

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 379/09

(No precedential interest)
In the matter between:

**SIBULELE MAVANGWANA
APPELLANT**

v

**THE STATE
RESPONDENT**

Neutral citation: *Mavangwana v State* (379/2009) [2010] ZASCA 43
(31 March 2010).

Coram: Mthiyane, Mlambo et Tshiqi JJA

Heard: 3 March 2010

Delivered: 31 March 2010

Summary: Criminal law – identification by a single witness.

ORDER

On appeal from: Western Cape High Court, Cape Town (Davis J, Dicker AJ sitting as court of appeal).

The following order is made:

The appeal is dismissed.

JUDGMENT

MLAMBO JA (Mthiyane, Tshiqi JJA concurring):

[1] On 4 September 2002 and sometime after midday at the corner of Selvin and Langa Streets in the Nomzamo informal settlement in the Western Cape, Anton Wyngaardt (the deceased) was shot three times, one of the bullets piercing his heart, and died on the scene. The cause of death was recorded in the post mortem report as loss of blood. At the same time, John Steven Haggard (Haggard), who was travelling with the deceased, was shot twice, on his right arm and face, but managed to drive away from the scene. The appellant was arrested some five months later on the 28 February 2003. He was charged with murder alternatively culpable homicide as well as attempted murder. In the ensuing trial in the Western Cape Regional Court the appellant pleaded not guilty to all the charges and

advanced an alibi defence in his plea explanation. The state led the evidence of Haggard and two police witnesses whilst the appellant testified on his own behalf but called no witnesses. He was in due course convicted of murder and attempted murder and sentenced to 15 and seven years' imprisonment respectively, and the sentences were ordered to run concurrently. His appeal to the Western Cape High Court (Davis J and Dicker AJ) against his convictions and sentences was unsuccessful but that court granted him leave to appeal to this court.

[2] The appellant's convictions rest entirely on the evidence of Haggard, who is the sole witness to the incident in which both he and the deceased were shot. The appeal is directed primarily at the acceptance by the courts below of Haggard's evidence identifying the appellant as the person who committed the two offences. I turn to Haggard's evidence as presented at the trial.

[3] He testified that he was a paraffin sales person and that on that day he had come to the Nomzamo informal settlement (Nomzamo) to recruit new customers for the oil company he was working for at the time. The deceased, had been working with him for approximately two weeks up to that day. After entering Nomzamo he stopped his vehicle next to a Spaza shop (as these informal settlement shops are known) situated at the corner of Selvin and Langa Streets, and spoke to a woman behind the counter enquiring if the shop owner was present. He left a short while thereafter upon being informed that the owner was not at the shop. Some time later, at 13h45 he returned to

the shop only to be told that the owner had not returned. He had left his car idling with the deceased seated in the passenger seat. I pause here to mention that on his earlier and subsequent stops at the shop and whilst speaking to the shop attendant he had noticed the appellant standing inside the shop next to what looked like a tank. He had also seen the appellant on two previous occasions when the latter had approached him to enquire about paraffin prices.

[4] Upon being informed that the owner had not returned, he got into his car and in an instant heard a gunshot go off and immediately realised that he had been shot in his right arm, with the consequence that he was flung sideways into the car. He neither knew nor saw who had fired the shot but as he looked up he saw a person moving in front of the car towards the passenger side. He saw the person shooting the deceased who had got out of the car. The deceased fell to the ground, and this prompted Haggard to move towards the latter to see if he could render any assistance. As he did so the person fired another shot at the deceased causing him to spin around and he tried to flee, but fell to the ground near the car. Haggard then tried to return to the driver's seat but the person with the gun blocked his path pointing it at him. It was at that stage that he realised that the person with the gun was a man. In reaction he knelt down and pleaded with the man not to shoot him. The man however took careful aim, closed his eyes and whilst turning his face sideways, fired another shot which hit him in his mouth. When the man shot him he was not more than two to three metres away from him. At that stage he had an opportunity to see the face of the man and recognised him as the

appellant, whom he had seen earlier inside the shop when he stopped for the first time, and thereafter, shortly before the shooting. Thereafter he managed to stumble into the car and drive away from the scene.

[5] Sometime after the shooting and after he had made a statement to the police, two police officers, Inspector Swart and Captain Van Dyk came to his house and gave him eight photos asking him to see if he could identify the face of the man who had shot him and the deceased. When he got to the third photo he immediately identified the appellant's face as that of the person who shot him and the deceased. He was subsequently called to a formal photo identification parade where he was shown the same photos and signed on the same photo he had identified previously. During cross-examination considerable time was spent on these photo identification parades as well as the positioning of the spent cartridge shells which were found on the scene and in his car. In this regard it is worth noting that two shells were found inside Haggard's car and three other shells were found inside the shop.

[6] The next witness for the state was Inspector Jan Harm Petrus Koekemoer. He was the first policeman on the scene after the shooting. The important feature of Inspector Koekemoer's evidence is that while he was at the scene he saw a black person in the shop, with a small built wearing blackish/brownish clothing. He also mentioned that the person concerned had a woollen cap, which fits in with the description given by Haggard in the identikit he prepared to

assist the police to trace the suspect. His description of the clothing of the person concerned also ties in with that given by Haggard. In his evidence Haggard testified that the appellant wore long black pants, a brownish coat and a woollen cap. The other state witness, another policeman, Inspector Adolf Johannes Jonker, did not take the case any further, save that he had accompanied the investigating officer to Haggard's house regarding the first identification parade.

[7] The appellant testified on his own behalf and raised an alibi defence, alleging that at the time of the shooting he had accompanied his elder brother, the owner of the shop Haggard had stopped at, to the wholesalers at Khayelitsha, another residential area, to make purchases for the shop. He denied that he was the man who murdered the deceased and attempted to murder Haggard.

[8] Other than arguments relating to certain alleged irregularities committed during the investigation of the matter especially with regard to the two photo identification parades conducted with Haggard as well as the positioning of the spent cartridge shells that were found at that shop and in Haggard's car, the primary focus of the argument advanced on the appellant's behalf was the reliability of Haggard's identification evidence. On the question of photo identification, no improper conduct was relied on by the appellant in relation to the photos shown to Haggard at his house. He was simply handed eight photos and it was left to him to identify the person who shot him and the deceased. In my view the reliability of this identification cannot simply be brushed aside but has to be

considered with other relevant evidence in the case. While there may be something to be said against the second photo identification parade, especially as regards the weight to be given thereto given the fact that Haggard was being shown the same photos that he had already been shown at his house, I do not see how the first photo identification could be impeached. Be that as it may, the main focus of counsel's attack was on the reliability of Haggard's identification of the appellant. Counsel's argument on this aspect, reduced to its bare essentials, was that the incident in itself was traumatic, chaotic and riddled with confusion which prevented Haggard from making a proper observation of the man who shot them. It was argued further that Haggard's testimony of having seen the appellant on previous occasions amounted to fleeting instances. It can thus not be said, so the argument went on, that he had adequate opportunity to make a proper observation. We were therefore urged to conclude that having regard to all of these factors there existed a reasonable possibility of a mistake on Haggard's part, as to the identity of the person that shot him and the deceased and that doubt must inure to the benefit of the appellant.

[9] A reading of the trial court judgment reveals that the trial magistrate warned himself of the need to approach Haggard's evidence with caution in view of the fact that he was a single witness. The court also warned itself of the need for reliability of his evidence of identification. That court then analysed the evidence and made several observations in the process. Those observations are that the incident happened during broad daylight; that Haggard was honest

and sincere; that he did not contradict himself nor did his evidence come across as unreliable; that he had seen the appellant on previous occasions when the latter had enquired about paraffin prices and further that on that day he had seen him earlier and had seen him on his return to the shop. The magistrate further observed that Haggard's best opportunity to observe the appellant was at the time when Haggard was about two to three metres from him and saw him not in profile but directly.

[10] In addition, the trial court reasoned that even though the first photo identification parade may have been flawed because the investigating officer was present, there was, however, no evidence or any suggestion that Haggard was informed beforehand which photo to identify. That court then concluded that Haggard's identification of the appellant was reliable and that he was the person who committed the offences. The court a quo made the same observations and reasoned the matter essentially along the same lines, save that it considered, correctly in my view, that there was enough evidence to convict even if the photo identification evidence was not considered.

[11] I can find no basis to fault the reasoning of the courts below. Their conclusions are buttressed in large measure by Koekemoer's evidence. In this regard Koekemoer, who responded to the call and arrived at the scene where the deceased's body was still present, testified that, whilst gathering evidence at the scene, he saw the appellant in the shop. His evidence was that he became conscious of the latter because the appellant was watching each and every move

they made on the scene and then simply vanished. He stated that it was the appellant's demeanour more than anything, which he found suspicious and made him become conscious of his presence there. He did not know who had committed the crimes and just found the appellant's demeanour suspicious. It was this observation that enabled him to identify the appellant in court as the man he saw in the shop not long after the incident. Koekemoer was not challenged on this version when he was cross-examined. It is important to remember that Koekemoer had had no discussion with Haggard and independently identified the appellant in the shop, though be it not as the perpetrator as he did not know what had happened. In my view Koekemoer's evidence effectively nullifies the appellant's version of not being there when the incident took place.

[12] I also find it instructive that Haggard had provided an identikit of the face of the appellant long before the latter's arrest. The only criticism levelled against the identikit during the trial was that Haggard had made the face slightly thinner than the real face. This criticism was, in my view, unfounded. The trial court found that the identikit evinced a striking resemblance to the appellant's face.

[13] Haggard was not seeing a stranger on the day of the shooting. This was someone he had seen before. Clearly, therefore, when he saw him during the shooting incident especially when he was kneeling in front of him, with a two to three metre gap between them, he was seeing someone that he had seen before and that to me is the most compelling factor that renders his identification of the

appellant conclusive.

[14] During the trial it was argued on the appellant's behalf that the appellant had a 2 cm scar on his face which Haggard did not mention. Reference was also made to another mark on his face. That the marks in question were not readily noticeable is clear from what transpired at the trial before the magistrate. Although the appellant's dock was right in front of the magistrate he was only able to notice the marks in question after his attention was drawn to them by his counsel and only after he had asked the appellant to turn his head. In those circumstances it could hardly be expected of Haggard to have noticed those superficial marks or scratches if they were there at the time. Besides, Haggard had the gun pointed at him at the time and he had been and was being shot at. In my view the failure to observe those marks, if they were there, does not detract from the reliability of his evidence.

[15] Given the opportunity for observation which Haggard had of making an accurate identification his evidence on this aspect is beyond reproach. On a quick calculation Haggard had at least six opportunities to identify the appellant. He had seen him on two occasions before the day of the incident; he saw him at the shop when he first came and when he returned to find out if the shop owner had returned. He saw him on two occasions during the shooting from a distance of about two to three metres. Even though these moments were not lengthy, the cumulative effect thereof allows of no other conclusion than that Haggard had time and opportunity to

make a correct identification and that he did make a reliable identification. I am not persuaded that there is a reasonable possibility that he was mistaken in identifying the appellant as the person who shot him and the deceased.

[16] Although there was an appeal against sentence, no argument was advanced in support thereof.

[17] In the circumstances the appeal against the convictions and sentences must fail. The following order is made.

‘The appeal is dismissed.’

D MLAMBO

JUDGE OF APPEAL

APPEARANCES:

APPELLANT: P Greyling
Instructed by HJG Labuschagne, Cape Town
Van Koppenhagen Attorneys, Bloemfontein

RESPONDENT: C de Jongh
Instructed by Director of Public Prosecutions,
Cape Town and Bloemfontein