THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 134/2021

In the matter between:

WAYLAN ABDULLAH **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral Citation: *Abdullah v The State* (Case no 134/21) [2022] ZASCA 33 (31 March 2022)

Coram: MOCUMIE, SCHIPPERS and NICHOLLS JJA and TSOKA and MEYER AJJA

Heard: 16 March 2022

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Summary: Criminal law and procedure – caution applied to single witness evidence – whether the state witness' identification was reliable and credible – whether the appellant's right to a fair trial was infringed by

the high court's refusal to recall the state witness after inspection in loco was completed.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Salie-Hlope J, sitting as court of first instance):
The appeal is dismissed.

JUDGMENT

Nicholls JA (Mocumie and Schippers JJA and Tsoka and Meyer AJJA concurring):

[1] On 15 September 2020 the Western Cape Division of the High Court, Cape Town (the high court) convicted the appellant, together with his co-accused, of one count of murder; robbery with aggravating circumstances; possession of an unlicensed firearm; and, unlawful possession of ammunition. He was sentenced to an effective term of 29 years imprisonment. The appellant sought leave to appeal against his conviction. It was refused by the high court (Salie-Hlope J) but was granted by this Court.

[2] The central issue in this appeal is the identification of the appellant as one of the persons who shot the decease. Aligned to this is the high court's refusal to grant an application to recall the sole eyewitness to the shootings after an inspection in loco had been held, and after the appellant had changed his legal representatives.

[3] The facts are largely common cause. On 18 October 2018 between 17h00 and 18h00 two persons, Prezano Holland and Gregory Carelse were shot and killed in Bishop Lavis, Cape Town by two gunmen acting with a common purpose. Mr Holland was killed by a single gunshot wound whereas Mr Carelse's body was riddled with multiple gunshot wounds. According to the pathologist ten shots were fired into his body, six of which were to the head. Of the 14 cartridges found at the scene, seven were fired from one 9 millimetre firearm, and the others from a .38 revolver. One of the firearms used was linked to many other murder cases. Because there were no witnesses to Mr Holland's murder, both accused were acquitted of his murder. The focus of this appeal is therefore the murder of Mr Carelse (the deceased).

[4] Before dealing with the question of identification, it is necessary to briefly sketch the milieu in which the murders took place. Gang violence has long been rife in the areas on the outskirts of Cape Town, commonly known as the Cape Flats. Gangs have their roots in the apartheid forced removals where communities were moved from their old neighbourhoods, in or near the city centre, to the wastelands which make up the Cape flats.[1] Gang violence continues today, unabated, making everyday life a hazardous business for the residents of those areas. Shootings and bullet-ridden bodies have become a daily occurrence in the gang-ravaged areas. The South African Police Service reported in 2019[2] that gang violence is often related to clashes between rival gangs or between gangs and residents. In 2018 the Western Cape Department of Community Safety acknowledged that there is the added challenge of drug abuse as well as

[1] D Pinnock *Gang Town* 1 ed (2016).
[2] South African Police Service (SAPS). 2020. Annual report 2018-2019 at 24, available at https://www.saps.gov.za/about/stratframework/annual_report/2018_2019/annual_crime_report2020.pdf accessed on 2022/03/30.

police officials who are being controlled by gangs and corrupt politicians who have control of the drug trade in specific areas.[3]

[5] The deceased was employed as a senior security officer in the Community Safety Department of the City of Cape Town. He was also a police reservist for over 20 years and a community activist committed to ridding the area where he lived of the scourge of drugs and gang-related violence. The deceased was an eyewitness and prospective State witness in a gang-related drive-by shooting that took place in 2017, in which three persons were murdered. The accused in that case were members of the notorious prison gang, the 28's, whose members, when outside prison, are mostly affiliated to a gang known as the 'Firm'. Sergeant Lombard, the investigating officer in the triple murder case, testified was that there were leadership disputes among the 28's which played themselves out amongst members of the Firm. Valhalla Park which borders on Bishop Lavis, was considered a safe territory for members of the Firm and the 28's. Colonel Charl Kinnear, a witness in this case and a senior member of the Anti-Gang Unit, said that there were two factions of the 28's in Valhalla Park. Their respective territories were divided by Forel Street. Mr Carelse spoke of a 'war' between the gangs in Valhalla Park and Bishop Lavis.

[6] In the triple murder which was referred to as the 'Forel Street murders', the deceased, after witnessing that shooting, gave chase and managed to execute the arrest of an infamous gang member, Mr Abraham Wilson. The deceased made a statement to the police and agreed to be a State witness. Sergeant Lombard said that the victims in the Forel

[3] Western Cape Department of Community Safety: Provincial Policing Needs and Priorities (PNP). Report for the Western Cape on the Policing of Drugs 2018-2019 at 8, available at https://www.westerncape.gov.za/assets/cover_page_-_pnp_on_drug_prevention_2018_and_19.pdf, accessed on 2022/03/29.

Street murder case were other known gang members, pointing to internecine gang warfare. The deceased was well-known in the community as a person who worked closely with the police in their crime prevention efforts. It became widely known that the deceased was the person who had arrested, and handed over, Mr Wilson to the police. Sergeant Lombard said that notwithstanding the risks, the deceased had insisted on remaining in the community where he lived despite it being known that he was working with the police. Another State witness in the Forel Street murder case had been murdered some months before the killing of the deceased, in March 2018.

[7] I now revert to the main issue in this appeal - whether the single witness to the murder, Mr Dale Carelse, made a credible and reliable identification of the appellant as being one of the two people who shot and killed the deceased. Mr Carelse is the son of the deceased and was 27 years old at the time of the murder. It is trite that as a single witness, his evidence must be approached with due caution, and should be satisfactory in all material respects.[4] The principles relating to identification are equally well established. It is not enough for the identifying witness to be honest. The reliability of his identification must be tested against other factors such as lighting, visibility, proximity of the witness and opportunity for observation.[5]

[8] Mr Carelse's version is briefly as follows. On 18 October 2018 he was at home with his father in Bishop Lavis. At about 15h20 his father told him that he was going to attend to an incident in Valhalla Park and left armed with his .38 revolver in a waist holster. Later that afternoon between

[4] *R v Mokoena* 1932 OPD 79 at 80; *S v Sauls* 1981(3) SA 172 (A); [1981] 4 All SA 182 (A) at 185.
[5] *S v Mthethwa* 1972 (3) SA 766 (A) at 768A-C; see also the various cases where *Mthethwa* has been cited with approval.

17h00 and 18h00, as he was standing in the doorway of the house, Mr Carelse saw his sister walk past heading for the bus stop on her way to work. Two minutes after she had passed he heard a single shot and then a series of shots. He jumped over the wall because he thought his sister was in danger. He called to her to return to the house and kept on running in the direction of the shots. He said that he was not trying to be a hero, rather this was an automatic reaction to a high-pressure situation.

[9] As he was running Mr Carelse heard more shots. He saw two people firing shots. They were on the same side of the road as he was. The shooting stopped. He saw the one shooter bend down and 'fiddle' with the person who was lying on the ground. The appellant was standing over the person, pointing a firearm towards him, while the other shooter searched him. The two assailants then ran in the direction of Valhalla Park. As Mr Carelse approached the body lying on the pavement, he realised that the person who had been shot was his father. When Mr Carelse reached his father, he had already died as a result of the bullet wounds. His firearm was no longer in his possession.

[10] Mr Carelse immediately identified the assailants as members of the Firm who lived in Valhalla Park. He did not know their proper names, only their nicknames, Krag and Wena. The appellant was known to him as Wena. Mr Carelse had gone to school in Valhalla Park and while they were not friends, he saw them both very regularly. In fact, he said that he saw the appellant on a daily basis. The appellant used a gangster language known as Sabela when conversing with his friends. He was antagonistic towards Mr Carelse who thought the reason for this was his father's anti-gang sentiments.

[11] Mr Carelse's mother confirmed that the following day after the death of her husband, in the morning, her son informed her that the persons who had shot his father were known to him by their nicknames, Krag and Wena. However, she did not tell the police what her son had shared with her. Her husband had always told her not to trust people, especially the police at the Bishop Lavis Police Station. She was therefore reluctant to volunteer any information.

[12] It was only 19 days later, and having been persuaded to do so by his uncle and a good friend of his father, that Mr Carelse agreed to make a statement to the investigating officer, Colonel Kinnear. Mr Carelse said that he was scared to come forward and only did so once he had been given assurances by his uncle that he could trust Colonel Kinnear. Colonel Kinnear had been in the police service for 31 years, was born in Bishop Lavis and, like the deceased, had lived his entire life in the area. It is not insignificant that in September 2020 Colonel Kinnear was murdered in a hail of bullets outside his house in Bishop Lavis, while investigating numerous cases of organised crime involving gangsters and high level police officers.

[13] The appellant contends that Mr Carelse did not have the opportunity to properly observe and identify the gunmen. Much was made of the fact that Mr Carelse only had between 2-4 seconds in which to observe the appellant. Had the appellant been a stranger to him, this could have been a significant factor. However, when seeing a person who is known to you, it is not a process of observation that takes place but rather one of recognition. This is a different cognitive process which plays a vital role in our everyday social interaction. The time necessary to recognise a known face as opposed to identifying a person for the first time, is very different.

It has been recognised by our courts that where a witness knows the person sought to be identified, or has seen him frequently, the identification is likely to be accurate.

[14] In *Arendse v S*[6] this Court quoted with approval the trial court's comments in *R v Dladla*:[7]

'There is a plethora of authorities dealing with the dangers of incorrect identification. The locus classicus is *S v Mthetwa* 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".'

[15] This Court reaffirmed this principle more recently in *Machi v The State*[8] where the witnesses stated that they knew the appellant and he too admitted that he knew them. The court said in these circumstances there is no room for mistaken identity.

[16] Mr Carelse testified that he knows Valhalla Park well. He went to school there. He knows the appellant because they frequented the same

[6] *Arendse v S* [2015] ZASCA 131 para 10.
[7] *R v Dladla* 1962 (1) SA 307 (A) at 310C-E.
[8] *Machi v The State* [2021] ZASCA 106 para 27.

places where Mr Carelse 'would be hanging out with friends'. He said that the appellant, and his co-accused, were members of the Firm and would often be in the company of members of the Firm in Valhalla Park. Mr Carelse named several members of the Firm within the appellant's circle of friends and said that he frequented the home of one Noah, where drugs were sold. This evidence, which shows that the appellant was well-known to Mr Carelse, was not challenged, nor controverted.

[17] It was argued on behalf of the appellant that in view of the chaos while the shooting was in progress, Mr Carelse did not have an unobstructed view of the scene. This would have inhibited his ability to identify the perpetrators. It was further argued that Mr Carelse observed the appellant's firearm, not his face. Neither of these submissions have a factual basis. The basis for the latter is Mr Carelse's evidence on being asked to describe the firearms. He said: '[The appellant] had a hand pistol, he had a pistol in his possession. And accused 1, I did not focus on his hands, I mostly focused on his face'. One cannot extrapolate from this comment that Mr Carelse did not see the appellant's face. He expressly stated that as he moved closer to the scene '[the appellant] was busy aiming with his firearm. I identified him by his face. . .'. Similarly, there is no evidence, nor was it put to Mr Carelse, that other people obstructed his view of the scene. He did not testify that people were running towards the scene which might have impeded his view, but rather away from the scene. The only people he saw on the scene, armed with firearms, were the appellant and his co-accused. They then fled the scene.

[18] The appellant points to various other reasons why Mr Carelse's identification of him is unreliable. Firstly, the statement to Colonel Kinnear was not made until 19 days after the incident. Mr Carelse explained why

he was scared to come forward. This is hardly surprising in view of the fact that his father had, in all probability, been murdered for his role in assisting the police and because he was a State witness in the Forel Street murders. Added to this was Mr Carelse's belief that some of the police were implicated in the gang-related crimes. Colonel Kinnear stated that other people refused to give witness statements for fear of being killed in retaliation. Under these circumstances, Mr Carelse's reluctance to go the police is quite understandable.

[19] Another complaint is that the description of the clothing that the appellant was wearing on the day was not contained in the statement made to Colonel Kinnear. Mr Carelse insisted that he had informed Colonel Kinnear that the appellant was wearing grey tracksuit pants and a maroonish coloured T-shirt while Colonel Kinnear insisted that he recorded everything that the appellant had told him. This it was contended, together with the lengthy interval before making the statement, is a factor that should be considered in assessing whether Mr Carelse's identification of the appellant was reliable.

[20] The absence of a description of the clothing that the appellant was wearing is hardly a reason to question the veracity of Mr Carelse's identification of the appellant. Moreover, this type of detail takes on far less significance once the appellant was a person well known to Mr Carelse. In any event, there is other corroboration of the appellant's identification. Photographs of the appellant show that he had his name 'Wena' tattooed on his body, as well as '28' signifying his membership of the 28 gang. Prior to the appellant's arrest and the day after he made the statement to the police, Mr Carelse identified the appellant in a photo identification parade.

[21] Mr Carelse described how the two shooters approached and shot the deceased from different angles. That there were two of them is corroborated by the fact that spent cartridges from 2 different firearms were found on the scene. The angle that Mr Carelse said they approached from explains why the corner house was damaged and why shrapnel was found inside the house. Mr Carelse's description of the shooting was in line with the V-shaped pattern of the ejected cartridges found on the scene. This is objective corroboration of his version.

[22] The high court held that, in view of the direct and credible evidence against him, the appellant's failure to testify in his own defence resulted in the prima facie case against him becoming conclusive. It is correct that the absence of any rebuttal in these circumstances was damning. Although an accused person's right to silence is guaranteed in the Constitution, this does not absolve an accused of the need for an honest rebuttal, if the situation, and evidence, demand it.[9]

[23] Apart from the question of identification, the second prong of the appellant's attack is that the high court erred in not granting the application to recall Mr Carelse after an inspection *in loco* had been held. This, it is contended, had an impact on his constitutional right to a fair trial which includes the right to adduce evidence and challenge evidence.[10]

[24] An inspection *in loco* achieves two purposes, the first being to enable the court to follow the oral evidence. The second is to enable the

[9] *Osman v Attorney General Transvaal* 1998 (4) SA 1224 (CC); *S v Boesak* 2000 (3) SA 381 (SCA) at 396; *S v Chabalala* 2003 (1) SACR 143 (SCA) para 21.
[10] Section 35(3)*(i)* of the Constitution *of the Republic of South Africa* provides that: Every accused person has a right to a fair trial, which includes the right—to adduce and challenge evidence.

court to observe real evidence which is additional to the oral evidence.[11] In this instance it was clearly held for the first purpose. At the pleading stage the presiding judge mentioned the need for an inspection *in loco* to orientate herself as to the layout of the area where the shootings had taken place. It was then agreed with the State and defence counsel that this would be more useful once Mr Carelse's evidence in chief had been completed.

[25] The inspection *in loco* eventually took place after Mr Carelse's entire evidence had been completed. All parties were present, including the two accused and their counsel. Various points were noted and the distance between points measured. The following day a memorandum of agreed facts was drawn up by counsel. It merely records the point where the deceased was lying and the distances from various fixed points; the points where Mr Carelse was when he identified the appellant and his co-accused; the time it took him to run between various points. No objections were raised during the inspection in loco. The memorandum was signed by the state prosecutor and defence counsel for the appellant's co-accused, but not counsel for the appellant who by that stage had been replaced by new legal representatives.

[26] After a postponement of several months, the new counsel of the appellant commenced with an application to recall Mr Carelse for further cross-examination. The application was premised on the appellant's constitutional right to a fair trial. The appellant set out the reasons why Mr Carelse should be recalled. This was, inter alia, because Mr Carelse had not been sufficiently cross-examined on: (a) his previous knowledge of the appellant; (b) the time and opportunity he had to observe the scene; (c) the

[11] P J Schwikkard et al *Principles of Evidence* 4 ed (2015) para 19.6. See also *Newell v Cronje* 1985(4) SA 692 (E) at 697-698; *Kruger v Ludick* 1947(3) SA 23 (A) at 31; *Bayer South Africa (Pty) Ltd and Another v Viljoen* 1990 (2) SA 647 (A) at 659-660.

fact that Mr Carelse ran towards danger rather than away from danger; and (d) what occurred at the inspection in loco. It was alleged that there were material differences between Mr Carelse's enactments at the inspection in loco of how the murder occurred when compared to his viva voce evidence. The discrepancy referred to was Mr Carelse's oral evidence that he was between 15-25 metres away when he identified the appellant. Whereas, the place he pointed out at the inspection in loco was 38.9 metres away.

[27] The high court refused the application. In the appellant's notice of appeal, a somewhat different contention was advanced, namely that the court had failed to place the observations on record and allow the parties to comment thereon. In argument before this court the emphasis fell squarely on the appellant's constitutional fair trial rights and the alleged gross infringement thereof by not allowing further cross-examination.

[28] On the facts of this case, I am not persuaded that there was any justification for further cross-examining Mr Carelse. Concerning the discrepancy in distances, he had already qualified his evidence prior to the holding of the inspection in loco, saying he was very bad at estimating distances. Mr Carelse had been cross-examined for two days by the appellant's previous counsel. All counsel including the appellant were on the scene. The observations were noted by counsel for the respondent in detail and confirmed by the trial judge to be correct, signed by both counsel for the respondent and the appellant's co-accused. The appellant's counsel, whose mandate was abruptly terminated the next day, did not raise any objection. None of the parties indicated any interest in pursuing what was noted at the scene.

[29] The appellant's counsel eschewed any reliance on the incompetence of the appellant's erstwhile counsel and was unable to point to other additional evidence elicited by the inspection in loco, other than the discrepancy in distances referred to above. This has no bearing on Mr Carelse's evidence as a whole which was credible and consistent.[12] The constitutional right to challenge evidence does not extend to the right to have a witness recalled every time an accused person changes his legal representatives. The courts have a duty to ensure justice is done, not only to the accused, but towards witnesses as well.

[30] For all these reasons the high court cannot be faulted for accepting Mr Carelse's identification evidence of the appellant as one of the men who shot the deceased, as credible and reliable. Nor did the high court err in refusing to allow the application for the recall of Mr Carelse.

[31] In the result I make the following order;
The appeal is dismissed.

C H NICHOLLS
JUDGE OF APPEAL

[12] *S v Van Meyden* 1999 (2) SA 79 (W) at 81-82; *S v Heslop* 2007 (4) SA 38 (SCA) at 45; *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (2) SA 317 (SCA) at 330.

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