

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION PRETORIA)

Case No: CC 67/2020

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.

DATE : 18 May 2023

A handwritten signature in blue ink, appearing to be "M. Sibiya", is written over a rectangular box.

SIGNATURE:

In the matter of:

The State

and

Muzikhawulelwa Sthemba Sibiya

Mbongani Sandiso Ntanz

Mthobisi Prince Mncube

Mthokoziseni Ziphozonke

Sifokuhle Sifiso Nkani Ntuli

Accused One

Accused Two

Accused Three

Accused Four

Accused Five

RULING

Introduction

1. This is a ruling pertaining to an application by witness number one in the list of witness to be called by the State in this case. The following five accused persons appear in this case with legal representation.
 - 1.1. Accused number one, Muzikhawulelwa Sthemba Sibiya, a male who was 34 years of age at the time he was arraigned.
 - 1.2. Accused number two, Mbongani Sandiso Ntanzi, a male who was 30 years of age at the time he was arraigned.
 - 1.3. Accused number three, Mthobisi Prince Mncube, a male who was 36 years of age at the time he was arraigned.
 - 1.4. Accused number four, Mthokoziseni Ziphozonke, a male who was 35 years of age at the time he was arraigned.
 - 1.5. Accused number five, Sifokuhle Sifiso Nkani Ntuli, a male who was 34 years of age at the time he was arraigned.
2. The accused stand charged on five counts, as follows:
 - 2.1. On count one, the accused were charged with murder, read with the provisions of section 51(1) of the Criminal Law Amendment Act, 1997 (the "CLAA").¹
 - 2.2. On count two, the accused were charged with attempted murder.
 - 2.3. On count three, the accused were charged with robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977 (CPA),² read with the provisions of section 51(2) of the CLAA³, as amended, and further read with sections 92(2), 94, 256 and 261 of the CPA⁴ further read with the provisions of section

¹. Act 105 of 1997.

². Act 51 of 1977.

³. *Idem* fn 1.

⁴ *Idem* fn 2.

51(1) of the CLAA.⁵

- 2.4. Count III. Contravening section 1, 103, 117, 120 (1) (a), and section 121, read with Schedule 4 of the Firearms Control Act 2000, (Act No 60 of 2000, and further read with 250 of the “Criminal Procedure Act”, and also read with section 51 (2) of the Criminal “Law Amendment Act”. Unlawful Possession of Firearms and,
- 2.5. Count IV. Contravening section 90, read with section 1, 103, 117, 120 (1) (a), and section 121, read with Schedule 4 of the Firearms Control Act 2000, (Act No 60 of 2000, and further read with 250 of the “Criminal Procedure Act”, and also read with section 51 (2) of the Criminal “Law Amendment Act”. Unlawful Possession of Ammunition.

Background

3. All five accused pleaded Not Guilty to all the charges. In criminal cases, the *onus* lies upon the State to prove its case against an accused beyond reasonable doubt. In the case of *S v Shackell*,⁶ Brand J as he then was, stated the following:

“[30] ..., a court does not have to be convinced that every detail of an accused’s version is true. If the accused’s version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused’s version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.

4. The State is in the process of leading evidence. It is now to call witness number one on the list of witnesses. Witness one was to commence with

⁵ *Ibid.*

⁶ 2001 (4) All SA 279 (SCA) at [30]

adducing testimony on Monday, the 15th of May 2023. Advocate Baloyi for the State informed the Court that on the evening of Sunday, the 14th of May 2023, the witness that is to testify got into contact and communicated that she is not prepared to testify amidst live visual broadcast.

5. Advocate Baloyi did not call witness number one to the witness stand to testify on Monday, the 15th of May 2023. He instead addressed the Court from the bar and he related what this witness told him, advancing reasons behind her reluctance to testify if there shall be visual audio broadcast of the proceedings taking place simultaneously. He advanced reasons for bringing this application in the middle he did. In this ruling, the court opts not to express on the manner in which the application was brought.

Reasons behind the application

6. In his address, Advocate Baloyi outlined the reasons why the witness is opposed to a visual and an audio broadcast of the proceedings. He said firstly, that the witness is concerned because she is a public figure and if the proceedings are live streamed then she shall be exposed to undue scrutiny and criticism by members of the public. Advocate Baloyi stated that the second reason second reason advanced by the witness is that her safety shall be compromised since the public shall get to know her facial appearance.
7. This case is about a murder which attracted and is still attracting a lot of media coverage. The murder was and still is, reported in both print and visual media. There is a huge public interest in the proceedings in this case, so much so that the media is live streaming the proceedings. In this case, safety is a concern for everyone. The applicant is open to members of the media photographing her along the corridor within the courthouse or anywhere outside the courtroom. Although witness number one did not testify, she has objected to visual and audio broadcast of her evidence.
8. The court must take public interest in this case into consideration. It has to consider that the public has the right to access information pertaining to

proceedings in this case. Secondly, the Court has to consider the sensitivities that the applicant raised and weigh it up against all the other factors pertaining to this case. When all is said and done, the Court has to ensure that the interests of justice are taken into regard and is protected.

9. For a witness to testify in a manner helpful, it is vital that his or her sense of comfort be preserved and protected. However, it has been correctly pointed out that the Court has to be conscious of the fact that what remains at stake becomes contemplations for considerations of the interest of justice to take preference. The rights of witness number one as an individual, as opposed to the rights of the general public, also deserve consideration.
10. In the case of *Van Breda v Media 24 Limited and Others; National Director of Public Prosecutions v Media 24 Limited and Others*, (“*Van Breda*”) ⁷ the Supreme Court of Appeal dealt with an application by the media to broadcast criminal proceedings. The court clearly indicated that technology and the role of the broadcasting media to inform the public is part of the right to freedom of the press and the principle of open justice. The Court held that the tension between the right to freedom of expression and the open justice principle, on the one hand and the right to a fair trial, on the other should as far as possible be harmonised with one another. It further *held* that the Court must exercise a proper discretion under section 173 of the Constitution in each case by balancing the degree of risk involved in allowing cameras into the court room against the degree of risk that a fair trial might not happen.⁸
11. It is notable that the Court made a clear point to the effect that courts ought not to restrict the nature and scope of the broadcast unless prejudice is demonstrable and there is a real risk that such prejudice will occur. The applicant only raised her concerns to Advocate Baloyi and did not testify. Through Advocate Baloyi, she expressed concerns that she runs a real risk

⁷. 2017 (2) SACR 491 (SCA); [2017] 3 All SA 622 (SCA); [2017] ZASCA 97.

⁸. *Idem* fn 8 at para 58.

of suffering prejudice.

12. In the *Van Breda* case⁹, the Court further *held* that “[m]ere conjecture or speculation that prejudice might occur ought not to be enough”. It follows therefore that an applicant who seeks for the Court to restrict the media in the manner the applicant seeks to do has a burden to show Court that such a risk not only exists but that prejudice is most likely to be brought to bear against him or her.
13. The legal representatives of all five accused contend that considerations of fair trial shall be sacrificed if the application for an order to restrict the media in the manner the applicant requests is granted.
14. In this case, four witnesses have already testified for the state. Two of them, who are police officials, did so without requiring any limitations directed at members of the media. It turned out that the third witness for the State was placed under protection due to fear for his life. While he was testifying; an incident took place where members of the media pursued him to a point where he had to flee down the passages in this Court-house to avoid his face getting beamed to viewers of a public television broadcast.
15. That incident resulted in a meeting, involving the court management, the members of the media and the security structure where agreement was struck concerning the do’s and don’ts to which members of the media are to conform in covering stories relating to this case. As a result, the faces of the third and the fourth witnesses for the State were not shown during the time when they testified, much as they shall not be broadcast publicly before completion of this trial.

⁹. With reference to *S v Mamabolo* [2001] ZACC 17 at para 45 and *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* [2005] ZACC 7 at para 59.

16. The defence counsels, collectively represented by Mr. Dan Rosengarten, oppose the granting of the order sought by witness number one. They make the point that this witness seeks to be afforded a latitude that goes beyond what preceding witnesses required for purposes of ensuring their safety and that allowing such latitude will have an unintended consequence where the rights of other interested parties in the case like members, friends and relatives of the family of the deceased, members, friends and relatives of the accused persons, members of the football club for which the deceased played, lovers of sports across the board locally, nationally and internationally will be adversely, unnecessarily and unduly impacted upon if an order is granted which fully accommodates the wishes of witness number one.
17. There is a vast number of people who have an interest in developments in this case who for various reasons are not in a position to make it to the court. Parties who have an interest in proceedings pertaining to this case straddle across far and wide in local, national and international spaces. Even where some of them are in a position to make it to court; limitations based on the capacity of the courthouse and the courtroom; available means of transport and parking where own transport is utilized, may render it impossible to accommodate all who are interested.
18. It is for that reason that Mr Rosengarten who represented the media, argued that lesser rather than greater restrictions and limitations should be imposed against those who are interested in following proceedings in this case. Failure to do so may bring unintended consequences where patience for the workings of our legal system may run out. Genuineness and purity of the process entailing trial proceedings shall become questionable. That is bound to eat away from the credibility of our criminal justice system and it may in turn leave room for keenness on the part of members of society to resort to taking the law into their hands when confronting adversity brought about by acts of criminality. That in itself may pose further untold harm to democratic principles in a country where uprisings and strife already

threaten to become the order of the day.

19. To the best extent possible, while confining themselves to their appropriate scope and while avoiding undue overreach and observing the principle of separation of powers within a democracy, Courts cannot afford to be seen to be failing witnesses in trials, victims of crime and the interest of communities in general through the manner in which they determine and balance conflicting rights, most if not all of which stand enshrined within the Constitution. That very Constitution was born amidst a hype based on promises of fairness and equality before the eyes of the law and access to justice without any discrimination.
20. Participants in court proceedings, members of society as well as those who face charges before courts are justified to expect that fairness and equity shall be part and parcel of judicial decision-making without exception.
21. At the same time, it turns out that ever since occurrence of the incident in this case, witness number one has consistently participated in social media platforms. She addressed issues pertaining to this case. In so doing, she placed her identity, including her face out in the public and that prompted the very public scrutiny, criticism, analysis and everything else that goes with public participation in social media whereas she says at the same time that she harbours an apprehension if a public broadcast of proceedings were to be done. She states that she fears that harm shall come her way if a public broadcast of proceedings is done.
22. The defence together with the legal representatives of the media, questions why witness number one suddenly and without proper notice seeks to be granted a latitude which is not only different from that which other witnesses in the same case were granted, but which goes overboard in not only limiting but also completely undermining the interests of a vast number of people who seek to follow proceedings in this trial. They charge that she seeks to blatantly undermine their rights to access information pertaining to

this trial.

23. The situation is further compounded by the fact that witness number one did not testify and was therefore never subjected to any test regarding her averments regarding potential threats to her person, her security and her reputation if her face and her voice get broadcast when she testifies. All her concerns were conveyed by Advocate Baloyi from the bar. It is so that matters pertaining to the safety of witnesses deserve prompt and adequate attention at all given times. Life is precious and once lost, it is never regained.
24. Courts do have a duty to go out of their way to protect and preserve the lives and safety of witnesses who testify before them. Failure to do so will prove to be counterproductive in that witnesses who have to provide vital evidence for the Court to arrive at just decisions, will be intimidated into reluctance to testify honestly and truthfully.
25. This will result in a malicious dent on the image of our justice system and it will in turn promote lawlessness and a semblance of the law of the jungle when it comes to actions and responses to acts of criminality. As indicated in *S v Matyityi*¹⁰ our justice system will have failed in accommodating victims of crime and society at large.
26. It is for this reason that the Court in determining the granting or refusal of the application herein has to balance the various rights and interests at play within this application. Considerations of fair trial have to be preserved, much as the interest of those with interests in the case and society have to be taken into consideration.

¹⁰. 2011 (1) SACR 40 (SCA) at para [16]-[17].

27. In the case of *S v Manamela & Another* (Director-General of Justice Intervening)¹¹ O'Regan J and Cameron J said¹²:

“The approach to limitation is, therefore to determine the proportionality between the limitation of the right considering the nature and importance of the infringement of right, on the one hand, and the purpose, importance and effect of the infringing provision, taking into account availability of less restrictive means available to achieve that purpose.”

28. Up until now, this Court does not know what perils witness number one stands threatened with in the event where her testimony is broadcast. The court allowed witnesses number three and four to testify with restrictions in place where it concerned the beaming of their faces in a public broadcast of court proceedings. This was after the incident in which the third state witness got chased down the passages by a journalist who wanted his pictures.
29. The defence and the representative of the media do not oppose a position where the beaming of the faces of witnesses is prohibited over time when they will be testifying up until finalization of this case. Witness number one's voice and most probably her face are already in the public domain due to her past participation in social media where she addressed issues pertaining to this case. Her explanation is that she needed to protect her integrity consequent to being subjected to public attacks revolving around issues related to this case.
30. Forbidding public broadcasts in which her voice will be exposed to interested parties and the public cannot bring any consequences her way which have not obtained before. As a result, while the Court understands that beaming the face of witness number one may bring an unintended

¹¹. 2001 (1) SACR 414 (CC).

¹². *Idem* fn 13 at para 66, dissenting judgment but this particular passage was approved by the majority.

adverse consequence to bear against her, there is no evidence showing that a public broadcast which exposes her voice can do so to any unprecedented extent.

31. Our courts have indicated that the approach to ensuring that each right finds expression, and the extent thereof, is clearly articulated by the Supreme Court of Appeal in the matter of *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)*¹³ where the following was stated:

“[9] Where constitutional rights themselves have the potential to be mutually limiting - in that the full enjoyment of one necessarily curtails the full enjoyment of another and vice versa – a court must necessarily reconcile them. They cannot be reconciled by purporting to weigh the value of one right against the value of the other and then preferring the right that is considered to be more valued, and jettisoning the other, because all protected rights have equal value. They are rather to be reconciled by recognising a limitation upon the exercise of one right to the extent that it is necessary to do so in order to accommodate the exercise of the other (or in some cases, by recognising an appropriate limitation upon the exercise of both rights) according to what is required by the particular circumstances and within the constraints that are imposed by s 36...”

32. This Court is vested with a discretion to allow publication of court proceedings, in particular visual and audio broadcasts. It is vested with the power to control proceedings to ensure a just outcome. That involves a jealous guarding of the process to ensure that the rights of the accused to a fair trial are protected while also ensuring that society see that justice being done. It is for that reason that a balancing of the interest of all participants as well as those with interest in the process conducted by the criminal justice system has to be done. There should also be consideration

¹³. 2007 (5) SA 540 (SCA) at para [9].

of others who may have become participants by accident of circumstance.

33. It is fact that broader society will retain a deep interest and will want to ensure that justice is done where the open court principle protects their ability to do so. Historically this meant that justice was done in an open forum where the default position was such that the public is able to come and observe what is taking place.

34. The Supreme Court of Appeal in *van Breda*¹⁴ described the interests at stake by broadcasting court proceedings as follows:

“It is important to emphasise that whilst greater access by the public to the court system by means of televised proceedings would result in: (i) demystification of the judicial process; (ii) greater informed deliberation and critical assessment of the judiciary based on the public’s ability to readily observe judicial proceedings; (iii) increased understanding of and respect for the judiciary based on the public’s increased ability to observe the daily working of the courts; (iv) improved journalistic standards relative to court reporting resulting from greater coverage of court proceedings and the development of court reporters specialising in judicial matters; and (v) heightened public awareness of deep seated societal problems, the right to a public hearing does not automatically mean that trials must necessarily be broadcast live in all circumstances.”

35. In the case of *Dotcom Trading 121(Pty) Ltd t/a Live Africa Network News v King NO and Others*¹⁵ the Court and by extension this country had occasion to grapple with the openness of proceedings within the criminal justice system. This case arose from a Commission of Inquiry into match fixing in cricket. The Commission chairperson limited the coverage of proceedings only to the press but banned radio and television

¹⁴ *Idem* fn 8 at para [58].

¹⁵ 2000 (4) SA 973 (C).

broadcasting. The chairperson further denied the applications to relax this even with limitations. In considering the impact of broadcasting on witnesses, the Court stated that the least restrictive means of protecting witnesses had to be preferred.¹⁶ The Court further observed that there are differences between audio and visual recordings which meant that they were more central to freedom of expression as they were first-hand accounts rather than interpreted materials.¹⁷

36. In criminal proceedings, the power of a court to limit broadcast of witness testimony stems from a reading of the provisions of sections 152 to 154 of the CPA¹⁸. The default position is that proceedings occur in open court¹⁹ except where otherwise expressly provided for under the CPA.
37. The set of circumstances which fall under those under which may justify a court in prohibiting broadcast of proceedings in open court include those where:
 - 37.1. prohibition is required considering the provisions of section 63(5) of the Child Justice Act 75 of 2008;²⁰
 - 37.2. the Court is of the view that it is in the interests of the security of the State, good order, or of public morals or the administration of justice;²¹
 - 37.3. It is possible that a witness may come to harm if they testify;²²
 - 37.4. cases involving various sexual offenses, extortion or attempts to gain an advantage not due;²³

¹⁶ *Idem* fn 18 at paras [56]-[61].

¹⁷ *Idem* fn 18 at para [61].

¹⁸ *Idem* fn 2.

¹⁹ *Idem* fn 2, Section 152.

²⁰ *Idem* fn 2, Section 153(1).

²¹ *Idem* fn 2, Section 153 (1).

²² *Idem* fn 2, Section 153(2).

²³ *Idem* fn 2, Section 153(3).

- 37.5. the witness is a minor;²⁴ and
- 37.6. the Court is of the view that the subject matter of the case is inappropriate for those under the age of 18.²⁵
38. Considering that witness number one did not tender evidence in support of her request, this Court is not in a position to determine how her particular circumstances can or cannot fulfil requirements that come into place out of a consideration of a variety of circumstances as outlined in paragraph 37 above. In addition, a Court exercises its powers to regulate its own proceedings in terms of section 173 of the Constitution when it determines the manner in which to broadcast proceedings.²⁶
39. A Presiding Judge may exercise a guided discretion on whether to permit the recording of proceedings and to allow open access thereto. Witness number one in this case complains of security threats and thus seeks to persuade the Court to exercise its powers to prevent a public-broadcast of visual and audio proceedings over the time when she will be rendering testimony.
40. Regarding the modality of the exercise of the Court's discretion, the balance lies in favour of openness unless there is good reason for deviating from this position. The Supreme Court of Appeal in *Van Breda*²⁷ set out the following guidance for the exercise of the Court's discretion:

"[70] In permitting the televising of court proceedings this Court is doing no more than recognising the appropriate starting point. It will always remain open to a trial court to direct that some or all of the proceedings before it may not be broadcast at all or may only be broadcast in (for example) audio form. It remains for that court, in the

²⁴*Idem* fn 2, Section 153(5).

²⁵ *Idem* fn 2, Section 153(6)

²⁶ *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) at para 35-36.

²⁷ *Supra*.

exercise of its discretion under s 173 of the Constitution to do so. It shall be for the media to request access from the presiding judge on a case-by-case basis. In that regard it is undesirable for this Court to lay down any rigid rules as to how such requests should be considered. It shall be for the trial court to exercise a proper discretion having regard to the circumstances of each case.

[71]. It remains the duty of the trial court to examine with care each application. That court should exercise a proper discretion in such cases by balancing the degree of risk involved in allowing the cameras into the court room against the degree of risk that a fair trial might not ensue. In acceding to the request, the judge may issue such directions as may be necessary to:

- (a) control the conduct of proceedings before the court;*
- (b) ensure the decorum of the court and prevent distractions; and*
- (c) ensure the fair administration of justice in the pending case.”²⁸*

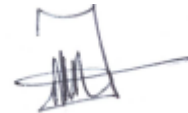
41. The defence averred that witness number one participated in a Netflix documentary covering the incident in this case. However, this averment was not backed by any reliable evidence. It therefore does not fall to be an issue which is deserving of much attention for purposes of the task at hand.
42. The defence argues that conduct on the part of witness number one within social media platforms seems to suggest that she is not camera-shy. However, ability to contend with the glare of cameras and dynamics of exposure to public scrutiny do not make for a complete set of considerations to be made. Realities that come with the magnitude of the case, the emotions it provokes and the sense of affinity, keenness and relatedness of all interested parties to all dynamics obtaining in this case ought to be taken into consideration. They may prove to be overwhelming to a witness.

²⁸. *Idem* fn 8 at para [70]-[71].

43. Advocate Baloyi mentioned that witness number one may find it difficult to testify if her request is not granted. This was perceived as a threat on her part to desist from tendering evidence for the Court to arrive at a just decision. Suffice it to say that appearance before Court for witnesses in court proceedings is largely preceded by the issue of a subpoena directed at a witness. By virtue of the fact that witness number one is to testify on behalf of the State, and considering that she is a layperson, it falls to be incumbent upon the State to appraise witness number one of all applicable legal connotations and implications flowing out of the process.
44. Further than that, like any other citizen, witness number one has an equal right to be heard before any Court of Law. It will not be correct to fault her for having made a request before Court in the manner she did. It became wise of her to engage and to communicate her request, at the same time soliciting the response of this Court and establishing attitudes on the part of the accused persons through their legal representatives where it regards the requests she made. This was done openly and frankly. She is therefore still entitled to fairness in the process which entails her testimony before court.
45. Having found that witness number one deserves to be treated fairly and equally. Her concerns deserve to be taken into regard and determination around them has to be based on a consideration of all of the factors at play. However, the Court finds that where a broadcast of visual images of her testimony may bring unintended adverse consequences to bear upon her, there is no evidence proving that this is more than likely to have. At the same time, there is no evidence showing that an audio-broadcast of her evidence may bring harm to her.
46. Taking all prevailing circumstances into consideration, the Court finds that witness number one did not advance reasons sufficient enough to justify an order restricting both visual and audio broadcast of her evidence. At the same time, there is no reason to subject witness number one to an atmosphere during the course of her testimony which compares worse as

compared to that which prevailed when witnesses number three and four in this case testified.

47. In the result, the Court makes the following order;
- 47.1. Live broadcast of the image of witness number one is not permitted. Prohibition of visual images of witness number 1 shall remain in place until finalization of the proceedings in this case.
- 47.2. Members of the Electronic Media are permitted to live broadcast the testimony of witness number one by means of audio feed.



T. A. Maumela
Judge of the High Court of South Africa
Gauteng Division, Pretoria

Appearances

For the State: Adv G Baloyi, assisted by Adv Sibanda

For accused 1 and 2: Adv Ramosepedi

For accused 3: Adv Mnisi

For accused 4: Adv Nxumalo

For accused 5: Adv Mshololo

For the Media: Mr Dan Rosengarten from Rosengarten & Feinberg Inc

Date of hearing	:17 May 2023
Date of judgment	:18 May 2023