Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case No: A234/2022
Before: The Hon Mr Justice Binns-Ward
The Hon Ms Justice Nziweni
Hearing: 3 February 2023
Judgment: 15 February 2023

In the matter between:

AYANDA BLESS **Appellant**

v

THE STATE **Respondent**

JUDGMENT

NZIWENI J (BINNS-WARD J concurring):

[1] The appellant was convicted on a charge of murder in the Regional Court. He was sentenced to 10 years' imprisonment. The trial court granted the appellant leave to appeal to this Court. The appeal is against conviction only. The appeal raises a number of issues, most of them linked to the incriminating identification evidence adduced at the trial.

[2] The state's evidence was to the following effect: On 29 July 2017, at 12h45, a certain Ms P[...] was in the company of the deceased. They were standing next to a

motor vehicle about a metre and a half apart from each other. They were approached by two males. The witness did not pay much attention to them. She only took particular notice of them when they were right in front of her. The two males were unknown to her, as she had only very recently come to live in the area.

[3] One of the males walked up to the deceased and stabbed him three times with an okapi knife. When the assailant was stabbing the deceased, he was facing away from Ms P[...]. After the man had stabbed the deceased, he and his companion went past her, and she got an opportunity to look at them. The witness estimated that from the time she noticed the two males for the first time to the time the assailant went to stab the deceased and then walked past her spanned a matter of minutes. She testified that she saw the facial features of the two males and noticed that the assailant had a scar.

[4] She then went to alert Ms M[...], a relative of the deceased, who was asleep at the time. After she had woken M[...] up, she went to call the police. When she returned with the police, the deceased was lying on the ground on his stomach at a corner, close to his house [the deceased's house], six to seven metres away from the spot where he had been stabbed. She heard M[...] asking the deceased who had stabbed him and the deceased saying "S[...], I was stabbed by Hagwana."

[5] Ms P[...] made a written statement to the police on the day of the incident. She told them that she was not in able to identify the person who had stabbed the deceased. She gave the police a detailed description of the clothing the assailant was wearing but did not tell them about the scar.

[6] Subsequent to the stabbing incident, she saw the assailant in the area again on two separate occasions, however, she could not recall when they were. She was not sure whether she saw him again within a week or a month later, but it was after the burial of the deceased. On the first occasion, she saw the assailant standing in the street and the second time she saw him standing close to another house. Under cross-examination, she testified that on the occasions she sighted the assailant again, it was somewhere between end of September and October 2017 and she also

saw him again around November 2017. She denied a proposition by the appellant's attorney that the appellant had been in custody at those times.

[7] The police later approached Ms P[...] and enquired if she would be able to point out the assailant at an identification parade. She indicated that she would be in a position to do so. In February 2018, she was then taken to the police station for a photo identification parade. She unhesitatingly pointed out the appellant at the photo identification parade, as the person who stabbed the deceased. Despite the fact that the witness testified that one of the distinguishing characteristics of the appellant's appearance was a facial scar, the scar was not discernible on the photograph of the appellant used in the photo identification parade. It follows that the witness's ability to unhesitatingly point out the appellant must have been founded on a far more detailed assimilation of his facial features than the presence of a scar. Having regard the opportunity for observation implicit in her description of the commission of the crime, that was unsurprising.

[8] **Ms M[...]** testified that she was woken up from her sleep by Ms P[...] telling her that the deceased had been stabbed. When she arrived where the deceased was lying, she asked him who had stabbed him. The deceased responded twice and told her that he was stabbed by "Hagwana" and he then passed away. She testified that she knew the appellant as Hagwana and that he had a history of hostility with the deceased.

[9] According to the investigating officer, **Mr. Mvunelo,** he had been stationed in the area in question for many years and there was only one person Hagwana in the area, namely the appellant. He confirmed that when the identity parade was held the appellant was already under arrest. According to his testimony, the appellant was arrested on 02 September 2017.

[10] **Ms Jones** testified that the investigating officer of the case gave her information that contained the photograph number of the appellant, his age, race and the case number. When she punched that information on the system, it gave her photos of males with the same age group and race as the appellant. She then compiled an album for the identity parade. A photograph identity parade was

conducted. The cross-examination of the state witnesses did not call the probity of the conduct of the identification parade into question.

[11] When the appellant took the witness stand he denied all the allegations levelled against him and claimed to have been at a traditional ceremony being conducted at his father's house at the time. The appellant's sister testified in his defence. She stated that she did not know when the deceased was killed; she was informed the day after they had conducted a traditional ceremony that the appellant killed someone the day before. On the day of the traditional ceremony she was sitting at a neighbour's stoep. She was not watching the appellant the whole time. She wouldn't know if the appellant had left their place. It was her testimony that they no longer call the appellant "Hagwana". Hagwana had been a childhood nickname for the appellant which people no longer used.

[12] The case of the State centred upon the testimony of Ms P[...]. It is now established that, even though the evidence of identification and of a single witness should be approached with caution, however, exercise of caution should not displace the exercise of common sense. The submission made on behalf of the appellant that Ms P[...] only saw the assailant for a brief moment, is not borne out by the evidence. She saw him approaching, she watched the stabbing take place at close quarters and she continued to watch as the assailant walked away after the attack. Her observation took place in broad daylight. All of that would not happen within an instant. Ms P[...]'s observation of the appellant cannot be described as a fleeting glance or one fraught with difficult conditions.

[13] Ms P[...]'s testimony demonstrates that at the time of the incident she took in important and small details. For instance, she observed that the assailant opened a 15-centimetre long knife, in front of the deceased. She also gave account as to how many times the deceased was stabbed, and where the stab wounds were inflicted. Her evidence also reveals that she also observed the assailant closing the okapi knife, after the stabbing. She could also discern the features of the knife which was used to stab the deceased.

[14] It was also her testimony that she was able to see the facial features of the men who approached her and the deceased. Similarly, she was able to describe the appellant's special facial feature [the scar] and when she made her police statement she described in detail what the appellant was wearing. Clearly, she could hardly have known about the scar of the appellant unless she had been in close proximity to him.

[15] One further important factor relevant to the identification of the appellant is the dying declaration of the deceased as declared to Ms M[...]. Besides the fact that the dying declaration identifies "Hagwana" as the offender, it demonstrates the trustworthiness of Ms P[...]'s identification.

[16] As to the name Hagwana, the investigating officer and Ms M[...], confirmed that the appellant was known as Hagwana in the local community. The defence version regarding the use of the name Hagwana, as far as the appellant is concerned, has been controverted by more than one State witness. For that matter, Ms P[...]'s identification of the appellant supports the evidence that the appellant is still known as Hagwana. Surely, it cannot be a coincidence that Ms P[...] fingers the appellant as the offender and the name Hagwana, which happens to be the name of the appellant, is linked to the dying declaration; and on top of that, it so happens that the appellant bears some form of a grudge against the deceased. Equally, in the circumstances of this case it is not remotely probable that in the vicinity of Hout Bay, there would be two men with the same name and same scar and same hat. Inasmuch the appellant sought to attribute the name issue to a mere coincidence, it would really be highly improbable that the person who stabbed the deceased coincidentally happened to have the same name and a scar as the appellant.

[17] In the circumstances, the dying declaration evidence is an objective fact that strengthens the identification evidence and dispels any risk of mistake. There is no reason why the dying declaration should not be taken into account when assessing the reliability of Ms P[...]'s testimony.

[18] In the appellant's heads of argument much is made of the fact that no evidence was lead in court to describe the scar on the appellant's face or even if the

appellant had any visible scar. It is very crucial to note that, during the trial it was mentioned that the appellant has a scar on his face which also played a prominent role in his identification. Moreover, during the trial, it was never asserted that the appellant did not have the scar that Ms P[...] ascribed to him. The evidence of Ms P[...] on this aspect, did not meet with any serious challenge in cross-examination nor was it rebutted by the appellant when he testified. In this regard, and as things stand, the evidence of the scar remains unchallenged.

[19] Furthermore, as rightly observed on behalf of the appellant that P[...] initially said to the police that she would not be in a position to identify the man she had seen stabbing the deceased. It was argued that this went directly to Ms P[...]'s credibility and reliability. In the context of this case it is really difficult to see how this aspect affected the reliability or cast doubt on P[...]'s identification. The fact that Ms P[...] was recorded as stating that she could not identify the assailant does not detract from her subsequent identification of the appellant. Contextually, her statement could be understood to convey that she did not know who the assailant was. That was indeed the effect of her testimony in court.

[20] In *S v Mpilo* 2021 (1) SACR 661 (WCC) at paragraph 23, the court (Rogers J, Binns-Ward J concurring) in dealing with criticism of identificatory evidence, stated following:

> "The appellant's counsel criticised the identificatory evidence because the witnesses had not mentioned the features of the driver's face which had caused them to identify him with the appellant. Now I know that points of this kind are often raised in criminal trials but I am not much impressed by them. It is not often that a face presents itself with one, let alone two or more, remarkable features. Nevertheless, human beings are highly adept at recognising faces and voices. A constellation of multiple minor variations in standard facial features combine to make up a facial appearance which in its own way is as unique as a fingerprint. The laborious process followed by identikit artists in teasing out from a witness the facial features of a perpetrator shows that people can readily match a face to a perpetrator without being able to verbalise a description."

See also *S v Bam* [2020] 4 All SA 21 (WCC); 2020 (2) SACR 584 (WCC) at footnote 7 to para 16.

[21] Notably, the evidence shows that Ms P[...] was able to pick out the appellant, without any hesitation, at the identification parade. The identity parade did put the reliability of Ms P[...]'s identification to test. It follows that, the identification of the appellant during the identification parade, provided further supporting material as it enhanced the reliability of Ms P[...]'s identification. It provided an assurance of reliability; cf. *S v Mthetwa* 1972 (3) SA 766 (A) at 768A-C.

[22] There was, as discussed, ample additional evidence supporting the reliability of Ms P[...]'s identification. There was thus no reason for the court a *quo* to not accept Ms P[...]'s evidence; whether as to the scar, or her later sightings of the appellant. As to the latter, it was immaterial that the witness may have been incorrect as to the months in which subsequently saw the appellant. She would have had no reason to remember the dates.

[23] The appellant's alibi defence had to be considered by the court with regard to the totality of the evidence; see *R v Hlongwane* 1959 (3) SA 337 (A) at 341A, where Holmes AJA said "The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses." The learned judge endorsed the observation by Greenberg JA in *R v Biya* 1952 (4) SA 406 (A) at 521 *"... if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime*". The evidence of the appellant's sister did not exclude the possibility of his involvement in the commission of the crime, whereas the combined effect of the reliability of the identification evidence of Ms P[...], the dying declaration made to Ms M[...] and the evidence of the investigating officer confirming that the appellant had long been known to him by the name Hagwana – contradicting the assertions of the appellant and his sister to the contrary - justified the magistrate's rejection of the appellant's alibi defence as not reasonably possibly true. Furthermore the reasonable possibility that another person called Hagwana could have been the person named in the deceased's dying declaration was excluded

when regard is had, in the context of the totality of the evidence, to the unchallenged evidence concerning the history of violent hostility between the appellant and the deceased.

[24] At this juncture it is appropriate to say something about the general handling of evidence dealing with the dying declaration, by the trial court. In this regard we are grateful for the careful and detailed written submissions made by counsel for both parties in respect of the admissibility of the dying declaration in response to our request for additional argument on the point.

[25] Counsel correctly identified that the trial court's regard to the dying declaration as evidence supporting the state's case was unexceptionable having regard to approach by this Court in close comparable circumstances in *S v Sigcawu* 2022 (1) SACR 77 (WCC). Mr Strauss, for the appellant, rightly stressed, however, that the admissibility of the evidence and its probative value were quite separate considerations. I have already addressed the weight that the trial court quite appropriately gave to the evidence and nothing more needs be said about that.

[26] The manner in which the trial court dealt with the dying declaration evidence was unsatisfactory, however. A dying declaration is hearsay evidence, and the admission of such evidence is regulated by s 3 of the Law of Evidence Amendment Act 45 of 1988. (The common law exception concerning the exception from the hearsay rule of dying declarations was abolished in terms of the repeal of s 223 of the Criminal Procedure Act 51 of 1977 by s 9 of Act 45 of 1988.) In the current case, the prosecutor correctly forewarned the court before he adduced the evidence concerning the dying declaration that he would be introducing evidence of a hearsay nature. He in effect was alerting the magistrate and the appellant's legal representative that a ruling in terms of s 3 of Evidence Amendment Act would be required.

[27] As it happened, the appellant's legal representative indicated an initial inclination to object to the admissibility of the evidence, but requested, and was granted, an adjournment to consider her position. When the trial resumed on a later date, nothing further was said on the issue by the legal representative and the

evidence was adduced by the prosecution without objection from the defence or any direction from the magistrate. The circumstances suggested tacit agreement by the defence to the admission of the evidence along the lines described in S v Sigcawu supra. The first express indication that the trial court was treating the evidence as admissible came in the magistrate's conviction judgment. That was, to say the least, unsatisfactory.

[28] It is highly important that trial courts should adopt a more vigilant approach when suddenly confronted with evidence of a dying declaration. There may be instances where the court is required to immediately examine and characterised such evidence. It is also critical that the court should immediately ascertain from the parties, the manner in which the admissibility of the evidence is going to be dealt with.

[29] This involves the court taking proactive steps to steer and manage the way as to how the admissibility issue would be dealt with timeously. A ruling on the admissibility of the dying declaration should be made on the record at the latest before the opening of the defence's case. The admissibility of such evidence should not be deferred for the main judgment; see S v Ndhlovu and Others 2002 (6) SA 305 (SCA), at paragraph 18; S v *Sigcawu* supra; and *Kapa v The State* [2023] ZACC 1 (24 January 2023).

[30] For these reasons given above the appeal is dismissed.

C.N. NZIWENI
Judge of the High Court

A.G.BINNS-WARD
Judge of the High Court