

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

CASE NO: A95/2024

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

In the matter between:

ANDRE MOOI

First Appellant

RUFUS FORD

Second Appellant

and

THE STATE

Respondent

JUDGMENT

STRYDOM J,

Introduction

[1] The appellants were arraigned in the High Court, Gauteng Division, Johannesburg on the following charges:

- 1.1 Count 1: Murder read with section 51(1) of Act 105 of 1997;
- 1.2 Count 2: Unlawful possession of a firearm;

1.3 Count 3: Unlawful possession of ammunition.

[2] The second appellant was also charged with two further offences, to wit,

2.1 Count 4: Unlawful possession of a prohibited firearm;

2.2 Count 5: Unlawful possession of ammunition.

[3] The first appellant was convicted on counts 1, 2 and 3 and was effectively sentenced to life imprisonment. The second appellant was convicted on counts 1 to 5 and was also sentenced to life imprisonment. The sentences on the other counts were ordered to be served concurrently with the sentences of life imprisonment.

[4] The trial court, pursuant to an application for leave to appeal, refused such leave but the appellants were granted special leave to appeal to this Court by the Supreme Court of Appeal against their convictions and sentences.

[5] Mr. Kruger, appearing for the appellants before us, abandoned the appeal against the conviction of the second appellant on counts 4 and 5. Further, Mr. Kruger conceded that should the convictions on the count of murder be dismissed the only appropriate sentence would be life imprisonment.

[6] Thus, this Court needs only to consider the correctness of the convictions of the first and the second appellant on counts 1, 2 and 3.

[7] The convictions of the two appellants by the trial court were based on the identification of the two appellants by two witnesses, each of them identifying an accused. It should further be mentioned that both accused testified that they were not at the crime scene when T[...] M[...] ("the deceased") was killed. Before us Mr. Kruger argued that the acceptance of the trial court of the positive identification of the first and second appellant was the main ground of the appeal. It was argued that even if it is accepted that the alibi of the first appellant was false, the State still failed to prove the guilt of the first appellant beyond reasonable doubt. The same applied as far as the second appellant is concerned. His defence was that he was wrongfully identified as one of the perpetrators as he was not present **at** the crime scene.

Background facts

[8] The State relied on the two witnesses, Ms. C[...] M[...] (“Ms. C[...]”), the wife of the deceased, and their 4-year-old child, BM.

[9] Ms. C[...] testified that on the morning of 19 July 2013, at about 7h20, she and her husband left their home simultaneously, each traveling in their own vehicle. At their residence there are two driveways and two gates which provide access to the street running in front of their home. They, both reversed their respective vehicles towards the street and came to a standstill to close their respective gates. In the vehicle of the deceased BM was a passenger, seated in the front passenger seat. Ms. C[...] was alone in her vehicle. Just before she was about to leave, she realised that she had left her cellphone in the house. She went back inside the house to fetch her phone. Whilst in the house she heard gunshots and thereafter BM shouting “Daddy, Daddy”. She rushed out towards the front wall and could see that another vehicle was blocking her husband’s vehicle. She managed to see the face of the driver of this vehicle who sat in the driver’s seat. She described the position of this vehicle in relation to the vehicle of her husband. It was parked at a right angle to the vehicle of the deceased. The front portion of this vehicle protruded beyond the rear end of the deceased’s vehicle which provided her with a clear view to identify the driver of the vehicle blocking the way of the Golf vehicle of the deceased. She indicated in photo 3, contained in exhibit C, the position of the vehicles and also her own position when she made her observations. She estimated that the driver of the getaway vehicle was approximately 6 paces from where she was standing. She said that the driver wore a top with a “hoodie”, but that he turned his head to his left. She made eye contact with him and immediately identified him as the first appellant. She testified that she knew him from school as they attended the same school, and after that, she saw him from time to time at various places. She testified that she never saw him outside of the vehicle but only in his position as the driver of the vehicle, sitting in the driver’s seat with his hands on the steering wheel. After she made eye contact with the driver he sped off. She then saw that the deceased who was in the Golf vehicle was shot. BM was still in the vehicle. She had a few scratches. The police arrived shortly thereafter, and she told the police that she saw Andre “Gong” Mooi, the first appellant, driving the getaway vehicle.

[10] BM testified, through the services of an intermediary, that she was seated in the front passenger seat of her father's vehicle when she saw a man at the drivers' side window. She alerted her father on two occasions about his presence, but her father never reacted as he was listening to music. The next moment this person started to fire shots through the window which hit her father. He fell on top of her, where she was seated. She said that when her mother came out of the house this person ran away. She testified that this person wore a top with a hoodie and that she could see his face, which was scarred. In court she indicated where on his face he had scars. She described him as a black man. She further testified that at a later stage she was taken to a police station where photos of various people were shown to her. She was asked whether she would be able to identify the person who shot her father. She identified the second appellant. His photo was one of the photos shown to BM. She said that this was the man who shot her father. She testified that nobody showed her photographs of the second appellant before she went into the room where she made her identification. Her mother never told her who to identify as the shooter.

[11] Evidence was led by the State in relation to the photo identification parade, the police officer who attended the crime scene shortly after the shooting, witnesses who took photographs and compiled plans of the crime scene and witnesses who were responsible for the arrest of the first and the second appellant. Affidavits were handed in, relating to the results of ballistic examination of a firearm found in possession of the second appellant during his arrest and relating to cartridges picked up on the crime scene and spent bullets found in the body of the deceased.

[12] In summary it became clear that the firearm found in possession of the second appellant could not have been ballistically connected to the shooting of the deceased. The murder weapon was not found. One of the phones found in possession of the second respondent contained the contact number of the first appellant. There was evidence of a telephone call made by the second appellant to the first appellant a week before the killing of the deceased. BM told her mother that a person of a dark complexion came to the window of the deceased's vehicle and fired shots at the deceased. This information was provided to the investigating officer which was, according to his evidence, provided to a police informer. The second

appellant was arrested after a week of the killing of the deceased on strength of information provided to the police by the informer who was not called as a witness.

[13] Thus, the credibility and reliability of the two eyewitnesses who identified the first and the second appellant are of cardinal importance in this matter. The trial court found C[...] and BM to be credible and reliable witnesses. This finding was supported by Ms. Williams, who appeared for the State during the trial and before us. Mr. Kruger argued that the trial court should not have accepted their evidence, either on the basis that they were not credible witnesses or that their identification of the perpetrators was not reliable.

[14] It is a trite law that the onus rests on the State to prove the guilt of **an accused** beyond a reasonable doubt. If the accused's version is reasonably possible, he is entitled to his acquittal.¹ There is no burden on the accused to prove his version or his innocence. The accused's version only has to be reasonably possibly true.

[15] In *S v Mbuli*², the court, with reference to *Moshephi and Others v R*³ and *S v Hadebe and Others*⁴ held that:

“The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond a reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence that may arise in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when the evaluation is conducted again, taking into account all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence, far from it. There is no substitute for a

¹ *S v V* 2000 (1) SACR 453 (SCA) at 455A-C.

² [2002] ZASCA 78; 2003 (1) SACR 97 (SCA) para 57.

³ (1980-1984) LAC 57 at 59F-H.

⁴ [1997] ZASCA 86; 1998 (1) SACR 422 (SCA) at 426F-H

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 for the trees.”

[16] A court of appeal would be exceedingly hesitant to disrupt the credibility findings made by the trial court, along with the assessment of the oral testimony, given the trial court's superior position in hearing and evaluating the evidence presented by the witnesses. Nonetheless, the appeal court will intervene if it is convinced that the credibility findings made by the trial court are manifestly erroneous, see *S v Mkhohle*⁵ 1990 (1) SACR 95 (A) at 100E

[17] When it comes to the identification of a perpetrator, the credibility of a witness is not the only concern. The question remains whether the identification of a perpetrator was reliable. In *S v Mthetwa*⁶ it was held as follows:

“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 witnesses; 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, voice, built, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. This 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 light of the totality of the evidence, and the probabilities;”

[18] In this matter the evidence pertaining to the identification of the two appellants are on a different footing. Ms. C[...] testified that she saw a person she knew on the crime scene. It was suggested to her during cross-examination that she pointed out

⁵ 1990 (1) SACR 95 (A) at 100E

⁶ 1972 (3) SA 766 at 768 A-C

a person because she thought he would have had a motive to point the first appellant whose brother was also killed allegedly by a group or gang member to which the deceased belonged. Thus, the first question relating to her identification of the first appellant would be whether her evidence was credible and, only thereafter, the question would arise whether her evidence was reliable

[19] Ms. C[...] said that she had sufficient opportunity to identify the first appellant as she saw him and recognised him as a person she knew. As far as BM is concerned her credibility was not the aim of attack against her evidence, but rather the reliability of her evidence relating to her identification of the second appellant.

[20] Ms. C[...] and BM were single witnesses who provided evidence regarding the identification of the appellants. A cautionary approach is called for. Pertaining to BM, the Court should further approach her evidence with caution as she was only about 4 years and six months old when she witnessed the killing of her father. When she testified, she was 5 years old. The Court will deal with the reliability of her identification hereinbelow.

[21] The Court will start with an evaluation of the evidence of Ms. C[...]. During her testimony she was consistent in her version despite the statements of policemen being put to her in which she allegedly provided them with a different version as to what she observed on the day of the killing of the deceased. She was steadfast in her version and stood her ground that she only saw the first appellant sitting inside the vehicle parked behind the Golf vehicle of the deceased. She said that nothing obstructed her view, and she could see him through the passenger seat window of the vehicle in which the first appellant sat. During cross-examination, it was put to her that from her vantage point, next to the low wall, it would have been impossible for her to see past the vehicle of the deceased and to see who was driving the vehicle behind her husband's vehicle. She maintained without hesitation that she could see the driver and that it was the first appellant.

[22] Ms. C[...] was confronted with three statements of police officers who attended the crime scene shortly after the shooting and to whom she allegedly gave

versions which differed from her evidence in court. She denied that she provided anyone with a version different from her version in court.

[23] It was put to her that Mbambo Felix Mkhanele stated in his affidavit that she informed him that following her hearing the gunshots, she went outside to check and then saw a silver Fiat Palio pulling off with three coloured males in it. She recognized the first appellant as Andre Mooi known as “Gong”. This witness was not called by the State, nor was his statement handed in as an exhibit. The investigating officer confirmed that there was a statement in the docket deposed to by this police officer marked as A1.

[24] It was put to her that Detective Sergeant Israel Nkaseng Thopudi, a police officer who attended the scene after the shooting, stated in his affidavit that she told him that she saw the person who shot her husband and gave him the name of “Gong” and his real name, Andre Mooi. This witness was called by the State and confirmed in evidence that this is what Ms. C[...] told him shortly after the killing of the deceased. His statement wherein these allegations were made was handed in as exhibit “N”. Having regard to the contents of this statement it becomes evident that the statement was deposed to sometime after Sergeant Thodudi went to the crime scene, as information contained in the statement, pertain to events which transpired after 19 July 2013.

[25] It was put to her that Constable Clayton Goodgall, stated in his affidavit that she told him that following her hearing the gunshots she went out of her house and saw Andre ‘Gong’ Mooi running away from her husband's car and getting into a greyish hatchback similar to a Renault or Palio. This witness was not called by the State, nor was the statement handed into Court. The investigating officer, Constable Miya, during his testimony confirmed that the statement of Constable Goodgall was in the docket, marked “A8”. It was not mentioned when this statement was made.

[26] It was argued that these police officers would only have written in their statements ~~that~~ what was told to them by Ms. C[...]. It was argued that what these police officers wrote down would have reflected that which she told them. It was argued that the trial court should have rejected her evidence on the basis that her

evidence in court materially differed from what she told the police after the incident. In court she was adamant that she never said to anyone that the first appellant shot the deceased, or that the shooter was running away from the deceased's vehicle and then got into the other vehicle and sped off. She also told no one that besides the first appellant she saw two further perpetrators in the vehicle.

[27] It was argued that BM testified that her mother saw that the person who shot the deceased through the window of the vehicle ran away. She could only have obtained this information from her mother, which version is supported by what she allegedly told the police after the incident.

[28] There was also an issue around the address where the first appellant stayed. She testified that she had no knowledge about the specific address of the first appellant. Ms. C[...] denied knowledge of the address whilst Sergeant Thopudi testified that she gave him the street name and description of the house where the first appellant resided. It was on the strength of this information that the police could go to this address to go and look for the first appellant. It should be noted that no weight could be attached to this, as in the statement of Constable Goodgall, it was stated that Ms. C[...] told them that the first appellant resided somewhere in Riverlea. He then made enquiries on the scene and obtained the address of the first appellant's mother and thereafter established that the first appellant indeed resided there. Ms. C[...] was adamant that she did not know the specific address where the first appellant resided and could, accordingly, not have provided the police with the street name.

[29] In my view, these discrepancies between what Ms. C[...] allegedly told the police on the scene must be considered having regard as to what transpired after the shooting. The evidence was that Ms. C[...] was in shock. This can be accepted given the circumstances she found herself in. Clearly, a full statement was not taken from Ms. C[...] **at** the scene. The police attending the scene made statements which differed in contents. Sergeant Thopudi testified that he was with Constable Goodgall when they spoke to Ms. C[...]. In his testimony he testified as follows: *"The report she gave to us when we were asking her questions, she said she had seen the person who had shot her husband."*

[30] Despite this, Constable Goodall, according to his statement made afterwards, he said that Ms. C[...] said something different. It should also be noted that what Ms. C[...] allegedly told Sergeant Thopudi is that she saw the person who shot deceased. Sergeant Thopudi did not say in his statement that Ms. C[...] saw the shots being fired which killed her husband. In such circumstances, not too much weight should be attached to what the police officers stated in their statements was told to them by Ms. C[...]. Rather, there should be a consideration of the evidence of Ms. C[...] in court. In my view, she stood her ground despite thorough and probing cross examination. These statements put to her were not contained in her own written statements but the version of police officers as to what was told to them.

[31] Even if it is no be accepted that she gave a different version on the scene shortly after the shooting the contradiction should be considered with caution by the Court. There may be an explanation. In the matter of *S v Mafaladiso en andere*⁷ the SCA held that a court had to: (1) determine carefully what the witnesses actually meant to say on each occasion in order to determine whether there was an actual contradiction and, if so, what the precise nature of the contradiction was; (2) had to bear in mind that previous statements are not taken down under cross-examination; that there may be language and cultural differences between the witnesses and the person taking down the statement; and that the person giving the statement is seldom, if ever, asked by the police officer to explain that statement in detail; (3) keep in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness law and that non-material deviations are not necessarily relevant; (4) consider and evaluate the contradictory versions on a holistic basis, taking into account and weighing up such factors as the circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, whether the witness was given a sufficient opportunity to explain the contradictions, the quality of any explanations given, and the connection between the contradictions and the rest of the witness's evidence; (5) weigh up both versions in

⁷ 2003(1) SACR 583 (SCA)

the light of all the evidence before deciding whether the truth has been told, despite any shortcomings.

[32] Applying the relevant criteria referred to in *Mafaladiso*, the statements attributed to Ms. C[...] were brief and not detailed. There is no evidence of follow-up questions. There was room for misunderstanding. In fact, the various alleged statements are contradictory and convincingly denied by Ms. C[...]. In my view, not much weight should be given to the alleged contradictions, which, apart from the evidence of Sergeant Thopudi, could not be challenged in court, as these witnesses were not called, despite them having been made available to the defence.

[33] Ms. C[...] was challenged extensively on the question of whether she would have been able to see a person in the vehicle parked behind the Golf vehicle of the deceased. The defence called a witness, Mr. Jannie van der Westhuizen, to testify on the investigation of the crime scene. He, on two occasions using different vehicles, set up the crime scene according to the photographs and information received from the legal representatives that represented the appellants. During cross-examination, he admitted that he did not receive the evidence of Ms. C[...] for purposes of his investigation. He prepared a report and concluded that Ms. C[...] would not have been able to see and identify the driver of the vehicle parked behind the Golf. During cross-examination he conceded that this depended on the position of the vehicle behind the Golf vehicle. The trial court rejected his evidence and his expertise was questioned. In my view, there is a weakness in his reconstruction of the crime scene and that relates to the actual position of the vehicle which was blocking the Golf vehicle. The only person who could provide evidence about the exact position of the vehicle was Ms. C[...]. She, at the time of his investigation, already testified that the front portion of this vehicle protruded sufficiently past the rear end of the Golf vehicle for her to see past the Golf. She indicated this by drawing something on photo 3 of exhibit "C". The original exhibit was not made available to this Court but on the photocopy a square drawing is visible plus an arrow, indicating the position and direction in which this vehicle was parked. What this shows, is that the front portion of this vehicle was protruding substantially past the rear of the Golf vehicle. If this was the situation, Ms. C[...] would have been able to see past the Golf. Mr. van der Westhuizen did not have access to the evidence of

Ms. C[...] and obtained his information from the defense counsel. This included the position of the vehicle which blocked the way of the Golf vehicle of the deceased. In my view, the evidence of the witness, Mr. van der Westhuizen that Ms. C[...] could not see past the Golf was correctly rejected.

[34] It was argued that the trial court should have conducted an inspection *in loco* as was requested by counsel representing the appellants in the trial court. In my view, the trial court's ruling not to have an inspection *in loco*, could not be criticized. Photos were available of the crime scene. The vehicles, and their respective positions on the date of the incident would not have been on the scene. This issue was a matter for evidence. The photos indicated the position of the vehicle of the deceased. This became common cause. The position where Ms. C[...] was standing was not seriously challenged. The only possible contentious issue was the position of the vehicle parked behind the Golf vehicle. The only person who could provide evidence in this regard was Ms. C[...]. Her version could be tested in court through cross examination without conducting an inspection *in loco*. It is not the purpose of an inspection *in loco* to reconstruct a crime scene.

[35] The trial court recognised and applied the principles of the cautionary rule in its consideration of the evidence of Ms. C[...]. Ms. C[...]'s testimony was found to be reliable and credible. She could have implicated the first appellant more directly by saying, for instance, she saw him shooting the deceased. She did not. She was open and frank in court that she never saw a second person and that she, accordingly, could not even suggest what happened to further possible perpetrators.

[36] In court she presented a clear and convincing account of the events. Her testimony was direct, devoid of any indications of evasion. She abstained from unnecessary embellishment and testified that she had no incentive to falsely accuse the first appellant. She refuted the suggestion that she implicated the first appellant as there was a rumour going around that the deceased was involved with the killing of the brother of the first appellant.

[37] In contrast, the court did not find the first appellant to be a credible witness; his alibi was fabricated. He withheld his alibi defence right up to the stage of plea in

the trial court. His alibi defence was that he could not have been on the crime scene around 7h20 as he was picked up for work at about 7h00. His own witnesses contradicted his version when he arrived at work. The first appellant's testimony was nothing more than a contrivance and was with good reason rejected by the trial court. This finding cannot be criticized. As stated hereinabove, counsel for the first appellant argued this matter on the basis that even if the alibi of the first appellant was false the State failed to prove that the first appellant was the person on the crime scene.

[38] That a false alibi can be used to support the evidence of an identifying witness was held to be competent. In *S v Thebus*⁸

[39] In my view, the trial court correctly accepted the evidence of Ms. C[...] as credible, reliable and compelling. The first appellant's conviction on the murder count should stand.

[40] I will now turn to the conviction of the second appellant. The only witness who identified him as the person who shot the deceased was the 4-and-a-half-year-old BM. The trial court found her to be a competent, credible and reliable witness. In fact, the trial court found that she was an impressive witness and one of the best minor witnesses ever who testified before the court.

[41] It could not, and was not, argued that the evidence of BM was not credible. The attack against the evidence was rather that the young girl was not a competent and reliable witness. This aspect requires further consideration.

[42] The question would be whether the State had proven beyond reasonable doubt the identification of the second appellant as the person who shot the deceased. Was the identification made by BM reliable, considering that she only had a short period to identify the person that fired shots at her father, whilst she was seated next to him. She testified that her father after the shots were fired fell on top of her where she was seated. Approximately two weeks after the shooting she attended a photo

⁸ 2002 (2) SACR 566 SCA at paragraph [14] of the judgment of Lewis AJA (as she then was)

identification parade where photos were shown to her. She was able to point out a person identifying him as the person that shot her father. On the 23rd of July 2013 she made a statement to the police with the assistance of a social worker to the effect that the person who shot her father was of a dark complexion. She stated that the person had scars on his face. The person she pointed out in the photographs did not have scars on his face, although she said that he did.

[43] Dealing with BM's competency as a witness first. She was asked questions by the trial Judge before she started her evidence. She provided her evidence to court through an experienced and qualified intermediary, Ms. Van Deventer. Considering the questions posed to her by the court and the answers provided by BM the trial court, in my view, correctly found that BM was a competent witness as she could distinguish between the truth and lies.

[44] Her evidence in court should be closely scrutinized to ascertain whether her evidence on the identification of the second appellant is indeed reliable. The fact that she had limited time to observe the person who shot the deceased cannot be disputed. It could only have been a few seconds. She had never seen this person before.

[45] According to the evidence of BM in court, the person who shot her father appeared at the driver's side window and started to shoot at him through the window. Her father then fell on her. She described that the person had a hoody on and only his face appeared. He was black. He ran away when her mother came out of the house. She did not see where he went to. She testified that she was shown photos later and pointed at the man with scars on his face, who shot her father.

[46] BM previously made a statement to the police in which she stated that a dark coloured male turned with a gun on her "daddy". She stated that the man had a hoody with strings. After this, this man ran away.

[47] In court she testified that she never told anybody how the person who shot her father looked like, but that she saw the picture at the police station. The investigating officer testified that BM told him that the person who shot her father

was a dark coloured male. This is the information he provided to his informant which led to the arrest of the second appellant. Later during her testimony, she said she told the police how this person looked like. When asked what she told the police she did not provide an answer but stated that her arm was sore.

[48] During her testimony in court, she denied that she told anybody that the person was wearing a hoody with strings. She testified that the man had scars on his face to which she had made no reference in her police statement. She never told anybody about this. In court she pointed to places on her face where this person had scars. It was below his eyes and on both cheeks. The person who was pointed out by BM as the assailant during the photo identification parade, the second appellant, however, does not have any scars on his face. The person with a scar in his face, as was pointed out in court, was the first appellant. In her evidence-in-chief she said that the man was wearing a black jean. Later she testified that she did not see the black jeans.

[49] She was initially clear on the issue during her evidence that this man ran away when her mother came out of the house. Later she became unclear about this.

[50] When asked why she pointed out the specific picture she testified as follows: "Because, I do not know." When asked whether she saw the man before she heard the noise caused by the shots she testified as follows: "No. I did not see the man. I just heard a loud noise."

[51] From the record of proceedings, it appears that BM found it difficult to keep her concentration for long. This is understandable considering the age of BM. When asked questions to elaborate on her answers she said she was tired. It was difficult for the cross-examiner to test her reliability to any extent. This placed a question mark over the reliability of her identification of the second appellant.

[52] During the photo identification parade the person in control of the parade, Warrant Officer Bruwer, declined the request by the legal representative of the appellants to ask the child whether a photograph had been shown to her before. Warrant Officer Bruwer said that she was not going to do that as she did not want to

confuse a 5-year-old child. In my view, such a request was reasonable and should not have been declined by the person in control of the parade.

[53] A further request to introduce further photographs to be shown to BM was also declined. In my view, this was also a reasonable request, which would have enhanced the probative value of the photo identification parade and the pointing out.

[54] When it comes to the consideration of the evidence of a child as a single witness, a court must approach such evidence with caution. Even more so if it relates to the identification of an assailant. Eyewitnesses' identifications are notoriously fallible and prone to error. (See *S v Mthethwa & another*⁹). The evidence of a single witness must be clear and satisfactory in every material aspect. When it comes to the consideration of the evidence of a child, the court should be aware that children are imaginative and maybe open to suggestibility from others, especially from a parent. The primary concern of a trier of fact is to ascertain whether the evidence of a young witness is trustworthy. In *Woji v Santam Insurance Co Ltd*¹⁰ the court examined the concept of trustworthiness and found, relying on the views of *Wigmore on Evidence*, that it comprised the following four components: (a) The capacity of observation, as to which the court should ascertain whether the child appears sufficiently intelligent to observe; (b) the power of recollection, which depends on whether the child has sufficient years of discretion to remember what occurs; (c) the narrative ability, which raises the question whether the child has the capacity to understand the questions put, and to frame and express intelligent answers; (d) sincerity, in regard to which the court should satisfy itself that there is a consciousness of the duty to speak the truth.

[55] The Supreme Court of Appeal in *S v ICM*¹¹ held that the court considering the evidence of a child '*must be satisfied that the child is a credible and reliable witness*' and that '*the credibility assessment relates to the child's honesty while reliability relates to the child's cognitive ability or brain development*'; and '*cognitive ability is*

⁹ Unreported, FB case no A230/2019

¹⁰ 1981 (1) SA 1020 (A) at 1028B-D

¹¹ [2022] ZASCA 108 (unreported), SCA case no 692/2021, 15 July 2022 at [23]

assessed by having regard to factors such as his or her ability to encode, retain, retrieve and recount information or an event’.

[56] In my view, there is uncertainty about the reliability of the identification of the second appellant by BM. She is a child and there exists a possibility that it was suggested to the child who the assailant could have been. The time she had as a young child to identify the person who shot her father was very short. Her description of the assailant and why she was able to identify the second appellant were contradictory.

[57] Her evidence that she could observe that her father was shot in his neck and his stomach and on his back is suspicious. It is highly improbable that she would have been able to see where her father was shot on his body in circumstances where the first shot would have shattered the window of the vehicle. Her father fell on her. It is more probable that this information she obtained at a later stage.

[58] The evidence of BM was not corroborated to any sufficient extent. The fact that an informer led the police to the second appellant who became the person who was pointed out by BM has no probative value as this informer was not called to explain what moved him to point out the second appellant. The informer could have pointed out a person who is known to be in the same “gang” as the first appellant. There is no evidence that there was a further person who observed the shooting of the deceased.

[59] The only further evidence against the second appellant was that there existed some kind of connection between the first appellant, identified by Ms. C[...] to have been a person on the crime scene, and the second appellant. The telephone number of the first appellant was saved on a phone found in possession of the second appellant as a “contact”. This cannot serve as corroboration for the identification of the second appellant by BM.

[60] In my view, the trial court wrongly accepted the evidence of BM as sufficiently reliable to base the conviction of the second appellant thereupon. In my mind, there exists a doubt whether the second appellant was the person who shot the deceased.

This doubt should have gone to the second appellant. This does not mean that the evidence of BM cannot be accepted that she was present in the vehicle of the deceased when a person came and shot the deceased. This fact was proven by the State beyond reasonable doubt.

[61] This finding leaves the Court with the following situation: The first appellant was correctly convicted based on him driving the vehicle which blocked the way of the deceased. This providing the opportunity for the person who fired the shots which killed the deceased. The State has failed to prove beyond reasonable doubt who the person was who fired the shots which killed the deceased, but the only reasonable inference which can be drawn from the proven facts in this matter is that the vehicle driven by the first appellant came there with a person or persons with the premeditated plan to shoot and kill the deceased. The driver of the vehicle associated him with the death of the deceased and contributed to such death by providing the opportunity to the person who pulled the trigger to kill the deceased. In my view, the first appellant was correctly convicted on the count of premeditated murder.

[62] The conviction of the second appellant on the count of murder stands to be set aside.

[63] The State failed to prove who shot the deceased and who was in possession of the murder weapon when the deceased was shot. In my view, the trial court erred in its finding that the first appellant was guilty on counts 2 and 3, namely unlawful possession of a firearm and ammunition. There was no basis upon which the trial court could find that the first appellant jointly possessed the murder weapon with the person who fired the shots. The Supreme Court of Appeal¹² and the Constitutional Court¹³ held that co-accused could not be convicted on counts of the unlawful possession of a firearm and ammunition by applying the doctrine of a common purpose. An element of these statutory crimes is the possession of the firearm and ammunition. The only basis for such convictions is upon proof of the intention to

¹² Leshilo v The State (345/2019) [2020] ZASCA 98 (8 September 2020) Unreported; S v Mbuli 2003 (1) SACR 97 (SCA)

¹³ Makubela v S, Matjeke v S [2017] ZACC 36; 2017 (2) SACR 655 (CC).

jointly possess the firearm and ammunition. No such evidence was led in this matter to possess such a firearm and ammunition as proof of an intention to jointly possess the firearm is required.

[64] The first appellant's appeal against his conviction on counts 2 and 3 should be upheld.

[65] The second appellant did not pursue his appeal in relation to counts 4 and 5 for being in the unlawful possession of a prohibited firearm and ammunition. Consequently, these convictions and sentences should stand.

[66] The following order is made:

66.1 The appeal of the first appellant against his conviction on count 1 is dismissed.

66.2 The appeal against the sentence of the first appellant in relation to count 1 is dismissed.

66.3 The appeal of the first appellant against his convictions on counts 2 and 3 are upheld and the sentences imposed are set aside.

66.4 The appeal against the conviction of the second appellant on count 1 is upheld and the sentence of life imprisonment is set aside.

66.5 The appeal of the second appellant against his conviction and sentences on counts 4 and 5 is dismissed.

66.6 The sentences imposed on the second appellant of respectively 10 years and 3 years imprisonment are antedated to be served separately from 12 August 2015.

R. STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

I agree,

R.B. MKHABELA
JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

I agree

T.P. BOKAKO
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Heard on: 26 May 2025

Delivered on: 21 July 2025

Appearances:

For the Appellants: Mr. J. Kruger

Instructed by: BDK Attorneys

For the Respondent: Adv. A.M. Williams

Instructed by: National Prosecuting Authority