IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL NO: A109/ 2017
CASE NO: SS 29/2017
DPP REF NO: JPV 106 /2010

1. Reportable: No

2. Of interest to other judges: No

3. Revised: Yes

(Signature)

In the matter between:

LANGA, ANDILE DAVID **Appellant**

and

THE STATE **Respondent**

Appeal against conviction based on the evidence of a single witness, and a confession. Alleged torture of appellant. Appeal dismissed.

JUDGMENT

DE VILLIERS, AJ:

Introduction

[1] The court a quo, Mahalelo J, granted leave to appeal the conviction after having convicted the appellant of five crimes:

[1.1] Count one: Murder (of Constable Mhlongo);

[1.2] Count two: Attempted murder (of Constable Nemaitoni);

[1.3] Count three: Robbery (of the pistols and ammunition of the two constables) with aggravating circumstances;

[1.4] Count seven: Unlawful possession of a firearm (used in the above three crimes); and

[1.5] Count eight: Unlawful possession of ammunition for the above firearm.

[2] The appellant was also charged with a further count of murder, and a further two counts of attempted murder, the details of which are not relevant to this appeal, as he was acquitted in respect thereof. The appellant was one of three accused. He had identified the other two in a confession, but they were acquitted. All three were legally represented.

[3] The court *a quo* convicted the appellant on the strength of a confession, supported by evidence of the pointing out of places at the scene of the crimes. The appellant alleged that he was tortured and that the evidence of a confession and the pointing out by him should have been disallowed by the court *a quo*. The other evidence against him was by a single witness, Constable Nemaitoni, whose evidence on identification, the appellant alleges, the court *a quo* correctly did not accept.

Facts

[4] Constables Mhlongo and Nemaitoni were stationed at the Jeppe Police Station. On 30 July 2010 at around 20H00, the two policemen were on duty and were sent to the George Goch hostel to investigate a suspicious vehicle.

The two policemen established that the suspicious vehicle was a hijacked vehicle. They waited for a tow truck to remove it. It was winter, already dark and cold. They sat inside their vehicle, Constable Mhlongo in the passenger seat, and Constable Nemaitoni in the driver's seat.

[5] Constable Nemaitoni saw Accused Two approaching the vehicle from the driver's side, from about five paces away. He turned to look at the person. He then saw that the person was holding a firearm in both his hands, pointing at him. The person started shooting when he was two or three paces away. Constable Nemaitoni turned and dived to his left. He was shot through the head, with the bullet exiting through his mouth. Other witnesses would confirm that the side windows of the police vehicle (a bakkie) were shot out. Constable Mhlongo had been shot through the head, where he sat in the passenger seat. As Constable Nemaitoni was lying down, facing Constable Mhlongo's body, he saw the appellant open the passenger door, remove the firearm of Constable Mhlongo (a pistol), and hand it to another person he could not see. Any observation of the appellant at this stage, albeit whilst Constable Nemaitoni was wounded and under severe stress, was at close proximity, aided by the cabin light, and more than fleeting. Afterwards he called for help on a police radio. He was hospitalised for a month, and spent another month in recovery. He would later identify both the appellant and Accused Two at identification parades.

[6] Constable Nemaitoni testified that the area was well lit. He would later be supported herein by Warrant Officer Akoo, and by two innocent bystanders who happened to drive into hostel and who were themselves thereafter shot at. The ambient lightning was so good, that Warrant Officer Akoo could use the ambient lightning to secure the area and to find the spent cartridges.

[7] On 6 August 2020 the police arrested the appellant in the early hours of the morning. Later that night, the state averred, the appellant confessed to Lieutenant-Colonel Ramukosi. The appellant denied that he made a confession, and alleged that he was tortured. After a trial-within-a-trial the presiding judge admitted the confession made, as well as the pointings out pertaining to the crime scene on 14 August 2020 to Captain Gininda.

[8] I agree with the court *a quo* that the evidence by the witnesses for the prosecution was impressive. The evidence by the witnesses for the prosecution fitted into the mosaic of proof, and there was no material contradiction in the evidence by a range of police officers from a range of police stations. All denied seeing evidence of, or witnessing any assault on the appellant. A critical assessment of this component of the evidence, revealed no improbabilities, no shortcomings, and no contradictions in the evidence. The prosecution put up a strong case, to be assessed with the other evidence.

[9] I agree with the court *a quo* that the versions put on behalf of the appellant was not consistent with his evidence, both in material matter left out, and in material contradictions. In addition, as is more fully addressed below, his evidence contained serious improbabilities. Mr Nene, is the appellant's brother-in-law, also testified. His evidence did not cure the defects in the appellant's case.

The (original) issues

[10] The presiding judge rejected the evidence of identification by Constable Nemaitoni, both his direct evidence of identification, and that of the identification parade. She was concerned by his inability to testify about the (bodily and facial) features of the appellant, or the clothing of the appellant (beyond that he wore a dark jacket). The learned judge held that Constable Nemaitoni had too short an opportunity to make the identification, and too little light within which to do so. The court held that the fact that Constable Nemaitoni was able to identify the appellant at the identification parade within one minute, seven months after the event, and without having been able to give description of the appellant, were further reason to doubt his evidence. It seems that the learned judge was influenced by cross-examination based on the police photographs taken on the night in issue. These photographs appear to be dark.

[11] In the end, the only basis for the conviction of the appellant by the court *a quo*, was a confession. The presiding judge ruled that a confession to Lieutenant-Colonel Ramukosi and a pointing out to Captain Gininda by the appellant, must be accepted into evidence. The presiding judge ruled that the confession

reflects that the appellant was the source of the following information contained in the confession:

[11.1] The names of his co-perpetrators, Accused Two and Three; and

[11.2] The facts that the police vehicle was parked at George Goch hostel, that two police officers were present and were shot, that police firearms were taken, and that more than one person shot at the police.

The applicable legal principles

[12] By way of an overview, *LAWSA*[1] correctly draws the distinction between when corroboration is required to accept evidence, and where caution is to be applied to assess evidence (but corroboration is not a requirement by law). Corroboration by another source in a material respect is only required in respect of a conviction based on a confession. See section 209 of the *Criminal Procedure Act.*[2] In the other cases where caution is called for to assess evidence, so-called "*cautionary rules*" apply. A description as "*cautionary guidelines*" may reflect their nature better in modern practice. They refer to those instances where courts have found that there are risks that certain types of evidence may be unreliable and should be approached with caution.

[13] In this case, cautionary rules apply to the assessment of evidence by a single witness (that of Constable Nemaitoni), and to the assessment of his evidence on identification.[3] The cautionary rules are guidelines only, as ultimately the test is if the evidence considered as a whole, established the guilt of the accused. See *S v Hadebe and Others*[4] where the court quoted with approval *Moshephi and Others v R.*[5]

[14] A court must weigh up the evidence that point towards the guilt of the accused against those that indicate innocence. The evidence is to be assessed,

---

[1] *LAWSA*, Volume 9, 2nd Edition, Evidence, para 827.
[2] Criminal Procedure Act 51 of 1977.
[3] In our law, a conviction may follow on the evidence of a single witness. See section 208 of the Criminal Procedure Act. *Testis unus testis nullus* (one witness, no witness) is not part of our law.
[4] *S v Hadebe and Others* [1997] ZASCA 86.
[5] *Moshephi and Others v R* (1980-1984) L A C 57 at 59 F – H, a judgment in the Lesotho Court of Appeal by Marais AJA. Maisels P and van Winsen AJA concurred.

considering inherent strengths and weaknesses, and considering probabilities and improbabilities. In the end a court must decide whether the balance of proof weighs so heavily in favour of the State, that it excludes any reasonable doubt about the accused's guilt. A finding of reasonable doubt must not be derived from speculation, but must rest upon positive evidence or reasonable inferences (that are not in conflict with, or outweighed by, the proved facts of the case). See *S and Another v S*[6] where Bosielo JA[7] quoted with approval the leading cases of *S v Chabalala*, *S v Phallo and Others*, and *Miller v Minister of Pensions*.[8]

[15] In this case, a single witness, Constable Nemaitoni, identified the appellant. Questions that may arise about the evidence of a single witness may relate *inter alia* to truthfulness, mistake, a risk of bias, and if he/she had a proper opportunity for observation. In this regard our law has been formulated as follows in the Supreme Court of Appeal ("*the SCA*") in *S v Mthetwa:*[9]

> "*Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities; see cases such as R. v Masemang, 1950 (2) SA 488 (AD); R. v Dladla and Others, 1962 (1) SA 307 (AD) at p. 310C; S. v Mehlape, 1963 (2) SA 29 (AD)*."

[16] It is predictable that science and technology will in time shed more light on the reliability of evidence of identification. The first such developments have commenced in the United States of America. The leading case is *S v Henderson*,[10] a judgment of the New Jersey Supreme Court by Chief Justice

---

[6] *S and Another v S* [2014] ZASCA 215 para 17-18.
[7] Schoeman and Fourie AJJA concurred.
[8] Their references appear below.
[9] *S v Mthetwa* 1972 (3) SA 766 (A) at 768A-D.
[10] *S v Henderson* 27 A.3d 872 (NJ 2011).

Rabner.[11] The court, based on substantial scientific research, *inter alia* identified high stress, weapon focus, duration of observation, distance and lightning, witness characteristics, perpetrator characteristics, memory decay, and cross-race bias as amongst the factors that may influence wrong identification. The potential impact of *Henderson* on jurisprudence in the United States is well set out in two articles, *State v. Henderson: A Model for Admitting Eyewitness Identification Testimony,*[12] and in *Judicial Understanding of the Reliability of Eyewitness Evidence: A Tale of Two Cases.*[13]

[17] The fact that caution must be applied in accepting evidence by a single witness identifying, in this case, the appellant, does not mean that the bar should be set at such a level that in effect such evidence is excluded. This point is illustrated by the fact that it is a cautionary practice for the police to establish a description of the perpetrator as soon as possible, as it may provide a safeguard against a later identification of a person in conflict with the description. In this case, Constable Nemaitoni could not give such a description, or even a description of the clothes the appellant worn, beyond that he wore a dark jacket.

[18] The cautionary practice (to establish a description of the perpetrator as soon as possible) does not mean that evidence of identification will only stand if a witness can recite a list of descriptive factors about the accused's face, build, and dress in his/her original statement. See *R v Mputing*,[14] a judgment by Boshoff J[15] in this division, where the point is made that there are circumstances where identification is a matter for the subconscious, where the witness can describe no distinguishing features of the perpetrator. There are millions of men, of average height, of average weight, of average complexion, of average build, with no remarkable features, aged between about 20 and about 35. There may also have been no opportunity for a studied observation

[11] Justices Long, LaVecchia, Albin, Rivera–Soto and Hoens concurred.
[12] Amy D. Trenary, *State v. Henderson: A Model for Admitting Eyewitness Identification Testimony,* published in the University of Colorado Law Review [Vol 84] P1257.
[13] Meintjes van der Walt L, " *Judicial Understanding of the Reliability of Eyewitness Evidence: A Tale of Two Cases*" PER / PELJ 2016(19).
[14] *R v Mputing* 1960 (1) SA 785 (T) at 787D-E.
[15] Marais J concurred.

of the perpetrator to note detail, but sufficient to see and remember the perpetrator.

[19] Caution must be applied, but this must not manifest as a formalistic approach, or one that displaces the exercise of common sense. See *S v Artman and Another*,[16] where the court quoted with approval *R v J*,[17] and *S v Snyman*,[18] and *S v Sauls and Others.*[19]

[20] The appellant was convicted based on the application of the common purpose doctrine, a finding that the three attackers had a common purpose to commit the crimes, and had acted together to achieve its outcome. See *S v Tshabalala and Another*.[20] In this division the law on common purpose and unlawful possession of a firearm is set out concisely in *S v Motsema* para 29,[21] This finding that is in accordance with *Leshilo v S*[22] in para 13 and 15, applying *inter alia Makhubela v S, Matjeke v S* para 46-57.[23]

[21] This brief overview of the applicable case law, ends with a restatement of the guideline that a court of appeal should not readily interfere with factual findings by the court a quo, a court that had the opportunity to observe the witnesses. See *R v Dhlumayo and Another*,[24] *Attorney-General, Transvaal v Kader*,[25] *Monyane and Others v The State*.[26]

Evaluation

[22] As reflected earlier, the presiding judge ruled that the confession reflects that the appellant was the source of two sets of information contained in the confession:

[22.1] The names of his co-perpetrators, Accused Two and Three. With respect I disagree with this reasoning. With respect, this does not

[16] *S v Artman and Another* 1968 (3) SA 339 (A) at 341A-D.
[17] *R v J* 1966 (1) SA 88 (SR) at 90E-F
[18] *S v Snyman* 1968 (2) SA 582 (A) at 585G
[19] *S v Sauls and Others* 1981 (3) SA 172 (A) at 180C-H.
[20] S *v Tshabalala and Another* 2020 (5) SA 1 (CC) para 46-49, and 56-60.
[21] *S v Motsema* 2012 (2) SACR 96 (GSJ) para 29.
[22] *Leshilo v S* [2020] ZASCA 98 para 15 and 15.
[23] *Makhubela v S, Matjeke v S* [2017] ZACC 36; 2017 (2) SACR 665 (CC); 2017 (12) BCLR 1510 (CC) para 46-57.
[24] *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 695.
[25] *Attorney-General, Transvaal v Kader* 1991 (4) SA 727 (A) at 739J-740B.
[26] *Monyane and Others v The State* [2006] SCA 141 (RSA) para 15.

constitute confirmation in a material respect of the confession, as is required by section 209 of the Criminal Procedure Act. They were only arrested after the appellant's confession, and may have been falsely implicated by him, as they were acquitted; and

[22.2] The facts that the police vehicle was parked at George Goch hostel, that two police officers were present and were shot, that police firearms were taken, and that more than one person shot at the police. These facts were known to the police too when the confession was taken. With respect, these facts too do not constitute confirmation in a material respect of the confession.

[23] I do find confirmation in a material respect of the confession in that the appellant stated that he and two accomplices participated in the attack. Constable Nemaitoni would later confirm that three attackers participated in the attack. When the confession was taken, the police did not know this fact. It provides the corroboration required for a conviction based on the confession. As will appear below, in my view the outcome of the identification parade, also provides the required corroboration.

[24] In the case of a confession before a police officer, section 217(1) of the Criminal Procedure Act requires that the confession is only admissible "*if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto*".

[25] The presiding judge, who had the benefit of hearing and seeing these witnesses, undoubtedly came to the correct conclusion that the appellant made the confession freely and voluntarily, in sound and sober senses, and without having been unduly influenced thereto:

[25.1] The allegations of torture, to be true, would require complicity by many senior police officers, from a range of units, amongst them not one with a conscience, not one prepared to say "*not in my name",* all prepared to commit crimes. This is unlikely;

[25.2] The appellant saw several police officers, each time awarding him an opportunity raise his treatment with a new person. He did not do so. When the appellant met his family members on the day of his arrest, he complained of no torture, as one would have expected;

[25.3] The alleged torture took place even where there were members of the public in the vicinity. This is unlikely;

[25.4] It is unlikely that a police officer from the Jeppe Police Station would participate in the interrogation of the appellant at the Johannesburg Central Police Station;

[25.5] It is unlikely that elite, military style, units would interfere in an investigation and torture a suspect;

[25.6] It is unlikely that a criminal police officer would be so thoughtless as to leave a tell-tale bloodied T-shirt of the appellant with his family members to raise questions and to be used as evidence later;

[25.7] It is unlikely that a criminal police officer would be so thoughtless as to take the bloodied appellant to his girlfriend;

[25.8] The appellant's eventual version differed materially from what he had told his counsel;

[25.9] The various photographs show no injuries to the appellant; and

[25.10] In material respects, bleeding because of the torture, and wearing fresh clothes after visiting the hostel, the appellant's brother-in-law did not support his evidence.

[26] The evidence shows that the court *a quo* correctly accepted the confession into evidence. The presiding judge was impressed with the consistent evidence by the state witnesses, evidence that where applicable, corroborated each other. She correctly describes the appellant as a poor witness with changing versions.

[27] It is true that the content of the confession differs from the evidence. The material difference is that the appellant alleged that one police officer was sitting behind the steering wheel (Constable Nemaitoni), and the other was

standing outside (Constable Mhlongo), writing on the bonnet, when he was shot. When the confession was taken, the police knew this to be factually untrue.[27] Its inclusion in the confession points away from a confession forced upon the appellant. Why did he include the wrong version? One answer is that it is an exculpatory version of sorts. It may have been an attempt to make the attack seem less cowardly than stalking an unsuspecting victim seated in a vehicle. One will never know.

[28] As uncomfortable as it is to hear allegations of police torture, the evidence must still be of such a nature as to raise reasonable doubt. As held in *Phalo*, it must rest on "*a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences*".

[29] In addition to the admissible confession, in my view the guilt of the appellant was established by the direct evidence of a single witness, Constable Nemaitoni, as well. The learned judge did not accept the outcome of the identification parade. With respect, she erred.

[30] Evidence on identification is not acceptable only when formal boxes are ticked, but when it is honest and reliable. The honesty of the evidence of Constable Nemaitoni was not questioned. Was his evidence reliable? Although Constable Nemaitoni was wounded, he observed the appellant over a very short distance, more than fleetingly, further illuminated with a cabin light. His relatively quick identification of the appellant on 1 February 2011 is consistent with having seen the appellant clearly. With respect, my view is that it reflects reliability in the identification. In addition, it was common cause that the identification parade was properly set up. It does not detract from this evidence if Constable Nemaitoni could only describe a dark in colour jacket. There is nothing in the record that shows that the appellant had any remarkable facial or bodily features that would immediately register with a witness and that these ought to have been reflected in Constable Nemaitoni's statement to the police. Direct factual evidence about visibility was given by Constable Nemaitoni and by three witnesses. I respectfully disagree with this use of photographs to establish the degree of visibility at a scene. A court is not able itself to interpret

[27] Constable Mhlongo was found dead in the passenger seat.

the amount of light reflected on photographs taken at night, which themselves depend on technical matters, and with respect, should not reject. In my view, the direct, factual evidence about visibility, must stand.

[31] Off course, once one considers the evidence of Constable Nemaitoni, the mosaic of proof includes the poor impression that the appellant has made as a witness. As one steps back, and consider all the evidence, I am satisfied that the appellant's guilt in respect of the murder, attempted murder, and robbery with aggravating circumstances, all have been proven beyond reasonable doubt, despite the caution that had to be applied to the evidence of Constable Nemaitoni.

[32] The appellant's unlawful possession of a firearm and ammunition has also been proven beyond reasonable doubt. On his confession, the appellant was given a firearm by his co-perpetrators to carry out the attack on the police officers. There is no suggestion that this was a licenced firearm, or that his possession thereof was lawful. The attack, on the objective facts, was carried out simultaneously from two sides of the vehicle, necessarily involving two firearms and ammunition. The appellant used a firearm, in his possession at the time. He has not been convicted based on common purpose of unlawful possession, but on the overwhelming evidence of his own possession. His conviction must stand.

[33] As such the appellant was properly convicted on all counts.

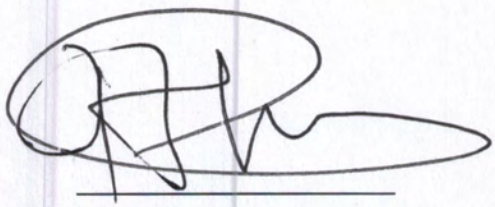
Accordingly, I propose the following order:

1. The appeal is dismissed.

DP de Villiers AJ

I agree and it is so ordered

M Ismail J



PH Malungana AJ

Heard on: 17 August 2020 by written submission at the election of counsel

Delivered on: 18 September 2020 by uploading on CaseLines and by e-mail

On behalf of the Appellant:	Adv R Gissing
Instructed by	Calvin Maile Attorneys
On behalf of the Respondent:	Adv KT Ngubane
	Office of the Director of Public Prosecutions