

IN THE HIGH COURT OF SOUTH AFRICA**(WESTERN CAPE HIGH COURT, CAPE TOWN)****CASE NUMBER:**

A244/2010

5 **DATE:**

10 SEPTEMBER 2010

In the matter between:

NEIL GROOTBOOM

Appellant

and

10 **THE STATE**

Respondent

J U D G M E N T15 **WRAGGE, AJ:**

On 5 June 2007 the appellant, Neil Grootboom, was convicted in the Cape Town Regional Court of the murder of Shahied Benting, ("the victim") on the night of 19 March 2000. The
20 appellant was sentenced to a period of 15 years direct imprisonment. The appellant appeals against his conviction, only, with the leave of the court *a quo*.

The Trial:

25 I believe that it is important for the purposes of determining
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this appeal that a short description of the trial proceedings be given. At the commencement of the trial both the appellant and his co-accused, Royston Price ("Price"), were represented by the same legal representative, namely Mr Catsicadellis.

5 Both the appellant and Price pleaded not guilty to the single charge against them. On behalf of his clients, Mr Catsicadellis gave a short explanation of plea to the effect that both the appellant and Price denied that they had any involvement in the murder.

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A *post-mortem* report was handed in and its contents were admitted as proof in terms of sections 212(7) of the Criminal Procedure Act. It appears from the *post-mortem* report that the forensic pathologist, Dr Van der Heyde, examined the body
15 of the victim on 20 March 2000 and found the cause of death to be a penetrating gunshot wound to the victim's head. Dr Van der Heyde was also able to recover the bullet that had caused the victim's death.

20 The State led the evidence of three policemen, Constable Bailey, Inspector Rossouw and Sergeant Delport. All of the policemen testified that they had attended at the scene of the shooting in Glider Crescent, Factreton and that they had been given a description of the alleged perpetrators. Inspector
25 Rossouw and Sergeant Delport, together with Sergeant Isaacs,
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set off in search of the alleged perpetrators. They found the appellant and Price in Lugmag Avenue, Factreton, a short distance from Glider Crescent and arrested them. Inspector Rossouw testified that he searched Price and found in his possession a Rossi .38 special revolver from which, it transpired, the shot that had killed the victim had been fired.

After Sergeant Delport had completed his evidence the trial was postponed. When the trial recommenced Mr Catsicadellis advised the Court that problems had arisen which rendered it necessary for him to apply to withdraw as the legal representative of both the appellant and Price. Mr Catsicadellis explained that neither the appellant nor Price had consulted with him properly since the beginning of the case. He had asked them to attend at his offices, but they had not done so. New information had since come in to his possession, which rendered it impossible for him to continue to act for the accused. Mr Catsicadellis' application was granted and for the remainder of the trial the appellant and Price were separately represented.

The State then called a fourth policeman, Sergeant Isaacs, who confirmed the evidence given by Inspector Rossouw and Sergeant Delport in most respects. A ballistic report was thereafter handed in as evidence. According to the report, a

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spent bullet found at the scene of the murder, as well as the spent bullet removed from the victim's head, had been fired from the Rossi revolver which, according to the evidence of the police, had been found on the person of Price. The contents
5 of the ballistic report were formally admitted by the defence.

The fifth witness called by the State was Moegsien Benting who was the uncle of the victim. He testified that on the night of the murder, he and the victim were walking along Glider
10 Crescent on their way to buy drugs. The appellant and Price walked towards them. Benting and the victim greeted the appellant and Price. The appellant then pulled out a revolver and pointed it at them. Shots were fired and Benting ran away, leaving the victim behind. He confirmed that it was the
15 appellant who had shot the victim. Under cross-examination he confirmed also that when the shooting occurred, Price stood alongside the appellant, but did not have the firearm.

Under cross-examination by the appellant's legal
20 representative, Benting was referred to a statement that he had made to the police. His evidence had been that he had made the statement on the day following the incident. (This is although the Commissioner of Oath's attestation, on the statement bears the date 31 May 2000, over two months after
25 the incident occurred). In the statement Benting had declared
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that two shots were fired. He also stated that he did not know if the shots were fired by Price or the appellant, but only the appellant had a gun. Benting confirmed once again that it was the appellant who had fired at them. The State then closed its
5 case.

Price then gave evidence which no doubt came as a surprise to the appellant. He testified that on the evening of the incident he was at his grandmother's house in Sunderland
10 Street, Factreton. He had been at his grandmother's house for the weekend and they had been to the funeral of his uncle. The same night he had accompanied the appellant to the house of the appellant's wife in Acre Road in Factreton. On their way there, as they were walking through Glider Crescent,
15 he needed to relieve himself and went behind a bush. Whilst he was doing this, the victim and Benting arrived on the scene. He was doing up his trousers when he heard shots. He ran towards the group and saw Benting run away. He did not see the victim, but saw that the appellant had a firearm in his
20 hand. The appellant pressed the firearm into Price's hands and told him to take the firearm and to run away.

When they got to Lugmag Avenue, the police arrived and instructed them to stand still. Price threw the revolver into a
25 nearby strip of veld, but the police saw him doing this,
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arrested him and recovered the firearm. He denied that, as the police had testified, the weapon was found in his possession. Under cross-examination it was put to Price that the appellant would testify that the two of them had gone to
5 visit the appellant's wife in Acre Road and that on the way back they had been arrested in Lugmag Avenue. It was put to him that the appellant would say that at no stage had they walked down Glider Crescent. Price denied this and said that he had never visited the appellant's wife. The Court also
10 pointed out to Price that his evidence differed from what he had told his legal advisor. Price testified that during the period that he and the appellant had had the same legal advisor, the appellant had threatened him and said that he should not tell the truth.

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The appellant thereafter gave evidence. He testified that on the night in question he met Price in the backyard of a house and asked Price to go with him to visit the appellant's wife in Acre Road. They duly went to the house of the appellant's
20 wife where the appellant went inside to visit his wife, leaving Price outside. When he emerged, Price had left, but he thereafter coincidentally met Price in Lugmag Avenue, running towards him. He confirmed that the revolver had been found in Price's possession. He denied that he and Price had ever
25 been in Glider Crescent.

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Lawrence Williams was then called by the appellant to give evidence on his behalf. The taped record of Mr Williams' evidence has gone missing, but the magistrate was able to reconstruct Mr Williams' evidence from his notes. Mr Williams testified that he knew the appellant and was also aware of the shooting incident in Glider Crescent on 19 March 2000. He had heard the shots and he had run to the scene of the shooting where he was arrested. When he was at the police station the appellant and Price were brought in. He testified that he had seen the appellant and Price in Glider Crescent before the incident. They were walking in the direction of Acre Road and went past him. He asked the appellant where they were going and the appellant told him that they were going to his girlfriend's house. Under cross-examination he testified that he heard the shots approximately five minutes after he had seen the appellant and Price. His house was in Glider Crescent between the scene of the shooting and Acre Road. The appellant then closed his case.

20 The Judgment:

The magistrate drew attention to the evidence of the police to the effect that the revolver used to shoot the victim had been found in Price's possession and the evidence of Price that whilst he had had the revolver in his possession, he threw it into the veld when the police arrived. He held this discrepancy

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to be of little relevance because Price admitted that the revolver had been in his possession at one time. The magistrate placed emphasis on the evidence of Benting regarding the circumstances in which the shooting of the victim
5 had occurred. He found the discrepancies between the contents of the statement made by Benting and his evidence not to be material.

The magistrate recognised that the State's evidence of the
10 circumstances of the shooting was solely that of Benting, a single witness, but held that his evidence could not be regarded in isolation. He emphasised that Benting's evidence corroborated the version of the shooting given by Price in his evidence. The magistrate thereafter focused on the evidence
15 of Price. He stated that he recognised the dangers inherent in assessing the evidence of a co-accused and referred specifically to the judgment of Miller, JA in S v Dladla 1980(1) SA 526 (A) at 529A-E, and held that it was necessary to exclude the possibility that Price was not attempting to
20 transfer blame to the appellant and so put himself in a better light.

The magistrate referred to the statement by Benting and, although the Commissioner of Oath's attestation was dated 31
25 May 2000, more than two months after the shooting, he
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accepted Benting's evidence that he had made the statement after the incident. The appellant and Price were in custody at that time and in the magistrate's view there was no opportunity for Price and Benting to conspire together to implicate the appellant in the crime. He found, therefore, that it was so unlikely that Benting and Price could have conspired to implicate the appellant that this possibility could be excluded. He also considered the appellant's evidence and pointed out that in material respects his evidence was in conflict with that of his own witness, Lawrence Williams. Whereas the appellant had testified that he had been at his wife's house in Acre Road when the shooting occurred, Williams testified that he had seen the appellant and Price passing his house on the way to Acre Road some minutes before the shooting occurred.

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The magistrate accordingly found that the risks involved in accept the evidence of Price were reduced, because his evidence had been corroborated by that of Benting. He also took into account the unlikelihood of there having been a conspiracy between Price and Benting and the material contradictions in the version that the appellant had apparently given to Mr Catsicadellis and which had been put to the witnesses and his evidence. The magistrate recognised, however, that the fact that Price made common cause with the appellant during the first part of his evidence, raised a

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question as to his credibility. He found, however, that Price had given a version as to how the weapon had come into his possession which was most convincing and his evidence was confirmed in material respects by that of Benting.

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Having regard to the foregoing the magistrate concluded that there was no room, on the grounds of the quality and weight of the evidence adduced by the State, to find that there was a reasonably possibility that the appellant's version was the truth. Having found that the doctrine of common purpose did not apply, the magistrate acquitted Price and convicted the appellant of murder.

The Appeal:

15 Mr Theunissen, who appeared on behalf of the appellant, submitted that the magistrate had erred in the following respects:

(a) The Court erred in using, as its point of departure, the evidence of Price, the co-accused. The magistrate should instead have focused on the evidence of Benting, a single witness.

(b) Benting's evidence was unsatisfactory in a number of respects:

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5 (i) Benting was a gangster and the shooting was clearly a gang affair. Benting may, therefore, have had some reason to give false evidence to the effect that the appellant and not Price, shot the victim.

10 (ii) The magistrate erred in accepting Benting's evidence that he had made his statement to the police on the day after the shooting (which would have been 20 March 2000). It was clear from the statement that it had been made on 31 May 2000, over two months after the shooting. It was submitted that this was an indication that Benting was an untruthful witness. It was submitted further that there were indications that the magistrate accepted the evidence of Price uncritically and perhaps too enthusiastically. In this regard:

20 (a) After the appellant had given evidence, the magistrate revoked his bail. It appeared from the record [page 162 (7-15)] that Price's advocate may have made submissions to the magistrate in chambers with regard to his client's safety. It was submitted that this constituted an irregularity and provided an

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indication that the magistrate had already been persuaded that the appellant had shot the victim.

- 5 (b) The magistrate found Price's explanation of how the firearm came to be in his possession convincing, whereas there must be doubt that Price's evidence in this regard was untruthful.

10 With regard to the evidence of Price, it was submitted that there were a number of factors that cast doubt on the truth of his evidence:

- (a) His evidence differed from the instructions that he had
15 obviously given to Mr Catsicadellis, his first legal representative.

- (b) He had every reason to lie and to implicate the appellant because he had to find a way of explaining why the
20 revolver had been in his possession.

- (c) His evidence that he had thrown the revolver away before the police arrived was contradicted by the evidence of Rossouw, Delport and Isaacs, all of whom testified that
25 the firearm was found on his person.

Ms Rafels, who appeared for the State, agreed that the magistrate had erred in concentrating on the evidence of Price and thereafter seeking support for Price's evidence in the evidence of Benting. She accepted that the magistrate's point of departure should have been Benting's evidence. Ms Rafels submitted, however, that Benting's evidence should be accepted. The contradictions were not material and his evidence was confirmed by Price in its central respect, i.e. that it had been the appellant who had had the revolver in his possession and who had fired the shot that killed the victim.

She submitted further that as far as the contradictions between the evidence of Benting and Price were concerned, it had to be borne in mind that Benting and Price testified more than six years after the murder had taken place and that it would, therefore, have been surprising if their evidence had been consistent in all respects. She submitted further that it was unlikely that Price had tailored his evidence to coincide with Benting's evidence, because Mr Catsicadellis had withdrawn as the appellant's and Price's legal representative before Benting had given evidence. Although there was nothing in the record which suggests that Mr Catsicadellis withdrew because Price had implicated the appellant in the shooting, it is reasonable to assume that this was indeed the reason.

Mr Rafels submitted in conclusion that it was evident that the magistrate had regarded Benting as a single witness and had applied the cautionary rule in assessing his evidence. Such
5 contradictions as there were in Benting's evidence and between his statement made to the police and his evidence, were not material.

This appeal

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The appeal in this matter is against the magistrate's findings of fact. It is well established that a court of appeal should approach the matter aware that the trial court was in a better position than the appeal court to make reliable findings of fact.
15 In the absence of a 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 & Others 1997(2) SACR 641 (SCA) at 645e-f). If there has been a demonstrable
20 and material misdirection by the trial court, a court of appeal will be free to come to its own findings instead of the trial court. (R v Dhlumayo 1948(2) SA 677 (A) at 706, R v Tusini & Another 1953(4) SA 406 (A) at 412B-G).

25 In my view the concession by the State that the magistrate

erred in focusing primarily on, and unreservedly accepting, the evidence of Price, a co-accused and possible accomplice, whereas he should properly have given consideration and applied the cautionary rule to the evidence of Benting, was well made. I agree with Mr Theunissen's submission that it is evident from the judgment that the magistrate appears to have paid lip service to the cautionary rule as regards the evidence of Price. Price's evidence was open to attack on a number of grounds. His evidence was contrary to what he had clearly instructed his legal representative, Mr Catsicadellis, at the beginning of the trial. This may well be explained by his initial alliance with the appellant. However, I do not find his explanation as to how the revolver came to be in his possession "uiters oortuigend".

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His evidence that he threw the revolver away is also contrary to the evidence given by the policemen who arrested the appellant and Price. Price also had a strong possible motive for implicating the appellant, namely to escape conviction himself, and he also had to find a way of explaining why the revolver had been in his possession. In my view, therefore, the magistrate's primary reliance on, and acceptance of, the evidence of Price to convict the appellant, constituted a material misdirection which entitles this Court to consider the evidence afresh and to make its own findings.

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As I have indicated above, it seems to me that the proper approach in the present matter is to evaluate Benting's evidence as a single witness in order to determine whether his evidence meets the standard required by law and should be accepted. Looking at the evidence as a whole, the ultimate question is whether the State discharged its onus of proving beyond reasonable doubt that the appellant fired the fatal shot. Whilst section 208 of the Criminal Procedure Act allows for the conviction of an accused on the evidence of a single competent witness, it is well established that such evidence should be treated with the utmost care.

However, there is no mechanical rule which applies to the assessment of such evidence. It is necessary to weigh the evidence, consider its merits and demerits and having done so, to decide whether the evidence is trustworthy, even though there may be shortcomings or defects or contradictions in the testimony. (S v Sauls 1981(3) SA 172 (A) at 180E-G, S v Webber 1971(3) SA 741 (A) at 758G-H). It is necessary to guard against separating the evidence into compartments. The conclusion whether to convict or not, must be based on all the evidence. (S v Van den Meyden 1999(1) SACR 447 (W) at 449f-450a, S v Cornick 2007(2) SACR 115 (SCA) at para [41]). It is also necessary to have regard to the inherent probabilities

of the appellant's version. (S v Stevens [2005] ALL SA 1 (SCA) at para [26]).

In my view the fact that Benting was a gang member and that
5 the shooting may have been related to a gang war, is not a
factor which casts doubt on Benting's credibility. Under cross-
examination he testified that he was no longer a gang member.
The only reason put to Benting as to why he might implicate
the appellant in the shooting, was that they both used to be
10 gang members and that Benting still had something against the
appellant. What that "something" might have been was not put
to Benting, who denied that he had any reason to implicate the
appellant.

15 By the time that the appellant testified six months had past
since Benting had given his evidence and the appellant had
retained a third legal representative, Ms Van der Westhuizen.
The appellant, therefore, had ample time to consider why
Benting might want to implicate him in the shooting. During
20 his evidence in chief he testified that Benting lied to the Court,
because they were members of opposing gangs. He testified
further, however, that on the weekend of the shooting he had
not had any problems with any gang member, including
Benting.

Under cross-examination by Price's legal representative, the appellant testified that the gang warfare that he had referred to in his evidence in chief had occurred many years previously, that he had no problems with Benting and that he could not
5 say why Benting would want to implicate him in the shooting. With regard to the submission that Benting must have lied about the date upon which he made his statement to the police, whilst I would not go so far as the magistrate did in accepting Benting's evidence in this regard unequivocally, in
10 my view this evidence cannot be rejected as being untruthful. In his evidence in chief he testified that he told the police about the incident on the day after it had occurred and that the police took a statement on that day.

15 Price's legal representative put to Benting that he had made his statement on 31 March 2000 (I assume that he must have misread the date of the Commissioner of Oath's attestation which was 31 May 2000). Benting testified that he could not remember the precise date upon which he made the statement.
20 One has to ask why he should lie in this relatively unimportant regard. Furthermore, having regard to the fact that more than six years elapsed between the incident and the date that he gave his evidence, it would be unsurprising if Benting had an unclear recollection of precisely when he made the statement
25 to the police.

The remaining ground upon which Benting's evidence was criticised was that it was inconsistent with the statement that he had made to the police. Mr Theunissen agreed that the suggestion made to Benting during cross-examination that, whereas he testified that it was the appellant who had fired the fatal shot, in his statement he had testified that he did not know if it was Price or the appellant who had shot at Benting and the victim, was without merit. In his statement Benting declared that the appellant had pulled the firearm out of his raincoat pocket and had shot at Benting and the victim. He stated further that he and the victim had then turned and ran. There were further shots and it was in respect of these shots that Benting could not say whether they were fired by the appellant or Price, save that it was the appellant who had a firearm.

Mr Theunissen, however, submitted that whilst Benting had testified that he and the victim had merely greeted the appellant and Price before the shooting occurred, in his statement he had declared "ons het vir Neil-hulle gegroet, waarop Neil gemeld het dat ons, ek en Shahied, lankal nie vol is nie". (Benting testified that, in gang parlance, this indicated that there was friction between them). It was submitted that Benting's failure to refer to this in his evidence provided an

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indication that he was being untruthful. I do not agree. When cross-examined on this aspect by Price's legal representative, Benting stated that the incident had occurred a long time ago and he could only remember the important facts. I do not find
5 this to be unreasonable, given the time that had elapsed between the date of the shooting and when Benting gave his evidence. (S van Janse van Rensburg 2009(1) SACR 221 (C) at para's 14 and 15).

10 In summary, I do not consider that the various criticisms of Benting's evidence have any great merit and, in my view, certainly do not justify a rejection of his evidence. Benting's evidence as to the identity of the shooter is also corroborated by the evidence of Price, albeit that such evidence must be
15 approached with great caution. It may be suggested that Price, who testified six months after Benting, had sufficient opportunity to tailor his evidence to coincide with Benting's evidence. Benting, however, made his statement to the police, identifying the appellant as the shooter at the latest on 31 May
20 2000, being the date of the attestation of the Commissioner of Oath's. Until the hearing was adjourned on 2 December 2002, however, the appellant and Price had made common cause that they had not been involved in the shooting in any way at all. It was during the period December 2002 till April 2003 that
25 Mr Catsicadellis was presumably placed in possession of
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instructions which made it impossible for him to continue as the legal representative of both the appellant and Price.

The reasoning of the magistrate which led him to conclude that it was highly improbable that Benting and Price could have conspired to implicate the appellant in the shooting therefore, has validity, whether or not Benting's statement was made on the day following the incident or on 31 May 2000. There is, however, less reason to doubt Price's evidence that both he and the appellant were present together at the scene of the shooting. On the appellant's own evidence, they were together not long before the shooting and then "coincidentally" very shortly thereafter. Benting was never in any doubt that he and the victim encountered two men, namely the appellant and Price. Furthermore, the evidence of the police was that they immediately started searching the neighbourhood for two alleged perpetrators as opposed to a single person.

The question which arises is whether, bearing in mind the dangers of accepting an accomplice's evidence and Price's possible motive to exonerate himself, Price's evidence should be accepted as providing corroboration for Benting's evidence that the shooter was the appellant. The only other possible inferences are that, although the appellant was present, Price fired the fatal shot, or the two men involved in the incident

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were Price and an unknown person. Neither of these scenarios accords with Benting's clear evidence as to the appellant's presence and role in the shooting, whilst the second scenario has Price falsely substituting the appellant for
5 the true gunman in the shooting. I regard these scenarios as far fetched.

In my view, notwithstanding the dangers inherent in accepting the evidence of an accomplice and the not insubstantial
10 criticism of aspects of Price's evidence, in the light of the factors which I have mentioned I consider that, at the least, Price's evidence as to the identity of the shooter can be accepted as providing corroboration for Benting's evidence on this issue. Regarding Benting's evidence on its own terms, I
15 do not find anything therein which suggests that he was being untruthful or that his evidence should not be accepted. I have dealt with the criticisms earlier in this judgment. Furthermore, his evidence reads well and he stood up well to cross-examination. In my view his evidence meets the standard for
20 the acceptance of the evidence of a single witness, namely that it is satisfactory in all material respects.

The evidence of the appellant on the other hand, was unsatisfactory in a number of respects. In the first place his
25 evidence differed from what his legal representative, Mr

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Catsicadellis, put to the State witnesses. In short it was put to the State witnesses that his evidence would be that he and Price were walking together down Lugmag Road when a group of people ran by. A police van then stopped alongside them and they were searched. The police persistently asked the appellant and Price whether they knew where the men who had run past, were. No firearm was found on either of their persons, but the police found a firearm when searching a nearby strip of veld with their torches. He and Price were then handcuffed and put into the police van, while the police went off in search of the group of men. The appellant was struck in the mouth with the butt of a pistol.

The appellant's evidence, however, was that he and Price went to the house of the appellant's girlfriend, where they parted. He left his girlfriend's house and encountered Price running towards him along Lugmag Road. The police thereafter arrived and found Price in possession of the firearm. He denied that he had been assaulted by the police. He also agreed with the evidence of the police that Lugmag Avenue was quiet and that he and Price were the only people on the street. The appellant's evidence was also contradicted by that of his own witness, Williams. It seems that the magistrate misconstrued the appellant's evidence as being to the effect that the appellant was with his girlfriend in Acre Road when the

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shooting occurred. In fact the appellant testified that he was in Ventura Crescent when he heard the shots. Williams testified, however, that he had seen the appellant and Price in Glider Crescent before the shooting. The appellant denied
5 that he and Price had ever been in Glider Crescent together.

When one has regard to the probabilities, in my view the case against the appellant is strengthened. Neither the appellant nor any other witness could suggest any plausible reason why
10 Benting might lie, both in his statement to the police and his evidence, and implicate the appellant in the shooting of the victim. I take into account the evidence that gunshot residue tests were carried out on both Price and the appellant but no positive results were found. There was, however, no expert
15 ballistic evidence and thus this fact is of limited, if any, assistance to the appellant.

In the light of Benting's evidence, corroborated as it is by Price's evidence in material respects (most notably the identity
20 of the shooter), and the inherent probabilities, I consider that the evidence of the appellant must be rejected as being not reasonably possibly true. Even if I am wrong in concluding that reliance can be placed on Price's evidence as corroboration for Benting's evidence of the identity of the
25 shooter, I am satisfied that Benting's evidence was such that

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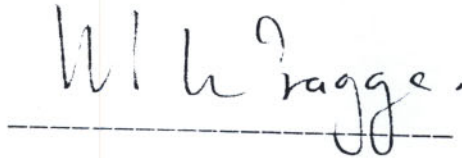
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the appellant could be safely convicted on its strength alone.

I am satisfied, therefore, that no reason exists to interfere with the magistrate's finding that the State had proved beyond reasonable doubt that the appellant was guilty of the murder of
5 Shaheed Benting. I would accordingly dismiss the appeal against the conviction.

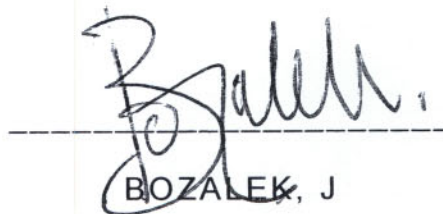
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W. H. Ragge.

BOZALEK, J: I agree. The appeal against conviction is dismissed.

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BOZALEK, J