



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case No: 475/2023

In the matter between:

DINESH MOODLEY

FIRST APPELLANT

UGRESEN PERUMAL

SECOND APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Moodley and Another v The State* (475/2023) [2024] ZASCA 102
(20 June 2024)

Coram: HUGHES and MABINDLA-BOQWANA JJA and SMITH AJA

Heard: This appeal was, by consent between the parties, disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email; publication on the Supreme Court of Appeal website and released to SAFLII. The time and date for hand-down is deemed to be 11h00 on 20 June 2024.

Summary: Criminal Law and Procedure – identification – witnesses' previous knowledge of the appellants – appellants identified by witnesses on the strength of their prior knowledge – whether the state witnesses' identification was reliable and credible.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Van Veenendaal AJ, sitting as court of first instance):

The appeal is dismissed.

JUDGMENT

Hughes JA (Mabindla-Boqwana JA and Smith AJA concurring):

[1] This appeal is against the judgment of Van Veenendaal AJ of the Gauteng Division of the High Court, Johannesburg (the high court) regarding conviction only. On 6 September 2019, the appellants, Dinesh Moodley and Ugresen Perumal, were convicted of murder and subsequently sentenced to twenty-five years' imprisonment. The high court granted leave to appeal to this Court.

[2] The fundamental issue in the appeal is whether the State proved the identity of the assailants who shot and killed the deceased, Avinash Manjanu, beyond a reasonable doubt. Critical, is the reliability of the evidence of the state witnesses and the strength of the witnesses' prior knowledge of the assailants. At the trial, the first appellant was accused 1 and the second appellant accused 2, respectively.

[3] The evidence led is briefly as follows. On the evening of 4 November 2017, Mr Vinay Choonie, one of the state witnesses, hosted a party at his home in Lenasia South. The first appellant, Dinesh Moodley and the deceased were amongst the guests in attendance. An altercation broke out involving the first appellant and a brother of the deceased. The deceased's brother was accused of touching the first appellant's sister, Ms Nerisha Moodley, inappropriately. This altercation escalated to a physical fight, which caused Mr Choonie to end the celebrations. He requested all the guests to leave his home. The first appellant left the venue with his family and the deceased also left. The deceased returned at a later stage and enquired about the assault on his brother.

[4] On his arrival, the deceased parked his vehicle close to the pavement by Mr Choonie's house. He alighted from the vehicle and stood by the driver's door, conversing with Mr Choonie, Ms Prenisha Moodley, Mr Simeshan Naidoo, and Ms Lorraine Moodley (the group). The individuals in the group all testified that the area was well lit by the streetlights situated on the road. Whilst they were still conversing about the first appellant assaulting the deceased's brother, the second appellant, Ugresen Perumal, arrived in a grey Hyundai i20 motor vehicle, with the first appellant in the passenger seat. This vehicle made a U-turn on Hibiscus Crescent and came to park behind the deceased's vehicle. The second appellant alighted from the vehicle, proceeded straight towards the deceased with a firearm in his hand, and started shooting directly at the deceased. He was spurred on by the first appellant to shoot the deceased. When the shots were fired, the deceased was facing the second appellant. After the shooting, the deceased got into his vehicle and drove off. The appellants also got into their vehicle and sped off following the deceased's vehicle.

[5] The group with whom the deceased was conversing sought safe refuge when the gunshots were being fired. After the appellants had sped off, following the deceased's vehicle, Mr Choonie together with the others of the group, climbed into his vehicle and followed the appellant's vehicle. They drove for about 220 metres and saw the deceased's vehicle, which had driven into and collided with a wall of one of the resident's houses. They found the deceased slumped in the driver's seat. The post-mortem found that he had succumbed to the fatal gunshot wound to his chest.

[6] At the trial, the State presented eyewitness evidence to confirm the identity of the shooter and his co-perpetrator. One of the witnesses, Prenisha testified that the first appellant was her stepbrother. She grew up with him in the same home. The first appellant was known to the majority of the state witnesses. Mr Choonie was Prenisha's husband and Lorraine was Prenisha's mother. As regards the second appellant's identification, both Lorraine and Prenisha knew him well as he was the first appellant's uncle. First names are used for convenience as the witnesses concerned share a surname.

[7] At the trial, Mr Naidoo testified that he encountered the first appellant for the first time at the party. Earlier that evening, Prenisha introduced the first appellant to

him, as her brother. Regarding the second appellant, he was adamant that he was the shooter and he had seen him clearly. His testimony was: ‘...I saw him, clean and clear, he climbed out and he started shooting like he was crazy’. He further reaffirmed this whilst being cross-examined. His testimony was ‘...I can say for sure. . ., I saw Accused 2 climb out and shoot our friend. It is all I can explain that, you can ask me [a] hundred times over and I will tell you the same thing’. His evidence was that Lorraine confronted the second appellant saying, ‘shoot me instead of Avenash’, the deceased.

[8] When it was put to him, that the first appellant would say that he was not present when the shooting occurred, he responded, ‘It is a lie though, because everyone was around, saw him climb out and say, “shoot him, fucken kill him”. He described what the appellants wore that night. Mr Naidoo’s evidence was further that during the party and whilst the first appellant and the deceased’s brother were fighting, he witnessed that the deceased had tried ‘continuously’ to stop the fight between the two.

[9] Lorraine confirmed in her evidence that the first appellant was her daughter’s (Prenisha) brother, and her stepson. Her testimony was that the first appellant refers to her as ‘Aunty Lorraine’. She further testified that it was the first appellant’s fight with the deceased’s brother that led to Mr Choonie requesting the guests to go to their respective homes. At some stage, after he arrived on the scene with the second appellant, the first appellant spoke to her directly and instructed her to go inside. In cross-examination she was asked ‘how did you identify Accused 2’. Her response was that he was the first appellant’s uncle. That was followed up with another question: ‘I am referring to that evening; how did you recognise him?’. Her response was: ‘I know him, he is sitting right there . . . His face I recognised immediately’.

[10] Prenisha corroborated Mr Naidoo’s evidence that the second appellant drove a Hyundai i20 and arrived with the first appellant after the guests had gone home, whilst the group was conversing with the deceased. Further, that after the shooting, the appellants got back into their vehicle and chased after the deceased’s vehicle.

[11] Mr Choonie’s testimony was that whilst he was being interviewed at the police station, he saw the second appellant through an open door and pointed him out to the investigating officer. Captain Israel, who also testified, corroborated this and explained

that while he was busy taking Mr Choonie's statement, the two appellants arrived at the police station, having been called by another police officer. This was when Mr Choonie pointed at them as being the ones involved in the shooting of the deceased.

[12] The appellants' testimonies amounted to a bare denial. Both were adamant that they were not present at Mr Choonie's home when the shooting of the deceased occurred. They both relied on *alibi* evidence. The first appellant testified that he was nowhere near the vicinity of the shooting at Mr Choonie's home. He had been at the party earlier, had a fight with the deceased's brother, and when the guests were told to leave, he left for his home with his family. He only became aware of the shooting when he went to the police station the following day to assist his sister, Nerisha, to open a case.

[13] The second appellant confirmed that he owned a silver grey Hyundai i20. He testified that on the night of the shooting, he was at home. He passed out on the couch watching television. He woke up at 23h00 to prepare for the prayer he was going to have for his late brother the following day. The only time he left his home was to collect his sister in Lenasia South, between 3h00 and 3h30, the following morning.

[14] The trial court found that the eyewitnesses all identified the second appellant as the shooter and 'accused 1 as being with him, even goading accused 2 on'. Further, that the witnesses corroborated each other in relation to the manner in which the shooting of the deceased unfolded, and that they were not shaken, even though they were subjected to thorough cross-examination. The trial court was conscious of the fact that the critical issue in this case was identification. It was also mindful of the trite approach to be followed when dealing with evidence of identification, which is 'the opportunity, the lighting, the length of time [and] the acquaintance between the witnesses'. The trial court concluded that the eyewitnesses had ample time to identify the appellants, knew the appellants personally, and the visibility was good, even though the shooting occurred at night.

[15] It is trite that the state bears the onus to prove the identity of the appellants and to dispel their *alibi* defence beyond reasonable doubt. In the circumstances, it is not

sufficient for the witness to be honest, as the reliability of the witness must also be tested against opportunity of observation, lighting, visibility and the witnesses' proximity to the appellant.¹ The *alibi* defence raised, must be considered with other evidence in totality, together with the impression of the witnesses.² In *S v Liebenberg* this Court stated:

' . . . Once the trial court accepted that the alibi evidence could not be rejected as false, it was not entitled to reject it on the basis that the prosecution had placed before it strong evidence linking the appellant to the offences. The acceptance of the prosecution's evidence could not, by itself alone, be a sufficient basis for rejecting the alibi evidence. Something more was required. The evidence must have been, when considered in its totality, of the nature that proved the alibi evidence to be false. . . ' ³

[16] Still on the topic of the law relevant to identification, especially in relation to witnesses having prior knowledge of the identity of the person sought to be identified, I refer to a judgment of this Court in *Abdullah v The State*,⁴ where Nicholls JA quoted the following:

'In *Arendse v S* this Court quoted with approval the trial court's comments in *R v Dladla*: "There is a plethora of authorities dealing with the dangers of incorrect identification. The locus classicus is *S v Mthetwa* 1972 (3) SA 766 (A) at 768A, where Holmes JA warned that: "Because of the fallibility of human observation, evidence of identification is approached by courts with some caution. In *R v Dladla* 1962 (1) SA 307 (A) at 310C-E, Holmes JA, writing for the full court referred with approval to the remarks by James J – 'delivering the judgment of the trial court when he observed that: 'one of the factors which in our view is of 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... In a case where the witness has known the person previously, questions of identification..., 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".

¹ *S v Mthetwa* 1972 (3) SA 766 (A) at 768A-C. See also, but not limited to *S v Nango* [1990] ZASCA 123; 1990 (2) SACR 450 (A) at 10 and *S v Charzen and Another* [2006] ZASCA 147; [2006] 2 All SA 371 (SCA); 2006 (2) SACR 143 (SCA) para 11.

² *R v Hlongwane* 1959 (3) SA 337 (A) at 340H-341A.

³ *S v Liebenberg* [2005] ZASCA 56; 2005 (2) SACR 355 (SCA) para 14.

⁴ *Abdullah v The State* [2022] ZASCA 33 paras 14 and 15.

This Court reaffirmed this principle more recently in *Machi v The State* where the witnesses stated that they knew the appellant and he too admitted that he knew them. The court said in these circumstances there is no room for mistaken identity.'

[17] The trial court was correct to reject the *alibi* defence, albeit partially on a wrong principle, when it stated that the *alibi* version of the appellants was not disclosed for the state to disprove. It was, however, correct in its examination of the evidence regarding the *alibi* defence as well as the other evidence, and correctly declared it as false.

[18] In addition, the trial court recognised that this case was not one of mistaken identity, as the witnesses knew the appellants. They were close relatives; the first appellant was the brother to Prenisha, and they grew up together; he referred to Lorraine as 'auntie Lorraine'. She was his stepmother with whom he had lived. The second appellant was known to both Lorraine and Prenisha as the first appellant's uncle.

[19] In his heads of argument, the appellants' counsel criticised the evidence of the eyewitnesses, submitting that the witnesses and the first appellant were family members who evidently had some personal issues amongst themselves. The appellants' evidence, however, does not support this. They both testified that there were no family issues between them and the witnesses. There could be no reason the appellants would be implicated by the eyewitnesses, much so the second appellant. Furthermore, the appellants were also identified by Mr Naidoo who had no prior involvement with them. The defence of false or mistaken identity does not withstand scrutiny. In any event, the evidence is so overwhelming against the appellants.

[20] Both appellants confirmed that the second appellant drove a grey Hyundai i20. A vehicle of the same make was identified by the state witnesses as the one the appellants arrived in, before the shooting took place and that which chased after the deceased's vehicle, after the shooting.

[21] Crucially, the distance between the scene where the shooting first occurred and the scene where the deceased vehicle knocked into the wall was said to be only 220

metres apart. The witnesses testified that the deceased was driving his vehicle fast, clearly, in an attempt to get away from the appellants after being shot at. Shortly after the crash at the second scene, the eyewitnesses and the people from the neighbourhood arrived. Thus, there is little room for speculation that there might have been another shooter at the second scene, where the crash occurred. This, too, negates the probability of mistaken or false identification.

[22] The appellant's *alibi* defence that they were at their respective homes when the shooting occurred is also negated by cellphone evidence adduced by the State. Both appellants' cellphones were cited at 23:19:45 as being near the Parkside Primary Tower. There is therefore corroboration as regards the cellphone tower evidence that the appellants were in the same vicinity at the same time. Both appellants live at different addresses in Lenasia South. The first appellant lived at Brandberg Place, while the second appellant lived at Shaba Crescent. The nearest tower for the first appellant was Lenasia South Tower with Parkside and Cosmos Street Towers to his north and Madiba Primary to the south. The second appellants' closest towers were Apex Tower with Spoonhill, Saliheen Masjidus, Shari Crest Primary. Therefore, the appellants could not have been at their respective homes.

[23] I now turn to the ballistics evidence, which was accepted in part and rejected in part by the trial court. A comparison of the bullets recovered from the deceased's vehicle was conducted by Captain Blignaut. The trial court found this evidence to be inconclusive and problematic with significant discrepancies. Bearing in mind that ballistic evidence is expert evidence, the principles associated with the acceptance or the rejection of such evidence are applicable. Captain Blignaut conceded that the bullets recovered from the deceased's vehicle could not have been fired from the second appellant's personal licenced firearm, a 9mm Parabellum semi-automatic pistol. No cartridges were recovered from the first scene outside Mr Choonie's home. The eyewitnesses' evidence was to the effect that some woman by the name of 'Cynthia' had picked up all the spent cartridges at the first scene. For some reason, which was not explained, the State failed to investigate this issue or call this witness. The appellants' counsel submitted in his heads of argument that all these shortcomings pointed to a possibility that there was no shooting at the first scene, and that the deceased was not struck by bullets fired from the second appellant's firearm. This

submission is, however, not sustainable. The manner in which the shooting occurred and the proximity between the first and the second scene leave no room for speculation.

[24] The expert evidence was accepted in part as being as such and rejected as the trial court was of the view 'that [Blignaut] corrected [her] finding after consultation with the state, not to exclude evidence but rather to implicate the [9mm firearm], appears highly suspect.' An expert witness is not retained to give a favourable opinion on behalf of the party who hired him or her. An expert is not a 'hired gun'. The expert's prime duty is to assist the court in coming to a reasonable conclusion on matters which require expert evidence. Thus, a judge would be favourably impressed by an expert's impartiality who is willing to make reasonable concessions which might be detrimental to the client's case, provided the concessions are justified in the circumstances.⁵ Hence, the rejection by the trial court was correct, as it was not bound to accept the expert evidence, if it was not satisfied that the finding of the expert witness was not corroborated by the rest of the evidence.

[25] Both the State and the defence conceded that there were discrepancies in the evidence adduced by the eyewitnesses. The trial court also acknowledged this factor. It, however, concluded that 'although their evidence [of the eyewitnesses] can be criticised as not exactly coinciding, it is also indicative of their independence'. In my view the discrepancies were not material. It is trite that contradictions are to be evaluated in the context of the evidence as a whole. The eyewitnesses were steadfast and unshaken as regards the identity of the appellants as the perpetrators. They may have given different accounts in relation to some aspects of how the incident unfolded, their evidence in relation to the main events was, however, consistent.

[26] For these reasons, there is no justification for interfering with the factual findings of the high court and its decision to convict the appellants. The following order is made: The appeal is dismissed.

⁵ *Schneider NO v AA* [2010] ZAWCHC 3; 2010 (5) SA 203 (WCC); [2010] 3 All SA 332 at 14-15.

W HUGHES
JUDGE OF APPEAL

APPEARANCES

For the Appellants:	Heads of argument prepared by J Muir
Instructed by:	AVDM Attorneys, Johannesburg Peyper and Botha Attorneys, Bloemfontein.
For the Respondent:	Heads of argument prepared by J M K Joubert
Instructed by:	The Director of Public Prosecutions, Johannesburg The Director of Public Prosecutions, Bloemfontein.