



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

Case No: A92/2016

In the matter between:

ARTHUR SITHOLE

Appellant

and

THE STATE

Respondent

Case Summary: Criminal Law – Appeal against convictions of attempted robbery with aggravating circumstances, murder, unlawful possession of firearm and ammunition and unlawfully pointing a firearm and against effective sentence of imprisonment for life dismissed.

JUDGMENT

MEYER, J (MASIPA and NICHOLLS JJ concurring)

[1] Arising from an incident that occurred on Saturday, 5 September 2009 at about 14.30 in which the late Mr Anthony Cecil Michael (the deceased) was shot by a man while he was sitting on the driver's seat of his car in the driveway where he

resided at 43 Basil Road, Marlboro and in which the same man moments later pointed a firearm at Mr Aarqil Farhad Dawood, the appellant, Mr Arthur Sithole, was tried in the South Gauteng High Court, Johannesburg (Tshabalala AJ). On 29 September 2010, he was convicted of attempted robbery of the deceased's car with aggravating circumstances (count 1), the murder of the deceased (count 2), unlawful possession of a firearm (count 3) and of ammunition (count 4) and unlawfully pointing a firearm at Mr Dawood (count 5). On 1 October 2010, he was sentenced to imprisonment for life pursuant to his conviction of murder (count 2) and to six years' imprisonment for his conviction of attempted robbery (count 1), to four years' imprisonment for his convictions of unlawfully possessing a firearm and ammunition (counts 3 and 4) and to two years' imprisonment for his conviction of unlawfully pointing a firearm. His effective sentence is accordingly one of imprisonment for life. The appeal to this full court against the convictions and sentences is with the leave of the trial court.

[2] The only question as far as the convictions is concerned is whether the state indeed proved beyond a reasonable doubt that it was the appellant who had shot and killed the deceased and who moments later had pointed a firearm at Mr Dawood. On another side of a veld about 100 metres away from the deceased's house are business premises that were guarded by Mr Mncedisi Molili on the day and at about the time of the incident. He noticed a group of three men walking into the veld and one of them dressed in a green jacket and khaki trousers.

[3] At about 14.30 on the same day, Mr Dawood, who resided in the neighbourhood, drove past the deceased's house. He noticed the deceased reversing out of his driveway. He heard what he described as 'a bang'. He stopped

and when he looked behind him he saw a person standing at the deceased's driver's side window and the window shattered. The man was dressed in a green jacket, khaki trousers and a white hat. Mr Dawood jumped out of his car, yelled at the man, who then started to run into the veld. Mr Dawood chased him, but he stopped when the man pointed a firearm at him, and he then returned to the deceased's residence. He noticed that the deceased had been shot. Shortly thereafter the police arrived at the scene. Mr Dawood gave them a description of the clothes the man he had seen was wearing, and he accompanied the police in search of the suspect.

[4] The security guard, Mr Molili, again noticed the man, who was dressed in a green jacket and khaki trousers and whom he had seen earlier in the company of two other men walking into the veld, returning from the veld. The man, according to Mr Molili, acted suspiciously. He kept on looking backwards, he took off his green jacket, made it into a bundle and it appeared to Mr Molili as if he was going to drop it in the tall grass. But when he noticed Mr Molili, he kept his jacket without putting it on and continued walking.

[5] A few minutes later Mr Molili was approached by Mr Dawood, who enquired from him whether he had seen a man wearing a green jacket and Mr Molili pointed out to him the direction in which the man had gone. Shortly thereafter the police also enquired from Mr Molili whether he had seen the man. Again he pointed out to them the direction in which the man he had seen had gone, and they left and went into that direction.

[6] On the day in question, Warrant Officer Jerry Seroto and a colleague were on crime prevention duty patrolling the streets of Marlboro when they reacted to a message that a shooting was in progress at the deceased's address. They found

the appellant about one hundred metres away from the point where Mr Molili had pointed out to them the direction in which the man he had seen, had gone. The appellant was wearing khaki trousers and he had a bag with him in which they found a green jacket and a white hat.

[7] The police returned to Mr Molili with the appellant in their company. Mr Molili confirmed to the police that the appellant was indeed the person he had seen. He based his identification of the appellant on the khaki trousers he was wearing and the green jacket, which at that stage had been placed inside a bag which the appellant had in his possession. The trousers and jacket, according to Mr Molili, were the same jacket and trousers the man whom he had seen walking into the veld and later returning, was wearing. The appellant was also taken to Mr Dawood. He identified the appellant as the man he had seen standing at the deceased's driver's side window whom he chased and who pointed a firearm at him. His identification of the appellant was based on the khaki trousers he was wearing and the green jacket and white hat which the appellant had with him in a bag. The trousers, jacket and hat, according to Mr Dawood, were the same items of clothing that the man he had seen and chased was wearing.

[8] The appellant denied that he was the man who Mr Molili had seen going into and returning from the veld or whom Mr Dawood had seen standing at the driver's side of the deceased's vehicle and whom Mr Dawood chased. He maintained that he had not been involved in any of the offences with which he was charged. He was not at the deceased's house on the day in question. He got a piece job painting on the day in question, and he was on his way home from work to Alexandra when the police found him. He denied that he wore the white hat and he maintained that the

police put it in the bag in which he carried not only his green jacket, but also a blue overall jacket.

[9] I am not persuaded that in convicting the appellant the trial court misdirected itself in any respect in its assessment of the evidence. The totality of the evidence justifies the trial court's findings and conclusions that the exculpatory version of the appellant was not reasonably possibly true and that the guilt of the appellant was proved beyond reasonable doubt. The trial court treated the evidence of identification with the required caution. A reading of the record satisfies me that the evidence of particularly Mr Dawood and Mr Molili is trustworthy and unquestionably true. The exculpatory evidence of the appellant is, on a conspectus of the evidence, inherently improbable and clearly false. It is in material respects self-contradictory and on the aspect of the blue overall jacket, which he said was also in the bag that was found in his possession, contradicted by the evidence of his own witness, Mr Vashi Mbatha, from whom he allegedly borrowed the overall jacket and to whom he needed to return it that day. I find it highly improbable that the police, in the circumstances of this case, would have planted the white hat in the bag which the appellant was carrying.

[10] The appellant had been identified as the perpetrator of the offences of which he was convicted by virtue of his dress in the light of the totality of the evidence. The ineluctable inference is that the appellant was the man dressed in khaki trousers and a green jacket, whom Mr Molili had seen entering the veld, that he was the man dressed in khaki trousers, a green jacket and a white hat whom Mr Dawood had seen next to the driver's side of the deceased's car and who ran into the veld when he was chased by Mr Dawood, that he was the man whom Mr Molili saw returning

from the veld and trying to dispose of his green jacket, and whom the police found about 100 metres away from where Mr Molili had seen him. The appellant wore the identical khaki trousers, green jacket and white hat worn by the perpetrator and he was caught in close proximity as to time and place. He was identified by Mr Molili and then by Mr Dawood individually shortly after he had been seen by each one of them. The evidence of identification is in the light of the totality of the evidence, and the probabilities, reliable. (See *S v Mthetwa* 1972 (3) SA 766 (A), at 768A.)

[11] The appellant also contends that the sentences which the trial court imposed upon him induce a sense of shock and that the trial court erred in its finding that there were no substantial and compelling circumstances, which justified the imposition of a lesser sentence than the legally prescribed one of imprisonment for life for the murder charge of which he had been convicted. There is no merit in these contentions. In sentencing the appellant, the trial court exercised its discretion judicially and his effective sentence of imprisonment for life does not induce a sense of shock. (See *S v De Jager* 1965 (2) SA 616 (A) at 628H-629B.) All the relevant factors and circumstances were considered and duly taken into account by the trial court. Interference with the imposed sentences is, therefore, not warranted.

[12] In the result I would make the following order:

The appeal against the appellant's convictions and against his sentences is dismissed.

P.A. MEYER
JUDGE OF THE HIGH COURT

I agree:

T.M. MASIPA
JUDGE OF THE HIGH COURT

I agree:

C. NICHOLLS
JUDGE OF THE HIGH COURT

Date of hearing:	05 August 2016
Date of judgment:	11 August 2016
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Instructed by:	Director of Public Prosecutions, Gauteng Local Division of the High Court of South Africa