BEYOND A REASONABLE DOUBT: HOW SOUTH AFRICAN COURTS ASSESS EYEWITNESS TESTIMONY IN MURDER TRIALS

by

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Signed on this 30th day of JANUARY in CAPE TOWN, SOUTH AFRICA

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Abstract

The impact of criminal courts accepting an honest eyewitness misidentification extends beyond the theoretical considerations of the purpose of criminal trials, sentencing, and mere notions of justice. A wrongful conviction has the consequence of punishing an innocent person, while allowing a guilty person to walk free. Such a conviction negatively impacts the life of the accused, who may suffer while in prison, and experience complex and long-lasting mental and social problems as a result of their conviction. It also damages the reliability and relevance of the criminal justice system, which should be underpinned by principles of fairness and justice. Consequently, it should be of significant concern that research across decades has confirmed the inherent fallibility of human memory. But has this research filtered into the court room? To answer this question, I have conducted a content analysis of thirteen murder cases heard by the Western Cape High Court between 2007 and 2021 to consider how the Court considers the role of human memory in eyewitness testimony. Using thematic analysis, I show how the Court has appeared to weigh various factors that support and detract from a witness' reliability, how it determines the risk level presented by each factor, and how it assures itself of its finding. From this, my findings confirm both a general judicial awareness of the risk involved in accepting eyewitness identification evidence, as well as an inherent subjectivity in how the Court comes to its conclusion that is not supported by scientific evidence. As such, I recommend the development of a more precise test for reliability, as well as further study into the area.

CONTENTS

CHAPTER 1: INTRODUCTION

The findings of a criminal court are equated in law to a finding on truth.[1] These findings, based on a rigorous assessment of the evidence before the court, become the justifications for either convicting or acquitting the accused in each given case.[2] However, while judges are qualified legal professionals, they may be underinformed on certain scientific matters before the Court. This can compromise the reliability of their findings, especially in the realm of eyewitness identification evidence. Well-established scientific research confirms the inherent fallibility of human memory,[3] which can result in disharmony between a witness' honesty and accuracy. This may make it difficult for courts to ascertain the veracity of a witness' memory, and thus run the risk of accepting honest misidentifications. It is therefore important to consider how courts consider the role of human memory in eyewitness testimony.

The importance of this enquiry is strengthened when considering the impact of criminal courts accepting an honest misidentification. Where a misidentification is used to justify the conviction of an innocent person, the courts actualise the double horror of allowing a criminal to walk free and unpunished, whilst an innocent person is condemned to prison. The effects of incarceration on a person's life are complex and long-lasting, reaching beyond their time in prison. Inmates frequently struggle to reintegrate into society, since they are met with mistrust and suspicion resulting from the stigma attached to their incarceration.[4]

Although South Africa's criminal justice system carries a retributive quality,[5] this retribution should only be carried out against those who have committed a crime, to express

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[1] SE van der Merwe 'Trial principles and the course of the criminal trial' in JJ Joubert (ed) *Criminal Procedure Handbook* 13 ed (2020) at 367; Mirjan Damaika 'Truth in adjudication' 49 (1988) *Hastings Law Journal* at 301.
[2]Ibid at 367.
[3]Sandra Guerra Thompson 'Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony' (2008) 41*U.C. Davis Law Review* at 1487.
[4] T.D. Matshaba 'Challenges faced by ex-inmates after their release from incarceration in the democratic South Africa' (2015) 2015 *Acta Criminologica* at 74.
[5] Van der Merwe op cite note 1 at 373.

society's outrage at the offence. A grave injustice is done to those who are wrongfully punished for an offence they did not commit, and this injustice impacts more than the accused. For example, children of incarcerated parents face a diverse array of difficulties, including 'depression, lack of emotional support, lack of financial support, and school-related difficulties.'[6] Further, parental incarceration has also been linked to the development of delinquent behaviours in children that can lead to legal problems later in life.[7] Thus, high levels of incarceration within a community may have the consequence of increasing, rather than decreasing, crime rates over time. Such consequence is even more grievous when individuals are wrongfully convicted.

As such, the impact of misidentifications may also have implications for both the reliability and relevance of criminal courts, whose existence and powers of punishment are justified in part by society's need for retribution.[8] Given this call to find the truth, and punish accordingly, courts must be able to stand firmly on the correctness of their decisions.

Although identification evidence is used as a means of proving the State's case, research over sixty years has consistently confirmed that human memory, which underlies identification evidence, is inherently unreliable.[9] It is selective, malleable, and subject to influence and change. Honest mistakes can and do result as a normal part of the function of memory recall. As a result, courts should be aware of the risks and vagaries of human memory which have been identified by scientific research when assessing identification evidence. Although eyewitness testimony is treated as legal in nature, the subcurrent of identification evidence is the functioning of human memory, which functioning has primarily been a concern of scientists. Therefore, courts should effectively use the relevant scientific literature to

[6] Thabiso Donald Matshaba 'Orphans of Justice: The Children of Incarcerated Fathers in South Africa' (2016) 17 *SAPSAC* at 55.
[7] Sarah Abramowicz 'Rethinking Parental Incarceration' 82(3-4) (2011) *University of Colorado Review* at 837.
[8] SS Terblanche 'The sentence' in JJ Joubert (ed) *Criminal Procedure Handbook* 13 ed (2020) at 411.
[9] Robert Buckhout 'Eyewitness Testimony' (1975) 15 *Jurimetrics* at 171.

determine whether a witness' memory is accurate, and thus whether their identification is correct.

I therefore sought to investigate how South African criminal courts evaluate identification evidence. My research question asks, 'How do South African criminal courts consider the role of human memory in murder trials?' As courts have the authority to make truth findings, they bear the responsibility of ensuring the methods they use and the standards by which they assess their evidence is correct. This means that scientific evidence must necessarily be considered in light of scientific research. I was driven to test whether established research in this field is being appropriately translated into the practice of criminal courts.

To this end, I have conducted a content analysis of 14 cases decided by the Western Cape High Court. I aim to address two sub-questions. First, what does the Court consider when assessing eyewitness testimony, and does it pay attention to the question of accuracy? Secondly, does its approach to the question of correct identification show an appreciation of the risks identified in the scientific literature? Here I specifically consider whether the knowledge presented merely relates to surface level information, which includes commonly held myths that will be discussed, or shows an awareness of the nuances of various factors that affect memory and the complex interplay between factors.

In the following chapters, I will first lay out the South African legal framework surrounding eyewitness testimony in Chapter 2, for the purpose of contextualising the Court's approach. I will then set out the general findings of the literature surrounding human memory in Chapter 3, including its functioning, limitations, and vulnerabilities. These findings present the basis on which I will evaluate the Court's assessment of eyewitness testimony, in determining whether the Court shows an awareness of scientific research and uses it appropriately. In Chapter 4 I set out my methodology, to explain how I identified and analysed

my chosen cases, as well as to justify my research methods while acknowledging their limitations and ethical considerations.

Chapter 5 sets out my findings, which will be presented according to key themes identified from the cases. In discussing these themes, I will show how the Court appears to be aware of the risks identified by the scientific literature but is ultimately guided by legal standards used to discharge the State's burden of proof. Finally, Chapter 6 sets out the implications of my findings and provides relevant recommendations, before concluding that the Court's assessment of eyewitness testimony in murder trials is predominantly guided by the law, and this means that points of its analysis can become problematic.

Much research has been conducted abroad that is relevant to the question of how human memory functions generally, but very little research has been done in the South African context reflecting the practical consequences of this understanding in a court setting. By focusing on South Africa, I intend to contribute to the local body of knowledge surrounding eyewitness testimony and demonstrate how scientific findings on human memory may be practically implemented in the court room.

CHAPTER 2: LEGAL FRAMEWORK

My approach to considering how the Court assesses the role of memory in determining the accuracy of an identification is necessarily couched in the consideration of how the Court assesses eyewitness testimony generally. A close link exists between eyewitness identifications and eyewitness testimony, as identification evidence is not considered in isolation. Instead, eyewitnesses frequently first make their identifications out of court and such evidence is then presented before the court within the context of oral testimony.[10] Thus, although I am primarily concerned with the evaluation of human memory in eyewitness testimony, my inquiry is first grounded in the legal framework surrounding identification evidence generally. Consequently, in this chapter I will set out the broad legal framework surrounding eyewitnesses, including: the kinds of witnesses who may appear in court and the rules pertaining to them, and the laws and judicial mechanisms in place governing the presentation of oral testimony and its assessment.

An understanding of this framework and the obligations it imposes will highlight the areas in which scientific research has already been implemented by the criminal justice system. It will also identify other considerations that play into the Court's determination of whether an eyewitness' identification is correct. These factors will not be considered in much detail in this dissertation, as they are outside the scope of my inquiry. However, they remain noteworthy because of their significance to the courts, and inform my answer to the question of how courts consider human memory. Finally, I will also identify areas where scientific research has not been incorporated but may be. This discussion will place emphasis on the importance of how the Court assesses eyewitnesses. This engagement with the nuances of the witness' testimony

[10] PJ Schwikkard & TB Mosaka *Principles of Evidence* 5 ed (2023) at 399.

provides a more effective guard against misidentification than other legal mechanisms which have historically been used to protect courts from making wrongful convictions.

2.1 Types of eyewitness and cautionary rules

The term 'witness' refers to a broad range of people who may present evidence in court. A strong distinction is drawn between expert and lay witnesses. Expert witnesses are people who, by virtue of their specialised knowledge and training, are considered capable of providing evidence that is beyond the scope of understanding of laypersons.[11] In contrast, the evidence of laypersons is usually of the nature that the court needs no help in understanding it, as they are limited to sharing their observations and experiences.[12]

Among other things, expert and lay witnesses can be distinguished by way of motive. Unlike lay witnesses, expert witnesses are reimbursed for their appearance in court, which necessitates caution in the acceptance of their testimony because of their motivation to present evidence in a light that best suites the party that has enlisted them.[13] Nonetheless, eyewitnesses, who have witnessed an event first-hand, are the subject of scepticism too. The reasoning for this has been articulated in the oft-cited *Mthetwa*[14] judgment, where the Appellate Division stated that: 'Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested.' Further, the Court in *R v Shekelele*[15] acknowledged that,

[11] Lirieka Meintjes-Van Der Walt 'Science Friction: The Nature of Expert Evidence in General and Scientific Evidence in Particular' (2000) 117 *SALJ* at 771.
[12] Schwikkard & Mosaka op cit note 10 at 90.
[13] Van der Walt op cit note 11 at 778.
[14] 1972 (3) SA 766 (AD) at 768 a-c.
[15] 1953 (1) SA 636 (T) at 4.

> 'An acquaintance with the history of criminal trials reveals that gross injustices are not infrequently done through honest but mistaken identifications. People often resemble each other. Strangers are sometimes mistaken for old acquaintances. In all cases that turn on identification the greatest care should be taken to test the evidence.'

Thus, there is a cautionary rule that applies generally to the acceptance of eyewitness identification evidence.[16] This rule is a rule of practice that requires two things: First, it requires courts to be aware of the risk involved in accepting a particular witness' evidence, and to therefore approach these witnesses with caution.[17] Secondly, the rule requires courts to make use of additional safeguards to reduce the risk of an incorrect finding resulting from the acceptance of that witness' evidence.[18] Safeguards can be any factor which would ordinarily reduce the risk of error, such as 'mendacity, a failure to cross-examine and the absence of gainsaying testimony.'[19]

A particularly noteworthy safeguard is corroboration, which serves to confirm a witness' testimony. In this sense, corroboration refers to other objective or testamentary evidence that supports the eyewitness' version of events.[20] It is noteworthy because, as will be shown in my Chapter 5, the Court frequently relies on this mechanism to lend credence to witnesses' testimonies.

While the justification for the general application of caution for eyewitnesses is based on the apparent understanding that there may be honest yet mistaken witnesses, there are additional rules that apply to further sub-categories of eyewitnesses. These include single witnesses, child witnesses, and accomplice witnesses, who have all been found by courts to pose a particular risk to the courts' truth-finding mission.

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[16] PJ Scwhikkard & S.E. Van der Merwe *Principles of Evidence* 4 ed (2016) at 590.
[17] Schwikkard & Van der Merwe op cit note 16 at 588.
[18] Ibid.
[19] Schwikkard & Van der Merwe op cit note 16 at 588.
[20] *S v Gentle* 2005 (1) SACR 420 (SCA) para 18.

Single eyewitnesses are found to be dangerous because their evidence cannot easily be corroborated, leading the Appellate Division to hold that their evidence should only be accepted where it is 'clear and satisfactory in every material respect.'[21] Child witnesses are often thought to be highly suggestible and imaginative, to the point that their evidence must be approached with circumspection.[22] Finally, accomplice witnesses are also treated with caution because they are self-confessed criminals, and 'various considerations may lead them to falsely implicate the accused.'[23]

An appreciation of these cautionary rules was relevant to the methodology I employed in selecting my case set. This is because, while there is a general cautionary rule applicable to all eyewitnesses, the rules against single witnesses, child witnesses and accomplice witnesses constitute additional rules. Courts have accepted that multiple cautionary rules may be applicable when dealing with a witness, and that each one must be adhered to.[24] Although courts have tended not to be formulaic in their application of these cautionary rules, so as not to allow the exercise of caution to displace the function of common sense, they have also acknowledged that non-compliance with such rules will generally result in a finding being set aside.[25]

In addition to how courts approach different types of witnesses, courts also consider the mode by which a witness made an identification as relevant to how they assess that witnesses' testimony. These modes will be discussed below.

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[21] *R v Mokoena* 1932 PD 79 at 80.
[22] *R v Manda* 1951 (3) SA 158 A at 163C.
[23] *S v Hlapezula and Others* 1965 (2) All SA 9 (A) at 11, where the Court stated: 'It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description-his only fiction being the substitution of the accused for the culprit.'
[24] Mokoatle v S (2016) JOL 36860 (ECG)
[25] *R v J* 1966 (1) SA 88 (SRA) at 90.

2.2 Modes of making an identification

There are various means by which a witness may make an identification. Although the method of identification was neither an inclusion nor exclusion factor in the selection of my case sample, courts maintain a standard for the probative value placed on each method. For example, dock identifications (identifications made in court) carry little probative value.[26] This is because they carry a danger that 'a person might make an identification in court because simply by seeing the offender in the dock, he had become convinced that he was the offender.'[27]

Photographs may also be used for the purposes of identification. The Supreme Court of Appeal in *S v Moti*[28] stated that caution must be exercised when approaching identification evidence based on a photographic identification parade. It further stated that it is essential that eyewitnesses give a detailed description of the alleged perpetrator as soon as possible, and that identification parades should be held at the earliest possible moment.[29] In *S v Ndika and Others*[30] the Court said that reliance on such evidence will depend on the 'reasonable possibility that improper conduct has tainted the reliability of the identification or that, in the absence of any improper conduct, the objective circumstances attending the photographic identification were not conducive to accuracy or reliability.'

Courts appear to prefer identifications made at identification parades. These constitute a line-up of persons including the suspect or accused, and persons of similar appearance to them.[31] The probative value of such identification depends largely on the reliability of the manner in which the parade is conducted.[32] This depends on the degree of adherence to standard

[26] Schwikkard & Mosaka op cit note 10 at 627.
[27] *S v Tandwa* 2008 (1) SACR 613 (SCA) para 130
[28] 1998 (2) SACR 245 (SCA) at 255C-A.
[29] Ibid at 167
[30] 2002 (1) SACR 250 (SCA) at 257H.
[31] Constantine Theophilopous *Criminal Procedure in South Africa* (2019) at 465
[32] Ibid.

rules of procedure that are meant to guarantee fairness to the accused, and minimise the risk of mistaken identification.[33]

Although these rules are set out in 'Identification Parade Form—SAP 329,' they are not to be applied rigidly, but rather according to a flexible, common-sense approach.[34] The police bear the burden of conducting a reliable identification parade, and the prosecution is 'required to prove to the court that the parade was conducted without any material irregularities,'[35] as such in the conduction of the parade might render the identification evidence inadmissible.[36] Conversely, where such a parade is proven to have been conducted without major irregularity or deviations from the rules they often carry the greatest probative value before the court.

Although it is not immediately linked to the question of accurate memory, the form of identification remains an important point of consideration to the courts. This is worth noting because, although it was not a direct consideration of my research, the mode of identification is a factor which courts consider in their determination of the level of reliance they choose to place on such identification.

2.3 Presentation of identification evidence in court

Apart from dock identifications, identification evidence is usually obtained out of court and the witness thereafter appears before the court for their evidence to be evaluated. As criminal trials are underpinned by a principle of orality, section 161 of the Criminal Procedure Act[37] (hereafter 'CPA') requires that witnesses give oral rather than written evidence. The rationale for this is

[33] Theophilopoulos op cit note 31 at 466.
[34] Ibid at 467.
[35] Ibid.
[36] Ibid at 466-7
[37] 51 of 1977.

twofold and will be discussed below in terms of the judicial mechanisms used to protect against the risk of wrongful convictions.

The first rationale relates to the legislative measures governing the presentation of oral testimony before a court. Noteworthy here is the insufficiency of two prominent safeguards which have historically been considered effective protections against wrongful convictions, but which do little to mitigate the risk of accepting honest misidentifications. The second rationale relates to the standards and rules according to which courts must interpret the eyewitness and their evidence. This interpretation shows the courts' understanding of human memory better than the judicial mechanisms, as it is in the court's engagement with the eyewitness and the question of correct identification that its considerations are revealed. It is for this reason that I have chosen to conduct a content analysis of reported judgments.

2.3(a): Insufficiency of legislative bars against wrongful conviction

Regarding the first rationale, South African criminal courts' strong preference for oral testimony flows from the accused's fair trial rights, which are enshrined in section 35 of the Constitution.[38] This provision requires that accused persons be given the opportunity to challenge the evidence adduced against them. Such opportunity has been interpreted as requiring the State witness to appear in court, so that they may be challenged and questioned.[39] The structure of the criminal trial reflects this and is implanted with two legislative measures that are meant to guard against the risk of wrongful conviction.

The first is the prohibition of perjury, the risk of which is thought to be dispensed with at the start of criminal proceedings. Before making their testimony, witnesses are generally

[38] Of the Republic of South Africa, 1996 at s35(3)(i).
[39] Schwikkard & Van der Merwe op cit note 16 at 388.

required to swear an oath or affirmation that the testimony they are about to deliver is truthful. Section 164 of the CPA allows for people who have been found to not understand the import of making an oath or affirmation to testify regardless, but must be admonished by the judge or presiding officer to speak the truth. Not doing so may give rise to a charge of perjury or statutory perjury.

Perjury is defined at common law as the 'unlawful and intentional making, upon oath, affirmation or admonition and in the course of judicial proceedings before a competent tribunal, or a statement which the maker knows to be or foresees may be false.'[40] At a statutory level, perjury is referred to as the contravention of section 319 of the CPA. The making of conflicting statements does not necessarily amount to a finding of common law perjury. Consequently, section 319 creates the statutory crime of intentionally making conflicting statements in situations where the same witness makes statements under different oaths that contradict each other.

According to this provision, it is not necessary to prove which statement is true or untrue, only that the statements conflict.[41] However, *R v Mahomed*[42] established that a person has the defence of honest belief in their statements in these instances. The result of these provisions is that a witness who intentionally changes their testimony, or intentionally gives false testimonies, is at risk of committing either common law or statutory perjury, or both. However, these do not address the issue of the witnesses who makes an incorrect identification in good faith.

The making of an oath is followed by the examination-in-chief, where the witness is first questioned by their own counsel to allow them to present evidence that is 'favourable to the party calling the witness.'[43] It is possible to allow the witness to recount their version of

[40] Scwhikkard & Van der Merwe op cit note 16 at 876.
[41] Ibid 880.
[42] 1951 (1) SA 439 (T).
[43] Schwikkard & Van der Merwe op cit note 16 at 390.

events as though they were telling a story, however, the approach generally adopted is a question-and-answer format, as it allows counsel to prevent the witness from making any inadmissible statements.[44] Leading questions, which either suggest the answer or assume that a certain answer already exists, are generally prohibited, except where the questions are introductory or regard uncontested matters.[45]

After the examination-in-chief the opposing party has the right to cross-examine the witness, to get answers from the witness or to paint the witness in a light that is favourable to the cross-examiner's case.[46] This is where the reliability and credibility of the witness are often questioned. Consequently, the scope of cross-examination is broader than that of examination-in-chief. The cross-examiner may ask leading questions and may question the witness on matters that were not mentioned during the examination-in-chief.[47] The cross-examiner may not use vague or misleading questions.[48]

Cross examination has been described as 'the greatest legal engine ever invented for the discovery of truth', with the underlying assumption that it can 'winnow out truth from falsehood.'[49] However, while it is thought to be an effective means of defending one's position by catching out falsehoods, the structure of cross-examination, as well as the stress that is associated with it, can often exacerbate the weaknesses of an honest eyewitness' testimony.[50]

For example, cross-examination is characterised by leading or close-ended questions, because this enables cross-examiners to control the focus and topic of the witness' response.[51] However, research has confirmed that leading questions have the potential to contaminate or

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[44] Scwhikkard & Van der Merwe op cit note 16 at 391.
[45] Ibid at 391.
[46] Ibid at 392.
[47] Ibid at 393.
[48] Ibid at 395.
[49] Jules Epstein 'The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination' (2007) 36 *Stetson Law Review* at 727.
[50] P.J. Schwikkard 'Does Cross-Examination Enhance Accurate Fact-Finding?' (2019) 136 *SALJ* at 31.
[51] Louise Ellison 'The Mosaic Art: Cross-Examination and the Vulnerable Witness' (2001) 21 *Legal Studies* at 358.

distort a witness' memory.[52] Studies have shown that cross-examination style questioning, as compared to other, neutral forms of questioning, can impair adult respondents' ability to answer accurately. [53] Research has also found that participants are likely to change their answers when subjected to cross-examination, and in one study, cross-examination led to a 26% reduction in the participants' statement accuracy.[54] Furthermore, the repeated question-answer nature of cross-examination, which is often believed to help weed out faulty recollections, can actually concretise a false or inaccurate memory.[55]

As well as the techniques used and the type of questioning employed, the stress involved in cross-examination can also reduce witness' confidence or accuracy.[56] Many legal representatives approach cross-examination with a mind to unsettle and confuse the witness.[57] Their approach can be hostile or intimidating, resulting in reports of vulnerable witnesses stating that they found the ordeal to be 'frightening' or humiliating'.[58] Such witnesses may appear to be uncertain in their answers. This can become problematic where a court uses a witness' demeanour to assess their credibility or reliability because a witness' confidence in their identification might not be an accurate indication of the veracity of their memory. Equally, a witness' hesitation might not be an indication of faulty memory. To the contrary, psychological research has found that witnesses may be undeservedly discredited for their responses, and that their inability to recall minor details does not necessarily negate the accuracy of their recollection of salient information.[59]

Thus, while cross-examination may be adept at identifying inconsistencies and contradictions in a manner that makes it fit for identifying lying witnesses, it is not necessarily

[52] Elizabeth F Loftus 'Make-Believe Memories' (2003) 68 *American Psychologist* at 868.
[53] Kimberley A. Wade & Emily R. Spearing 'The effect of cross-examination style questions on adult eyewitness accuracy depends on question type and eyewitness confidence' (2023) 31 *Memory* at 164.
[54] Ibid.
[55] Ibid
[56] Schwikkard op cit note 50 at 33.
[57] Ibid at 32.
[58] Ellison op cit note 51 at 360.
[59] Ibid.

useful for detecting misidentifications. This is ultimately because witnesses who misidentify are often genuinely mistaken.[60] As such, they may behave and react differently to the pressures of cross-examination when compared to those witnesses who are intentionally lying or attempting to conceal the truth.[61]

After cross-examination, the party who called the witness has the right to re-examine them.[62] This is usually to clarify any confusion or misunderstanding, as well as to give the witness a chance to further explain something raised during cross examination.[63] Re-examination generally serves to cast the witness' testimony in a light that is favourable to the party who called them.[64] The rules applicable to examinations-in-chief also apply to re-examinations.[65]

While the opposing party has the primary duty and right to question and challenge the witness' testimony, a court may also question the witness, and may do so at any point during the proceedings.[66] The rules relating to leading questions do not apply, however the court is under general limitations to ensure that its impartiality and fairness are neither lost nor discredited, and to do so in such a way that does not intimidate the witness.[67] Such questioning and engagement with the witness is important.

The discussion above illustrates that cross-examination and the prohibition on perjury are insufficient safeguards against a court's acceptance of an honest misidentification. Because of this inadequacy, courts must be aware of scientific findings on human memory and risk factors leading to misidentifications instead. They should also consequently wield this

[60] Taylor C. Lebensfeld & Laura Smalarz 'Cross-Examination Fails to Safeguard against Feedback Effects on Eyewitness Testimony' (2022) 3 *Wrongful Conviction Law Review* at 247.
[61] Ibid.
[62] Scwhikkard & Van der Merwe op cit note 16 at 40.
[63] Ibid.
[64] Ibid.
[65] Ibid at 402.
[66] Ibid at 401.
[67] Ibid at 402.

understanding in their engagement with the witness and their testimony, so as to ascertain the veracity of the witness' memory for themselves.

2.3(b): Interpretive standards

The second rationale for the presentation of oral rather than written evidence turns from the accused's opportunity to challenge the evidence, to the Court's ability to assess the evidence. This rationale is grounded in the fact that a witness' presence provides the court with the opportunity to evaluate the witness' demeanour. A witness' demeanour includes 'their manner of testifying, their behaviour in the witness-box, their character and personality, and the impression they create…'[68] The importance of demeanour evidence stems from the belief that a witness' demeanour can reflect on their credibility,[69] which is a concern that is of central importance to the courts.

Although it is no longer a requirement under the current CPA[70] that a witness should be credible, as it was in the 1955 Act,[71] the Court in *S v Sauls and Others* [72] stated that courts are still required to assess a witness' credibility. Although this case related to single eyewitnesses specifically, courts generally consider a witness' credibility in each case.[73] The Court stated that there is no rule of thumb or general test for credibility, but some of the considerations relevant to a credibility enquiry have been outlined in *Hees v Nel*.[74] These are:

[68] *Cloete v Birch* 1993 (2) PH F17 (E) at 51.
[69] Ibid.
[70] Criminal Procedure Act supra note 37. See section 208 regarding conviction based on the evidence of a single witness. The Act simply makes reference to 'competence.' See Schwikkard & van der Merwe op cit note 16 at 450: Every person is generally presumed to be competent and compellable as a witness before a court.
[71] Criminal Procedure Act 56 of 1955. See section 256 in relation to single witnesses: 'Any court or jury may convict any accused of any offence alleged against him in the charge, on the single evidence of any competent and credible witness.'
[72] 1981 (4) All SA 182 (AD) page 186.
[73] Schwikkard & Mosaka op cit note 10 at 411. As has been discussed, one purpose of cross-examination is to challenge a witness' credibility.
[74] 1994 (1) PH F11 (T) at 32.

> '[M]atters such as the general quality of his testimony (which is often a relative condition to be compared with the quality of the evidence of the conflicting witnesses), his consistency both within the content and structure of his own evidence and with the objective facts, his integrity and candour, his age where this is relevant, his capacity and opportunities to be able to depose to the events he claims to have knowledge of, his personal interest in the outcome of the litigation, his temperament and personality, his intellect, his objectivity, his ability effectively to communicate what he intends to say, and the weight to be attached and the relevance of his version, against the background of the pleadings.'[75]

A further consideration requiring attention is that of reliability, which is the basis of the cautionary rule against eyewitness identifications. According to *Mthetwa*,[76] reliability is to be distinguished from honesty and the factors relevant in considering reliability include:

> '[L]ighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive.'

The Court further stated that: '[t]hese factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities.'[77]

Although the credibility and reliability inquiries bear close resemblance to one another, the distinction between these two was best articulated in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others*,[78] where the Court stated that credibility generally

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[75] Ibid.
[76] *Mthetwa* supra note 14 at 786 a-c.
[77] Ibid.
[78] 2003 (1) SA 11 (SCA) at 5. 'To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his

depends on the Court's impression of the witness. As such, 'a credible witness is found to have testified honestly about what they know.'[79] A reliability inquiry includes factors relevant to a credibility inquiry, however, a reliable witness is ultimately 'one whose testimony coincides with the established objective facts.'[80]

As such, a reliability inquiry considers factors such as the witness' opportunity of observation and 'the quality, integrity and independence of his recall.'[81] A court may therefore be more likely to consider the veracity of a witness' memory when considering their reliability, rather than their credibility. However, it should be noted that reliability also takes credibility into account,[82] showing that the two inquiries are closely linked, and indicating that memory may be broadly assessed as part of both inquiries.

Thus while memory accuracy will not be treated as its own separate inquiry by the courts, the content of both the reliability and credibility inquiries make it clear that courts understand that witnesses are prone to making mistakes. It is for this reason that *Mthetwa* held a witness' reliability should be distinguished from their honesty.[83] Further, the factors listed in both inquiries show an appreciation of the scientific literature, which has identified many of the same factors as being relevant to the question of misidentification. These include lighting, the scene's mobility, the accused's presentation and the witness' suggestibility.[84] Each of these will be discussed in my Literature Review below, and their impact on the Western Cape High Court's reasoning will be assessed in my Findings chapter.

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version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof.'

[79] Schwikkard & Mosaka op cit note 16 at 614.

[80] Ibid.

[81] *Stellenbosch Farmers' Winery Group* supra note 78 at 5.

[82] Ibid.

[83] *Mthetwa* supra note 14 at 768a.

[84] Ibid.

While this appreciation of the scientific literature is certainly positive, it is complicated by courts' auxiliary focus on the witness' demeanour. Despite its centrality to the evaluation of eyewitnesses, demeanour evidence appears to be accepted without any rules governing how courts are to interpret it.[85] This means that courts make subjective assertions relating to a witness' demeanour, which might play a key role in determining their credibility or reliability, and consequently the acceptance or rejection of their identification and testimony.[86]

Part of the problem with this lies in the unfounded conflation of two different questions. The first is whether the witness presents themselves well before the court. The second is whether the witness' identification, based on accurate recollection, is correct. The answer to these two questions will not necessarily be the same. Consequently, by conflating these questions one of the Court's chief ways of assessing the safety of its reliance on an eyewitness' identification may prove to be a faulty method.

In my Findings Chapter I will show how this has occurred in the judgments, thereby highlighting an area where the Court does not make use of scientific knowledge. Going forward the court should make use of the existing scientific research to support its discretion. First though, in the following chapter, I will set out the scientific literature on the functioning of human memory, to identify factors of which courts should be aware and may be well-served in implementing during their evaluation of the eyewitnesses.

[85] Adebola Olaborede & Lirieka Meintjes van der Walt 'Demeanour, credibility and remorse in the criminal trial' (2021) 34 *SALJ* at 59.
[86] Ibid.

CHAPTER 3: LITERATURE REVIEW

Having set out the legal framework governing the reception of eyewitness testimony in South African courts in the previous chapter, this chapter turns to the literature concerning the function and flaws of human memory. This chapter outlines general findings relating to how it can happen that a person witnesses one thing, and recalls something, or someone, else. Taken together, these two chapters will show that courts have correctly identified and taken appropriate measures to address certain factors which threaten a witness' ability to correctly identify someone. However, it will also identify factors that have been neglected or inappropriately assessed by the Court, as evidenced in my Findings chapter.

When a witness gives testimony or makes an identification, they engage in the activity of remembering the event or person. However, although 'remembering' is a single term, it actually involves several complicated processes which psychologists have generally arranged into three distinct phases. First is the acquisition phase, in which information about a person or event is collected and stored by the brain. Second is the retention phase, which relates to the time between acquisition and recollection of a memory. The third phase, recollection, refers to the time when a person brings their memory to the foreground, usually to retell their version of events as remembered.

During each phase there are various factors or phenomena that can occur which scholars and psychologists have identified as posing a risk to the credibility or veracity of a person's memory. This chapter outlines the literature on these phases and related risk factors and serves as the lens of analysis through which to assess the cases in Chapter 5 below. The risk factors discussed will highlight the difficulty in objectively testing the accuracy of an eyewitness' memory, thereby also underscoring the importance of courts' awareness of these factors and the need to develop some method of assessing their presence and reacting accordingly.

3.1: Stage 1—Acquisition

Scholars emphasise that acquiring a memory is not a passive process of recording events that transpire before a person's eyes, nor is it neutral.[87] Rather, memory acquisition entails a complicated process of perception. Perception refers to 'the manner in which we give meaning to the information our senses receive from the environment at a specific time,'[88] and is impacted by a great number of factors which affect the information that is stored and that later becomes known as a memory.

As a selective process, perception relates not just to the gathering of information, but also the ordering of it through interpretation. The perceptual system involves bottom-up processing of sensory information, and top-down processing of semantic memory, which is information that has already been stored from previous experiences and constitutes prior knowledge.[89] These two processes work closely together for the purpose of finding order and consistency in memories by attempting to align new and unfamiliar information with existing information. However, this attempt can lead the brain to alter the information received in order to make it align with existing memories, thus making it difficult for the recalling witness to differentiate what truly happened versus what made most sense to their brains.[90]

In addition to the interference of perception in the natural processes of forming memories, there are a number of other factors which can lead to a distortion of the memory at the acquisition stage. They are divided into three clusters: witness factors, situational factors, and perpetrator factors. Each is discussed in turn below.

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[87] Buckhout op cit note 9 at 172.
[88] A Venter; DA Louw & T Verschoor 'Perception and memory: Implications for eyewitness testimony' (2003) 16 *SACJ* 137 at 140-1.
[89] Ibid.
[90] Ibid at 143.

3.1(a): Witness factors

This first category pertains to those qualities or characteristics of the witness that might impact their memory and its reliability. First there is prior training, or relevant expertise.[91] For example, one might assume that, because of their training and experience, police officers might be more reliable witnesses than civilians.[92] However, experimental evidence has not confirmed this belief. On the one hand, results from a 1990 study found that police officers with at least three years' professional experience were more accurate than other participant groups in the study, which included police recruits, civilian students, and teachers.[93] Contrastingly, other studies have also indicated that police officers are no better than civilians at perceiving and remembering events and people. In fact, due to their training and experience, they may be more likely to regard non-criminal behaviour as criminal, thereby colouring their perception and expectations.[94]

Another factor that is commonly believed to impact memory function is age – a witness' age might be treated as an indication of their ability to accurately perceive and recall memories. As noted in Chapter 2, child witnesses are viewed with suspicion in South African law, and the cautionary rule against accepting their evidence arises from their alleged suggestibility and imaginativeness, which might make them more impressionable to influence or prone to make-believe.[95] They also possess a perceived inability to understand the importance of taking an oath, which adds to their unreliability.[96]

[91] DA Louw & A Venter 'Estimator Variables and Eyewitness Testimony' (2005) 18 *Acta Criminologica* at 25.
[92] Ibid.
[93] Ibid.
[94] Ibid.
[95] Supra *R v Manda* at note 22.
[96] *Raghubar v S* [2013] JOL 20809 (SCA) para 5.

In line with the judiciary's circumspection, a similar belief has proliferated in academic spheres.[97] It appears to stem from the belief that children's memories are more malleable, and that children themselves are more suggestible and prone to lying than adults.[98] Research in the area of false memories has confirmed that children are especially sensitive to suggestion when compared to adults, as they are more willing to acquiesce to external influence.[99] However, it is of note that adults are not invulnerable either.

Elderly witnesses are subjected to a variety of assumptions. They may be viewed as more respectable and less likely to lie because of their age but, alternatively, elderly witnesses may be forgetful and therefore less reliable.[100] This is due to the fact that cognitive functions, including memory, decline in normal human aging.[101] Research on elderly eyewitnesses has focused on two different components of memory, the first being their ability to describe details and the second being their ability to correctly identify a perpetrator.[102]

Studies on the first component have generally found that elderly witnesses are not worse than younger witnesses at recalling details, but that their performance depends on the type of test.[103] Study results have consistently affirmed the common observation that elderly witnesses do poorly with recall tasks that require self-initiated effort, but perform better where they are given retrieval cues, such as being asked specific questions.[104]

However, studies on the second component have found that age is only a factor where it comes to identifying bystanders, where elderly witnesses perform worse than younger witnesses.[105] Overall, the reliability of elderly witnesses' memory performance depends on the

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[97] Henry Otgaar; Mark L. Howe, Harald Merckelbach & Peter Muris 'Who is the Better Eyewitness? Sometimes Adults but Other Times Children' (2018) 27 *Current Directions of Psychological Science* at 378.
[98] Olaborede & Meintjes-van der Walt op cit note 85 at 26.
[99] Otgaar et al op cite note 97 at 379.
[100] Olaborede & Meintjes-van der Walt op cite note 85 at 28.
[101] Brian H. Bornstein 'Memory processes in elderly eyewitnesses: What we know and what we don't know' 13 (1995) *Behavioural Sciences and the Law* at 338.
[102] Ibid at 339-340.
[103] Ibid at 340.
[104] Ibid.
[105] Ibid.

way in which their memory is tested, and so the subtle nature of how age affects functioning should mean that age is treated as a factor worth considering, but should neither automatically be considered either a strength or weakness.

A further factor which psychologists believe to be important is that of intoxication. Alcohol has been found to impair memory at each stage. At the acquisition level, intoxication impacts the ability to attend to multiple cues, the top-down processing of semantic memory in order to relate new information to existing knowledge, and the ability to draw inferences from the information received.[106] Further, alcohol has also been found to have a negative effect on the brain's ability to encode episodic memories and to form new long-term memories,[107] which could lead to the natural conclusion that intoxication negatively impacts a person's ability to make an accurate identification.

However, of four studies which used forensically valid eyewitness identification procedures to test the ability of intoxicated persons to make correct identifications, only one study found that intoxication had a negative effect on this ability.[108] This could result from alcohol myopia, which refers to the disproportionate attention paid by moderately intoxicated persons to immediate situational cues, as compared to weaker, peripheral cues or atypical objects.[109] A study by Kneller & Harvey confirmed the myopia theory, finding that identification accuracy was not impaired by intoxication where the perpetrator's face was given focussed attention.[110]

However, there is no consensus regarding what is to be considered a salient feature as opposed to a peripheral detail in each event. This means that, when a court evaluates a witness

[106] Nadja Schreiber Compo; Ronaldo N. Carol, Jacqueline R. Evans, Pamela Pimentel, Howard Holness, Kristin Nichols-Lo, Stefan Rose, & Kenneth G. Furton 'Witness memory and alcohol: The effects of state-dependent recall' (2017) 41 *Law and Human Behavior* at 202.
[107] Wendy Kneller & Alistair J. Harvey 'Lineup identification accuracy: The effects of alcohol, target presence, confidence ratings, and response times' 8 (2016) *The European Journal of Psychology Applied to Legal Context* at 12.
[108] Ibid.
[109] Schreiber et al op cit note 106 at 203.
[110] Kneller & Harvey op cit note 107 at 16.

who was intoxicated at the time of the crime's occurrence, it should in some way determine whether the perpetrator's face was a salient feature in the witness' mind. Such confirmation could increase the reliability of the court's acceptance or rejection of the witness' identification.

Further, although research has consistently shown that alcohol has a negative impact on cognition, the level of impact depends on several factors, including level of intoxication, obviousness of the event or person, and engagement in the event. One study which aimed to address the question of when it was best to question a witness who was intoxicated at the time of the event found that an immediate interview, compared with a post-detoxification interview, was preferable in terms of obtaining the most complete details from the witnesses.[111] The study found that repeated testing or questioning was only beneficial for witnesses who had been sober at the time, but not intoxicated witnesses. Consequently, intoxication, and the witness' level of intoxication at the time of the event as well as questioning, are of importance in determining the level of reliance that should be placed by a court on their identification.

Finally, while studies have found that acute stress during the retrieval stage negatively impacts memory,[112] the eyewitness and fundamental memory research fields have found different results with regards to the impact of stress on memory acquisition. A meta-analytic review of 27 studies focused on eyewitness research conducted in the laboratory found that stress at the time of acquisition negatively impacted the eyewitness' ability to encode details about the perpetrator and details associated with the crime.[113] However, other studies on fundamental memory research have found that acute stress might actually enhance memory

[111] Kim van Oorsouw; Nick J. Broers & Melanie Sauerland 'Alcohol intoxication impairs eyewitness memory and increases suggestibility: Two field studies' (2019) 33 *Wiley* at 452.
[112] Carey Marr; Henry Otgaar, Melanie Sauerland, Conny W.E.M. Quaedflieg & Lorraine Hope 'The effects of stress on eyewitness memory: A survey of memory experts and laypeople' (2020) 49 *Memory & Cognition* at 402.
[113] Ibid.

performance because of the quick release of certain hormones (adrenaline and noradrenaline) which put the brain in a memory formation mode.[114]

Thus, research has shown a range of impairing and enhancing effects made by stress on the ability of eyewitnesses to encode memories and to make accurate identifications.[115] The differences between these might be explained by the differences in the conditions and types of stress which the witnesses or participants endure during acquisition. For example, while fundamental memory research has used laboratory-based stressors,[116] eyewitness field research has used stressors that are more similar to the type of stress an eyewitness might actually experience, for example by using interactive police training scenarios and military survival programmes as stressors.[117] The downside of this is that these stressors are less controlled than laboratory research, making it difficult to identify stress as the sole contributor to impaired memory performance.[118]

Although the significance and the impact of these factors is best assessed as close to the event as possible, courts often deal with witnesses months or years after the event has occurred. Therefore, they must work retrospectively to determine how a witness' memory may have been impacted by their stress or intoxication levels, and so they are at a great disadvantage when compared to researchers, who are able to make more objective findings. While this difficulty is acknowledged, these findings indicate that one should be able to expect a court to deeply engage with surrounding factors regarding an intoxicated or frightened witness' testimony.

[114] Marr et al op cit noe 112 at 402.
[115] Ibid at 1092.
[116] Ibid at 1093.
[117] Ibid at 1094.
[118] Ibid.

3.1(b): Situational factors

The next category of factors involves those factors that relate to some part of the witness' external surroundings at the time of the event. In relation to the impact of emotional stress, the seriousness of a crime is believed to have a significant impact on a person's memory.[119] This manifests as an inability to recall the details of violent events when compared to less violent events, such as assault when compared to bribery.[120] It can further impact the witness' confidence during recall,[121] which might in turn have the effect of creating a negative impression with courts that place emphasis on confident demeanour.

When paired with the discussion above, it is clear that, although there are discrepancies in the research results, the shock and violence involved in murder can make it an especially traumatising event to witness for many people, and this can severely impact witnesses on both a memory and demeanour basis. Thus, the old adage that 'time heals all wounds' might not be true in the instance of remembering the face of a murderer.

Another situational factor is the duration of exposure to a face – where a person only briefly glimpses a face versus where they are given time to properly study that face. Some experts believe that increased exposure time leads to more reliable identifications.[122] A meta-analytic review of the effects of exposure on identification accuracy found that longer exposure was associated with more accurate identifications.[123] Nonetheless, other research indicates that it either makes no difference, or might actually impair memory.[124]

[119] Louw & Venter op cit note 91 at 33.
[120] Ibid.
[121] Ibid.
[122] Amina Memon; Lorraine Hope & Ray Bull 'Exposure duration: effects on eyewitness accuracy and confidence' (2003) 94 *British Journal of Psychology* at 339.
[123] Brian H Bornstein; K.A. Deffenbacher, S.D. & E.K. McGorty 'Effects of exposure time and cognitive operations on facial identification accuracy: A meta-analysis of two variables associated with initial memory strength' (2012) 18 *Psychology, Crime & Law* at 482.
[124] Memon et al op cit note 122 at 340.

One study that varied the exposure of young and older adult witnesses to a face between 12 and 45 seconds found that longer exposure boosted identification accuracy.[125] However, the authors of that study cautioned general application of their study to real world examples, which they noted includes cases where eyewitnesses have misidentified persons whom they observed for much longer than 45 seconds.[126] They noted that exposure in real crime circumstances might be impacted by other factors, such as arousal, the presence of a weapon and the nature of the interaction between the victim and the perpetrator.[127] Consequently, duration of exposure should not be considered in isolation as an indicative factor of accuracy, but within the totality of the event itself.

These factors align with those listed in *Mthetwa,* including lighting and opportunity for observation.[128] This section shows that courts have correctly identified some risk factors. However, how they assess the impact of those factors is still to be determined. For example, how does the Court find that a witness had an adequate opportunity for observation, especially where the quick pace of the environment means that a witness may only have had a few short seconds to see the perpetrator? While this is to be set out in my Findings chapter, the perpetrator factors set out below will complete my discussion on risk factors relevant at the acquisition stage.

3.1(c): Perpetrator factors

These factors relate to aspects of the perpetrator which might cause the eyewitness confusion. The first factor is a phenomenon termed 'own-race bias,' which is believed to occur in cross-

[125] Memon, Hope & Bull op cit note 122 at 348.
[126] Ibid at 350.
[127] Ibid.
[128] *Mthetwa* supra note 14 at 768a.

racial identifications. According to the theory behind own-race bias, people have more difficulty remembering the features of those from different racial groups than their own, or conversely have an easier time remembering people from their own racial group.[129]

There are two main hypotheses as to the cause of own-race bias. The first is that people of the same race tend to have distinctive features which are similar to their own and therefore more familiar, and the absence of this familiarity can make cross-racial identifications more difficult.[130] The second explanation is based on the possible lack of contact between people of different ethnic groups.[131]

Although research results and trends have been inconsistent, a 2001 meta-analysis of 39 studies, involving responses from over 5000 participants across thirty years, revealed a trend for own-race bias in cross-racial identifications.[132] While its prevalence in criminal trials and impact in the courtroom has not been a topic of deep study, especially in South Africa, scholars have argued that 'cross-racial identifications by witnesses are disproportionately responsible for wrongful convictions.'[133]

Innocence Project statistics show that, of 330 people exonerated from wrongful convictions, 40% of convictions involved cross-racial misidentifications.[134] Despite differing results, enough research confirms the existence of own-race bias for it to be a relevant concern. The difficulty involved in determining when it might come into play means judges should be cognisant of the potential of own-race bias in cross-racial identifications and approach a witness' identification with this in mind.

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[129] Christian A. Meissner & John C. Brigham 'Thirty Years Investigating the Own-race Bias in Memory for Faces: A Meta-Analytic Review' (2001) 7 *Psychology, Public Policy and Law* at 3.
[130] Arthur L. Rizer III 'The Race Effect on Wrongful Convictions' (2003) 29 *William Mitchell Law Review* at 855.
[131] Sheri Lynn Johnson 'Cross-Racial Identification Errors in Criminal Cases' 69 (1984) *Cornell Law Review* at 940.
[132] Meissner & Brigham op cit note 129 at 21.
[133] Rizer op cit note 130 at 856.
[134] Laura Connelly 'Cross-Racial Identifications: Solutions to the "They All Look Alike" Effect' (2015) 21 *Michigan Journal of Race and Law* at 126.

Another thorny issue for acquisition is the role that expectation plays in memory acquisition and recollection. Scholars had noted that people show a tendency to perceive what they expect to happen.[135] Although this seems like an issue relevant to the category of witness factors, it is dealt with under this section because it can become especially problematic when dealing with people who hold prejudicial stereotypes about what crime looks like and who commits it.

For example, researcher Gordon W. Allport's classic study on this subject involved having his participants briefly look at a drawing of people in a train, among whom there was a seated black man and a white man with a razor in his hand.[136] Afterwards, when asked who had the razor, fifty percent of participants reported that it had been the black man,[137] indicating prejudicial sentiments and stereotypes about who would be carrying a weapon.

Further considerations include the use of disguises or alterations. Perpetrators can often alter or conceal their appearances, frequently with the use of disguises such as hats, hoodies and glasses.[138] Alterations of external features can negatively impact a person's memory or recollection, and major changes in appearance have been found to produce significantly lower rates of positive identifications.[139] This is not only relevant to the perpetrator who has somehow altered or concealed their visage during the commission of a crime, but may also be relevant when considering the timing of identifications. Hair that was focused on during the event may have grown or been cut off, a beard may have been added or deleted, and changes such as this can serve to throw off a witness, especially where additional factors such as short exposure and dim lighting are at play.

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[135] Venter, Louw & Verschoor op cit note 88 at 144.
[136] Buckhout op cit note 9 at 176.
[137] Ibid.
[138] Andrea Buckley & Brian H. Kleiner 'The Accuracy of Eyewitness Testimony' (2002) 44 *Managerial Law* at 87.
[139] Ibid.

Although the rules relating to identification parades do not address the issue of disguises or alterations, the Court in *S v Sibanda*[140] held that police may refuse an accused's request to change clothes where such a change may partially alter or disguise their appearance. As such, there is some appreciation shown for the need to maintain consistency in the accused's appearance, whilst simultaneously minimising the risk of guess work by having others of similar height and build in the line-up.[141] However, there is little courts can do where an accused wore a disguise at the crime scene or changed their hairstyle before being apprehended. Therefore, as with other factors discussed above, one should expect courts to require deep interrogation of a witness' recollection, in order to identify relevant risk factors and assess their potential impact on the witness' memory.

In contrast to disguises or alterations, which serve to confuse a person's identification, the presence of a weapon during the commission of a crime may draw the witness' attention away from the perpetrator towards the weapon.[142] For example, in a 1986 study, positive witness identifications of a crime in which there was a weapon dropped to 26%, compared to a 46% identification rate where there was no weapon.[143] One explanation for this phenomenon is the arousal hypothesis, which contends that the fear induced by the presence of a weapon causes the witness to focus on the weapon as opposed to the perpetrator.[144] The logical outcome of this, however, is that the witness would then have a better memory of the weapon.

A different theory focuses on salience and argues that diminished focus on the perpetrator is because the weapon poses a new, incongruent or salient object in the given situation.[145] Studies have yielded different results on which theory is most responsible for the

[140] 2005 (2) SA 345 (T) at 349A-C.
[141] SAP 329 rule 8.
[142] Louw & Venter op cit note 91 at 33.
[143] Buckley & Kleiner op cit note 138 at 87.
[144] Shaw, Jerry I. & Paul Skolnick 'Weapon Focus and Gender Differences in Eyewitness Accuracy: Arousal Versus Salience' (1999) 29 *Journal of Applied Social Psychology* at 2329.
[145] Ibid.

weapon-focus effect,[146] meaning that exact mechanisms which underly it remain unclear. Regardless, it has been positively recorded in simulation and laboratory experiments, where results have shown that the likelihood of making a correct identification drops where a weapon was involved.[147] However, a review of robbery cases found that a weapon's presence did not reduce the level of detail or accuracy of descriptions of the perpetrator, and that reduction in the likelihood of correct identifications being made was rather due to the time interval between the event and the identification procedure.[148]

3.2: State 2 – Retention

Following from the acquisition stage, the retention interval refers to the period of time between the acquisition of a memory and its recollection. A retention interval can be minutes, weeks, months or years long, and research has consistently confirmed that the passage of time can decrease the quantity, quality, and accessibility of memories.[149] This means that the length of the interval that has passed can have a deleterious impact on details relating to the memory that is eventually retrieved, thus reducing recognition ability.

For example, delay influences the ability to recall different facial features at different rates.[150] As it frames the face, hair is considered an external feature, and appears to be best stored by the memory.[151] In contrast, internal features such as the eyes and mouth appear to be more susceptible to decrement.[152] Furthermore, this should be considered in light of the

[146] Ibid at 2330.
[147] Tim Valentine; Alan Pickering & Stephen Darling 'Characteristics of Eyewitness Identification that Predict the Outcome of Real Lineups' (2003) 17 *Applied Cognitive Psychology* at 970.
[148] Ibid at 971.
[149] Elizabeth F. Loftus 'Eyewitness Testimony: Psychological Research and Legal Thought' (1981) 3 *Crime and Justice* at 116.
[150] Venter & Louw op cit note 91 at 29.
[151] Ibid.
[152] Ibid.

discussion above regarding the frequent use of disguises and alterations and the impact these can have on one's ability to correctly identify a perpetrator.

Other factors that are relevant to the consideration of retention interval include the age of the witness and what happens during the interval. Studies have shown that, although there is not a significant difference in recall between child and adult participants after one day, child participants' memories tended to degrade significantly more than the adults' after a five-month period.[153] Further, researchers report that people experiencing uncertainty will often report what they remember or do not understand and acquiesce to the group's consensus.[154] In the context of eyewitnesses, Skagerberg and Wright found that most eyewitnesses saw the crime with someone else, and that over half of them spoke to this other person after the event.[155]

Memory conformity, or the social contagion of memory, refers to the phenomenon by which eyewitness' memories are affected by what others do or say.[156] Researchers distinguish between two main motivations for memory conformity. The first is normative influence, which is based on the goal of gaining social approval,[157] and thus conformity occurs where the incentive to accurately recall the memory is outweighed by the negative consequences of disagreeing. This is seen in situations where a person may feel compelled to agree with what someone or a group of other people have said in order to gain acceptance and to avoid disapproval.[158] Normative influence therefore results from a focus on self-presentation, in that the witness changes their behaviour or recollection in order to be favourably perceived. [159] This understanding is relevant to the discussion of how eyewitness testimony is assessed. In light of

[153] Ibid at 30.
[154] Daniel B. Wright; Amina Memon, Elin M. Skagerberg & Fiona Gabbert 'When Eyewitnesses Talk' (2009) 18 *Current Directions in Psychological Science* at 174.
[155] Ibid.
[156] Ibid.
[157] Kerri A. Goodwin; Jeffrey P. Kukucka & Irina M. Hawks 'Co-Witness Confidence, Conformity, and Eyewitness Memory: An Examination of Normative and Informational Social Influences' (2013) 27 *Applied Cognitive Psychology* at 91.
[158] Wright et al op cit note 154 at 175.
[159] Paul Williamson; Nathan Weber & Marie-These Robertson 'The Effect of Expertise on Memory Conformity: A Test of Informational Influence' (2013) 31 *Behavioural Sciences and the Law* at 608.

the importance of demeanour evidence in how the courts determine a witness' reliability, courts should have a corresponding awareness that the pressures of cross-examination may further prompt a witness to acquiesce to the cross-examiner's questions or narrative.

The second reason for memory conformity is referred to as informational influence, and is based on the goal of providing an accurate account of what happened.[160] It occurs when the eyewitness, after having been exposed to a different version of events than what they remember, must decide which version is correct.[161] Therefore, while normative influence motivates people to alter their version to present themselves favourably to their co-witness or peers, informational influence motivates witnesses to provide the most accurate account they can.

While no link was found between the intimacy of the witnesses and the witness' likelihood of conforming to their co-witness,[162] researchers have found that the more credible someone appears to the witness, the more likely the witness is to rely on their opinion than their own.[163] One factor which influences a person's perceived credibility is confidence. People tend to trust others who seem confident in their response, assuming that they are right and, consequently, that their own conflicting version is wrong.[164] An experiment which involved having pairs look at differing versions of a storybook and answer questions about it afterwards found that, of the 79% of participants who conformed to their partner's version of events, 73% of participants did so when their partners reported high confidence in their answer.[165]

Another factor which increases the credibility of the co-witness in the witness' eyes is the perceived expertise of the co-witness. A 2013 study found that witnesses were more likely

[160] Goodwin et al op cit note 157 at 91.
[161] Wright et al op cit note 154 at 175.
[162] Aileen Oeberst & Julienne Seidemann 'Will Your Words Become Mine? Underlying Processes and Cowitness Intimacy in the Memory Conformity Paradigm' (2014) 68 *Canadian Journal of Experimental Psychology* at 91.
[163] Wright et al op cit note 154 at 175-6.
[164] Ibid at 176.
[165] Goodwin et al op cit note 157 at 92.

to conform to an expert as opposed to a non-expert witness.[166] The study found that the perceived accuracy of the co-witness also impacted the likelihood of memory conformity.[167] It is thus a positive feature of South Africa's identification parade procedure that requires witnesses to make their identifications individually, and police officers to keep witnesses separate from each other before and after the parade.[168] This procedure is aligned with the scientific research and makes appropriate steps towards illuminating the risk of memory conformity or contamination.

The final consideration under retention relates to the impact of the violence of the crime in question. The general scientific view is that the trauma and stress caused by witnessing violent as opposed to non-violent events seriously degrades the witness' ability to encode, retain and later recall the events that happened.[169] Scientists believe one reason for this is that stress 'reduces motivation and interferes with efficient memory search processes,' as well as decreasing attention due to an increased focus on other things, which could include the weapon-focus effect.[170] Another view regarding trauma is that the brain's nature often leads it to compartmentalise traumatic events, encouraging repression of a memory and refusing to properly process it.[171]

However, there is contradictory research on this topic, as Yuille and Catshall have found that memories of real traumatic events can be more detailed, specific and persistent than memories from laboratory-induced traumatic events, as often used in research studies.[172] Further, some research indicates that while stress may limit focus on some details, it may heighten attention on others,[173] which would mean that it does not worsen the quality of a

[166] Williamson, Weber & Robertson op cit note 159 at 619.
[167] Ibid.
[168] SAP 329 Rules 13, 14 and 15.
[169] Louw & Venter op cit note 91 at 23; A Venter & DA Louw 'The effect of violent versus non-violent incidents on eyewitness memory' (2004) 23 *Medicine and Law* at 834.
[170] Louw & Venter op cit note 91 at 22.
[171] Venter & Louw op cit note 169 at 834.
[172] Ibid.
[173] Ibid at 836.

memory in all respects. Furthermore, dealing specifically with the memory retained in the interval between acquisition and recollection, research has found a significant decrease in memory accuracy after a six-week retention period for participants who viewed videos of both violent and non-violent events.[174]

While police can mitigate the risk of memory conformity, and courts are able to assure themselves of this, courts may not be able to deal with the impact of memory deterioration as a result of stress and trauma. Given the violent nature of murder, courts should be expected to take witness' shock and fear into consideration when determining whether they would have had an adequate opportunity to see the accused. They should also consider the impact of trauma on witnesses' ability to remember the accused, given that there is a frequent time interval between the crime and the identification parade.[175]

3.3: Stage 3—Recollection

The final stage of remembering is known as the recollection or retrieval stage, in which the eyewitness recalls the relevant memory. Much like the previous stages, scholars note that retrieval is not a neutral process which leaves the memory unaffected, but is rather an active and selective process which might strengthen, weaken or alter the memory recalled.[176] The theory that memory is reconstructive accepts that the recalled memory integrates perceptual information and past experience, as well as other information which may be introduced later on.[177] Factors which are relevant to this stage are: the effects of repeated recall; identifying multiple perpetrators; and the risk of creating false memories. A final consideration has to do

[174] Venter & Louw op cite note 169 at 849.
[175] This was the case in every case apart from *B v S.*
[176] Geralda Odinot & Gezinus Wolters 'Repeated Recall, Retention Interval and the Accuracy-Confidence Relation in Eyewitness Memory' (2006) 20 *Applied Cognitive Psychology* at 974.
[177] Venter, Louw & Verschoor op cit note 88 at 145.

with how others might judge an eyewitness' accuracy in relation to their confidence. In addition to these factors, factors which were relevant to previous stages also influence the memory that is retrieved.

Regarding repeated recall, witnesses will likely recount their testimony many times prior to their appearance in court, whether to police officers, social workers, lawyers, or even family and friends. Where identifications are required, these will be made to the police prior to their appearance in court. They may be questioned several times with the belief that information they could not recall earlier would be retrievable during later attempts.[178] However, while retrieval can help to consolidate the memory, it can consolidate both correct and incorrect information.[179]

One disastrous consequence of the repeated recall and consolidation of misinformation is the creation of a false memory. This is defined as remembering an event that never happened or remembering it significantly differently to how it actually happened.[180] Bartlett, who is 'usually credited with conducting the first experimental investigation into false memories,'[181] distinguished between reproductive memory (rote, accurate recollection of an event) and reconstructive memory, which emphasises the active and selective aspect of memory construction and which aims to fill in any missing blanks. Later researchers include Loftus and Palmer,[182] Brewer,[183] Bransford and Franks,[184] and Sulin and Dooling,[185] who all showed the construction of false memories to different degrees.

[178] Odinot & Walters op cit note 176 at 974.
[179] Ibid.
[180] Henry L. Roediger & Kathleen B. McDermott 'Creating False Memories: Remembering Words Not Presented in Lists' (1995) 21 *Journal of Experimental Psychology* at 803.
[181] Ibid.
[182] E.F. Loftus & Palmer, J.C. 'Reconstruction of automobile destruction: An example of the interaction between language and memory' (1974) 13 *Journal of Verbal Learning and Verbal Behaviour* 585.
[183] W.F. Brewer 'Memory for the pragmatic implications of sentences' (1977) 5 *Memory & Cognition* 673.
[184] J.D. Bransford & J.J. Franks 'The abstraction of linguistic ideas' (1971) 2 *Cognitive Psychology* 331.
[185] R.A. Sulin & D.J. Dooling 'Intrusion of a thematic idea in retention of prose' (1974) 103 *Journal of Experimental Psychology* 255.

Prominent examples include Underwood's list experiment, in which he gave his participants a list of words to study and then put them to the continuous task of identifying whether words later presented to them were part of the original list.[186] His results showed that words associated with those on the list were falsely recognised as being part of the list.[187] Another example is Loftus' shopping mall experiment, in which she induced participants to believe that they had been lost in a shopping mall at age 6 and rescued by a kind elderly person.[188] Yet another study was conducted in 2015 by Shaw and Porter, where they were able to induce 70% of their participants to believe that they had committed criminal acts.[189]

Loftus attributes the creation of false memories to the misinformation effect, which is the phenomenon by which eyewitness accounts change, usually for the worse, after reporting.[190] Research has shown how: the environment in which someone is introduced to misleading information affects their memory;[191] how personal factors such as age and personality affect susceptibility to misleading information;[192] and how the presence or absence of a warning that one is about to be exposed to misinformation can also impact susceptibility.[193] As discussed above, misinformation can also take the form of misleading questions or verbal cues.

The insidious nature of a false memory is that participants believe that the memory is correct. This means that, when testifying, a witness may confidently provide inaccurate information on this basis. As discussed in Chapter 2, cross-examination is not well-suited to catch this form of inaccuracy, since witnesses who genuinely believe in their answers may not

[186] Brenton J. Underwood 'False Recognition Produced by Implicit Verbal Responses' (1965) 70 *Journal of Experimental Psychology* at 123.
[187] Ibid at 128-9.
[188] Elizabeth F. Loftus 'Planting misinformation in the human mind: A 30-year investigation of the malleability of memory' (2003) 12 *Learning & Memory* at 363.
[189] Julia Shaw & Stephen Porter 'Constructing Rich False Memories of Committing Crime' (2015) 26 *Psychological Science* at 296.
[190] Loftus op cit note 188 at 361.
[191] Ibid.
[192] Ibid at 362.
[193] Ibid.

behave as those who are intentionally lying. Further, it will be discussed below how this sort of confidence in one's response may be taken as a sign that the witness' identification is correct, to the detriment of the court and the reliability of its reasoning.

An additional risk factor during the recollection stage is the presence of multiple perpetrators. Although much research has been done on single-perpetrator crime, and indeed much of the research explored in this paper involved such crimes, a large issue which South African case law and research has not addressed in depth is the struggles with which witnesses to multiple perpetrator crimes are faced.

The first issue is the memory burden placed on witnesses of these crimes to identify each of the perpetrators.[194] Studies have shown a drastic decline in the accuracy of a witness' identification where multiple perpetrators were involved. For example, in 1981, Clifford and Hollin's study indicated a steady decline in identification accuracy when participants were shown both violent and non-violent videos in which there was one perpetrator, then two, three and four.[195] In a 1983 study conducted by Shepherd, only one of 41 participants was able to correctly identify both perpetrators to a crime.[196] Similarly, a 2012 study with the aim of assessing participants' ability to identify a target when their face was shown in the presence of another face also showed a severe deterioration in participants' identification abilities in multiple-perpetrator incidences.[197]

It has been theorised that, when there are multiple perpetrators, theirs faces may contaminate one another in the witness' memory.[198] As such, identifying a single main perpetrator in such crimes can prove to be extraordinarily difficult. This is relevant in

[194] Alicia Nortje; Colin G Tredoux & Annelies Vredeveldt 'Eyewitness identification of multiple perpetrators' (2020) 33 *SACJ* at 348.
[195] Brian R. Clifford & Clive R. Hollin 'Effect of the Type of Incident and the Number of Perpetrators on Eyewitness Memory' (1981) 60 *Journal of Applied Psychology* 364.
[196] Ahmed M. Megreya & A. Mike Burton 'Recognising Faces Seen Alone or with Others: When Two Heads Are Worse than One' (2006) 20 *Applied Cognitive Psychology* at 958.
[197] Ibid at 970.
[198] Ibid at 958; Nortje et al op cit note 194 at 358.

evaluating how courts determine whether there has been a correct identification in multiple-perpetrator crimes, especially in circumstances where some of the perpetrators may resemble one another.

The second issue with multiple-perpetrator crimes is role-pairing the perpetrator and their part in the crime. Even when there has been an accurate identification of the perpetrators, the role-pairing may be incorrect.[199] Although this information is not overtly required when witnesses make their identification, SAP Form 329 requires officers to note any observations made by the witness during their identification, which might potentially include remarks regarding role.[200] It is therefore relevant to determine whether correctly identifying the accused's role in the commission of a crime is relevant to courts when considering whether the identification of the accused is correct. It is further relevant to determine whether witnesses changing their minds, or recalling the accused's role differently at a later point in the trial or investigation process, may work against their overall reliability. While it may be in some cases that this distinction is material, as only one accused may have actually shot or killed the deceased, it may not be in others where a group of accused work together in similar roles.

The final consideration, which has been alluded to above, does not strictly have to do with a person's memory, but with perceptions of how accurate their memory is. A common belief held by observers is that highly confident or rapid decisions made during identifications are more accurate, and that responses which contain hesitations or are less confident are indicators of lower accuracy.[201] Although psychologists have stated that there is no meaningful connection between the confidence of an answer and its accuracy, research has shown that the picture is not quite so black and white.[202]

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[199] Ibid at 359.
[200] Ibid at 366.
[201] Neil Brewer & Gary L. Wells 'Eyewitness Identification' (2011) 20 *Current Directions in Psychological Science* at 24.
[202] Ibid at 25.

When measured immediately after an identification, confidence does appear to have a meaningful link to accuracy.[203] However, this becomes less clear the longer after an event or identification the measurement is made, likely due to the many issues caused by repetition, various misinformation effects and the creation of false memories.[204] Consequently, the diagnostic utility of confidence as a measure of accuracy should be placed in context. As supported by the research findings, courts may be justified in using confidence as an indication of accuracy when the identification is first made, especially if it is made relatively soon after the crime has occurred. [205] However, a witness' level of confidence when making identifications long after the event has passed, or when testifying, should not be used as an indication of accuracy.

3.4 Conclusion

Throughout this chapter, and the literature in general, the dynamic nature of human memory remains a key feature in the study of its role in eyewitness identifications. This dynamism means that human memory is malleable and subject to change or distortion throughout the different memory phases. Further, the multitude of risk factors and phenomena do not work in a uniform manner, nor are they applicable to each person in the same way. Thus, although the research is important, this creates a problem of translatability.

While the interplay of factors is easily controlled in a laboratory or simulation environment, most crimes happen in uncontrolled environments. Unlike researchers, the courts are not present during the commission of the crimes they adjudicate and are therefore tasked with the job of reconstructing the events as objectively as possible to come to the truth of the

[203] Ibid.
[204] John T. Wixted; Laura Mickes, Steven E. Clark, Scott D. Gronuld & Henry L. Roediger III 'Initial Eyewitess Confidence Reliably Predicts Eyewitness Identification Accuracy' (2015) 70 *American Psychologist* at 522.
[205] Ibid at 523.

incident. While the research can help with this by informing courts of relevant factors, it is inevitably prejudiced by the fact that laboratory-controlled simulations are inherently different to real-life scenarios. Courts simply lack the same objective basis available to researchers.

Nonetheless, the research provides a solid foundation on which courts can build their approach. Experts have identified many factors which are relevant to assessing the veracity of a person's memory. Courts must make use of this work, as ignoring these findings means courts increases the risk of incorrectly assessing a person's testimony, based on flawed assumptions. Courts' approach to witnesses should therefore be purposive and nuanced, informed by the complexities of the research findings. The precise contours of that approach is beyond the scope of this paper and should be subject to future further research. However, the need for such an approach is demonstrated by my analysis of judgments from the Western Cape High Court in Chapter 5. In order to engage with those findings though it is first necessary to explain my methodology in Chapter 4 below.

CHAPTER 4: METHODOLOGY

To answer my research question, I conducted a content analysis of a sample of murder cases heard by the Western Cape High Court. My sample was extracted from three online databases: the South African Legal Information Institute, LexisNexis South Africa, and JutaStat. The purpose of the analysis was to determine whether, having engaged with the knowledge contained in academic scientific literature concerning the fallibility or reliability of human memory, this knowledge is reflected in the way the Court has considered eyewitness' testimonies. Although my initial sampling was not limited by the year in which the case was heard, all selected cases were heard between 2008-2021. As they occurred relatively recently, these cases are relevant in understanding how the Court currently assesses eyewitness testimony.

This chapter explains: my reasoning in selecting the Western Cape High Court; the method of identifying and pooling the cases used; the applied requirements for inclusion; factors that warranted automatic exclusions; and the procedure followed when analysing the cases. In doing so, I aim to establish the reliability of my research methods, as well as to disclose limitations which may open doors for further research into this area.

4.1: Process of determining the court

The initial options for courts were a Magistrate's court, a High Court, the Supreme Court of Appeal or the Constitutional Court, all of which, to varying extents, have jurisdiction to hear criminal cases. I eliminated magistrate's courts because of their inaccessibility. While these courts have the jurisdiction to hear murder cases and are often the court of first instance for many criminal accused, their judgments are not reportable. Gaining access to these judgments

would have required requesting them from the courts themselves. This would have required a set pool of cases to have already been determined, whereas my approach necessarily required the narrowing of a greater pool to a smaller pool. As such, I would not have been able to ensure I had collected all the relevant cases within the mandatory time frame of my dissertation.

I then considered both the Supreme Court of Appeal and the Constitutional Court. Both Courts have the benefit that they have jurisdiction to hear appeal cases from any other court in the country. As such, they may have been able to offer a more holistic view of how courts approach eyewitness testimony, whereas focusing on one High Court would yield results for a single province. Ultimately, I decided in favour of choosing a High Court, as I found that the authoritative power of the superior courts would have lent itself better to an inquiry on the rules regarding evaluation of eyewitness testimony.

In my Legal Framework, I set out the existing body of law governing how identification evidence is given and the standards and tools used in evaluating oral testimony. This was for the purpose of establishing the boundaries within which courts may exercise their judgment and reasoning in determining whether an identification was correct. However, my ultimate focus remains in the evaluative process. Rather than ascertaining the rules set by superior courts, it is in analysing how courts practically engage with eyewitnesses that it will become clear how they truly consider the role of human memory in eyewitness testimony. It is also in this engagement that their understanding and translation of the findings of memory research into judicial practice becomes clear. I therefore chose to focus on the Western Cape High Court because my research took place within the Western Cape province, and I wanted to produce work that was relevant to my local context.

4.2: Method of identifying and pooling the cases

Having selected the Western Cape High Court, I proceeded to collect cases from three online databases: Southern African Legal Information Institute ('SAFLII'), LexisNexis and JutaStat. I chose to look at all three of South Africa's main online legal databases to ensure that I had collected all potentially relevant cases.

The greater sample of my cases was found by conducting a keyword search for the term 'murder' in the databases, under the Western Cape High Court. Other potential terms were 'eyewitness', 'credibility' and 'reliability,' as they are closely tied to my research question. However, these were deemed to be less effective at gathering directly relevant cases. For example, data pooling began on 1 June 2022, and on that date, there were 477 cases brought forward for 'murder' on SAFLII under the Western Cape High Court, as opposed to 61 cases under 'eyewitness' and 254 for 'reliability.' What became obvious from this, and while reading the cases, was that not all murder cases were included under this term, likely because courts do not always refer to eyewitnesses as such and might instead refer to them by name or as 'the witness.' Nor would courts always mention reliability, even if they were considering elements of reliability.

Further, these terms did not always include all murder trials, however all murder trials in which eyewitnesses were mentioned were included under the keyword 'murder'. For example, the term 'credibility' brought up 481 cases, which is greater than that for murder. Not all of these cases were from murder trials, thus rendering a number of them automatically unusable. Consequently, as murder was the most inclusive and reliable term, it became the initial keyword used to gather the cases.

I chose to look at all the cases that were brought up and did not discriminate according to date, as it was important to get a holistic picture of the case law before imposing any excluding factors or inclusion requirements for identifying my subset. These will be discussed immediately below.

After having extracted the cases from the three databases using my keyword search, I read through each of the cases to distinguish those that were actually murder trials, as opposed to bail or appeal judgments or cases dealing with attempted murder. After having done this, and to narrow down my cases and identify the relevant subset, I created a list of inclusions and automatic exclusions.

4.3: Requirements for inclusion

The first requirement for inclusion in my subset was that the case involve engagement with multiple identifying eyewitnesses. It was decided that these cases would paint a richer, fuller picture because this would require courts to discuss the different weight it would place on different eyewitnesses. The Court would not only engage with the eyewitness in isolation, but in relation to other eyewitnesses. In this comparison, factors that the court found desirable in one eyewitness, or compelling in their testimony, would be highlighted by what it did not appreciate in another. Further, it would also be clear which factors are valued by the Court when they are used to bolster the weakness of another eyewitness' testimony.

The second requirement for inclusion was that the eyewitnesses had to make an identification of the perpetrator or accused, as opposed to merely giving recollections of the events or scenery. This is partly because the literature focused on these kinds of identifications. It is also due to the increased importance of correctness in these scenarios. Identifications placing the accused at the scene of the crime are instrumental to the court's decision regarding the accused's guilt or innocence. It is for this reason that it is pivotal that eyewitnesses do not make erroneous identifications, and therefore that courts be sufficiently aware of the risks of trusting an eyewitness's memory.

4.4: Factors which warranted exclusion

Since it was a requirement that a case involve multiple eyewitnesses who were not subject to a cautionary rule, those cases which did not were generally excluded on this basis. This occurred for cases in which the Court only dealt with a single eyewitness, or when there were multiple eyewitnesses, but some or all of them were subjected to an additional cautionary rule. It was found that the Court took a stricter approach to these witnesses, which meant that it was operating on a different, higher standard compared to when it evaluated eyewitnesses against whom there was no additional cautionary rule. Accordingly, including these cases would have meant that my findings risked ignoring the critical issue that the Court used a different standard when assessing various cases within the same set.

For example, in the case of single witnesses, the Court has consistently found that the witness' testimony must be 'clear and satisfactory in every material respect.'[206] Thus, where there were shortcomings so that the witness' evidence was not unequivocal, the Court rejected their evidence, which often resulted in the acquittal of the appellant or accused. In contrast, in cases where there were multiple eyewitnesses, and these witnesses were not subject to a cautionary rule, the Court was found to be more lenient. Other witness' testimonies and other forms of evidence were used to shore up the obvious and sometimes significant weaknesses of one eyewitness' testimony.

Where cases had multiple identifying eyewitnesses who were not excluded but did still contain excluded witnesses, they were accepted into the subset. This presented technical challenges in my analysis. In these cases, excluded witnesses' evidence was not analysed where it could be separated from other witnesses. For example, in *Ngcukana v S*,[207] the Court dealt

[206] *R v Mokoena* supra note 21 at 80.
[207] 2017 ZAWCHC 83 (WCC).

with an instance where there were multiple perpetrators. With regards to one of the perpetrators, there was but a single eyewitness who could have identified him. Dealing with this in a separate portion of the judgment, the Court acknowledged the 'definite shortcomings and defects' in the witness' testimony, that his evidence was therefore not 'clear and satisfactory in every material respect' as required by case law,[208] and rejected the trial court's acceptance of his identification in this regard.

However, when dealing with the evidence against a perpetrator for whom there were multiple eyewitnesses, the Court was far more willing to accept discrepancies and errors in the witnesses' testimonies, as this evidence could be corroborated or strengthened by the identifications of other eyewitnesses to the same crime. This shows in a single case why it was necessary to exclude witnesses against whom there are cautionary rules, as the Court deals with them and their evidence according to a different standard, thereby justifying the exclusion of cases in which there were only cautioned witnesses.

Having conducted my readings and determined which cases met the inclusion requirements, the following cases were selected for analysis:

1. *B v S*[209]
2. *Deyi and Another v S*[210]
3. *Memani and Another v S*[211]
4. *Ngcukana v S*[212]
5. *S v Booysen and Others*[213]
6. *S v Bveni*[214]

[208] *Ngcukana* ibid para 59. See also *Mokoena* supra note 21 para 80.
[209] (1) SACR 553 (WCC).
[210] 2013 ZAWCHC 202 (WCC).
[211] 2015 JOL 34616 (WCC).
[212] *Ngcukana* supra note 209.
[213] *And Others* 2021 (4) All SA 859 (WCC).
[214] 2020 ZAWCHC 190 (WCC).

7. *S v Goni and Another*[215]

8. *S v Jordaan and Others*[216]

9. *S v Kupe*[217]

10. *S v Mabenu and Others*[218]

11. *Mbanyaru and Another v S*[219]

12. *S v Petersen and Another*[220]

13. *Qunta and Another v S*[221]

14. *Sophazi And Others v S*[222]

4.5: Thematic analysis

The literature review outlined numerous points of caution one should be aware of when considering a person's recollection or identification. These points formed the basis of the codes, which are discussed in Appendix B. After the cases were coded, they were analysed for themes that arose from those codes.

These themes identified, which will be discussed below, were—

1. Inconsistency in weight of consideration of the identification

2. The terminology of the Court

3. Determination of risk level of a given factor

4. Factors not considered

5. Assurance of the Court

[215] 2021 ZAWCHC 94 (WCC).
[216] 2018 (1) SACR 522 (WCC).
[217] 2011 ZAWCHC 533 (WCC).
[218] 2011 ZAWCHC 506 (WCC).
[219] 2009 (1) SACR 631 (C).
[220] 2017 ZAWCHC 31 (WCC).
[221] 2011 ZAWCHC 54 (WCC).
[222] 2010 ZAWCHC 566 (WCC).

4.6: Limitations

As this dissertation only looks at the Western Cape High Court, it not generalisable and therefore has limited authority on how all South African courts consider eyewitness testimony in murder trials. This however leaves room for future research to be done regarding other courts in various provinces to see if it accords with the findings of this research.

Further, the fact that it only considers certain cases involving eyewitnesses in murder trials, and not others, further limits its scope. It is not representative of how the Court has considered eyewitness testimony in all murder trials. However, this is because those cases were significantly impacted by the exclusionary factors, to the extent that there was a marked difference in the court's approach that warranted their exclusion.

4.6: Ethics considerations

I am aware that, in choosing to analyse criminal cases, I am pooling information on a vulnerable group of people. Further, I am also analysing histories that are deeply and profoundly personal to friends and families of the victims involved. Consequently, it is my aim for my research to present the cases and data contained therein as respectfully and objectively as possible. To do this, I have focused solely on information that is relevant to answering my research question, and maintain focus on the High Court as the subject of my analysis. Opinions will not be formed on the witnesses, the accused or appellants, but rather on the Court's approach to their testimonies, and these opinions will be developed from the research gathered in my Literature Review and Legal Framework.

Further, all the objective information presented is freely available online. Consequently, I am not disseminating otherwise private information nor breaching any confidentiality agreements. Despite this, and in a further effort to produce respectful and ethical research, the names of the witnesses will be omitted in my dissertation, and all witnesses will be referred to anonymously. As a result, I do not foresee any major ethical problems arising from my research. However, despite these minimal concerns, and in alignment with my aim, ethics clearance was applied for and granted by the UCT Ethics Committee, clearing me to conduct my research in the manner described above. It has been attached in my Appendix A.

CHAPTER 5: FINDINGS

My discussion in the Legal Framework and Literature Review revealed that, because of the inherent dangers present in accepting eyewitness identification, the Court should always be alive to the danger of misidentification. While the Legal Framework set out the ways in which courts are currently required to do this, as well as areas where they may exercise their discretion and use the research findings, my Literature Review set out those factors which have been identified as posing a risk to the veracity of a witness' memory and subsequent identification. Based on this research, my argument is that the High Court should allow the research findings to inform its engagement with eyewitnesses and its determination of whether the witness' positive identification is correct. My subsequent analysis of the selected judgments sought to evaluate to what extend the Court does so, in assessing how the Court considers the role of human memory in eyewitness testimony.

5.1: Inconsistency in depth of consideration of identification

The cautionary rule against the acceptance of identification evidence requires courts to caution themselves on the dangers of accepting such evidence, and to approach the witness accordingly.[223] Although courts are bound to respect this rule, it is possible that a court may only pay it lip service. Consequently, this theme is concerned with the level of attention or engagement the Court gave to the question of correct identification.

The Court dealt with the State's identification evidence in each case. However, while the Court generally seemed to acknowledge problems surrounding identification evidence, the cases show that there is inconsistency in the level with which they engage the eyewitnesses.

[223] Schwikkard & Van der Merwe op cit note 16 at 588.

There are cases which are characterised by a general lack of engagement with the issue, where the Court merely mentioned that there was an identification made but did not engage in an analysis of whether it was reliable. Conversely, the Court fully interrogated the evidence before it in other cases, considering a multitude of factors in determining whether the witness' identification was correct, as well as whether the witness was credible.

The more engaged end of the spectrum is characterised by cases such as, *Booysen,*[224] *Bveni,*[225] *Jordaan,*[226] *Mbanyaru,*[227] and *Goni.*[228] For example, in *Booysen*, the Court found that the issue of reliability is not a compartmental question, and that the dictum in *Mthetwa,* which set out the reasons why a court must concern itself with more than just truthfulness, requires a holistic approach to the assessment of eyewitness identification evidence.[229] Instead, 'it is an aspect to be weighed and considered in the light of the totality of the evidence in the case and the probabilities.'[230]

As a result, the Court engaged in a rigorous analysis of each of the witnesses. With one witness, the Court appeared to put itself in the shoes of someone in the eyewitness' position. For example, it acknowledged that the witness was most likely caught unawares when the shooting broke out and so therefore could 'not have had much of an opportunity to take note of the identity of his assailants.'[231] The evidence before the court also suggested gang-related tension between the accused and the witness, which the Court stated it would 'not be surprised' to find led the witness to make an identification based on his suspicions and not his observations.[232]

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[224] Supra note 213.
[225] Supra note 214.
[226] Supra note 216.
[227] Supra note 219.
[228] Supra note 215.
[229] *Booysen* supra note 215 para 192.
[230] Ibid para 193.
[231] Ibid.
[232] Ibid para 195.

Further, the Court also considered the possibility that the eyewitnesses had fabricated their stories. As mentioned earlier in the paper, keeping witnesses separate from each other when conducting identification parades may be indicative of adherence to the research on the risk of prior discussion. In *Booysen*, the Court considered the risk that 'the evidence against the accused was an organised fabrication.'[233] Ultimately it found that because the eyewitnesses' accounts differed from each other, and because they were unafraid to disagree with other eyewitnesses' evidence, this indicated that they had not colluded beforehand.[234]

Other cases show a similar level of engagement. For example, in *Jordaan*, the Court considered the witness' demeanour, general knowledge of the area, lack of reason to falsely implicate the accused, their level of sophistication and the deep unlikelihood of all three of them mistakenly identifying the same accused as counting in their favour.[235]

These cases are contrasted by *Sophazi*,[236] *Deyi*,[237] and *S v Kupe*.[238] Here the Court referred to the trial court's discussion, showing an awareness of the risk of misidentification, but did not go into an in-depth analysis themselves. For example, in *Sophazi*, the Court referred to the magistrate's satisfaction with her finding that the appellants had been correctly identified,[239] and concluded that the magistrate had been correct in so doing.[240] Similarly, in *Deyi*, the Court dealt summarily with the issue of identification, stating that, because of the presence of certain factors, identification had 'therefore been proven beyond a reasonable doubt.'[241] These factors included that there had been multiple identifications of the second

[233] Booysen supra note 215 para 203.
[234] Ibid.
[235] *Jordaan* supra note 216 para 118.
[236] Supra note 221.
[237] Supra note 210.
[238] Supra note 217.
[239] *Sophazi* supra note 221 para 17.
[240] Ibid para 12.
[241] Deyi supra note 210 para 17.

appellant, that one witness had identified him on several occasions and that the description of him that she had given matched the photographs that were taken of him after the incident.[242]

In these cases the Court did not engage with issues such as the vagueness of the witness' description,[243] nor did it consider factors which might have weighed against the witnesses or weakened the veracity of their testimony. These factors include the fast pace of the environment and the witness' fear during the moment,[244] as well as the presence of multiple perpetrators.[245]

It is thus clear that certain Courts view their role in the reception of identification evidence as an active one, while others see their role as merely relaying what the trial court found, thereby showing deference to the magistrate's findings. Particularly in those cases characterised by a lack of engagement, the Court makes references to and heavily relies on the trial court's findings. For example, in *S v Kupe*, the Court stated that the magistrate had 'carefully evaluated the evidence,'[246] and in this had considered factors such as the age of the witnesses, their respectability, and the fact that they had no apparent motive to falsely implicate the accused.[247] Consequently, the Court found that the magistrate had been correct in his approach, and dismissed the appeal.

Flowing from this, it is clear that the High Court, as a court of appeal, is bound by the factual findings of the trial court regarding the correctness of the eyewitness' identifications. For example, in *Memani and another v S*,[248] the Court stated that it was 'bound to respect the credibility findings of the regional magistrate,' who was quoted as having been 'impressed with the eyewitnesses as reliable and honest.' In *Qunta & others v S*,[249] the Court elaborated

[242] Deyi supra note 210 para 17.
[243] Ibid. The witness' description of the second appellant was simply that he was 'a black man who was wearing a beanie', a description which could have matched any number of people.
[244] Ibid para 5.
[245] Sophazi supra note 221; Kupe supra note 217.
[246] *Kupe* ibid at 5.
[247] Ibid.
[248] *Memani* supra note 211 para 22.
[249] *Qunta* supra note 221 para 32.

that this deference was because the trial court has the advantage of interacting with the witnesses, which speaks to the importance that is placed on demeanour evidence.

However, as discussed in my Legal Framework, there are no set rules governing how demeanour evidence is to be assessed. Consequently, this assessment is widely discretionary. This may either be positive or negative, in that the Court may choose to implement research findings in its analysis or reject them. Such interaction will be the focus of later themes regarding cases in which the witnesses appeared before the Court.

Returning to the topic of deference, the Court in *Ngcukana v S*[250] referenced *R v Dhlumayo*[251] as authority in explaining that, because of the trial court's perceived advantage, courts of appeal 'can only interfere with the trial court's factual findings' if there is some 'material misdirection' or error in its findings. This was affirmed by the Court in *B v S*[252] and Deyi,[253] where the Court similarly concerned itself primarily with determining the correctness of the trial court's approach or finding. Although the Court did not clearly state what constitutes a material misdirection in any of the analysed judgments, this matter may be trite.

For example, with reference to sentencing, the Appellate Division has previously linked the notion of a 'material misdirection or irregularity' with the idea that the sentence imposed was 'so startlingly inappropriate as to create shock.' [254] It has further stated that the presence of such misdirection will vitiate the exercise of the trial court's discretion, such that an appellate court may impose its own sentence as though the trial court's sentence was of no relevance.[255] The High Court echoed this principle in *Ngcukana,*[256] as well as in *B v S*,[257] when explaining

[250] *Ngcukana* supra note 207 para 6.
[251] *R v Dhlumayo* 1948 (2) SA 677 (A) at 705-706
[252] *B v S* supra note 209 para 11.
[253] *Deyi* supra note 210 paras 23-24.
[254] *Moosajee v S* 1999 (2) All SA 353 (A) para 9.
[255] *Malgas v S* 2001 (3) All SA 220 (A) para 12.
[256] *Ngcukana* supra note 207 para 6.
[257] *B v S* supra note 209 para 11.

that it could and would only depart from the trial court's findings where there was a material misdirection.

In the absence of this misdirection, the appellate court is bound by the trial court's findings. Consequently, courts have previously acknowledged that it is not sufficient for magistrates to simply decide whether to believe a witness or not, but that they must furnish detailed reasons on which they base their findings.[258] As such, appeal courts can expect magistrates to provide an 'intelligent analysis of the evidence.'[259] While these reasons may be available to High Courts, they are generally inaccessible to the public, since Magistrate's courts' judgments are not reportable.

An analysis of what moves the court to accept the witness' identification is largely limited to what the High Court records of the magistrate's findings in its judgment. This may create an issue of transparency where an appeal court is vague about the magistrate's reasoning or limits its discussion to a mere agreement with the magistrate. However, it may also reveal what the High Court believes are quintessential factors in determining the accuracy of the witness' identification. These factors will be considered in my final theme, regarding the assurance of the Court.

At this stage my discussion has shown that although the High Court is aware of the risk of misidentification, it engages with this issue to different extents in different judgments. This may partially to be due to the question of whether the High Court is hearing the matter as a court of first instance, or as a court of appeal. In cases where it sits as an appellate court, and in the absence of a material misdirection or error, the Court is bound by the trial court's findings. Consequently, in appeal cases, the Court generally only briefly relays the magistrate's findings, which may not be accessible to the public.

[258] *Schoonwinkel v Swart's Trustee* 1911 TPD 397 at 401.
[259] *S v Bhengu* 1998 (2) SACR (N) at 234*h-i.*

5.2: The terminology of the Court and relevant factors

Having shown that the level to which the Court deals with the correctness of the identification differs, I now focus more heavily on the substantive content of the Court's engagement. But first it is important to assess the Court's language in relation to the witnesses' testimonies. As previously mentioned, the language of the scientific research is that of 'correctness,' 'veracity,' or 'accuracy.' Clearly it is focuses on whether there has been memory degradation, deterioration, or contamination. These terms were not found in the judgments and so is not immediately clear whether the Court considered memory research and the risks it has identified. However, the cases revealed a clear, correlative link between the application of certain labels to the witnesses and the acceptance or rejection of their evidence.[260] Consequently, it is important to identify and understand the terminology used in the cases in order to evaluate its adherence with the findings in the established research.

My discussion in this section will therefore involve laying out the most common terms used to refer to the eyewitnesses, which amount to a decision on whether to accept the witness' identification. Some of the terms used are legal terms which have been shown to be relevant to the assessment of the eyewitness' observations, whereas other terms are simply linguistic descriptors that reveal satisfaction or dissatisfaction on the part of the Court towards the witness. I will also endeavour to understand how the Court understands and uses these terms. Finally, I will assess the strength of the correlation between the application of these terms and the acceptance or rejection of the eyewitness' evidence.

[260] This will be discussed in terms of how the Court used the labels such as 'credible', 'reliable', 'good', and 'honest'.

As discussed in my Legal Framework, the terms which were anticipated for use by the Courts are primarily reliability and credibility. Iterations of the term 'reliable' appeared in seven different cases as descriptors of at least one eyewitness or their evidence.[261] The terms credible or credibility also featured significantly. First, in those cases where the Court deferred to the trial court it did so in respect of the trial court's credibility, rather than their reliability, findings regarding the witnesses. Further, the Court accepted the identification evidence of the witnesses who were found to be at least 'credible' in eight of the 13 cases. [262]

For example, in *Memani,*[263] with reference to the trial court's credibility findings, the witnesses were found to be 'reliable and honest.' This justified the acceptance of their identifications, despite 'the fact that the scene was mobile, that they were emotionally charged with fear, and their opportunity for observation was of short duration.'[264] Strikingly, in *Ngcukana*, one of the witnesses presented several risk factors of note, including drunkenness at the time of the incident, receiving inappropriate influence from the police when giving her statement and the significant consideration that she had been proven to have misidentified one of the accused. Regardless, the trial court found her to be a 'good and credible' witness,[265] because she 'made a favourable impression and gave compelling and convincing evidence.'[266] As a result, the issue of proven misidentification was described by the High Court as a 'wrinkle' in light of the otherwise positive impression she made,[267] and the Court found that there was no reason why this should adversely impact her evidence identifying the appellant.[268]

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[261] *Memani* supra note 211 para 22, *Ngcukana* supra note 207 para 77, *Qunta* supra note 221 para 21, *Booysen* supra note 213 para 215, *Bveni* supra note 214 para 178, *Jordaan* supra note 216 para 26, *Mabenu* supra note 218 para, *Petersen* supra note 220 para 53.
[262] *B v S* supra note 209 para 12, *Memani* ibid note 211 para 22, *Ngcukana* ibid note 207 para 81, *Booysen* ibid note 213 para 186, *Bveni* ibid note 214 para 178, *Jordaan* ibid note 216 para 118, *Mabenu* ibid note 218 page 88, *Mbanyaru* supra note 219 para 8.
[263] *Memani* ibid para 22.
[264] Ibid.
[265] *Ngcukana* supra note 207 para 81.
[266] Ibid para 77.
[267] Ibid.
[268] Ibid para 81.

Apparently, because both courts had formed a favourable opinion of the witnesses, factors which ordinarily would have detracted from her credibility were disregarded. As such, it appears that the Court's impression of the witness influenced how the Court approached their evidence, rather than objective factors. Although *Ngcukana* was an exceptional case, other cases show the clear link between the Court expressing a positive opinion of the witness and accepting that witness' evidence, as well as the opposite being true.

In addition to making positive credibility and reliability findings, the Court also commonly used terms such as honesty, or iterations of truthfulness, to convey their approval of the witnesses. The finding of honesty was often associated with either credibility or reliability. For example, in *Memani*, the Court states that it was 'bound to respect the credibility findings of the regional magistrate, who was impressed with the eyewitnesses as reliable and honest.'[269] Similarly, in *Bveni*, the Court found the witnesses to be 'honest, reliable and credible.'[270] However, honesty was found to be its own primary feature in two cases.[271] Finally, concern with truthfulness was also found in five cases.[272]

The cases of *Mthetwa*[273] and *Stellenbosch Wine Farmers*,[274] which were used to define the terms 'reliability' and 'credibility' respectively, indicate that there is some distinction between the meaning of these terms. For example, credibility may be more concerned with the witness' trustworthiness, whereas reliability is concerned with the trustworthiness of their evidence.[275] Further, *Mthetwa* explicitly distinguished reliability from the question of honesty, in that it 'is not enough for the identifying witness to be honest: the reliability of his observation must also be tested.'[276] However, the terms also appear to be used interchangeably, indicating

[269] *Memani* supra note 211 para 262.
[270] *Bveni* supra note 214 para 178.
[271] *Booysen* supra note 213 para 208. See also *Petersen* supra note 220 paras 43, 59.
[272] *Booysen* ibid para 103, *Petersen* ibid para 43, *Jordaan* supra note 216 para 118, *Ngcukana* supra note 207 para 81, *Bveni* supra 214 para 210.
[273] Supra note 14 at 768a-c.
[274] Supra note 78 at 5.
[275] Schwikkard & Mosaka op cit note 16 at 621.
[276] *Mthetwa* supra note 14 at 768 *a-c*.

that the Court may have conflated their meaning, or place little practical value in distinguishing them.

I come to this conclusion because, in addition to the Court using these terms together in a single clause, it also concerned itself with the reliability of one witness and the truthfulness or credibility of another in the same case.[277] Importantly, while the court in *Memani* attributed reliability as part of what amounted to a credibility finding,[278] in *Bveni*, the Court stated that 'reliability depends on a variety of factors,' including the credibility of the eyewitness concerned,[279] showing significant overlap between the terms. I found this also meant that, when used, the Court made little distinction between the meaning of each term.

Further, the factors which the Court considered in coming to both credibility and reliability findings aligned with those factors identified by *Mthetwa* as being relevant to a reliability inquiry. These factors included: lighting; distance; emotional stress or trauma; duration of exposure; sobriety; violence; multiplicity of perpetrators; and prior discussion.[280] The Court considered the traumatic impact of the witnesses' situations in six cases;[281] the amount of time and distance from which the witnesses had the opportunity to observe the accused or appellants in five cases;[282] the speed of the environment's movement in four cases;[283] and the quality of lighting in seven cases.[284]

As such, it appears that the Court makes no practical distinction between the terms 'credibility' and 'reliability'. In their usage, the Court considers factors listed in *Mthetwa*. Those given above are closely aligned with the literature, which has identified many of the

[277] *Jordaan* supra note 216 paras 26 and 32.
[278] *Memani* supra note 211 para 22.
[279] Bveni supra note 214 para 196.
[280] Ibid.
[281] *Petersen* supra note 220 para 64. See also: *Memani* supra note 211 para 22, *Bveni* supra note 214, *Goni* supra note 215 page 9, *Qunta* supra note 221 para 31, and *Booysen* supra note 213 para 99.
[282] *Petersen* ibid para 55, *Memani* ibid para 23, *Bveni* ibid para 202, *Goni* ibid page 9, and *Mbanyaru* supra note 219 para 5,
[283] *Memani* ibid para 22, *Mbanyaru* ibid para 25, *Booysen* ibid para 78, *Qunta* supra note 221 para 30.
[284] *Booysen* ibid para 76, *Mbanyaru* supra note 219 para 5, *Goni* supra note 215 page 9, *Jordaan* supra note 216 para 6, *Kupe* supra note 217 page 2, *Petersen* supra note 220 paras 50-55, *Ngcukana* supra note 207 para 65.

factors as being particularly troublesome during the acquisition phase. However, and importantly, *Mthetwa* goes beyond the literature factors and considers additional factors such as prior knowledge of the accused, as well as those factors that Courts may deem relevant. Problematically, the inclusion of these factors indicates that the reliability inquiry, which is equated with a factual correctness inquiry, actually goes beyond the scope of factual correctness, in that it considers factors that do not relate to the veracity of the witness' memory, but rather to the witness themselves.

One such factor was the eyewitness' certainty or confidence. This confidence, or lack thereof, appeared to be a factor weighing for or against the conclusion that the eyewitnesses' identifications were accurate in several cases.[285] It is noteworthy that it was not merely the High Court that considered confidence, but also the trial court and the police investigators in some instances,[286] showing that the belief in confidence as an indicator of accuracy may be pervasive throughout the criminal justice system. The scientific literature has shown that confidence is not a helpful or reliable measure by which to gauge the accuracy of the witness' identification where there has been a long time period between the event and the identification.[287]

However, in *Qunta*, the fact that the witnesses were not able to immediately identify the accused appeared to weigh against them, even though the identification parade occurred roughly two years after the incident.[288] Consequently, the Court's reliance on confidence is not only unsupported by the scientific literature, but ill-advised. This is because the Court has chosen to base part of its determination on the veracity of the eyewitnesses' memory on a standard which has been proven be incorrect and misleading. Errors can be made in these

[285] *Goni* supra note 214 at 2, *Booysen* supra note 213 para 65, *Qunta* supra note 221 para 28, Petersen supra note 220 para 70, *Bveni* supra note 214 paras 101-113.
[286] *Bveni* ibid para 123.
[287] Wixted et al op cit note 204 at 523.
[288] *Qunta* supra note 221 para 28.

instances, and reliable testimony may be disregarded arbitrarily, whilst misidentifications may conversely be accepted without justifiable cause.

Another factor which the Court considered can be seen in *Bveni*, [289] where two of the witnesses were found to be 'particularly impressive' because of the absence of a motive to falsely implicate the accused. This was also taken into consideration in a further seven cases where the witnesses were found to be either honest, credible, reliable or a combination of the three.[290] While the inclusion of this consideration might make intuitive sense, in that it purportedly eliminates the possibility that the witness is consciously lying, it is irrelevant to the consideration of whether that witness' identification is mistaken. This consideration is the focus of cross-examination, which attempts to catch out the lying witness. However, a witness' motive has no bearing on their memory, and consequently it is submitted that lack of malignant intent should not be included in an inquiry into factual correctness.

Further, prior knowledge of the accused was also a consideration that featured prominently in the cases.[291] In eight cases, at least one of the witnesses already knew the perpetrator before the time of the incident, and the Court viewed this as weighing in the witness' favour every time. In *Ngcukana*,[292] the fact that two of the witnesses 'knew the appellant by sight,' coupled with the fact that there was no motive for false incrimination, aided in the Court's decision that mistaken identity was implausible. In *Booysen*,[293] it weighed positively with the Court that one of the witnesses was already acquainted with one of the accused: 'assuming the lighting conditions were good enough…[he] would have no difficulty recognising him if he saw him.' In *Mbanyaru*,[294] the Court mentions each time that the

[289] *Bveni* supra note 214 para 182.
[290] *Ngcukana* supra note 207 para 76, *Goni* supra note 215 at 8, *Kupe* supra note 217 at 5, *Petersen* supra note 229 para 36, *Booysen* supra note 213 para 100, *Jordaan* supra note 216 para 118, *Mabenu* supra note 218 at 55.
[291] *Ngcukana* ibid para 76, *Booysen* ibid paras 207-211, *Goni* ibid at 6, *Jordaan* ibid para 118, *Kupe* ibid at 3-4, *Mabenu* ibid para 71, *Mbanyaru* supra note 219 para 6, *Petersen* ibid para 29.
[292] *Ngcukana* ibid para 77.
[293] *Booysen* supra note 213 para 207.
[294] Supra note 219 paras 6-9.

witnesses not only knew the accused, but were so familiar with them as to know their nicknames as well. In *S v Jordaan*,[295] the fact that three eyewitnesses who knew the accused all identified him was viewed favourably by the Court. The Court does not engage with their identification, apparently assuming that, in the absence of damaging external factors, there is no, or limited, threat of misidentification on this basis.

Although these cases only show so far that prior knowledge is a positive factor, other cases reveal the importance which the Court places on it. For example, in *Petersen*[296] the Court stated that it was unsurprising that the witnesses could identify the accused, since they knew them by sight. Further, in *Goni*,[297] the Court found that, despite discrepancies between one witness' written statement and his oral testimony, his identification could not have been mistaken because he knew the accused and had even addressed him by name. It was also shown in that case that the primacy of prior knowledge or acquaintance in the Court's consideration was sufficient to shore up the weaknesses of another witness' testimony. It was found to be compelling that the second witness' identification did not stand alone, and was corroborated by someone who, as well as making his identification shortly after the event, also knew the perpetrator.[298] It appears from these cases that the Court finds the presence of prior knowledge of the accused a factor which confirms the accuracy of their identifications.

This was recently confirmed by the Supreme Court of Appeal in *Abdullah v S.*[299] It referred to *R v Dladla*[300] as authority, which is based on the belief that the probability of an incorrect identification is substantially lessened by previous familiarity, and that the relevant

[295] Supra note 216 para 118.
[296] Supra note 220 para 29.
[297] Supra note 215 page 8.
[298] Ibid.
[299] 2022 (33) ZASCA (SCA).
[300] 1962 (1) SA 307 (A).

test is the degree of previous knowledge and opportunity for a correct identification to be made.[301]

The assumption that familiar faces are more easily recognised than unfamiliar faces is not one that is frequently discussed when one surveys the literature on human memory. However, it has been noted that the scientific research discussed focussed on identified risk factors that threaten the veracity of a witness' memory. Further research on the issue supports this belief,[302] and confirms the idea that Courts should place less reliance on familiar as an indication of accuracy where the level of familiarity is weak.[303] Therefore, it is commendable that the Court, when referring to prior acquaintance, also frequently made reference to the degree of familiarity between the witnesses and the accused, as well as their opportunity to observe the accused.

Finally, a witness' consistency was also frequently considered by the Court on two fronts. First, the Court considered how consistent a witness' testimony was with that of other eyewitnesses. Secondly, the consistency of a witness' testimony and identification throughout trial and pre-trial proceedings was also deemed important. In *Bveni*, the Court was particularly impressed those witnesses who were 'unshaken in their testimony.'[304] Conversely, in *Booysen*, inconsistency was a detrimental to a witness' evidence. In that case, one witness was found to be unsatisfactory because of evidence that was so 'vague and contradictory' that the Court stated it 'would not attach any weight to it unless it were corroborated by other satisfactory evidence.'[305]

[301] *Abdullah* supra note 299 paras 14-15.
[302] Madison B. Harvey; Kaila C. Bruer & Heather L. Price 'Perceptions of familiar and unfamiliar ear- and eyewitnesses' 29 (2022) *Psychiatry, Psychology and Law* at 396.
[303] Ibid at 410.
[304] *Bveni* supra note 214 para 178.
[305] *Booysen* supra note 213 para 193.

In the same case another witness' reliability was also hindered by contradictory statements.[306] The Court did not state whether this was because the contradictions were material, but it appears from the cases that the Court is forgiving of discrepancies regarding peripheral matters. However, of note in *Booysen* is that the second self-contradictory witness made the error of misidentifying one of the accused by giving the police one name and then pointing out another person in a photo identification parade.[307] This is like the debacle in *Ngcukana*, where one of the witnesses initially misidentified the appellant.[308] However, the critical distinction is that the witness in *Ngcukana* was described as 'good and credible' regardless.[309] This was because the witness was familiar with the appellant's appearance, there was adequate lighting and opportunity for observation and, 'importantly,' the witness had no motive to falsely implicate the appellant.[310]

While factors relevant to the veracity of the witness' memory were considered, the Court also took special note of those factors which were not. Namely, the absence of a motive to falsely implicate the appellant, and prior knowledge of the appellant. In addition to the consistency of the witnesses' testimonies and their demeanour, the Court found these factors to be relevant to a reliability inquiry in a number of cases.

It has been shown in the above discussion that the Court is primarily concerned with determining whether an eyewitness, or their evidence, is credible or reliable. These terms are used interchangeably throughout and within the judgments, and so there appears to be no practical distinction that is made between their meaning. Further, a finding that a witness is credible, reliable, or both, is associated with an acceptance that their identification evidence is

[306] *Booysen* supra note 213 para 193.
[307] Ibid.
[308] *Ngcukana* supra note 207 para 32.
[309] Ibid para 81.
[310] Ibid para 76.

correct. As such, the reliability inquiry appears to either subsume or be equated to the question of whether the witness has correctly identified the accused or appellant.

However, this question of whether an identification is correct is concerned with the veracity of the witness' memory. Consequently, if the outcome of a reliability inquiry determines whether the Court accepts or rejects the witness' identification evidence, then the reliability inquiry should be concerned with factors relating specifically to memory accuracy. However, the above discussion reveals that, instead of being solely guided by the scientific literature in this inquiry, the Court is primarily guided by the list of factors set out in *Mthetwa.* Although this list includes many of the factors deemed relevant by the scientific literature, it also includes factors that are cautioned against by the literature. Further, some of these factors bear no relevance to the question of accurate identification.

5.3: Determination of the risk level of a given factor

The above discussion established the connection between credibility and reliability inquiries, and how they are used to frame the Court's assessment of the veracity of an eyewitness' testimony. Consequently, this theme is concerned with how the Court determined the level of risk that adverse factors posed to an eyewitness account, so as to detract from their overall credibility finding. This is central to my research in the following ways: it considers how the Court determines whether an identified risk factor presents a risk; if that factor should be treated as risky in the given case; and if it is, whether the weakness presented by that factor can be compensated for by some other consideration that weighs more heavily. Factors identified in both the literature and the case law as being relevant to identification accuracy that will be discussed in this section are lighting, the use of disguises or alterations, opportunity for

observation, and the impact of emotional trauma or stress. These factors also commonly appeared in the case set and will thus be the focus of analysis for this theme.

The first relevant factor is that of alcohol intoxication, which was identified in the literature as impairing memory at all stages. Although it was infrequently discussed in the cases, the potential that the witnesses were intoxicated to some extent was present throughout them. For example, two cases involved shootings which took place outside of a tavern,[311] and the consumption of alcoholic drinks were mentioned in a further two.[312] The impact of intoxication was most deeply discussed in *Ngcukana*,[313] where three of the eyewitnesses were intoxicated at the time of the shooting. Both the High Court and the trial court found this to be reason to approach their evidence with 'great circumspection,'[314] however, the High Court found that 'they were clearly not so drunk that they could not walk, run, dance and converse.'[315]

As a result, the witnesses' intoxication levels did not detract from their reliability but were instead used to explain differences in their testimonies. The Court did not find these differences to be sufficient to detract from their reliability 'on the crucial question, namely whether they saw the appellant with a firearm.'[316] The Court felt satisfied that the witnesses could not have been mistaken as to the accused's appearance because they were familiar with him, 'the lighting was good, they had adequate opportunity for observation and—importantly—had no motive to falsely implicate him.'[317] Thus, while the Court felt cautious about accepting their evidence, it did so regardless, because it found that other considerations in favour of such acceptance outweighed the risk posed by their intoxication.

[311] *B v S* supra note 209 and *Ngcukana* supra note 207.
[312] *Booysen* supra note 213 para 12 and *Goni* supra note 215 at 6.
[313] Supra note 207.
[314] Ibid para 80.
[315] Ibid para 76.
[316] Ibid.
[317] Ibid.

Lighting was also considered in many of the cases and was frequently mentioned by the Court in its retelling of the witnesses' versions of events, or in its analysis of their overall reliability. This is likely because many of the events in the cases took place at night – where the facts took place during the day, the Court did not question whether the lighting conditions were sufficient.[318] The Court engaged with this factor in two key ways. First, where it was able to, the Court relied on police evidence of lighting to assess the eyewitnesses' version. Thus in *Petersen*[319] and *Booysen,*[320] the Court accepted the eyewitnesses' testimonies regarding the adequacy of the lighting conditions because their testimonies were supported by photographic evidence from the scene.

However, in the remaining cases, the Court seemed to lack an objective standard according to which it could determine whether the lighting conditions were bright enough to allow the witnesses to make a reliable identification. This led to a trend in which it often found that it was 'satisfied' that they were, based on the witnesses' testimonies that this was the case. However, while the Court accepted one witness' evidence without further inquiry in *Goni*,[321] it is noteworthy that the Court did not always come to this determination based on the testimony of one witness alone. Rather, it took into consideration that multiple eyewitnesses, who had all made the same identification, claimed that the lighting conditions had been good enough to allow them the opportunity to see the perpetrator. For example, in *Jordaan*[322] the Court considered the witnesses' corroboration of each other's claims and decided that this 'evidence establishe[d] that the scene was well illuminated.' This was also the case in: *Ngcukana*[323] and *Mbanyaru.*[324]

[318] *Kupe* supra note 217 at 3.
[319] Supra note 220 para 54.
[320] Supra note 213 para 213.
[321] Supra note 215 at 10.
[322] Supra note 216 para 118.
[323] Supra note 207 para 76.
[324] Supra note 219 para 5.

It thus appears that the Court was not only alive to the importance of adequate lighting conditions, but also regularly sought to come to a determination on their adequacy by using some objective standard. This desire for objectivity appears in *Booysen*, where the Court lamented that the State did not regularly call for expert evidence on lighting conditions to "provide the Court with an objective and more definitive basis to assess the position."[325] In the absence of such evidence, it sometimes seeks to find objectivity in witnesses' corroboration of one another's testimonies.

In addition to lighting, the Court noted a volatile, fast-changing or quick-paced environment in several cases.[326] For example, in *Petersen,* where the events took place at night, the Court noted that the perpetrators were approximately eight metres from one witness, and 12 metres from the nearest light source.[327] It also noted that she only had 'a few seconds' to observe them.[328]

However, it was noteworthy that these factors, which are mentioned in the literature as problematic in the acquisition phase, and therefore detracting from the overall veracity of the witness' memory, were used in some cases to explain away inconsistencies. For example, in *Memani*,[329] the trial court had found that the witnesses were reliable, 'notwithstanding the fact that the scene was mobile...and that their opportunity for observation was of short duration.' Further, in *Qunta*,[330] the fact that the witnesses observed 'a fast-changing series of traumatic events from different vantage points' was used to explain the minor differences in their evidence. This combination of emotionally traumatising and quick-moving events was also used to explain differences in *Goni*.[331] The Court noted in both cases that the discrepancies

[325] *Booysen* supra note 213 para 211.
[326] *Memani* supra note 211 para 18, *Qunta* supra note 221 para 30, *Booysen* supra note 213 para 28, *Bveni* supra note 214 para 202, *Goni* supra note 215 at 9.
[327] Supra note 220 para 55.
[328] Ibid. Other cases include *Memani* supra note 211 para 22 and *Mbanyaru* supra note 219 para 5.
[329] Supra note 211 para 22.
[330] Supra note 221 para 30.
[331] Supra note 215 at 9.

between the witness' testimonies only related to peripheral details. Nonetheless, while the Court appeared to understand that this lack of opportunity for observation should weaken the witness' reliability, this did not always happen in practice. Instead, factors which obfuscated the opportunity for observation were used to explain away contradictions or disparities.

This may appear to be problematic, because it could indicate that the Court ignored relevant risk factors, and consequently accepted potentially unreliable identification evidence. However, in considering how the Court approached these issues, several observations can be made. First, the Court's apparent approach to various risk factors is to weigh them holistically against those factors which support a positive credibility finding. Secondly, where the Court found that a witness was credible, the factors which should have detracted from their credibility were instead used to justify minor errors in their accounts. This focus on the peripheral nature of the details is important because the research shows that, due to any combination of risk factors, some level of memory deterioration or contamination is to be expected when witnesses interact with the criminal justice system. Thus, the Court's focus on correctness as to material details shows an understanding the affinity of human memory to error.

Furthermore, knowing how malleable and subjective human memory is, it would be unwise for courts to allow the presence of a single risk factor to vitiate the reliability of the witness' identification entirely. Due to the importance of oral and identification evidence in the criminal trial, such an approach would be untenable, as it would make it nearly impossible for courts to accept any identification evidence. A preferable approach, which the Court seems to follow, is one that considers factors which weigh for and against a positive credibility finding, and thoughtful engagement with their implications on the accuracy of the eyewitness' identification, before reaching a credibility finding. The Court appears to have found a practicable way of working around the weakness of human memory, which may reveal a nuanced appreciation for how human memory functions.

Nonetheless, while this approach may be commendable, it also begs the question: if a witness is wrong about several peripheral matters, how does one know they are right about the material ones? While the cases do not provide an answer to this specific question, the Court's approach does reveal an apparent hierarchy of factors relevant to its consideration. This is because, while it clearly engages in a holistic analysis of multiple factors, the presence of certain factors appears to be considered fail-safes. These will be discussed in my final theme,[332] which considers how the Court assures itself that, despite the presence of one or many risk factors, it is correct to accept the witnesses' identification evidence.

5.4: Factors not considered

Before assessing how the Court assured itself of the correctness of its findings, it is important to note that certain factors that were identified in the literature were not considered by the court, despite their presence in cases. In doing so, I consider why the Court may not have found this topic to be worthy of consideration, either as a factor which detracts from the eyewitnesses' reliability, or one that is used to explain minor discrepancies or inaccuracies in their account, as was seen above.

It is significant that all the cases involved the use of weapons, with 10 cases involving firearms, three cases involving knives, and two other cases involving the use of miscellaneous items such as screwdrivers and wooden planks. This is because the presence of a weapon has been discussed in the literature as being a factor which can draw an eyewitness' attention away from the perpetrator's face. It can also induce a level of fear that interferes with their ability to encode the memory accurately. However, the Court rarely considered the presence of a weapon to be a factor that counted against the witness' identifications. Only in the case of *Booysen* did

[332] See page 81.

the Court consider that the presence of a weapon might impugn the witness' ability to properly observe the perpetrator, but this had to do with the witness running away as much as it did with the shock of seeing a weapon.[333]

In addition to this, the act of witnessing a murder or attempted murder is likely traumatising to a great number of people, and the stress or burden of witnessing these violent acts was noted as being a feature which could impact a person's memory at different stages. However, few of the cases made note of this or counted it against the witnesses in any substantial way. *Goni*[334] and *Qunta*[335] both referred to 'traumatic events,' and in Qunta these events were used as a justification for minor discrepancies as opposed to being something which counted against the witnesses' credibility.[336] Only in *Booysen*[337] did the Court consider that one witness' panic and distress at being shot at would have made it difficult for him to make a reliable identification. However, when describing why this witness was 'wholly unreliable,' the Court appeared to take issue primarily with his initial misidentification of two of the appellants, and his potential shock or fear was used to explain why this may have occurred.[338] As such, it served as an explanation for initially misidentifying two of the accused, and did not appear to be an factor that the Court took issue with individually.

Further, it did not appear that nervousness worked against witnesses when they testified either. Although the Court noted that a witness' calmness during cross-examination made a favourable impression, the Court did not seem to count a lack of calmness as working against a positive credibility finding. For example, in *Booysen* one of the witnesses appeared to be particularly scared when testifying. It was evident to the Court that she 'was under considerable

[333] *Booysen* supra note 213 para 193.
[334] Supra note 215 at 2.
[335] Supra note 221 para 30.
[336] Ibid.
[337] *Booysen* supra note 213 para 194.
[338] Ibid para 193.

strain and very obviously frightened.'[339] As such, discrepancies between two of her police statements in which the Court acknowledged she might have misremembered some details were therefore 'neither here nor there,' because it was clear that she was in an 'overwrought and traumatised condition'[340] when she underwent one of her interviews. While it was made clear that the Court, and other actors in the criminal justice system, are speculative of a witness' confidence in determining the correctness of their identification, it does not appear that experiencing shock, or presenting fear, weighs negatively against an eyewitness' reliability individually.

This is in line with earlier discussions in the theme above, where it appeared that the Court has established a willingness to overlook inaccuracies regarding peripheral details, so long as the witness is consistently correct regarding the material facts. The purpose for noting shock or trauma, and the presence of a weapon, in this theme was that they are factors which are left largely undiscussed by the Court, despite being an ever-present risk in murder cases. It may seem paradoxical that such obvious risk factors are not discussed, however this may be for two reasons.

First, it may be that the Court can do very little to assess the impact of fear or seeing a weapon on a person. As these factors are present at the acquisition stage, before the witness has come in contact with the criminal justice system, the Court can neither mitigate nor determine their impact on the witness. While the Court also engaged with other factors relevant to acquisition, such as lighting and opportunity for observation, there is a difference here. Whereas a Court can determine whether it would have been impossible to make an identification under specific lighting conditions, it has no way of assessing the level of fear a witness may have felt, as well as how greatly that fear impacted them. It appears that the Court

[339] *Booysen* supra note 213 para 99.
[340] Ibid para 98.

may prefer to deal with factors whose impact on reliability is more objectively determinable, rather than impact that is highly subjective.

Secondly, due to their inevitability, the Court may be willing to overlook the risk presented by these factors where there is sufficient evidence to show that the witness was able to make an identification regardless. It would therefore be for this reason that the Court engages in discussion on specific factors it deems to be uniquely relevant to the case at hand, instead of also including a discussion of generally applicable risk factors in each given case.

Rather than negligence, there is wisdom in each of these three reasons. First, the impact of situational factors is not only more readily examinable, but their impact has also been more widely researched. This may be due to the considerable ethical issues that may arise from inducing fear in or garnishing weapons against research participants. The fact remains that there is very little research that would support any determinative stance the Court may take on how greatly a witness was impacted by the event, and how much that should weigh against a positive consideration of their identification. Secondly, abstaining from a detailed discussion of ever-present risk factors is not negligent where there is evidence to show that a witness was able to make an identification regardless. Instead, it may be further justified by the belief that, if these factors did not prevent the witness from making a positive identification, they need not be discussed in every given instance unless they become a direct issue, as was the case in *Booysen*.[341]

This analysis of why certain factors may not have been considered by the Court supports my observation in the previous theme, that the Court appears to have a hierarchy of factors in its mind. Since some factors may not be viewed as worthy of consideration for various reasons, other factors are necessarily viewed as having more weight or relevance to a reliability inquiry. Taking this further, there seem to be factors whose presence appear to justify

[341] Supra note 213 paras 98-99.

the Court's acceptance of an eyewitness' identification, because they apparently guarantee the correctness of such identification. These will be discussed in my final theme below.

5.5: Assurance of the Court

Concluding the findings of my thematic analysis, I turn now to the question of how the Court assured itself of the correctness of its findings. This theme completes my analysis of the case law and draws me to a finding on my research question, because it determines the role that human memory plays in the decision to accept or reject an eyewitness' testimony overall. This is because a court must be certain that an accused's guilt has been proven beyond a reasonable doubt in order to justify a conviction against them. [342]

Thus far, I have shown that a link exists between a positive credibility finding and the acceptance of an eyewitness' identification. The assessment of the veracity of human memory is often contained within this inquiry. As such, a positive credibility finding entailed that the Court was satisfied that the accuracy of the witness' memory was such that their identification was correct. However, the Court frequently considered factors that were not relevant to the question of accurate memory in the credibility inquiry, but were of legal importance. Therefore, the veracity of the witness' memory only formed part of the credibility inquiry, and so determining that a witness' memory is accurate is insufficient to satisfy the Court that the burden of proof has been met.

Knowing that it had already assessed the quality of the witness' memory in determining their credibility, how did the Court find that the accused had been reliably identified? Could an identification be proved beyond a reasonable doubt based on a positive credibility finding

[342] This was confirmed in *B v S* supra note 209 para 18, *Deyi* supra note 210 para 15, *Memani* supra note 211 para 21, *Ngcukana* supra note 207 para 44, *Qunta* supra note 221 para 32, *Booysen* supra note 213 para 186, *Bveni* supra note 214 para 220, *Goni* supra note 215 at 8, *Kupe* supra note 217 at 5, *Mbanyaru* supra note 219 para 9, and *Petersen* supra note 220 para 100.

alone? Or did the Court require additional safeguards against the possibility that the apparently credible eyewitness was incorrect?

At this point, it is necessary to acknowledge that the Court considered additional forms of evidence, such as ballistics or fingerprints, which helped to place the accused at the scene of the crime. However, the Court tended not to consider forensic findings when assessing an eyewitness. As such, they generally bore no weight in how the Court considered the question of whether the eyewitness' identification was correct.

Although the Court assessed the quality of the witness' memory within the credibility inquiry, it frequently considered the possibility of mistaken identification separately. In most cases, this determination was explicitly stated. For example, in *Memani*, it stated that the presence of various factors 'reduces the likelihood of mistaken identification by the eyewitnesses.'[343] Further, in *Ngcukana*, it stated that '[n]either mistaken identity nor a conspiracy to commit perjury is at all plausible in the circumstances.'[344] In *Booysen,* it found that, '[i[n all the circumstances, I am satisfied beyond reasonable doubt that accused 1 was reliably identified as one of the shooters.'[345] Other examples include, *Goni*,[346] *Mbanyaru*,[347] and *Bveni*.[348]

In other cases, the Court did not speak to the question of whether there had been a mistake, but rather simply stated its assurance that the accused had been correctly identified. In *Kupe*, the Court confirmed that the magistrate 'correctly found that the appellant's version was of such a nature that it could not be reasonably possibly true.'[349] In *Petersen*, the Court stated, that "all things considered [...] there is sufficient doubt that I cannot be satisfied beyond

[343] *Memani* supra note 211 para 22.
[344] *Ngcukana* supra note 207 para 76.
[345] *Booysen* supra note 213 para 215.
[346] Supra note 215 at 8: 'The identification cannot be a mistake.'
[347] Supra note 219 para 9: 'The trial court correctly ruled out the question of mistaken identity" on the part of both eyewitness.'
[348] *Bveni* supra note 214 para 208.
[349] Kupe supra note 217 at 5.

reasonable doubt that No 2 has been correctly identified as one of the perpetrators. On the other hand, there is no reasonable doubt in my mind that No 1 was the shooter.'[350]

While the veracity of the eyewitness' memory played a role in coming to these determinations, the Court considered other factors when finding that there could not have been a mistake. As discussed in my second theme, some of these factors include the absence of a motive to falsely implicate the accused, the witness' consistency, and whether the accused was already familiar to the witness. Another significant factor was corroboration,[351] as the Court appeared to find safety in numbers. For example, in *Jordaan*, the Court found that the possibility 'that all three of them could have mistakenly identified the accused in the circumstances is so highly improbable that it may safely be discounted.'[352]

The impact of corroboration can be seen more clearly in cases where the Court used the identification of a more credible witness to support that of one who was less credible. For example, in *Booysen*, the Court chose to accept the evidence of a witness whose conflicting statements called her reliability into question, 'only to the extent that it was independently supported by the acceptable evidence of the other eyewitnesses.'[353] Further, after having acknowledged the significant weakness in one of the witnesses' testimonies, the Court nevertheless accepted that the accused had been correctly identified because, '[t]he fact is, however, that her identification of accused number 1 does not stand alone.'[354] Rather, it was supported by the identification of another witness whose version the Court felt so safe in relying on that it stated that '[i]t must be an outright lie if his evidence is to be rejected.'[355]

[350] Petersen supra note 220 paras 100-1.
[351] *B v S* supra note 209, *Bveni* supra note 214 para 208, *Goni* supra note 215 at 8, *Jordaan* supra note 216 para 118, *Kupe* supra note 217 at 5 and *Petersen* supra note 220 para 74,
[352] *Jordaan* ibid para 118.
[353] Booysen supra note 213 para 206
[354] *Goni* supra note 215 at 8.
[355] Ibid.

These examples show how one witness' strengths can shore up the weaknesses of another. This also sets these cases apart from cases in which the Court deals with the identification of a single witness, because it is partly due to the uncorroborated nature of their evidence that Courts have applied an additional cautionary rule to such witnesses.[356] It is unsurprising that courts would place importance on corroboration when evaluating eyewitnesses' testimony. While the cautionary rule against identification evidence is based on the fallibility of human memory, it requires courts to do more than exercise caution in their consideration. It further requires them to seek some additional safeguard that reduces the risk of a wrong finding.[357] In addition to corroboration, other factors which would ordinarily decrease the risk of a wrong finding may be considered. It is likely for this reason that the Court has previously been shown to also favour witnesses who lack a motive to falsely implicate the accused, and witnesses who were already familiar with the accused.

However, the focus on corroboration implies that a different standard of accuracy may be required of witnesses in different cases. This was made clear by the Appellate Division in *R v Bellingham,*[358] were it stated that:

> '(G)iven the same apparent quality of witnesses, the more there are the more reason there is to accept their story. It is not a mere rule of thumb; if there are two or more witnesses to the same facts their versions can be checked against each other to see if they have given honest and accurate evidence.'

It therefore appears that, when engaging with multiple eyewitnesses in a single case, the Court is willing to accept weaker evidence it would not have otherwise accepted, on the basis that such evidence is corroborated. On the question of human memory, this means that the Court may accept the identification of a witness who cannot, on their own, prove that their memory of the accused is reliable, simply because another witness can. This may not

[356] *Mokoena* supra note 21 at 80.
[357] Schwikkard & Van der Merwe op cit note 16 at 588. As previously mentioned, any factors which would ordinarily reduce the risk of a wrong finding may suffice.
[358] 1955 (2) SA (AD) at 566.

necessarily be problematic. Using the corroboration of a more credible witness to shore up the weaknesses of a less credible witness shows some allowance for the inherent fallibility of human memory. Such allowance was commended above, where I explained that too strict a standard could mean that courts would have to reject reliable evidence simply because it presented inevitable inaccuracies.

However, it should be noted that the Court's focus on corroboration here allows for a level of leniency that is unwise in certain circumstances. If, in applying the requisite level of caution, the quality of a witness' evidence would not have been accepted in a case where they appeared as a single witness, there may be little reason why it should be accepted simply because it has been corroborated. This is especially true where the corroborating witness is not highly credible themselves. Unsafe evidence should not be relied on because it is corroborated by other unsafe evidence – such corroboration may only compound the mistake.

CHAPTER 6: DISCUSSION AND CONCLUDING REMARKS

Drawing my dissertation to a close, this final chapter summarises my findings and considers their implications for how courts may consider the role of human memory in eyewitness testimony.

My argument in this dissertation was grounded in the findings of scientific research, which have shown that the natural function of human memory contains inherent weaknesses. These weaknesses, such as its suggestibility and malleability, mean that it is prone to error. The consequence of these weaknesses in the legal context is that eyewitnesses may misidentify the perpetrator. The consequences of such misidentification reach beyond the restriction of individual liberties, and can affect communities,[359] as well as the reliability of criminal courts' reasoning. Accordingly, it is relevant to study how courts deal with the issues posed by the function of human memory, and whether their approach appropriately incorporates the findings of scientific research on the matter.

My starting point was therefore to determine the framework within which courts operate. My Legal Framework showed that courts are required to apply a cautionary rule to eyewitnesses when assessing their evidence. This rule requires courts to warn themselves of the risk involved in accepting the eyewitness' evidence, as well as requiring some other form of safeguard to support their evidence.[360] I thereafter set out the research findings in my Literature Review, which identified a variety of risk factors that pose a threat to the veracity of a person's memory. This chapter identified risks to which courts should pay attention in their evaluation of eyewitnesses, as well as common myths about what may be indicative of accuracy or inaccuracy, which should be avoided. However here two points should be noted.

[359] See my discussion of Matshaba op cit note 6 and Abramowicz op cit note 7, regarding the deleterious impact of parental incarceration on children and communities.
[360] Schwikkard & Van der Merwe op cit note 16 at 621.

First, scientific research often occurs in optimal conditions, where the objective facts are easily discernible. Consequently, researchers can test the impact of a single or a few factors on a participant's memory with relative accuracy. Courts are dealing with people in suboptimal conditions, and these people may be impacted by a different combination of risk factors each time. Unlike in research studies, objectivity is rarely ever an option in the court room. This is why a court must be satisfied that guilt has been proven 'beyond a reasonable doubt'. Accordingly, courts have enforced the cautionary rule against the acceptance of eyewitness identification evidence, however, this only minimises the risk of accepting an incorrect identification, it does not erase it completely. It is clear is that this risk cannot be erased completely.

Second, my research was essentially focused on the issue of reflection. My Literature Review discussed risk factors which were relevant to the consideration of accurate memory, and my central argument in this dissertation has been that courts should take heed to what the literature has revealed about how human memory functions. However, since courts are judicial creatures, I did not expect to find direct references to scientific research as the basis for the Court's consideration of a particular factor. As such, I focused on whether the Court's approach reflected the scientific research, rather than whether the Court mentioned researchers or their findings.

This point brings me to a consideration of my research question. In this dissertation, I asked how courts consider the role of human memory in eyewitness testimony. Combined, my Legal Framework and Literature Review revealed that the South African criminal courts are aware of the risk involved in accepting identification evidence. This was evinced by the SAP rules relating to identification parade procedures, and the enforcement of the cautionary rule. The oft-cited reason for this rule is found in the *Mthetwa* judgment. Although this case does not refer specifically to research findings, it reflects an understanding of what the literature has

identified. Many of the factors *Mthetwa* listed as relevant to the consideration of the eyewitness' reliability were also found in the literature. Examples include the lighting, distance, and opportunity for observation.

However, I noted the importance of *Mthetwa's* inclusion of other factors whose relevance to the question of accurate memory were not included in the literature. Examples are corroboration and the witness' prior acquaintance with the accused. This revealed that, when considering eyewitnesses, a court may consider more than the factors discussed in the literature. As such, there is more to the evaluation of eyewitnesses than the role or veracity of their memory.

This was further explored in my Findings chapter. After setting out my methodology, and justifying my focus on murder cases heard by the Western Cape High Court, I set out the themes which emerged from my analysis of the cases. First, I discussed the apparent inconsistency in the level of attention which the Court paid to the question of correct identification. In this discussion, I concluded that this was likely because of the deference which an appeal court must pay to the trial court's findings. It was clear that, although eyewitnesses must always be approached with caution, it is not every court's duty to deeply question the veracity of their memory. Consequently, an appeal court cannot deviate from the trial court's findings unless there has been a material error.

I then went on to discuss the Court's terminology. In this, I noted that, as legal creatures, courts use terms such as 'reliability' and 'credibility' when discussing eyewitnesses. These terms have been given meaning in previous judgments. Credibility involves the consideration of factors such as the witness' candour and demeanour, and the witness' internal contradictions. *Stellenbosch Wine Farmers*[361] indicated that a reliability inquiry will include some aspects of

[361] Supra note 78 at 5.

the credibility inquiry, with additions that are relevant to the question of accurate memory. The *Mthetwa*[362] judgment has provided authority for these factors.

As the credibility and the reliability inquiries are closely linked, the Court often used the terms together, or used them interchangeably. However, it was clear that establishing a witness' reliability entailed the Court's satisfaction that the witness' identification was correct. In coming to this conclusion, the Court engaged in a holistic assessment of each individual witness' evidence, as well as the combined strength of the witnesses' testimonies. This assessment made it clear that factors affecting the veracity of the witness' memory play an important, but not the ultimate, role.

I attributed this weighing of considerations to the legal nature of the Court's inquiry. Although the Court's inquiry showed some awareness and appreciation for the scientific literature, it remains a judicial creature. Consequently, it is unsurprising that it was ultimately more concerned with whether the State has discharged its burden of proof, and therefore whether it could justify convicting the accused, rather than analysing the witness according to research findings. However, it should be of concern that the Court came to a positive reliability finding in instances where witnesses had made clear mistakes, or significant risk factors were present, because of considerations that had nothing to do with the veracity of the witness' memory.

While it may be difficult to determine the veracity of a witness' memory in the court room, I suggest that Courts should not conflate the consideration of memory with other legal concerns, such as the witness' confidence, and prior acquaintance with the accused.[363] Rather than including the assessment of a witness' memory within a wider inquiry, this assessment should be treated separately. This means that courts will have to make a pronouncement on

[362] Supra note 14 at 768 a-c.
[363] These were discussed in my second theme from page 67.

their opinion of the witness' memory, apart from their opinion on the witness' performance or motives.

This would not only remove the risk of incorrectly or insufficiently assessing the witness' memory. It would also not interfere with the general nature of a court's inquiry. The cautionary rule requires that courts should alert themselves of a present risk, and then take additional steps to guard against that risk. The separate inquiry into a witness' memory, apart from an inquiry into their performance or motives, would serve to help satisfy the first requirement. After having clearly done this, courts should thereafter take additional safeguards, such as corroboration and apparent motives,[364] into account.

[364] Schwikkard & van der Merwe op cit note 16 at 588.

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APPENDIX A

Research Ethics Committee

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Certificate of Approval for Ethical Clearance

PRINCIPAL INVESTIGATOR/SUPERVISOR: KELLEY MOULT	**ETHICS REFERENCE NUMBER: L0025NS-2023**
STUDENT: ANESU MUSABAYANA FACULTY: LAW DEPARTMENT: PUBLIC LAW	ORIGINAL APPROVAL DATE: 01-JUNE-2023 APPROVAL EXPIRY DATE: 31-MAY-2024

PROJECT TITLE: Honest Mistakes: The Role of Human Memory in Eyewitness Testimony

PURPOSE OF RESEARCH: Masters by coursework and dissertation. The research aim is to assess Courts' approaches to eyewitness testimony.

CONDITIONS OF APPROVAL

This Certificate of Approval is valid for the above term provided there is no change in the protocol.

Modifications

To make any changes to the approved research procedures in your study, please submit a formal "Request for a Modification" to the REC Administrative Office. You must receive ethics approval before proceeding with your modified protocol.

Renewals

Your ethics approval must be current for the period during which you are recruiting participants or collecting data. To renew your protocol, please submit a "Request for Renewal" form before

the expiry date on your certificate. You are responsible for submitting this by at least 2 months prior to the expiry date of clearance date issued.

Project Closures

When you have completed all data collection activities and will have no further contact with participants, please formally notify the REC: Law as well as your supervisor where applicable.

Certification

This certifies that the University of Cape Town Law Faculty's Research Ethics Committee has examined this research protocol and concluded that, in all respects, the proposed research meets the appropriate standards of ethics as outlined by the University of Cape Town Research Regulations Involving Human Participants.

Signed by candidate

_____

DR SIMPHIWE PHUNGULA REC: LEAD REVIEWER

Certificate Issued On: 20/06/2023

APPENDIX B

B v S

In this case, a minor was charged with one count of murder, as well as two counts of attempted murder; one count of possession of an unlicensed firearm, and one count of possession of ammunition. The matter was placed on automatic review in terms of the Child Justice Act 75 of 2008, and was heard in February 2016. From there, the appellant launched an appeal against the sentence only in the Western Cape High Court which, in its judgment, considered the eyewitness evidence that was placed before the court a quo.

Three eyewitnesses appeared for the State, all testifying to have seen the appellant shoot and kill the deceased. They also confirmed that he had been the only one shooting at the scene.

The appellant's version was that, when the shooting started, he had been in line to buy alcohol and fell to the ground when he heard the shots go off. He testified that a man in a brown jacket had been the shooter, and that he had simply been confused with this man.

The court a quo rejected his version, as it failed to explain why three state witnesses positively identified him as being the shooter and was found to be "inherently improbable to the point of not believable."[365]

Counsel for the appellant attempted to rely on discrepancies between the witnesses' testimonies to prove their unreliability, however the trial court found them to be credible witnesses. It further fount that the discrepancies between the eyewitness' testimonies were not

[365] B v S supra note 209 para 10.

material in nature. Consequently, the High Court found that nothing warranted a deviation from the trial court's finding.[366]

Although the High Court did not explain what was meant by 'credible', it did directly compare it to the appellant's evidence, which was found to be highly improbable. It further referenced *Mthetwa* in saying that appropriate caution must be used when approaching eyewitness testimony, and affirmed the trial court's approach, thereafter dismissing the appeal against the conviction on all counts.

Deyi and Another v S

The appellants in this case were charged attempted robbery with aggravating circumstances, attempted murder, possession of an unlicensed firearm and unlawful possession of ammunition, as well as murder. The events took place in June 2007, where an attempted robbery resulted in the death of the deceased.

The State's case rested on direct and circumstantial evidence, based on ballistic and eyewitness evidence. Four eyewitnesses were recorded to have testified as to the appellants' identities. Before the High Court, counsel for the appellants contended, firstly, that there was no direct evidence before the trial court proving the appellants' presence at the scene and, secondly, that the trial court misdirected itself in relying on one of the eyewitnesses' evidence.

This eyewitness saw a white Toyota Corolla not far from the crime scene, where she observed the car stop for the second appellant, who looked back at her and frightened her. She called the police, who encountered the car soon afterwards and engaged it in a chase, during

[366] B v S supra note 209 para 12.

which the second appellant fired shots at the police. The appellants' car crashed, enabling the police to catch and arrest the appellants. There were three people in the car, including the first and second appellants. The third person passed away before commencement of the trial.

As such, the eyewitnesses did not see the appellants at the crime scene, but rather in a car not far from the crime scene. Relying on *R v Blom,*[367] the High Court found that the correct approach to dealing with circumstantial evidence was to only draw an inference that could be supported by the proven facts. The Court found that these facts supported the inference drawn by the eyewitness identifications linking the second appellant to the crime. As such, the second appellant's appeal was dismissed.

However, the Court found that, although the first appellant was in the car, the magistrate had not looked at his individual conduct. As such, there was no evidence apart from his presence linking him to the commission of the robbery or the shooting. The Court consequently found that the magistrate had erred in finding the first appellant guilty based on common purpose because of his presence alone. The first appellant was accordingly acquitted and discharged on all counts.

Memani & another v S

The two appellants were convicted in the Regional Magistrate's court of one count of murder, robbery with aggravating circumstances, illegal possession of a firearm, and two counts of attempted murder. The State's version was that, in September 2009, the appellants fired shots at two men who were unloading goods outside of a supply store in the Cape Flats. One man was fatally shot. The remaining three men were eyewitnesses. However, one witness was

[367] 1939 AD 188 para 14.

deemed to be an accomplice by the trial court. Consequently, his evidence was not considered in this dissertation.

With regards to identity, the remaining eyewitnesses identified the first appellant as the man who discharged the firearm. The Court stated that the correct approach, in its view, was to evaluate the claims of the eyewitnesses against the veracity of the appellants' testimonies.[368] The Magistrate was quoted as having been "impressed with the eyewitnesses as reliable and honest,"[369] notwithstanding the volatile moving environment, the fact that they were emotionally charged, and that observation time was limited. Absent any material misdirection, the Court held that it was bound to respect the Magistrate's findings. Consequently, both appellants' appeals against their convictions were dismissed, although the second appellant's appeal against the sentence was successful.

Ngcukana v S

This case involved shootings that occurred between November 2006-March 2007.. The matter appeared before the trial court in the period between October 2012-April 2013. The appellant was convicted of four counts of murder, four counts of attempted murder, and possession of the firearms and ammunition that were used in the murder and attempted murder charges. However, the High Court focused heavily on the murder charge contained in count one. For this, the State presented three witnesses, aged 17, 19 and 23 respectively at the time of the crime, who positively identified the appellant as having been the shooter. In accordance with my exclusion requirements, the minor's evidence was not assessed for this dissertation.

[368] Memani case supra note 211 para 21.
[369] Ibid para 22.

Of the remaining two witnesses, the first testified that she was speaking to the deceased when she heard the second witness shout that she should get away from him. The first witness then heard three shots go off and, as people were running out of the tavern, she saw the appellant holding a firearm about "six metres away" from her.[370] She ran and hid and saw the appellant and another perpetrator kicking one of the deceased. She testified that she was familiar with the appellant's appearance. The second eyewitness confirmed the first's evidence that she went to speak to the deceased, that Asanda shouted for Thuliswa to get away from him, and that she saw the appellant with a firearm outside the tavern.

The appellant testified that he was at his parents' home on that night and that he went to bed without having gone to the tavern. His father confirmed his alibi.[371] Counsel for the appellant's first main contention against the trial court's acceptance of the eyewitnesses' testimonies was that they had consumed alcohol on the night.

The second related to the confusion caused because the eyewitnesses misidentified one of the accused in respect of count one, as the suspect and the shooter had been two men who looked similar and had the same nickname. However, the trial court found that this error regarding an accused did not detract from the reliability of their identifications of the appellant. In supporting the trial court's findings, the High Court mentioned the trial court's observations that the witnesses made "a favourable impression," despite the misidentification.[372]

The third contention made by the appellant's counsel related to discrepancies between the eyewitness' dockets and their oral statements. However, the trial court identified police ineptitude as being the cause for these discrepancies. This was because the police did not read the second witness' statement back to her for confirmation. Further, the police wrote both

[370] *Ngcukana* supra note 207 para 64.
[371] Ibid para 70.
[372] Ibid para 77.

witnesses' statements in English, despite them giving their accounts in Xhosa. In this, the court made note that caution should be exercised when detracting from a witness' credibility on the basis of a police statement.

The High Court concluded that the trial court had not misdirected itself with regards to count 1 and its acceptance of the eyewitness' reports and identifications, and consequently dismissed the appeal against conviction.

S v Booysen

The accused in this case were charged with contravention of the Prevention of Organised Crime Act 121 of 1998, two counts of murder, three counts of attempted murder and contravention of the Firearms Control Act 60 of 2000.

The events took place at night. Despite minor discrepancies in the eyewitness' testimonies, the general picture that can be painted is a shooting that took place outside a black of flats in Atlantis, Cape Town. The State called forward eight witnesses, who's testimonies were all assessed by the High Court.

In its approach, the Court restated the principle that the state bears the onus of proving the accused's guilt beyond a reasonable doubt, and that the correct approach in determining this depends on whether the eyewitness' identifications are "credible and reliable," and whether there is a reasonable possibility that the accused's alibis might be true.[373] It explained that,

[373] *Booysen* supra note 213 para 186.

although they might seem like two separate questions, they launch a single enquiry, since an alibi defence is essentially a denial of eyewitness' identification.[374]

The court also considered the *Mtethwa* dictum regarding the fallibility of human memory, stating that the reliability of an identification is not a compartmental question, but is ainstead an aspect "to be considered in the light of the totality of the evidence in the case and the probabilities."[375]

In its analysis, the Court appeared to put itself in the shoes of someone in the eyewitness' position. For example, the court found that, in light of the totality of the evidence, one witness' identification was "wholly unreliable."[376] It acknowledged that the witness was most likely caught unawares when the shooting broke out and so therefore could "not have had much of an opportunity to take note of the identity of his assailants."[377] The evidence before the court also suggested gang-related tension between Anthony, which the court stated would "not be surprised" to find led the witness to make an identification based on his suspicions and not his observations.

In its assessment of another witness, the court determined that she was an unsatisfactory witness with regards to all counts except one. This had to do with two contradictory statements that she made, which called her reliability into question.[378] Although she was consistent in her identification of accused 1, the Court accepted her evidence with consideration of the fact that it was supported by two other witnesses.

[374] *Booysen* supra note 213 para 186.
[375] Ibid para 192.
[376] Ibid para 193.
[377] Ibid.
[378] Ibid para 206.

When discussing a third witness, the Court found that he was a "satisfactory witness."[379] The facts that he was not "not shaken in any material aspect in cross-examination" and that he was candid about his inability to identify both the shooters and was able to provide reasoning for it were viewed positively by the court.[380] The Court also considered the fact that he was well-acquainted with accused 1 as supporting the conclusion that Florence had reliably identified him.[381]

The Court also considered the possibility that the eyewitnesses had fabricated their stories, which might also be indicative of a consideration of prior discussion. It found that because the eyewitnesses' accounts differed from each other, and because they were unafraid to disagree with other eyewitnesses' evidence indicated that they had not colluded beforehand.[382]

Having considered all the evidence before it, the Court found that there was sufficient evidence to convict Accused 1 for two counts of murder, while the other two were acquitted on all counts. Regarding accused 3, this was because he was only identified by a single witness, whose identification of accused 1 had only been accepted because it was buttressed by the evidence of other more reliable witnesses. The evidence relating to accused 2 was found to not satisfy the requirements of the common purpose doctrine.

[379] *Booysen* supra note 213 para 207.
[380] Ibid.
[381] Ibid.
[382] Ibid para 203.

S v Bveni

The case revolved around a series of attacks on people in Cape Town in March 2018. The accused appeared before the court facing 12 counts, including two charges of murder, one of attempted murder, and two counts of assault. The State brought forward 21 witnesses, six of whom positively identified the accused. In assessing their identification evidence, the Court predominantly focused on the procedure required for a proper photo identification parade. To this extent, it looked specifically at the identifications made by four of the witnesses.

The first witness described the accused as having dark skin, a big nose, small eary, very short scruffy 'dreadlocks' and being short and stocky.[383] The Court took note that, according to the report on his identification parade, he completed it within six minutes and with "a fair degree of certainty and confidence, without hesitation."[384]

The second eyewitness completed a photo identification parade three days after the first. The attending officer estimated that it took him between twenty to thirty minutes to complete it, because the officer had invited him to take his time.[385] The witness claimed that he was able to identify the accused because, as a former photographer for the South African Navy, he focused on the accused's face and eyes during the attack.[386] He described the accused as having a dark complexion, being taller and younger than himself, and having 'mini dreads,'[387] although it was the officer who gave him this description. It was recorded the he made his identification with "a fair degree of certainty and confidence."[388]

[383] *Bveni* supra note 214 para 98.
[384] Ibid para 101.
[385] Ibid para 106.
[386] Ibid para 107.
[387] Ibid para 108.
[388] Ibid.

The third witness attended a photo identification parade the next month in May 2018, where he "immediately identified the accused".[389] It was recorded that he made his identification "instantaneously without hesitation and with a high degree of confidence and certainty."[390] The fourth eyewitness discussed identified the accused at a photo identification parade in March 2018, where she identified him "immediately."[391]

In its assessment of their evidence, the Court considered two questions: whether the identification parade had been proper, and whether the evidence of the eyewitnesses was reliable. In this, it stated that reliability "depends on a variety of factors", which includes credibility and others,[392] and found that all the witnesses who testified "impressed as honest, reliable and credible witnesses."[393] It was particularly impressed by the facts that two witnesses who had no motive to falsely implicate the accused, and that another two were particularly skilled at facial recognition because of the chosen vocations.

Further, the Court noted that the eyewitnesses arrived and completed their identification parades alone, potentially showing awareness of the risk of prior discussion. It found that it was so improbable that so many eyewitnesses, many of whom had not been proven to have even known each other prior to the photo identification parade, would have all identified the same person justified the finding that they had correctly identified the accused. Accordingly, the accused was found guilty on the count of murder.

[389] *Bveni* supra note 214 para 112.
[390] Ibid para 113.
[391] Ibid para 135.
[392] Ibid para 196-7.
[393] Ibid para 178.

S v Goni

The accused in this case were charged on six counts, including two counts of murder. The Court considered the evidence of two eyewitnesses. The first was a woman who, on the night of the murder, had left her house, leaving her two daughters and a ten year old family relation there. She testified that ,when she returned home, she saw a young man on premises whom she did not know but described as being "of dark complexion, not tall of short and not taller than she is."[394] Inside the house, she saw another young man of light complexion whom she did not know standing outside her bedroom. Despite the fact that he had a firearm in his hand, the took note that he had a scar along his face running from his ear to level with his mouth, and he was slightly taller than her.[395]

She completed a photo identification parade at the police station that same night and pointed out accused two among the photographs.[396] At a second photo identification parade in March 2007, she pointed out accused number 1 as being among the photographs. The Court was able to view a video of the identification parade, and made note of the fact that she identified accused 1 as soon as she came across his picture.[397] She was a single witness in respect of accused number 2 and so I focused on her identification of accused 1, which was supported by the identification of the second eyewitness.

He testified that he knew the accused personally and told the police that night that he would be able to identify him. He was then presented with six photographs, where he pointed out accused 1.

[394] *Goni* supra note 215 at 2.
[395] Ibid at 3.
[396] Ibid at 4.
[397] Ibid.

Counsel for accused 1 contended that the first eyewitness' evidence should be treated with "extreme caution."[398] This was because, firstly, she saw the accused from a distance through a window and would likely not have been able to see the scar on the left side of his face. Secondly, she identified him at the parade more than five months later, leaving a considerable gap in time in which she might have seen him in court, as she allegedly frequently visited courthouses.[399]

However, the court found that it was compelling that her identification did not stand alone, and was corroborated by someone who both knew the accused and identified him shortly after the event. Although there were discrepancies between the second eyewitness' written statement and his evidence in court, the Court found that his identification could not have been a mistake, because he knew the accused and addressed him by name. The Court also took note of the fact that the second eyewitness had no apparent reason to implicate the accused.[400]

The details between the two eyewitnesses' evidence was found to relate only to peripheral details and complemented each other on the issued of accused 1's presence at the crime scene.[401] Further, the discrepancies between the second eyewitness' written statement and presented evidence were found to be "expected" given the three and a half year difference between his statement and presentation of evidence.[402] Based on their evidence, the court found accused number 1 guilty of both counts of murder.

[398] *Goni* supra note 215 at 8.
[399] Ibid.
[400] Ibid.
[401] Ibid at 9.
[402] Ibid.

S v Jordaan

The accused in this case were charged with murder, attempted murder, and the alleged unlawful possession of a firearm and ammunition. The State called several eyewitnesses, one of whom was a minor at the time of the incident. The remaining eyewitnesses positively identified the accused.

In its assessment of their evidence, the Court made special note of the discrepancies between the witnesses' written and oral statements, stating that lawyers should not become too bogged down by difference between police and oral statements, since the procedures served different purposes.[403] It further considered the fact that several of the witnesses knew the accused by name and that they were calm and frank during cross-examination as weighing in their favour, especially when contrasted with the apparent coyness of the accused.[404] It found that the probability that all three witnesses in these circumstances could have misidentified the accused was so highly improbably that it [could] safely be discounted.'[405] As such, the burden of proof was met, and two of the accused were found guilty of murder.

S v Kupe

The appellant in this case was convicted on one count of murder in the regional court. He was one of four persons who allegedly murdered the deceased in June 2007. The State relied on two eyewitnesses who positively identified the appellant as being one of the perpetrators.

[403] Jordaan supra note 216 para 20.
[404] Ibid para 118.
[405] Ibid.

The first testified that he was at a street council meeting when he heard a group of people shouting and went to investigate. He found the appellant and three others beating the accused. In its assessment of his evidence, the Court made mention of the fact that he knew all four of them by name. The second eyewitness was an elderly woman in the neighbourhood. She had been at a friend's house when she received a call informing her that the deceased was being beaten outside. She corroborated the first witness' testimony that the four men were beating the deceased, and she similarly knew all four of them.

The full extent of the High Court's engagement with the witnesses' reliability was made in a single paragraph discussing the trial court's assessment. It stated that the magistrate 'carefully evaluated the evidence,' and found that the witnesses corroborated 'each others' evidence in all material respects.'[406] Factors that weighed in favour of the witnesses were that they were older, respectable and did not have any apparent motive to falsely implicate the appellant.[407] Because it was also highly unlikely that they would both identify the same four perpetrators in a crowd, the magistrate found that the appellant's version could not reasonably be possibly true. The High Court stated that the magistrate was 'correct' in his assessment and conviction.[408] It accordingly dismissed the appeal against conviction.

S v Mabenu

This case involved a housebreaking, in which the three accused robbed and killed the deceased. As such, the three accused were charged for murder, robbery with aggravating circumstance, possession of a firearm and illegal possession of ammunition. The State led with evidence from

[406] Goni supra note 215 at 5.
[407] Ibid.
[408] Ibid.

a number of eyewitnesses who positively identified the accused as being at the crime scene, and identified accused 2 as being the one who shot and killed the deceased.

After having set out the witnesses' evidence, the Court stated that, although it was reminded of the relevant cautionary rule against identification evidence, the ultimate standard to be met was proof beyond a reasonable doubt. As such, it did not want to be stifled by formalism in its assessment of the witnesses' evidence. An example in which it displayed leniency was its consideration of the discrepancies between various witnesses' written statements. The Court found that, despite these discrepancies, there was a 'golden thread'[409] that permeated through their testimonies which lent to the conclusion that the accused had been reliably identified. As such, all three accused were found guilty on the charge of murder.

S v Mbanyaru

The appellants had been convicted in October 2006 of one count of murder, one count of attempted murder and the unlawful possession of a firearm. Both appealed on the merits of their convictions, and argued that the trial court had erred, among other things, in accepting the State's identification evidence.

The State had called forward two eyewitnesses, and the High Court considered the fact that both of them knew the appellants as strengthening the veracity of their identifications.[410] Regarding the first eyewitness, the Court mentioned that she knew the area in which the appellants lived, she knew their nicknames, and so it was improbable that she would misidentify them.[411] Although second eyewitness did not know the second appellant, he knew

[409] Mabenu supra note 218 at 96.
[410] *Mbanyaru* supra note 219 para 6.
[411] Ibid para 9.

the first. Because of this familiarity, the Court found that the trial court had correctly ruled out the possibility of misidentification with respect to both appellants.

The Court then turned to consider the inconsistent statements made by the eyewitnesses. The first eyewitness had alleged that only the first appellant was armed, whereas the second eyewitness testified that both appellants had been armed. Counsel for the appellants argued that this was a material error in their testimonies. The Court differed from the trial court, which had accepted the second eyewitness' version, and found that the overwhelming evidence pointed to only one firearm being used.[412] As such, it found that the trial court had made an incorrect finding of fact. From this, the Court then considered whether the two appellants had acted with common purpose, and found that the fact that the second appellant was on the scene of the crime at the time of the shooting was not enough to confirm that he had acted with common purpose with the first appellant. As such, the second appellant was entitled to an acquittal on all charges, and the Court confirmed the convictions of the first appellant.

S v Petersen

The two accused were charged with trespassing, attempted murder, murder, unlawful possession of a firearm and unlawful possession of ammunition with regards to events relating to a shooting that took place in January 2016. The State called four eyewitness who made positive identifications of the accused.

All the eyewitnesses attended a photographic identity parade. A key factor repeated throughout the case was the fact that all four of the witnesses knew both the accused and were

[412] *Mbanyaru* supra note 219 para 12.

familiar enough with them to also know their nicknames and their gang association.[413] With regards to its evaluation, the High Court found that it was unsurprising that the eyewitnesses' testimonies were not entirely consistent, attributing this to the fast pace of events.[414]

The first eyewitness testified that he knew both of the accused by name but, while he was able to identify the first accused, he claimed to not be able to identify the second.[415] The second and third eyewitnesses similarly testified that they knew both the accused by name,[416] and they, along with the fourth eyewitness, identified both the accused. The second eyewitness saw the accused as they were running across the netball court. Although there was a discrepancy between two of her statements, the Court found an explanation in the fact that she was 'combining what she herself observed with what she had heard from others.'[417] The Court did not want to 'judge her too harshly,'[418] since she was likely very traumatised and had slept very little when she made her first statement, causing her to not fully appreciate the importance of limiting her statement to the things she actually saw or to read back over her statement carefully. The Court found that, whatever the reason for the discrepancy was, it was satisfied that she was honest.[419]

As such, the Court was impressed with both the first and second eyewitnesses, however, it found that it could not assume the third and fourth eyewitnesses had moral scruples because they were gang associated.[420] In its assessment of the third eyewitness, the Court mentioned that he was soft-spoken, passed standard five and wondered if his "intellectual faculties had been impaired by drug use.[421] Although it did not believe that he was being untruthful, it found

[413] *Petersen* supra note 222 para 49.
[414] Ibid para 25.
[415] Ibid para 16.
[416] Ibid paras 16 and 19.
[417] Ibid para 58.
[418] Ibid.
[419] Ibid para 59.
[420] Ibid para 37.
[421] Ibid para 38.

that it had to apply "great caution" in relying on his evidence.[422] This had to do with material conflicts between his oral testimony and the statement he made to the investigating officer, although the Court's opinion of him was also dampened by his occupation, education level and demeanour.

Although the fourth eyewitness was consistent in his identification of both the accused, his identification of accused 2 was undermined by contradictory statements. While he started off well, things were derailed when he was asked to explain a material conflict between two statements he had made before the trial had started with regards to who the shooter was.[423] As best as the court could understand him, he claimed to have been influenced by the third eyewitness to claim that the shooter was accused 2. The third eyewitness later told him that the shooter had actually been accused 1, apparently causing the fourth witness to say so during the identification parade.[424] This is indicative of prior discussion, but also the fact that they in some way colluded prior to the identification parade. Further, the Court asked itself why, if the fourth eyewitness knew accused 2, he did not also identify him on his own.[425] Despite this, the Court relied on his evidence, although with "great caution", and this had to do with the fact that it was corroborated by the first and second eyewitnesses' testimonies.

The Court was aware that it was the witness' alibi defence against the four identifying eyewitnesses, and asked itself whether it was satisfied beyond a reasonable doubt that his version was reasonably possibly true.[426] It found accused 1 guilty of all charges. However, it

[422] *Petersen* supra note 222 para 43.
[423] Ibid para 44.
[424] Ibid para 47.
[425] Ibid para 65.
[426] Ibid para 74.

found accused 2 not guilty of all charges, partly because of the admissions made by the witnesses that they may not have fully paid attention to accused 2, who was not the shooter.[427]

Qunta and Another v S

The facts of this case centre on a shooting in June 2004. The two appellants were accused numbers two and three respectively before the court a quo, and were convicted on eight counts of robbery with aggravating circumstances, one count of murder, and two counts of unlawful possession of firearms and ammunition.

The State's version was that a group of armed persons entered a restaurant in Cape Town and proceeded to rob the guests and restaurant manager. During the course of the robbery, one member of a dining family was shot and fatally wounded, and passed away from his injuries the next morning. The appellants alleged that, while they were present in the restaurant during the robbery, they were not participants in its commission.

There were several eyewitnesses. The three surviving members of the deceased's family testified; however they were unable to positively identify either of the appellants. Of the other two witnesses, one eyewitness was a customer at the restaurant and was able to identify accused number three. The witness was the restaurant's manager, and he identified both the appellants as having been involved in the robbery and shooting.

The High Court included the comments of the court a quo, mentioning that the trial court has the advantage of interacting with the witnesses. Although there were minor differences in the identifying witnesses' evidence, the High Court agreed with the trial court

[427] Ibid para 97.

that the differences were not material and that they "can be explained by the fact that the witnesses observed a fast-changing series of traumatic events from different vantage points."[428] Consequently, the Court dismissed the appeals against the convictions on the counts of robbery and murder. Beyond this, the High Court did not engage with the evidence of the eyewitnesses or their credibility.

Sophazi v S

The appellants were convicted in the Cape Town Regional Court of murder and appealed to the High Court with respect to both conviction and sentence. The State had brought forward to eyewitnesses, who both made identifications of the accused. The facts generally were that the five appellants had been together in a car that was hit with a stone. They pulled the car over by two men to enquire whether they knew anything about the stone. They were then attacked by a different group of people in the vicinity and fought to defend themselves. At some point, the deceased was killed during the fight.

The magistrate in the trial court had rejected the appellants' evidence where it contradicted that of the State witnesses and found that they had all been correctly identified. She found that the first eyewitness, who was a police captain, to be an outstanding witness, and the High Court agreed with this sentiment. However, it indicated that this was due to his performance in a dangerous situation and not his conduct as a witness.

The Court focused primarily on the doctrine of common purpose and did not engage with the question of identification in detail. It dealt with each of the appellants, as it found that

[428] *Qunta* supra note 221 para 30.

it had a duty to 'consider the evidence of each accused separately and individually.'[429] In doing so, the Court focused on the conduct that the eyewitnesses attributed to the appellants in determining whether they had partaken in the crime. However, it did not enquire into the likelihood of their identification. Based on the probabilities of their versions being true, it found that the first, second and fourth appellants had been correctly identified, and set aside the convictions against the third and fifth appellants.

[429] *Sophazi* supra note 222 at 10.