IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

(Coram: Henney, J *et* Smuts, AJ)

[Reportable]

Case No: A113/16

In the matter between:

BRADLEY PARKINS Appellant

and

THE STATE Respondent

JUDGMENT: 27 OCTOBER 2016

Coram	**:**	**HENNEY, J et SMUTS, AJ**
Judgment by	**:**	**HENNEY, J et SMUTS, AJ**
For the Appellant	**:**	**Adv John Van Der Berg**
Instructed by	:	**R D Roode Attorney** P O Box 445 Kuils River CAPE TOWN
c/o	:	O J Williams & Associates 1 Egham Road Wynberg 7800
For the Respondent	**:**	**Adv G Wolmarans**
Instructed by	:	**Director of Public Prosecutions** Private Bag X9003

CAPE TOWN

Date(s) of Hearing : 14 OCTOBER 2016

Judgment delivered on : 27 OCTOBER 2016

HENNEY, J *et* SMUTS, AJ

Introduction

[1] The Appellant was convicted in the Regional Court sitting at Wynberg on the following charges:

1.1 Count 1: Murder committed on 23 February 2008 at Sandown Lane, Athlone, in that the court found that he unlawfully and intentionally killed Donovan Cupido ("the deceased") by shooting him with a 9 mm Tanfoglio semi-automatic pistol serial number no: AB 02086 ('the Tanfoglio').

1.2 Count 2: Possession of the firearm, as mentioned above, without being the holder of a licence to possess such firearm in contravention of section 3 of the Firearms Control Act[1] at the same time, date and place mentioned in Count 1.

1.3 Count 3: Possession of one 9mm Norinco semi-automatic pistol with serial number 408336 ('the Norinco') in contravention of sec 3 of the Firearms Control Act, on the same time, date and place as mentioned in count 1.

[1] Act 60 of 2000.

1.4 Count 4: Possession of 15 rounds of 9 mm rounds of ammunition in contravention of section 90 of the Firearms Control Act 60 of 2000, also at the same time, date and place as mentioned in Count 1.

1.5 These charges emanate from a shooting incident where the deceased was found to have been shot and killed by the Appellant. The facts and circumstances surrounding this incident, to which we will refer as **the first shooting incident,** are set out below.

1.6 Two further charges emanated from an incident occurring on 29 May 2008 at 7 Barrowdale Close, Parklands, the residence of the Appellant at the time of his arrest. These are:

1.7 Count 5: A further charge in contravention of section 3 of the Firearms Control Act 60 of 2000. He was found guilty of possession of the same Tanfoglio as mentioned in Count 1 above except that in respect of this charge, he was found to be in possession thereof on 29 May 2008. In respect of this charge, he was also found guilty of being in unlawful possession of the Norinco and a 9 mm semi-automatic Taurus pistol ('the Taurus').

1.8 Count 6: This is a further charge of possession of ammunition in contravention of section 90 of the Firearms Control Act, also committed on 29 May 2008 at 7 Barrowdale Close, Parklands. I will refer to this as **the search and seizure incident**.

The Appellant was convicted on all these charges on 9 December 2013 and sentenced by Regional Magistrate Govuza on 23 April 2014.

[2] During this time, the Appellant was also standing trial with two other accused, also in the Regional Court sitting at Wynberg, before Regional Magistrate Langa, on the following charges:

2.1 Count 1: Murder committed on 22 April 2008 at Kudu Street, Athlone. It was alleged that he killed EV, a female person, by shooting her with a firearm.

2.2 Count 2 : Possession of a firearm which the make and model were unknown to the state, also in contravention of section 3 of the Firearms Control Act on the same date, time and at the same place as mentioned in the first charge, without holding a licence to possess such firearm.

2.3 Count 3: Attempted murder. It was alleged that he intended to kill RM by shooting at him with a firearm at the same time, date and place as mentioned in count one.

2.4 Count 4: Possession of 7 rounds of 9 mm rounds of ammunition and 2 x .40 Smith and Wesson calibre rounds of in contravention of section 90 of the Firearms Control Act.

[3] This trial started on 10 June 2009 before Regional Magistrate Langa and on 20 October 2011 the Appellant was found not guilty on all 4 charges by him. We will refer to this as the **second shooting incident**.

[4] It is common cause that the Tanfoglio, the Norinco that were found at 7 Barrowdale Close, the residence of the Appellant, were linked by means of ballistic evidence to the incident that happened on 23 February 2008 in which the deceased, Donovan Cupido was murdered. This was the matter in which Regional Magistrate Govuza found the Appellant guilty on all 6 charges and against which this appeal had been lodged.

[5] It is also common cause that these two firearms as well as the Taurus that was linked by means of ballistic evidence were also used in the first shooting incident. The present appeal against conviction only relates to the second shooting incident.

Grounds of appeal

[6] The first ground of appeal is based on the contention that the court *a quo* erred in admitting the evidence regarding the search and seizure at the residence of the Appellant on 29 May 2008, which led to the finding of the Tanfoglio and the Norinco which were ballistically linked to the murder committed on 23 February 2008, as the same evidence had already been found by Regional Magistrate Langa to be unconstitutional and consequently inadmissible.

[7] The Appellant contends that on the basis of *res judicata* and more specifically issue estoppel, which is now a well-known defence in civil law, this evidence should not have been admitted. The plea of *autrefios acquit,* he contends, is but an example of issue estoppel in the narrow sense. The Appellant submits that this court is enjoined by the

constitution to develop the common law in order to recognise issue estoppel as part of our criminal procedure. In essence, the Appellant submits that the state was precluded from relying on the same facts, relating to the same search, between the same parties, which had been previously been ruled inadmissable by a court of parallel jurisdiction.

[8] The second ground of appeal is that the hearsay statement that was made by the deceased to a policeman in which he identified the Appellant as the person who shot him, should not have been admitted into evidence because it rendered the trial unfair and because it is unreliable.

The facts of the first shooting incident relating to this appeal

[9] On 23 February 2008, at around 18h00, the deceased, accompanied by his mother Merle Cupido ("Merle"), walked along Blossom Street in Silvertown, Athlone. They met up with Trevor Jeptha ("Trevor") and walked down Durandt Street. Merle decided to turn back, whereupon the deceased and Trevor continued walking down Durandt Street.

[10] On her way home, Merle heard 7 shots going off and she immediately ran down towards the direction of Durandt Street. At number 39 Durandt Street, she found the deceased lying on the sidewalk. He was shot in the stomach. She then asked him who shot him and he answered, "*Dit was Kop*" ("It was kop").

[11] According to Trevor, he indeed accompanied the deceased as they walked down Durandt Street into Sandown Lane. He observed a white motor vehicle driving past them. This vehicle stopped and a male person got out of the vehicle, ran in the direction of the deceased and started chasing him. Trevor ran further down Sandown Lane. A short while later he heard a few shots going off. When everything was quiet, he went back in the direction of Sandown Lane. On the corner of Sandown Lane and Durandt Street, he observed two males moving away from the deceased, who was lying on the ground. They jumped into the white motor vehicle and left.

[12] Gadija Delport ("Gadija") stays at number 39 Durandt Street, Silvertown and her evidence is that at the time of the shooting, she was in her lounge, when she heard shots being fired. She looked through the window and saw the deceased running in the direction of her house. She closed the front door, looked out of the window and saw the deceased lying on the sidewalk in front of her house. She also observed two people walking towards a white car that was parked in the road opposite the house. They got into the car and drove away. She was unable to identify these persons.

[13] Deon Sheldon ("Sheldon") was a Sergeant stationed at the police station at that time and he attended the scene of the shooting at number 39 Durandt Road, Silvertown. There he found the deceased lying on the sidewalk. The deceased, was still conscious at that stage. The deceased was known to him, as was the Appellant. The Appellant was known by the nickname of "*Kleinkop"*. During the course of his duties as a policeman in the Athlone area, he regularly met the Appellant at 79 Springbok Street in Kewtown, Athlone.

[14] According to Sheldon, the deceased was also known to the Appellant. At times when in the course of his duties, he went to the address of the Appellant at 79 Springbok Street, he would find them in each other's company. He was however unable to say whether they were friends. Shell casings were also found at the scene. Sheldon says he asked the deceased who shot him, to which he answered, "*Dit was Kleinkop*". ("It was Kleinkop"). The deceased also said to him that he and a friend named Trevor walked from Sandown Lane when he observed the Appellant and another two persons in a white Fiat.

[15] Sheldon further testified that the deceased said that the Appellant jumped out of the Fiat with the other two persons and ran towards him (the deceased). Appellant then shot him in the stomach. The deceased also said that he then proceeded to run in the direction of 39 Durandt Road. When the deceased used the word "*Kleinkop*", he (Sheldon) asked him, "*Watter Kop*", to which the deceased answered, "*Bradley, jy moet jou nie dom hou nie*".

[16] Sheldon's evidence was that when the deceased spoke to him, he was awake and conscious throughout. Sheldon said that, given his experience of working in that area, he knew other people with the nickname "*Kop*" but none with the nickname "*Kleinkop*". He took down the deceased's words on a piece of paper in his pocket book, and later transferred it to his statement.

<u>The facts of the second shooting incident</u>

[17] The facts of this incident need not detain us unnecessarily. The evidence was that the deceased, was sitting in a vehicle with another person when a vehicle drew up

alongside the vehicle they were sitting in. Immediately thereafter shots were fired at and into the vehicle in which the deceased and the other person were seated. The deceased was fatally wounded and died as a result of a gunshot wound to the head. The court found that the evidence of the eyewitness that was in the car with the deceased was unconvincing and rejected his evidence as to the identity of the assailants for reasons which are not relevant to this appeal.

[18] It was common cause that a bullet was found in the vehicle in which the deceased was shot, as well as other cartridges that were ballistically linked to the firearms which were found on 29 May 2008 during the search of the Appellant's house at 7 Barrowdale Close, Parklands. Regional Magistrate Langa found the evidence relating to the search and seizure of these firearms unconstitutional and subsequently inadmissible.

Search and Seizure incident

[19] The evidence of the search and seizure, during the course of the trial before Regional Magistrate Govuza, was that of Captain Kinnear ("Kinnear"), Detective Warrant Officer April ("April"), Detective Warrant Officer September ("September") and to a lesser extent that of Warrant Officer Thys. This evidence is undisputed. The search and seizure occurred on 29 May 2008 at an address in Parklands, Table View.

[20] The police arrested the Appellant after he attempted to evade arrest by climbing through a window from inside the house. This was after the police carried out an operation in order to affect the arrest of the Appellant for which Captain Kinnear had a warrant. He was being sought by the police for some time. During the search of the house, the police discovered 3 firearms and ammunition. The evidence revealed that 2 of

these firearms were positively linked ballistically to the murder of the deceased. The time period between the arrest of the Appellant and the murder was approximately 3 months.

[21] Prior to the operation, on 28 May 2008, the police established a possible location of the Appellant at 7 Barrowdale Close, Parklands, Table View. A Deeds Search revealed that the property was registered in the name of Kim Parkins, the wife of the Appellant. During the course of the day the police went to the property and observed a vehicle that could possibly be linked to the Appellant, leaving the house. They therefore decided not to approach the house because they were afraid that should the Appellant not be at the house, he would be alerted about the fact that they were looking for him.

[22] At approximately 1am on the morning of 29 May 2008, they went back to the house. April and September climbed over a side wall into the back of the property. Kinnear then approached the front door and proceeded to knock while shouting "*it is the police, open up*". He knocked and called about 5 times but heard nothing from inside the house.

[23] Kinnear then heard his colleagues at the back of the house shout "*Staan polisie*". Thereafter the garage door opened and he observed Kim Parkins standing at the doorway inside the garage. The garage provided access into the house. Kinnear identified himself as a police member and informed her that they were looking for Bradley Parkins, to which she responded by saying that they are at the back in the yard and showed Kinnear to the patio door leading to the yard. At that stage he observed that April and September had apprehended the Appellant.

[24] Before they went back into the house, September told him that when he saw the Appellant in the house, he was putting a black bag in one of the boxes in a room. They went back into the house. At that stage, the Appellant was lying on the floor in the kitchen of the house and he was handcuffed. He then went to Kim Parkins and told her that he had reason to believe that there were firearms in the house and asked her permission to conduct a search of the house. She gave the permission.

[25] September opened the trapdoor to the ceiling and found two phosphor grenades that were hidden in the ceiling. Both the Appellant and Kim said that they did not have any knowledge of the grenades. Kinnear then went to the bedroom where September had indicated the Appellant had placed a bag. In a toy box lying between the toys he could see the black bag. He picked it up and could feel that there was a firearm in the bag. He opened it and took a black firearm from the bag. This firearm was the Tanfoglio. He showed the firearm to Kim Parkins and she denied ever seeing the bag or having any knowledge of the firearm in the bag. The firearm contained a magazine filled with bullets.

[26] Back in the kitchen, Warrant Officer Thys opened the refrigerator and found a red canvas bag in it. Thys handed the bag to Kinnear, who opened it and found a further 2 firearms in the bag. Upon seeing the firearms, Kim Parkins appeared surprised and told him that she did not have any knowledge thereof. When asked about the firearms, the Appellant also told him that he did not know how it got there. The firearms in the red bag were the Taurus and the Norinco. The Taurus had 9 X .40mm rounds in the magazine and the Norinco had 15 X 9mm rounds in the magazine. The bag also contained 14 X 9 mm rounds of ammunition lying loose. Apart from the 14 X .40mm rounds that were in the magazine, a further 9 X .40mm rounds were lying loose in the bag.

[27] He further testified that from all 3 scenes where shootings occurred in respect of which the Appellant was allegedly involved, spent cartridges were found. He denied that after Kim Parkins opened the garage door, he told her that he is from the police and that he might have reason to believe that there might be firearms in the house, and that he would like to conduct a search. He says at that stage April shouted at the back and he immediately went to the back where he found the Appellant, and only then decided to conduct the search of the property after September told him that he saw the Appellant hiding something in the room.

[28] April testified that from his position at the rear of the property, he could look inside the open plan house. He testified that before Kinnear was knocking at the front door, the inside lights of the house were on, but once Kinnear started knocking at the door, the lights were switched off. He observed a man, moving inside the house with a lighted torch. After a while he heard a window situated at the back of the house open. From this window a man proceeded to a climb out. This man, who proved to be Appellant, was later arrested after attempting to flee. Thereafter he and his colleague went into the house with the now handcuffed Appellant through the patio door, which was opened by Kim Parkins.

[29] September testified that he was also at the back of the house, but on the opposite side from where April was. He observed the Appellant moving in the house at the time when Kinnear was knocking on the front door and saying "*polisie maak oop*". At some stage, the Appellant moved out of sight and the light was turned off. When he appeared again, he had a torch and a black moon bag with him. He moved out of sight again and the witness moved to another window from which he could see the Appellant standing in

the doorway. From there, he observed the Appellant placing the moon bag into a box situated next to a door.

[30] The Appellant once again moved away to the section of the house where his colleague April was and he indicated to April that the Appellant is moving in his direction. Later, the Appellant was seen climbing out of a window at a section of the house that was between him and April. The Appellant was apprehended and Kinnear came to them at the back of the house where they were. All of them later moved into the house where they were joined by Kim Parkins. He, Kinnear and Kim went to the room where the Appellant had placed the black bag. He further confirms the evidence of Kinnear regarding the search and seizure of the firearms and ammunition found in the house. The Appellant did not testify during the trial and elected to remain silent.

Analysis

[31] The evidence presented by the State remains undisputed. During the course of the trial, a plea of *autrefois acquit* was raised on behalf of the Appellant in respect of charges 5 and 6, which dealt with the possession of three pistols and ammunition found at the house of the Appellant's wife at the time of his arrest. The Plea arose from the Appellant's acquittal on 11 October 2011 on similar charges, regarding the second shooting incident, by Regional Magistrate Langa in the Wynberg Regional Court.

[32] However, from even a superficial perusal of the charge sheets in relation to the charges relating to the second shooting incident, it is clear that the plea of *autrefois acquit* was ill-conceived. For whereas these charges related to the possession of a firearm 'make and model unknown to the State; seven 9-mm rounds and two .40 Smith &

Wesson rounds found on 22 April 2008 at Kudu Street, Athlone; the present charges, relating to the first shooting incident, relate to possession of three pistols and different quantities of ammunition, found on 29 May 2008 at 7 Barrowdale Close, Parklands.

[33] The charges relating to the second shooting incident were coupled, in the 2011 matter, with charges of murder and attempted murder, alleged to have been committed on the same date and place. From Regional Magistrate Langa's judgment it appears that one of the pistols linked ballistically to bullets found in the deceased's car in that matter was later found at the Appellant's wife's house during the search of 29 May 2008[2]. But this is as far as the State's case went, for no link was made between this pistol and the bullets found in the deceased's body.

[34] It is therefore not surprising that the Appellant's counsel abandoned the plea of *autrefois acquit* during argument on the charges relating to the first shooting incident. On appeal, however, the Appellant sought to re-introduce the idea of *res judicata* under a different guise. He found his cause in Regional Magistrate Langa's finding, in the course of his judgment on the charges relating to the second shooting incident, that the search of 29 May 2008 was unconstitutional and the evidence obtained during it accordingly inadmissible.

[35] The Appellant invited us, in his heads of argument, to develop the common law in order to recognise issue estoppel as part of South African criminal law. The Appellant argued that if this is done in the present instance, we had to find that because the 'issue' of the constitutionality of the search had been decided between the State and the

[2] However, according to the ballistic evidence all three firearms were linked to this shooting incident.

Appellant before, the Regional Magistrate in the present case (the first shooting incident) should have disregarded the evidence obtained during the search. Absent this evidence, the argument concluded, the State did not prove its case beyond reasonable doubt, because a link between the bullets found in the deceased's body and the Appellant could no longer be established.

[36] In considering the Appellant's argument, the first question to be answered is whether, on principle, issue estoppel should be recognised as part of South African criminal law. It is not a question with an easy answer. For the principle of *res judicata* is constitutionally entrenched in the criminal law as part of the right to a fair trial. Thus section 35(3)(m) of the Constitution provides that every accused's right to a fair trial includes the right not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted. Sections 106 (1)(c) and (d) of the Criminal Procedure Act[3], which deal with the pleas of *autrefois convict* and *autrefois acquit* respectively, are statutory embodiments of this right.

[37] But the *res judicata* principle thus entrenched have its own features, which differ from civil law. In civil law, *res judicata* will apply to a default judgment given in the absence of a Defendant;[4] criminal law does not recognise the principle of default judgment given in the absence of an accused. In criminal law, the failures of justice because of procedural irregularities are fairly common and do not as a rule provide grounds for a plea of *autrefois acquit.*[5] In civil law, such failures are much rarer and do not

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[3] 51 of 1977.
[4] *Jacobson v Havinga t/a Havingas* 2001 (2) SA 177 (T).
[5] See the discussion in *Du Toit et al* Commentary on the Criminal Procedure Act 2016 Vol 1 15-33,36 and the authorities there quoted.

feature in the development of the *res judicata* principle. Finally, of course, *res judicata* in civil law is a creature of common law; in criminal law it has become a creature of statute.

[38] In deciding to develop the common law in this instance, one should therefore tread carefully, lest unintended consequences follow. And in doing so in such a clearly legislated context, one should not lose sight of the imperative that 'the major engine for law reform should be the Legislature and not the Judiciary'.[6] But even on the assumption that we are able to do so, and we make no finding in this regard, there are cogent reasons not to do so in the present instance.

[39] First, it is evident from the treatment of the doctrine in specific cases that issue estoppel finds application where the issue previously decided was an indispensable, essential part of the cause of action.[7] What is the 'cause of action' in the present matter? Murder, which is the unlawful, intentional killing of another person.[8] The essentials of the present cause of action do not include the evidence arising from the search of the Appellant's wife's premises – that is part of the *facta probantia*, not the *facta probanda.*

[40] Secondly, we are of the view that the application of issue estoppel in the present instance will lead to patently unfair consequences, of exactly the same kind which *Brand JA* warned against in *Prinsloo NO and Others v Goldex 15 (Pty) Ltd and Another:*[9]

> *"[…] deviation from the threefold requirements of res iudicata should not be allowed when it is likely to give rise to potentially unfair consequences in the*

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[6] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) par [36].
[7] *Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk* 1995 (1) SA 653 (A) at 674C-D.
[8] See, for instance, *Milton* South African Criminal Law and Procedure 1996 Vol II 3rd at 10.
[9] 2014 (5) SA 297 (SCA) par [26].

subsequent proceedings [...] That, I believe, is also consistent with the guarantee of a fair hearing in s 34 of our Constitution."

[41] For Regional Magistrate Langa's findings in the course of his judgment regarding the search on the previous charges, were procedurally fatally flawed. He raised the matter *mero motu* and did not give the parties an opportunity to address him before making the finding, in his final judgment, that it was inadmissible because it was unconstitutional. Moreover, we are of the view that for the reasons discussed below, that Kinnear obtained the permission of the Appellant's wife before commencing the search. This means that section 22(a) of the Criminal Procedure Act was complied with and that the search was perfectly regular.

[42] The evidence of Kinnear regarding the reasons as to why he decided to conduct a search of the premises was not disputed. His evidence was that after he was appraised by September, the report that the Appellant had been seen hiding something in a box in one of the rooms, it had raised a reasonable suspicion on his part that there may be firearms in the house. This, together with the fact that the Appellant was about to flee from the premises by jumping out the window, not knowing that two policeman were at the back of the house, must have played a part in Kinnear forming a reasonable suspicion prior to him conducting a search of the house. It is for these reasons that he requested permission from Kim Parkins to conduct such a search.

[43] The search in our view complied with the provisions of section 22 of the Criminal Procedure Act which states the following: *"A police official may without a search warrant*

search any person or container or premises for the purpose of seizing any article referred to in section 20-

(a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or

(b) if he on reasonable grounds believes-

(i) that a search warrant will be issued to him under paragraph (a) of section 21 (1) if he applies for such warrant; and

(ii) that the delay in obtaining such warrant would defeat the object of the search."

[44] Therefore, even though this was a warrantless search, the police had the permission of the owner of the house to conduct the search. This was not disputed during the course of the trial, nor during this appeal. The evidence of the police officers were also that the Appellant did not object to the search being conducted. Their attitude was rather a denial of any knowledge of the firearms and ammunition found. It is therefore our view that the Regional Magistrate was correct in admitting this evidence against the Appellant. According to section 23 of the Criminal Procedure Act, it is also lawful to search a person who has been arrested and to seize any article which is found in the possession or in the custody or under the control of the person arrested.

[45] Mr Van den Berg, for the Appellant, was constrained to concede the latter points during argument and it is then not surprising that he did not press his contentions regarding *res judicata* beyond his heads of argument. The search of the premises in any event, in our view, complied with the requirements of the Constitution and the law.

[46] In dealing with the hearsay evidence, it is not the Appellant's case that the Regional Magistrate was wrong in admitting the evidence. The Appellant is rather of the view that the Regional Magistrate was wrong in accepting the evidence which was, according to the submission of Mr Van den Berg, not sufficient to sustain a conviction against him. The complaint against the admission of the evidence rests squarely on the reliability of the utterances made by the deceased to Sheldon and the other two witnesses.

[47] In his heads of argument and in Court, the Appellant's counsel referred us to a number of cases in support of his submission that the hearsay evidence regarding the deceased's identification of the Appellant should either be ruled inadmissible or that no weight should be attached to it, which amounts to the same thing. He cited these cases as authority for the proposition that, as the evidence regarding the identification 'had a crack' which could not be subjected to the 'chisel of cross-examination' of the deceased, it should not be allowed. The so-called 'crack' is dealt with below. But in any event the cases cited by the Appellant do not support his submission.

[48] First, Mr Van den Berg cited a string of cases starting with *S v Ndhlovu and Others,*[10] dealing with extra-curial statements made by co-accused and which implicate the accused. Such cases, which are treated in accordance with their own set of principles, cannot give guidance in the present instance, as they do not deal with the

[10] 2002 (2) SACR 325 (SCA).

admission of a dying declaration in terms of section 3(1) of the Law of Evidence Amendment Act.[11]

[49] Secondly, Mr Van den Berg quoted from a number of cases[12] which dealt with uncompleted cross-examination due to the death of a witness who had started testifying. The general statements made by the Judges in these matters should equally be seen against the background of the particular situations they were analyzing and are not helpful in the present instance.

[50] Thirdly, Mr Van den Berg quoted from two cases which, he submitted, were comparable to the facts *in casu.* But in both of these cases[13] the hearsay evidence constituted the only pieces of evidence on which a Court could possibly convict the accused. The present matter is very different, for whilst the hearsay evidence is clearly an important part of the State's case, it is by no means the only part thereof. Furthermore, in both the quoted cases there were factors which strongly mitigated against the allowing of the hearsay evidence - factors which are absent in the present instance.

[51] The admission of dying declarations was confirmed by the Supreme Court of Appeal as recently as March 2016, in *Van Willing and Another v S.*[14] The treatment by the Court of the hearsay evidence in that matter confirms that such statements must be considered in the usual way, by the application of the criteria set out in section 3(1). That is what we propose doing in the present instance.

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[11] 45 of 1988.
[12] *S v Msimango and Another* 2010 (1) SACR 544 (GSJ); *S v Mothlabane and Others* 1995 (2) SACR 528 (B); *S v Khumalo* (110/12) [2012] ZAGPJHC 141.
[13] *Mpungose and Another v S* (460/10) [2011] ZASCA 60 (31 March 2011); *Seemela v S* 2016 (2) SACR 125 (SCA).
[14] (109/2014) [2015] ZASCA 52 (27 March 2015).

[52] The section confers a discretion on the court to allow hearsay evidence if it is in the interests of justice to do so. In considering whether it is in the interests of justice to admit such evidence, one should take into account the factors set out in the subsection. These factors are:

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account […].

[53] Although the court *a quo* did not deal with these factors independently and in the manner set out in the subsection, it nevertheless attached due weight to the evidence. The attack in this court was not so much against the fact that the court did not consider any of these factors, either collectively or individually, but rather against the weight the court attached to this evidence in assessing the guilt of the Appellant. We must hasten to add that the State sought to introduce this evidence by means of a trial within a trial, but the parties agreed that the court *a quo* should ultimately make a determination, as was argued by Mr Van den Berg, that both “the admissibility and the value of it can be decided at one and the same time”. The correct procedure, in our view, would have been as proposed by the State to have this evidence introduced by means of a trial within a trial.

We will now deal with the factors as set out in the subsection in relation to the evidence that was presented by the State.

The nature of the proceedings

[54] Whilst the legislature was mindful of the type of proceedings in which such evidence would be presented, it is trite that such evidence may be allowed in criminal cases. Presiding officers should, however, be mindful in criminal cases of the warning heeded by *Schutz JA* in *S v Ramavhale*[15]. Further, in this particular case, given the totality of the evidence to which we were referred to at a later stage, one should also consider *Van Willing (supra)* with reference to the case of *S v Shaik & Others*[16], where it was held that whatever the nature of the proceedings is, the true test is whether it is in the interests of justice to admit such evidence. The evidence, in any event, would not conclusively point to the guilt of the Appellant beyond reasonable doubt.

The nature of the evidence

[55] The nature of the evidence is that it implicates the Appellant as one of the persons was involved in the shooting of the deceased. The probative value of the evidence depends on the credibility of the deceased. Evidence of identification in a criminal trial must be accepted with caution. Such evidence is usually controversial where there are eye witnesses to the commission of the crime. Such evidence should not only be honest

[15] (208/95) [1996] ZASCA 14 (18 March 1996) where it was held at par [34-35] "[…] *a judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there are compelling justifications for doing so."*
[16] 2007 (1) SA 240 (SCA) at par [171].

but also reliable. See *S v Mthetwa*[17]. We will refer in more detail to the nature of this evidence when dealing with the probative value thereof at a later stage.

The purpose for which the evidence was tendered

[56] As mentioned earlier, the evidence was tendered by the State to prove the involvement of the Appellant in the commission of the crime.

The probative value of the evidence

[57] The probative value of the evidence depends, in our view, not only on the credibility and reliability of the utterances made by the deceased, the credibility and reliability of the evidence of Sheldon, the evidence of other witnesses on the scene, but also on the other circumstantial evidence relating to the search and seizure. This includes the ballistic evidence linking the weapons found at the house of the Appellant and the spent cartridges found on the scene where the deceased was killed. It is therefore important to once again have a look at the evidence of Sheldon. His version as to what the deceased had told him was not disputed.

[58] Sheldon was very clear and confident about who the deceased had identified. There was no doubt in the mind of Sheldon that the deceased had identified the Appellant. He said he made sure that the deceased, when he referred to "*Kop*" or "*Kleinkop*", knew who exactly he was referring to. This is borne out by evidence of Sheldon that, "*Toe hy die woord Kleinkop gebruik het, het ek hom gevra watter Kop en hy*

[17] 1972 (3) SA 766 (A) at 768.

het gese Bradley, ek moet my nie dom hou nie". This evidence in our view is a clear indication that the deceased knew exactly who the person was that shot him. The deceased's identification is further corroborated by Sheldon, as the Appellant was known both to him (Sheldon) and the deceased. Clearly, this is an indication on the part of the deceased that Sheldon should have known who he (the deceased) was talking about.

[59] The version of the deceased as to the circumstances under which the offence was committed and relayed to Sheldon is corroborated by other witnesses in the following respects: that two male persons driving a white car were responsible for the shooting of the deceased, is confirmed by Trevor, who saw two male persons running away from the deceased towards a white car after the deceased was shot, and Gadija who says she saw two male persons chasing the deceased, whereafter he was shot.

[60] Gadija later saw two male persons walking in the direction of a white car after they shot the deceased. Merle says that she left the deceased at the time when Trevor joined them while they were walking and later heard shots going off, whereupon she found the deceased lying on the pavement. When she asked him who shot him, he said, "*Dit was Kop*". Sheldon testified that the deceased also told him that he was walking to Trevor when he saw a white Fiat motor vehicle with the Appellant as occupant. The deceased also told him that the Appellant and two males jumped out of the vehicle and started shooting him. The evidence of Trevor and Gadija confirms this fact, except that they were unable to point out the Appellant.

[61] The further evidence strengthening the probative value of the utterances made by the deceased to Sheldon, regarding the Appellant's involvement in the commission of

crime, is the fact that at a later stage two of the firearms that were used during the shooting of the deceased were found in the possession of the Appellant at his house.

[62] Mr Van den Berg made much of the fact that the deceased were not consistent in his report to Sheldon as to whether "*Kop*" or "*Kleinkop*" was one of the persons involved in the shooting of him. He referred to this as the so-called "crack which could not be subjected to the chisel cross-examination" as in the case of a witness who would be subjected to cross-examination when making an inconsistent statement. While this is true and would have been a factor that had to be considered in examining the credibility of the deceased, we are not convinced that this so-called "crack", if regard is to be had to the totality of the evidence, makes this evidence unreliable. We say this for the following reasons. Firstly, as pointed out earlier, the strength of the evidence not only depended on the uncontested version of the deceased, but also on the version of Sheldon, who also knew exactly who the deceased was referring to. Secondly, when Sheldon asked him to which "*Kop*" he referred to, he said "*Kleinkop*". This was a description of the person which he gave to Sheldon, and in doing so he was referring to a specific person. This is further confirmed by words used by the deceased, "*Bradley, moet nie vir jou dom hou nie"*. Thirdly, it is not in dispute that the Appellant is known by the name of "*Kleinkop".* Fourthly, there is ballistic evidence that links the firearms that was found at the house of the Appellant, also known as "*Kleinkop*", to the shooting incident of the deceased.

[63] In our view, no amount of cross-examination of the deceased would have been able to unsettle this corroborative evidence of his version, especially not in the absence of any evidence by the Appellant.

The reason why the deceased did not give evidence

[64] This fact is self-evident and needs no further discussion.

Prejudice

[65] It goes without saying that in a criminal trial where evidence is admitted against a person which implicates him or her in the commission of crime, such evidence might be prejudicial to such a person, especially where such evidence is hearsay. In *S v Ndhlovu and Others*[18] the court held at *para [50] at 328*:

> "*The suggestion that the prejudice in question might include the disadvantage ensuing from the hearsay being accorded its just evidential weight once admitted must however be discountenanced. A just verdict, based on evidence admitted because the interests of justice require it, cannot constitute 'prejudice'. In the present case, Goldstein J found it unnecessary to take a final view, but accepted that 'the strengthening of the State case does constitute prejudice'. That concession to the proposition in question, in my view, was misplaced. Where the interests of justice require the admission of hearsay, the resultant strengthening of the opposing case cannot count as prejudice for statutory purposes, since in weighing the interests of justice the court must already have concluded that the reliability of the evidence is such that its admission is necessary and justified. If these requisites are fulfilled,, the very fact that the hearsay justifiably strengthens the proponent's case warrants its admission, since its omission would run counter to the interests of justice."* (our emphasis)

[66] In our view, even though the evidence is prejudicial to the Appellant, there is no risk that his fair trial rights were infringed if the court in the interests of justice admits the evidence. It is under this overall protection that any prejudicial evidence is admitted during

[18] 2002 (6) SA 305 (SCA).

a criminal trial, obviously with the added caution that such evidence is hearsay and that the court should be vigilant in admitting such evidence without any good or compelling reason.

Any other factor

[67] There is no other factor which the parties or which the court considered to be taken into consideration in deciding whether the hearsay evidence should be admitted.

[68] We are of the view that having regard to all the factors set out in the subsection and the totality of the evidence, the Regional Magistrate was correct in admitting this evidence. As shown above, and as will be shown later, the evidence completes the picture and strengthens the circumstantial evidence.

[69] The next question to consider is whether, given the totality of the evidence which includes the hearsay evidence, the court *a quo* was correct in concluding the Appellant was one of the people involved in the shooting and subsequent killing of the deceased. Mr Van der Berg argued that, given the long lapse of time between the shooting incident that occurred on 23 February 2008, and the finding of the firearms on 29 May 2008, coupled, with the fact that these firearms could easily have been moved from one person to another person during this time, it cannot be the only reasonable inference that the court can draw that at the time of the shooting, the Appellant was in possession of the firearm.

[70] We do not agree with this submission. In dealing with circumstantial evidence in a criminal matter, the court will apply the oft-quoted dictum in *R v Blom*[19] where the court in dealing with circumstantial evidence applied the two cardinal rules of logic. These are, firstly, that the inference sought to be drawn must be consistent with all the proven facts and, secondly, that the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. See also *S v Reddy*[20]. Most of the proven facts in this case are beyond dispute. These are:

1) That on 23 February 2008 the deceased was killed and he made a hearsay utterance to Sheldon that it was the Appellant, to whom he referred to as "*Kleinkop*", that shot him.

2) That the Appellant whose name is Bradley, is also known as "*Kleinkop*", and was known to Sheldon and the deceased.

3) That on 29 May 2008 during the arrest of the Appellant, the police found firearms (the Tanfoglio and the Norinco) at the house of the Appellant.

4) That during the arrest the Appellant was seen hiding away the Tanfoglio; and the Norinco was found hidden together with the Taurus in a refrigerator on the premises.

5) That during this operation and prior to the police finding these firearms, the Appellant attempted to flee from the scene.

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[19] 1939 AD 188 at 202-3.
[20] 1996 (2) SACR 1 (A) at 8C-E.

6) That later it emerged that the Tanfoglio and Norinco were linked by means of ballistic evidence to spent cartridges found on the scene of the shooting of the deceased.

7) That there was no evidence tendered by the Appellant to gainsay the strong evidence adduced by the State during the trial.

[71] These are the proven facts from which the court *a quo* was requested to draw an inference of guilt. It is so unlikely that the residence of the person to whom the deceased referred to as "*Kleinkop*" or Bradley, who he accused as the person who shot him, two firearms would be found which were linked by means of ballistic evidence to that same shooting incident, that in the absence of an answer it must be considered to be proven beyond reasonable doubt.

[72] In our view, the Regional Magistrate was correct in drawing the inference that the Appellant was the person or one of the persons that was responsible for the killing of the deceased.

Order

[73] It is for the reasons stated above, that we make the following order:

"The appeal against conviction in respect of all of the charges is dismissed."

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HENNEY, J

Judge of the High Court

_____

SMUTS, AJ

Acting Judge of the High Court