



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
**JUDGMENT**

**Not Reportable**

Case No: 1257/2022

In the matter between:

**JEROME CUPIDO**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Cupido v The State* (1257/2022) [2024] ZASCA 4  
(16 January 2024)

**Coram:** MOKGOHLOA, MBATHA and GOOSEN JJA, and KEIGHTLEY  
and TOKOTA AJJA

**Heard:** 02 November 2023

**Delivered:** 16 January 2024

This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website, and released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 16 January 2024.

**Summary:** Criminal law and Procedure – reliance on single witness – whether the court applied the cautionary rule in respect of single witness – admission of hearsay evidence – section 3 of the Law of Evidence Amendment Act 45 of 1988 – admissibility of the photo identification in terms of s 37 of the Criminal Procedure Act 51 of 1977 – circumstances where no rules of identification parade applicable – evidential value of statement made in terms of s 115 – whether the appellant’s alibi is reasonably possibly true.

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## ORDER

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**On appeal from:** Western Cape Division of the High Court, Cape Town (Allie, Dolamo JJ and Mziweni AJ sitting as court of appeal):

The appeal is dismissed.

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## JUDGMENT

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**Tokota AJA (Mokgohloa, Mbatha and Goosen JJA and Keightley AJA concurring):**

### **Introduction:**

[1] The appellant stood trial in the Western Cape Division of the High Court (the trial court) before Slinger J, on an indictment containing the following five counts:

Count 1: murder

Counts 2: and 3 attempted murder

Count 4: unlawful possession of a firearm; and

Count 5: unlawful possession of ammunition.

He pleaded not guilty but was found guilty on all counts. He was sentenced to life imprisonment for murder; eight years' imprisonment for each of the counts of attempted murder; 15 years in respect of unlawful possession of a firearm; and 18 months in respect of unlawful possession of ammunition. With the leave of the trial court, he unsuccessfully appealed against his convictions to the full court of the Western Cape High Court (full court). This appeal is with special leave of this Court.

[2] During the trial the appellant disclosed his defence in terms of s 115(3) of the Criminal Procedure Act 51 of 1977 (the CPA) as that of an alibi. He denied having committed the offences with which he was charged and stated that on 26 April 2018 at 18h00 he was at his residence at 26 Strand, Roos Close, Athlone. He, however, admitted the identity of the deceased and the cause of his death, in terms of s 220 of the CPA.

### **Factual matrix:**

#### *State's case*

[3] On 26 April 2018 at about 18h00 the complainant (Mr Brown) in one of the attempted murder charges, was at 8 Short Street, Athlone at the house of Mr Ashraf Mitchell, who was also known as Tony. Mr Brown was there to sell drugs on behalf of Tony. There were several people at the house: Tony, his girlfriend, Clint Scholtz, Pagad, and Asheeq Mitchell, a twelve-year-old boy. Later Tony and his girlfriend left for the mall.

[4] Mr Brown testified that he observed a Nissan 1400 bakkie stop outside the pedestrian gate at Tony's house. Two males, who were wearing hooded jerseys and gloves, got out of the vehicle. He testified that he identified one of the men as the appellant. They approached him and the appellant asked for a 'packet', referring to the drug 'Tik'. It was then about 19h00 and it was at dusk. Floodlights mounted next to a satellite television dish on the wall of the house and electric street lamps illuminated the yard. There was also light from a fire which had been made by Scholtz and others.

[5] Mr Brown testified that he felt uncomfortable when he saw that these people were wearing gloves. After speaking to the appellant, he walked away, pretending to fetch the drugs whereas they were in his possession. He returned and handed the drugs to the appellant and was paid R50. The appellant then asked

him to give them 'a half', meaning half of a mandrax tablet. Mr Brown told him that it would cost R20 to which the appellant agreed. He left to fetch the mandrax and upon his return gave it to the appellant.

[6] When Mr Brown returned, the appellant took out a 9 mm firearm and pointed it at his face. He reacted by pushing the gun away and turned his face, but the gun went off and he was shot in his jaw. He fell to the ground. He got up and ran to a shack at the back of the property. He heard several shots being fired in the background. Asheeq was wounded and followed him to the shack. He (Asheeq) was holding his chest. Scholtz was shot in his back but managed to jump over the wall and escaped with Pagad.

[7] Mr Brown, Asheeq and Scholtz were later taken to Groote Schuur Hospital where Asheeq succumbed to his injuries. Later that evening at about 23h20 two police officers, Constables Conroy Cloete and Mmbowane, visited them in hospital. Mr Brown was unable to speak due to the fact that his jaw was wired. Mr Brown did not recall the police visit on the date of his admission but only recalled a visit by Constable Mziwenene Welcome Nkenke on the following day. They asked if he would be able to identify the assailants.

[8] Constable Cloete testified that when he visited the hospital on the night of the incident, he spoke in Afrikaans to Mr Brown who was not in a position to respond. He asked him if he could identify the person who shot him. Mr Brown only nodded indicating that he could identify him. Constable Cloete gave him a piece of paper to write on it. He wrote 'Rompie, Q.town and white Nissan 1400 bakkie'. Constable Cloete showed Mmbowane the piece of paper.

At about 00h15 Constable Cloete posted the information on the Athlone VISPOL WhatsApp group of his division as follows:

*‘Samuel Brown informed me that it was Rompie 28 of Q.town who shot them and they were 2 guys driving a 1400 bakkie he could not see the other suspect’s face.’*

[9] When Colonel Mark Marco Adonis, the station commissioner, saw the message on the WhatsApp group of VISPOL he instructed that Rompie be arrested. On the morning of 27 April 2018, at about 10h00, the appellant reported to the police station Athlone, having learnt that he was a suspect in the case and the police were looking for him. Although Mr Brown did not remember the police visit on the night of the incident, the visit was supported by an entry in the visitors’ register of the hospital made at 23h20. Constable Mmbowane testified that he observed the interaction between Mr Brown and constable Cloete. At the time they were speaking to Mr Brown he observed that he (Mr Brown) appeared to be drowsy and was at times falling asleep.

[10] On 27 April 2018, Constable Nkenke visited the hospital. He saw Mr Brown and asked him if he knew who shot him. Mr Brown was still unable to talk and appeared to be in pain but nodded indicating that he knew the perpetrator. Constable Nkenke gave him a piece of paper to write down the names of the perpetrator. He wrote ‘Rompie for Q.town 28 Viking’. The paper was handed in court as exhibit H and was shown to constable Mmbowane. Mmbowane testified that it was not the paper that was shown to him by constable Cloete.

[11] After the visit by Constable Nkenke, at about 16h20 Col Edwin William Clarke and Sergeant Wilson visited Mr Brown at the hospital. They showed him a photograph album containing twelve photographs. Col Clarke asked him if he could identify the perpetrator, if he was amongst the people on the photographs. The Mr Brown pointed out a photograph of the appellant as the perpetrator and signed on the photo.

[12] The State called a number of witnesses on collateral issues and not the identification issues. It is unnecessary to set out the evidence of these witnesses. Reference will be made to those parts of their evidence where necessary. At the close of the State's case, an application for discharge was made in terms of s 174 of the CPA. The application was refused.

**Defence case:**

[13] The appellant elected not to give evidence but called one witness, namely, Ms Isabella Davids, his girlfriend. Ms Davids testified that she was employed at Performance Brands company as an administrative clerk. On the 26th of April 2018, she left work at 16h45 and got home after 17h00. She lives in the same block of flats as the appellant. At about 17h20 she went to the appellant's flat and invited him to have dinner with her. She then returned to her flat to prepare dinner.

[14] At about 18h00 she went back to the appellant and informed him that the dinner was ready. The appellant informed her that he still wanted to spend time with his family and would join her later. She left. She testified that after she had spoken to the appellant, she stood outside on the stairs to chat with her neighbours. She remained there until 20h30. She testified that there was a single flight of stairs to her flat, the appellant's flat and the neighbour's flat. From where she was standing, she would have noticed if the appellant left his flat. According to her, the appellant never left his flat. At about 20h30 she went to fetch the appellant and they had dinner at 20h45 at her place. She testified that the appellant could not have been at the scene of crime from 18h00 till 20h30 as she knew that he was at his home.

[15] Under cross-examination she was confronted with a statement she had made in support of the appellant's bail application in the magistrate's court. In that statement she never mentioned that at any stage after 18h00 till 20h30 she visited the appellant. When she was questioned about this statement her response was that she did not give details in that statement. The appellant's case was then closed.

**Discussion:**

[16] Mr Mathewson, who appeared for the appellant, applied that the statements of Messrs Aqueel Barker and Scholtz, both of whom were on the list of State witnesses be admitted as they were favourable to the appellant's case. Mr Scholtz made three statements: two to the police and one to his attorneys. In two of those statements, he stated that it was not the appellant who shot them. In one statement he stated that he did not know the people who shot at them as he was busy collecting fire wood. In the other two statements he stated that he had been threatened by the family of the deceased, Asheeq Mitchell, to implicate the appellant. Ultimately, Scholtz was not called either by the State or the defence.

[17] I deem it expedient to mention at this stage that there were interlocutory applications brought by Mr Mathewson. Those applications related to the admission of the bail record in the proceedings in terms of s 60 of the CPA, and the admission of hearsay evidence in terms of s 3(1)(a) of the Law of Evidence Amendment Act 45 of 1988 (Hearsay Evidence Act) in respect of the statements of Messrs Scholtz and Barker.

[18] Mr Mathewson contended that the trial court erred; (a) in relying on the evidence of a single witness for its conviction of the appellant; (b) in accepting the photo identification evidence whereas the rules of identification parade were not followed; (c) in that the use of the photograph of the appellant was illegal and



in contravention of s 37(6)(iii) of the CPA and this was an infringement of the appellant's constitutional rights to privacy; (d) the trial court did not consider the exculpatory statement of the appellant made in terms of s 115(3) of the CPA and seems to have shifted the onus to the appellant to prove his alibi defence; (e) in refusing to admit the entire bail record of the bail proceedings in the magistrate's court; (f) having admitted the hearsay evidence contained in the statements of Messrs Barker and Scholtz in terms of s 3(1)(a) of the Hearsay Evidence Act it erred in ignoring it during the evaluation of evidence.

### ***Reliance on the evidence of a single witness***

[19] Section 208 of the CPA provides that an accused may be convicted of any offence on the single evidence of any competent witness. The general approach as to how the evidence of a single witness should be treated is well established.

Mr Mathewson relied on the case of *R v Mokoena*<sup>1</sup> (*Mokoena*), a case which dealt with the predecessor section to s 208, where it was stated:

'Now the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by s 284 of Act 31 of 1917, but in my opinion that section should only be relied on where the evidence of the single witness is clear and satisfactory in every material respect. Thus the section ought not to be invoked where, for instance, the witness has an interest or bias adverse to the accused, where he has made a previous inconsistent statement, where he contradicts himself in the witness box, where he has been found guilty of an offence involving dishonesty, where he has not had proper opportunities for observation, etc . . .'<sup>2</sup>

[20] Mr Mathewson contended that Mr Brown had (a) an 'interest or bias adverse' to the appellant; and (b) he did not have the opportunity to observe and identify his attacker. As regards the latter contention, during oral argument in this Court, Mr Mathewson conceded that Mr Brown had sufficient opportunity to

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<sup>1</sup> *R v Mokoena* 1932 OPD 79.

<sup>2</sup> *Ibid* at 80.

observe the unfolding events and persons involved. As regards the alleged interest or bias adverse to the appellant, Mr Mathewson argued that Mr Brown belonged to a rival group of gangsters who were competing with Tony, his boss, in selling drugs. This argument overlooks the response of Mr Brown when he was cross-examined in this regard. Mr Brown testified that there were many drug dealers in the area starting from the 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, and 14<sup>th</sup> avenues where the drugs were being sold. He testified that it would be impossible to kill all those people who were selling drugs. He therefore denied that he was biased against the appellant. Mr Mathewson conceded further that other factors mentioned in *Mokoena* were not applicable to the Mr Brown. That said, none of the factors then affected the evidence of Mr Brown as a single witness.<sup>3</sup>

[21] In *S v Mehlaphe*<sup>4</sup> (*Mehlaphe*) it was stated that, 'a court should be satisfied not only that the identifying witness is honest, but also that his evidence is reliable in the sense that he had a proper opportunity in the circumstances of the case to carry out such observation as would be reasonably required to ensure a correct identification',<sup>5</sup> and further that:

'(t)he nature of the opportunity of observation which may be required to confer on an identification in any particular case the stamp of reliability, depends upon a great variety of factors or combination of factors; for instance the period of observation, or the proximity of the persons, or the visibility, or the state of the light, or the angle of the observation, or prior opportunity or opportunities of observation or the details of any such prior observation or the absence or the presence of noticeable physical or facial features, marks or peculiarities, or the clothing or other articles such as glasses, crutches or bag, etc, connected with the person observed, and so on'.<sup>6</sup>

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<sup>3</sup> See also *S v Webber* 1971 (3) SA 754 (A) at 758; *S v Sauls* 1981 (3) SA 172 (A) at 180E.

<sup>4</sup> *S v Mehlaphe* 1963 (2) SA 29 (A).

<sup>5</sup> *Ibid* at 32A-B.

<sup>6</sup> *Ibid* at 32C-D.

[22] If regard is had to the evidence of Mr Brown, all the factors mentioned in *Mehlape* are on all fours with the identification made by him. There was sufficient light, it was not the first time that he saw the appellant as he had seen him on two previous occasions before the date in question, the last of which was three days before the incident where he was a mere 12 metres away from him. On the night in question the close proximity of Mr Brown to the appellant has not been denied, but in fact, conceded. As a result of bright illumination, the visibility was clear and the appellant was directly facing Mr Brown when the trading of drugs took place; he had observed him on two occasions at the time the sale of drugs and he noticed that he had no scars on his face.

[23] Relying on *S v Mthethwa*<sup>7</sup> (*Mthethwa*) the trial court said: ‘after considering the above factors and the guiding principles set out in *S v Mthethwa* I accept that not only was Mr Brown honest in his identification of Cupido but that his evidence was also reliable’. It is trite that the factual findings of a trial court are presumed to be correct. Therefore, a party seeking interference therewith must demonstrate that there was a misdirection on the part of the trial judge which can be clearly identified in order to justify interference with those findings on appeal, otherwise a court of appeal will not interfere.<sup>8</sup> The trial court was alive to the fact that it was dealing with the evidence of a single witness and properly applied the cautionary rules. Consequently, I hold the view that the credibility findings of the trial court were justified and I find no room for interference in that regard. In the premises Mr Mathewson’s contention cannot be sustained.

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<sup>7</sup> *S v Mthethwa* 1972(3) SA 766 (A).

<sup>8</sup> *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705–706; *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) [2004] 2 All SA 23 para 5; *R B v Smith* [2019] ZASCA 48;2020 (4) SA 51 (SCA) para 22; *HAL obo MML v MEC for Health, Free State* [2021] ZASCA 149;2022 (3) SA 571 (SCA) para 87.

***Was the use of photo identification evidence irregular?***

[24] Mr Mathewson contended that the trial court erred in accepting the photo identification evidence where the rules applicable to identification parade were not followed. The use of a photograph as an aid to identification has been pointed out by Hoffmann and Zeffert in *The South African Law of Evidence* 4<sup>th</sup> ed at 618: 'In the course of their investigations the police often have to show photographs of suspects to potential witnesses, but this practice may impair the value of the witness's subsequent identification. In particular, if the witness is shown only a single photograph, his identification is worth almost as little as if he had been shown the accused and asked "Is this the man?" The proper practice is for the witness to be asked to pick out the alleged criminal from a number of photographs. Once he has done so, however, the value of his evidence must depend almost entirely upon his selection of the photograph, and the fact that he later picks out the accused at an identification parade will not carry the matter much further.'

[25] Showing a victim a photograph of a suspect who is not only known to the victim, but who has already been identified by some other description, is a process through which the police want to ensure that the right person is arrested. In the present case, Mr Brown had already positively identified the perpetrator to the police. The alleged perpetrator was not a stranger to him and there was no evidence indicating that the police influenced him to point out the appellant. On the contrary, the evidence of Col Clarke was to the effect that he had informed Mr Brown that the perpetrator may not be amongst the persons in the album

[26] It is not necessarily wrong to show eye-witnesses photographs of suspects who are still being investigated or sought to be arrested. The primary object thereof is to confirm existing suspicions and to ascertain the identity of the suspect that has already been described. Consequently, this is done in order to facilitate the investigation of the crime. For precisely that reason it would be inappropriate to impose upon such a photo-identification the strict requirements

postulated for a regular identification parade. Evidence of what occurred during a photo-identification is in principle admissible. Proof that an eye-witnesses to a crime had pointed out a photograph as being that of a person involved in the crime, together with evidence that it was a photograph of the accused, could therefore play an important, and even a ‘decisive role’ in the conviction of the person so identified.<sup>9</sup>

[27] Col Clarke testified that when constable Poggenpoel informed him that he knew one Rompie in the area and that he had arrested him a few months ago and that he (Poggenpoel) had kept his photo on the data base, he deemed it necessary for his investigation to get that photo. He compiled an album from various photos for purposes of ‘verification of identification’ because the perpetrator was known by the victim. Col Clarke showed it to Mr Brown and explained to him that the perpetrator may not necessarily be there. In my view there was no irregularity committed in the procedure followed.

***Were the appellant’s rights to privacy infringed?***

[28] Mr Mathewson submitted that the photograph of the appellant was illegally obtained contrary to the provisions of s 37(6)(a)(iii) of the CPA<sup>10</sup> thereby infringing the appellant’s constitutional rights to privacy. The nub of his argument was that the photograph of the appellant should have been destroyed and, therefore, it was improper to use it. I do not agree. Even if it is accepted that his rights to privacy were infringed no nexus was established that his rights to a

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<sup>9</sup> *S v Moti* 1998 (2) SACR 245 (SCA) at 254J-255C.

<sup>10</sup> Section. 37(6)(a)(ii) of the CPA provides: ‘(6) (a) Subject to subsection (7), the body-prints or photographic images, taken under any power conferred by this section, and the record of steps taken under this section-. . . (iii) in a case where a decision was made not to prosecute a person, if the person is found not guilty at his or her trial, or if his or her conviction is set aside by a superior court or if he or she is discharged at a preparatory examination or if no criminal proceeding with reference to such body-prints or photographic images was instituted against the person concerned in any court or if the prosecution declines to prosecute, must be destroyed within 30 days after the officer commanding the Division responsible for criminal records referred to in Chapter 5A of the South African Police Service Act has been notified.’

fair trial were infringed. Accordingly, there is no basis to find that the appellant was denied a fair trial.

[29] The Constitutional court expressed itself as follows on this issue:

‘The general approach to evidence obtained under constitutionally doubtful circumstances was outlined in *Key v Attorney - General, Cape of Good Hope Provincial Division and Another*:

‘What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in *Ferreira v Levin*, fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted. If the evidence to which the applicant objects is tendered in criminal proceedings against him, he will be entitled at that stage to raise objections to its admissibility. It will then be for the trial Judge to decide whether the circumstances are such that fairness requires the evidence to be excluded.’

It would be as well to repeat that in such cases the flexible approach advocated by Ackermann J in *Ferreira v Levin* and subsequently endorsed unanimously by this Court in *Bernstein v Bester*, is to be adopted’.<sup>11</sup> (Footnotes omitted.)

[30] Consequently, I hold the view that the rights of the appellant were not infringed and the police were entitled to conduct the photo identification for the purposes of their investigation in the manner in which they did.

***Did the trial court consider and evaluate the exculpatory statement of the appellant made in terms of s 115(3) of the CPA?***

[31] Mr Mathewson contended that the trial court failed to consider exculpatory statements (as part of the evidence) made in the plea explanation proffered by the appellant in terms of s 115 of the CPA. In his plea explanation in terms s 115(3) the appellant denied having committed the crimes as he was with his siblings at

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<sup>11</sup> *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* [1999] ZACC 8; 1999 (2) SACR 51 (CC) para 97.

the critical time of the commission thereof. His defence was therefore an alibi. In that case he bears no onus of proving that his alibi was true. The court had to assess his alibi the same way as any other defence, namely whether it could be accepted as being reasonably possibly true or whether it should be rejected as being obviously false.<sup>12</sup>

[32] Exculpatory statements in explanations of the plea should, as a general rule, be repeated by the accused under oath in the witness-stand for them to have any value in favour of the accused.<sup>13</sup> In *S v Mkhize*<sup>14</sup>(*Mkhize*) it was stated:

‘It follows that any statement made by an accused or any answer to questions put to him in terms of s 115 has no evidential value.’<sup>15</sup>

[33] Unlike formal admissions made in terms of s 220, exculpatory statements made in terms of s 115 do not constitute proof of the facts and furthermore do not relieve the State of the burden of proving those facts. When a defence is raised in the exculpatory part of an explanation of plea, the State need only negate that defence to the extent of a prima facie case.<sup>16</sup>

[34] Furthermore, an accused person is under no obligation to testify. However, once the prosecution had produced sufficient evidence that establishes a prima facie case, such evidence may become conclusive if not dislodged by credible evidence of the accused. Thus, absent a credible version from the accused, the version advanced by the prosecution, if found credible, has to be accepted. In *S v Dlamini and Others*<sup>17</sup> Kriegler J emphasised the importance of freedom of choice

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<sup>12</sup> *R v Biya* 1952 (4) SA 514 (A) at 521D-E; *R v Hlongwane* 1959 (3) SA 337 (A) at 340H and 341A-B; *S v Mhlongo* 1991 (2) SACR 207 (A) at 210d-f.

<sup>13</sup> See *S v Malebo en Andere* 1979(2) SA 636 (B); *Sesetseen 'n Ander* 1981 (3) SA 353 (A) at 374A-376H.

<sup>14</sup> *S v Mkhize* 1978 (2) SA 249 (N).

<sup>15</sup> *Ibid* at 251B. See also *S v Dreyer* 1978 (2) SA 182 (NC); *S v Malebo en Andere* 1979 (2) SA 636 (B) at 640C-H; *S v Selane* 1979 (1) SA 318 (T) at 320G.

<sup>16</sup> See *S v Mothlapingen 'n Ander* 1988 (3) SA 757 (NC).

<sup>17</sup> 1999 (4) SA 623 (CC); [1999] ZACC 8 para. 93

in a democracy. He stated that liberty to make choices brings with it a corresponding responsibility and 'often such choices are hard'.

[35] The trial court considered the s 115 statement and since it had no evidential value, it was in any event unhelpful. The trial court found that the evidence adduced in support of the defence of alibi raised by the appellant was unreliable and did not account for the period covering the commission of the offence. It cannot be faulted in this finding.

[36] When the trial court dealt with the evaluation of evidence, it started with the evidence relating to alibi. The appellant did not give evidence, but relied on the evidence of Ms Davids to support his alibi. The trial court analysed the evidence of Ms Davids and found that she was nervous, with a tendency to answer questions whilst they were still being posed to her. Her evidence was fraught with contradictions. It concluded that her evidence did not account for the crucial time of between 18h10 and 19h30, which was the time of the commission of the offences.

[37] Where there is direct evidence of the commission of an offence, as in this case, the failure to testify or the giving of a false alibi – whatever the reason therefor – *ipso facto* that tends to strengthen the direct evidence of the State. Since there is no testimony to gainsay it there is less occasion or material for doubting it.<sup>18</sup> In *Osman v Attorney-General, Transvaal*<sup>19</sup> the Constitutional court went further and stated:

‘Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is

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<sup>18</sup> *S v Nkombani* 1963 (4) SA 877 (A) at 893G; *S v Snyman* 1968 (2) SA 582 (A) at 588G;

<sup>19</sup> *Osman v Attorney-General, Transvaal* [1998] ZACC 14; 1998 (2) SACR 493 (CC) (*Osman*); *S v Boesak* [2000] ZACC (25); 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 para 24; *S v Chabalala* 2003 (1) SACR 134 (SCA) para 20.



at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.<sup>20</sup>

[38] Accordingly, the appellant made his choice not to give evidence at his own peril. He made his bed with his eyes open. It is not unfair now to say that he should lie on it. According to the evidence on the bail application proceedings, he was with his family at the time of the incident. None of his siblings were called as witnesses. This was not a case where he was required to prove his alibi, it was a case of evidential burden to establish that his defence was reasonably possibly true. The fact that the appellant may have a duty to satisfy the court about his alibi does not alter the incidence of onus. The onus remains with the State to prove its case beyond reasonable doubt, including negating the defence of alibi.

[39] Taking into account the overall weight of evidence against the appellant and the analysis thereof by the trial court, it does not appear from the judgment that the court placed an onus on him to prove his alibi. It follows from the above that the evidence relating to the appellant's defence was properly considered and found to be unreliable and therefore not reasonably possibly true. This submission too must be rejected.

***Did the trial court commit an irregularity in refusing to admit the entire record of the bail proceedings in the magistrate's court?***

[40] A decision to admit or exclude portions of the bail record is a matter that falls within the discretion of the trial court. It has been held that:

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<sup>20</sup> *Osman* para 22.

‘... no matter how the judgment [is] formulated by the High Court, it is clear that a decision to exclude evidence is an interlocutory decision which can be revisited at any stage during the trial. As we find below, it was open to the State to re-apply for the admission of the bail record, or parts of it, at relevant times during the trial. In our view, therefore, the timing of the hearing of the application to exclude the bail record is not a matter upon which the State can succeed on appeal’.<sup>21</sup>

By analogy even in this case there was nothing precluding the defence from re-applying to court to reconsider its interlocutory decision to exclude certain portions thereof.

[41] The decisive factor is whether the exclusion or admission of certain portions of the bail proceedings rendered the trial unfair. The trial court is best placed to determine what will constitute a fair trial or not. An allegation that an interlocutory ruling was wrongly made which may have had a material impact on the outcome of a case is not sufficient to demonstrate that the trial was unfair.<sup>22</sup> The Constitution requires a trial to be fair towards both the accused and the State.<sup>23</sup> Therefore, a ruling relating to the exclusion of certain portions of the bail proceedings does not constitute an irregularity and any party is entitled to bring the application to the trial court to revisit its ruling at any stage depending on the circumstances of the case.<sup>24</sup>

[42] Mr Mathewson relied heavily on *R v Valachia and Another*<sup>25</sup> and *S v Machaba*<sup>26</sup> for the contention that the trial court committed an irregularity in excluding portions of the bail proceedings. This contention is at odds with the ruling of the Constitutional Court in *Basson*<sup>27</sup>. In the words of the Constitutional Court, it is accordingly ruled that ‘the appeal insofar as it relates to the correctness

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<sup>21</sup> *S v Basson* [2005] ZACC 10; 2007(1) SACR 566 (CC); 2005 (12) BCLR 1192 (*Basson*) para 105.

<sup>22</sup> *Ibid* para 120.

<sup>23</sup> *Ibid*.para.120

<sup>24</sup> *Basson* para 121.

<sup>25</sup> *R v Valachia and Another* 1945 AD 826 at 835.

<sup>26</sup> *S v Machaba* [2015] ZASCA 60; 2016 (1) SACR 1 (SCA); [2015] 2 All SA 552 para 30.

<sup>27</sup> *Footnote 21 above*.

of the High Court's decision to exclude the bail record from the evidence in the trial of the [appellant] must be dismissed.’<sup>28</sup> Accordingly, the argument that there was an irregularity committed by the trial court cannot be sustained. Furthermore, in any event the test is whether the irregularity had an impact on the outcome of the case. The answer thereto is that it had no impact on the outcome of the case. In *S v Moolman*<sup>29</sup> The manner of its assessment is detailed in the following passage by Botha JA in *Xaba*<sup>30</sup> at 735-736B:

‘In considering the appeal regard must be had to the proviso to s 322(1) of the Act, in terms of which the accused's convictions and sentences are not to be set aside by reason of the irregularity unless it appears to this Court that a failure of justice has in fact resulted from the irregularity. The irregularity in question here is not of the kind that per se vitiated the proceedings, as in *S v Moodie* 1961 (4) SA 752 (A); it is of the kind, as in *S v Naidoo* 1962 (4) SA 348 (A), which requires consideration of the question whether on the evidence and credibility findings unaffected by the irregularity there was proof of the accused's guilt beyond reasonable doubt, in accordance with the test laid down in *S v Yusuf* 1968 (2) SA 52 (A) at 57C-D (see Masinda's case supra at 1162D-1163C).’

In my view there was sufficient evidence proving the appellant's guilt beyond reasonable doubt and there was no unfair trial.

***Did the trial court commit a misdirection in excluding hearsay evidence admitted in terms of s 3(1)(a) of the Hearsay Evidence Act?***

[43] Section 3(1)(c) of the Hearsay Evidence Act provides:

‘Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless—

- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

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<sup>28</sup> *Basson* para 123.

<sup>29</sup> *S v Moolman* [1995] ZASCA 124; 1996 (1) SACR 267 (A) at 289D-E.

<sup>30</sup> 1983 (3) SA 717 (A) at 735-736B.

(c) the court, having regard to—

- (i) the nature of the proceedings;
- (ii) the nature of the evidence;
- (iii) the purpose for which the evidence is tendered;
- (iv) the probative value of the evidence;
- (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
- (vi) any prejudice to a party which the admission of such evidence might entail; and
- (vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.’

The thrust of the argument of Mr Mathewson was that the ‘evidence’ of Barker was allowed and cross-examination was also allowed in relation thereto. Thus, the court was obliged to afford it due weight.

[44] As I understood the argument by Mr Mathewson his main complaint was that the statements of Messrs Barker and Scholtz were admitted by consent, and cross-examination based thereon was allowed. Those statements were admitted in terms of s 3(1)(c) of the Hearsay Evidence Act.

Both Barker and Scholtz did not testify and no explanation was proffered as to why they could not be called as witnesses. Both of them are still alive and both of them were on the list of State witnesses. The State, however, decided not to call Barker but made him available to the defence. The State prosecutor could not find Scholtz for consultation. As far as Barker’s statement is concerned, he was not present at the crime scene on 26 April 2018. The upshot of his statement was that there was a plot to kill Tony but on the following day he was told that a boy was killed. This statement does not advance anyone’s case in this matter.

[45] Regarding Scholtz, on 19 June 2018, he made a statement to his attorney in which he said he did not know the two men who shot them. He said he turned around to collect firewood to make fire, then heard shots being fired. He felt that he was being shot. He managed to run away and jumped over the wall with Pagad. On 24 June 2018 he made another statement to Sargeant Fischer-Luitjies of Athlone police station in which he said the deceased's family threatened to kill him if he did not implicate the appellant. On 10 July 2018, he made another one to Sergeant Wilson and did not mention any death threats by the family of the deceased.

[46] I cannot agree that the trial court was bound to accept the statement of Scholtz and give it more weight in comparison to witnesses who testified. Barker was available to testify and one cannot blame the court for allowing cross-examination unless it was pertinently brought to its attention that he was not going to be called as a witness. His statement was admitted provisionally on the understanding that he would be called to testify. The same applies to Scholtz.

[47] In my view the purpose of the Hearsay Evidence Act is to ensure that all the relevant evidence is placed before court. The evidence remains hearsay and therefore inadmissible unless the court decides that it is in the interests of justice to admit it, regard being had to the factors mentioned in ss 3(1)(c). The primary objective is to cater for non-witnesses who are no longer available to testify due to, for example, death or mental incapacity after the incident. It could never have been the intention of the legislature that witnesses who are available should simply be excused from giving evidence without any explanation why they are not called. This would in fact not be in the interests of justice, as this may open a floodgate to witnesses running away from being tested under cross-examination.

[48] It is not uncommon for witnesses to say something in their statements and, when giving evidence, say something else. There may be a variety of reasons for this. It maybe that the person who took the statement misunderstood the witness or that by the time the witness testified, he/she may have forgotten the details of the events, etc.

[49] When the court evaluates such evidence it must, inter alia, consider the purpose for which it was tendered. For example, the evidence must be compared with the testimony of other witnesses to check if its purpose is merely to confirm what other witnesses have already testified. The probative value thereof must relate to both proof and disproof of guilt of the accused, not just speculation. In *S v Ndhlovu and Others*,<sup>31</sup> this court defined 'probative value' in the following terms:

"Probative value" means value for purposes of proof. This means not only, "what will the hearsay evidence prove if admitted?", but "will it do so reliably?" In the present case, the guarantees of reliability are high. The most compelling justification for admitting the hearsay in the present case is the numerous pointers to its truthfulness.<sup>32</sup>

The nature of the evidence and reliability thereof is of utmost importance. In *S v Kapa*<sup>33</sup> the Constitutional Court said:

'In essence, the enquiry under this rubric is, first, the extent to which the evidence can be considered reliable; and, second, the weighing of the probative value of the evidence against its prejudicial effect.

There are a number of factors relevant to the reliability question, namely:

- (a) any interest in the outcome of the proceedings by the witness;
- (b) the degree to which it is corroborated or contradicted by other evidence;
- (c) the contemporaneity and spontaneity of the hearsay statement; and
- (d) the degree of hearsay.<sup>34</sup>

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<sup>31</sup> *S v Ndhlovu and Others* [2002] ZASCA 70; (3) All SA 760; 2002 (6) SA 305.

<sup>32</sup> *Ibid* para 45.

<sup>33</sup> *S v Kapa* [2023] ZACC 1; 2023 (1) SACR 583 (CC).

<sup>34</sup> *Ibid* paras 79-80.

[50] The evidence of Barker would not assist the court in proving either the guilt or innocence of the appellant. As he was not present at the scene of the crime he knew nothing about the presence or absence of the appellant at the crime scene, at the relevant time. With regard to Scholtz, although he was present, he did not have sufficient opportunity to observe the suspects. In one of his statements, he said he did not see the two gentlemen as he was busy collecting wood to make a fire. His back was turned to them, which explains why he was shot in the back. In one statement he said he did not know them, but the appellant was definitely not one of them. His evidence was contradictory in material respects and therefore unreliable. Furthermore, it is clear from one of his statements that he had an interest in the appellant's exoneration. His alleged experience of intimidation was also never confirmed, as he did not want to come forward to lay charges or seek witness protection. Lastly, the fact that he ran away from court and was unwilling to testify, leaves much more to be desired.

[51] In my view the trial court cannot be faulted for disregarding the evidence of Scholtz and Barker as contained in their statements. In my view the trial court committed no misdirection in this regard. It cannot be said that the appellant was subjected to an unfair trial. In *Thebus and Another v S*<sup>35</sup> the test was formulated thus:

‘In my view, the misdirection of the SCA would be relevant only if it would be an issue which materially alters the outcome of the trial or compromises its substantive fairness, to which the appellant is entitled under section 35(3) of the Constitution. Put otherwise, the applicable test is whether, “on the evidence, unaffected by the defect or irregularity, there is proof of guilt beyond reasonable doubt”. If this Court were to find that such proof has been established, it must follow that the conviction must stand.’ (Footnotes omitted.)

I am of the view that even in this case such exclusion would not affect the fact that the State had proved its case beyond reasonable doubt.

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<sup>35</sup> *Thebus and Another v S* [2003] ZACC 12; 2003 (2) SACR 319 (CC); 2003 (6) SA 505; 2003 (10) BCLR 1100; [2003] ZACC 12 para 74.

**Conclusion**

For all the reasons stated above the appeal must fail. In the result I make the following order:

The appeal is dismissed.

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B TOKOTA  
ACTING JUDGE OF APPEAL



## Appearances:

For the appellant:	Mr B Mathewson
Instructed by:	Mathewson Gess Inc Attorneys, Cape Town Symington De Kok attorneys, Bloemfontein
Counsel for the respondent:	CJ Teunissen
Instructed by:	The Director of Public Prosecutions Cape Town Director of Public Prosecutions Bloemfontein