

SOUTH AFRICA / JUDGMENT

Nkonki and Another v S (CA149/2016) [2018] ZAECHGC 47 (7 June 2018)

[2018] ZAECHGC 47

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M Makaula, MJ Lowe, GH Bloem

CASE / FILE NUMBER

CA149/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION – GRAHAMSTOWN

Case

No: CA 149/2016

Date

Heard: 5/02/2018

Date

Delivered: 7/06/2018

In

the matter between:

MTHOBELI
NKONKI
FIRST APPELLANT
THANDUXOLO
MZANGWA
SECOND APPELLANT
and
THE
STATE
RESPONDENT

JUDGMENT

MAKAULA J:

A.

Introduction:

[1] On 10 July 2013 the appellants were convicted of murder and attempted robbery with aggravating circumstances. They were sentenced to undergo twenty two years' imprisonment in respect of the murder charge and ten years' imprisonment in respect of the attempted robbery charge. Both sentences were ordered to run concurrently. They appeal against the convictions with the leave of the court a quo. There were initially four accused, the appellants being accused 2 and 4 respectively. Accused 3 ("the deceased accused") passed away before trial and accused 4 (second appellant) became accused 3. Accused 1 was acquitted entirely.

B. Grounds of Appeal:

[2] Immediately after the sentence was passed, the appellants brought an application in terms of section 316(4)(b) of the Criminal Procedure Act.[1]

[3] In a summary form, the grounds of appeal are as follows:

First Appellant

3.1 The first appellant argues that the court a quo erred in not applying the cautionary rules when dealing with the evidence of Mr Lindani who was warned in terms of section 204 of the Criminal Procedure Act;

3.2 Mr Lindani contradicted himself in material respects;

3.3 The identification by Mr Brown was not reliable and so was the dock identification by Mr Voorslag.

Second Appellant

3.4 The court erred in accepting the evidence of Mr Lindani especially in lieu of the contradictions in his evidence in respect of the bail application, what he said in his written statement to the police and his evidence in court;

3.5 There is no proof that the appellant was present at the scene nor that he participated in the commission of the offences;

3.6 The circumstantial evidence relied on by the State was not sufficient as there are many inferences which could be drawn therefrom;

3.7 The State failed to prove that the second appellant was acting in common purpose with the other accused.

C.

Facts:

[4] The common cause facts are that the deceased was an owner of a cash loan business called Quali Loans (the shop), operating from Jeffreys Bay. On 10 May 2010, at about 7:30, the deceased opened the shop as usual. Estelle Arnolds (Estelle) entered the shop first followed by one Noulene and thereafter by the deceased. Inside the shop is a security gate which separates the employees from the customers. While the deceased was opening the security gate, an unknown man entered the shop. That man went straight to the deceased. They were separated by the security gate. The deceased requested him to wait as he was still opening the shop. Estelle suddenly heard a gunshot. She lay on the floor. After a short period a second gunshot went off. It was quiet thereafter. She heard the deceased calling out for help saying that he had been injured. She lifted her head and noticed that the deceased was indeed injured. She went out of the shop to seek help. She saw Henry Voorslag (Mr Voorslag) and asked him to call the police. The deceased was lying next to the stairs

in front of the door of the shop. She could not identify the person who shot at the deceased.

[5] Mr Voorslag testified that on the day the deceased died, he was standing in front of the shop waiting for transport to take him to work. He saw Estelle, Noulene and the deceased entering the shop. He observed people following them into the shop. Immediately thereafter he heard gunshots. He ran towards the shop. When he was four metres away from the door, he came across the person who he suspected had shot the deceased. He saw the first appellant standing next to the door of the shop about five to six paces away from him. He had eye contact with the first appellant. He was able to observe the first appellant because it was light, the visibility was clear and nothing obscured his view, so he testified. At the time he saw the first appellant he was uncertain whether he was part of the robbers or not.

[6] Mr Voorslag testified in his evidence in chief that he pointed out the deceased accused and the first appellant at an identification

parade. He remembered the face of the first appellant clearly when he identified him at the identification parade. He even testified as follows in this regard:

“As I have initially mentioned, my lady, that his face is still like daylight in me”. (sic)

[7] It transpired however under cross-examination by Mr Ngqakayi, for the first appellant, that Mr Voorslag was unable to identify the first appellant at the identification parade. Mr Voorslag confirmed that he did not point out the first appellant because he was unsure of his identity. He testified that even though he was unable to identify the first appellant at the identification parade, he was at the time of his testimony certain that the first appellant is the person he saw standing next to the door of the shop on the day of the killing of the

deceased.

- [8] Mr Paulus Brown (Mr Brown) testified that he worked across the shop as a cleaner. He was at work on the day of the death of the deceased from 7 am. As he was working he saw the deceased and two ladies opening and entering the shop. After a short time, another person entered the shop. He heard gunshots emanating from the shop. He saw the deceased falling on top of the deceased accused who managed to free himself and thereafter went out of the shop. He was standing next to the door. He saw the second appellant standing on the other side of the road. The deceased accused went to the second appellant and they spoke for a short while and then parted ways.
- [9] In court he pointed out the first appellant as the person who was standing at the doorway at the time the deceased was killed. He testified that he also identified accused 1 at the identification parade. It turned out that was not correct. Accused 1 was not at the identification parade at all.
- [10] Mr Ntutuzelo Nimrod Lindani (Mr Lindani) was warned in terms of section 204 of the Criminal Procedure Act. As an accomplice

witness, he testified that he was approached by one Skhomo to take people to Jeffreys Bay. He did not then know where Jeffrey's

Bay was, but Skhomo told him it was on the other side of George, in the Eastern Cape. Preparations were made for the trip. He met with the second appellant who confirmed that they were hiring him to go to Jeffreys Bay. The deceased accused mentioned something about dagga. He told him that dagga would never be transported in his motor vehicle. He borrowed a motor vehicle from Ndileka Mfuko (Ms Mfuko) who was his girlfriend. I must mention at this stage that the evidence of Ms Mfuko tallies with that of Mr Lindani in so far as it relates to her and the motor vehicle.

- [11] He left Cape Town in the company of the appellants, the deceased accused and another passenger. He had no money for petrol.

His passengers paid for the fuel. When they drove past George, he requested the deceased accused to drive as he was tired. He woke up on hearing the deceased accused requesting directions on the phone. They drove to a garage in Jeffreys Bay where they met with accused 1. He was taken to a house where he lived for the duration of their stay at Jeffreys Bay.

- [12] On a certain day he was going to the shop to buy bread. He saw the second appellant running towards him. The second appellant told him that he must turn and go back to the house because the first appellant and the deceased accused had robbed the shop and had also fired gunshots there. He went back to the house and remained there. After a while, he received a telephone call from the first appellant who told him to go to Humansdorp. On arrival at Humansdorp, he found the first appellant, the deceased accused and others at a garage. The first appellant had blood stains on his face. The first appellant and the deceased accused were quarrelling about who fired gunshots between them.

- [13] He was given money to go and fetch the motor vehicle from Jeffrey's Bay, which he did. On the way back to Cape Town, the deceased accused and the first appellant were arguing amongst themselves or "fighting" as he put it. The deceased accused alleged it was the first appellant who fired gunshots and the latter disputing it. On arrival in Cape Town, he delivered all his passengers at their respective homes and went to sleep at his place.
- [14] In the early hours of the morning, he was woken up by the police. They enquired about the appellants, Nomahiya, Ngash and Terror. He took them to the second appellant's house. The police arrested the second appellant. They proceeded to the Skhomo's house where they arrested the first appellant and the deceased accused. They were detained at Jeffreys Bay police cells.
- [15] After a few days, the police took him to Cape Town so that he could show them the motor vehicle that they had been using when they travelled to Jeffrey's Bay. The police took pictures of the motor vehicle. He testified that though not familiar with the first appellant, he used to see him in Cape Town as they did not stay far away from each other.
- [16] He testified that while in Jeffreys Bay mention was made by the appellants, the deceased accused and others of robbing Pep Stores and another shop which he could not remember. He did not pay much attention to their conversation. On hearing that, he called the second appellant and told him that they should go back to Cape Town. The latter promised to organise money for petrol.
- [17] Mr Lindani admitted that he lied to his girlfriend about going to George because he knew she would refuse if he told her the truth. He was taken to task about the difference in evidence about the amount he charged. There was a deviation from what he said in his bail application, his written statement to the police and his testimony in court in that regard. I agree with the court a quo's finding that nothing turns on the discrepancies.
- [18] Mr Lindani denied the version of the appellants especially that of the second appellant that he had been hired to fetch dagga from Jeffreys Bay.
- [19] Andile Mahlathini (Mr Mahlathini) was also warned in terms of section 204 of the Criminal Procedure Act. He testified that he resided in Jeffrey's Bay and was approached by accused 1 to provide a place to sleep for Mr Lindani. He agreed. He knew accused 1 because they worked together for a fishing company as fishermen. Accused 1 further asked him to find employment for the deceased accused in his fishing company. He informed accused 1 and the deceased accused that his employer had enough employees and therefore he could not secure work for them. The deceased accused said he would resort to committing robberies in that event. The appellants were present when he said so. He testified that during the same weekend, he went to accused 1's home and found him with the appellants, the deceased accused and Mr Lindani. Nothing more is relevant in his evidence to this appeal. I shall not deal with the evidence regarding the pointing out of the crime scene because the court a quo found the pointing out to be inadmissible.

[20] Accused 1 testified that he met the first appellant in Jeffrey's Bay at a Caltex garage. He was to organise a fishing job for the first appellant at sea. The second appellant and Mr Lindani came to Jeffreys Bay in connection with dagga. They remained in Jeffreys Bay for seven days. He last saw the appellants on 2 May 2010 a day before the deceased was killed. He testified that he was at the scene after the robbery at about 8 am. He saw Mr Brown at the scene. They knew each other. He testified that the second appellant and the deceased accused came to fetch the motor vehicle from his place at about 15h00 on the day the deceased was killed.

[21] The first appellant and the deceased accused were arrested in Cape Town on 5 May 2010. He confirmed the evidence of accused 1 about him trying to find employment and the reason why he went to Jeffreys Bay. He was brought to Jeffreys Bay by the deceased

accused who knew accused 1 and with the second appellant, Mr Lindani and the deceased accused. He was informed by accused 1 that there was no work at that stage because of bad weather.

[22] The first appellant testified that they all used the same accommodation, contrary to what Mr Lindani testified to. He

confirmed that Mr Brown pointed him out at the identification parade. He denied that they were six in number in the motor vehicle when they came to Jeffreys Bay. He further denied that he committed the offences.

[23] The first appellant testified that he neither knew accused 1 nor Mr Lindani before the trip to Jeffreys Bay. He only knew the deceased accused who introduced him to accused 1. He saw Mr Lindani for the first time when he came with the second appellant to fetch him from his house on the way to Jeffreys Bay. He testified that they arrived in Jeffreys Bay in the morning.

Accused 1 provided them with accommodation. It was a big room with two beds. He shared a bed with Mr Lindani.

[24] He testified that when he left Jeffreys Bay, he did not inform the others that he was leaving for Cape Town because they were looking for job opportunities. He did not even tell accused 1 and the deceased accused who were kind to him. The former accommodated him in Jeffreys Bay, while the latter brought him all the way to Jeffreys Bay to find him employment. His reason was that he had to go and attend to his six year old child who had epileptic fits and considered that as a private family affair. He said the following of Mr Lindani.

"Because he was still at that stage, waiting for that opportunity because we were going to get employment The reason why I did not, because at that stage, he was still waiting for an opportunity to get employment, to get work". (sic)

F.

Analysis:

- [25] The first appellant could not give a plausible reason as to how it occurred that he was arrested in the early hours of the following morning in Cape Town together with the deceased accused albeit they had left at different times from Jeffreys Bay and in the backdrop of the first appellant's testimony in that regard. He proffered, as a reason, that it was rainy in Cape Town and whenever that occurs, the deceased accused would come and sleep at his house because the latter's house had a leak. However, he could not explain how the deceased accused would gain entry because he was not aware that the first appellant was in Cape Town. When confronted with that, his response was that the deceased accused knew that he was in Cape Town, at his house, because the deceased accused could not have thought that he remained at Jeffreys Bay because "there is no place that I know in Jeffreys Bay". This explanation is not reasonably possibly true and cannot be believed. It is apparent that he went to Cape Town with Lindani and the others.
- [26] The first appellant could not explain how Mr Brown was able to identify him and the deceased accused as the people who were together at the scene, without Mr Brown knowing that they in fact knew each other and were together from Cape Town at the time of the commission of the offences. That would in my view be too much of a coincidence. This to me clearly corroborates the correctness of the identification by Mr Brown of the first appellant at the crime scene. This is corroborated by the fact that Mr Brown did not know the deceased accused and the first appellant before the commission of the offences.
- [27] Mr Geldenhuys, counsel for the first appellant, argued that the identification of the first appellant by Mr Brown was not reliable
- because Mr Brown made the mistake of saying that accused 1 was part of the identification parade when in fact he was not. That may be so, but that does not mean that he was wrong about the first appellant against the backdrop of the evidence that implicates the first appellant.
- [28] Mr Voorslag's concession that he could not identify the first appellant in the identification parade does not totally discredit his evidence. In court, his evidence was that he was certain that the first appellant was standing at the door of the shop. There is nothing to suggest that his dock identification is tainted in any manner. There were three accused persons at the time of his identification in court. He did not merely identify the first appellant but went further to state that he did not see him participate in the commission of the offences other than standing next to the door of the shop. His evidence in this regard confirms the evidence of Mr Brown.
- [29] Furthermore, the evidence of Mr Brown, Mr Voorslag, Mr Mahlathini and Mr Lindani must be viewed as a whole in respect of what occurred before, during and after the commission of the offences. The court a quo, correctly found that if Mr Lindani wanted to lie about the first appellant, he could have gone much further and said he played a role in the commission of the offences. I have no reason to interfere with the court a quo's credibility findings of the witnesses. In any event, an appeal Court has very limited power to interfere with the

credibility

findings of a trial court. The evidence by the first appellant that he left unannounced on the day of the commission of the offences cannot be accepted in the circumstances of this case. The evidence of the second appellant goes some way in confirming the evidence of Mr Lindani that he found them at Humansdorp. Mr Lindani testified that when he got to Humansdorp, the deceased

accused had blood on the side of his face. Mr Lindani's evidence is corroborated by Mr Brown who said that the deceased,

after he was shot, fell on top of the deceased accused. Mr Lindani did not witness this. However, Mr Brown's

explains the presence of blood on the face of the deceased accused seen by Mr Lindani. This gives credence to the evidence of Mr Lindani that he found the deceased accused quarrelling with the first appellant about who shot at the deceased. The quarrelling, according to Mr Lindani, carried on even on the way to Cape Town. In the light of the above factors, I am unable to find that the court a quo erred in convicting the first appellant.

[30] The second appellant testified that in April 2010 he approached Mr Lindani to request him to fetch dagga for him from Jeffreys Bay. He, Mr Lindani, the appellants, Terror and Ngash left Cape Town for Jeffreys Bay. They arrived in Jeffrey's Bay on the Saturday morning. The deceased accused phoned accused 1 who later met them at a garage at Jeffreys Bay. They went to sleep at a place arranged by accused 1. He waited for seven days for Zolani who eventually brought the dagga. He met him in Humansdorp. He summonsed Mr Lindani to come with the motor vehicle to Humansdorp. Mr Lindani arrived in a taxi. He and Mr Lindani returned to Jeffreys Bay to fetch the motor vehicle. They returned and loaded the dagga and proceeded to Cape Town. He denied that they ever talked about robbery during their stay in Jeffreys Bay. He testified that he neither knew the first appellant nor accused 1 before they travelled together to Jeffreys Bay. He was subsequently arrested in his house in Cape Town. He denied that he was involved in the commission of these offences.

[31] In convicting the second appellant the court a quo relied on circumstantial evidence. In its judgment, the court a quo reasoned as follows in this regard:

"Accused 3, according to evidence, came running on the day of the incident, saying that the deceased accused as well as accused 3 had robbed a Cash Loan and shots were fired. If he was not part of the people who were standing outside the Cash Loan, how else would he have known that information? If he was not part of those people, why was he alarmed into running? The very witnesses had identified accused 2 as well as the deceased accused. How else would he have known that these were the people inside the Cash Loan? How did he know that shots were fired? If he was not part of this crew, why did he tell Mr Lindani to go back? If he was not part of the crew that attempted to rob the Cash Loan, why was he part of the deliberations outside Humansdorp garage? Why did he phone Lindani to bring the motor vehicle unless he was attempting to flee the area?"

At this point I must point out that it was initially denied to Mr Lindani that accused 3 met Lindani in Humansdorp.

The version that was put to that witness was that accused 3 had met Mr Lindani by accident in Humansdorp on that morning. It was denied that he made a telephone call to Mr Lindani. He, however, confirmed this evidence when he testified. He confirmed having gone to Humansdorp albeit for a different reason. I do not accept that his reason for going to Humansdorp were to collect his dagga. In my view this is just a version that has been made up to coincide with his escaping to Cape Town after the fatal shooting of the deceased. I am therefore satisfied that circumstantial evidence that has been proved by the State is enough to come to the conclusion that with common purpose with the deceased accused as well as accused 3, he attempted to rob a Cash Loan. I am also satisfied that he associated himself with the eventuality of the deceased's fatal shooting." (sic)

[32] There is no evidence placing the second appellant at the scene of the crime. Mr Lindani does not say anything about the contribution the second appellant made at the time he overheard the talk about robbery. The mere presence of the second appellant at that stage does not establish any involvement or guilt on his part. Even the evidence of Mr Mahlathini does not implicate him at all.

[33] The report made by the second appellant to Mr Lindani about the robbery that had taken place, and the involvement of the deceased

accused and the first appellant, does not implicate the second appellant. Advising Mr Lindani to turn back does not mean that he was part of the robbery. The fact that he was aware that there were people inside the shop when the gunshots were fired was not taken further during the trial. It has not been established how he got to know about those details. It is possible that he might have heard from other people of course. I do not accept that the only inference to be drawn from the evidence is that he was involved in the commission of the offences. As Mr Daubermann, for the second appellant submitted, even if one were to assume that he was present at the scene, that does not establish that he had a common purpose with the robbers to commit the crimes. The State still had to prove that he actively associated himself in one way or another in the furtherance of the commission of the crimes.

[34] I do not agree with the finding by the court a quo that the second appellant "escaped to Cape Town". I must state, however, that I do not accept that the second appellant was truthful when he said that they had dagga in their motor vehicle when they drove back to Cape Town. The evidence of the second appellant stands to be rejected in this regard. It is possible that he was trying to distance himself from the commission of the crimes. It would be farfetched however to conclude that he is lying because he was involved in the commission of the crimes. It cannot be doubted that the second appellant may have wanted dagga to be taken to Cape Town. This can be gleaned from the evidence of Mr Lindani. I am of the view that the State has failed to prove beyond reasonable doubt that the second appellant was involved in the commission of the offences.

[35] Consequently, I make the following order:

1. The first appellant's appeal is dismissed.
2. The conviction of the second appellant is set aside and replaced with the following:

"Accused 3 is found not guilty and discharged in respect of all counts."

M MAKAULA

Judge of the High Court

LOWE J:

I agree.

MJ LOWE

BLOEM J:

GH BLOEM

For First Appellant:

Adv DP Geldenhuys

Instructed:

Legal Aid South Africa

Grahamstown

For Second Appellant:

Mr P Daubermann

Instructed:

Peter Daubermann Attorneys

Port Elizabeth

For Respondent:

Adv J Thysse

Director of Public Prosecutions

[1] Criminal Procedure Act, 1977 (Act No 51 of 1977). Section 316(4)(b) provides: "If the accused applies orally for such leave immediately after the passing of the sentence or order, he or she must state such grounds, which must be recorded and form part of the record."

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Prepared on 10 October 2026 · Esheria