

SOUTH AFRICA / JUDGMENT

Matsekane and Another v S (A115/2018) [2021] ZAGPPHC 674 (18 October 2021)

[2021] ZAGPPHC 674

COURT

North Gauteng High Court, Pretoria

BEFORE

Nyathi, Yacoob

CASE / FILE NUMBER

A115/2018

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IN THE HIGH COURT OF SOUTH

AFRICA

GAUTENG

PROVINCIAL DIVISION, PRETORIA

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER

JUDGES: NO

(3)

REVISED: NO

(4)

Date of hearing: 02

September 2021

CASE

NO: A115/2018

In

the matter between: KENNETH
 MATSEKANE
 1st Appellant
 DANIEL
 THEKISO
 2nd
 Appellant
 And
 THE
 STATE
 Respondent

JUDGMENT

NYATHI AJ

A.

INTRODUCTION

- [1] This is an appeal by both Appellants against conviction only, after their conviction and sentence by the Regional Magistrate in Sebokeng.
- [2] They were found guilty of one count of murder, two counts of robbery with aggravating circumstances, one count of rape and one count of kidnapping. They were sentenced as follows:

First Appellant:

Count 1: Life imprisonment

Count 2: 15 years imprisonment

Count 3: 15 years imprisonment

Count 4: Life imprisonment

Count 5: 2 years imprisonment

Second Appellant:

Count 1: Life imprisonment

Count 2: Twenty years imprisonment

Count 3: Twenty years imprisonment

Count 4: Life imprisonment

Count 5: 2 years imprisonment

- [3] The Appellants were legally represented throughout their trial.
- [4] The 1st Appellant pleaded not guilty to Count 1 (murder) and denied any involvement in the commission of the murder. 1st Appellant further pleaded guilty to counts 2 up to 5. 1st Appellant made admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977 in respect of counts 2 to 5. In due course the 1st Appellant closed his case without testifying.
- [5] 2nd Appellant pleaded not guilty to all counts. He denies being involved in the commission of any of the offences he is charged with but admits having consensual intercourse with the complainant at a place called Chaka's. Various exhibits were handed in and a trial-within-a-trial was held regarding the admissibility of an extra-curial confession made by the 2nd Appellant. Three State witnesses testified during the trial-within-a-trial and the 2nd Appellant also testified.

B. SUMMARY OF EVIDENCE

- [6] The State called 5 witnesses to testify.
- [7] On the night of 21 March 2015, the two Appellants went on the rampage in Sebokeng Township, leaving a trail of murder, robbery of two motor vehicles and a female who was gang raped.
- [8] V[...] P[...] M[...] testified that on 21 March 2015 she was seated in a motor vehicle with her boyfriend, the deceased. The 2nd Appellant knocked on the driver's window. After the deceased rolled down his window, the 2nd Appellant asked directions to a certain Bra Tizza. The deceased answered that he did not know Bra Tizza whereafter the 2nd Appellant shot the deceased with a firearm. At that stage, the 1st Appellant arrived and assisted the 2nd Appellant in taking the deceased out of the motor vehicle. The 1st Appellant got into the driver's seat, while the 2nd Appellant took the deceased's cell phone and cash.
- [9] The 1st Appellant warned Miss M[...] not to do anything otherwise she will be shot. The 2nd Appellant got into the back seat of the motor vehicle. They drove away from the scene with Miss M[...] still in the vehicle.
- [10] Along the way, the 1st Appellant indicated that there was something wrong with the motor vehicle. The motor vehicle was stopped, and everybody got out and walked away. Along the way the 1st Appellant requested the firearm from the 2nd Appellant as he intended to hijack another motor vehicle. The 1st Appellant returned to them without hijacking the motor vehicle as one of the occupants was known to him. They kept on walking until they reached a certain Tavern. The 2nd Appellant went into the Tavern to buy beer, while the 1st Appellant remained outside with Miss M[...]. The 2nd Appellant returned, and they kept on walking.
- [11] They reached a house where two females were seated in a parked motor vehicle. The firearm was handed back to the 2nd Appellant. The 2nd Appellant approached the parked motor vehicle and he pointed one of the ladies with the firearm, demanding the keys. The 1st Appellant

took the keys from a lady who was carrying a baby. The lady with the baby was assaulted with an open hand. A ring was taken from the second lady. Miss M[....] was instructed to get into the motor vehicle, and they drove away.

- [12] After a while they stopped in an open veldt. Miss M[....] was taken out of the motor vehicle. She was then raped in her anus as well as in her vagina by the 2nd Appellant. He only ejaculated after inserting his penis into her vagina. The 1st Appellant was standing nearby watching. Miss M[....] was thereafter raped by the 1st Appellant. It was dark at the spot where Miss M[....] was raped. The 1st Appellant wanted to shoot Miss M[....] but was stopped by the 2nd Appellant. The 2nd Appellant indicated to the 1st Appellant that they should not kill her, as they were still going to rape her at a later stage.
- [13] They drove away from the veldt and parked in a yard with shacks. The two Appellants argued with one another inside the motor vehicle. Miss M[....] was taken from the motor vehicle by the 1st Appellant and taken with him to a tavern. They returned to the parked motor vehicle. The 2nd Appellant and one of his friends were seated in the back of the motor vehicle. They all left in the motor vehicle. After the motor vehicle was stopped, the 1st Appellant wanted to take Miss M[....] with him to his home. The 2nd Appellant objected. The unknown friend took the motor vehicle keys and drove it against the wall of a certain house. The 2nd Appellant fired a few shots into the air. The 1st Appellant grabbed Miss M[....] and took her to his home nearby home. Upon their arrival at the home of the 1st Appellant, he left her in the company of an unknown man who they found standing at the gate. The 1st Appellant left to go back to the motor vehicle. Miss M[....] reported to the unknown man that she had been kidnapped and raped by the 1st Appellant and his friend. Miss M[....] was taken to the family of the unknown man. The unknown man was a family member of the 1st Appellant and there were family members of the 1st Appellant in the home. The 1st Appellant came back and instructed Miss M[....] to accompany him. She refused. The 1st Appellant then assaulted Miss M[....] with fists and took out a knife. The unknown man intervened. The wife of the unknown man lent Miss M[....] her phone with which Miss M[....] phoned her mother. A member of the 1st Appellant's family phoned the Police. When the Police arrived, she pointed out the place where they had left the motor vehicle of the deceased. The deceased was still lying on the ground. The Police received a tip where the Appellants were drinking. They found the 1st Appellant sleeping in the Tavern. The 1st Appellant was arrested after Miss M[....] pointed him out. Miss M[....] was taken to the Police Station to make a statement. Thereafter she was taken to hospital.
- [14] At a later stage Miss M[....] was contacted by the Police and informed that the 2nd Appellant was arrested. She had to go to Leeuhof Prison to point out the 2nd Appellant amongst other people at an identification parade. She did not point out the 2nd Appellant as she was too scared. She had to face them and touch them and felt too traumatised.
- [15] P[....] M[....] M[....] testified that on 21 March 2015 her motor vehicle was hijacked from her. The incident happened at 21h00. It was dark. She was approached by two men and a lady. The one man was in possession of a firearm. There were some Apollo lights nearby. The

outside lights of the house were also on. Miss M[...] could see that one of the men had dreadlocks and had a light complexion. The motor vehicle was later recovered. It had sustained R15 000 damage. Miss M[...] pointed out the 1st Appellant at an identification parade. She also pointed him out in court. The robber, whom she was unable to identify, was in possession

of the firearm.

[16] Besides the confession made by 2nd Appellant, there was admitted chain evidence relating to the post-mortem report, and of the DNA that linked both Appellants to the rape as well as the evidence of the Identity parade.

C. ANALYSIS OF THE EVIDENCE

[17] The conviction of the two Appellants is based on the following factors:

17.1 The admissibility of the statement made by the 2nd Appellant.

17.2 The identity of the Appellants.

17.3 Whether the Appellants acted with common purpose when the offences were committed.

[18] I deal with each of them below:

18.1 Admissibility of the 2nd Appellant's statement: It is trite that the State bears the onus to prove that a confession was made voluntarily, without undue influence, with the maker being of sound mind and sober senses. The Appellant denies that he made the statement voluntarily. He came up with various explanations during the trial. He also adapted his reasons during the trial. The State adduced evidence of the police officers who had arrested 2nd Appellant all the way up to the time he made the confession. At the conclusion of the trial-within-a-trial it became clear that the confession could not be faulted, and the learned magistrate admitted it into the record.

18.2 The identity of the two Appellants:

1st Appellant admitted to participating in the commission of the crimes which form the basis of counts 2 to 5. He was also identified by the two complainants during an identification parade.

2nd Appellant admits having been in the presence of 1st Appellant and the complainant during the evening at a place called Chaka's where he had consensual sex with the complainant, Miss M[...]. This place is a shebeen, where no doubt, there would have been lighting. The 2nd Appellant, however, denies having committed any of the other offences. The issue of the identity of the 2nd Appellant is then beyond dispute at this point.

18.3 Did the Appellants act with a common purpose?

Whilst 1st Appellant denies involvement in the killing of the deceased his conduct at the scene indicates otherwise. Miss M[...] testified that as soon as the shot that killed the deceased was fired by the 2nd Appellant, 1st Appellant was there to assist 2nd Appellant to remove the body of the deceased from the vehicle. 1st Appellant then got behind the steering wheel and drove the car

until it broke down for some reason. After that 1st Appellant took the firearm from the 2nd Appellant in order to commit a second robbery which he abandoned because he knew the occupants of the target motor vehicle. The 1st Appellant raped P[....] M[....] and watched while 2nd Appellant raped her too. He participated in the robbery of P[....] R[....] and drove her Land Rover after they had stolen it. He never left P[....] M[....] out of his sights. All the above actions are not indicative of a person that did not associate himself with the actions of his co-accused. He never distanced himself from the actions of 2nd Appellant.

[19] It bears noting that 2nd Appellant could not drive a motor car while 1st Appellant could drive and fulfilled the role of a driver on two occasions on that fateful evening.

D. THE LEGAL PROVISIONS

[20] 1st Appellant pleaded not guilty to count 1 (murder) and pleaded guilty to counts 2, 3, 4 and 5. He then made admissions which were read into the record and recorded by the regional magistrate as admissions in terms of section 220 of the Criminal Procedure Act.

[22] Whether the above oversight is material or not is of no consequence in this matter at this stage. The fairness of the trial was clearly not impacted to the extent envisaged in section 317 of the Criminal Procedure Act to warrant interference by this court. At any rate section 322 of the Criminal Procedure Act, which confers appellate jurisdiction to this court has the following proviso:

“... Provided that, notwithstanding that the court of appeal is of opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect.”

[23] 2nd Appellant pleaded not guilty to all the counts. He however, had to contend with a confession he had made previously after his arrest.

The statement was tested against the provisions of section 217 of the CPA by the trial court and found to meet the required standard. It was consequently admitted into evidence.

The doctrine of common purpose.

[24] The essence of the doctrine of common purpose is that if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, then the conduct of each of them in the execution of that purpose is imputed to the others.[1]

[25] The doctrine of common purpose was recently confirmed by the Constitutional Court to be valid and applicable to Rape cases as well.

[26] As stated above, 1st Appellant's conduct after the shot that killed the deceased was fired, was one of complete and seamless association with 2nd Appellant's actions. From assisting the latter to remove the deceased from his car, to hopping onto the driver's seat and driving away and all the rest of it. 1st Appellant was the archetype of a collaborator with the requisite common purpose to the whole transaction.

E.

CONCLUSION

[27] In the light of the above considerations, I find no merit in the two Appellants' appeal against conviction. I make the following order:

The appeal is dismissed.

J.S. NYATHI

Acting Judge of the High Court

Gauteng Division, Pretoria

I agree.

S. YACOOB

Judge of the High Court

Gauteng Division, Pretoria

Date of hearing : 02 September 2021

Date of Judgment: 18 October 2021

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[1] S v Sefatsa 1988 (1) SA 868 (A), S v Mgedezi 198 (1) SA 687 (A); S v Thebus [2003] ZACC 12; 2003 (2) SACR 319 (CC) 341e.

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