IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.: 11206/2008

In the matter between:

RICARDO ENRICO NICHOLSON **Appellant**

and

THE STATE **Respondent**

JUDGMENT DELIVERED: FRIDAY, 12 NOVEMBER 2010

SALDANHA, J

[1.] The appellant Mr. Ricardo Nicholson was charged in the Regional Court, Wynberg with two counts of murder and one of attempted murder. He was convicted on the 9th September 2009 on all three counts and sentenced to an effective term of imprisonment of twenty two and a half years. He was granted leave to appeal against both the conviction and the sentence.

[2.] The charges arises out of an incident on the 17th of December 2006 in Manenberg, Cape Town where the appellant was alleged to have shot and murdered Mordecai Van Rooyen and Eirefaan Peters and is also to alleged to have attempted to murder Moegamat Adams by shooting at him.

[3.] The appellant was legally represented at the trial and having pleaded not guilty on all three counts chose not to disclose the basis of his defence.

[4.] The state tendered the evidence of 6 witnesses while the appellant chose not to testify nor to call any witnesses in his defence.

[5.] The central issue in appeal on the conviction is whether the state had proved beyond reasonable doubt the identity of the appellant as having been the assailant on all three charges.

[6.] The appellant formally admitted in terms of section 220 of the Criminal Procedure Act the identity of both the deceased. In respect of Mordecai Van Reenen the appellant admitted that the cause of his death was a gun shot wound to the head of which he died on the 17th December 2006. In respect of Eirefaan Peters the appellant admitted the cause of death as being multiple gunshot wounds on the abdomen and body and that he had died on the 17th December 2006. The appellant also formally admitted the contents and findings of the medical legal post mortem examinations conducted by a Dr. Sandisa Potelwa on the 17th and 19th December 2006 and in which the causes of death of both deceased were recorded. The appellant further admitted the contents of a forensic affidavit with regard to the ballistic findings in respect of two cartridges which were found on the scene. A set of photographs of the scene were also admitted.

[7.] The incident occurred in the early hours of the morning of the 17th December 2006 in Manenberg in an area well known for a high incidence of gang activity.

[8.] Mr. Adams the complainant on the third count testified that in the early hours of the morning of the 17th December 2006 he was in the company of the two deceased while walking home from a place from which they had just purchased drugs for their use. The appellant who appeared to have been in the company of other persons approached them and accompanied them. It appeared to Adams that the appellant was known to the deceased and while walking along Thames Avenue in the direction of Thames Lane the appellant asked them if they had any drugs for him to smoke. They replied that they did not and during the course of the conversation between the appellant and the deceased Adams heard the appellant say that people in the area had suspected him, the appellant, of being a member of the the Hard Livings "HL" gang. The appellant claimed that he was in fact a member of the Young Americans "YA" gang and showed them a tattoo on his arm with the inscription "YA". The appellant was not known to him and Adams had asked one of the deceased who the appellant was. He was told by them that the appellant was known as "Madora". Adams claimed that he saw that the appellant was holding onto a gun in the pocket of his jacket. He described the handle of the gun as being black in colour. As they approached the intersection of Thames Avenue and Thames Lane the appellant said to them that they should look out for the police who he claimed were driving around in the area. He thereupon turned around to leave them. As Adams and the deceased proceeded along Thames Lane Adams suddenly heard gunshots and out of fear all three of them immediately ran. Van Rooyen fell and as Adams turned around he saw the appellant with a gun in his hand running and shooting at them. Peters had run next to him and at some

stage Peters also fell. He continued running while the appellant gave chase behind him. The appellant gave up and ran away in the opposite direction. He immediately went to Peters who laid not far from Van Rooyen. Van Rooyen appeared to be laying still while Peters had cried out in pain and he saw that they had been shot. Adams in a state of panic immediately ran to the homes of the deceased to call their families. He returned to the scene where one of the family members of Peters tended to him while the police and ambulance were called. Adams claimed that he had subsequently made a statement to the police and informed them that the assailant was a person by the name of Madora. He claimed that the appellant had a cap on and that he could have clearly seen his face. He also claimed that the incident occurred while it was just beginning to get light and that he was able to have clearly seen the appellant.

[9.] Adams further claimed that at a later stage he met the appellant while in the cells at the Athlone Police Station. He claimed that the appellant had said to him that he did not really want to shoot at him but that he had really targeted the deceased. Adams said nothing in response to the appellant. He claimed that the deceased were members of the "26" gang and that the appellant was also a member of the same gang. Adams had not attended a formal identification parade but was asked to identify the appellant from a set of photographs handed to him by the investigating officer Witbooi. He identified the appellant on one of the photographs. The set of photographs of twelve faces was also handed into evidence with the consent of the defence. One of the photograps on which the appellant had been identified was signed by Adams

[10.] In cross-examination Adams conceded that in his statement to the police he had stated that he was not certain if he would have been able to identify Madora if he saw him again. He claimed though that he would be able to identify the tattoo marks of the person. He further claimed in the statement that Madora had on a woolen cap which was up to his eyes. He also claimed that he and the deceased had been about five to seven minutes in the company of Madora as they walked along Thames Avenue.

[11.] He disputed the version of an alibi by the appellant which was put to him that the appellant had been at home asleep when the incident occurred. It was also put to him that although the appellant had seen him in the cells at the Athlone Police Station the appellant would claim that because the cell was very full he did not have the opportunity of talking to Adams. The appellant would also claim that he did not know that Adams was to have been a witness against him.

[12.] **Mrs. Yvonne Madat** the mother of the deceased Van Rooyen testified that she was taken to the scene of the incident but did not get out of the vehicle as she was traumatized by having seen her son laying dead on the scene. She asked Adams what had happened and he said that she should speak to Peters. Peters said to her that it was "Madora" who shot at them. The defence had no objection to this hearsay evidence being led.

[13.] Madat did not know Madora and she had also made a statement to the police.

[14.] **Police Officer Carl Allies** testified that he was one of the first policeman to arrive at the scene. He found the two deceased laying near the corner of Thames Avenue and Thames Lane and one appeared to have been shot in the pelvic area and the other in the back of the head. He claimed that by the time he arrived at the scene it had become much lighter and that the weather had been clear. The one who had been shot in the back of the head did not respond to him while the other was able to speak. He asked Peters for his details and also asked him if he knew who had shot at them. Peters claimed that it was Madora. Peters also explained to him that they had been in the company of Madora when the incident occurred. He recorded the name Madora in his statement and he also testified that he found empty cartridges on the scene.

[15.] The state tendered the evidence of **Constable Jeffrey Martin Witbooi** who was the second investigating officer in the matter. It appeared that at some stage after the appellant had first been arrested the charges were withdrawn against him. One of the post mortem reports had not been available and the magistrate had refused to postpone the matter further. The charges were therefore provisionally withdrawn against the appellant. Witbooi continued with the investigation of the matter after it had been withdrawn against the appellant. He consulted with all of the state witnesse and confirmed that the complainant Adams had said to him that all he knew was the name of the person who had

shot at them as Madora. Adams had subsequently found out who the appellant was. Witbooi had arranged with Adams to attend a formal identification parade but when he contacted Adams again Adams informed him that he had since seen the appellant at the cells in Athlone Police Station where the appellant had made certain utterances to him. He therefore did not think it necessary to conduct a formal identification parade except to show Adams a set of photographs from which he identified the appellant. Witbooi claimed that the appellant was known to him as a member of a gang in Manenberg. He claimed that gang members had been profiled by the Criminal Investigation Unit and records were kept of each of them. He claimed that he knew the appellant by the name Madora and when he arrested the appellant again on the case that was the name the appellant had given him. He also checked in the Criminal Investigation Profile which confirmed the appellant's nickname as been Madora. In cross-examination it was put to him that the appellant would admit that he was a member of the 26's and that he had also been a member of the Young Americans but that he had since attempted removing the tattoo because he did not want to belong to any particular gang. He claimed that as a member of the "26" gang he was known as a "Madota" which is a name commonly used amongst the 26 gang. Witbooi denied any knowledge of the appellant being referred to as Madota.

[16.] It was also put to Witbooi that the appellant would confirm that he had been questioned by the police about his background as part of the profiling process and that the appellant had informed them about his schooling and his

membership of gangs. The appellant would deny though that he had read and confirmed the details taken down in the profile.

[17.] **Inspector Rodney Calvin Abrahams** testified that he was the initial investigating officer in the matter. The complainant Moegamat Adams had made a statement to him in which a person by the name of Madora was identified as the assailant. He claimed that he immediately recognized the name Madora as that of the appellant who was known to him. He thereafter checked the Criminal Investigation profile records and confirmed that the name Madora was that of Ricardo Nicholson the appellant. He had also recalled that he had previously been an investigating officer in a case of housebreaking in which the appellant had been involved in. He thereafter arrested the appellant. In the subsequent questioning of the appellant the appellant confirmed to him that he was known by the name Madora. He however did not take down the statement of the appellant in writing.

[18.] In cross examination he maintained that the appellant was known to him as Madora. He also claimed that he had worked for a very long time in the Manenberg area and was familiar with the known gangsters. He claimed that he would not have easily forgotten a nickname such as "Madora". He denied that he had mistaken the appellant for other persons who were known as "Madota's" who are members of the 26 gang. It was also put to him that the appellant's version was that he was known as a "Madota" in the context of being a member of the 26 gangs and that he had also been a member of the Young Americans.

[19.] **Police Officer Frederick John White** testified that he was part of the Criminal Intelligence Unit in the Manenberg area. The unit's task was to profile known gang members and to discern patterns of criminal activity in the area. He claimed that on the 20th December 2006 he had met the appellant early in the morning prior to the appellant attending court. He interviewed the appellant and his personal details and schooling was taken down. The various nicknames given to him by the appellant such as "Cardo" and "Madora" were also recorded. Various tattoo marks on the body of the appellant was also recorded and photographed. The appellant had a "YA" tattoo on his forearm and the words "agcha" and "boy" was tattooed on his leg. The magistrate recorded from an inspection of the appellant's arm that the tattoo marks YA was still visible although it appeared that the appellant had other markings over it. White claimed that he was not involved at all in the investigation of the charges against the appellant and his task only related to criminal intelligence and profiling. Two pages of the profile document were handed in as evidence with the consent of the defence. In cross examination White claimed that he did not know of any other person in the Manenberg area who was also known as Madora. He claimed that he had known the appellant prior to the 20th December 2006 and that he was known by the name Madora.

[20.] The state thereafter closed its case whereupon the defence applied for the discharge of the appellant in terms of section 174 of the Criminal Procedure Act. The application was dismissed. The appellant thereafter closed his case without tendering any evidence.

[21.] The magistrate in his evaluation of the evidence indicated that he shared the same concerns as the defence counsel about the identification of the appellant if it was only to be based on the photograph identification. He did not regard such identification as reliable and attached were little weight to it. He however stated that he understood why the police had not held a formal identification parade in the circumstances. The magistrate took into account that the name Madora was given to the witness Adams by the deceased when they initially met the appellant. The name was also given by Peters to both Mrs. Madat and the police officer Allies at the scene as the person who had shot at them. Adams himself had also testified that as he had turned around while running he saw the person known as Madora shooting at them.

[22.] The magistrate dealt extensively in the evaluation of the evidence with regard to the question as to whether the appellant had been identified as the person Madora who shot the deceased and Adams. The magistrate was impressed with Adams as a witness whom he had observed had not hesitated in answering questions especially where it incriminated him. In that regard Adams had admitted that they had gone to buy drugs when he had accompanied the deceased. Adams also admitted that he had been arrested in another case and that is how he landed up in the same cell with the appellant. The magistrate noted that there was no suggestion by the defence in cross-examination that there was any reason or motif for the witness Adams to have falsely implicated the appellant. Adams has testified that he did not know the appellant when they first met and that the name Madora was given to him by one of the deceased.

He also conceded that he had only seen the face of the appellant from the eyes downwards and that he had said to the police that he was not sure as to whether he would have been able to identify the person Madora again. However it only became clear to him after the appellant had approached him in the police cells at Athlone where the appellant apologized for having shot at him, that Adams was convinced of the identity of the appellant as Madora. The magistrate correctly approached the facial identification of the appellant by Adams with the necessary caution given the circumstances in which the incident had taken place and the limited opportunity for the observation of the assailant by Adams. However the name Madora which was given to the police during the course of the investigation was clearly linked to that of the appellant from not only the personal knowledge of the three police officers who knew the appellant as a member of the gangs in Manenberg but also as the name that was recorded on the criminal profile of the appellant. The magistrate was satisfied that the police officers had correctly linked the appellant to the name Madora. Moreover, Adams had testified that he had seen the "YA" tattoo mark on the inner arm of the appellant. The tattoo mark accorded with that which the court observed on the appellant's arm in the court. The court found that the observation supported Adams identification of the appellant. In the assessment of all the evidence of the state the court was satisfied that there was sufficient corroboration by the police with regard to the identification of the appellant as "Madora" and that of Adams's evidence as having seen the person Madora shot at him and the deceased.

[23.] However in the face of all the evidence of the state the appellant elected not to testify. The question arises therefore is whether the state had successfully placed sufficienct evidence before the court to secure a conviction on the evidence of only the state witnessess. In this regard see **S v Budda & Others 2004 (1) SACR 9 (T)** in which the following were stated:

> *"Yet there are, as has been held by the Supreme Court of Appeal and the Constitutional Court, limits to this right. (to silence)There comes a stage in a prosecution where an accused has a duty to tell her or his story or to lead other evidence, which would show that, for example, the denial of participation is reasonably possibly true. The question is, of course, whether that stage has been reached in this case."*

[24] See also **S v Chabalala 2003 (1) SACR 134 (SCA) Heher AJA** stated, in para [20], as follows:

> *'As was pointed out in S v Mthetwa 1972 (3) SA 766 (A) at 769D: "Where . . . there is direct prima facie evidence implicating the accused in the commission of the offence, his failure to give evidence, whatever his reason may be for such failure, in general ipso facto tends to strengthen the State case, because there is nothing to gainsay it, and therefore less reason for doubting its credibility or reliability; see S v Nkombani and Another 1963 (4) SA 877 (A) at 893G and S v Snyman 1968 (2) SA 582 (A) at 588G."*

[25.] See also **S v Boesak 2001 (1) SA 912 ;**

"The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. What is stated above is consistent with the remarks of Madala J, writing for the Court, in *Osman and Another v Attorney-General, Transvaal* , 24 when he said the following:

> 'Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a *prima facie* case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would A destroy the fundamental nature of our adversarial system of criminal justice.'

[26.] In considering the approach of the magistrate to the issue of identification I am satisfied that he correctly found that the appellant had been properly identified as the person Madora who had shot at the deceased and the witness Adams. Moreover in the face of the evidence proffered by the state the appellant ought to have led evidence in response thererto. During the course of cross examination his alibi and version was put to the state witnesses yet none of it was confirmed under oath.

[27.] In the result I propose to uphold the convictions of murder and that of attempted murder.

Ad sentence

[28.] The provisions of the Minimum Sentence Act Act 105 of 1997 were applicable to the charges. The magistrate however found that the murder of the deceased was not premeditated and therefore dealt with the sentence as falling under Part 2 of Schedule 2 of Act 105 of 1997. The accused was 23 years at the time of sentencing and had lived with his family members. It appeared that while he was awaiting trial he became the father of twins who were living with their mother. The mother of the children was unemployed. The appellant had been a member of a band from which he had earned some money. Counsel for the appellant emphasised that the appellant was brought up in an environment which was plagued by gangsterism and violence and that he did not enjoy the opportunities afforded to others in his upbringing and community. The appellant had left school in grade 9.

[29.] The magistrate having considered the appellant's circumstances pointed to the prevalence of the crimes of violence in the Manenberg area. The magistrate also appeared to be mindful of the circumstances in which the appellant had grown up in but did not find that it was an excuse for his conduct. It also appeared that the murder of the deceased was gang related which lead to the deceased being killed in cold blood.

[30.] The court did not find that the appellant's difficult upbringing nor his personal circumstances constituted substantial and compelling circumstances that warrented a lesser sentence than the prescribed sentence of less than 15 years on counts one and two.

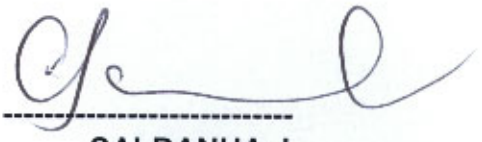
[31.] The court however took into account the cumulative effect of the three charges and the fact that the appellant had spent over a year and a half in custody awaiting trial.

[32.] It is apparent from the magistrate's sentence that he had properly weighed the appellant's personal circumstances with that of the seriousness of the offence and the interests of the public. It is also apparent that the magistrate had tempered his sentence with a measure of mercy in ordering that half of the sentence of fifteen years on the second count run concurrently with that of count one. The sentence of five years imprisonment on count 3 was also ordered to

run concurrently with that of count one. In the result I also propose to uphold the sentence and order as follows;

(1.) The appeal against conviction and sentence is dismissed.

(2.) The conviction on all three counts and the sentence imposed by the magistrate is confirmed.



SALDANHA J

I AGREE

GERBER AJ