THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 425/18

In the matter between:

JOSE PEDRO MORAIS CARNEIRO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral Citation: *Carneiro v S* (425/18) [2019] ZASCA 45 (29 March 2019)

Coram: Lewis ADP, Wallis and Mathopo JJA and Davis and Rogers AJJA

Heard: 11 March 2019

Delivered: 29 March 2019

Summary: Criminal Law – appeal against conviction and sentence – right to speedy and fair trial – extends to appeal process – need for reasonable expedition – principles not adhered to. Evidence – adequacy of proof – State witnesses' evidence riddled with improbabilities – failure to secure ballistic evidence – trial court misdirected itself – State failed to prove guilt of accused beyond reasonable doubt – appeal upheld – conviction and sentence set aside.

ORDER

On appeal from: The South Gauteng High Court, Johannesburg (Moshidi and Heaton-Nicholls JJ sitting as court of appeal from regional court):

1 The appeal is upheld.

2 The order of the South Gauteng High Court is set aside and replaced by the following:

'The appeal is upheld and the appellant's conviction and sentence are set aside.'

JUDGMENT

Mathopo JA (Lewis ADP and Wallis JA and Davis and Rogers AJJA concurring):

[1] Our duty in this case is to adjudicate an appeal that has its origins in an offence allegedly committed by the appellant almost 20 years ago. On 3 September 1999, in the early hours of the morning, Vuzumuzi Herry Bongolo (the deceased), was walking along Pretoria Street in Hillbrow, Johannesburg in the company of his friends when he was fatally shot. Two of his friends, who were called as State witnesses, identified the appellant as the perpetrator and he was arrested that evening. On 7 February 2000 the appellant was arraigned before the Johannesburg Regional Court (trial court) on a charge of murder read with the provisions of the Criminal Law Amendment Act 105 of 1997. He pleaded not guilty to the charge. After a long drawn-out trial, during the whole of which he was on bail, he was convicted on 31 May 2006. On 20 November 2006, he was sentenced to seven years' imprisonment, the trial court having found that there were substantial and compelling circumstances justifying a lesser sentence than the statutory minimum. On the same day, the trial court granted him leave to appeal against his conviction only and extended his bail pending appeal subject to the usual conditions.

Delay

[2] One aspect of the case that has caused this court considerable disquiet is the long delay in having this appeal prosecuted expeditiously. The appellant was sentenced on 20 November 2006. The appeal was heard by the South Gauteng High Court (Moshidi and Heaton-Nicholls JJ) on 1 December 2010. This was after a delay of some four years. The present appeal was finally heard by this court on 11 March 2019. All in all it took a total of thirteen years for this appeal to be disposed of. In the ordinary course the appeal should have come before the high court far sooner. The lack of explanation for this highly regrettable delay is unconscionable.

[3] It is often said that justice delayed is justice denied. While this may be an overstatement in some contexts, it does underline the need for reasonable expedition. The law reports abound with examples of judgments concerning the right of an accused to a fair and speedy trial, something that is constitutionally guaranteed. The old adage that justice must not only be done, but also manifestly be seen, to be done operates, with greater force in our constitutional dispensation. An objective observer sitting in a trial must come away with a clear feeling that the accused has had a fair trial. The observer will not do so if the proceedings are unduly protracted. The same applies to hearing appeals where accused persons have been convicted. Here the period from offence to conviction was nearly seven years and the first appeal took a further four years.

[4] I think it is important that a brief history be set out to explain why this further appeal then took such an inordinate period to reach finality. After the high court dismissed the appeal on 1 December 2010 the appellant applied to the high court for leave to appeal to this court. It took more than five years for the application for leave to appeal to come before the high court. On 29 March 2016, the high court, in a comprehensive judgment, held that it lacked jurisdiction to entertain the application for leave to appeal and struck it off the roll. Aggrieved by that decision, the appellant approached the offices of the Deputy Judge President, Johannesburg on 17 May 2016 for a date for the application for leave to appeal. The Deputy Judge President advised him to

approach the judges who heard the application. On 14 June 2016, the office of the Deputy Judge President wrote to the appellant in the following terms:

'1. …

2. After considering copies of your correspondence with annexures, which this office sent to them, both Moshidi and Heaton-Nicholls JJ advised that they stand by their judgment and that it is up to the dissatisfied party to petition the Supreme Court of Appeal.

3. The office accordingly regards the issue closed on that basis.'

[5] The appellant then rightly approached this court on petition for leave to appeal that decision. On 12 September 2016 this court, on petition, granted the following order:

'1. The application for condonation is granted.

2. Special leave to appeal is granted to the Supreme Court of Appeal against the judgment and order of the Gauteng Local Division of the High Court in terms of which the applicant's application for leave to appeal under s 309(c) of the Criminal Procedure Act 51 of 1977 was struck off the roll.'

Thereafter, on 24 November 2017, this court upheld the appeal and set aside the judgment of the full bench striking the application for leave to appeal from the roll. (*Carneiro v The State* [2017] ZASCA 154).

[6] Pursuant to that order on 28 March 2018 the high court again heard the application for leave to appeal and, without furnishing reasons, granted leave to appeal to this court. Now almost nine years after his appeal was initially dismissed, and after a long and tortuous journey, characterised by many administrative bungles, this appeal serves before us.

[7] What further exacerbates our disquiet is that part of the delay in the trial was caused by the insistence of the magistrate on securing a transcript of the proceedings, which delayed the preparation and delivery of judgment by over a year. This was despite the fact that during the trial he repeatedly asked witnesses to take their time so that he could take notes. This approach is clearly unacceptable. What is further disturbing is that the record of the proceedings is replete with too many instances where the trial magistrate interrupted the proceedings and unduly spoke for a long period of time.

Although it was not suggested that by so doing he entered into the arena, this is another factor that materially contributed to the delay. Such conduct must be deprecated. In my view this delay not only impacted on the appellant's rights to a fair trial, but also infringed on the witnesses' rights to have the case finalised while the events were still fresh in their minds.

[8] The appellant was out on bail during his trial and for most of the period during which appeal proceedings were pending. However, the lengthy delay which occurred after December 2010, without the appeal being heard, led to a number of administrative errors as a result of one of which his bail was estreated and a warrant issued for his arrest. This caused the police to arrest him on 9 June 2015 in order that he start serving his sentence. He remained in prison until September 2016 when this court granted special leave to appeal against the high court's order striking the appeal from the roll. Among other prejudicial effects on the administration of justice, therefore, the delays resulted in the appellant spending fifteen months in prison. As shall presently appear, this occurred in circumstances where he was entitled to succeed on his appeal.

[9] The State called two eye witnesses, who were allegedly present when the deceased was shot, and two police officers whose evidence was of a peripheral nature. The appellant testified in his defence and did not call any witnesses. It seems clear to me that the benefit of making proper credibility findings was lost as a result of delays. The first eye witness gave his evidence in September 2001 and the second slightly more than a year later in November 2002. The police officers testified in March 2003 and the appellant on 29 June 2004. The argument took place on 2 March 2005 and judgment was delivered on 31 May 2006 almost two years after the evidence was finalised and three and a half to four and a half years after the two eye-witnesses for the State had testified. For fourteen months the magistrate delayed the matter while waiting for the transcript, a delay aggravated by the fact that some of the cassettes on which it was recorded went astray. It can safely be assumed that he had little recollection of this case and of the witnesses after such a delay. The delay would have affected his ability to

make proper credibility findings. An examination of the evidence indicates that his credibility findings were flawed. It is, of course, trite that the powers of a court on appeal against factual findings are limited. There must be demonstrable and material misdirections by the trial court before a court of appeal will interfere (see *S v Hadebe* 1997 (2) SACR 641 (SCA) at 645f). In view of the misdirections to be identified due course, this court is at large to disregard the magistrate's findings of facts even if based on credibility and to come to its own conclusion on the record as to whether the guilt of the appellant was proved beyond reasonable doubt (see *R v Dhlumayo & a*nother 1948 (2) SA 677 (A)).

[10] This sorry state of affairs cannot be countenanced. It must be pointed out that before us the systemic delays were not at any stage raised or complained of by the appellant. Until he was arrested in June 2015, the appellant was not directly prejudiced by the delay since he was out on bail, but thereafter he spent 15 months in prison while matters dragged on. Counsel for the State was questioned by members of the Bench about the delays. In fairness to him the delay in the present case was not attributable solely to his office. But this does not relieve the State of its burden of ensuring that trials, including appeals, are dealt with expeditiously.

[11] This court has in a number of judgments expressed its displeasure at the lackadaisical approach in promptly dealing with trials and appeals.[1]

[12] In my view the inordinate delay may well have vitiated the appellant's right to a fair trial and appeal and rendered it unconstitutional. However, in the light of the fact that the State and the appellant did not raise this but argued solely on the merits of the conviction, it is unnecessary to make a finding on the constitutionality of the process.

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[1] See *Chauke & another v S* [2012] ZASCA 143 (28 September 2012) and *S v MM* 2012 (2) SACR 18 (SCA).

The merits of the appeal

[13] The appellant attacks the conviction on the basis that there was no direct evidence linking him to the offence. It was contended that the trial court misdirected itself in placing reliance on the evidence of the State witnesses whose evidence was full of contradictions and inconsistencies. It was submitted that the contradictions in the evidence of the State witnesses affected the reliability and probative value of their evidence.

[14] At the centre of this appeal is the identity of the person who fired the shot that killed the deceased. To prove its case the State relied on the evidence of the friends of the deceased who were with him shortly before he was fatally wounded. What was in dispute, however, was the reliability and credibility of the State witnesses who identified the appellant as the person who fired the fatal shot. In his defence the appellant admitted that he fired several shots in the ground but disputed that any of those shots could have hit the deceased. The State was made aware of his defence, which was raised when he was arrested and throughout the trial. In an attempt to counter that defence the State sought and obtained a postponement to procure ballistics evidence, a sketch plan and a map prior to the commencement of the trial. This evidence, which in the event was not forthcoming, was necessary to assist the State to prove its case against the appellant. I shall deal with this aspect later in the judgment. The appellant made the following admissions in terms of s 220 of the Criminal Procedure Act 51 of 1977 (the CPA). 'That the deceased died of a gunshot wound to his mouth which was corroborated by the post mortem report. That the calibre of the firearm was unknown.' These admissions squarely put the onus on the State to prove that the shot that killed the deceased was fired from the appellant's firearm.

[15] The State's version was that on the evening of 2 September 1999 the deceased left his home in Soweto in the company of some of his friends (the State witnesses and others), to go to Club Las Vegas in Hillbrow. According to the State witnesses, sometime during the early hours of the following morning the deceased and his friends decided to look for food. As they were walking along Pretoria Street they noticed the appellant at the traffic lights near a

clothing shop called Bogari. At that time they were approximately at the corner of Pretoria and Claim Streets (the record refers to it as Klein, but it is in fact Claim Street as shown on a photograph handed up as an exhibit). He was dressed in black trousers and a white T-shirt. Visibility was good because of the streetlights. The appellant was talking, but they could not hear what he was saying. There was a group of people who were sitting around a fire on the opposite side of Pretoria Street. The appellant then pointed a firearm at them. The people were speaking loudly, making a noise, taunting him to shoot. A few minutes later the appellant, ignoring the group and, without any warning, pointed his firearm in the direction of the deceased and his friends. The group of people were still on the other side. The State witnesses decided to run away. The deceased did not and said that the appellant would not shoot. There was no argument with the appellant before the shooting and neither did they have any confrontation with him at all.

[16] Sonabo Shedrack Ngqomo (Ngqomo) testified that the appellant pointed a firearm in their direction. He decided to run. The deceased did not. The witness did not look behind and eventually managed to hide behind a tree at a distance of about 15 metres from where the deceased was standing. A few minutes later he came out of his hiding place and found the deceased lying on the ground. Fifteen minutes later the police arrived at the scene and the appellant also came back, now wearing a beige jersey over his T-shirt. He pointed out the appellant as the person who shot the deceased. The narrative of the events was then taken up by Floyd Skumbuza Mhlangathi (Mhlangathi), who testified that the appellant pointed a firearm at the group. Mhlangathi ran away. He heard a gunshot and hid next to a building. A few minutes later he came out and saw the deceased lying on the pavement. He further testified that the deceased was shot at the back behind the ear and was uncertain whether it was the left or right ear. He disputed the proposition put to him that the deceased was shot in the front. He testified further that he noticed the appellant entering the bottle store holding a firearm. The sum total of his evidence is that the deceased was shot by the appellant. He disputed that there were other shots that were fired at that stage. When pressed in cross-

examination whether indeed he saw the appellant pulling the trigger, he conceded that he did not.

[17] Because the State's case rested entirely on the evidence of these two witnesses they were cross-examined extensively by the appellant's legal representative. During cross-examination, it emerged that there were several inconsistencies in their evidence. Ngqomo conceded that he did not see when the appellant allegedly pulled the trigger because he was running away and did not look behind. By the time he came out from behind the tree, the appellant was nowhere in sight. When pressed further about the shooting the witness conceded he heard other gunshots that evening and thus he could not exclude the possibility that there was somebody else with a firearm. This contradicted the evidence of Mhlangathi. In his statement to the police, given two hours after the incident, Ngqomo said in chief that he saw the appellant entering the bottle store in Claim Street shortly after the shooting. This was also alleged in his statement to the police given two hours after the incident. Clearly this was a fabrication and improbable, because where he was hiding his view would have been obscured by the building on the south-east corner of the intersection of Pretoria and Claim Streets. He conceded in cross-examination that he had not seen the appellant entering the bottle store. When confronted with his docket statement, he claimed to have been 'confused' when he made the statement.

[18] It was suggested to the State witnesses that their evidence that the deceased was struck in the back of his head is improbable and incompatible with the post mortem report which recorded that:

'There is a gunshot wound of entrance involving the upper right frontal incisor tooth which shows inward bevelling more marked medially. The corresponding 1cm X 0,9cm oval bullet exit wound lies over the nape of the neck on the left, 3cm to the left of the midline and shows a 2mm wide marginal rim of abrasion at its superior and medial borders and a 5mm wide marginal rim of contused abrasion at its lateral and inferior borders.

Track of wound 2: The track passes downwards, backwards and to the left lacerating the superior surface of the tongue, passes through the 3rd cervical vertebra and the spinal cord and exits as the wound noted over the back of the neck on the left.'

[19] Undoubtedly, according to the post mortem report, the shot through the mouth must have been fired while the deceased was facing his assailant and not as testified to by the State witnesses. The extreme difficulty facing the trial court was that of reconciling the State witnesses' evidence that the appellant shot the deceased in the back of the head, with the post mortem report. One would have expected such a serious discrepancy to deserve closer and better attention by the trial court, which should have called the pathologist to give evidence. Instead the trial court dealt with it in a perfunctory and dismissive manner. The same is true of the post mortem evidence regarding the wound track. It is not readily apparent how a shot fired by the appellant towards the deceased, while the former was standing some 15m to 20m from the latter, could have followed the downwards trajectory noted by the pathologist.

[20] The appellant testified that he was on his way to his car carrying large sums of money when he noticed people breaking into his motor vehicle, which was parked in Claim Street, near the exit from the High Point shopping centre where his bottle store was located. The back window of his motor vehicle was broken. He fired a total of three warning shots, he claimed. The first two shots were fired in quick succession when the unknown persons were in his car. These two shots were directed just in front of himself towards the ground near the front of his motor vehicle. Whilst retreating he noticed a person putting his hand in his jacket and he then fired the third shot, aiming at the same place in front of the car. During cross-examination he conceded that nobody approached him or came in his direction prior to firing the shots. He specifically denied that the deceased died as a result of a bullet discharged from his firearm. His counsel relied strongly on the fact that, according to his evidence, the shots were fired in Claim Street, some distance from its intersection with Pretoria Street, while the deceased was shot in Pretoria Street some 20 metres or so from the intersection. The point was made that

bullets do not ordinarily go round corners and they could not have passed through the buildings between him and where the deceased was shot.

[21] There are serious irreconcilable differences between the State witnesses and the appellant as to what transpired on the day in question. The State witnesses conceded that they did not see the appellant pulling the trigger. They surmised that, because he was the last person they saw holding a firearm, he should be responsible. The trial magistrate and the high court on appeal accepted the version of the State witnesses as credible and reliable despite the contradictions. The high court reasoned that:

'Further, that the shot was fired by the appellant. A further observation is that the whole version of the appellant as to why he approached his motor vehicle alone at night, carrying so much cash leaving behind some 13 employees and security in his bottle store at that time of the morning. That this is highly improbable. The number and the reason for the warning shots is also improbable. His failure to report the breaking into his motor vehicle and his speculation about the origin and distance of the other shots etcetera, was equally highly improbable in the view of the Court.'

[22] It is clear from the judgments of both courts that in spite of material discrepancies in the evidence of Ngqomo and Mhlangathi, they wrongly held that it was true and reliable. The magistrate's judgment contains little by way of analysis. He stated that the two state eyewitnesses testified in a direct and straightforward fashion, while glossing over material difficulties with their testimony. His discussion of the appellant's version was extremely brief. To judge from the transcript, the appellant also gave his evidence in a 'direct and straightforward fashion'. While particular features of his version might raise questions of plausibility, no material inconsistencies were revealed by cross-examination.

[23] The court a quo's judgment is likewise open to criticism:

(a) Apart from failing to identify some important discrepancies between the versions of the State witnesses, the court a quo regarded it as highly improbable that the appellant would have gone out into the street with a bag containing R75 000. However, the appellant gave a credible explanation for

why he was alone when carrying his bottle store's takings to his car. The court a quo did not suggest a more plausible reason for the appellant having been in the road at the time in question.

(b) The court a quo doubted the appellant's version of a break-in into his car on the basis that it was 'highly improbable' that the appellant would not have reported the break-in to the police. However, it was common cause before the trial court that the rear window of the appellant's car had been smashed. The appellant testified that he indeed telephoned the flying squad to report the break-in. His failure thereafter to open a case is unremarkable.

(c) The court a quo said that according to Sergeant Phakathi the appellant 'pretended' not to know what had happened. But of course, on the appellant's version, he did not know what had happened (ie he did not know that the deceased had been shot).

(d) The court a quo said that an appellate court will not lightly interfere with the factual findings of a trial court. Although that is the general position, it is subject to an absence of material misdirection by the trial court. Furthermore, the court a quo failed to advert to the unacceptable delays in the running of the trial which made the making of reliable credibility findings by the magistrate all but impossible.

[24] The evidence of the State witnesses was unconvincing and based on conjecture. A major aspect of their evidence which is improbable is that the appellant, for no apparent reason, while they were walking innocently in the street, decided to turn his attention towards them, fired a shot and ignored a group of people who were sitting around the fire insulting and taunting him. It is difficult to understand why the appellant acted as alleged when the State witnesses were not a source of bother to him, unlike the group which was sitting around the fire. The evidence of the State witnesses defies logic and in simple terms one is left with a suspicion that they did not tell the truth. Their statement that their friend was shot in the back, when he was shot from the front is clearly wrong. The appellant's evidence that there were other shots in the vicinity was not seriously negated. Ngqomo confirmed that he could not exclude a possibility that there were other shots fired at the critical time. One

has to bear in mind that the onus to prove who actually fired the fatal shot rested with the State and not the appellant.

[25] If one accepts the appellant's evidence that he found people breaking into his car – and such evidence cannot be said to be false beyond reasonable doubt – it is even more improbable that he would have directed his attention to innocent bystanders in Pretoria Street rather than the miscreants in Claim Street. And if the appellant was carrying a bag containing a substantial sum of money – again this cannot be rejected as false beyond reasonable doubt – it is most implausible that he would have wandered some distance from his bottle store and his car to the intersection with Pretoria Street. Neither of the courts below even touched on the inherent implausibility of the appellant having behaved in the random and irrational way described by the State's eye witnesses.

[26] A factual issue to which the trial magistrate ought to have directed his attention was the trajectory of the bullet that fatally wounded the deceased. The bullet followed a downward trajectory but it was not explained how that could have occurred if the shot was fired from some twenty metres away. Since this issue was squarely put in dispute by the appellant it should have been clear to the trial court that more was required in the form of ballistics evidence to make a proper determination as to what transpired on the day in question. Issues such as whether the police looked for cartridges or casings at the scene were not explored. Evidence of this kind was necessary for a proper determination as to the guilt or otherwise of the appellant. One should not lose sight of the fact that the calibre of the firearm was placed in dispute by the appellant. It is unacceptable that no thought was given by the police officers, especially Sergeant Phakathi, about to examine the cartridges. He arrived at the scene 15 minutes after the incident and did nothing. Sergeant Sigara confiscated the appellant's firearm and failed to take it in for ballistic examination. No proper explanation was given why this was not done. The cumulative effect of all these shortcomings demonstrates that the State failed to discharge the onus resting upon it.

[27] Because of the failure by the State to procure ballistic evidence in relation to the firearm and the cartridges, the manner in which the fatal wound was inflicted on the deceased, could not be ascertained. In fact no evidence was led in this regard. The trial court was in no better position to determine this issue, which was at the core of this appeal. The State failed to adduce evidence negating the appellant's version that the fatal shot could have been fired by somebody other than him. If ballistics evidence had been procured by the State any doubt about whether the appellant was guilty or not could have been eliminated.

[28] The fact that the post mortem was admitted in terms of s 220 of the Criminal Procedure Act did not relieve the State the burden of proving other aspects of its case. The admission only went to the extent of the cause of death and no other. In the absence of ballistics evidence, sketch plan and a map, to allow the court to determine from where the shot was fired, or at the least where the appellant was alleged to have been standing at the time and the location of the deceased, the trial was run in a confused and haphazard manner. The evidence adduced failed to demonstrate the position of the appellant and the witnesses prior to the shooting. It is also not clear where the appellant fired the two warning shots and the third shot. A map or sketch plan could have clarified the discrepancies and avoided the fundamental error that these events took place near Klein Street, instead of Claim Street. (The position was unclear from the record and it seems likely that at times the appellant's attorney at the trial was asking questions on the basis that the events occurred in or near Klein Street. Both counsel's heads of argument proceeded on the basis that it was Klein Street.)

[29] To sum up I have referred to the improbabilities and inconsistencies in the evidence of the State witnesses. I have also referred to the failure of the State to present vital evidence in support of its case. In my view, no evidence was adduced to establish where the deceased was in relation to the appellant before the fatal shot was fired. What we have been able to determine from the record is that he was found lying on the pavement next to a shop called Bogari. As to where he was prior to the shooting, the court does not know. In

the absence of a sketch plan or map it is difficult to determine where he was when he was shot. The evidence of the State witnesses was unhelpful in this regard. It cannot be excluded that he must have moved after he was shot. The appellant admitted to firing three shots, but not in the direction of the deceased and his friends. No evidence was led to establish whether the bullet ricocheted or not. The failure of the State to obtain ballistics evidence was totally negligent.

[30] At most for the State, if the ballistics evidence was not available, secondary evidence in the form of a reconstruction of the scene of the crime should have been procured. This critical lapse of judgment on the part of the State demonstrates lack of diligence. In the final analysis, all these shortcomings reveal that the State's case was conducted in a shambolic manner. Approaching the evidence in its totality as this court must, it is not clear which bullet struck the deceased or whether it came from the accused's firearm. In my view it was not conclusively proven beyond reasonable doubt that the deceased died as a result of a shot fired from the appellant's firearm. The shoddy investigation on the part of the State materially affected the quality of the State's case. The trial court's conduct aggravated the State's very poor handling of the evidence.

[31] I am thus not satisfied that the guilt of the appellant was proved beyond reasonable doubt. The evidence of the State witnesses was patently unsatisfactory and unreliable. Even if we had doubts about the veracity of the appellant and could imagine scenarios in which he might have been responsible for the deceased's death, the remaining evidence was not sufficient to discharge the onus. The appeal must be upheld and the appellant must be acquitted.

[32] I therefore make the following order:

1 The appeal is upheld.

2 The order of the South Gauteng High Court is set aside and replaced by the following:

‘The appeal is upheld and the appellant’s conviction and sentence are set aside.’

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R S Mathopo
Judge of Appeal

APPEARANCES:

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