Republic of South Africa

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

Case Number: **A265/16**

In the matter between:

WAYNE GAVIN ARMSTRONG Appellant

and

THE STATE Respondent

DATE: 17 September 2018

J U D G M E N T

MACWILLIAM AJ:

[1] On 21 September 2011, the Appellant was convicted of murder and sentenced to 18 years direct imprisonment for the murder of Jubilus Mngomezulu ("the deceased") who was shot and killed on 3 February 2001.

[2] On 29 May 2015, the Appellant was granted leave to appeal against both his conviction and sentence. This appeal was enrolled on 17 June 2016, but due to the Appellant's failure to prosecute the appeal, it was removed from the roll. The Appellant thereafter applied for the appeal to be re-enrolled and that order was subsequently granted.

[3] At that time, the Appellant's counsel noted that prior to the witnesses testifying (save for one witness), the court *a quo* had said the following words to the witnesses:

> *"Do you swear the evidence you are about to give will be the truth, nothing but the truth, so help me God?"*

And in respect of an Afrikaans witness:

> *"Sal u sweer die getuienis wat u nou gaan aflê sal die waarheid wees, net die waarheid, so help my God?"*

[4] The State, in addition, ascertained that one of the witnesses, Ms Matoti, had not been sworn in at all.

SECTION 162(1) OF THE CRIMINAL PROCEDURE ACT

[5] Section 162(1) of the Criminal Procedure Act, 51 of 1977 ("the CPA") states as follows:

> *"**162 Witness to be examined under oath***
>
> *(1) Subject to the provisions of sections 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath, which shall be administered by the presiding judicial officer or, in the case of a superior court, by the presiding judge or the registrar of the court, and which shall be in the following form:*
>
> *'I swear that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God'"* (emphasis added).

[6] Section 163(1) of the CPA provides that where an affirmation is to be made, that affirmation shall be in the following words:

> *"I solemnly affirm that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth"* (emphasis added).

[7] Section 164 of the CPA deals with unsworn or unaffirmed evidence. In terms of that section, the witness shall, in lieu of the oath or affirmation, be admonished by the Presiding Judge or Judicial Officer to speak the truth.

THE APPELLANT'S SUBMISSIONS

[8] The Appellant submitted that all of the *viva voce* testimony presented at the trial was inadmissible. For this submission he relied on S v *Matshiva*[1] where the Supreme Court of Appeal stated that:

> *"The reading of section 162(1) makes it clear that, with the exception of certain categories of witnesses either falling, and I repeat, either falling under section 163 or 164, it is peremptory for all witnesses in criminal trials to be examined under oath. The testimony of a witnesses who has not been placed under oath properly, has not made a proper affirmation or has not been properly admonished to speak the truth as provided for in the Act, lacks a status and character of evidence and is inadmissible"* (underlining added by the Appellant).

[9] In addition, and without referring to the cases in his Heads of Argument, or identifying the paragraphs or principles on which he relied, the Appellant attached copies of an additional 7 cases to his Heads of Argument (the case reference being taken from the copies in question):

[a] *S v Anthony*;[2]

[b] *S v Rammbuda*;[3]

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[1] 2014 (1) SACR 29 (SCA) at paragraph 10

[2] (SHF 27/14) [2014] ZAWCHC 30 (20 March 2015)

[3] (156/14) [2014] ZASCA 146 (26 September 2014)

[c] *S v Gallant*;[4]

[d] *S v B*;[5]

[e] *S v N*;[6]

[f] *S v Maseti*;[7]

[g] *D v Ndhlovu and Others*.[8]

[10] In *Anthony's* case, this Court concluded that where a witness had not been sworn in at all, that error was such a grievous one, that it vitiated the proceedings as whole.[9] In that matter, after the State had closed its case, the defence closed its case without leading any evidence. The Magistrate thereafter, acting in terms of Section 186 of the CPA caused a further witness to be subpoenaed and testify. It is that witness who was not sworn in.

[11] This Court held that:

> *"[8] The Magistrate presiding in the instant matter was thus perfectly within his rights to act in terms of section 186 in order to secure the evidence he thought would enable him to administer justice properly in the case before him. Where he made a mistake is that he then failed or omitted to act in terms of section 162 in respect of this particular witness. I*

[4] (CA&R 69/06) Date of judgment 19 July 2007 (Eastern Cape Division), being an unreported judgment of Revelas J

[5] (22/02) 2003 (1) SACR 52 (SCA)

[6] 1996 (2) SACR 225 (C)

[7] (353/13) [2013] ZASCA 160 (25 November 2013)

[8] (327/01) 2002 (2) SACR 325 (SCA)

[9] See paragraph [10] of the judgment

> *venture to say it is indeed a fatal mistake. For all intents and purposes, the evidence of that particular witness, because it is unsworn, is vitiated by that error. It must be regarded as though it never existed. The evidence in criminal proceedings may only be adduced under oath, under affirmation and under warning."*

[12] In the result, the Court concluded that the error was so material that it qualified to vitiate the proceedings as a whole[10] and the proceedings before the Magistrate were reviewed and set aside.

[13] It seems clear that in that matter the evidence of that particular witness was crucial to the accused's conviction and the Court was requested by the Magistrate himself to set aside the accused's conviction.

[14] In my opinion, that case is not authority for the proposition that merely because a witness has not been sworn in, the conviction of the accused in that matter must necessarily be set aside. In my opinion, one must have regard to the remainder of the evidence as well as the impact of the unsworn evidence, on the outcome of the case, before deciding whether or not the conviction should be set aside.

[15] The next 5 cases attached (which included S v Matshivha *supra* all related to the evidence of young witnesses who had testified when the prerequisites set out in Section 164 of the CPA had not been

[10] See paragraph [10] thereof

followed. In each of those cases that evidence was ultimately rejected. These cases did not address the specific issue which arises in this matter in relation to the omission of the words "the whole truth" when all of the witnesses, apart from Mrs Matoti, were sworn in.

[16] The seventh case related to the improper splitting of charges and the proper approach to that evidence, while the eighth case related to the admissibility of hearsay evidence. These cases too do not bear on the present issue.

THE STATE'S ARGUMENT

[17] On behalf of the State it was conceded that it was peremptory for all witnesses in criminal trials to be examined under oath and that the testimony of a witness who has not been sworn in lacks the status and character of evidence and is inadmissible. In addition to *Matshivha's* case *supra* the State referred us to *The State v Raghubar* [11] and *The State v Pilane*.[12]

[18] In the result, the State correctly conceded that the evidence of Ms Matoti was inadmissible.

[19] However, insofar as the remaining witnesses are concerned, where the Magistrate in the court *a quo* had omitted to include the words *"the whole truth"* in administering the oath to the witnesses, the State

[11] 2013 (1) SACR 398 (SCA)

[12] (559/16) [2017] ZASCA 71 (1 June 2017)

submitted that omission of the words *"the whole truth"* from the oath did not make the witnesses' testimony any less reliable. The State further submitted that the words *"the whole truth"* and *"nothing but the truth"* should be interpreted to have the same meaning.

[20] The State referred to *S v Ndunyunu* [13] where Dolamo J stated:

> *"The reason for giving evidence under oath (see section 162), affirmation (see s 163) or admonishment (see s 164) is to ensure that the evidence given is reliable"* [14]

[21] The State argued that there was no reason to suggest that the evidence of the witnesses who testified in this matter was any less reliable because the words *"the whole truth"* had been omitted when the oath was administered.

[22] The State also referred to *S v Baadjies* [15] where Gamble J and Fortuin J held that:

> *"Experience shows that even in cases where witnesses are much older than the complainant the word 'oath' remains a nebulous concept, whereas the invocation to tell the truth is more readily appreciated and understood. The transcript demonstrates unequivocally that the judge was satisfied that the complainant comprehended the difference between truth and falsehood, and his*

[13] (A487/2010) [2013] ZAWCHC 43 (28 February 2013)

[14] At paragraph [12]

[15] 2017 (2) SA CR 366 (WCC)

admonishment that she speaks the truth was in my view sufficient to render the complainant's evidence admissible."

[23] Finally in this regard, the State referred to *S v Elton Moses* [16] where Binns-Ward J stated, in a different context, that

"the application by the court of the recent trend in statutory construction, is to have regard, in respect of the practical application of statutory provisions, less to the characterisation of the language in which a provision has been couched (whether as 'peremptory' or 'directory'), and more to whether on the facts of the given case the evident substantive purpose of the provision has been achieved or not." [17]

EVALUATION

[24] The Court in S v Moses *supra* had regard to two judgments, one of the Supreme Court of Appeal in *Weenen Transitional Local Council v Van Dyk* [2002 (4) SA 653 (SCA), [2002] 2 All SA 482 at para. 13, and the other of the Constitutional Court in *Allpay Consolidated Investment holding (pty) Ltd and Others v Chief Executive Officer of the South African Social Securit Agency and Others*, 2014 (1) SA 604 (CC); 2014 (1) BCLR 1, at para. 30. The first of these matters related to the interpretation of section 166 of the Local Authorities Ordinance 25 of 1974 (KZN) and the second to compliance with the

[16] (R48/2018) ZAWCHC 14 June 2018

[17] At paragraph [13]

state procurement process. In the latter, the Constitutional Court held that:

> *"[30] Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between 'mandatory' or 'peremptory' provisions on the one hand and 'directory' ones on the other, the former needing strict compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this court O'Regan J succinctly put the question in ACDP V Electoral Commision as being 'whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose".* (Emphasis added)

[25] Insofar as the interpretation of Section 162(1) of the CPA is concerned, one must necessarily have regard to the approach to the interpretation of legislation enunciated in the two judgments in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [18] and *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*.[19]

[18] 2012 (4) SA 593 (SCA) at para [18]

[19] 2014 (2) SA 494 at paras [10] to [12]

[26] The language of the section itself, makes it clear that in terms of Section 162(1) and 163(1) of the CPA it is peremptory that a witness must either take the oath or affirmation in order to render his or her evidence admissible. This was conceded by the State and, as was made clear in S v Mashivha *supra,* this concession is not contentious.

[27] In enacting the 2 sections, the purpose of legislature was to make it clear to a witness who is about to testify that he should speak the truth.

[28] As I see it, the question for decision is whether that purpose has been satisfied in this matter, notwithstanding that the words "the whole truth" were omitted when the witnesses were sworn in.

[29] It is to be noted that Section 162(1) of the CPA provides that the oath *"shall"* be in the *"following form"* (emphasis added), whereafter the specific words are set out. The fact that the oath must be in that *"form"* is an indication that although the specific words which make up the oath are set out between quotation marks, the precise words do not have to be used and that the exact use of those words is not peremptory. If, for example, the word *"complete"* was utilised instead of the word *"whole",* the oath would still be in that *"form"*.

[30] Having said that, I do not agree with the State that the words *"the truth, the whole truth, and nothing but the truth"* must be interpreted to have the same meaning. A witness can tell the truth without telling

the whole truth. A witness can also embroider on, and speculate, while at the same time telling the truth. Thus, in my opinion, the two additional phrases do indeed have a distinct meaning.

[31] However, when interpreting the section, I agree with the approach of Binns-Ward J in S v Elton Moses *supra* that the section should be interpreted in a practical way. In particular, the Court should have regard to the evidence given by the witness in order to make an assessment whether the omission of the words *"the whole truth",* when the oath was administered, could have detracted from the veracity, truthfulness and value of the evidence which the witness has given.

[32] I doubt whether witnesses who take the oath or affirm their evidence listen carefully to the specific words when the oath is administered. Furthermore, I doubt whether anyone, apart from an eagle eyed advocate, would have noticed that in this case the words *"the whole truth"* had been omitted when the oath was administered to each witness. Not only that, but it seems that this was the standard wording used by the Magistrate and he may well have had countless other cases in which the same oath was administered by him. In the case of) DPP v Minister of Justice and Constitutional Development 2009 (2) SACR 130 (CC) the Constitutional Court was called upon to interpret section 164(1) of the CPA in terms of which a person, who does not understand the

nature or the importance of an oath or a solemn affirmation, may give evidence without taking an oath or making an affirmation.[20]

[33] It is instructive that although the Constitutional Court was there dealing with a separate section which specifically requires the Presiding Judge or Judicial Officer to admonish the witness "to speak the truth" the Court held that:

> *"What the section requires is not the knowledge of abstract concepts of truth and falsehood. What the proviso requires is that the child will speak the truth"*[21].

[34] The Court then went on to hold:

> *"[166] The reason for evidence to be given under oath or affirmation or for a person to be admonished to speak the truth is to ensure that the evidence given is reliable. Knowledge that a child knows and understands what it means to tell the truth gives the assurance that the evidence can be relied upon".* (Emphasis added)

[35] In the present matter the requirement that the witnesses should tell the truth was satisfied by the administration of the oath albeit without the words "the whole truth" included. In the case of S v Vumazonke 2000 (1) SACR 619 (CPD), the complainant was 10 years old by the time of giving evidence and was a mildly retarded

[20] See para [164] at p. 186 b-c
[21] At 186 g-h

child with Down Syndrome.[22] In that case it was argued that the warning to be conveyed to the witness in terms of section 164(1) did not comply with the provisions of that section, in that the words used were not in accordance with the formula, namely "to speak the truth, the whole truth and nothing but the truth".[23] Jali J (with whom Van Zyl J concurred) rejected this argument in the following terms:

> *"[14] It is my view that when a witness is being warned in terms of s 164(1), it was not the intention of the Legislature that exactly the same words should be used as prescribed in s 162(1). If that was the intention of the Legislature it would have been prescribed or conveyed in s 164(1) as in s 162(1), where the words to be used when the oath is administered are quoted. I am saying this without making any finding as to what the failure to use the exact words quoted in s 162(1) would result in. In my view there is no merit in the submission that the oath should be in the same words or form as set out in the Act. <u>It is the substance of what is being said which matters and not the form</u>".*

[36] In the present matter I have come to the conclusion that "the substance" of the oath which was sworn to by the witnesses, apart from this Mrs. Matoti, was sufficient to satisfy the requirement of section 162(1) and that the use of the exact words quoted in section 162(1) is not pre-emptory. Conversely the failure to use the exact words quoted in section 162(1) was not sufficient, on its own, to render the evidence of the witnesses unreliable.

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[22] See p. 620 d
[23] See p. 623 e

[37] My approach accords with the approach taken in two cases where an oath was improperly administered when an affidavit was signed.

[38] In *S v Munn* [24] the deponent had signed the affidavit before taking the oath. It was accordingly argued that this defect invalidated the affidavit as the oath should first have been administered by the Commissioner of Oaths before the deponent signed the affidavit. The issue for decision was whether the relevant regulations were peremptory or directory.[25]

[39] The Court analysed this issue in the following terms:

> *"I do not propose to analyse the various aids to interpretation of statutes, and cases dealing with these referred to by counsel. One who concentrates or whether the Legislature has chosen to use 'shall' instead of 'may' or clothed its wishes in a positive or negative form in the regulations in issue is in my view one qui haeret in cortice. Sec. 10 of Act 16 of 1914 empowered the Governor-General to make regulations prescribing*
>
> > *'... (c) the form and manner in which oaths and declarations shall be taken, when not prescribed by any other law';*
>
> *but the taking of the oath was part of our procedure long before this. I ignore the oath under previous practice when it was regarded as the equivalent of a iudicum Dei; but since the time when oral testimony was, apparently reluctantly, permitted in*

[24] 1973 (3) SA 734 (NCD)

[25] At p. 736E

addition to circumstantial evidence as having probative value, courts have attempted to provide a stimulus to truthfulness in witnesses in judicial proceedings by the sanction of punishment, in this world or the next, for falsity. An oath is no more than a calling on God to punish you if you say what is not true; and, if it is to be clothed with any efficacy, it can matter little what words or ceremonies are used in imposing it, provided the witness regards his conscience as bound thereby. The purpose of administering an oath - normally before a witness testifies - is to ensure that he does not speak lightly and frivolously, but weighs his words; to impress on him the solemnity of the occasion, and above all to provide a sanction against untruthfulness. Originally the sanction lay solely in fear of deferred punishment by God. This subjective potency of the oath has tended to diminish and been reinforced by the sanction of more immediate punishment by the State, as well as being extended to extrajudicial proceedings by statute. And courts and commissioners of oaths have inclined in modern times to fritter away the effect of the spiritual sanction by administering the oath in irreverent and perfunctory fashion, without giving its theoretical reinforcement effect, by informing or reminding witnesses of the temporal one. See Wigmore, secs. 1815 et seq. The valid criticism of 'the thoughtless, trivial, and degenerate modern practice' by Wigmore, vol VI, p. 295, in all probability led to the promulgation, in terms of Act 16 of 1963, of the new regulations contained in Government Notice R.1258 published in Government Gazette dated 21.7.1972."[26] (Emphasis added)

[26] At 736E-737C

The court thereafter concluded that:

> *"In my view both the 1961 and 1972 regulations are directory only and the reasoning in cases such is Ex parte Vaughan, 1937 C.P.D. 279; Mtembu v. R., 1940 N.P.D. 7; and R. v. Sopete, 1950 (3) S.A. 769 (E), irrefutable. These deal with the directive that the commissioner is to certify in the jurat that the deponent 'knows and understands' the contents of the relevant document. But they are in my view equally applicable to the question of signature by the deponent."* [27]

[40] The Court also had regard to the history and purpose of the administration of the oath:

> *"A study of the history and purpose of the administration of the oath leads to the view that the purpose of obtaining the deponent's signature to an affidavit is twofold: to add to the dignity or impressiveness of the occasion (cf. Wigmore, vol. VI, sec. 1819, pp. 296-7) but primarily to obtain irrefutable evidence that the relevant disposition was indeed sworn to. The former aim would be frustrated were the signatory to sign an unsworn statement; and for the latter purpose the signature is valueless to prove that the deponent swore to the affidavit if admittedly signed before the oath was taken. <u>But if uncontradicted evidence were to be adduced that he was indeed aware of the solemnity of the occasion and voluntarily took the oath as to the veracity of the contents of the document, it would in my view be to place form</u>*

[27] <u>*Munn*</u> *supra* at p. 736F - 737F

before substance to allege that the document produced is nevertheless invalid.

Compliance with the regulations provides a guarantee of acceptance in evidence of affidavits attested in accordance therewith, subject only to defences such as duress and possibly undue influence. Where an affidavit has not been so attested, it may still be valid provided there has been substantial compliance with the formalities in such a way as to give effect to the purpose of the legislator as outlined above.

And whether there has been such 'substantial compliance' is a matter of fact, not of law. Where a man, fully aware of the solemnity of the occasion and fully intending to be bound by his words, signs before swearing, it would place form above substance were his affidavit to be nullified for such chronological irregularity." [28] (Emphasis added)

[41] *S v Msibi* [29] was a decision of the full bench of the then Transvaal Provincial Division. In that matter Viljoen J held:

"Daar word op talle terreine van die samelewing beëdigde verklarings vereis en indien die nie-nakoming van die vormvereistes soos voorgeskryf, nietigheid van die verklaring sou beteken, sou dit in vele opsigte ontwrigtend op die samelewing inwerk. As 'n persoon wat valslik 'n verklaring beëdig het, later straf vir meineed sou kon vryspring bloot op grond daarvan dat die

[28] *Munn supra* at p. 737F - 738A

[29] 1974 (4) SA 821 (T)

vormvereistes soos voorgeskryf nie stiptelik nagekom is nie, sou dit nie gevolg gee aan die bedoeling van die Wetgewer nie. Vgl. Sopete se saak, supra op bl. 772H-773A-D.

Daar bestaan dicta in gewysdes wat daarop dui dat al die regsprekers in die verlede nie eners gedink het oor die aangeleentheid nie. Hierdie gewysdes is R. v. Pietersen, 1944 C.P.D. 340 te bl. 341; Swart v. Swart, 1950 (1) S.A. 263 (O). In hierdie verband wil ek my graag, met eerbied, vereenselwig met die opmerkings van REYNOLDS, R, in Sopete se saak, supra, waar hy die mening huldig dat om te beweer dat die betrokke voorskrifte aanwysend is, nie beteken dat hulle beskou moet word as skeurpapier ('waste paper') (soos wat die suggestie is in Pieterse se saak nie), want soos ook later in hierdie uitspraak sal blyk is hierdie voorskrifte van groot waarde en het die Hof 'n diskresie om 'n beëdigde verklaring ten aansien waarvan die voorgeskrewe vereistes nie nagekom is nie, in 'n gepaste geval as waardeloos te beskou.

Ek het dus tot die gevolgtrekking gekom dat die huidige voorskrifte soos vervat in regulasies 1, 2, 3 en 4 van R.1258 gedateer 21 Julie 1972, nie gebiedend is nie, maar slegs aanwysend.

Dit beëindig egter nog nie die ondersoek nie. Soos ek reeds hierbo in die vooruitsig gestel het kan 'n hof, in 'n gepaste geval waar die voorskrifte nie nagekom is nie, weier om die betrokke beëdigde verklaring as sulks te aanvaar of om enige gevolg daaraan te heg. Ook dit is herhaaldelik in die verlede deur Howe

benadruk. In Vaughan se geval, supra, sê CENTLIVRES, R. (soos hy toe was):

> *'So it seems to me that in the circumstances of this case I should accept the affidavits which have been filed; but in accepting the affidavits in this case I do not wish to suggest for a moment that there may not be cases in which the Court will refuse to accept affidavits which do not comply with the provisions of para. (e) of the regulation to which I have referred …'"* [30]

[42] See also *Cape Sheet Metal Works (Pty) Limited v JJ Calitz Builder (Pty) Limited*.[31]Accordingly, in the circumstances of this case, it seems to me that we should have regard to the evidence given by all of the witnesses, apart from Ms Matoti. There is, with respect, nothing in their evidence which indicates that they did not take the oath seriously and undertake to tell the truth, or to put it differently, that the omission of the words *"the whole truth"* served in any way to detract from the reliability of their evidence.

HEARSAY EVIDENCE

[43] In argument the Appellant's counsel submitted that the trial court had misdirected itself by having regard to was said by the deceased to Patrick Mngomezulu. Patrick Mngomezulu spoke to the deceased after had been shot and shortly before he died. His evidence was as follows:

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[30] *Msibu supra* at p. 828H-829E

[31] 1981 (1) SA 697 (O) at 699A-C

"Did you speak – did you get a chance to speak to your brother at that stage? --- Yes

What did you speak to him? --- and I asked him what had happened and he told me that the person with whom I left him – him with at home is the one who shot him.

Did he give you a name? --- Yes

What was the name Sir? --- Wayne

[44] The Appellant's legal representative did not challenge the admissibility of that evidence at the time and when the evidence was led.

[45] Before relying on this evidence, the Court *a quo* had regard to section 3(1) of the Law of Evidence Amendment Act 45 of 1988 and the factors listed in section 3(1)(c) thereafter. It then concluded that the evidence was admissible.

[46] The Appellant's counsel referred us to Antoinio Van Willing and Another v State (109/2014) [2015] ZASCA 52 (27 March 2015) . In that case the Supreme Court of Appeal stated at paragraph 26 that:

"The probative value of the hearsay evidence depends on the credibility of the deceased. The question must thus be asked whether his evidence identifying the perpetrators would be reliable".

[47] In this matter there are no grounds to believe that the statements made by the deceased were unreliable. It was not suggested either in the course of cross examination or in argument before us that the deceased had any reason to falsely identify the Appellant.

[48] In my opinion, the court *a quo* correctly had regard to the hearsay statements made by the deceased to Patrick Mngomezulu.

ALIBI

[49] In the course of the oral argument it was submitted that the Appellant had raised an alibi and that it was incumbent on the State to prove that the alibi was false. The submission was made with reference to the S v Liebenberg (156/2003) [2005] ZASCA 56 (31 May 2005) and more specifically para [14] thereof.

[50] The highwater mark of the evidence to which we were referred as constituting the alibi, was the following evidence which was given in chief by the Appellant:

> *"Now the witnesses that have testified alleges that an incident occurred on the 3rd of February 2001. Can you tell the court, can you recall where you were the morning of 3 February 2001 --- Ja. I think it was on a Saturday, that day I was at home.*
>
> *HOF: "Tolk --- Yes I can recall I was at home.*
>
> *Where is home? --- In Guguletu NY 71.*

The Appellant also stated in his evidence in chief that if he had to travel from his home to the place where the deceased was shot by taxi it could be 10 mins".

[51] In cross-examination he stated that that to walk, it would take 30 or 40 mins.

[52] Furthermore it was not suggested in evidence that the Appellant was at home that entire day or that the fact that the Appellant had been at home for some of the day precluded him from being at the scene of the murder when the deceased was shot.

[53] Even if this evidence could be regarded as constituting an alibi, it was not sufficient to cast doubt on the State case.

THE CONVICTION

[54] It was most unfortunate that the evidence in this matter was heard some 10 years after the incident. In the result one must be cautious when assessing the evidence given by the witnesses in order to take into account that they were testifying about events which took place 10 years earlier.

[55] Having said that, it seems plain that the witnesses were not to blame for the delay. The fact is that the initial police investigation appears to have been woefully inadequate and the police appear to have been largely responsible for the inordinate delay.

[56] Insofar as the unsworn evidence of Ms Matoti is concerned, that evidence was largely irrelevant and of little assistance one way or the other. If her evidence is disregarded, the State's case remains a convincing one and there is no prejudice to the appellant.

[57] It is the compelling evidence of Nomathandayo Ntolwana (who was referred to by the witnesses as *"Norma"*) which is the cornerstone of the State's case. Her evidence was clear and straightforward. She testified that the Appellant had unequivocally told her that it was he who had shot the deceased as he laboured under the impression that the deceased was in a relationship with her. As it turned out, the Appellant belatedly conceded that he had shot the wrong man. Her evidence with regard to the events preceding the murder and the difficulties which she was experiencing with the Appellant, his wish to continue the relationship and her determination to end it was plausible and fitted in well with the totality of the evidence presented.

[58] It is striking that much of the Appellant's evidence coincided with that of Norma's, save that he denied that he had told Norma that he had shot the deceased. In this situation it seemed clear that the Appellant was constrained to fabricate grounds for Norma to falsely accuse him of the shooting. His version was that Norma was attempting to frame him in order to get back at him arising out of her discovery that he was having an affair. This version was simply not credible. Norma was the mother of his son and the Appellant

continued to phone Norma on her birthday every year and did not appear to have any malice towards Norma arising out of her falsely implicating him in so heinous a crime.

[59] The Appellant has criticised the evidence of Chester and Patrick, the deceased's brothers. However, that criticism fails to take into account that save for the Appellant's identification, they were giving evidence about an actual murder which actually occurred and in relation to which any inconsistencies were entirely irrelevant. The only question for determination is whether their identification of the Appellant as the murderer falls to be disregarded.

[60] While no identification parades were held and they both testified some 10 years after the shooting, in circumstances where they had more recently seen the Appellant in court where he was already identified as the accused, the fact is that some weight must be given to their identification of the Appellant as the murder. Even if little weight is given to that evidence, it nonetheless serves to corroborate Norma's evidence.

[61] Insofar as identification is concerned, the Appellant referred us to S v ***Matshivha*** *supra* at para [28] and following. It is not clear how that reference advanced the argument in anyway.

[62] During the course of cross-examination of Chester in particular, and to a lesser extent Patrick, the defence made much of the fact that they had not made statements to the police at an early stage.

However, this is hardly something for which they can be blamed, in circumstances where the then investigating officer was not available to testify as he had apparently died in the meanwhile and it is quite evident that the police investigation and their preparation of the evidence was particularly poor. No crime scene forensics were conducted, no photo/identification parades were held and Norma herself only appears to have been contacted by the police with regard to the whereabouts of the Appellant in 2007.

[63] In any event, the Appellant was shown to be an unreliable witness. He contradicted his own version which was put to Norma by his legal representative, namely that Norma had called him on the Monday after the shooting. The Appellant's testimony in fact supported Norma's in that he alleged that he had called Norma. Not only was his explanation why Norma would falsely implicate him wholly implausible, but what was put by his legal representative to Norma was that she was angry with the Appellant because he had had a relationship with a woman in Johannesburg and with one Zanelle in Cape Town. However, in evidence he sought to embroider this by adding the fact that Norma was allegedly upset because he had two older children that she was unaware of. As against that, Norma's conduct in distancing herself physically from the Appellant and leaving her home was confirmed by the Appellant.

[64] It is difficult to believe that Norma would want the father of her child to be imprisoned for a murder which he had not committed on the

flimsy basis alleged by the Appellant, particularly as it is also highly improbable that she would continue to falsely accuse the appellant 10 years after their relationship had ended, in circumstances where there was no evidence to suggest that she could still be angry with the Appellant.

[65] In the circumstances, there are no grounds to set aside the Appellant's conviction.

SENTENCE

[66] The court *a quo* not only found no substantial and compelling circumstances, but also found aggravating circumstances to be present. The deceased was shot a number of times in circumstances where he offered no resistance and did not in any way provoke the Appellant. He was deputy principal at a school, a respected member of the community who had made a positive contribution to society. His father, who was seriously ill, and his brothers, lost their son and brother in this, a cold-blooded murder.

[67] In the circumstances, I find that there are no grounds to interfere with the sentence.

MACWILLIAM AJ

I agree and both the appeal against the Appellant's conviction and sentence is dismissed.

ALLIE J

Date of Hearing: 07 September 2018
Date of Judgment: 17 September 2018

APPEARANCES

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