THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 216/05
Reportable

In the matter between :

REUBEN HESLOP APPELLANT

and

THE STATE RESPONDENT

CORAM : ZULMAN, CLOETE *et* MLAMBO JJA

HEARD : 23 NOVEMBER 2006

DELIVERED : 30 NOVEMBER 2006

Summary: Criminal Appeal: Delay and failure by the registrar of the court *a quo* to provide an explanation, criticised. Discussed: The role of probabilities in evaluating guilt; inconsistency of evidence with unassailable fact; failure to allow cross-examination; when an appeal court is justified in disregarding favourable credibility findings by a trial judge in respect of a witness's demeanour; the difficulty of drawing inferences from the location of gunshot wounds; and reasoning based on matters not canvassed in evidence.

Neutral citation: This judgment may be referred to as *Heslop v S* [2006] SCA 155 (RSA).

CLOETE JA/

CLOETE JA:

[1] The appellant was charged with three counts of murder and convicted on 13 August 1996 of three counts of culpable homicide by Mailula J and assessors in the Johannesburg High Court. He was sentenced on 5 November 1996 to an effective term of imprisonment of six years. On the same day that sentence was imposed, leave to appeal was sought and granted without opposition from the State.

[2] A disquieting feature of the case is that it took nearly ten years for the record to arrive at this court. On 20 March 2006 the matter was struck off the roll because the Johannesburg Justice Centre had been unable to obtain a power of attorney from the appellant. The representative of the State informed the court that it is the sole responsibility of the registrar of the court *a quo* to transmit the record to the registrar of this court. Accordingly, this court in a letter dated 22 March 2006 sent by its registrar requested an explanation from the registrar of the Johannesburg High Court for the delay. That was more than eight months ago. Despite several reminders, this court's request has simply been ignored. That is unacceptable. The matter has been taken up in a letter sent by the President of this court to the Minister of Justice, who has advised that she views the content of the letter in a serious light and has directed the Director General to conduct the necessary investigation. Fortunately the appellant has been on bail pending the decision of the appeal. It is necessary to reiterate what was said in *S v Senatsi*:[1]

'In the appeal before us Mr *Van der Vijver* for the State assured us that steps have now been taken in the DPP's office to ensure that appeals, especially those lodged by unrepresented accused, are not lost in the system. One can imagine the prejudice that would have occurred if the appeal by the two appellants had been upheld or sentences of less than the period they have already served had been imposed. The office of the DPP is urged to ensure that such delays do not occur in the future. Such delays deny justice to the persons concerned by preventing a speedy disposal of their cases. Sadly, this is not the first time this has occurred. In *S v Joshua* this Court had to deal with a case in which there was a delay of some six years before the appeal was heard. Fortunately, the accused was out on bail in that case. Not so in the present matter. Such delays are to be avoided at all costs.'

[1] 2006 (2) SACR 291 (SCA) para 11.

We would suggest that the DPP of the Johannesburg High Court ─ and indeed, the DPPs of all High Courts ─ put in place similar safeguards, if this has not already been done; and to this end the registrar is requested to forward a copy of this judgment to the NDPP and all DPPs drawing this paragraph to their attention.

[3] The appellant was traced and on 24 May 2006 furnished the Johannesburg Justice Centre with a power of attorney to prosecute his appeal. The appeal was reinstated following an application in terms of SCA rule 11. This court is grateful for the assistance of the Johannesburg Justice Centre, and in particular, Mr Miller, in the prosecution of the appeal.

[4] It was common cause at the trial that on 20 May 2005 the appellant shot and fatally wounded Mr Mark van der Westhuizen (deceased 1), Mr Richard van der Westhuizen (deceased 2) and Mr Keith Davids (deceased 3). The shootings took place outside Steers Fast Foods in Pretoria Street, Hillbrow. Pretoria Street runs from west to east. Banket Street runs from south to north and intersects with Pretoria Street. Steers is situated on the south side of Pretoria Street at that intersection. The appellant's case was that he had acted in private defence. Four witnesses were called on behalf of the State and the appellant testified on his own behalf.

[5] The principal witness for the State was the 20-year old son of deceased 3, Mr Darryl Lee Davis. He said that when he rounded the corner of Pretoria Street at its junction with Banket Street he saw the appellant, who had a pistol in his hand, struggling with deceased 1 outside Steers. Deceased 2 and deceased 3 were standing nearby. Deceased 2 ran to assist his brother, deceased 1. The appellant then shot deceased 2, deceased 1 and deceased 3, in that order, and they all fell to the ground. Whilst on the ground deceased 3 shot at the appellant, who ran away backwards in an easterly direction along Pretoria Street, firing indiscriminately. The witness was adamant that the appellant was not injured in front of Steers or while he was running away. According to the witness, none of the deceased had drawn their firearms when the shooting started and although deceased 1 managed to draw his

firearm after he was shot, he did not fire it. Deceased 2's firearm remained in its holster. Later the witness went to a café in Abel Road, a few blocks east of where the incident took place, where the appellant, who (the witness confirmed) had been injured, was arrested by the police.

[6] Mr John Arthur Gray also testified on behalf of the State. He was in Banket Street, to the south of the Pretoria Street intersection, when he heard gunshots. Darryl Davis then came running around the corner shouting that his father (deceased 3) had been shot. The witness ran around the corner and saw the three deceased lying on the ground, and the appellant running backwards and shooting wildly. He ran after the appellant and fired four or five shots at him, but did not hit him. On his return to the scene he said that deceased 1's firearm was out of its holster, but no shot had been fired from it; and deceased 2's firearm was still holstered. He took possession of deceased 1's firearm and thereafter handed it to one of the police at the scene. Later he went to the café in Abel Road where the appellant was arrested.

[7] It is not necessary at this stage to deal with the evidence of the two policemen, Inspector Parker and the investigating officer, who also testified on behalf of the State.

[8] The appellant said that he was walking in front of Steers Fast Foods when Darryl Davis pointed him out to deceased 1 and 2. Deceased 1 then took hold of his shoulders and tried to headbutt him. The appellant moved backwards and deceased 1 drew his firearm. The appellant turned sideways and deceased 1 shot him in the left abdomen. The appellant then drew his firearm and shot deceased 1. Deceased 3, who was then standing close by, and deceased 2 thereupon also drew firearms and shot at the appellant. He fired at deceased 2, who fell down, and at deceased 3, who was standing and still firing at him. The appellant was hit all over his body and legs; apart from the wound I have mentioned, he was shot on his left hip, twice through his right thigh, on his right elbow and through the calf of his leg. I pause to emphasise that the appellant's evidence as to the number and location of all of the

six gunshot wounds sustained by him was not challenged by the State. According to the appellant, he fell down after he had been shot and he was thereafter assisted from the scene by Mr Francis Adams (who was on the list of State witnesses but not called by either side). He saw Gray and two other persons, who were then about 100 metres away, shooting at him. Later the same night at the café in Abel Road where he was arrested and after the flying squad had arrived, Darryl Davis and Gray pointed firearms at his head and threatened to shoot him.

[9] The judgment of the court *a quo* concludes as follows:

'[I]t is a unanimous finding of the members of the court that it cannot be accepted that at the stage when the accused produced his firearm and shot at all the three deceased persons that anyone of the three had pulled out a firearm on him or at all. Although the accused may have reasonably believed that the attack was imminent it is the unanimous finding of the members of the court that the means he employed in order to ward off the attack were in the circumstances of the present case not commensurate with the attack on him. It was not necessary for him to produce a firearm and fire at any of the deceased persons and the means adopted in this particular case were extremely harsh and absolutely unnecessary.

It is therefore the unanimous finding of the members of the court that in acting in the manner that he did the accused exceeded the bounds of self-defence . . .'.

The appellant was thereupon found guilty of culpable homicide on each count.

[10] A number of fundamental misdirections appear from the judgment of the court *a quo*. First, the court applied the wrong standard of proof, as appears from the following passage:

'However as I have said, the court has found that the accused's version as to how the shooting occurred is highly improbable. Davis's evidence on this aspect is a more probable one and therefore accepted.'

The remarks of Brand AJA in *S v Shackell*[2] are particularly apposite in regard to the approach followed by the court *a quo*:

'It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be

[2] 2001 (4) SA 1 (SCA); 2001 (2) SACR 185 (SCA); [2001] 4 All SA 579 (SCA), para 30.

convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. On my reading of the judgment of the Court *a quo* its reasoning lacks this final and crucial step.'

[11] Second, the court *a quo* overlooked the fact that the State version, testified to by Darryl Davis and Gray, does not explain how the appellant could have sustained the injuries which the State accepted that he did: according to Darryl Davis, the appellant was not shot by his father, deceased 3, at Steers or while he was running away and according to Gray, he shot at the appellant whilst he was running away, but did not hit him. That fact in itself should have gone a long way to secure the acquittal of the appellant because logic dictates that where the evidence of a witness is irreconcilable with an unassailable fact, such evidence falls to be rejected. But the conflict in the evidence was apparently ignored. That was a misdirection. As Nugent J said in *S v Van der Mayden*:[3]

'What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'

[12] Third, the court *a quo* found that Darryl Davis was an 'impressive witness' and that his evidence that his father, deceased 3, did use his firearm was corroborated by the ballistics report. I shall deal with this latter aspect first. It was common cause that deceased 3 had fired at the appellant. Other evidence showing that the witness's evidence was correct on this point does not provide corroboration, because by corroboration is meant other evidence which supports the evidence of the witness and which renders the evidence of the accused less probable, *on the issues in*

[3] 1999 (2) SA 79 (W) at 82D-E; 1999 (1) SACR 450 (W) at 450b. The passage has been repeatedly quoted with approval by this court: see eg *S v Van Aswegen* 2001(2) SACR 97 (SCA) para 8; *S v Trainor* 2003 (1) SACR 35 (SCA) para 8; *Stevens v S* [2005] All SA 1 (SCA) para 18; and *S v Gentle* 2005 (1) SACR 420 (SCA) para 27.

dispute: *S v Gentle*.[4] There is, however, a more disturbing feature of the case which requires mention. The ballistics report showed that of the ten cartridge cases found at the scene, eight could not have been fired from the appellant's firearm. The firearms used by deceased 1 and 2 were revolvers which (as was established by the evidence) do not eject spent cartridge cases. The firearm used by deceased 3 was a pistol which (as the evidence also established) could have ejected the eight cartridge cases to which I have referred. When Darryl Davis said in his evidence-in-chief that his father, deceased 3, had shot at the appellant, it was put to him by the prosecutor that during a consultation at which the investigating officer was present, he had said that none of the deceased had fired shots at the scene. This was confirmed by the investigating officer. (The court found that the investigating officer was 'not telling the truth in certain respects' — in which respects, it did not specify — and that 'his evidence should be treated with caution'. But his evidence on this aspect can be accepted in view of the questions put by the prosecutor to the witness and his answers as confirmed by the latter.) It is significant that the ballistics report, which established that not only the appellant had fired shots on the scene, only became available after the consultation. When asked by the prosecutor to explain the contradiction between his evidence-in-chief and what he had said at the previous consultation, the witness said that by 'the deceased' he had meant the two Van der Westhuizen brothers, deceased 1 and 2, and had not meant to include his father, who had indeed fired at the scene. One would have thought that the deceased most important to the witness would have been his own father. Regrettably, the court *a quo* prevented cross-examination on this point, despite a protest by defence counsel. The relevant passage reads:

'MS VAN NIEKERK: I put it to you further that nowhere in your statement do you say that your father fired shots, and as my learned friend also put to you apparently you also said last week that he did not fire shots. How come you now …(intervenes)

COURT: Well he has explained what transpired at the consultation with the state's counsel.

MS VAN NIEKERK: My lady with respect he explained, but the prosecutor has put certain things to him. Surely I may also put that to him.

COURT: Yes, he has explained what he meant.

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[4] Above n 3 at 430j-431a.

MS VAN NIEKERK: As the court pleases.'

Defence counsel then simply asked the witness to restate his explanation, without cross-examining him on it. In its judgment the court *a quo* glossed over the problem by saying that 'it appears that [State] counsel and the witness were talking at cross-purposes'. In the absence of proper cross-examination on the point this conclusion was unfairly favourable to the witness and correspondingly prejudicial to the appellant. In addition the failure to allow cross-examination on the witness's explanation of his previous inconsistent statement to the prosecutor and the investigating officer was a fundamental irregularity. He may have been discredited entirely on an essential aspect of his evidence, namely, that his father, deceased 3, only shot at the appellant after he had been shot by the appellant and was lying on the ground. (It will be remembered that it was the appellant's version that he shot deceased 3 whilst the latter was still standing and shooting at him.) The witness's statement to the prosecutor and the investigating officer, taken at face value, was inconsistent with the ballistic evidence which was not then available, which gives rise to the possibility (of which defence counsel was well aware) that the witness's evidence was tailored to fit the ballistic evidence when it did become available. It must also be emphasized that Darryl Davis was a single witness as to what had happened in front of Steers. The irregularity would have justified an application for a special entry in terms of s 317(1) of the Criminal Procedure Act, 51 of 1977; but it can nevertheless constitute a ground of appeal in terms of s 316 of that Act: *Sefatsa v Attorney-General, Transvaal*.[5] In consequence of the irregularity the appellant did not receive a fair trial[6] and the appeal must succeed on this ground alone.[7]

[13] The finding that Darryl Davis was an 'impressive witness' is cause for comment. The record shows that he was argumentative, rude to the appellant's counsel and sarcastic, and continued to ask questions instead of answering them despite a warning from the bench to stop doing so. Many examples could be given.

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[5] 1989 (1) SA 821 (A) at 843F-844B.
[6] S v Jaipal 2005 (1) SACR 215 (CC) para 39.
[7] *R v Ntshangela* 1961 (4) SA 592 (A) at 599; *S v Cele* 1965 (1) SA 82 (A) at 90H; *S v Pretorius* 1991 (2) SACR 601 (A) at 609h-j, all of which must now be read subject to what the Constitutional Court said in *S v Jaipal*, above n 6.

Two will suffice:

'But he [the appellant] need not have started running before he shot you if he had wanted to shoot you. -- Why did he run if it was self-defence?

Because… -- No why did he run if it was self-defence?

Because he had shot them …(intervenes) --So?'

And further:

'He [the appellant] says that Keith who was then on the scene, that is your father, and the other brother pulled out firearms and shot at him and he shot in return. -- Okay so you, your evidence that you stated earlier on already proves you are wrong. You said you found two different calibre shells over there. Now if three of them shot it is three different calibres. So who is lying where now?

Sir do you know about .38 revolvers, what happens to their shells? -- No I do not know. I do not work for ballistics.'

The correct approach to the deference which a court of appeal ought properly to accord credibility findings made by a trial court based directly or indirectly on the demeanour of witnesses who have testified orally before it, has been dealt with in a number of decisions.[8] I merely wish to emphasise the following aspect. It is cause for concern to find laudatory epithets applied by a trial court to witnesses when the record shows that their performance, judged by the written word, was obviously far from satisfactory. In such a case an appeal court will more readily interfere with the findings of the trial court as to the weight to be attached to the witnesses' evidence and its ultimate conclusion based on such findings.

[14] The court *a quo* was alive to the fact that Darryl Davis was a single witness but, surprisingly, it made no mention of the fact that his evidence should also be approached with caution both because he was the son of deceased 3, and because he admitted bias. When asked why he had gone to the place where the appellant had been arrested, he said: 'Hatred'.

[15] Gray was also hostile to the appellant. He boarded with deceased 3 and his wife, and (to use his own words) he was 'very good friends' with deceased 3. He, too, displayed bias: when asked in cross-examination why 'all of you carried guns, is

[8] Eg *President of the RSA v South African Ruby Football Union* 2000 (1) SA 1 (CC) paras 77 to 80; *S v M* 2006 (1) SACR 135 (SCA) para 40.

it because it is so dangerous in Hillbrow or what?' he replied 'To protect ourselves from people like Reuben Heslop.' He also sparred with cross-examining counsel and was warned by the presiding judge not to put questions to counsel, which he continued to do. One example will suffice:

'And obviously you did not look at the accused [after he had been arrested], you said so. You would not know whether he was injured or not so you cannot verify whether he sustained six wounds? -- If he was laying on the floor he must have been injured. I say I did not observe where his injuries were.

But surely you must have observed blood or something? Six injuries, it is …(intervenes) -- I mean what do you want me to …(intervenes)

Several entrance and exit wounds. Surely one …(intervenes) -- Do you want me to go sympathise with the accused?'

The judgment of the court a quo nevertheless records in regard to Gray that 'the members of the court are impressed with his evidence'.

[16] Fourth, the court misdirected itself on the facts. The principal misdirection is contained in the following passage in the judgment:

'Further one of the deceased person's firearm, namely Richard van der Westhuizen [deceased 2], was found in its holster on his person. This was the evidence of Gray as well as Inspector Parker. The evidence by Inspector Parker on this aspect was never disputed. He arrived on the scene approximately ten, 15 seconds after the shooting. If he had produced his firearm and fired at the accused at all, as the accused has testified, it is indeed strange that the firearm would have been found in its holster a few seconds later.'

It was common cause that deceased 2 was shot only once, in the neck (the bullet passed through the sixth cervical vertebra and lacerated the spinal cord) and that he fell down after he had been shot. I agree with the court *a quo* that it is therefore difficult to see how he could have returned his firearm to its holster; and no reason suggests itself as to why he may have wanted to do so. The possibility that some third person may have done so after the shooting is fanciful and may safely be excluded. Accordingly, if deceased 2's firearm was found in the holster after the shooting, this would cast serious doubt on the appellant's version that deceased 2 had shot at him before he shot deceased 2 and undermine both the appellant's credibility and his reliance on private defence. It was indeed the evidence of Gray, as the court *a quo* said, that deceased 2's firearm was in its holster after the shooting.

This was also the evidence of Darryl Davis. But it was not, contrary to the finding of the court *a quo*, the evidence of Inspector Parker. He said he picked up two firearms at the scene ─ one from deceased 3 and another from one of the deceased whom he did not identify. By a process of elimination, this must have been deceased 2's firearm because Gray picked up deceased 1's firearm himself and handed it to a policeman at the scene. In addition, the evidence established that deceased 1 lay in the middle of the three deceased after they had been shot. Parker said in his evidence-in-chief:

'Apart from the firearm which was with Davis… -- Yes?

Did you see any other firearms? --Yes there was one on the second, on the middle person. There was a, I cannot recall if the firearm was in a holster or if it was laying on the ground but I know I had taken a firearm. I, I got one from the second person. I picked one up.'

His evidence in cross-examination was to exactly the same effect:

'Did any witness ever hand you a firearm? There were firearms that you did not pick up, handed to you by the police colleagues? --No. The first one, that is what I said, the first one, the one that was by Davis, I, I cannot recall whether it was handed to me by a witness or if I picked it up myself. All I wanted to do was get the firearms away from the scene.

And the second firearm you saw, did you pick that up? -- That I picked up yes. I cannot recall if it was in the holster or if I got that in his hand or I got it underneath him. I do not know.'

There was therefore no independent corroboration of the version of Darryl Davis and Gray that deceased 2's firearm was still in its holster after he had been shot.

[17] In all the circumstances this court is justified in calling into question the reliance placed by the trial court on the evidence given by Darryl Davis and Gray.

[18] Fifth, the court rejected the appellant's version as to how he came to be shot as a 'fanciful story', because ─ apart from the gunshot wound to his right elbow ─ all the gunshot wounds were to his lower body, and the court reasoned that one would have expected them to have been to his upper body because deceased 2 and 3 were taller than he. It is notoriously difficult, even when the tracks of wounds are known (which was not the case here), to draw inferences from the location of wounds to establish how a shooting incident must have occurred. Expert evidence is usually required. Everything depends on the positions of the firearm and the person

shot relative to each other, and the angle at which the firearm was held when it was fired. The appellant said when asked by one of the assessors that deceased 3 was crouching when the latter fired at him. This evidence was criticised as an afterthought. The criticism is unjustified. The appellant was not asked the question earlier and there was no particular reason for him to have volunteered the information. The court also found that the evidence was an 'attempt to explain away the injuries' on appellant's 'own admission'. This criticism is also misplaced. The relevant passage in the record reads:

'No, the question is why didn't you mention the crouching position? -- I did not think that was, I did not think that was important because I just …(intervenes)

Well then why do you mention it now? -- Because you asked me if Keith Davis is taller than me and that is why I answered you that Keith Davis was crouching position shooting at me.

What you are in fact trying to do is to justify the fact that you got most of your wounds on the lower part of your body. -- Yes that is it.'

It is quite possible to interpret the word 'justify' as meaning 'explain how it came about'. It is unfair to interpret the exchange between the appellant and the assessor that I have quoted as amounting to an admission by the appellant that he was fabricating a version to explain the location of his injuries.

[19] Sixth, the court *a quo* failed to have regard to the appellant's obvious merits as a witness. The appellant was cross-examined in minute detail by the prosecutor. He did not put a foot wrong. His version was consistent throughout. None of this is mentioned in the judgment of the court *a quo*. Instead, there is a finding that the appellant 'did not make a good impression on the court'. It is difficult to fathom from the record why not. His version was said ─ repeatedly ─ to be 'highly improbable' and 'riddled with improbabilities'. I have already dealt with the proper approach to be followed in criminal cases when probabilities are considered and the more important improbabilities relied on in the judgment. They were without foundation. So are the remainder. I shall deal with two more.

[20] The court *a quo* found that on the appellant's version he had only fired three shots (which is not so ─ he said that in addition to shooting deceased 1 and 2 he had

fired at deceased 3 twice or three times); but six bullets were found in his firearm, which was loaded with fourteen bullets; so, asked the court *a quo*, what happened to the other five bullets? The answer is that no-one knows because the appellant was not asked. The issue was simply not canvassed in evidence at any stage with any of the witnesses. In the circumstances, the apparent discrepancy ─ for what it might be worth ─ could not be held against the appellant.

[21] The court *a quo* reasoned:

'Further according to the version put to the witnesses, when the state witnesses Gray and Davis later found him at the shop lying on the floor at least one of them put a firearm on his head but did not fire. It is indeed peculiar how the two would have managed to get to the accused in the presence of the police and the paramedics and would have managed to produce a firearm and act in the manner that they did without repercussions. What is even more amazing is that no shot was fired at all.'

The criticism of this evidence is entirely misplaced. It is not peculiar at all that the two state witnesses managed to get to the accused at the place he was arrested. This fact was common cause. So was the fact that Gray was armed and the fact that both he and Darryl Davis were hostile to the appellant. Nor is it amazing that no shot was fired. Whoever did so would have been arrested immediately by the flying squad who were on the scene and charged with murder. And in any event the evidence does not disclose whether there were repercussions or not; this question was similarly not canvassed during the trial.

[22] It goes without saying that it is a requirement of the fair trial guaranteed by s 35(3) of the Constitution that if a court intends drawing an adverse inference against an accused, the facts upon which this inference is based must be properly ventilated during the trial before the inference can be drawn.

[23] All in all, if regard is had to the principal shortcoming in the State case, namely, that it does not explain how the appellant came to sustain the wounds which it is common cause he did; to the performance of the appellant in the witness-box, and the shortcomings of the principal witnesses called on behalf of the State; and to the misdirections in the judgment of the court *a quo*, both factual and legal, it cannot

be said that the guilt of the appellant was proved beyond a reasonable doubt. Furthermore, the fact that the court *a quo* prevented proper cross-examination of the principal State witness had the effect that the appellant was not accorded his right to a fair trial. The appeal is allowed and the convictions and sentences are set aside.

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T D CLOETE
JUDGE OF APPEAL

Concur: Zulman JA
Mlambo JA