

CASE NO 154/90
/wlb

IN THE SUPREME COURT OF SOUTH AFRICA
APPELLATE DIVISION

In the matter between

JAMES JOCHEMS

Appellant

and

THE STATE

Respondent

CORAM:

ROEXTER, MILNE et KUMLEBEN JJA

DATE OF HEARING: 20 November 1990

DATE OF JUDGMENT: 28 November 1990

J U D G M E N T

/MILNE JA:

MILNE JA:

The appellant, an 18 year-old youth, and his former co-accused (whom I shall call accused No 2) were charged with the murder of one Denzel Ronald Abrahams and with the attempted murder of Gert Lewis. The appellant was convicted on both counts and accused No 2 was acquitted on both counts. The trial court found that there were no extenuating circumstances and sentenced the appellant to death on the murder charge. On the attempted murder charge he was sentenced to 3 years' imprisonment. He applied for leave to appeal against his convictions and against the sentence of death. The trial court granted leave to appeal against the sentence but refused leave to appeal against the convictions. Leave to appeal against both these convictions was, however, subsequently granted by this court.

The deceased was shot twice. One of these wounds caused his death. Gert Lewis was shot once.

The crucial issue at the trial was whether it had been proved that the appellant fired these shots. The case for the State was that the deceased and Lewis were shot on the night of 8 October 1987. Estimates of the time when this occurred varied from about 9 p.m. to 10 p.m. The shooting took place somewhere in the vicinity of a block of flats called Soetwaterhof which consists of two separate buildings and which is situated in the Hanover Park area in the Cape Peninsula. The appellant denied that he was, at any relevant time, present at the scene where the shooting took place. He said that he was at his home that evening and that he was not involved in any of the events attested to by the main witnesses for the State. There is no direct evidence as to where his home is situated. There was,

however, undisputed evidence that the appellant lived near a Mrs Hendriks in whose house accused No 2 lived and accused No 2 said that Soetwaterhof was about half an hour's walk from where he lived. Accused No 2 also denied that he was, at any relevant time, present at the scene where the shooting took place.

The State called Gregory Prinsloo, Fernel Rustin, Denis September and Gert Lewis, the complainant on count two, to testify to the actual shooting. The trial court, rightly in my view, placed no reliance on the evidence of Prinsloo or Lewis. The former gave confused and conflicting evidence as to what he allegedly heard the appellant and accused No 2 say to each other after the shooting. The latter departed materially from a statement he had made to the police and was a manifestly unreliable witness. The trial court convicted the appellant and accused No 2 on the

evidence of Rustin and September.

Before dealing with the evidence of these witnesses it is necessary to call attention to certain aspects of the reasoning of the trial court. As already mentioned, accused No 2 was acquitted on both counts. The trial court's findings in this regard are not altogether clear. As I understand it, the main basis upon which accused No 2 was acquitted was that the evidence of the State proved no more against accused No 2 than that on the evening in question he, in company with the appellant, had chased the deceased and Lewis, and that the State had failed to prove that he had had any weapon with him at that stage or that he had had any criminal intent towards the deceased or Lewis. The learned Judge, however, went on to say the following:

"Dit is dus nie vir my nodig om te breedvoeriglik

verder met sy eie getuienis te handel nie, behalwe om te sê dat sy verhaal van dat hy nie daar was nie, soos gestaaf deur die getuienis van die vrou Shahieda Hendriks, in ons oordeel bloot in isolasie gesien, wel redelik moontlik waar gehou kan word. Ek wil nie daarmee sê dat hy die waarheid praat nie. Ek wil nie daarmee sê dat die Staatsgetuienis se verhaal dat hy inderdaad op die toneel van die skietery was, nie die waarheid is nie. Dit is een van daardie eienaardighede waartoe ons reg hom leen in hierdie verband, dat sonder om te bevind dat die Staatsaak nie waar en betroubaar is nie, geoordeel aan die feit dat sy storie onverstoord deur kruisverhoor was en onverstoord so gestaaf was deur Shahieda Hendriks se getuienis, kan ons die bevinding maak dat sy weergawe redelik moontlik waar gesien kan word."

I understand the effect of the trial court's findings to be that because the evidence of accused No 2 and his witness withstood cross-examination, his version might reasonably be true, but that in any event, the evidence of the State did not go the length of establishing that accused No 2 was guilty of any offence on either charge. Once one says, however, that it is reasonably possible that accused No 2 was not present at the scene of the killing, then it

necessarily follows that it is reasonably possible that the evidence of the State witnesses that he was present and that he and the appellant did chase the deceased and Lewis, is not correct. The trial court nevertheless convicted the appellant on the evidence of Rustin and September saying, with reference to Rustin's evidence,

"... staaf hy en September mekaar in alle wesenlike opsigte dat die twee persone wat agter die oorledene en Lewis gehardloop het, wel beskuldigdes 1 [the appellant] en 2 was."

Having concluded that these two witnesses might be wrong in their identification of accused No 2, it is difficult to understand how it can be said that they corroborate each other as regards the identity of accused No 2. Be that as it may, these findings of the trial court also make it difficult to follow the logic of the conviction of the appellant. The same evidence, namely that of Rustin and September, and no other, was found to be insufficient to

prove beyond reasonable doubt that accused No 2 was in fact one of the two persons who ran after the deceased, but sufficient to prove that the appellant was one of such persons. The opportunity to identify each accused was the same and no features were present to make their identification of the appellant more reliable than that of accused No 2. In these circumstances the finding that the identification of accused No 2 was incorrect necessarily weakens the case against the appellant to a substantial degree. Of course, in concluding that it was reasonably possible that accused No 2 was not present at the scene of the shooting, the trial court, as it was obliged to do, weighed up the evidence as a whole and took into account that accused No 2 and his witness had made a reasonable showing in the witness box. It seems that the trial court rejected the evidence of the appellant because it found that there were material contradictions between the evidence of

the appellant and his mother as to the details of his conduct at the time when, according to the State witnesses, the appellant was on the scene of the crime. As will appear from what I say later, I do not consider that the presence of such contradictions, of itself, justified the rejection of the appellant's evidence. Even if the evidence of the appellant was rightly rejected that would not, in the circumstances, justify his conviction unless the evidence of Rustin and September was both honest and reliable. As will appear later, an examination of their evidence reveals, in my judgment, that, at lowest, it was clearly unreliable.

Furthermore, the trial court's approach to the evidence tendered on behalf of the appellant was, with respect, flawed in several respects. In the first place, the learned judge said:

"Dit bly dus oor om die getuienis wat hier ter inkriminering en verontskuldiging van die beskuldigdes aangebied is, in balans te oorweeg. In die proses moet ons in gedagte hou dat die bewyslas deurgaans op die Staat rus en daar geen bewyslas hoegenaamd op die beskuldigdes rus om die waarheid van hulle alibi te bewys nie."

So far so good. The learned judge, however, then proceeds as follows:

"Hulle hoef slegs die Hof te oortuig met wat hulle vertel dat dit redelik moontlik waar is, gesien teen die agtergrond van die Staatsgetuienis."

Where the onus is clearly on the State, the suggestion that the accused were obliged to convince or persuade the trial court of anything, is misplaced. Perhaps realizing this, he then proceeds:

"Daarmee bedoel ek nie dat daar n bewyslas op hulle rus nie, ek bedoel slegs dat die Hof oortuig moet voel dat hulle storie redelik moontlik waar is."

Once again the use of the word "oortuig" is inappropriate.

If the court finds that their version might reasonably be

true, that is sufficient. There is no question of the court having to be convinced that that is so.

Secondly, the mere fact that there were contradictions between the evidence of the appellant and his mother on the details of what each of them did and saw in the night in question is not, of itself, a sufficient ground for rejecting the evidence of the appellant. That there were differences in matters of detail admits of no doubt. What the trial court had to do was to consider the significance or otherwise of such differences and to evaluate the evidence of each of the witnesses. Thus, if a good witness is contradicted by an indifferent one, that is no reason for rejecting the evidence of the former. No adverse findings of demeanour were made against the appellant nor was it suggested that there was any inherent improbability in his version of what occurred on the night

in question. There is some substance in the submission of counsel for the appellant that the trial court exaggerated the significance of the differences, some of which were possibly explicable on the basis that some of the events testified to by the appellant had occurred before his mother arrived on the scene. Quite apart from that aspect of the matter, the trial court does not seem to have considered the possibility that the appellant's mother's recollection of events which had occurred some two years earlier might be less accurate than that of the appellant.

Be that as it may, the trial court was obliged to consider the evidence as a whole and such defects as there may be in the evidence of the appellant do not materially assist the State in discharging the onus if the evidence of the State witnesses relied upon by the trial court is open to serious criticism.

"The danger of mistaken identification is one to which all judicial officers are or should certainly be alive. Enough has been said and written about it over the years and in various parts of the world to see to that."

S v Ngcobo 1986(1) SA 905 (N) at 906I. I agree, but I nevertheless find it necessary in this case to refer to some of the well-known authorities. In S v Mthetwa 1972(3) SA 766 (A) at 768A-D Holmes JA said the following:

" Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities; see cases such as R v Masemang, 1950(2) SA 488 (AD); R

v Dladla and Others, 1962(1) SA 307 (AD) at p 310C; S v Mehlahe, 1963(2) SA 29 (AD)."

In R v Dladla & Others 1962(1) SA 307 (A) at 310D the following remarks of the trial judge in that case were approved:

"In a case where the witness has known the person previously, questions of identification marks, of facial characteristics, and of clothing are in our view of much less importance than in cases where there was no previous acquaintance with the person sought to be identified. What is important is to test the degree of previous knowledge and the opportunity for a correct identification, having regard to the circumstances in which it was made." (My underlining)

The degree of previous knowledge which Rustin and September had of the appellant cannot be said to have been properly tested. The trial court found that both these witnesses "... die gesigte van die twee beskuldigdes redelik goed geken het." The evidence does not bear out this finding. The evidence of Rustin on this aspect was as

follows:

"Het u die beskuldigdes geken van voor die aand af? --- Ja, Meneer, ek het al vir hulle geken al Meneer voor daai.

Het u hulle by name geken? --- Nie by name nie, by bynaam, Meneer.

By hulle byname? --- Ja.

Wat ek bedoel, het u met hulle al gepraat voorheen, met hulle te doen gehad? --- Nee, ek het nie eintlik met hulle gesels nie, maar ek het hulle al geken al, met aangesig, Meneer.

Vir hoe lank sou u sê het u hulle geken al? --- Omtrent - van daai tyd af Meneer omtrent mooi drie jaar of vier.

Altwee van hulle? --- Omtrent daai tyd kan ek nou sê Meneer."

There was no investigation at all as to when or in what circumstances or with what degree of frequency the witness had seen the appellant and accused No 2 during this alleged period of "omtrent mooi drie jaar of vier". In the case of September the evidence is even more exiguous. Indeed, the only evidence on the point relates to the fact that after the shooting September asked Rustin who the two whom he said had done the shooting were. His evidence in chief was as follows:

"Nou goed die mense, het u hulle geken? --- Op daardie stadium, 'but' ek het hulle nie geken by hulle name nie, toe vra ek die een wat saam met my gesit het, toe vra ek vir hom 'but' ken jy die mense, toe sê hy vir my ja hy ken die mense, toe sê hy my die naam, toe sê hy vir my die ene is Joepie en die ene is Herkie.

Het u die twee manne al voorheen gesien? --- Ek het, 'but' ek het hulle nie - ek het hulle al voorheen gesien al, maar ek het hulle nie geken by hulle name en so nie, net van aansien en so."

The matter was not taken much further from the point of view of the State by the following passage in cross-examination:

"En u het getuig dat op daardie stadium het u nie geweet wie is dit nie, ek bedoel u het nie name geken nie? --- Korrek ja.

U het vir Fernel[Rustin] gevra wie is dit? --- Ja.

En wat het u met daardie vraag bedoel? --- Vir Fernel gevra, 'but' ken jy hulle name toe sê hy my - voor ek kan vir hom kon vra die naam toe sê hy vir my ja daai is Joepie en daai is Herkie.

Kan jy onthou wat was jou woorde aan Fernel gewees, wat het jy vir hom gevra? --- Wat ek vir Fernel gevra het, is ken jy hulle, daai is wat ek vir hom gevra het.

Ken jy hulle? --- Ken jy vir hulle, ja dit is wat ek nou gevra het.

U het nie gevra wie is dit nie? --- Nee ek het nie gevra wie is dit nie, ek het hom gevra ken jy vir hulle.

Want in jou getuienis in hoof het jy vir hom gevra soos ek my notas hier staan het jy gevra wie is dit? --
- Ek het hom gevra 'but' ken jy vir hulle, ek sal dit so stel, mens kan mos net so goed sê wie dit is en dan nou wie is hulle, 'but' ken jy hulle.

Maar as jy vir hom - maar jou getuienis is dat jy wel vir die mense geken het van aansien? --- Ja 'but' ek ken mos nie hulle name.

Maar jy weet nie wat is hulle name nie? --- Ja korrek ja.

Maar sou dit dan nie meer - sou n mens in so n posisie dan nie gesê het ek ken die mense, nie wie is hulle nie, want jy het hulle mos geken, al het jy nie hulle name geken nie? --- Ja 'but' hy ken hulle mos.

Het jy nie vir hom gesê jy ken...(tussenbeide) ---
Dit is wat ek gevra het, 'but' ken jy hulle.

Ek ken die mense? --- Sou ek sê?

Ek sou gedink het dat jy vir hom gesê het ek ken die mense, want jy het hulle geken? --- Ja 'but' ek ken mos nie hulle name nie, ek ken hulle nou van aansien, kyk as ek u sien net van aansien dan gaan ek mos nie sê ek ken u nie as ek nie u naam ken of so nie? --- Maar hoekom het u nie vir hom gevra nie wat is hulle naam, dis mos wat jy nie ge...(tussenbeide) --- Ons verstaan mos mekaar, wat ek vir hom vra 'but' ken jy hulle, toe sê hy my ja die een is Joepie en die een is Herkie.

Ja maar dit klink vir my asof jy wel nie vir hulle geken het nie? --- Soos ek gesê het ek het geken net van aansien.

Maar ek stel dit aan jou dat van wat jy nou vir die Hof vertel het dat jy nou vir Fernel gevra het wie is hulle of ken jy hulle, dit klink vir my asof jy wel nie vir hulle daardie tyd herken het en jy het vir hom

gevra wie is hulle toe sê hy vir hulle, hulle is Joepie en Herkie? --- Ja ek het hulle geken daai...(tussenbeide)

Daarom weet jy ja dis Joepie en Herkie? --- Ek het hulle mos geken by die gesig, 'but' ek weet nie wat hulle name is nie."

If, as September concedes may have been the case, he asked Rustin with reference to the two alleged assailants "Who are they?" this suggests, as a distinct possibility, that he did not know them at all rather than that he did not know their names. In any event, the degree of knowledge is slight and, in his case too, the degree of frequency with which he had seen the appellant and accused No 2 before, and the circumstances under which he had seen them, were not properly investigated.

Nor was the opportunity for a correct identification in any way adequately tested. I shall, in

due course, deal with differences in their respective versions but what may be extracted from the evidence of Rustin and September as being common to both versions at the critical time is the following: They were standing on the landing of an external flight of stairs between the two blocks of Soetwaterhof at third storey level at about 9 or 10 o'clock at night when they saw a taxi without its lights on, coming down a road towards Soetwaterhof. The taxi disappeared from sight behind some buildings and at that stage there were two people standing near one of the corners of one of the blocks of Soetwaterhof. (I shall call these two people "the leading couple"). Two other people whom they could not, at that stage, identify (and whom I shall call "the pursuers") then came round a corner and chased the front couple. One of the pursuers had a fire-arm in his hand. Shots were then fired. After the shots had been fired the pursuers walked, or trotted, or ran through the

area between the two blocks of Soetwaterhof and below the stairs on which Rustin and September were standing. (This area was inaccurately referred to in evidence as a passage and I shall continue to use that word although the distance between the two blocks was 18 metres.) They then identified the pursuers as the appellant and accused No 2. The pursuers then walked off in the direction of Solent Court, a nearby block of flats. Rustin and September then descended the stairs and found the deceased lying on the ground at a place west of the most western block of Solent Court and not far away from him on the same side of Solent Court, Gert Lewis injured.

The trial court was faced with substantial problems in ascertaining what opportunities Rustin and September actually had for correct identification. In the first place the police plan, which was put in by consent,

was inadequate and indeed misleading. The two blocks of Soetwaterhof were indicated as being extremely close to one another and, what is more, exactly parallel and in line with each other. As already mentioned, however, there was a distance of some 18 m between the blocks and the western block had its northern side quite considerably south of the northern side of the eastern block. The exact position of the stairs from which the vital observations were alleged to have been made was not indicated on the plan at all. To make matters worse, Rustin and September were not *ad idem* as to where the stairs were situated. One of them said the stairs were more or less in the middle of the passage and the other said that they were more to the southern end of the passage. Moreover, one has no indication of the height of the landing above the ground. The plan has on it no less than four large dots with crosses through them. The key to the plan has on it the following "Oorledene + beseer X".

One would expect therefore that this sign would indicate where the deceased and presumably Gert Lewis, the "beseerde", was found. There is nothing, however, to indicate which was which. What is more, there were two similar marks just south of the eastern block of Soetwaterhof. Counsel for the appellant and counsel for the State were, however, in agreement that in fact the body of the deceased was found more or less opposite the middle of the western block of Soetwaterhof, that Gert Lewis was found lying injured on the same side of Soetwaterhof but more towards the south and that the two marks just south of the eastern block indicate the position of the front couple when they were first observed by Rustin and September. The plan also indicates by means of arrows and dashes the direction in which the pursuers are alleged to have chased the front couple. It does not, however, indicate the route alleged to have been taken by the pursuers after the shooting.

That the trial court was conscious of the defects in the plan, appears from various remarks of the learned judge in the record and also from the following remarks which he addressed to counsel for accused No 2 after a vain attempt by counsel to get a proper description of the stairs from the witness September:

"HOF: Mnr Douglas, na tien minute van moeisame ondervraging is die Hof presies nog net so in die duister oor hoe dat dit daar lyk, as u wil daaroor 'n punt maak dan stel ek voor dat u self gaan kyk na die plek en miskien getuienis daaroor aanbied, want hierdie man kan nie vir ons beduie hoe dit daar lyk nie."

It is true that the cross-examination did not dispel the lack of clarity but the solution was, I venture to suggest, to be sought not in a visit by counsel to the place where the shooting occurred but an inspection-in-loco by the court. This was not, apparently, ever considered by the Court nor was it suggested by counsel for the State or either counsel for the accused.

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What makes the task of this court more difficult is the frequency with which witnesses referred in the vaguest of terms to particular places or areas without the precise place or area being recorded. For example, the following passage occurs in the evidence of September:

"Kan u nou vir ons sê wat u gesien het of wat u kan sien as u daarbo staan, kyk nou maar na die plan dan sê u vir ons wat 'n mens alles kan sien as 'n mens daarbo staan? --- Wat ek kan sien, as ek hier bo-op die 'stairs' staan dan kan ek regoor sien tot daar by Solent Court se hof en 'n stuk van die Solenthof, mag ek dit so wys, en dan kan ek regoor sien, as ek dit op die 'stairs' sien dan kan ek hier regoor sien tot daar, ek kan die 'court' sien hier en as ek diékant toe kyk dan kan ek hier deur die pad van die 'civic' sien hierso en daar wat op die veldjie aangaan en daar waar die 'caretaker' en so aan, dis wat ek kan sien daar."

No attempt was made to place on record what the witness meant by "daar", "hier", "diékant", "hier deur die pad van die 'civic'", "hierso" or "daar waar die 'caretaker'". On some occasions the trial judge did indeed place on record what "hier" or "daar" or similar expressions referred to but

there are many such references which remain unexplained. To add to the confusion, the State witnesses spoke in a manner characteristic of the young underprivileged. The following passage from the evidence of Rustin will suffice to illustrate what I mean:

"Toe ry die taxi nie vinnig nie Meneer, op 'n 'slow' spoed toe ry hy Meneer, toe kom hy - maar die ligte was dood gewees en die dinges was donker gewees, hulle was so gedinges, 'colour' was so 'n donker 'colour' gewees was die taxi gewees, maar die egte 'colour' van die taxi self Meneer dit was wit en rooi gewees, toe kom die taxi meer na die 'court' se kant toe, toe wat ek weer sien Meneer toe sien ek daar gaan die taxi agter by die 'court' verby en toe wat ek weer sien toe sien ek die taxi is weg agter die 'court'".

The only evidence as to the position of the lights is that recorded on the plan. That evidence does not support September's bald statement that the light in the passage was bright. The effect of the evidence was that the length of the passage was at least 80 m (and possibly more

bearing in mind that the two blocks were not in line with one another). According to the police plan the only electric light poles were at either end of the passage and the electric light pole at the southern end of the passage was round the corner outside the passage thus throwing less light into the passage. Before even considering the consistency and honesty of the versions given by Rustin and September one has, therefore, the situation that the trial court was given a confused picture of the scene. Thus no foundation was laid for the Court to test objectively whether reliable identification was feasible. Even taking their evidence at face value, the two State witnesses were making observations from a landing three storeys up at night, where it is far from clear what the light conditions were, where the scene was a highly mobile one and where the period during which the alleged identification occurred was very short. It appears from the evidence, furthermore, that

no identification parade was ever held.

On analysis of the versions of Rustin and September it is apparent that there are serious inconsistencies on material points which cannot be brushed aside nor explained, as suggested by the trial court, on the basis that they are the sort of differences one would expect from witnesses testifying to events which had occurred two years earlier. They were, in my judgment, not the kind of peripheral differences of detail which were exposed in the case of the appellant and his mother. They related directly to the probabilities and to what the witnesses were able to see and did see at the crucial stage. The platform, both physically and metaphorically speaking, on which the State bases its case, is the third floor of the landing of the staircase on which Rustin and September were allegedly standing when they observed the shooting. If one examines

the evidence as to how they came to be there and why they were there at all at the critical time, it is far from satisfactory. Rustin said that he went to borrow a long-playing record from September, that he was told by members of the Vulture Kids gang that September was on the landing of the stairs and that he indeed found him there. A long conversation then ensued, so he says, between them about this long-playing record and the gang fights which had occurred earlier that day. He said that the conversation could have lasted as long as two hours. They both then saw the taxi arrive which occurred just before the shooting. September, on the other hand, says that Rustin was not there at all when the taxi arrived, but after the taxi arrived, he decided to go up and sit on the landing, that Rustin then arrived and after a few minutes conversation in which no mention was made of gang fights or any other events of the day, the pursuers arrived on the scene. Not only is there a

marked difference in the two versions but the question arises firstly, as to why September remained on the landing and did not go into his flat which was in Soetwaterhof and secondly, why the two of them would have remained there instead of having their discussion in September's flat. This was raised in cross-examination and September's answers are unsatisfactory:

"Nou wanneer het julle trappe toe gestap? --- Wat die taxi verby is.

Ja, nou hoekom het julle trappe toe gestap? --- Toe stap ek op trappe toe.

Ja? --- Toe gaan ek daarbo staan.

Hoekom? --- Omdat ek nog nie lus gehad het om huis toe te gaan daai tyd nie.

Maar hoekom staan 'n mens bo-op die trappe, net om daar bietjie te rus of wat? --- Dis nie gewees om te rus nie, want wat ek op trappe toe gaan toe sien ek hoe Denzil en Gert huis toe gaan, toe kan ek nog vir hulle dophou hoe hulle huis toe gaan en my gedagte was as hulle moet huis toe gegaan het dan sou ek toe vir Fernel [Rustin] mos die plaat gee het mos.

Ja, maar wanneer het jy trappe toe geloop, nadat die taxi toe verby is? --- Korrek ja.

Maar hoekom wou jy vir Denzil en vir Gert agterna kyk as hulle huis toe loop? --- Hoe bedoel u hoekom?

U het nou net gesê u het op die trappe gaan staan

om vir hulle agterna te kyk? --- En dan kon ek hulle mos sien, dan kon ek mos sien hoe hulle huis toe gaan, want toe almal daar weggaan toe is ons twee alleen, want hulle moet nog ver omloop en ek woon sommer net hier (onduidelik).

Ja, maar hoekom het jy nie huis toe gestap nie?--- Soos ek reeds gesê het ek het nie gevoel daai aand om huis toe te gaan nie.

Maar waarom spesifiek op daardie trappe gaan staan daar? --- Ek is gewoond te staan daar op daai trappe."

This raises a doubt whether in fact September and Rustin were ever on the landing as they say. One must bear in mind that the background to the shooting is the enmity between rival gangs operating in the Hanover Park area and in particular the Vulture Kids gang to which the deceased belonged and the Americans gang to which the appellant belonged. It appears from the evidence that:

- (a) Rustin was a member of the Back Street Kids gang which was well-disposed towards the Vulture Kids gang and hostile towards the Americans gang;
- (b) September was a founder and leader of the Vulture

Kids gang;

- (c) the deceased was a co-founder of the Vulture Kids gang and September described him as his blood-brother;
- (d) the appellant had been a leader of the Americans gang and was still regarded as such by Rustin and September and accused No 2 had, according to his evidence, also "saam met hulle [the Americans] geloop"; and
- (e) there was bitter animosity between the Americans gang on the one hand and the Vulture Kids gang and the Back Street Kids gang on the other.

It is thus apparent that there was a possible motive for both the State witnesses to implicate the appellant falsely. As counsel for the appellant submitted, it was probable that Rustin and September

"would have gone to great lengths to revenge the death of their leader (and/or founder) and friend by implicating a leader figure of the opposite gang."

The trial court was, as is apparent from the judgment, fully aware of this possibility but does not, with respect, seem to have given it sufficient weight in evaluating the credibility and reliability of Rustin and September.

There is a striking inconsistency between the evidence of Rustin and the evidence of September as to where the shooting first occurred. Rustin said that while he was on the landing with September he saw the leading couple first on his right at the southern end of the passage and then on his left at the northern end of the passage; a short while thereafter the pursuers appeared and the leading couple ran off in a westerly direction being chased by the pursuers and shots were heard. September, on the other hand, said that he watched the leading couple walk home in

the direction of Solent Court. Now, Solent Court is to the south-east of Soetwaterhof. He says that the leading couple had just disappeared from view when he heard a volley of shots. The effect of his evidence is therefore that the first shots were fired when the leading couple were walking from the southern end of the passage towards Solent Court, whereas Rustin's evidence is that the shooting first occurred at the northern end of the passage when the leading couple were moving in a westerly direction. What is more, Rustin contradicted himself as to whether he saw the shooting or only heard it. When cross-examined by the appellant's counsel he said that when the pursuers were chasing the leading couple, the pursuers began to shoot (a statement which he later qualified by saying only one had a fire-arm) and he was asked "Het hulle agter die hof verdwyn toe hulle geskiet het en jy die skote gehoor?", to which the answer was an unequivocal "Ja". Later, however, he said

that he actually saw the shooting and denied that he had said that he had not seen the shooting. September, on the other hand, says quite clearly that he did not see the shooting. Each of them is alleged to have observed the shooting from the same landing at the same time. Rustin furthermore said that when he saw the leading couple and the pursuers at the northern end of the passage he could not see their faces but, describing the pursuers, he said "... ek het gesien dis 'n grote en 'n kleintjie langs mekaar loop...". I shall return to the significance of this description of the pursuers at a later stage. Having said that he could not see the faces of or recognize any of the four people at the northern end of the passage he nevertheless persisted in saying that he saw the appellant doing the shooting. One of the assessors attempted to clarify the picture in the following series of questions:

"MNR KELLAWAY: Wanneer vir die eerste keer het jy

gesien hoe die twee mense wat gejaag het, hoe hulle gekleed was? --- Hoe hulle gekleed gewas het Meneer?

Ja watter soort klere het hulle aangehad ja, wanneer is die eerste keer wat jy dit sien? --- Wat hulle verby die eerste hoek is.

Ja. --- Toe kan ek sien.

Hoe hulle gekleed was? --- Toe kan ek die 'tracksuit'-broeke sien.

En die mense wat teruggekom het, hoe was hulle gekleed? --- Ek het gesien hulle het dieselfde 'tracksuit'-broeke aangehet.

Was dit dieselfde mense? --- Ja, Meneer."

This attempt to get some clarity was, however, in vain since it is quite clear that he said that the pursuers only came through the passage once and that this was after the shooting had occurred. Nevertheless, in cross-examination by appellant's counsel when Rustin was asked about this occasion when the pursuers allegedly trotted through the passage below the landing, one finds the following:

"Nou toe hulle verby gedraf het, het u gesien die een man het 'n blou 'tracksuit' aan? --- Ja.

En h Balaklawā op sy kop? ---Ja."

If that means what it says, namely that it was when they trotted through the passage that he noticed what the pursuer was wearing, then there is no basis upon which it can be said that he could identify the pursuers as the two who had trotted through the passage. (I interpose here to comment that, if the deceased and Lewis were shot on the western side of the western block of Soetwaterhof, then it is difficult to see why their assailants would have gone back on their tracks to the northern end of the passage and run through to the southern end if they were heading for Solent Court instead of simply carrying on in the same direction that is to say, from north to south, until they reached the south-westerly corner of the westerly block of Soetwaterhof and then turning in an easterly direction going to Solent Court.) One finds similar discrepancies in the evidence of September identifying the pursuers. Even in his evidence in

chief September contradicted himself as to what he could see of the clothing of the two pursuers. He said that the one had a dark-coloured tracksuit with a dark "baadjie ... 'but' ek kon nie sien wat die ander een het nie ...". On the very next page of the record, when he was asked whether he could remember anything of the other man's clothing, he said "Hy het ook so 'n donkerkleurige 'tracksuit' aangehad en ook 'n donker baadjie." Again it is of crucial importance in September's evidence that he said he knew that the two who had trotted through the passage were the two pursuers because they had "dieselfde kleredrag". Yet it is quite clear that he said they only came through that passage once and equally clear that it was only at that stage that he saw what they were wearing.

"Mnr September, ons was nou op die stadium wat u daar op die trappe gestaan het en die twee mense voor u verbygehardloop het in die gang tussen die twee blokke woonstelle. Kan u vir die Hof sê hoe hierdie mense gelyk het, die mense wat hulle aangehad het? --- Ja, ek

kan sê vir die Hof wat hulle (woorde onduidelik)

Ja, praat net mooi hard en duidelik --- Wat hulle onderdeur ons kom toe kon ek sien watter kleredrag hulle aan het."

In view of the fact that the degree of previous knowledge was not tested these unsatisfactory features about the purported identification of the appellant and accused No 2 are significant.

An even more significant incongruity is that both Rustin and September were adamant that there was a substantial difference in height between the two pursuers. As already mentioned Rustin said that at the first opportunity he had of observing the pursuers "Ek het gesien dis 'n grote en 'n kleintjie langs mekaar loop". September also spoke about the "grote" with the gun and the "kleintjie". In cross-examination he said that the

difference was "amper 'n kop" and then increased it to "omtrent seker by die skouer gesit". Counsel for the appellant, appreciating the importance of this evidence, arranged for the appellant and accused No 2 to stand next to each other in court and the learned judge then recorded that the difference was "omtrent twee duim". In the light of this observation it is difficult to understand how he came to state in his judgment:

"Ek mag net hier byvoeg dat beskuldigde no 1 [the appellant] opsigtelik langer as beskuldigde no 2 is".

What is more, at a later stage in his judgment, he says:

"Mnr Saner het ook tereg daarop verwys dat hulle getuienis [that is the evidence of Rustin and September] oor die aansienlike verskil in lengte tussen die twee manne nie ooreenstem met die werklikheid van beskuldigdes 1 en 2 se lengtes hier voor die Hof nie. Hy dui daarop dat alhoewel beskuldigde no 1 'n bietjie langer as no 2 is hy nie 'n hele kop langer as no 2 is, soos wat getuig is nie. Dit is egter ons oordeel dat dit ook moontlik 'n parallaksfout is wat redelikerwys begaan kon word vanweë die hoek waarteen die twee mense van bo af na die mense se lengte moes kyk en dit het afgehang van die distansie tussen die twee manne soos

hulle beweeg het."

This material weakness in the State case cannot be reasoned away on this basis. In fact, if the two State witnesses were looking down on to the pursuers from three storeys up, that would tend in the eyes of the viewers to diminish the difference in height rather than accentuate it and the matter certainly cannot be explained on the basis of being "n parallaksfout". The word "parallax" means the apparent displacement, or difference in the apparent position, of an object caused by the actual change (or difference) of position of the point of observation. That does not arise here. Each of the two State witnesses were, on their version, observing from exactly the same point of observation through out the relevant period. Nor can the distance between the two pursuers explain away this weakness since Rustin said "Hulle het naby mekaar geloop" and September said they were no more than a meter apart. As

counsel for the appellant pointed out the court a quo held that both Rustin and September had had sufficient opportunity properly to observe the pursuers below them so as to make a positive identification. If that is so, then either the witnesses observed the two men below them properly and were not mistaken as to the marked height difference between them, in which case the pursuers could not have been the appellant and accused No 2; or else the two witnesses did not have sufficient opportunity for proper observation given rise to the mistake as to the height in which case the whole accuracy of the identification is then called into question. The trial court also remarked in this regard

"Daarby sal in gedagte gehou word dat beskuldigde No 1 [appellant] inderdaad toe hy verby gestap het, met die met die pistool langs sy kop nog opgekyk en nog rondgekyk het of iemand hulle sien en dat hulle deurgaans 'n goeie beeld van sy gesig het"

and

"soos ek egter reeds uitgedui het, wat beskuldigde no 1 se gelaatstrekke betref het hy wel deeglik die geleentheid aan die twee waarnemers gebied om hom te herken deur op te kyk en rond te kyk terwyl hy onder hulle verby gestap het."

It is true that Rustin said in cross-examination that the two pursuers "... het nog in die rondte gekyk wie vir hulle dophou en wie agter hulle kom, Meneer". The trial judge then asked "Het hulle opgekyk boontoe na jou toe?" This was a distinctly leading question which may affect the weight of the answer but in any event the answer was "Hulle het omtrent s6 gekyk, Meneer, na onse kant toe." The learned judge then asked three further questions as follows:

"Na jou toe? --- Ja, Meneer.

Toe sien hulle jou? --- Hulle kon my nie gesien het nie want die lig Meneer, dit was 'bright' gewees.

Die lig, was dit in hulle oë? --- Ja, die lig was ook daar bo gewees."

Now had the pursuers in fact looked up at Rustin and September so that the latter had a good view of the faces of the former, one would have expected them to have volunteered

that as an important part of their identification. That they did not, may be an indication that a glance in the direction of observers on a third storey landing at night with lighting coming from above and some distance away, would not necessarily reveal the faces of the men below. There is, furthermore, an interesting contradiction in Rustin's evidence which bears upon this point. When it was put to him in cross-examination that he and September had got together and made up a story, he said

"Nee, Meneer, ek het nie 'n storie opgemaak hiervan nie, ek het dit gesien, Meneer, en die twee beskuldigdes het ook vir ons gesien, toe was hulle plan om weg te kom."
(My underlining)

This is in direct contradiction to his evidence given in answer to questions by the trial judge where he said "Hulle kon my nie gesien het nie ...".

It is perhaps necessary to mention one more

contradiction in the evidence of Rustin. In his evidence the following passage appears in answer to questions by the learned judge:

"Kon jy die twee manne uitken, die twee manne wat daar voor die ander twee gehardloop het? --- Nee Meneer.
Nie geweet wie dit is nie? --- Ja Meneer.
Nooit geweet wie dit is nie? --- Daardie stadium het ek nie geweet dit is hulle twee nie.
Het jy op enige stadium geweet wie hulle is? --- Nee Meneer."

Rustin is obviously referring here to the leading couple. The effect of his last answer is that he did not at any stage know who the leading couple were. Nevertheless, in cross-examination by counsel for accused No 2, he says that the deceased wanted to run into the passage

"toe sê Dwerg [accused No 2] hom 'nee' toe draai hulle weer terug, Meneer."

At a later stage he said he saw the deceased fall and then stand up again. Counsel for accused No 2 then said to Rustin

"So jy het hom [the deceased] daar uitgeken?"

which elicited an answer in the affirmative and the following questions were then asked by the trial judge

"Terwyl hy daar val? --- Ja, Meneer.

Kon jy toe sien dit is die oorledene? --- Ja.

Kon jy sien wie dit is? --- Ja, Meneer.

Het jy hom herken? --- Ja, Meneer.

Jy het dan nou-nou gesê jy het nie die manne kon herken
het daar nie? --- Nee, die agterste twee."

If, when he said that he did not at any stage know who they were, he was referring to the "agterste twee" then that destroys his evidence identifying the pursuers. In fact, I am left with the impression that Rustin actually saw nothing of the shooting and he admitted as much at one stage in his cross-examination.

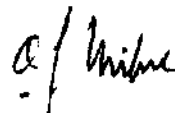
"Ek stel dit aan u dat u nie eintlik gesien het wat daar gebeur het, maar dat u wel net gehoor dat skote klap. --- Ja, Meneer."

In all these circumstances, it is apparent that

the evidence of September and Rustin identifying the appellant and accused No 2 as the pursuers was unreliable and it may well be deliberately dishonest. The evidence of Prinsloo and Lewis having been rejected, there was no other evidence implicating the appellant and it follows that he should have been acquitted on both counts.

I place on record our appreciation of the carefully reasoned and well-presented argument of counsel for the appellant and the fair and objective approach of counsel for the State.

The appeal accordingly succeeds and the conviction and sentence on each count is set aside.


A J MILNE
Judge of Appeal

HOEXTER JA]
] CONCUR
KUMLEBEN JA]