# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
# JUDGMENT

**Not Reportable**
Case no: 089/15

In the matter between:

**MAURICO ARENDSE** **APPELLANT**

**and**

**THE STATE** **RESPONDENT**

**Neutral citation:** *Arendse v S* (089/15) [2015] ZASCA 131 (28 September 2015)

**Coram:** Shongwe, Theron and Saldulker JJA

**Heard:** **28 August 2015**

**Delivered:** **28 September 2015**

**Summary:** Criminal law – identification by witnesses who had prior knowledge of the appellant – in cases where the witness has known the person previously, questions of identification of facial characteristics and of clothing are less important than where there was no previous acquaintance with the person sought to be identified – general principles of identification evidence, credibility and reliability of identifying witnesses revisited.

## ORDER

**On appeal from:** Western Cape Division of the High Court, Cape Town (Cloete and Henney JJ sitting as court of appeal):

The appeal is dismissed.

## JUDGMENT

**Shongwe JA (Theron and Saldulker JJA concurring)**

[1] This appeal is against the confirmation of conviction and sentence by the Western Cape Division of the High Court, Cape Town (Cloete and Henney JJ concurring). The appellant and a co-accused were convicted of murder, attempted murder and unlawful possession of a firearm by the regional court, Khayelitsha. They were sentenced to an effective period of 25 years' imprisonment. Two other accused were discharged at the close of the State's case in terms of s 174 of the Criminal Procedure Act 51 of 1977. The appellant and his co-accused were granted leave to appeal to the high court against their conviction – which appeal was upheld in respect of the appellant's co-accused but the appellant's was dismissed. The appeal is with the leave of this court.

[2] The entire appeal turns on the adequacy of the identification of the perpetrators of these heinous offences, the details of which will be dealt with later. The facts giving rise to the charges being preferred against the appellant are largely common cause. On 1 June 2010, at 44 Buick Street, Beacon Valley, Mitchells Plain a fatal shooting took place. That is the residence of the complainant, Mr Jeremy Henkeman. He had been residing at those premises, in a shack structure described as a 'hokkie' with his girlfriend, Ms Jessica

Guiliball (the deceased). He and the deceased had been in a relationship for about ten years and two children, aged 6 and 4 years, had been born out of this relationship. Immediately prior to the shooting incident Henkeman and the deceased had been relaxing on a bed in their home.

[3] Most of the facts are common cause and not in dispute – what is disputed is the identity of the perpetrators. While Henkeman and the deceased were relaxing at home, they heard someone calling Henkeman's name. He recognised the voice as that of 'Mugabe' (appellant's nickname). Henkeman and Mugabe knew each other very well. They were members of different gangs and resided in the same street. After the name 'Jeremy' was called, the deceased went outside to investigate as to who it was. She left the door open but returned shortly and stood in front of Henkeman at the bed, between him and the door. Before she could utter a word a volley of gun shots were fired at her and Henkeman. They were both shot at and she fell on top of Henkeman. She was fatally injured and died later that night. Henkeman sustained twelve gunshot wounds on his body and was, as a result of his injuries, hospitalized for about a month. Henkeman testified further that he managed, during the shooting, to recognise the appellant and one 'Slappes' (third accused whose appeal was upheld by the court a quo for lack of evidence implicating him) standing outside the shack holding black revolvers and shooting at them. After the shooting the two left the premises. Henkeman also saw a third person and identified him as 'Mejage' (fourth accused who had been discharged at the close of the State's case by the trial court).

[4] Two police officers, Constables Enver Leo (Leo) and John Fortuin (Fortuin) who were off duty at the time, were travelling in a motor vehicle

driven by Fortuin, somewhere in the vicinity of Henkeman's home. As they were stationary at a traffic intersection waiting for the traffic lights to change, Leo heard five loud bangs – which sounded like fireworks. Shortly thereafter he saw two persons jumping over a wall on his left hand side. They ran across the street in front of the vehicle in which he was. One of these persons was light complexioned and the other was dark and was carrying a firearm. Leo and Fortuin made a U-turn and followed the two running men with their vehicle. The two men disappeared out of their sight. Leo telephoned the police station to alert them of the incident in consequence of which other police officers were dispatched to the area. It was then discovered that there had been a shooting at the home of the complainant. The complainant and the deceased were transported to Groote Schuur Hospital.

[5] It was also common cause that Warrant Officer Joseph Lekay (Lekay) arrived on the scene. He arrested the appellant and his co-accused as a result of a report made to him by Leo to the effect that they were the same two men who had earlier jumped over the wall.

[6] It was not disputed that Leo made a statement the very evening of the shooting incident and a second statement on 11 March 2011, some nine months later, which was recorded by Warrant Officer Malan. It was in the second statement that Leo mentioned the name 'Mugabe' for the first time. On 10 August 2011, Henkeman consulted with Detective Van Reenen in an office at the Mitchell's Plain police station. It was common cause that photographs of suspects were displayed on the wall of the office in which the consultation was held. In response to a question from Van Reenen as to whether he, Henkeman, could identify the persons who had shot him and the deceased, Henkeman said

yes and pointed to a photograph of three persons, namely, Slappes, Mugabe and Mejage.

[7] Constable John Fortuin also testified – in broad he confirmed the testimony of Leo. In particular he confirmed that Leo told him, before the appellant was arrested, that the dark complexioned person was Mugabe.

[8] The appellant's version is that he was walking in the street in the company of the second accused on their way to buy airtime. They were confronted by Lekay who arrested them as perpetrators of the shooting. The appellant denied all the allegations against him. He testified that Leo and Fortuin came to the police holding-cells to have a look at them subsequent to their arrest. He confirmed that he knew Henkeman and the deceased by sight – however he did not deny that he lives in the same street as Henkeman. He also said he knew Henkeman and the deceased for a period of about three years.

[9] In this court, counsel for the appellant levelled trenchant criticism against the testimony of Leo and Henkeman, his main submission being that Leo failed to mention the name of the appellant in his first statement to the police, and that he only did so nine months later, which must make his evidence unreliable. He also criticised Henkeman in that it was improbable to have identified the appellant during the shooting and volley of shots. That the position in which Henkeman laid must have hindered his vision. In my view these criticisms are inadequate to vitiate the quality of the identification evidence.

[10] The nub of this case revolves around the identification of the appellant. In particular evidence of witnesses with prior knowledge of the appellant. There is a plethora of authorities dealing with the dangers of incorrect identification. The *locus classicus* is *S v Mthethwa* 1972 (3) SA 766 (A) at 768A, where Holmes JA warned that: 'Because of the fallibility of human observation, evidence of identification is approached by courts with some caution'. In *R v Dladla* 1962 (1) SA 307 (A) at 310C-E, 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.'

[11] In the present case we have the evidence of Henkeman who, independently and separately from Leo, testified that he heard the voice of the appellant calling his name and also saw him during the shooting. Leo on the other hand testified that one of the persons he saw jumping over the wall was the appellant nicknamed Mugabe. Fortuin confirms that Leo told him, while they were in the car before the appellant was arrested, that the dark complexioned person, with a firearm in his hand, was Mugabe. The evidence of those three witnesses cannot be ignored especially that the appellant was seen and arrested in the vicinity of the shooting. My conclusion is that the appellant was properly and satisfactorily identified and is fortified by the fact that Leo and Henkeman are not known to each other, they did not discuss this incident

before – I am satisfied that the appellant was one of the persons who shot the deceased and Henkeman. Despite the criticism of Henkeman's evidence that he admitted under cross-examination that he was under the influence of drugs – he explained that he had had the drugs early in the morning that day – at around 7 pm he had been free from the influence. The appellant did not dispute that he was a member of the 28 gang, although he did not want that aspect discussed further. Henkeman had testified that he was a member of the rival gang, the Mongrels and had known the appellant for about 20 years. This testimony solidifies Henkeman's prior knowledge of the appellant. Furthermore, Henkeman's and Leo's identification of the appellant was not based on a fleeting encounter in adverse lighting conditions. There was good lighting outside the shack of Henkeman at the time of the shooting.

[12] There is no doubt that the manner in which this case was investigated is open to criticism. For example, the evidence of Warrant Officer Malan and Detective Van Reenen, the two police officers who were involved in the investigation of this case displayed sloppiness, to say the least. Henkeman was, for example, brought to a room containing photographs of the suspects – and the prosecutor is alleged to have entered the room while Henkeman was with Van Reenen. The evidence of Leo was also criticised in that he failed to mention the name 'Mugabe' in his first statement, but only did so in the second statement. It was argued that there were discrepancies between Leo and Fortuin on whether they went to the cells after the arrest of the appellant and his co-accused. Fortuin was emphatic in his evidence that after the appellant and his co-accused were arrested, Leo and himself visited the police cells '[om] seker gaan maak'. (To make sure.) (My translation.) The evidence of Leo on this aspect was:

'Nadat die persone nou gearresteer was, was u op enige stadium weer by die polisiestasie om die persone uit te ken as die persone wat daar by die persele was? --- Nee' (After the persons

were arrested, were you at any stage at the police station in order to identify the persons as the persons who were at the scene.) (My translation.)

In my view the question is ambiguous. Leo was not specifically asked whether he visited the cells on that same day. Furthermore, he was asked whether he visited the cells in order to *identify* the persons. It is thus not possible, on this evidence alone, to conclude that there was a discrepancy between Leo and Fortuin in this regard.

[13] Of importance is whether, after considering the conspectus of the evidence, the State succeeded in proving the guilt of the appellant beyond reasonable doubt. The corollary thereof is whether the appellant's version is reasonably possibly true. (See *S v van der Meyden* 1999 (2) 79 (W) at 82C and *R v Difford* 1937 AD 370 at 373).

[14] I agree with the conclusion reached by the trial court and the court a quo and also their overall analysis and evaluation of the evidence. The high court found that Henkeman's evidence on its own cannot be regarded as sufficiently reliable and required material corroboration by other reliable evidence. The court found such corroboration in the evidence of Leo and reasoned as follows:

'… Henkeman's identification of accused number 1 [appellant] was corroborated in all material respects by the evidence of Leo. It was never put to Leo that he had not in fact been at the intersection of A Z Berman and Trampoline Streets at about 19h00 that evening; that the area was not well lit; that he had mistakenly heard shots being fired in close proximity just before the two men had jumped over the wall less than 2 metres away from him to his left; or that accused number 1 was not known to him. Furthermore, the evidence of Fortuin that Leo had immediately identified accused number 1 to him as Mugabe was not challenged.… Against this background and despite the fleeting opportunity and night time

conditions, Leo's identification of accused number 1 cannot be said to have been without inherent plausibility.'

Triers of facts should be careful and guard against admitting fanciful possibilities to deflect the cause of justice. There is no obligation on the State to close every possible avenue of escape which may be open to an accused (see *R v Mlambo* 1957 (4) SA 727 (A) at 737F-H and *S v Phallo* 1999 (2) SACR 558 (SCA) para 10.

[15] The irregularity complained of (see para 12 above) is not so fundamental or serious that the proper administration of justice and the dictates of public policy require that it be regarded as fatal to the proceedings in the trial court. (See *S v Tuge* 1966 (4) SA 565 (A) at 568B.) This accords with the approach recommended by Mahomed CJ in *S v Shikunga and another* 1997 (2) SACR 470 (NmS) at 484 C-D:

'It would appear to me that the test proposed by our common law is adequate in relation to both constitutional and non-constitutional errors. Where the irregularity is so fundamental that it can be said that in effect there was no trial at all, the conviction should be set aside. Where one is dealing with an irregularity of a less severe nature then, depending on the impact of the irregularity on the verdict, the conviction should either stand or be substituted with an acquittal on the merits. Essentially the question that one is asking in respect of constitutional and non-constitutional irregularities is whether the verdict has been tainted by such irregularity.'

[16] I must mention that there is a lot of information that has not been revealed by Henkeman by reason of his involvement in gangsterism and drugs. Such information, although not decisive in this matter, could have shed light on the motive for the shooting.

[17] The appeal is dismissed.

J B Z SHONGWE
JUDGE OF APPEAL

Appearances

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| For the Appellant: | R M Liddell<br>Instructed by:<br>N Hassan & Associates, Cape Town;<br>Phatshoane Henney Attorneys, Bloemfontein. |
| For the Respondent: | M Marshall<br>Instructed by:<br>Director of Public Prosecutions, Cape Town;<br>Director of Public Prosecutions, Bloemfontein. |