the state calling witnesses to clarify the shortcomings, they elected to hand in statements which does not address the discrepancies. One such example is that Sergeant Ngwenya’s evidence is that the identity parade was conducted on the 26th February 2021, According to exhibit “H1”, the statement of Detective Sergeant Mgiba the identification parade was conducted on the 25th February 2020, where he escorted the witness after the identification parade. Had the witness been called to testify this would have been clarified. Another is the discrepancies in the dates in the SAP 329, exhibit “G1”

Verdict

- [96] The state in this matter is relying on the evidence of a single, witness of Miss Y [...], and submits that the complainant was an honest and credible witness. She submitted that her evidence was portrayed in a coherent, detailed and consistent narration of events and her contradictions or differences were satisfactorily explained by her.

[97] The defence, submits that Captain Moses was a poor witness and could not remember many things regarding the accused, Sergeant Ngwenya tailored her evidence on the identification parade and was not a good witness. He submits the complainant was not a reliable witness. Her evidence lacked credibility and reliability when one compares her written statement in respect of the identification of the accused, it is different from the description of the accused in her evidence in chief. Additionally, she testified in chief that there were no other people at the crime scene, whereas in cross examination she testified

that there were other people in a car and one mentally sick person.

[98] His submission is that the probabilities are such that these other people could have committed the offences and that the accused should be acquitted on all counts that he is charged with as the state has not proved its case beyond a reasonable doubt.

[99] When considering the totality of the evidence before me I have the states and the defences version.

[100] The State has to prove its case beyond a reasonable doubt and to secure a conviction and the accused's version has to be reasonably possibly true to secure an acquittal. The evidence must be considered holistically in arriving at this decision.

[101] According to *S v Charzen*[16], "Our courts have emphasized again and again, in matters of identification, honesty and sincerity and subjective assurance, are simply not enough. There must in addition, be certainty beyond reasonable doubt that the identification is reliable, and it is generally recognised in this regard that evidence of identification based upon a witnesses' recollection of a person's

appearance can be 'dangerously unreliable', and must be approached with caution. [17]

[102] Cameron JA at paragraph 14 stated, "facial; characteristics are a more reliable and enduring source of identification than variable features such as hairstyle or clothing...." and at paragraph 19, he stated "that the only evidence the state called about the robbery, was the single testimony of the complainant. There was no physical evidence, not a fingerprint, not a recovered cell phone, nor wallet, nor purse, nor baby seat: nothing to connect the accused to the crime and thus to provide a measure of objective assurance against the pitfalls of subjective identification. The greatest assurance of guilt must lie in such evidence, rather than in identification on its own, which as this case shows can be beset by error and misdescription and doubt, in which case possibly and even presumably guilty persons must walk free".

[103] Considering the totality of the case, I find that the State witnesses, seen in context of all the evidence submitted by the state was not corroborated by any physical objective evidence. There was no evidence linking the accused to any of the charges. There was no DNA, there was no fingerprints, there was no firearms found. The cartridges were found on a different day than when the offence was committed, and it cannot be linked to the accused in any manner whatsoever. There is no corroboration of the finding of the cartridges at the crime

scene and exhibit “H2” in that the statement indicates that the cartridges were found on the 16th September 2019, the SAP 13 register indicates that the spent cartridges were booked in on the 26th September 2019 with no explanation provided for the discrepancy in the dates.

[104] I am mindful that the state is relying on the evidence of a single witness. There appears to be too many discrepancies in the identification of the accused by the complainant. Being honest and coherent is not enough. The evidence must be reliable and credible. I have before me at least three different descriptions of the accused by the complainant. The legitimacy of the identification parade is questionable as it is unclear who escorted the witness to the identification parade and no explanation was advanced as to why was the procedure for the identification parade explained to the complainant by the police officer who was guarding the complainant and the different dates provided as to when the identification parade was actually held.

[105] My conclusion is that the accused was not properly and satisfactorily identified and this is fortified by the fact that there are a minimum of three (3) different descriptions provided by the complainant. Additionally, the identification parade is not without its blemishes as alluded to above. I am of the view that the evidence of the State witness is not reliable and credible and the state failed to discharge its onus and did not prove its case beyond a reasonable doubt.

Order

[106] In the result, I make the following orders:

Count 1: Murder read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997, and further read with section 258 of the Criminal Procedure Act 51 of 1977, I find the accused not guilty and acquitted;

Count 2: Contravention of section 3 read with sections 1, 103, 117, 120(1)(a) and 121, read with schedule 4 of the Firearms Control Act, 60 of 2000 and further read with section 250 of the Criminal Procedure Act 51 of 1977- unlawful possession of firearm, I find the accused not guilty and acquitted;

Count 3: Contravention of section 90 read with sections 1, 103, 117, 120(1)(a) and 121, read with schedule 4 of the Firearms Control Act, 60 of 2000 and further read with section 250 of the Criminal Procedure Act 51 of 1977- unlawful possession of ammunition, I find the accused not guilty and acquitted;

Count 4: Robbery with aggravating circumstances as defined in section 1(1) of the Criminal Procedure Act 51 of 1977, read with the provisions of section 51(2) of the Criminal Law Amendment Act, 105 of 1997, and further read with section 260 of the Criminal Procedure Act 51 of 1977, I find the accused not guilty and acquitted;

Count 5: Robbery with aggravating circumstances as defined in section 1(1) of the Criminal Procedure 51 of 1977, read with the provisions of section 51(2) of the Criminal Law Amendment Act, 105 of 1997, and further read with section 260 of the Criminal Procedure Act 51 of 1977, I find the accused not guilty and acquitted.

C B Bhoola AJ

Acting Judge of High Court

Gauteng Local Division, Johannesburg

[1] S v Van der Meyden 1991 1910 SACR 44 (WLD)

[2] 1937 (AD) 370 at 373.

[3] 2006 (1) SACR 135 (SCA) at 183h-i

[4] 2003

(1) SACR 134 (SCA)

[5] 1997

(2) SACR 641 (SCA),

[6] (1980 – 1984) LAC 57 at 59F-H

[7] 1999(2) SA 79 (W)

[8] 2003(1) SACR 35 (SCA)

[9] 2005

[1] All SA 1 (SCA)

[10] 1981

(3) SA 172 (A) at 180E-G

[11] 1972(3) SA 766(A)

[12] 1962 (1) SA 307 (A) at 310C-E

[13] 1972(3) SA 766(A)

[14] Carhzen (344/05) [2006] ZASCA 147

[15] S v Sibanda and Others 1969 (2) SA 345.

[16] (344/05)

[2006] ZASCA 147

[17] DT Zefferdt, AP Paizes and A St Q Skeen, The South African Law of Evidence (2003) page 142.

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