

IN THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPORTABLE: NO/YES

OF INTEREST TO OTHER JUDGES: NO/YES

REVISED.

Signature

[REDACTED]

Date

25 February 2025

CASE NO: A148/2022

MALOSE GIFT SHIMA

1ST APPELLANT

ISHMAEL CONDRI HLABATHI

2ND APPELLANT

and

STATE

RESPONDENT

DATE OF JUDGMENT: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 25 FEBRUARY 2025

JUDGMENT

KHUMALO J (ALLY AJ concurring)

Introduction

[1] The Appellants, exercising their automatic right of appeal in terms of s 309 (1) (a) of the Criminal Procedure Act 51 of 1977 ("the Act") are appealing against their

conviction by the Regional Court, Benoni (the court a quo) on 1 April 2022 on 2 counts of premeditated murder and sentence of life imprisonment the court imposed on 4 April 2022 for each of the convictions.

[2] The Appellants were also arraigned on a 3rd count, that is of robbery with aggravating circumstances however acquitted on that charge for lack of evidence.

[3] During the trial the Appellants were duly represented. The 2 counts of murder for which they were convicted were read with the provisions of s 51 (1) of the Criminal Law Amendment Act, 105 Of 1997 ("the Amendment Act") namely that "on 26 May 2019 at or near Crystal Park acting in the furtherance of a common purpose the Appellants intentionally and unlawfully murdered one Jacobus Johannes Janko Fleishman ("Janko"), a male person and Jessica Kuhn ("Kuhn"), a female person (both referred to as "the deceased") by shooting at them." As to the 3rd count of robbery with aggravating circumstances, that they intentionally and unlawfully in furtherance of a common purpose assaulted Joseph Raimos, took with force his cellphone valued at R280.00 and cash valued at R10.00. They both pleaded not guilty to all the charges.

[4] Following the Appellants' plea, which in essence was a denial that they were present on the scene, they proffered their admissions in terms of s 220 of the Act in relation to the identity of the deceased, the date, time and location of the incident, the contents and the authors of the post mortem report relating to the deceased's cause of death, the photo album with regard to the scene, the items and the cartridges found at the scene, without any qualifications.

[5] The salient facts are that on the date of the incident at around 11 am, a silver bakkie in which the deceased and two other passengers Joseph Raimos ("Raimos") and January Gonye ("Gonye") were travelling in ran out of diesel after they have off ramped onto the N12 and Putfontein Road. They stopped on a bridge near a squatter camp where the bakkie stood stationery on an island. Three men were seen by Raimos and Gonye, approaching the bakkie. Raimos at the time was walking away from the bakkie and thereafter Gonye noticed the three men near the bakkie one of the men holding a gun. The man with a gun shot at the deceased. The bodies of the deceased were found by the police who arrived at the scene shortly after the shooting. Gonye

and Raimos separately ran away after witnessing Janko being shot and falling down. They both could not identify the three men.

[6] The trial court convicted the Appellants based on the evidence of one Mkhize who came forward and reported to the police a year after the incident. Mkhize reported to have seen on that date and time of the incident the 1st and 2nd Appellant passing by a shack where he was drinking. The Appellants were walking hurriedly towards the tar road to a bridge nearby and 1st Appellant held a gun in his hand. Another male, Tebogo, who was at the shack also drinking, joined the Appellants and together the three proceeded to the direction of the bridge. Shortly after the Appellants had passed them they heard gunshots from that direction. They looked at that direction and saw the three, that is the Appellants and Tebogo running back from where the bakkie was stationery on the bridge. The three jumped a fence into the squatter camp and disappeared into the shacks.

[7] Raimos testified to have passed the three men walking towards the bakkie on his way to get diesel as sent by Janko. One of the men tried to trip him. He ignored the man and continued walking. A minute thereafter he heard gunshots. He looked back and saw Janko falling down. He ran away. According to Gonye he was busy at the bonnet of the vehicle, whilst Janko was standing outside the passenger window talking to his girlfriend when the three men approached the bakkie. On seeing Janko, one of the men who was holding a gun shot at the deceased. Gonye said fearing for his own life, he ran into the nearby bushes. Neither Gonye nor Raimos was able to identify the perpetrators.

[8] The trial court found Mkhize's evidence to have been corroborated by Gonye and Raimos' circumstantial evidence who both testified to have encountered the three men and saw one of the man who was holding a gun, shoot at the deceased. Also Mkhize's evidence to have been further corroborated by the documentary evidence that was admitted in terms of s 220, mainly the post mortem report that indicated that the deceased Janko was shot four times whilst Kuhn was shot three times. As a result, considering the whole evidence the court found, notwithstanding that Mkhize was a single witness and the only one who could positively identify the Appellants, that the state had proven the Appellants' guilt beyond reasonable doubt for the premeditated

murders. Whilst rejecting the evidence of the Appellants which it found not to be reasonably possibly true.

[9] The Appellants are appealing their conviction on the basis that the learned magistrate erred:-

[9.1] as he relied on the evidence of Mkhize a single witness, in convicting the Appellants when he ought to have applied the cautionary rule as it is expected of the court in its verdict against the Appellants. He therefore erred in not entirely applying caution to the evidence of Mkhize.

[9.2] by contradicting himself when during the summary of evidence about the inspection *in loco*, he said "we indeed walked in between the shacks down the passage for approximately 30 metres. From where we walked in between the shacks, it seems as if though there was no way that this witness could have seen what he said he observed. We went to the exact spot where he sat drinking with Tebogo and others. The shack where he showed us and stated that he was drinking was no longer there but "the spot was still there." In so doing the learned regional magistrate was doing more than just summarizing the evidence as it was presented before the court but entered the fray by amplifying the state's case and corroborating the evidence of Mkhize when he said but the spot was there, as if such was corroborated or verified by an independent person or witness. In so doing the learned Magistrate misdirected himself.

[9.2.1] Further, the magistrate by so doing was going beyond the inspection, but the question remains that the inference to be drawn has to be consistent with the proven facts and it is the Appellants contention that the learned magistrate misdirected himself in that regard.

[9.3] in not being mindful that there is nothing of material nature that links the Appellants to the offence except the evidence of Mkhize, no firearm was found or any item of value that could connect the Appellants to the offence. So for the inference to be drawn there must be more than just the evidence of Mkhize given to the police after a year.

[9.4] The circumstantial evidence upon which the trial court relied on in convicting the Appellants is more to the manner in which the offence of murder was committed, but it does not relate to the identification of the Appellants. It is a further misdirection by the learned magistrate to come to a conclusion that he was satisfied that the witness Mkhize knew the Appellants and that as a result he could not make a mistake about the identity, despite the Appellants insisting to the contrary and without any corroboration of some sort whether from an independent person or from any form of evidence, ie from an independent source, for example forensic or otherwise.

[10] On the sentence, the Appellants' take on it is that it is to be reconsidered only if the court finds in favour of the Appellants on the appeal on conviction, as it did not induce a sense of shock for the crime charged.

The evidence led

The state's case

[11] Mkhize, the key state witness, was at a nearby shack in the squatter camp, not far from the bridge and the road where the incident occurred, which is approximately 200 meters away, drinking. He was in the company of three other males, one of whom was Tebogo when they saw the Appellants walking past them at quiet a pace, hurrying towards the tar road to the bridge. He knew the Appellants as he used to see the 1st Appellant more or less twice a week and the 2nd Appellant who is a tuckshop owner from whom he used to buy cigarettes on a daily basis as he is a smoker. They all stay in the same area, so they will greet one another when they see each other and the relationship was fine until the incident happened. The Appellants passed the shack, the 1st Appellant was running in front holding a firearm in his hand followed by the 2nd Appellant. Tebogo joined the Appellants, together they hurried towards the tar road, that was 30 meters away from where Mkhize was sitting, they turned left into the road towards where the bakkie was stationery. He thereafter heard several shots. After seven shots it became quiet, that is when he looked towards the bridge and saw the Appellants and Tebogo running back, away from where the bakkie was stationery. They jumped the fence and went into the shacks. He does not know where they ended up.

[12] The police arrived later and started kicking everybody asking them about the whereabouts of the three men. He went towards the road but did not reach the scene. The deceased's bodies were already covered. He did not report to the police that day what he observed for the reason that he feared for his life and the police work with the perpetrators. The Appellants were also aware that he saw them hurrying to the place where the murders occurred. Following the incident he left and went home to KZN. He came back a year thereafter in 2020 and reported the matter to Colonel Motaung in Crystal Park as she was more trustworthy. He pointed out the Appellants to the police. He confirmed not to have actually seen the actual shooting but to have heard the gunshots after the Appellants passed them with 1st Appellant holding a firearm, walking towards the road where the bakkie was stationery. After they were seen running away from there, bodies were found.

[13] Under cross examination Mkhize's evidence was that they were seated at a second shack after the passage which is not far from the tar road. So it is the tar road, 100 meters away from the passage, then the shacks. The bridge was visible from the shack. For him to be able to have a clear view he will have to go to the passage or to stand up to see clearly and which is what they did. They stood up when they heard the sound of the gunshot coming from the direction of the bridge. He could positively identify the Appellants whom he knew and that 1st Appellant was carrying a firearm. At the time when Tebogo joined the Appellants they did not care much about that but were worried that 1st Appellant had a firearm.

[14] He confirmed to have seen the Appellants after he came back from KZN. He discussed the incident with Ntokozo and Freddy and told them that this issue was eating him. They both did not want to be involved because they did not want to die. It was a month after he came back from KZN when he voluntarily went and discussed the matter with Colonel Motaung. He did tell the police about Tebogo, but could not go to his place as it was not accessible. It was put to him that the investigating officer was going to testify that he did not tell them about Tebogo or take them to Tebogo's place. He confirmed not to have taken the police to Tebogo's place. It was put to him that the 2nd Appellant's nickname was not Stone and he was not known to the 2nd Appellant personally except just as one of the customers that come to the spaza shop every day.

Similarly, put to him that 1st Appellant came to Gauteng towards the end of 2018, beginning of 2019, and also did not know him. It was put to Mkhize that actually it was Ntokozo, Tebogo and Freddy who committed this crime that is the reason why there were no statements from the trio. He was further told that the Appellants do not understand why he was implicating them.

[15] At the instance of the defence an inspection *in loco* was conducted to ascertain Mkhize's position in relation to the scene of the incident, that is how far he was and how much of the scene was he able to see from where he was at the shack. The learned magistrate noted the following evidence that the Bakkie was travelling from West to East when it took the Puntfontein off ramp. The road at the top makes a natural curve to the right. The Toyota Hilux Bakkie was stationery at a painted island on the left of the curve referred to. When standing on the painted island looking north the road makes a natural slope going lower. It crosses the highway which is the N12 national highway over the bridge. On the other side of the Highway there is an offramp. If one was to travel from west to east side. It would therefore be on the persons left hand side. They were taken across the bridge past the offramp from the highway and approximately 30 meters from there on the right hand side there is a small passage. One would have passed the lowest point of the decline of the road. A short passage from the shack leads to the bridge. From where the bakkie was stationery to the passage nearby it was about 50 meters. The passage is 3 meters wide. There is a shack once the passage has been entered that is about 20 meters from the road.

[16] Mkhize pointed out the spot where the shack was, wherever they were sitting and drinking with Freddy, Ntokozo and Tebogo. It was not as close to the passage as it was then but four steps from the passage. When one stands in front of the shack where it is now and look up where the bakkie was stationery there is a clear line of sight. In fact the bend of the highway as you come out of the offramp from the highway is visible from there. Another shack was then in front of them that had two tyres on the roof. It did not influence the sight at all, but Mkhize pointed out that the tyres were not there at the date of the incident. He further pointed out that if one was to look from where they were standing to where the incident happened there is a line what the learned magistrate says was not visible to them, forms a t- junction with a passage.

[17] The parties accepted the learned magistrate's observation and were both satisfied. The defence however also pointed out that it should be noted that they were not able to visit the Appellants' places of abode due to risk reasons. Also the fence that Mkhize said the Appellants had jumped was not there, and instead a shack was erected in its place.

[18] January Gonye ("Gonye"), the second occupant who was in the bakkie with the deceased, testified that they had just left the N12 highway via the Pitfontein offramp driving on a road that bends towards a squatter camp nearby when the bakkie ran out of diesel. They stopped on the painted island. He jumped out and opened the bonnet so that he can clean the battery. He had started cleaning it when three guys emerged coming towards them. They passed him. At the time Janko was standing outside on the side of the passenger door talking to his girlfriend who was sitting inside the bakkie. The three walked towards the direction of Janko and said "We have umlungu." Janko was trying to turn around to face the three, when the one with a firearm who was about 1.5 meters away from Janko shot at Janko. Gonye turned around and ran. He did not see the faces of the men. He later came back and found Jan and his girlfriend lying on the ground. A lot of people had gathered there, the police and the traffic officers arrived as well. At the time he was employed by Janko's uncle from where they were fetched by Janko. He had come back from the bush after he received a phone call. He did not observe any police assaulting any person at the scene.

[19] Gonye's evidence under cross examination was that as he was in front of the vehicle with the bonnet open he was able to see the side of the men's bodies. He had spontaneously started cleaning the battery when he heard them say after passing him, "We have Umlungu." The three had walked to the front passenger side where Janko was standing leaning on the window talking to his girlfriend. As Gonye lifted his head to look at where the three were going that is when the gun was fired. The shots were fired towards Janko from a firearm held by one of the men. He feared that he might also be shot and ran away into the bushes. Raimos was not around as the three passed him earlier when they were walking towards the bakkie. The person who called him whilst in the bushes and told him that he can come out they were at the scene is Trompie He could not identify the three since he did not take note of their faces as there were other people who were walking by crossing the road, he thought they were

also just walking by. He explained that he first ran away towards the shacks and when a further shot was fired which he thought was fired at him he turned left into the bushes. Several shots were fired at Janko and his girlfriend.

[20] According to Raimos, when the bakkie ran out of diesel Janko sent him to go and meet up with one Johanna at High Road to get the diesel. When he was leaving, he came across three men on the road walking to the opposite direction. One of them came closer to him and tried to trip him. He did not look at this person and continued walking. He could not remember their faces. After two minutes the three men had passed him, he heard three gunshots from the direction that he was coming from. He turned his back to where he was coming from, it is a little bit downhill and he was going uphill. He saw Janko going down. He thought to himself that he can't go back and started running away. He was on the bridge 30 to 40 meters away from the scene and therefore ran across the bridge and down the highway. He later felt tired and set down. Whilst sitting down somebody came and robbed him of his phone, a Nokia. The person pointed him with a firearm. After robbing him, the person told him to go. He ran to Janko's house and found people there. It seemed they already knew that Janko was shot. He heard that Johanna phoned and told them. He never went back to the scene of the crime.

Post mortem Report

[21] The post mortem report indicated the death of the deceased to have been as a result of multiple gunshot wounds at the time and date of the incident. The report and the clinical notes were not disputed. Janko had suffered four gunshots whilst his fiancée suffered three gunshot wounds.

The Defence

[22] The 1st Appellant confirmed his names to be Malosi Gift Shima. He denied that he is Mosalodi as he was referred to by Mkhize. He denied knowing Mkhize and or Tebogo and alleged to have seen Mkhize for the first time in court. Although it was his legal representative who brought up the name of Tebogo. He also denied knowing the 2nd Appellant even though they stay around the same area. His evidence was that on the day of the incident he was alone at home preparing for school the next day as he was enrolled at the Johannesburg College studying to be a Police Officer. He knew that only because that is what he does every Sunday, prepare for school. During his arrest his cellphone was confiscated, a Samsung Galaxy 9. He later also presented documentary evidence to confirm his registration.

[23] The 2nd Appellant's testimony was that his name is Ishmael Hlabathi. He lives with his girlfriend, child and younger sibling in a shack in Cloverdene, where he runs a spaza shop. It was his 6th year running the spaza. He always is the only one that sells from the spaza shop and never gets assisted by anybody. He was arrested at home and his two cellphones confiscated. He denied knowing Mkhize or ever seeing Mkhize at his tuckshop. He alleged to have seen Mkhize for the first time when he testified and never before that date. He was adamant Mkhize was never his customer. Notwithstanding that it was put to Mkhize that he was not known to the 2nd Appellant personally except just as one of the customers that come to the spaza shop every day. He denied that his nickname is Stone or to have a nickname. He denied passing Mkhize at the shack on that day or walking to the bridge with the 1st Appellant and Tebogo alleging both to be unknown to him. He alleged to have seen the 1st Appellant for the first time on the day of their arrest at the police station. His tuckshop opens all day and weekends as well. When he is not there his little brother will run the business. Under cross examination he said on the day he personally was running the spaza. He knows every single customer from the community. He heard about the shooting on that day as he also heard the gunshots coming from the freeway. The shots were fired twice. He remained adamant that he was at the tuckshop the whole day.

[24] The main issues this court should therefore determine are:

[24.1] Whether indeed the court a quo relied on the evidence of Mkhize a single witness without applying the cautionary rule.

[24.2] Whether there was indeed nothing of a material nature that linked the Appellants to the murders except the evidence of Mkhize. The circumstantial evidence relied upon by the court a quo related only to the manner in which the murder was committed and not to the identity of the perpetrators without any corroboration from an independent source or other evidence.

[24.3] Whether the magistrate depicted incorrectly the evidence on the inspection in loco with a motive to strengthen the state's case and corroborate

Mkhize's evidence. Also if the inference drawn from such evidence consistent with the proven facts.

Legal framework

[25] The approach the court of appeal is to follow when considering the factual and credibility findings of the trial court are explicitly set out in *R v Dhlumayo*,¹ urging the appeal court to bear in mind that the trial court saw the witnesses and could observe and assess their conduct, if there was no misdirection as to the facts, the point of departure is that the trial court's findings were correct. The court of appeal will only reject the findings of the trial court if it is convinced that they were erroneous. If there is doubt, the findings of the trial court must stand.² However, it is not only the trial court's findings that are important but also the reasons for adopting those findings which must be set out in the judgment.³

[26] The approach is explained clearer by Jones J in *Leve v S*⁴ as follows:

"The fundamental rule to be applied by a court of appeal is that, while the appellant is entitled to a re-hearing because otherwise the right of appeal becomes illusory, a court of appeal is not at liberty to depart from the trial court's findings of fact and credibility unless they are vitiated by irregularity or unless an examination of the record of evidence reveals that those findings are patently wrong. The trial court's findings of fact and credibility are presumed to be correct because the trial court, and not the court of appeal, has had the advantage of seeing and hearing the witnesses and is in the best position to determine where the truth lies. See the well-known cases of Rex v Dhlumayo 1948 (2) SA 677 (A) 705 and the passages which follow; S v Hadebe 1997 (2) SACR 641 SCA 645; and S v Francis 1991 (1) SACR 198 (A) 204C-F.

[27] Jones J furthermore held that:

¹ *R v Dhlumayo* 1948 (2) SA 677 (A) 705

² *S v Robinson & others* 1968 (1) SA 666 (A) at 675G-H.

³ *S v Nkosi* 1993 (1) SACR 709 (A) AT 711E-G.

⁴ (CA 60/2009, CC 34/2008) [2009] ZAECGHC 61; 2011 (1) SACR 87 (ECG) 90 (10 September 2009) at 90

“These principles are no less applicable in cases involving the application of a cautionary rule. If the trial judge does not misdirect himself on the facts or the law in relation to the application of a cautionary rule but instead demonstrably subjects the evidence to careful scrutiny, a court of appeal will not readily depart from his conclusions.”

[28] Equally, the appeal court is cautioned to tread carefully on the issues of identity and the circumstantial evidence. It is accepted that incorrect identification is always a dangerous possibility and can result in serious cases of injustice. The courts are therefore implored to approach the evidence of identification with caution to limit unintended outcomes that would result in the failure of justice. In that regard *S v Mthethwa*⁵ is instructive, and the following approach set forth at 768A:

*“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.” (my emphasis)*

[29] The Appeal Court’s power to interfere with the discretion of the trial court on findings of fact is therefore constrained.⁶ Interference in this regard is only permissible where the findings of the court below are vitiated by misdirection or are patently wrong.

[30] It would therefore be in exceptional cases that an appeal court will be entitled to interfere with the trial court’s valuation of the oral testimony of witnesses. Therefore

⁵ 1972 (3) SA 766 (A)

⁶ *S v Mabena* 2012 (2) SACR 287 (GNP) that:

in order to succeed, the Appellant will have to convince the Appeal Court that the trial court was wrong in accepting the evidence of a state's witness/es and rejecting his version, in so far as it was in conflict with that of the state, as being reasonably possibly true, hence a reasonable doubt will not suffice to justify interference with such findings; see *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705-706; *S v Francis* 1991 (1) SACR 198 (A) at 204c-e; *S v Monyane and Others* 2008 (1) SACR 543 (SCA) at para [15].

Single evidence and identification

[31] In terms of the provisions of s 208 an accused may be convicted of any offence on the single evidence of any competent witness. However, a cautionary rule is applicable, with the trial court obliged to exercise caution when evaluating evidence of a single witness. It has been authoritatively decided that '[t]he absence of the word "credible" [in the section] is of no significance; the single witness must still be credible,⁷ . . .' as it would be required of any other witness.

[32] The perspective from which all this is to be considered is the fundamental principle that an accused person has no obligation to prove his or her innocence. It is rather the State's duty to prove beyond reasonable doubt the guilt of the accused person.⁸ As a result, an accused person who advances a version that is reasonably possibly true is entitled to an acquittal.⁹ This must never be lost sight of even where a cautionary rule applies.

[33] On the other hand the cautionary rule that the evidence of a single witness must be clear and satisfactory in every material respect does not mean that any criticism of that witness' evidence, however slender, precludes a conviction¹⁰ There being no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness.¹¹

⁷ *S v Sauls and Others* 1981 (3) SA 172 (A) at 180D.

⁸ *S v Mbuli* [2002] ZASCA 78; 2003 (1) SACR 97 (SCA) para 57.

⁹ *Viveiros v S* [2000] ZASCA 95; [2000] 2 All SA 86 (A); 2000 (1) SACR 453 (SCA) para 3.

¹⁰ *R v Bellingham* 1955 (2) SA 566 (A) at 569, quoting *R v Nhlapo* (AD 10 November 1952).

¹¹ *S v Weber* 1971 (3) SA 754 (A) at 758.

[34] The court held in *R v J*¹² that although there may be circumstances that necessitate special caution, “the exercise of caution should not be allowed to displace the exercise of common sense.” The purpose of the cautionary rule being to assist the court in deciding whether or not the onus on the state has been discharged.¹³ It should accordingly be borne in mind that satisfying the rule does not in itself guarantee a conviction. The rule is merely an aid in establishing the truth. It obliges a court to warn itself of the danger of convicting a person on the basis of the evidence of a single witness. The final analysis is whether the court is satisfied beyond reasonable doubt that all the evidence presented is essentially true.¹⁴ The evidence must be weighed by considering its merits and demerits before deciding whether, despite shortcomings, defects or contradictions, the truth has been told.

[35] The proper approach to evidence is still the promulgated old practice of looking at the evidence holistically in order to determine whether the guilt of the accused has been proven beyond a reasonable doubt as confirmed in *S v Haupt*,¹⁵ with reference made to *S v Hadebe* **1998 (1) SACR 422** (SCA) at 426f-426h where it was stated that:

“But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual parts of what is, after all, a mosaic of proof. Doubt about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that the broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood from the trees.”

¹² **1958 (3) SA 699** (SR)) at 90.

¹³ *S v Hanekom* **2011 (1) SACR 430** (WCC) at par 8).

¹⁴ *S v Francis* **1991 (1) SACR 198** (A) at 205f).

¹⁵ *S v Haupt* **(2018 (1) SACR 12** (GP) par 16).

[37] it is the Appellants' argument that the court failed to apply the cautionary rule when dealing with Mkhize's evidence as a single witness.

[38] It is fitting to state that the trial court's judgment was very comprehensive and detailed in its analysis. The court was very much alive to the challenges it was confronted with in relation to Mkhize's single evidence right from the outset. It for that reason dealt with the evidence carefully rather than approbatively as suggested by the Appellants, sensitive as much to the fact that Mkhize was also the only one who could positively identify the Appellants. The reasons for all its findings clearly set out.

[39] Mkhize, a person unknown to Raimos and Ganye, came out a year after the incident has happened, to report an occurrence of the same date. He by doing so, enabled names and faces to be put to the perpetrators which would have seemed, if reliant was to be on Ganye and Raimos' evidence, unachievable and farfetched. Throughout the evidence Mkhize never claimed to have witnessed the shooting itself which if he had a motive, he could have exploited. He only testified to what he witnessed regarding the people he knew.

[40] He also could not have mistaken the identity of the Appellants as the court a quo correctly found. He stayed in the same community with the Appellants and knew them in different capacities. Mkhize confessed that he is a chain smoker and would visit the 2nd Appellant's spaza almost everyday to buy cigarettes where he always found the 2nd Appellant. He would see the 1st Appellant more or less twice a week. They would greet each other although not friends. On the day of the incident he saw them in broad day light passing by the shack where he was, 1st Appellant brandishing a gun. The chances of a mistaken identity very minimal.

[41] Furthermore any chance that there could have been other three men with one of them holding a gun besides the Appellants, who had around the same time approached a stationary bakkie in the same vicinity on the tar road and had shot at the deceased is also very slight. Appellants passed Mkhize at the shack where Mkhize was with Tebogo, the third man who joined the Appellants. The short space of time within which this happened confirms the fact that the place where the bakkie was stationery was not too far from the shack as Mkhize had testified that the gunshots

were heard not long after the Appellants had hurriedly passed the shack. He looked at where the sound of gunshot came from and it was at the bridge where a bakkie was stationery. The three were seen running away from there.

[42] Ganyo also testified that as soon as the three men arrived where the bakkie was stationery and they had sight of Janko who was standing outside the bakkie talking to his fiancée one of the three man started shooting. The fiancée also got shot. Apparent that the three men did not waste any time. Mkhize's evidence is that they had the gunshots after two or more minutes the Appellants had passed the shack. After the gunshots, they stood up to look at the direction from which the gunshots were heard, and saw the three, the Appellants and Tebogo, running away from the scene where the bakkie was stationery. It all ties up and the only possible inference that can be drawn from such circumstances without a shadow of a doubt is that the Appellants, after being seen hurriedly passing the shack and turning to the tar road leading to the bridge, proceeded to where the bakkie was parked. The 1st Appellant who was seen carrying a gun is the man seen by Ganyo shooting at the deceased whereafter the three, that is the Appellants and Tebogo were seen running away following the sound of the gunshot that was heard coming from that direction. There is no other possible inference that can be drawn from all these proven facts.

[43] The court a quo also found the post mortem report to corroborate Mkhize's and Ramios' evidence that several shots were fired that is seven to eight gunshots heard. The deceased Janko had four gunshot wounds whilst his fiancée had three gunshot wounds. In that instance, there is no rational in the allegation that the court a quo erred or did not apply the cautionary rule.

[44] In terms of the proximity of the location, an inspection in loco was conducted without any contention being raised on what was noted to have been observed, except for the fact that the Appellants' residence could not be visited. It would not have taken the matter any further anyway. It was clear that the shack was in the immediacy of the tar road and the bridge. The tar road was accessible from the shack through a passage that was said to be 3-meters wide and the shack about 300 meters from the tar road. It was noted that even though there is another shack in front of the shack with tyres on the roof, which Mkhize said was not there on the day, the place of the incident was

still visible from the shack, that is if standing up. The shack was said to be in a straight line with where the bakkie was stationery, the tar road and bridge visible from there. The observation corroborates Mkhize's evidence that after hearing the gunshots, they stood up and looked towards the bridge where the sound was coming from and saw the Appellants running away from the scene.

[45] The criticism levelled against the learned magistrate that he described the evidence on the inspection in loco incorrectly in order to strengthen the state's case and corroborate Mkhize's evidence, is also unmerited. It is first noted that no query was raised at the inspection against the evidence depicted. The evidence was summarised in the judgment as depicted at the inspection in loco but for the emphasis on the fact that although the shack was no longer there the spot was still there. Nothing turns on that since the focus was on whether from where the shack was pointed to have been by Mkhize (which is the spot referred to), it was possible that Mkhize was indeed able to see the bridge where the bakkie was stationery. The learned magistrate therefore could make that conclusion, deduced from the observation made. The conclusion drawn consistent with what has been observed, and all the proven facts.

[46] The observation was depicted as follows; Mkhize pointed out the spot where the shack was, where he was sitting and drinking with Freddy, Ntokozo and Tebogo. It was not as close to the passage as it was then but four steps from the passage. When one stands in front of the shack where it is now and look up where the bakkie was stationery there is a clear line of sight. In fact the bend of the highway as you come out of the off ramp from the highway is visible from there.

[47] Gonye and Raimos's evidence was also indeed credible, being very candid about the shortcomings in what they saw. Although they independently saw the three men, and Gonye witnessed the shooting that happened very quickly, whilst Raimos saw Janko falling down after hearing the gunshots, they were both honest about the fact that the men were unknown to them and they could not identify them. Seeing also that each's encounter with the men was very brief, everything happening quickly, it made sense that they could not identify the men.

[48] On the other hand the Appellant's evidence had serious shortcoming and glaringly not reasonably possibly true. Notwithstanding that the 2nd Appellant's legal practitioner had put it to Mkhize that he was unknown to the 2nd Appellant and explained that the 2nd Appellant did not know him personally but only as one of the customers whom he always saw at his shop coming to buy like any other customer, corroborating Mkhize's evidence that he was frequently there to buy cigarettes. He was adamant during his testimony in chief that he does not know Mkhize at all as Mkhize was never his customer. He said he has never seen Mkhize before until the first date of trial.

[49] He also contradicted himself saying that he always is the one that sells at his shop and thereafter said his younger brother would sometimes assist. It was put to Mkhize that 2nd Appellant knew nothing about this incident. However, suddenly under cross examination he alleged to have been at home and to have also heard the gunshots coming from the bridge. The 1st Appellant was also very evasive alleging also seeing Mkhize for the first time at court and not knowing the 2nd Appellant notwithstanding leaving in the same community and the 2nd Plaintiff running a known spaza in the area for six years.

[50] All evidence considered together, there is no merit in alleging that the court a quo erred in any way when weighing the evidence of Mkhize and the other witnesses and in the factual findings it made. The conclusion it arrived at was logical and supported by the factual findings it made, bearing in mind that it is not the duty of this court to re-evaluate the evidence afresh as if sitting as a trial judge, but to decide if patently wrong findings and or misdirection by the magistrate led to a failure of justice.

[51] The Appellants pin their appeal on the fact that there was no direct evidence linking them to the crime and therefore the court should not have returned a guilty verdict founded on Mkhize's single evidence and the proven circumstantial evidence, even though the evidence is admitted to have been properly summarised by the trial court. They further argue that the inference drawn should be the only one as per *S v Blom*, without mentioning which other inference could be drawn from all the proven facts as there is none, all pointing to the Appellants involvement. The cautionary rule requires that the evidence of a single witness should be substantially satisfactory in

relation to material aspects or be corroborated, as it is in this case, not that it must be free of all conceivable criticism.¹⁶

[52] This also goes to the question of identity. It cannot be argued that the court a quo erred when it had carefully weighed the total evidence guided by the precautionary measures identified in *Mthethwa supra*. This was weighed against the evidence of the 2nd Appellant's uncorroborated alibi that was proven to lack credibility and the 1st Appellant's bare denial plus the proven facts. Both therefore rejected as not reasonably possibly true, or to create any reasonable doubt, but false.

[53] I therefore find no basis for interference in the court a quo's findings and conviction of the Appellants. The sentence is indeed as confirmed appropriate and to be upheld.

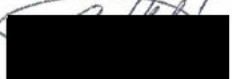
[54] In the circumstances I therefore make the following order:

1. The Appeal against conviction and sentence is dismissed.

I concur


N V KHUMALO

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA


ALLY A J

ACTING JUDGE HIGH COURT
GAUTENG DIVISION, PRETORIA

For the Appellants: P T MTHOMBENI

¹⁶ *Rugnanan v S* [2020] ZASCA 166 para 23.

Instructed by: P T MTHOMBENI ATTORNEYS
email: mthombeniattorneys@telkomsa.net
Ref: Ref A148/32022

For the Respondent: ADV PCB LUYT

Instructed by: The Director of Public Prosecutions
Appeal section; Gauteng, Pretoria
Email: pcbluyt@npa.gov.za