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

CASE NO: A 110/2020

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES

30/06/2021

SIGNATURE **DATE**

In the matter between:

NDLOVU, MELUSI **Appellant**

and

THE STATE **Respondent**

JUDGMENT

DE VILLIERS, AJ:

Introduction

[1] The appellant was charged in the District Court for the Regional Division of Gauteng, sitting at Johannesburg, with two charges, namely attempted

robbery with aggravating circumstances, and murder. The appellant was legally represented. He pleaded not guilty and gave no plea explanation. The appellant requested in terms of section 93ter of the Magistrates' Courts Act 32 of 1944 for a trial where two assessors had to assist the presiding magistrate. The two assessors on 28 August 2018 found the appellant guilty on both counts, whilst the presiding magistrate found that there was doubt as to the guilt of the appellant.

[2] The appellant was sentenced to fifteen years direct imprisonment, in that the sentence in respect of the attempted robbery conviction and the sentence in respect of the murder conviction, were to be served concurrently.

[3] This matter comes before us with leave of the court *a quo*. Despite having obtained leave to appeal the sentences, that appeal has been abandoned and the matter only proceeded as an appeal against the conviction.

Context and facts

[4] The facts are uncomplicated, although distressing as all the facts in all senseless killings are.

[5] A perpetrator stabbed and killed Ms Marcia Mabitla ("*Ms Mabitla*") in an attempted robbery of her handbag. He fled emptyhanded after the incident. The incident took place at the corner of Essellen and Twist Streets in Hillbrow on 28 January 2016. The appellant was arrested on 25 September 2017. An identity parade was held on 3 October 2017, about 20 months after the incident, where two eyewitnesses identified the appellant. The trial commenced on 16 April 2018, more than 26 months after the incident.

[6] Ultimately the identification of the perpetrator and the appellant's conviction rested on the evidence of the two eyewitnesses. The two witnesses, with the same surname, but not related to each other, were Mr Mduduzi Ncube and Mr Sibusiso Ncube. There was no suggestion that the two witnesses had any reason to falsely implicate the appellant. The principal argument before this court was that they conspired (a) to give a name to the perpetrator and (b) to frustrate a fair identification parade. The remainder of the argument was that their evidence was unreliable in essence as they did not describe clothes,

facial features, and built of the appellant in the same manner, or could not do so.

[7] The incident took place at about six o'clock in the afternoon, during summer time. The sun had not yet set, and visibility was good. Mr Mduduzi Ncube was close enough to the incident to observe the crimes. Mr Mduduzi Ncube and friends/acquaintances sat across the road at a building called Essellen Court from where the crimes were committed. The road is a double lane road, carrying traffic in both directions. On Mr Mduduzi Ncube's version, Mr Sibusiso Ncube and Mr Doubt Nare ("*Mr Nare*") were in the group of people with whom he was sitting. In cross-examination Mr Mduduzi Ncube recalled that Mr Nare had left the group before the incident.

[8] Mr Sibusiso Ncube, on his version, had been in the company of Mr Mduduzi Ncube, but walked away and crossed the road before the incident. The incident took place near him, close to a building called Garth Mansions. This is a contradiction in the evidence about whether the two witnesses were in each other's company at the time of the incident, but an immaterial contradiction in the totality of the evidence. It was an unremarkable matter in the context of a group of people sitting on the side of a street in the late afternoon, having social interaction. The group was not small - Mr Sibusiso Ncube testified that about 15 people were sitting together. It is not improbable that Mr Mduduzi Ncube simply would have missed one person in the group stepping away and crossing the road. Mr Mduduzi Ncube testified that after the stabbing he followed the deceased to the building where she resided, accompanied by Mr Sibusiso Ncube and Mr Nare. In other words, they re-joined, making a mistake about having been together all the time, even more probable. It is common cause that the three of them were indeed with the late Ms Mabitla after she was stabbed and assisted her until she was taken to hospital. I make the obvious observation, had the version of Mr Mduduzi Ncube and Mr Sibusiso Ncube been concocted, I would have expected to hear a dovetailed version about being together when they witnessed the incident.

[9] The two eyewitnesses testified that they became aware of what was happening because of a commotion, which caused them to look at the incident.

Their attention thus was focussed on the events. It is true that their opportunity for observation was not for a long period, as Ms Mabitla was stabbed in the struggle for her handbag, and the perpetrator shortly thereafter fled away. The shorter the time for observation, the more the incident being observed involved two people battling for control of a handbag, the less one would expect witnesses to observe immaterial facts.

[10] As stated, the first principal argument before this court was that the witnesses conspired to give a name to the perpetrator. The two eyewitnesses testified that they knew the appellant well prior to the incident, and knew him by sight. Mr Sibusiso Ncube also knew his nickname ("*street name*"), as "*Maya*". This leads to another contradiction, Mr Mduduzi Ncube recalled that neither of them knew the appellant's name. This is a contradiction in the evidence, but is also not material. There is strong evidence that Mr Mduduzi Ncube was mistaken. Mr Sibusiso Ncube's version that he knew the nickname of the perpetrator, is confirmed by Mr Nare and by Detective Constable Booi. The events took place a long time ago, and it is not improbable that Mr Mduduzi Ncube simply forgot the detail that Mr Sibusiso Ncube he knew the nickname of the perpetrator in the intervening period, a detail that emerged after a stressful incident.

[11] The appellant argued that Mr Nare influenced the identification in that "*the witnesses were influenced by Mr. Doubt Zama Nare to believe that the Appellant was the perpetrator, although Mr. Nare was not even an eye witness to the incident*". The submission is not borne out by the evidence.

[12] It is common cause that Mr Nare assisted in arranging transport for the deceased to the hospital, and spoke to the two eyewitnesses, but no one testified that he had played any role in the identification of the appellant. The facts also do not lead to such an inference. The version of manufactured evidence was the cross-examiner's version in one instance, but denied by the witnesses in so far put to them for comment:

[12.1] Mr Mduduzi Ncube was asked in cross-examination if he, Mr Nare, and Mr Thabane Ndlovu ("*Mr Ndlovu*") did try and work out who the perpetrator was. His response was that they all knew who it was, and

knew him by sight and he denied the suggestion they conspired to work out who the perpetrator was;

[12.2] Mr Sibusiso Ncube was asked in cross-examination if he had met with Mr Mduduzi Ncube (Mr Nare was not mentioned) the night after the incident and discussed the events. Mr Sibusiso Ncube confirmed that they met, Mr Mduduzi Ncube knew the perpetrator, but not his name, and Mr Sibusiso Ncube testified that he told Mr Mduduzi Ncube that it was "*Maya*". He did not know if Mr Nare knew the name as well, and it was not even suggested to him that it was Mr Nare who came up with the identification;

[12.3] Mr Nare testified that he did not witness the incident, but confirmed that assisted late Ms Mabitla. He testified that Mr Sibusiso Ncube helped him and gave him the name of the perpetrator, "*Maya*". Again, it was not even suggested that it was Mr Nare who came up with the identification;

[12.4] Detective Constable Booi confirmed that Mr Sibusiso Ncube told him on the night in question that the perpetrator was called "*Maya*". He was not cross-examined.

[13] There is thus no evidence or evidence for an inference of a manufactured identification, one where Mr Nare identified the appellant as the perpetrator.

[14] The two eye witnesses were able to identify the appellant at an identity parade. As stated, the second principal argument before this court was that witnesses frustrated a fair identification parade. The appellant argued that Mr Nare also unduly influenced this identification by the two eyewitnesses at an identity parade in that (as set out in the heads of argument):

> "*Mr. M. Ncube was taken along with Mr. S. Ncube and Mr. Nare to the police station for purposes of the identity parade by the investigation officer. It need to be reiterated that Mr. Nare was the person that pointed the Appellant to the brother of the deceased before his arrest and that he did not participate in the identity parade but went along. There was obviously time for discussion between the witnesses on their way to the police station*."

[15] There is no evidence of, or evidence for an inference of, a manufactured identification. It seems that Mr Nare was not in the same car as the two eye

witnesses, and no one placed him at the identification parade. In any event, on the evidence he at most would have been able to refer to the street name of the appellant, a name that the appellant denies.

[16] Identification at an identification parade carries weight. The identification by Mr Mduduzi Ncube is of lesser value, as his evidence was that Mr Nare pointed out the appellant to him the day before the appellant's arrest. He had thus seen the appellant in the intervening period. Still, he too identified the appellant. The long delay however strengthens the identification by Mr Sibusiso Ncube who had not seen the appellant in the intervening period.

[17] As stated, the remainder of the criticism of the evidence is the almost mechanical attack on the list of factors our courts could take into account in assessing evidence, but which the eye witnesses could not recall or where their recollections differed. The main argument was that the identification was unreliable due to the eye witnesses' failure to describe facial features of the perpetrator and his gait. I assume that the main criticism meant to say that the eyewitnesses did not describe the perpetrator's face/facial features, build, or clothes. It is not suggested that there was anything remarkable in the features of the appellant. The time for observation of the perpetrator was not long, and he was in struggle with the late Ms Mabitla. Under these circumstances, Mr Mduduzi Ncube initially could not state the colour of the clothes of the perpetrator. On being prompted as to the version of Mr Sibusiso Ncube, Mr Mduduzi Ncube remembered that the appellant wore a red cap (but he could not remember him wearing a red T-shirt) as Mr Sibusiso Ncube later testified. In my view, any contradiction is slight. Mr Nare testified that he saw the appellant between an hour or two hours before the incident, and that he at that stage was wearing a black jersey, not a red T-shirt. This does not mean that he was not wearing a red T-shirt underneath the jersey. Mr Nare had no reason to take notice of the clothes of the appellant when he saw him. In addition, there was no reason for the two eye witnesses to pay close attention to the clothes of the perpetrator. Again, I make the obvious observation, had the version of Mr Mduduzi Ncube and Mr Sibusiso Ncube been concocted, I would have expected to hear a dovetailed version about the clothes that the

perpetrator wore. It would have been a remarkable feat if the eye witnesses in the commotion and short period would have registered these matters. Their evidence is that they identified the perpetrator as someone they knew well.

[18] The two eye witnesses differed about the colour of the handbag - brown versus black in colour. Whether the brown was a dark brown or a light brown was not clarified during the trial. It would have been an unremarkable manner, testified about long after the incident. This is a contradiction in the evidence, but is also not material.

[19] Lastly the appellant took issue with the length of time Mr Sibusiso Ncube had to see the face of the perpetrator. Ms Mabitla blocked his view during part of the struggle for her handbag, but Mr Sibusiso Ncube saw the face of the appellant as he stabbed Ms Mabitla from a few paces away. He had an especially good opportunity to identify the appellant.

The magistrate's reasoning

[20] The learned magistrate believed in error that the evidence was that Mr Mduduzi Ncube, Mr Sibusiso Ncube and Mr Nare "*discussed the incident and decided that the description between themselves and the community that the identity fit the description of the person with the street name Mayer*". This has been addressed already.

[21] The learned magistrate found that the two eyewitnesses did not impress him. His criticism was that Mr Mduduzi Ncube could not describe the perpetrator's face, build or clothes. The learned magistrate noted that Mr Sibusiso Ncube could not describe the perpetrator's face or build, but could describe his clothes. The learned magistrate noted that Mr Sibusiso Ncube could describe his clothes (a red T-shirt and red cap) and (in error recorded) that he did know the nickname of the appellant. The learned magistrate took issue with the contradiction with regard to the colour of the handbag. These matters been addressed in part already, and is further addressed below with reference to case authority. The learned magistrate saw it as a negative that Mr Mduduzi Ncube did not know the appellant's name. With respect, the issue is not a name, but a face. The appellant was well-known to the eye witnesses.

[22] The main contradiction relied upon by the learned magistrate is that Mr Mduduzi Ncube testified that Mr Sibusiso Ncube was in his company, whilst Mr Sibusiso Ncube testified that he indeed was in the company of Mr Mduduzi Ncube until very shortly before the incident when he crossed the street. This has been addressed already.

[23] The learned magistrate criticised the absence of the name of the perpetrator in the police statement by Mr Sibusiso Ncube, but the police confirmed receiving the name. It hardly could be put before the door of the witness. Police statements are notoriously inaccurate and often incomplete.

Applicable principles

[24] A court on appeal does not lightly interfere with findings of fact by the court a quo. See the minority judgment in **R v Dhlumayo and Another** 1948 (2) SA 677 (A) at 695-696, applied in **Attorney-General, Transvaal v Kader** 1991 (4) SA 727 (A) at 739J-740B. The law is summarised in **Monyane and Others v The State** [2006] SCA 141 (RSA) para 15:

> "*This court's powers to interfere on appeal with the findings of fact of a trial court are limited. It has not been suggested that the trial court misdirected itself in any respect. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong (**S v Hadebe and Others** 1997 (2) SACR 641 (SCA) at 645e-f). This, in my view, is certainly not a case in which a thorough reading of the record leaves me in any doubt as to the correctness of the trial court's factual findings. Bearing in mind the advantage that a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with a trial court's evaluation of oral testimony (**S v Francis** 1991 (1) SACR 198 (A) at 204e)*."

[25] Of course, an incorrect finding must be rectified. See **S v Mafaladiso en Andere** [2002] ZASCA 92. In assessing the evidence, one must have regard to the evidence as a whole. See **S v Trainor** [2003] 1 All SA 435 (SCA) para 8 and 9, and **S and Another v S** [2014] ZASCA 215 para 17-18.

[26] Minor contradictions may well be mere errors, and in fact not indicate untruthful evidence. See **S v Oosthuisen** 1982 (3) SA 571 (T) at 576H-577C quoted with approval in **President of the Republic of South Africa and Others v**

South African Rugby Football Union and Others 2000 (1) SA 1 (CC) para 124. The oft-quoted summary on evidence on identification is to be found in **S v Mthetwa** 1972 (3) SA 766 (A) at 768A-D (underlining added):

> "*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)*."

[27] These factors are not a mechanical list of boxes to be ticked, but guidelines in the assessment of the evidence. Caution must be applied in assessing identification evidence, but this must not displace the exercise of common sense. See the reasoning in **S v Artman and Another** 1968 (3) SA 339 (A) at 341A-D, **S v Snyman** 1968 (2) SA 582 (A) at 585G and **S v Sauls and Others** 1981 (3) SA 172 (A) at 180G. See too **R v Mputing** 1960 (1) SA 785 (T) at 787D-E 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 may have been no opportunity for a studied observation of the perpetrator to note detail, but sufficient to see and remember the perpetrator without a recollection of features (or clothes). **R v Mputing** was referred to with approval in **S v Willemse and Others** [1988] 2 All SA 435 (A) para 57.

[28] Lastly, but not least. If a witness is accused of concocting evidence, that argument must be put to the witness concerned for comment. See again

President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) para 61-65.

Discussion

[29] I am satisfied that a proper identification of the appellant was made. The overwhelming evidence by the eye witnesses, corroborated by the identification at the identification parade, is that they identified a perpetrator as someone they knew, Maya. The eye witnesses made an identification in good visibility, and near the incident. Their attention was focussed, and they had sufficient time to observe the perpetrator. They had no reason to implicate the appellant falsely. The differences (even if in fact contradictions) in their evidence are in immaterial matters, and in fact point to reliable evidence on the facts of this case. The minority judgment came about as a result of an error in recording the evidence, and the elevating contradictions that are either minor in nature to material matters. Under these circumstances there is no reason to interfere in the factual findings by the court *a quo*. The guilt of the appellant was established beyond reasonable doubt and consequently I have not basis to find that the conviction was wrong.

Accordingly, I propose that the following order be made:

1. The appeal is dismissed.

DP de Villiers
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

I agree

ML Senyatsi
JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

Heard on: 25 May 2021

Delivered on: 30 June 2021, by uploading on CaseLines

On behalf of the Appellant	Adv S. Simpson Legal-Aid SA
On behalf of the Respondent:	Adv EK Moseki Office of The Director of Public Prosecutions