THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 109/2014

In the matter between:

ANTONIO VAN WILLING **FIRST APPELLANT**

FAREEZ MOHAMED **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral Citation: *Van Willing & another v The State* (109/2014) [2015] ZASCA 52 (27 March 2015)

Coram: Mpati P, Bosielo JA and Schoeman, Van der Merwe and Meyer AJJA

Heard: 6 March 2015

Delivered: 27 March 2015

Summary: Criminal law – Admissibility of hearsay evidence in terms of s 3(1)(c) of Act 45 of 1988 where person who made the statement deceased – whether evidence of single identifying witness credible and reliable – effect of failure of appellants to testify.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Rogers J sitting as court of first instance).

1 The appeal against the conviction and the sentence of each of the appellants is dismissed.

JUDGMENT

Schoeman AJA (Mpati P, Bosielo JA, Van der Merwe and Meyer AJJA concurring)

[1] This appeal stems from an incident that occurred on 27 June 2012 when Lance Harrison (the deceased) was shot and wounded at Steenberg, Cape Town. He succumbed to his wounds shortly afterwards. Both appellants were charged with murder and the unlawful possession of a firearm or firearms and ammunition in contravention of ss 3 and 90 of the Firearms Control Act 60 of 2000 respectively. The appellants were both convicted of murder and the second appellant, was in addition, convicted of the two contraventions of the Firearms Control Act. The appellants were each sentenced to life imprisonment on the murder charge, while the second appellant was, in addition, sentenced to two years' imprisonment for the illegal possession of the firearm and one years' imprisonment for the unlawful possession of ammunition. The court below granted leave to appeal to this court both appellants against their convictions and sentences.

[2] Numerous witnesses testified, but the convictions of the appellants were based on the evidence of an identifying witness, Ms Petersen, placing the two appellants on the scene where the shooting took place and statements made by the deceased first to Ms Erica Petersen and later to Constable Ncedo Ndyamara. The two appellants did not testify in their own defence, but both called witnesses to confirm their alibis.

Grounds of appeal

[3] The criticism by the appellants of the judgment of the court below centred on (a) the acceptance of the evidence of Ms Petersen and Const. Ndyamara, arguing that the court paid lip service to the applicable cautionary rules, in that it did not approach their evidence with the necessary caution when both were single witnesses in respect of part of their evidence. Ms Petersen was furthermore an identifying witness, whose evidence must be approached with caution on that score as well; (b) the ruling that the hearsay evidence of the deceased as to the identity of his assailants was admissible; (c) the submission that if the court was correct in finding that the first appellant was on the scene, the state failed to prove that he had shot the deceased or that he had made common cause with the shooter; and (d) the argument of both appellants that the court below erroneously rejected their alibis.

Approach on appeal

[4] It is appropriate to reiterate the approach of a court of appeal regarding the factual and credibility findings of the court below as set out in *R v Dhlumayo.*[1] The court of appeal must keep in mind that the trial court saw the witnesses and could observe and assess their conduct. If

[1] *R v Dhlumayo & another 1948 (2) SA 677 (A).*

there was no misdirection as to the facts, the point of departure is that the trial court's findings were correct. The court of appeal will only reject the finding of the trial court if it is convinced that the finding was erroneous. If there is doubt, the findings of the trial court must stand.[2] However, it is not only the trial court's findings that are important but also the reasons for adopting those findings which must be set out in the judgment.[3]

[5] The judgment of the court below was comprehensive and detailed, setting out the reasons for all the findings.

The evidence

[6] The State's case is that the deceased lived on the property of Ms Petersen in a bungalow in the back yard. On the night in question a man called the deceased's name from the street. Ms Petersen recognised the voice as that of a certain 'Tony'. She recognised his voice as she often saw him when he visited her neighbour's daughter with whom he was involved in a relationship. As Tony continued calling, Ms Petersen called the deceased from his bungalow. The deceased went to the front door and addressed 'Tony' asking him what he wanted. The person on the other side of the door said that he must come out as 'ons soek jou stem'.[4] She did not know what that meant. She heard a second voice say that the deceased must come out and the deceased then asked (while speaking Afrikaans): 'What is it Fareez?' and 'Fareez, why do you want my voice?'. The deceased sounded anxious and when she peeped through her bedroom window she saw two men outside the gate, one of whom was Tony and the other a person she only knew from the neighbourhood but did not know his name. She identified the first appellant as 'Tony' and

---

[2] *S v Robinson & others 1968 (1) SA 666 (A) at 675G-H.*

[3] *S v Nkosi 1993 (1) SACR 709 (A) AT 711E-G.*

[4] *The direct English translation of this is 'we want your voice'.*

the other man as the second appellant. While the two men were talking with the deceased, the first appellant entered the yard and walked towards the house. Thereafter the second appellant entered the yard while he had his right hand in his pocket. They asked the deceased to come outside. Ms Petersen left her vantage point and was on her way to the front door to remonstrate with the two men as they were causing a disturbance, when gunshots rang out. The deceased cried out (in Afrikaans): 'What are you doing now Fareez?' Further shots rang out and she jumped onto the bed to protect her son. After the deceased had called for help she went to him and saw that he had stumbled back into the house. She went to him, held him and asked who had shot him. The deceased said that it was Tony from next door and then added that it was not Tony who had shot him, but Fareez.

[7] Const. Ndyamara was the first policeman on the scene, a short while after the incident. He found the deceased lying on the floor in a pool of blood. He asked the deceased who had shot him and the deceased first said 'Tony'. When he asked again the deceased said 'Antonio'. The deceased furthermore said that 'Raez' was the second person. The deceased said that Antonio lived in Wicht Court. At this stage the deceased was weak and Const. Ndyamara could not hear distinctly what he had said.

[8] The investigating officer, Const. Heinrich Sampson, arrested the two appellants. On 5 July 2012, he went to Wicht Court to arrest the first appellant who, according to an informant, lived in a flat. He found four males in the flat and asked for their names. None was called Tony and the first appellant gave him a false name. After he had obtained a physical description of the suspect, he returned to the flat where he found the same

four males present. He then confronted the first appellant who confirmed that he was Antonio van Willing. Acting on directions of a fellow policeman, Const. Sampson went to Wicht Court in search of Fareez. At Wicht Court he told the second appellant's grandmother and sister that they were looking for Fareez. Later the next day the second appellant handed himself over to the investigating officer.

[9] Const. Ndyamara made a statement that same evening in which he stated that the deceased mentioned Tony and Raez as the names of the persons that were involved in the shooting and Wicht Court as the name of a block of flats where the first appellant resided.

[10] The post mortem examination of the deceased revealed that the deceased had sustained four gunshot wounds of which two were fatal. One of these wounds entered the front right chest area which perforated the apex of the right lung. The other wound entered the right chest cavity from the back, perforated the right and middle lobes of the right lung and the subclavian vein. Both these wounds caused significant haemorrhaging.

[11] A photographic identity parade was held after Ms Petersen had intimated to the investigating officer that she would not participate in an identity parade where she had to face the persons she saw on the night of the incident. Const. Samson selected eight photographs of persons with the same gender, race, skin colour, hairstyle and similar features to the second appellant. He sealed those photographs in an envelope together with the photo of the second appellant and it was stored in the exhibits storeroom. At the photographic identity parade Ms Petersen pointed out a photograph of the second appellant.

[12] The evidence regarding this identity parade was led during a trial-within-a-trial. It was, however, decided that it was not only the admissibility that would be tested during cross-examination, but also the issue of the reliability of the identification and the weight that should be attached to the evidence. A video recording was made of the identification parade which was admitted in evidence. The trial court studied the video recording. The second appellant's counsel, conceded during the trial that there was no evidence of deliberate tampering with the photographs. All the photographs were available during the trial and the trial court found that the identification of the second appellant was both proper and reliable.

[13] In *S v Moti* [5] this court expressed the view that it would be improper to have a photographic identity parade rather than an identity parade after the arrest of a suspect. In that instance the issue was whether a photo-identification of the appellant before his arrest was proper and reliable. This court found that there was no impropriety attached to the photo- identification.

[14] I am of the view that the photographic identity parade was properly held. The reasons for resorting to a photographic identity parade were valid due to the accepted fact of gang activities in the area where the shooting of the deceased had occurred and Ms Petersen's realistic fears of reprisal. Ms Petersen initially refused to make a statement to the police as she feared involvement due to the gang activities in the area where she resided. The view in *Moti* that a photo-identification would have been improper had the suspect already been arrested was *obiter* as the issue did

[5] *S v Moti 1998 (2) SACR 245 (SCA) at 255D-E.*

not arise in that matter. There is an additional safeguard in this instance where the coincidence of a person named Fareez being one of the perpetrators and Ms Petersen pointing out an innocent person named Fareez, is just too remote and improbable.

[15] The presiding judge called two witnesses in terms of the provisions of s 186 of the Criminal Procedure Act 51 of 1977: Carmen Abrahams, a lodger in Ms Petersen's premises at the time and Nadine Harrison, the widow of the deceased. Ms Abrahams ostensibly contradicted Ms Petersen in respect of the sequence of events. Furthermore, she tesitifed that did not hear the deceased say anything after he had been shot. Mrs Harrison testified that she was called to the scene by Ms Abrahams who informed her that the deceased had been shot. The deceased then spoke to her but did not disclose who had shot him (she did not ask) and he also said that he did not know why he had been shot.

[16] The two appellants did not testify, but each called a witness to confirm their respective alibis. During cross-examination of Ms Petersen it was put to her that the appellants denied that they were the two persons who were at the scene where the shooting took place. Paradoxically, the first appellant furthermore disputed that the evidence established that the person who Ms Peteren identified as 'Tony' and who was not the shooter, made common cause with the shooter.

Evaluation

The cautionary rules

[17] Counsel for the appellants argued that because Ms Petersen was contradicted by Ms Abrahams, her evidence should have been rejected. This loses sight of the correct approach in evaluating the evidence of

witnesses in respect of self-contradictions and contradictions between witnesses. In *S v Oosthuizen*,[6] Nicholas J said:

'There is no reason in logic why the mere fact of a contradiction, or of several contradictions, necessarily leads to the rejection of the whole of the evidence of a witness.

The subject is considered in Wigmore on *Evidence* vol III chap 35 ("Specific Error (Contradiction)") and chap 36 ("Self-contradiction"). What follows is drawn largely (although it should be said, by way of caution, not exclusively) from those chapters.

Where one statement contradicts another, both cannot be true; one of them must be false.

Where the statements are made by different persons, the contradiction in itself proves only that one of them is erroneous: it does not prove which one. It follows that the mere fact of the contradiction does not support any conclusion as to the credibility of either person. It acquires probative value only if the contradicting witness is believed in preference to the first witness, that is, if the error of the first witness is established.'

[18] Ms Petersen was extensively cross-examined on her identification of the two appellants. It was common cause that street lights illuminated the scene and the light from the house also shone outside. She was adamant that there was sufficient light to identify the people in her yard. It was not denied that (a) the first appellant had a relationship with Ms Petersen's next door neighbour's daughter and that he regularly visited there; or (b) that the second appellant was on occasion in the street where Ms Petersen resides and she had previously seen him.

[19] The court below formed a very favourable impression of Ms Petersen as a witness. Such impression is borne out by a reading of the

---

[6] *S v Oosthuizen 1982 (3) SA 571 (T) at 576A-C. This case was followed in President of the Republic of South Africa & others v South African Rugby Football Union & others 2000 (1) SA 1 (CC) para 124.*

record. Her evidence was approached with caution, both as an identifying and a single witness.[7]

[20] Ms Petersen was further corroborated by Const. Ndyamara in that the deceased, shortly after he told Ms Petersen about the identity of the people who had shot him, also told Const. Ndyamara. Const. Ndyamara's virtually contemporaneous statement that the deceased told him the names of the perpetrators put paid to allegations of collusion or conspiracies.

[21] The court below found Ms Petersen to be a very good witness. There is nothing in the record that belies that conclusion. Const. Ndyamara was similarly found to be a credible witness, which is also borne out by the record. The assessment of the witnesses can therefore not be overturned on appeal.

Hearsay evidence

[22] The content of the statements made by the deceased to Ms Petersen and Const. Ndyamara constitute hearsay. Prior to the introduction of s 3 of the Law of Evidence Amendment Act 45 of 1988, such statement could have been admissible as an exception to the general principle that hearsay evidence is inadmissible, either as a 'dying declaration' or as part of the res gestae. The admissibility of hearsay evidence, including hearsay evidence of the sort under consideration here, is now regulated by the said section.[8]

[23] Section 3(1)(a) provides that hearsay evidence is inadmissible unless each party against whom the evidence is to be adduced agrees to

[7] *S v Sauls & others 1981 (3) SA 172 (A) at 180E-G.*

[8] *S v Ramavhale 1996 (1) SACR 639 (A) at 647d-e.*

the admission thereof as evidence at such proceedings. S 3(1)(c) confers a discretion on the court to allow hearsay evidence if it is in the interests of justice and sets out the factors that have to be taken into account by the court when making such a determination. These factors are:

'. . .(i) the nature of the proceedings;
(ii) the nature of the evidence;
(iii) the purpose for which the evidence is tendered;
(iv) the probative value of the evidence;
(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
(vi) any prejudice to a party which the admission of such evidence might entail; and
(vii) any other factor which should in the opinion of the court be taken into account. . .'

I will discuss these factors seriatim in relation to the evidence presented by the State.

The nature of the proceedings

[24] In *Ramavhale*,[9] Schutz JA held that '. . . a Judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there are compelling justifications for doing so.' However, as was expressed in *S v Shaik & others*[10], '. . . sight should not be lost of the true test for the evidence to be admitted, and that is whether the interest of justice demands its reception.'

[25] The admission of the statements had the effect that it corroborated the evidence of an identifying witness. Although the statements played a

[9] *At 649 C-D.*
[10] *S v Shaik & others 2007 (1) SACR 247 (SCA) para 171; [2006] ZASCA 105.*

part in the conviction of the appellants, it was found to be in the interests of justice to allow the evidence.

The nature of the evidence

[26] The probative value of the hearsay evidence depends on the credibility of the deceased. The question must thus be asked whether his evidence identifying the perpetrators would be reliable. In this instance the deceased reported to Ms Petersen that Tony and Fareez were the persons who had shot him, but it was Fareez who was the shooter. The reliability of this evidence was enhanced by the fact that Ms Petersen testified that she had seen the people with those names outside the house, talking to the deceased immediately before the shots rang out. The fact that those were the names that were mentioned is further corroborated by the evidence of Const. Ndyamara that the name of the first appellant as well as his address, 'Wicks Court' was mentioned to him. Later investigation confirmed that the appellants either lived or had connections with Wicht Court. Const. Ndyamara's testimony that the deceased mentioned the name 'Raez' does not detract from the reliability of the deceased's statement as it is common cause that the deceased was very weak at that stage and Const. Ndyamara had difficulty in hearing the deceased. Phonetically, 'Raez' and 'Fareez' are not that dissimilar.

The purpose for which the evidence was tendered

[27] The evidence was tendered by the State as corroboration of the evidence of Ms Petersen that the two appellants were at the scene immediately prior to the shots being fired. It was furthermore presented as proof that the second appellant was the shooter.

The probative value of the evidence

[28] To paraphrase *Ramavhale:* the enquiry relating to the probative value of the evidence should proceed under two heads, namely (a) the reliability and completeness of Ms Petersen and Const. Ndyamara's transmission of the deceased's words, and (b) the reliability and completeness of whatever it was that the deceased did say.[11]

[29] With regard to (a), both Ms Petersen and Const. Ndyamara were reliable witnesses and their respective testimonies regarding what the deceased said to them were in line with the identification of the two appellants by Ms Petersen. Although Const. Ndyamara testified that the deceased mentioned 'Raez', it was also evident that the deceased was weak at the time and he was speaking softly. It is probable that Const. Ndyamara did not hear the name clearly or correctly.

[30] With regard to (b), the reliability and completeness of what the deceased said to the two witnesses must be assessed against the background of the evidence of Ms Petersen, which the court below accepted as credible, that she saw the two appellants at the scene. The name Tony was also repeated to Const. Ndyamara.

The reason why the deceased did not give the evidence

[31] This item is uncontentious.

Prejudice

[32] In *Shaik* it was stated that the prejudice mentioned in this regard, is not the prejudice that an accused may be convicted.[12] No prejudice was submitted as a reason why the statement should not be admitted in this

[11] *S v Ramavhale at 649E-F.*

[12] *Paragraph 177.*

case. The usual prejudice is that the person could not be cross-examined. This however is prejudice only if the case of the appellants could be advanced by cross-examination.[13] It was not argued that it was the position in the instant matter.

Any other factor

[33] No other factor has been mentioned as being important in deciding whether the statements should be admitted or not.

Conclusion in respect of the admissibility of the hearsay evidence

[34] I can paraphrase what has been said in *Shaik* in that, having regard to the high probative value of the evidence and the risk that the appellants would be prejudiced by its admission was slim, the admission of the hearsay in evidence was in the interest of justice, notwithstanding the fact that its admission was sought in criminal proceedings and such evidence is of importance to the State's case. Furthermore, the court below dealt with all these factors and we have not been referred to any misdirection.

Common purpose

[35] The first appellant argued that the state has failed to prove that the two people present made common cause with each other regarding the shooting. According to this argument, it was only the person called Fareez who was mentioned as the shooter by the deceased. Furthermore, the correct inference from the evidence of Ms Petersen was that it was the person whom she identified as the second appellant who had his hand in his pocket who must have fired the shots. Therefore, it was argued, there was no evidence that they made common cause with each other.

---

[13] *See Shaik para 177.*

[36] In S v Mgedezi & others,[14] Botha JA set out the prerequisites for a finding that people acted with a common purpose in the context of a murder charge in the absence of a prior agreement. These are that the first appellant must have been present at the scene where the violence was being committed; he must have been aware of the assault on the deceased; he must have intended to make common cause with those who were actually perpetrating the assault; he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others; and he must have had the requisite mens rea.

[37] In applying these principles to the facts of the instant matter it is clear that the first appellant was present at the scene and he was aware of the shooting. The witnesses could not explain what the phrase 'Ons soek jou stem' means. However, those were words uttered by both the appellants at the scene and it was clear that both appellants wanted the deceased to come outside, in fact it was the first appellant who first called the deceased and told him to come out. Shortly thereafter the shots rang out. Clearly the first appellant associated himself with the further conduct of the second appellant. There was no evidence on the part of the first appellant, verbal or otherwise, to indicate or show shock or surprise at the shooting of the deceased. After the deceased was shot four times the first appellant and Fareez ran from the scene and the first appellant did not report the incident to anybody in authority nor to Ms Petersen or the deceased's wife. The court below put it thus:

'It must be remembered that the shooting took place at a house next door to the house where he used to visit his girlfriend. Petersen, the owner or landlady of the house, was not unknown to him. Nor was Harrison [the deceased] (who addressed the first accused by his name). Since the first accused was not a stranger to the household,

---

[14] *S v Mgedezi & others 1989 (1) SA 687 (A) at 705I-706B.*

one would have thought – if he was not there for a nefarious purpose and meant Harrison no harm—that after an unexpected and shocking attack on Harrison he would have remained and offered help rather than fleeing.'

[38] It can be argued on the same facts that the appellants went to the deceased's home with the pre-meditated plan to kill the deceased. However, due to the finding that the appellants acted with a common purpose, it is not necessary to do so.

Failure to testify

[39] In S v Boesak[15] *the following was said.*

'The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. What is stated above is consistent with the remarks of Madala J, writing for the Court, in Osman and Another v Attorney-General, Transvaal, when he said the following:

"Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice."' (footnotes omitted)

---

[15] *S v Boesak 2001 (1) SACR 1 [2000] ZASCA 25 para 24.*

[40] The appellants both called witnesses to confirm their alibis. The improbability of the evidence of their witnesses, coupled with their own failure to testify, had the result that such alibis were correctly rejected.

[41] The evidence against the two appellants established a prima facie case against them. The evidence of the prosecution, sans any rebuttal from the two appellants, thus proved the guilt of the appellants beyond reasonable doubt.

Sentence

[42] The minimum sentencing provisions of s 51 of the Criminal Law Amendment Act 105 of 1997[16] *are applicable to the sentences imposed on the appellants. This means that there have to be substantial and compelling circumstances present for the trial court not to impose the prescribed minimum sentence of life imprisonment, as it was found that the murder of the deceased by the appellants were premeditated and they were acting with a common purpose.*

[43] S v Malgas[17] *is the starting point to determine whether the trial court was correct in its assessment that there were no substantial and compelling circumstances present. The substantial and compelling circumstances we were referred to in respect of the first appellant were: he was youthful at the time of the commission of the offence, he was 23 years old; he had been using drugs for the previous five and a half years; and he has a young son aged seven years. The second appellant was 22 years old when the offences were committed, he used tik, a dependence producing substance, and he had been in custody for 14 months as an awaiting trial prisoner.*

---

[16] *Section 51(1) of the Criminal Law Amendment Act read with Part I of Schedule 2 of the Act.*

[17] *S v Malgas 2001 (1) SACR 469 (SCA).*

[44] The reason why youths' ages are taken into consideration during the sentencing process is because of their immaturity and the possibility that their judgment might have been impaired and therefore could bow to peer or other undue pressure to commit crimes. However, I cannot find that the appellants, in the instant matter, were immature or intellectually undeveloped. As was remarked in S v Matyityi[18] *a person of 20 years should show that he was immature to such an extent that his immaturity would be a mitigating factor. That was not done in the instant matter. Similarly the appellants did not show that their addiction to drugs had anything to do with the commission of the crime.*

[45] Murder is a heinous crime. In the instant matter it has taken on all the characteristics of an assassination without the two appellants providing a motive for the killing.

[46] No real substantial and compelling reasons were advanced why the prescribed sentences were erroneously imposed.

[47] Accordingly the following order is made in respect of both appellants:

The appeal against the conviction and the sentence of each of the appellants is dismissed.

I SCHOEMAN
ACTING JUDGE OF APPEAL

[18] *S v Matyityi 2011 (1) SACR 40 [2010] ZASCA 127 (SCA) para 14;.*

APPEARANCES

For Appellant:	R Cloete (First Appellant)
	M Calitz (Second Appellant)
	Instructed by:
	Legal Aid South Africa, Cape Town
	Legal Aid South Africa, Bloemfontein
For Respondent:	K Pillay (with him N Bell)
	Instructed by:
	Director of Public Prosecutions, Cape Town
	Director of Public Prosecutions, Bloemfontein