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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Appeal Case Number: A200/25
WCHC Case Number: SS48/2021

In the matter between:

SHAKOOR GAFFOOR

Appellant

and

THE STATE

Respondent

Coram: Lekhuleni J, Ralarala J, Janisch AJ
Heard: 23 March 2026
Delivered: 15 April 2026

Appeal – Evidence on identification of the Appellant - State not proving the identification of the Appellant as the alleged perpetrator beyond a reasonable doubt – Appeal upheld.

ORDER

The Court makes the following order:

- “(a) *The appeal against the conviction of the Appellant succeeds.*
- (b) *The conviction and sentence are set aside.*”
-

JUDGMENT DELIVERED ON 15 APRIL 2026

THE COURT:

Introduction

[1] On 7 June 2024, the Appellant was convicted by the court *a quo* on three charges, namely:

- (a) One count of murder;
- (b) One count of contravention of section 3 of the Firearms Control Act 60 of 2000 (“*the Firearms Act*”) in that he had unlawfully in his possession a firearm, the further details of which were unknown to the State, without holding a licence, permit or authorisation issued in terms of that Act to possess that firearm; and

(c) One count of contravention of section 90 of the Firearms Act, in that he had in his possession an unknown quantity of ammunition of unknown calibre, without being the holder of a licence in respect of a firearm capable of discharging that ammunition or any other relevant permit.

[2] The Appellant was acquitted on certain other charges, namely contravening section 9(2)(a) of the Prevention of Organised Crime Act 121 of 1998 (“POCA”) and attempted murder.

[3] On 20 January 2025, the Appellant was sentenced as follows:

(a) On the count of murder read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1977, to life imprisonment;

(b) On the count of possession of a firearm, to five years’ imprisonment; and

(c) On the count of possession of ammunition, to five years’ imprisonment.

[4] The Appellant applied for leave to appeal to the Full Court against his conviction on each of the three charges. The court *a quo* granted leave on 28 March 2025.

[5] The Appellant had been convicted together with two other persons found to have been involved in the same incident, Mr Riedewaan Cedras (“Cedras”) and Mr Grandall Solomons (“Solomons”). Cedras and Solomons received the same sentences as the Appellant. They did not apply for leave to appeal.

The factual background

- [6] The appeal arises out of a tragic incident which occurred on Saturday 30 May 2020. At approximately 09h30 that morning, Mr Achmat Gaffoor (*“the deceased”*) was brutally murdered by assailants who shot him multiple times in broad daylight at the intersection of St Bernard Crescent and St Blaise Street in Montague Village, Lavender Hill, Cape Town.
- [7] The attack was captured by a closed circuit video camera installed at a property on that intersection. The video footage was admitted into evidence. We discuss its contents in more detail below. For present purposes, we record that it shows a silver grey Volkswagen Polo vehicle driving in a northerly direction on St Blaise Street and coming to a halt at the corner with St Bernard Crescent. Three persons alight from the vehicle. They are wearing Covid-19 style face masks over their noses and mouths. Two appear to be wearing beanies and the third has a blue hoodie covering his head. The deceased sprints away from the vehicle and across St Blaise Street as the assailants shoot at him. He falls against the opposite kerb. The three assailants continue to shoot at him on the ground. It appears that a fourth person gets out of the passenger side of the vehicle and also fires a shot from that side of the vehicle. The assailant wearing the hoodie then points his firearm in an easterly direction along St Bernard Crescent. He fires shots in that direction. All three assailants then get back into the vehicle which speeds off. The deceased is left lying in the street.

- [8] According to the time stamp on the video footage, approximately 19 seconds passed from the time the vehicle stopped at the intersection (09:32:57) to the time that it drove away (09:33:16).
- [9] The Appellant was arrested on 9 October 2020, just over four months after the date of the incident. He, together with Cedras and Solomons, was charged with the murder and other counts referred to above. The State contended that these were the three assailants who chased after the deceased and fired the shots.
- [10] When the matter came to trial before the court *a quo*, all three accused pleaded not guilty. Each of them raised an alibi, contending that he was not present at the crime scene and that the charges against him were a case of mistaken identity.
- [11] The Appellant said in this regard that at the time of the murder, he was staying with his parents and some of their friends at a house in Melkbosstrand, far away from the crime scene. He stated that he had arrived the previous evening, and was still there on the Saturday morning when he received a telephone call informing him of the shooting of the deceased.
- [12] The deceased, it was common cause, was the Appellant's nephew. The Appellant's father, also called Achmat Gaffoor ("*Gaffoor senior*"), had children from two marriages. Two daughters from his first marriage, Roegshana Gaffoor ("*Roegshana*") and Rihanna Gaffoor ("*Rihanna*"), lived in Montague Village. Roegshana was the mother of the deceased. Gaffoor senior had remarried, and the Appellant was one of the children of that union. While Gaffoor senior had originally lived in Montague Village and still owned properties there, he and his

immediate family (including the Appellant) had since settled in the more upmarket suburb of Kirstenhof.

[13] Although the Appellant and the deceased were uncle and nephew to one another, they were of similar age.

[14] Of direct relevance to the matter was an ongoing conflict at the time of the murder between two criminal gangs operating in and around the Montague Village area. There was evidence of a “war” between the gangs known as the Junky Funky Kids (“JFKs”) and the Flakka Kids (“*Flakkas*”). The Flakkas had apparently been a breakaway group from the JFKs. The area where the murder occurred was part of the territory of the Flakkas.

[15] The deceased was a member of the Flakkas. Cedras and Solomons were known members of the JFKs. Gaffoor senior was said to have once been a leader of the JFKs. The Appellant however denied that he was associated with the JFKs. He did not have any gang insignia tattooed on his body.

[16] The incident on the morning of Saturday 30 May 2020 displays the hallmarks of a gangland “hit” in which a member of one gang is targeted for assassination by members of a rival gang. Such incidents are notorious in the gang-ravaged areas of Cape Town. They, and the grip which gangs have over these communities, cause untold distress and upheaval amongst the inhabitants, who are often caught, both literally and figuratively, in the crossfire.

[17] The trial before the court *a quo* was a lengthy affair. It commenced on 6 November 2023, with the evidence being completed on 24 May 2024. Nine

witnesses testified for the State. The prosecution's case was shortened considerably by the fact that the accused, consistent with their defences of alibi and mistaken identity, made substantial formal admissions in relation to aspects such as ballistic examination and the post-mortem examination of the deceased. Each of the accused then testified in their own defence, and called witnesses (two in the Appellant's case) in support of their alibis.

[18] The court *a quo* concluded ultimately that the State had established the guilt of all three accused beyond a reasonable doubt. Their alibis were rejected as false.

The issues in the appeal

[19] The Appellant was granted leave to appeal against his conviction only. His legal representatives properly approached the matter on the basis that if his conviction is upheld, there would be no basis to upset the sentence imposed on him.

[20] The core submission made by the Appellant is that the State failed to adduce evidence on which it could properly be concluded that he was one of the assailants who shot the deceased. The Appellant contends that the court *a quo* erred in accepting the eyewitness' evidence identifying him. A central question is whether the eyewitnesses had a proper opportunity to identify the Appellant in the circumstances.

[21] In granting leave to appeal, the learned Judge *a quo* said the following:

“The only aspect on which another court could come to a different conclusion is that the whole incident was of a short duration. This could have affected the reliability of the two witnesses. For this reason, and this reason alone the [Appellant] is granted leave to appeal to the Full Bench of this Division against his conviction.”

[22] The reliability of a positive identification of a perpetrator, and the validity of an alibi defence, are essentially two sides of the same coin. For reasons that follow, our primary focus is on the reliability of the State’s evidence pertaining to the identification of the Appellant as a perpetrator of the incident itself. We deal with the alibi evidence, to the extent necessary, thereafter.

The evidence of the State: the shooting incident

[23] The direct evidence presented by the State in support of the charges against the Appellant comprised:

- (a) The eyewitness accounts of two persons who were at the scene of the murder, Mr Ethan Schoeman (“*Schoeman*”) and Mr Waseem Wilson (“*Wilson*”);
- (b) The aforementioned video footage, whose authenticity was verified by Captain C Louw of the South African Police Service (“*Capt Louw*”); and
- (c) The evidence of Roegshana (the deceased’s mother) and Rihanna, who were not at the scene but said that they had identified the Appellant as one of the assailants from viewing the video footage.

[24] We proceed to deal in more detail with the evidence, starting with the manner in which the video footage was obtained and admitted into evidence.

Evidence of Capt. Louw

- [25] Capt. Louw specialises in digital forensic investigations for the South African Police Services (“SAPS”). She testified because counsel for Cedras and Solomons did not admit the authenticity of the video footage. The Appellant did not dispute its authenticity. The court *a quo* held a “*trial within a trial*” at the conclusion of which it ruled that the footage was admissible.
- [26] At the hearing of the trial within a trial, Capt. Louw testified that she was requested by the investigating officer to assist with downloading CCTV footage from an address at the corner of St Bernard and St Blaise Streets in Montague Village. On 7 August 2020 she accompanied the investigating officer to this address and was given access to the DVR (digital video recorder) hard drive that stored video footage from the CCTV camera. She searched the DVR for the specific date and time when the incident occurred. The investigating officer confirmed what was of interest to his investigation, and she exported the relevant footage to a USB flash drive. The downloaded footage covered the time period from 9:00 am to 11:00 am on that day. The shooting incident occurred just after 9:32 am. Back at her office, she registered the footage and copied it to a DVD which was handed to the investigating officer. This was the source of the footage ultimately shown in court.
- [27] The significance of the downloaded portion commencing at 9:00 am is as follows. As we discuss below, Schoeman testified that around half an hour before the incident occurred, he (while walking with the deceased) had seen a silver grey Polo vehicle travelling along St Blaise Street in the direction of the

intersection where the incident would later occur. His observation of this vehicle at that time was central to his ultimate identification of the Appellant as one of the assailants. However, the footage presented does not show any such vehicle in the street from 9:00 am onwards until the incident occurs some 32 minutes later. It also does not show Schoeman and the deceased arriving on foot at the intersection, although they must have done so. Given Schoeman's evidence as to the timing of the incident, it may be that he and the deceased arrived shortly before 9:00 am, with the vehicle passing shortly before that. Therefore, had Capt. Louw downloaded earlier footage, even for a few minutes before 9:00 am, there might have been corroboration of the evidence that the same vehicle had been near the scene earlier that morning. There was however no explanation for why footage from before 9:00 am was not requested. We assume that by the time the matter came to trial, the earlier footage was no longer available from its DVR source.

Evidence of Schoeman

- [28] Schoeman was 18 years old at the time of the incident.
- [29] He testified that on that Saturday morning, he was at his house in St Blaise Crescent, Montague Village. The deceased, who was his friend, arrived and asked him for R5 to buy a "*dagga bag*" for them to smoke. Schoeman did not have the money, but the two decided to go and see if they could get money from people on the street.
- [30] They then walked together along St Blaise Crescent towards the intersection with St Blaise Street which runs perpendicular to it. They were moving in an

easterly direction. As they neared St Blaise Street, they saw a silver grey VW Polo driving past on that street. It was travelling from their right to their left (i.e. in a northerly direction) and passed in front of them.

[31] Schoeman said that he saw four people in the vehicle, being a driver and three male passengers in the back seat. There was no passenger in the front seat. The driver had a face mask on (the event occurred during the time of the Covid-19 pandemic). None of the three persons in the back seat had masks on. He identified them as the three accused before the court *a quo*.

[32] The nickname by which Schoeman knew Cedras was “Puffy.” He testified that Cedras was a member of the JFKs. He knew him because he (Cedras) lived in Sea Winds, a suburb next to Hillview where he (Schoeman) had grown up, and the two had played soccer together.

[33] He knew Solomons by his nickname of “Triller”. He also lived in Hillview and was known as a drug dealer and someone looked up to by members of the JFKs.

[34] He knew the Appellant merely as Shakoor. He was the uncle of his friend, the deceased, and had lived in a house in Montague Village. Schoeman had not met the Appellant, but the deceased had pointed him out to him.

[35] Schoeman testified that the vehicle just drove on, and that he and the deceased did not take note of anything or expect anything to come from it. He confirmed that he saw Puffy (Cedras) sitting behind the passenger seat (i.e.

closest to him as the car drove past) with a blue top on. He could not provide any further clothing descriptions of the other passengers.

[36] Schoeman said that he and the deceased then went and sat on the corner where the incident would later occur. They were asking people for a Rand or two towards their “*dagga bag*” but had not been successful. He identified some other people who were sitting on the corner on the other side of the road.

[37] After about half an hour or so, he saw the same silver grey vehicle driving towards the intersection, travelling in the same direction as when he had first seen it. This time, he said, there was a passenger in the front seat as well. He also noticed was that everyone in the car had masks on. He said that “*something doesn’t feel right now about the situation but the car is coming for the second time around with five people and they had masks on*”.

[38] Schoeman said that when he saw the car coming, he stood up and walked slowly towards it. The car stopped right next to him and the deceased. He saw guns being held low on the laps of the three back passengers. (He later also suggested that he had seen a longer gun on the lap of the passenger in the front seat.)

[39] He heard the car doors open and realised that he had to get away. He remembered hearing someone shouting “*hier is julle pappas*” but he did not know the significance of those words. He started running in the direction from which he had come earlier, i.e. down St Blaise Street towards the intersection with St Blaise Crescent, while the deceased ran in another direction.

- [40] The video footage records Schoeman sprinting away from the scene of the shooting. He had started running even before the vehicle came to a complete stop. He disappears from the footage about 4 seconds after the shooting commences.
- [41] Schoeman testified that he heard several shots going off. As he was about to round the corner into St Blaise Crescent, his shoulder hit the side wall and he fell. He turned his head and looked back towards where he had come from. He said that *“all I saw was three people, three guys shooting on Achmat. I heard over ten shots”*.
- [42] He was asked to confirm who the occupants of the vehicle on the second occasion were. In response, he stated that it was the same three passengers that he saw when they drove past him the first time, namely, the Appellant, Cedras and Solomons. When asked whether he had seen who was shooting at the deceased, he said that they were the same three people.
- [43] Schoeman also testified that the assailants were still shooting at the deceased, but that the one who had the blue top on, whom he knew to be Puffy, went to the corner and shot in the other direction. He could not see who he was shooting at because everyone who had been on that side of the corner was already gone.
- [44] He viewed all of this while lying on the ground where he had fallen. His uncle came around the corner to pick him up from where he was lying down because he did not want to stand up. His uncle took him home and that was all he saw

at the time. A few minutes later, he returned to the scene and saw the deceased lying dead on the ground.

[45] In cross-examination on behalf of the Appellant, it was not denied that the Appellant was known to Schoeman as a person who had lived in the area. The focus of the questioning was however on Schoeman's opportunity to identify the Appellant as one of the people who shot the deceased. In this regard:

- (a) In relation to his original view of the VW Polo, he testified that he was approximately 4 metres away from the vehicle as it passed in front of him. At the time, he and the deceased were just walking and talking. He confirmed that the three passengers whom he saw in the back seat did not have masks on, but he noticed the blue top of the person sitting behind the front passenger seat. He was also asked whether he noticed the colour of the driver's eyes. He said yes. However, he immediately after that said that he had not noticed the driver's eye colour at that time. The significance of this is that, in his later statement to the investigating officer, Schoeman had stated that when he saw the driver of the VW Polo, he noticed that he had green eyes.
- (b) He said that when the vehicle passed him, it was driving less than 60 kilometres per hour. Nonetheless, he said he was able to see who was in the back, even though his attention was not on the back seat exclusively.
- (c) As regards what happened when the vehicle returned, he testified that as the vehicle drove up, he was squatting on the pavement, and the deceased was standing next to him. He repeated that when he saw the

car coming back a second time, “we” (presumably meaning he and the deceased) noticed something different about the car, because of the extra passenger and that everyone had masks on. He said he stood up and watch the car come towards him, and that when it stopped, he started walking slowly away. When the doors opened, he and the deceased started running in different directions.

- (d) In response to the question as to how far he had run (i.e. before he fell), he initially estimated 12 metres. It was just as he wanted to take the turn into his street (where he could hide behind a wall) that he stopped because his right arm hit the wall. The assailants were busy shooting at the time.
- (e) As regards his written statement regarding the green eyes of the driver, Schoeman testified that he had noticed this when the vehicle stopped, and not on the first occasion when the vehicle drove by.
- (f) In his written statement, he had said that when he had looked back after falling, he saw the deceased lying on the ground, with all three passengers that had been in the back seat now out of the car. He said that he could “*still*” recognise them because Puffy was “*still*” wearing a blue hoodie with black pants, the Appellant was wearing a black jacket and Triller was wearing light blue jeans. In his oral evidence, he however did not mention any other clothing worn by the assailants. His statement also recorded that he had stood up and walked up towards his house,

whereas he had testified before the court that his uncle had had to pick him up.

- (g) When his cross-examination recommenced after the admission and playing of the video footage, Schoeman confirmed that when he had initially seen the VW Polo it was dirty, but that he could see through the windows. It was put to him that the sun would have been shining directly into his eyes at that early hour, as he was looking in an easterly direction. He denied this, saying that the sun was already high in the sky. He also stated that the driver had a "*number 1 haircut*", but that at that time he did not notice what colour his eyes were. Later he agreed that the vehicle's windows were tinted, but insisted that he could see the people inside through the windows.
- (h) As regards his running away from the shooting incident, Schoeman agreed that he had fallen on his stomach facing away from where the shooting was happening. He said that "*it took me less than five seconds to turn my head around to look what was going on behind me*". He did that as soon as possible "*because I did not know if somebody was coming behind me*".
- (i) There was further discussion as to how far he had run before he fell. Based upon Google Maps, it appeared that the distance from the corner where they had been sitting to the entrance to St Blaise Crescent was approximately 50 metres. Schoeman testified that he had, the day

before, gone to measure the distance using a measuring wheel and had found it to be 35 metres.

- (j) He testified that when he turned and saw the persons shooting, they were wearing masks, and that he saw their clothes (apart from the blue hoodie) at that point for the first time. In other words, he did not link the persons shooting to those he had seen on the first occasion by reference to their clothes, save for Cedras. He agreed that when he saw the blue hoodie he knew who it belonged to, and that is why he could identify the person wearing that item of clothing. It was put to him that he had just assumed that the three people outside the vehicle were the same people that he had seen in the first occasion. He denied that this was just an assumption.
- (k) Schoeman however did not testify as to any other objective points of reference which enabled him to positively identify the Appellant on the scene, such as physical characteristics, behaviour or clothing.
- (l) He admitted that he was a member of the Flakkas, as the deceased had been. He however said that he had only joined the gang after the incident.
- (m) In cross-examination by counsel for Cedras, Schoeman agreed that when the vehicle arrived for the second time, he could not see the faces of any of the accused as they were wearing masks, but that he had identified them the first time he had seen them. He also said that with masks or without masks, he knew who they were.

(n) Finally, counsel for Solomons put to Schoeman that he had not seen what the vehicle had done in the half hour between the two sightings; and that he could not say that it was the same people in the vehicle when it returned, because they were all wearing masks at the time. His response was *“you can’t say but I can say because I know who it is”*.

Evidence of Wilson

- [46] Wilson was 20 years old at the time of the incident, in which he also was shot and seriously wounded. He was sitting, together with his two-year-old son, on the corner of St Blaise Street and St Bernard Crescent, directly opposite from the corner where Schoeman and the deceased had been situated just before the shooting. He is initially in full view in the video footage.
- [47] Wilson confirmed that at the time he was a member of the Flakkas. He testified that the main area of operation of the Flakkas is Montague Village (where the incident occurred) and Hillview.
- [48] He testified that he was sitting on the corner when a grey vehicle approached. It stopped in front of the deceased and Schoeman. He said that Puffy got out of the car and there was a shot. It was when he heard the shot that he jumped up and ran away. Then he turned back because he realised that he had left his child behind. He saw Puffy coming and shooting towards him and he turned around again. Then he felt an impact and his left leg gave in. After he had fallen, his son crawled into a yard to safety.

- [49] He confirmed that he had known Puffy for a long time as a gangster belonging to the JFKs. (In cross-examination he said that he identified him that day by his body structure and “*fris*” build.) He saw him getting out of the car on the far side. He saw the deceased running behind the car, with Puffy shooting at him. He did not witness anyone else shooting. He however said that after he fell, he saw the Appellant running back to the car at about the same time as he saw his son crawling to safety. He said he knew the Appellant from childhood.
- [50] Wilson also testified that he saw Schoeman running down St. Blaise Avenue.
- [51] Wilson was cross-examined on three statements that he had made to the police. The first was given just after he came out of surgery on the day of the incident, when he was in great pain, and it is generally accepted that it is not a reliable or helpful statement. However, in a later statement, he said that after he had been shot, he looked to see where his son was, and he saw his son running into the yard. Puffy was still shooting in his direction and he could not see “*wie die ander twee skieters was nie*”. He could however see that one was slightly built and dressed in a black jacket and black trousers. He did not name the Appellant as one of the gunmen: his statement reads “*die drie skieters was ook geklee in swart kleredrag, maar ek kon nie sê wie hulle was nie*”.
- [52] He confirmed that the three people depicted on the video were wearing headgear and masks. He also agreed that he must have run approximately 50 to 60 metres before turning to look for his son and being shot.
- [53] He confirmed that while he was lying on his back and looking back toward the incident, already having been shot, his focus was on his son who was just in

front of the shooters. He denied that he was unable to see the Appellant despite his attention being on his son. He was adamant that he saw the Appellant *“and I know him since he was young”*.

[54] It was put to him that he had not only failed to name the Appellant in his statement but that he had expressly said that he did not know who the other shooters were. His response was that when he made the statement, he was only asked who the shooters were, and not who else he had seen at the scene. The implication was that he had in fact identified the Appellant as the person getting into the vehicle, but had not thought he was required to name him as he did not know him as a gunman.

[55] Wilson had also made a third statement to the investigating officer in which he stated that the deceased had begun running on the other side of the road, that he had seen Puffy approximately two or three steps away shooting the deceased three times, and that he had seen the deceased fall on the ground.

[56] This version of events is however not readily reconciled with what the video footage reveals. Wilson is sitting on the kerb when the vehicle enters the frame. He is focused on his son who has just walked across the intersection towards him; thus, he is not looking towards the vehicle. As the deceased emerges from behind the car with the shooter in a blue hoodie in pursuit, Wilson appears to recoil from hearing a gunshot. He turns to look momentarily back towards the shooter, while already bolting away. He then turns his head forward and sprints away from the scene, leaving the frame at 09:33:00. The deceased may indeed have started to fall by the time Wilson turned his head, and it is not impossible

that he was in Wilson's frame of vision in that brief moment, but Wilson certainly could not have seen the deceased actually fall on the ground, as the footage shows that he was already looking and running in the other direction by that time.

[57] It is also apparent from the video footage that Wilson could not have seen Schoeman running down St Blaise Street. By the time he turned to look briefly towards the source of the gunshots, Schoeman was already well out of Wilson's potential field of vision.

[58] Finally, given how Wilson's attention was on his son until he first recoiled from an apparent gunshot, it seems unlikely that he could have seen the blue-hooded assailant getting out of the far side of the vehicle, as he had testified.

[59] The video footage does however corroborate Wilson's evidence in the sense that the assailant in the blue hoodie is seen walking back towards the vehicle, then looking down St Bernard Crescent (in the direction in which Wilson had run) and firing shots in that direction, before running back to the car and getting in on the far side. The other two assailants run back to the car at the same time. One climbs into the rear door on the (near) driver's side and the other on the far side. The video also shows Wilson's young son, abandoned when the shooting began, running in the same direction as Wilson had run, and then falling down and crawling into an entrance to a neighbouring property.

Evidence of Roegshana

[60] Roegshana, the mother of the deceased, was not present at the scene. However, she testified that she was shown a copy of the video footage after the incident. This was sent to her mother's mobile phone.

[61] When she looked at the footage, she said she could not believe what she saw: her brother (i.e. the Appellant) and Triller shooting her son.

[62] In response to the question as to how she knew that it was her brother on the footage, she said "*he is my brother. I know him all the years*". She also testified that she had given him the jacket he was wearing. Having been asked whether there was anything that stood out in the video that helped her to know that this was the Appellant, she simply said "*I just know it is my brother*".

[63] Later she repeated that she knew it was the Appellant and Triller, that she could see quickly that it was them, and that:

"I know their appearance. I know how – ek ken hulle lyftaal. Ek het gebly met hulle. Ek ken, daar is nie 'n manier hoe ek nie vir hulle sal uitken nie."

[64] In cross-examination, it was put to her that the cell phone screen on which she saw the footage was too small for her to identify clearly the facial features and the bodily features of the Appellant. She denied this. Again she simply said "*I have nothing to say, but I know my brother*".

[65] In her statement to the police, Roegshana had said that the Appellant had JFK tattoos on his back. It was put to her that this was wrong, which she accepted.

She explained that she had been told of the tattoo, rather than having personal knowledge of it.

- [66] Roegshana gave further evidence as regards how she identified Solomons / Triller (particularly from his body language and gait). However, she did not provide any equivalent details in relation to recognising the Appellant.

Evidence of Rihanna

- [67] Rihanna is the aunt of the deceased. She was at home during the incident, a few minutes' walk away from where it happened. She heard gunshots. Almost immediately, people came running to her to say that the deceased had been shot. She heard that there was a video of the incident which she and Roegshana obtained and watched the next day.

- [68] Rihanna testified that when they watched the video footage, she identified her brother Shakoor (i.e. the Appellant) on the video. In response to the question as to how she knew that it was the Appellant that she saw, she said the following:

“My broer, ek ken my broer; ek en my broer is baie close. Ek het vir hom, toe hy sy hare geknip is, sy kleredrag en hoe hy loop en beweeg, daai is my broer.”

- [69] She said she also recognised Triller by the way he walked and his bent back.

- [70] In cross-examination, Rihanna was asked when she had recognised the Appellant on the video footage. She said that she had been together with Roegshana when they got the video footage for the first time. Although she accepted that she had watched the video footage together with Roegshana while they were driving, she said that the first time she identified that it was the

Appellant on the video was when she saw it on her own phone. Her words were as follows:

“Toe ek die video footage op my eie foon het en ek het oor en oor na die video footage gekyk.”

[71] Thus, on her own evidence, she did not immediately recognise the Appellant when first watching the video, but only did so after watching the video over and over on her own.

Evidence of the State: the Appellant’s alibi

[72] As stated, the Appellant had indicated that he would rely on an alibi, namely that he was present at a house in Melkbosstrand with his parents and some of their friends at the time the incident occurred.

Evidence of Dzikici

[73] The State led the evidence of Mr Geamatswa Dzikici (“*Dzikici*”), who testified by way of video link from Lusaka, Zambia where he was studying at the time.

[74] Dzikici had been the caretaker of the Melkbosstrand house. The witness testified that he lived in this house for about four years, from 2019 to 2022. He further testified that the house was occupied between 27 March and 20 July 2020 by three men whose names he recalled as Bule, Nazeer and Zaheer, with a woman and children. This included the period of 29 and 30 May 2020 when the Appellant said he was there. He had been shown a picture of the Appellant and said that he did not know the person in the picture and never seen him at the premises while he was working there. He stated that after those occupants

had left, one Javid and his wife Nabeelah had been there for a day, and after that a man called Irefan had lived there until he (Dzikici) left. Javid and Nabeelah had come to visit from time to time when Irefan was staying there.

- [75] In cross-examination, the Appellant's alibi was put to Dzikici who denied the material parts thereof. It was also put to him that Irefan, who was apparently a business partner of the owner of the house, would come and testify that the people that he spoke of were not there during the time period that he mentioned. He disputed this.

Evidence of Sgt van Reenen

- [76] The State led the evidence of Sgt van Reenen, the investigating officer from the Hawks investigating unit of the SAPS. He confirmed that he had been tasked with investigating the murder of the deceased after complaints from the deceased's family that the investigation through the Steenberg SAPS had stalled. Following receipt of statements implicating the Appellant, he had arrested him on 9 October 2020.
- [77] Following the arrest, van Reenen was told by the Appellant's attorneys of the Appellant's alibi, which he had investigated. He was presented with an affidavit from Nabeelah Kola ("*Kola*") to the effect that the Appellant was at the Melkbosstrand house on the day of the incident. After various attempts to speak to Kola, he had been able to do so telephonically. She had reiterated that they had been in the house in May, contrary to what Mr Dzikici had said. Van Reenen did not accept the veracity of her alibi evidence, and told her that it was

an offence to lie under oath, which had made her angry. They had not spoken again after this. That concluded the State's case.

Evidence for the Appellant

[78] The Appellant and his co-accused testified before the court *a quo*. However, for the purposes of this judgment, we will not summarise the evidence of the other accused. Instead, we will confine ourselves to the Appellant's defence evidence, as the party who impugns the decision of the court *a quo*. The Appellant testified and called two witnesses.

The evidence of the Appellant

[79] The Appellant testified in some detail as to his whereabouts on the weekend of 30 to 31 May 2020. He stated that on the evening of 30 May, after drinking alcohol at his home with some friends, he had been taken to the Melkbosstrand house together with some friends. He was inebriated when he arrived. There he found his parents and their friends, Javid and Kola. He had contacted Kola to let her know that he was on his way and she had let them in. The driver and two other persons stayed in the van. His friends stayed for more drinks before leaving in the van. He said that he fell asleep and then woke up again around 23h00, and went to smoke marijuana on the beach. After that he continued to socialise with the others (his father, Kola and Javid) until the early hours of the morning when they went to bed. He could not sleep after that. The next morning, he went up to his parent's room and was speaking to them. Kola was also there. One of them asked him to make coffee for them. He went downstairs to the kitchen for that purpose. While he was there, he received a

call (from whom he could not recall) telling him that a shooting had occurred and that the deceased had been killed. He went directly to his father to tell him the news. His mother said that he should go and fetch his sisters from Kirstenhof, which he did, borrowing Kola's vehicle. He also fetched his girlfriend, Chelsea, and their child. All of them came back to the house, although Chelsea left soon afterwards. There was further "partyng" during the day and more alcohol arrived with a driver. At one point he went to the Melkbos police station to try to help a friend of Javid who had been caught with alcohol in his car, but then went back to the house. The Appellant left the Melkbosstrand house the next day with the others. They had lunch at Kola's house in Blouberg before going home.

The evidence of Zaheer Smith

[80] The Appellant led the evidence of Mr Zaheer Smith who testified that he had been staying at the Melbosstrand house with two of his friends, his sister and her two children in the period up to April 2020, when they moved out. The others were Nadeer Matah and Rafeek Bule. He denied that they were staying in the house on 29 and 30 May 2020.

[81] Smith did not deviate from his evidence in cross-examination.

The evidence of Kola

[82] Kola testified that she was at the house in Melkbos from the afternoon of 29 May 2020 until Sunday 31 May 2020. She confirmed that the Appellant had arrived on the Friday evening when she and his parents were already there.

She also testified that the next morning she had seen him in his parents' bedroom where he was playing on a treadmill. His mother had asked him to make coffee for them. He had gone downstairs and when he returned he told his father the news about the shooting of the deceased. Everyone was shocked. Kola lent the Appellant her vehicle to go and fetch his sisters, which he did. After he returned they stayed in the house for the rest of the day and left the next day, going to her house for lunch.

[83] Ms Kola's evidence as to what exactly happened in the house over that weekend differs in certain respects from the Appellant's own rendition of events. We address this further below.

The judgment of the court a quo

[84] We turn now to setting out the material aspects of the decision of the court a quo in relation to the conviction of the Appellant.

[85] As already stated, the three accused were acquitted on charges of attempted murder and a contravention of POCA. We do not address these aspects here.

[86] Because only the Appellant has appealed, we need not address the convictions of Cedras and Solomons. There is of course an overlap in relation to the events that happened at the crime scene, but we refrain from analysing the evidence (including alibi evidence) as it relates to them specifically.

[87] The court a quo stated at the outset that the main issue for determination was whether the accused "*have been positively identified as the perpetrators of the crimes which they have been charged with*".

[88] Having addressed the issue of the State's onus of proof and case law regarding identification evidence, the court *a quo* highlighted aspects of the factual evidence. In particular:

- (a) It recorded Schoeman's evidence of his earlier sighting of a vehicle in which the three accused were in the back seat; that the same vehicle had approached them approximately 30 minutes later, with an additional passenger sitting in the front passenger seat and all the occupants masked; that as the shooting began, he fled the scene and fell as he was trying to negotiate a corner; that from that position he looked back to see the three accused shooting at the deceased; that he saw Cedras moving to the corner and continuing to shoot; that Schoeman knew all three of the accused; and the basis for this knowledge of them.
- (b) It recorded Wilson's evidence that Cedras had emerged from the vehicle and started shooting; that he (Wilson) ran down the road, turned to look for his son and then saw Cedras shooting at him; that he felt an impact and fell to the ground; and that he "*only noticed Shakoore on the scene as he was running back to the vehicle*"; that he had not named the Appellant in his statement as one of the shooters, but this was because he was asked who was shooting, and not whom he had seen on the scene.
- (c) In considering whether the identity of the accused had been established, having been placed at the scene by two eyewitnesses and two secondary witnesses (i.e. Roegshana and Rihanna), the court *a quo*

concluded that there is no doubt on the evidence that the accused were all well known to the witnesses.

- (d) The question arose as to the circumstances in which they made the identification of the accused. As regards the evidence of Schoeman, it held that he had two opportunities to make an identification, the first being the time when the vehicle passed him and when he said he could see into the vehicle and recognise the accused (including the Appellant). The court held that *"the criticism that [Schoeman] could not see into the vehicle because the vehicle was dirty and its windows tinted is unfounded."*
- (e) The second identification opportunity was when the vehicle on the second occasion stopped close to him and the deceased. The court stated that *"although they were wearing masks at this stage, he [Schoeman] was still able to identify them because these were people that he knew very well. His description of the assailants was not based solely on their faces, but their overall appearances. The same degree of reliability can be found in the evidence of Wilson, who also knows the accused very well"*.
- (f) The court then pointed out that it was necessary, in weighing up the identification evidence, to have regard to the evidence for and on behalf of the three accused, to determine whether it could accept the reliability of the identification of the witnesses.

- (g) It then turned to the alibi evidence. It recorded that the evidence of Kola, when looked at in isolation, appears to have been without any blemish, but when contrasted with the evidence of the Appellant himself, there were serious and material discrepancies between the two.
- (h) In relation to Kola's evidence, the Court stated that the investigating officer had testified that he had tried several times to contact her to discuss the alibi issues. It was not clear why she did not make herself available to the police at the earliest opportunity when the case was being investigated. The court also held that it was "*interesting and remarkable that only Kola came to testify. Shakoor's parents never testified, never provided any corroborative evidence that Shakoor was with them at No. 1[...] F[...] Road, Melkbosstrand*".
- (i) Returning to the shooting event, the court dismissed the concern that the video footage was not of sufficient clarity for the identification of the accused beyond a reasonable doubt. It pointed out that the primary sources were Wilson and Schoeman, being eyewitnesses who were on the scene. It reiterated that Schoeman had two opportunities to identify the accused, once when they drove past him and the second when they jumped out of the vehicle and started shooting. He had ample opportunity to make a positive identification, given that he was identifying people that were known to him.

- (j) It concluded that after observing the two witnesses, “*the primary identification of Shakoor on which this court can safely rely is that of Schoeman and Wilson,*” and in particular held that:

“Schoeman at one stage appeared to be hostile to counsel for Shakoor, but in my view this was as a result of the acidic manner in which he was cross-examined. On close scrutiny he has been a reliable witness upon whom the court can make a finding. Wilson was also a reliable witness.”

- (k) Having dealt with the alibi evidence of the other accused, the court concluded as follows:

“In the circumstances I am satisfied that the evidence of the three alibi witnesses were false and therefore can be rejected as false.

The rejection of these alibi witnesses leaves the evidence of the identifying witnesses, namely Wilson and Schoeman who were positive in their identification of the accused intact. In the circumstances, the conclusion that I have arrived at is that the state has proved beyond a reasonable doubt the following charges: ...”

- [89] On that basis, the Appellant and the other two accused were convicted on the charges of murder and illegal possession of a firearm and ammunition.

Legal principles

- [90] While it is obviously desirable that incidents of wanton violence such as that which led to the death of the deceased be thoroughly investigated and the perpetrators brought to justice, a conviction can only follow if the State proves the guilt of the accused by discharging the substantial onus which lies upon it, namely to establish such guilt beyond a reasonable doubt.

[91] This standard was described in *Monageng v S* [2009] 1 All SA 237 (SCA) in paragraph 14 as:

“evidence with such a high degree of probability that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that the accused has committed the crime charged (*R v Mlambo* 1957 (4) SA 727 (A) at 738A; *S v Phallo* 1999 (2) SACR 558 (SCA) paras 11 and 12). An accused’s evidence therefore can be rejected on the basis of probabilities only if found to be so improbable that it cannot reasonably be true (*S v Shackell* 2001 (2) SACR 185 (SCA) para 30; *S v V* 2000 (1) SACR 453 (SCA) para 3.”

[92] The relevant *dictum* in *S v Shackell* (also reported at 2001 (4) SA 1 (SCA)) in paragraph 30 is as follows:

“It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused’s version is true. If the accused’s version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. Of course, it is permissible to test the accused’s version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.”

[93] In *Nkomo v S* [2024] ZASCA 61 in paragraph 15, the following was stated:

“The fundamental principle of our law that cannot be overstated is the presumption of innocence for the accused until proven guilty beyond reasonable doubt. If there remains any reasonable doubt about the accused’s guilt after considering the evidence, the accused must be acquitted. Reasonable doubt is based on reason, logic, and a common sense evaluation of the evidence presented, not on prejudices or emotions. In my view, what is needed is a degree of certainty that falls between absolute certainty and probable guilt.”

[94] In determining whether the onus has been discharged, the court does not approach the questions of whether guilt has been proved beyond a reasonable doubt and whether the accused's version is reasonably possibly true in isolation from one another. They are part of the same test, as stated in *S v Sithole* 1999 (1) SACR 585 (W) at 590g-i:

“There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true. These are not two independent tests, but rather the statement of one test, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is not true. The two conclusions go hand in hand, each one being the corollary of the other. Thus in order for there to be a reasonable possibility that an innocent explanation which has been proffered by the accused might be true, there must at the same time be a reasonable possibility that the evidence which implicates him might be false or mistaken.”

[95] An accused who raises an alibi defence does not attract an onus to prove that alibi. An alibi essentially constitutes a denial of the State's case on the issue of identification or a denial of its evidence as to the accused's involvement at the crime scene, and if it is reasonably possibly true, it must be accepted (*Carolus v S* [2025] ZAWCHC 362 in paragraphs 8 and 9; see also *S v Gcam-Gcam* 2015 (2) SACR 501 (SCA) in paragraph 61). If evidence of an alibi cannot be rejected as false *per se*, this result cannot be reversed because the State has put up strong evidence linking the accused to the offences (*S v Liebenberg* 2005 (1) SACR 335 (SCA) at 358h-i).

[96] Evidence identifying a person as the perpetrator of a crime must necessarily be approached with caution. The well-known *dictum* of Holmes J in *S v Mthethwa* 1972 (3) SA 776 (A) at 768A-D sets out the various factors relevant to a positive identification.

“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, 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 Mehlaphe*, 1963 (2) SA 29 (AD).”

[97] One of the factors referred to in the above *dictum* is the extent of prior knowledge of the accused. The aspects to be taken into consideration when an eyewitness is identifying a person known to him or her may differ from those applicable where the witness is identifying a person previously unknown.

[98] In *R v Dladla* 1962 (1) SA 307 (A) at 310B-E, Holmes JA endorsed the following dictum of the court *a quo* in that matter:

“One of the factors which in our view is of the greatest importance in a case of identification, is the witness’ previous knowledge of the person sought to be identified. If the witness knows the person well or has seen him frequently before, the probability that his identification will be accurate is substantially increased. Even in the case when a witness has some difficulty in the witness-box in giving an accurate

description of the facial characteristics and clothes of the person whom he has identified, the very fact that he knows him provides him with a picture of the person in the round which is a summary of all his observations of the person's physiognomy, physique and gait, and this fact will greatly heighten the probability of an accurate identification 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.' (our underlining)

[99] The distinction between the processes of observation and recognition was described as follows in *S v Abdullah* [2022] ZASCA 33 in paragraph 13:

“The appellant contends that Mr. Carelse did not have the opportunity to properly observe and identify the gunmen. Much was made of the fact that Mr Carelse only had between 2-4 seconds in which to observe the appellant. Had the appellant being a stranger to him, this could have been a significant factor. However, when seeing a person who is known to you, it is not a process of observation that takes place but rather one of recognition. This is a different cognitive process which plays a vital role in our everyday social interaction. The time necessary to recognize a known face as opposed to identifying a person for the first time, is very different. It has been recognised by our courts that where a witness knows the person sought to be identified, or has seen him frequently, the identification is likely to be accurate.”

[100] In *S v Sithole* (*supra*) at 591e-g, the court pointed out that where a conviction depends on identification alone, something more will be required than the mere assertion that he recognises the offender. This could be the fact that the person is known to the witness, or some other distinctive feature. A mere assertion of a correct identification will usually not be enough.

[101] In considering an appeal based on fact, it must be remembered that the court *quo* had an opportunity to observe the witnesses and their demeanour in person and to form a view as to their credibility and reliability.

[102] In *S v Francis* 1991 (1) SACR 198 (A) at 204c-e, the SCA stated as follows:

“in order to succeed on appeal [the accused] must ... convince us on adequate grounds that the trial Court was wrong in accepting [the witness's] evidence – a reasonable doubt will not suffice to justify interference with its findings. ... Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this Court will be entitled to interfere with a trial Court's evaluation of oral testimony.”

[103] This is consistent with long-standing principles relevant to appeals on questions of fact as set out as follows in the judgment of Davis AJA in *R v Dhlumayo* 1948 (2) SA 677 (A) at 705-706:

- “1. An appellant is entitled as of right to a rehearing, but with the limitations imposed by these principles; this right is a matter of law and must not be made illusory.
2. Those principles are in the main matters of common sense, flexible and such as not to hamper the appellate court in doing justice in the particular case before it.
3. The trial Judge has advantages - which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked.
4. Consequently the appellate court is very reluctant to upset the findings of the trial Judge.
5. The mere fact that the trial Judge has not commented on the demeanour of the witnesses can hardly ever place the appeal court in as good a position as he was.
6. Even in drawing inferences the trial Judge may be in a better position than the appellate court, in that he may be more able to estimate what is probable or

improbable in relation to the particular people whom he has observed at the trial.

7. Sometimes, however, the appellate court may be in as good a position as the trial Judge to draw inferences, where they are either drawn from admitted facts or from the facts as found by him.
8. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.
9. In such a case, if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.
10. There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.
11. The appellate court is then at large to disregard his findings on fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular case, and so come to its own conclusion on the matter.
12. An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial Judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.”

[104] Consistent with this *dictum* is what was said by the Constitutional Court in *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC) in paragraph 45:

“It is undesirable for this court to second guess the well-reasoned findings of the trial court. Only under certain circumstances may an appellate court interfere with factual findings of a trial court. What constitutes those circumstances are demonstrable and material misdirection and a finding that is clearly wrong (*S v Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426 ...). Otherwise trial courts are best placed to make such findings.”

[105] This however does not mean that an appeal court should approach the factual findings of the trial court with kid gloves. The appeal court must closely scrutinise the evidence and the reasoning process of the court *a quo* in deciding whether circumstances are present warranting deference to, or a departure from, those findings.

[106] Against these legal principles, we turn to address the evidence on which the Appellant was convicted.

Analysis: the eyewitness evidence

[107] As stated, the court *a quo* accepted the reliability of the eyewitness evidence of Schoeman and Wilson placing the Appellant on the scene as a participant in the attack. Although it referred to the secondary identification of the Appellant by Roegshana and Rihanna from watching the video footage, it did not, in fact, rely on that identification: it held that “*the primary identification of Shakoor on which this Court can safely rely is that of Schoeman and Wilson*”.

[108] There was no dispute that the Appellant was previously known to both Schoeman and Wilson. The key question is however whether their identification of him as an active perpetrator at the scene of the crime was sufficiently reliable to justify the conviction.

[109] Even though different considerations come into play when one is dealing with the recognition of a person known to one, this does not mean that the circumstances in which the identification occurred are to be less thoroughly scrutinised. As stated in the underlined *dictum* from *Dladla* cited above, what

remains important is “*the opportunity for a correct identification having regard to the circumstances in which it was made.*”

The evidence of Schoeman

[110] The court *a quo* held that Schoeman had two opportunities to make an identification, the first being when he saw the vehicle before the incident with its unmasked occupants (including the Appellant), and the second being when the vehicle stopped close to him and the assailants jumped out. The learned Judge stated that “*although they were wearing masks at this stage, he [Schoeman] was still able to identify them because these were people he knew very well. His description of the assailants was not based solely on their faces, but their overall appearances.*”

[111] With respect, the approach of the court *a quo* is open to material criticism.

[112] In the first instance, even if one accepts the evidence that the Appellant was identified to have been in the back seat of the vehicle when it drove past Schoeman earlier that morning, despite the fact that the vehicle was dirty, the windows were tinted and the sun would clearly have been low in the eastern sky directly above the vehicle, this does not mean that he was necessarily still a passenger in the vehicle when it returned more than half an hour later. On Schoeman’s own version, there was now a fifth person in the vehicle, and all the occupants were now masked. Schoeman had obviously not had eyes on the vehicle in the meantime. It must have stopped somewhere to take on another passenger. He could not have known whether anyone had got out. In

the light of those facts, it is not safe to assume that the Appellant was one of the persons still in the vehicle when it returned.

[113] Second, the court *a quo* reasoned that Schoeman independently recognised the three occupants (including the Appellant) a second time when the vehicle came back. Although after relating his version, he confirmed that the three people he had seen out of the vehicle and doing the shooting were the three passengers, it is not clear from his evidence that he positively identified the Appellant in the vehicle when it came towards him on the second occasion. He said that he saw guns on the laps of the persons in the back seat; he saw the longer gun on the lap of the person on the front seat; he also said that he saw the green eyes of the driver; but he did not say that he independently recognised the Appellant behind his mask as he sat in the seat. On the contrary, he accepted that he had not seen the occupants' faces at that time. Schoeman also did not at any stage describe the Appellant by his overall appearance (as opposed to his face), despite saying that he knew him whether or not he had a mask on.

[114] Third, the video footage suggests that Schoeman would have had almost no time to identify the occupants of the vehicle as it drove up the second time. The footage shows him sprinting away even before the vehicle comes to a halt. It is highly unlikely that he had a clear and adequate opportunity to carry out an identification of the three masked passengers before running away.

[115] Fourth, in his police statement, Schoeman did not say that he identified the assailants inside the vehicle on the second occasion. He said that he saw Puffy

emerging from the vehicle with a gun and that he ran away. He did not say that he saw the others jumping out of the vehicle, and the footage would seem to confirm that this is unlikely as he is already running away when the other two assailants come into view.

[116] On the contrary, Schoeman's evidence of having identified the gunmen on the second occasion appears to arise from his observation after he fell at the corner and looked back towards the scene.

[117] The court *a quo* did not in any way analyse the circumstances of this observation opportunity. Had it done so, it would in our view have been obliged to have regard to the following factors:

- (a) The extremely short duration of the incident (19 seconds from start to finish).
- (b) The even shorter duration of the opportunity for Schoeman to identify the Appellant. He had sprinted between 35 and 50 metres away from the scene before falling and looking back. This would probably have taken up the least half of the active shooting period, leaving him with a very short window to observe a complex and chaotic scene.
- (c) The distance at which Schoeman was viewing the scene (35 to 50 metres away).
- (d) The stressful conditions under which the observation was made. Schoeman was lying on the ground, having run for his life from an armed

gunman or gunmen, having fallen while in flight, and having looked back because he did not know whether someone was coming after him.

(e) Quite apart from the distance he was away from the scene, the fact that the assailants were all wearing masks and headgear.

(f) The fact that the scene was fluid, with none of the assailants standing still or facing Schoeman for any length of time.

[118] None of these factors makes for an ideal or even reasonable opportunity to identify a perpetrator by a person in Schoeman's position.

[119] Moreover, as already pointed out above, Schoeman did not testify as to any particular physical characteristics that caused him to recognise the Appellant as one of the gunmen actually carrying out the shooting. In his police statement, he had said that he could "still" identify the Appellant because he was wearing black clothing, but he conceded in evidence that he had not seen the clothes worn by the Appellant on the first occasion; so that he could not have identified him by that means at the scene. In other words, he provided no real objective basis for his identification of the Appellant as one of the gunmen other than the fact that he had seen him in the vehicle on the first occasion the vehicle had passed him, the difficulties with which we have already mentioned above.

[120] There is a further factor which appears to us to be relevant, albeit that it was not addressed in the judgment or in argument. This is that, as was common cause, video footage of the incident had been freely circulating on social media in the days that followed it. It seems most probable that Schoeman would have

viewed this footage before making his statement, and he certainly did so before testifying. Indeed, this is the only explanation for something that he said in his police statement, to the effect that Puffy saw Wilson who was sitting with his child and started shooting in his direction, and that Wilson just left his child on the pavement and started running with his child following after him. Schoeman could not have seen any of this, as the video footage shows him having run away before Wilson himself turned and ran. This raises a legitimate concern as to the degree to which Schoeman's evidence was his own eyewitness account and to what extent he was relating what he saw on the footage (including what the accused were wearing).

[121] For all these reasons, while recognising the advantages that the court *a quo* had in viewing Schoeman giving evidence, we consider with respect that the court misdirected itself in its recordal and analysis of Schoeman's eyewitness identification of the Appellant. There is in our view material doubt as to whether Schoeman had the opportunity to make such an identification in the heat of the moment, and accordingly as to whether his identification is correct. As stated in *R v Dhlumayo (supra)*, there may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; and there may be such a misdirection also where, though the reasons as far as they go are satisfactory, the court *a quo* is shown to have overlooked other facts or probabilities. It appears to us, with respect, that both these criteria are met on the present facts.

The evidence of Wilson

[122] The court *a quo* did not subject the evidence of Wilson to any particular scrutiny in relation to his opportunity to identify the Appellant. It simply held that *“the same degree of reliability can be found in the evidence of Wilson, who also knows the accused very well”*.

[123] We also have considerable difficulty with the finding of the court *a quo* in relation to Wilson’s evidence.

[124] In the first instance, Wilson’s evidence was limited to a single identification opportunity. He could not, like Schoeman, tie his observations to an earlier sighting of the vehicle or its occupants. He would have had no prior expectation as to who the gunmen might have been.

[125] Second, as with Schoeman, the court did not analyse the opportunity that he had to identify the Appellant at the scene. If it had done so, the following aspects (some similar to Schoeman’s opportunity) would have had to be noted:

- (a) The extremely short duration of the incident.
- (b) The even shorter duration of the opportunity for Wilson to identify the Appellant. He had sprinted some 50 metres away from the scene before looking back to look for his son. By that time, the person he identified as Puffy was already pointing his firearm at him. He turned, felt the shot hit him and fell on the floor, again looking back. His view of the black-clad assailant thereafter running to the vehicle could not have lasted more than a few seconds.
- (c) The distance at which Wilson was viewing the scene (50 metres away).

- (d) The stressful conditions under which the observation was made. Wilson was lying on the ground, having been shot, with the gunman still pointing a gun in his direction and looking for his young son who had been left behind in an active shooting scene. The prospect that at this crucial moment he was able to pay proper attention to the identity of another person running behind the one pointing the gun at him seems unlikely.
- (e) Quite apart from the distance he was away from the scene, the fact that the assailants were all wearing masks and headgear.
- (f) The fact that the scene was fluid, with the person he identified as the Appellant running to the vehicle.

[126] Wilson also did not provide any evidence of objective characteristics (e.g. build, gait or other features) by which he identified the Appellant as one of the masked assailants.

[127] Very importantly, the court *a quo* did not question the fact that Wilson, in his written statement to the police, had not only not identified the Appellant, but had positively said that he did not know who the other shooters were (apart from Puffy). While care always has to be taken in drawing conclusions from police statements, it would seem most improbable that if Wilson had actually immediately recognised the Appellant as the person getting into the getaway vehicle with “Puffy” (whom he did name), he would not have mentioned this when interviewed by the police. He also did not suggest that the reason he failed to do was because of fear of reprisal, or a lack of trust in the police. His explanation, i.e. that he was not asked to name persons he did not know to be

shooters, does not make sense, since his statement shows that he viewed the persons getting out of and back into the car as the gunmen: indeed, his statement reads that “[e]k sien hoe nadat alles stil geword het die drie (3) skietters na dieselfde silwer Polo hardloop en inspring en wegry” (our underlining).

[128] Moreover, in Wilson’s case, the concern we expressed above about the extent to which evidence was the product of his later viewing of the video footage rather than an actual recollection of the event is even more pronounced.

[129] In Wilson's statement given on 8 July 2020, he said that while he was sitting on the corner, he noticed a silver Polo vehicle coming in his direction. He says he saw how the vehicle came to a halt on the other side of the street, and saw that there were 4 male persons in it. None of this seems likely given the video footage, which shows Wilson not looking at the vehicle at all until his reflexive glance towards the blue-clad gunman while already running away. The same criticism can be made of his statement that he saw three male people getting out of the vehicle with weapons, that the deceased began running to the other side of the road, that Puffy had fired two or three shots at the deceased, and that he saw the deceased falling on the ground. At most, he might have viewed the person identified as Puffy shooting at the deceased in the brief moment that he turned, but as stated he probably could not see the deceased fall.

[130] As also stated, Wilson’s evidence at the trial that he had seen Schoeman running away is inconsistent with the video footage.

[131] These discrepancies cast material doubt on the reliability of Wilson's identificatory evidence of the Appellant. In our view, the court *a quo* ought to have engaged with these aspects. The fact that Wilson may have known the Appellant well is not, with respect, an adequate counter to these numerous factors. We consider, with respect, that the court *a quo*'s conclusion that Wilson's evidence was reliable amounts to a misdirection of fact on the basis that the limited reasons given (more of a conclusion than reasons) were not satisfactory, and that other material facts or probabilities were overlooked.

The evidence of Roegshana and Rihanna

[132] Although the court *a quo* did not rely on the secondary identification of the Appellant by his half-sisters on viewing the video footage, we should for the sake of completeness record that we do not consider that that evidence was of particular value, and certainly could not compensate for the deficiencies in the eyewitness accounts.

[133] In this regard:

- (a) Although the video footage is very informative as to the events of the shooting, it is not possible to make out distinguishing facial features of the assailants. This is not only because of the fact that they are wearing face masks and beanies or a hoodie, but also because of the low resolution of the images and the fact that the assailants were some distance from the camera.

- (b) While both sisters were adamant that they saw their brother, they were not able to articulate what precisely it was about the person on film that caused them to identify him.
- (c) While Roegshana said that she recognized the black jacket as one that she had given to the Appellant, it did not appear to us from the footage that the jacket worn by the assailant was in any way distinctive or unusual.
- (d) Rihanna's evidence, moreover, was that she only recognized the Appellant when on a separate occasion, when she was alone, she viewed the footage over and over again. This is not consistent with the sort of identification process that would be associated with recognizing someone that one already knows well.

[134] In the circumstances, we do not think that there would be a proper basis for basing a conviction on that evidence, independently of the evidence of the eyewitnesses.

Conclusion on the eyewitness evidence

[135] For the above reasons, we believe that there are proper grounds in the circumstances to depart from the decision of the court *a quo* that the evidence reliably established that the Appellant was identified as one of the assailants who carried out the murder. The court *a quo* granted leave to appeal on the basis that it was possible that another court might regard the opportunity that Schoeman and Wilson had to observe the Appellant as being so short as to

affect the reliability of their evidence. We conclude that that is the case. We have also provided further reasons above as to why reasonable doubt must exist as to whether the Appellant was properly identified, having regard to all the evidence pertaining to the crime scene.

[136] In the words of *S v Sithole (supra)*, there is therefore in our view a reasonable possibility that the evidence which implicates the Appellant as a participant in the shooting might be false or mistaken.

The alibi evidence

[137] As pointed out above, an alibi is essentially a denial of the State's identification evidence.

[138] In our view, where reasonable doubt already exists as to whether the accused was the perpetrator because of material deficiencies in the direct evidence pertaining to the incident, it is not necessary that the accused's alibi should necessarily be accepted as independently reliable for an acquittal to follow.

[139] Put differently, even if the accused's alibi is subject to material criticism, that fact in and of itself cannot necessarily eliminate the reasonable doubt that arises as to whether the accused has been shown to have been at the scene.

[140] In the present case, the court *a quo* was very critical of the alibi evidence put up by and on behalf of the Appellant. It referred to a number of discrepancies in particular between the evidence of the Appellant himself and that of Kola.

[141] We agree that there were various discrepancies in the witnesses' evidence as to what actually happened in the Melkbosstrand house on the Friday and

Saturday. Some of the more material aspects involved whether the Appellant had socialised with the others into the early hours of the Saturday morning, as he said, or whether he had gone to bed (as Kola said); and whether after news of the murder the mood in the house was sombre for the rest of the day (as Kola said), or whether the inhabitants continued to “party” (as the Appellant testified).

[142] Despite these differences, what remained consistent was the evidence that the Appellant had been present in or at the house on the morning of the murder. Moreover, the evidence of Smith to the effect that he and the other persons whom Dzikici mentioned had been living there at the end of May 2020 had in fact moved out in April 2020, and were not staying there on the weekend in question, was not shaken in cross-examination.

[143] The court *a quo* cast doubt on the evidence of Kola by reference to the evidence of van Reenen that he had had difficulty arranging an opportunity to speak to her, and also by questioning why Kola had not made herself available to the police at the earliest opportunity when the case was being investigated. The fact is, however, that she had provided an affidavit (through the Appellant’s attorneys) a mere 5 days after his arrest on 9 October 2020, and van Reenen did say that Kola had spoken to him telephonically a fairly short time after he had tried to set up a meeting. Those criticisms were therefore in our view not properly justified.

[144] Moreover, the court *a quo*’s conclusion that it was “*interesting and remarkable*” that the Appellant’s parents were not called to testify in support of his alibi

seems to presuppose some heightened duty on him to prove his alibi, when (as stated above) the onus remained on the State to disprove it. There was no suggestion that his parents could not have been subpoenaed by the State to testify.

[145] For these reasons, even recognising the material discrepancies between the evidence of Kola and the Appellant, we cannot conclude that it is not reasonably possibly true that the Appellant was at the Melkbosstrand house at the time of the shooting, or that the Appellant's version is palpably false. In the circumstances, the quality of the alibi evidence cannot dispel the reasonable doubt that arises in relation to the direct evidence implicating him as being a perpetrator.

Conclusion

[146] It is tragic that a young life was lost in the brutal manner described above. However, the duty remains on the State to prove its case beyond a reasonable doubt if an accused person is to be subjected to criminal sanction.

[147] This is a case in which the evidence put up by the State failed to meet the required standard of proof. In short, it cannot be concluded that the Appellant's contention that it was not him who shot the deceased is not reasonably possibly true.

[148] For the reasons set out above, we consider that the decision taken to the contrary by the court *a quo* cannot stand.

Order

[149] In the premises, we make the following orders:

(a) The appeal against the Appellant's conviction succeeds.

(b) The conviction and sentence are set aside.

LEKHULENI J

JUDGE OF THE HIGH COURT

RALARALA N

JUDGE OF THE HIGH COURT

JANISCH M W

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Appellant:

R Liddell

S Webb

For the Respondent

L Williams (office of the DPP)