

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT CAPE TOWN

CASE NO A 372/10

IN THE MATTER BETWEEN:

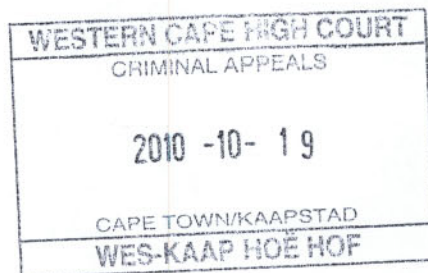
RICARDO WILLIAMS

APPELLANT

AND

THE STATE

RESPONDENT



JUDGEMENT : 19 OCTOBER 2010

MARAIS AJ

[1] Shortly after midnight on 7 May 2005, Mr Justin Nero and his girlfriend Allison Ruiters were going to his home in the West Coast town of Saldanha. He was on a bicycle while she was walking beside him. At the local taxi rank Mr Nero deviated from his course to avoid the uneven terrain there. Ms Ruiters proceeded straight on.

[2] A man dressed almost completely in black passed her from behind and approached Mr Nero who was some 40 metres away at that time. The man pulled out a gun and indiscriminately fired at Mr Nero who attempted to ward off the shots. He shouted to his girlfriend to run away. The first shot hit him in his left wrist. The next shot hit him in his stomach. Mr Nero fell from his bicycle and was shot three more times – in his right upper leg, in his upper left leg and in his right foot. More shots were fired but did not hit him. (Nine spent bullet casings were found on the scene and sent for forensic testing.) Mr Nero was left lying on the ground and his assailant ran off into the night.

[3] Ms Ruiters took refuge at a nearby house together with two other persons who were also in the vicinity when the shooting started. When everything had quieted down she emerged from the house and ran towards her boyfriend who was lying some distance away from where he was shot. Mr Nero told the bystanders who had gathered there to help him that the person who shot him was a man called “Holland”. He was subsequently taken to hospital.

[4] Both Nero and Ruiters made written statements to the police on the same day. Nero described his assailant's clothes merely as “swart klere” and gave no further description of any of his features. Nero stated that he recognised the man when he was standing in front of him just before the first shot was fired as a person called “Holland”. During the shooting he called out to the man “Holland!”. Ruiters stated that the attacker wore black clothes but was unable to give any further description of the man. She said that she did not see his face – “dit was te donker”. She added that she would not have been able to identify the man if she saw him.

[5] The Appellant was arrested on 15 October 2005 and charged with attempted murder and the contravention of section 3 of Act 60 of 2000 being unlawfully in possession of a fire arm. The case against the Appellant was postponed on various occasions – he failed to appear for his trial on 14 March

2007 and his bail was estreated. He was subsequently arrested and appeared again on 17 June 2008. The Trial eventually proceeded on 19 March 2009.

[6] The Appellant was not represented. The Magistrate refused the Appellant's application for a postponement in order to appoint an attorney and ordered that the trial should proceed – in the event the Appellant refused to cross-examine the witnesses Nero and Ruiters. Both these witnesses were recalled later during the trial after Mr Cook was appointed to act for the Appellant and was cross-examined by him.

[7] Mr Nero testified that on the night of the shooting the moon was shining very brightly and that there was a streetlight at the corner of the Taxi rank. He said that he recognised the man who shot him as "Holland". He saw his face and stated that he knew him well. According to him he went to school with "Holland" and had known him for 26 years. In court Nero gave a full description of the man's clothing - he wore a black jacket with a hood as well as a "beanie" on his head and a red scarf. He described "Holland" as tall and added that he recognised him from his gait.

[8] Just before the first shot was fired "Holland" removed the "beanie" from his head. Nero was very confident that the man who shot him was the Appellant and was adamant that he was not mistaken in identifying the Appellant as his assailant. To support his confidence he said that a few days prior to the shooting the Appellant showed him and others a gun that Appellant possessed.

[9] He further testified that the Appellant had a motive for shooting him because they were both members of the same gang and that he, Nero was accused of stealing a safe with a large amount of cash in it and had been seriously assaulted by friends of the Appellant a few days before the shooting. He said the Appellant shot him because Appellant and his friends were afraid that he would revenge the assault by shooting them and he had to be shot first.

[10] Ms Ruiters testified that the man who shot her boyfriend was tall and dark of complexion and wore a dark cap, black jacket and black trousers. According to her she did not see the red scarf, the "beanie" or the hooded jacket. The collar of the jacket was upright and covered half of the lower part of the man's face. The cap was drawn low down to almost over the man's eyes.

[11] She did not see the man removing anything from his head at any time. She was unable to recognise the person and did not see his face. She stressed the fact that the man was tall and was of similar height as the Appellant.

[12] The State produced no other evidence to link the Appellant to the crime. Statements in terms of Section 212 of Act 51 of 1977 was handed in by agreement showing that the spent bullet casings found on the scene was fired from a fire arm that was confiscated by the police some weeks after the shooting.

[13] The Appellant gave evidence and denied that he was the person who shot Nero. He testified that on the night in question he was at his mother's house and was not in the vicinity of the shooting. He further denied that he was known as "Holland" and denied that Nero and he were friends or that they went to school together. He described Nero's claim that they had known each

other for 26 years as nonsense and pointed out that he was only 18 years at the time of the incident.(according to the record Nero is six years older than the Appellant)

[14] The Magistrate called a witness to testify in terms of section 186 of Act 51 of 1977 in order to establish whether the Appellant was known under the alias of "Holland".Inspector Karosieni testified that the Appellant was known under the alias of "Holland" When cross-examined by Mr Cook he conceded that the Appellant was known to him as such only from the time of the investigation of the shooting that the Appellant was charged with in this case.

[15] In his judgement the Magistrate correctly held that the main issue in dispute was identification of the perpetrator. The Magistrate, somewhat tentatively ,concluded that in relation to the identification Nero was a single witness.In this finding he was correct.

[16] However, the Magistrate failed to approach the evidence of Nero as a single witness with the necessary caution. He also generally appears not to have applied the usual caution with which our Courts are called upon to scrutinise evidence of identification.

[17] Before a Court can place any reliance on the evidence of a single witness the evidence must be clear and satisfactory in every material respect. The evidence must not only be credible, but also reliable.In this respect see R v Makoena 1956(3)SA 81(A); S v Webber 1971(3) SA 754(A); S v Sauls and others 1981 (3) SA 172(A); S v Gertle 2005 (1) SACR 420 (SCA) and S v Janse Van Rensburg and Another 2009(2) SACR 216 (CPD).

[18] A perusal of the record discloses that Nero gave contradictory evidence in relation to the clothing worn by the assailant. This is a crucial aspect in assessing the reliability of his evidence – it is closely linked to the circumstances under which his observation was made. On his version he had sufficient time to observe the person who shot at him and who was very close to him. According to him the lighting at the scene was good – there was street lighting and the moon was very bright.

[19] One would then expect that there would be very little if any difference in the description of the clothing given by Ruiters. However, Ruiters contradicts Nero substantially in this regard. Ruiters also contradicts Nero in regard to the removal of the “beanie” and also contradicts him in regard to the relative positions of Nero and the assailant when the shots were fired. Nero also contradicted himself.

[20] It is also significant that Nero was unable to give the detailed description of the clothes, length and gait as well as the real name of Appellant he gave five years later in court in his statement he made on the same day as the shooting. That he was prone to bolster his evidence is borne out by his steadfast insistence that the moon was shining brightly and there was sufficient street lighting. Both these assertions were contradicted by objective evidence. He lied about this in order to make his identification of Appellant more likely. For the same reason he also lied about the length of time that he ostensibly knew the Appellant.

[21] It is also clear that Nero showed bias against the Appellant and provided a motive for himself to falsely accuse the Appellant. In these circumstances it cannot be said that Nero’s evidence was satisfactory in material respects. On the contrary, a reading of his evidence reveals that Nero was argumentative, attempted to avoid questions and gave vague answers when it suited him.

[22]When the proper caution is applied it is clear that not only is his evidence unreliable but also not trustworthy. He is not honestly mistaken. It would be dangerous to rely on such evidence to find that a proper identification was made. The Magistrate therefore misdirected himself by accepting Nero's evidence as truthful and relying thereon to convict the Appellant.

[23]The Magistrate further erred in finding corroboration for Nero's evidence in the fact that he identified his attacker as "Holland" and finding that the Appellant was in fact "Holland". Firstly, as conceded by Ms Galloway who appeared for the State in the appeal, this is nothing more than self corroboration that carries no weight – a repetition of a mistaken fact does not make it true and, secondly the evidence by inspector Krasieni in this regard did not establish that the Appellant was known as "Holland" at the time of the shooting.

[24] It is trite that there is no onus on an accused person to prove an alibi. In the present case the Appellant maintained that he was at his mother's home at the time. Nothing in his version appears to be improbable or not reasonably possibly true. The Magistrate rejected the Appellants' evidence because it was in conflict with the State's evidence. This is the wrong approach. In this regard see *Sv Saban en 'n ander* 1992(1)SACR 1999(A); *S v Van der Meyden* 1999(2) SACR447 (W)


[25] In the circumstances, the Appellant's evidence cannot be rejected as false and the State has therefore failed to prove that he was not at his mother's house at the time of the shooting.

[26] Ms Galloway conceded that the evidence about the firearm that was linked to the shooting does not provide any nexus between the Appellant and the shooting and is of no consequence. She was also constrained to concede that the allegation that the Appellant showed some people that he had a firearm days before the incident was also of no consequence.

[27] In view of the foregoing I am of the view that the State has not succeeded in discharging the onus of proving beyond reasonable doubt that the Appellant was the man who attempted to kill Mr Nero.

[28] I would accordingly uphold the appeal and set both the convictions and the sentences imposed in respect thereof aside.

JC MARAIS AJ.



I agree and it is so ordered.



S DESAI J