

SOUTH AFRICA / JUDGMENT

Ntuli and Another v S, S v Xhego (A69/2011) [2012] ZAFSHC 158 (16 August 2012) [2012] ZAFSHC 158

COURT

Free State High Court, Bloemfontein

BEFORE

Kruger, Hancke, Mocumie

CASE / FILE NUMBER

A69/2011

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Appeal No. : A69/2011

In the appeal between:-

VINCENT XOLANI NTULIFirst Appellant

SIMIKIWE GANYAZASecond Appellant

and

THE STATERespondent/Appellant in Cross-Appeal

SIBULELO PATRICK XHEGORespondent in Cross-Appeal

CORAM: HANCKE AJP et KRUGER et MOCUMIE, JJ

JUDGMENT BY: KRUGER, J

HEARD ON: 13 AUGUST 2012

DELIVERED ON: 16 AUGUST 2012

- [1] This is on appeal against the judgment of Rampai J sitting in the circuit court at Virginia. The appellants are referred to as accused in this judgment so as to avoid confusion. Accused no 1, S P Xhego, is the respondent in the State's appeal against sentence. His application for leave to appeal against his convictions (he was convicted on counts 3, 4, 5 and 6) was

refused. Accused no 2 is the first appellant. He was convicted on counts 1 to 6. He applied for and was granted leave to appeal against his convictions on counts 1 and 2. Accused no 3 is the second appellant. He was convicted on counts 3, 4, 5 and 6 and was granted leave to appeal against those convictions.

- [2] As to the merits this court is only seized with the convictions of accused no 2 on counts 1 and 2 and the convictions of accused no 3 on counts 3, 4, 5 and 6.
- [3] Regarding sentence, the court a quo granted the State leave to appeal against the sentences imposed on accused no 1 (Xhego). The State gave notice of its intention to apply for an increase in the sentences of accused no 1 on counts 3, 4, 5 and 6 and the sentences of accused no 2 and 3 on the charges they were convicted of. The State's notice to increase sentence contains an obvious error in that the sentences of

accused no 2 and 3 have been transposed. All the sentences are thus before this court. The State contends the sentences are too lenient.

I CONVICTION OF ACCUSED NO 2 (FIRST APPELLANT) ON COUNTS 1 AND 2

- [4] Counts 1 and 2 concerned the robbery and murder of Ms Claassens at Bothaville on 26 March 2007. Mr Nel, for accused no 2, points out that accused no 2 was convicted solely on circumstantial evidence. The most important piece of circumstantial evidence against accused no 2, was his possession of the deceased's cell phone.
- [5] Mr L.V.W. Rossouw testified that he is a private investigator who specialises in cell phone related investigations. On 14 January 2008 Mr van Zyl instructed Rossouw to investigate the death of his mother on 27 March 2007 at Bothaville (counts 1 and 2). Rossouw got the particulars of the cell phone of the deceased Ms Claassens, it was a Nokia 3410 which had been taken from the scene during the robbery and murder. Rossouw also determined the IMEI unique number of the cell phone.
- [6] On 7 February 2008 he went to Northam, in the North-West province as a result of information he had received. There he saw a person by the name of Bhash Marishi, who had the deceased's Nokia cell phone in his possession. Rossouw checked the cell phone records (about which evidence was given in the trial) which showed that the deceased's Nokia was used in the period 27 March – 29 March 2007 with a 078-number, an MTN pay-as-you-go number. That number was put into deceased's phone after her sim card was removed. Rossouw also determined that the same 078-number was used from 12 April – 21 April 2007 in the Nokia 6230i, which had been robbed from Ms Vermaak on 10 April 2007 (count 3). The full 078-number was: 078 417 9510, being a pay-as-you-go, one cannot determine the owner. Mr Makhene, for Accused No 2, did not cross-examine Rossouw.
- [7] Bhasha Marishi testified that he bought Exhibit 1 the deceased's cell phone at Beit Bridge on 4 January 2008, and confirmed that Rossouw found the cell phone in his possession.

- [8] The mother of Accused No 2, Thandeka Manhotile Ntuli testified that her cell phone number is 078 440 8985. She said she did not recall Accused No 2 calling her on that number. There was no cross-examination.
- [9] The cell phone evidence is set out by the court a quo in pars [93] – [100]. Important evidence is that on 29 March 2007 (two days after the robbery and murder of Ms Claassens, counts 1 and 2) the deceased's cell phone was used to call 078 440 8985 the admitted number of the mother of Accused No 2, and the call was picked up by the Kutlwanong tower, which is 500 metres from Accused No 2's house. On 12 April 2007 (two days after the robbery of Ms Vermaak) at 19:45:40 the same sim card was used in Ms Vermaak's cell phone to again call Accused No 2's mother at 078 440 8985 (Exhibit "P", p. 873). The court a quo describes this as the most crucial evidence. This means that there are two calls using both the robbed cell phones, to Accused No 2's mother.
- [10] The reasoning of the trial judge in relation to the cell phone evidence is detailed and to the point. It cannot be faulted. It establishes the guilt of Accused No 2 on counts 1 and 2 beyond reasonable doubt, especially in the absence of any acceptable explanation by Accused No 2, who denied any knowledge of the two cell phones, Exhibits 1 and 2. He denied phoning his mother.
- [11] Mr Nel, for Accused No 2 in his heads of argument submitted that the court a quo erred in finding that Accused No 2 was the owner of sim card no. 078 417 9510 but during argument in court conceded that on the evidence no-one else would have called Accused No 2's mother from those instruments. As Ms Ferreira, for the State, points out in her detailed reasoning, that number was used in both the handsets of the deceased Ms Claassens and that of Ms Vermaak to call Accused No 2's mother. As she says, both stolen handsets were used by the 078 417 9510 number within two days of acquiring these cell phones, and both these times the mother of Accused No 2 was phoned. In the absence of any acceptable exculpatory explanation, the guilt of Accused No 2 is clear. There is no basis to interfere with Accused No 2's conviction on counts 1 and 2.

II CONVICTION OF ACCUSED NO 3 (SECOND APPELLANT) ON COUNTS 3, 4, 5 AND 6

- [12] Counts 3 and 4 concern the robbery and attempted murder of Ms Vermaak on Eva farm, district Odendaalsrus on 10 April 2007. Count 5 concerns the four rifles detailed in the charge sheet, and count 6 lists two pistols, namely the Heckler and Koch and the Inox.
- [13] An identity parade was held, but because the proceedings at the parade appeared to have been unfair to the accused, the court a quo attached no weight to the result of the identity parade.

[14] In the judgment the court a quo points to the fact that Ms Vermaak was certain that Accused No 3 was not inside her house during the attack. The evidence showed that there was a person outside at the time. Accused No 3 was identified by Mr Qoai, who testified that about 4h00 on 10 April 2007 he was asleep. Four males arrived. He thought it was the owner of the farm, but it was a person who asked Mr Qoai whether he

still remembered him, saying he had seen Mr Qoai on a previous occasion when he was drinking beer there five months previously

together with Saul. Mr Qoai then remembered him.

[15] Each of the four men had a rifle hanging on his shoulder. The men asked Qoai to keep the rifles and other items for them until the morning, that was Accused No 1. Accused No 2 and 3 were also present. After the four had left, Qoai called the owner of the nearby shop, and later the police arrived and found the rifles and other items, inter alia jewellery. The rifles were identified as those that had been robbed at Ms Vermaak's farm. In cross-examination it appeared that Mr Qoai's left eye was totally dysfunctional. In cross-examination on behalf of Accused No 3 Qoai said his eyesight only became weak after he had already seen the four men on 10 April 2007. Mr Qoai confirmed that only Accused No 1 spoke to him. All four entered Qoai's house, one by one, and put the rifles down in the house. When it was put to Mr Qoai that Accused No 3 was not present, Mr Qoai said he was.

[16] Mrs Qoai testified that on the day in question four men arrived at their house. They entered the house, and asked permission to leave firearms there. They put the rifles on the floor next to the wardrobe. In cross-examination she said she was lying down on the floor when she identified Accused No 3. He was about one metre from her. They said they were going to come and collect the items the following day in the morning. In court she pointed out Accused No 1, 2 and 3. The four left and they returned the next day at 8h00, as they had promised. They rushed to her house to get their weapons and goods they had left the previous night. In cross-examination she reiterated that Accused No 3 was present the next morning when the four came to fetch the rifles.

[17] The court referred to the evidence of Mr and Mrs Qoai, but found it not sufficiently reliable as to the identity of Accused No 3, by itself, but the court found the evidence of Mr Tau important for the identification of the accused.

[18] The witness Mr Tau, to whom Accused No 3 sold the firearm on 21 April 2007 made a good impression on the court a quo. Mr Tau testified that he is 25 years old. On 27 April 2007 Mr Tau and Mr Paul Blouw were at Frankie's place in Odendaalsrus. Accused No 1 and three men arrived there. Accused No 2 and 3 were with Accused No 1. Accused No 1 offered to sell a firearm to Mr Tau for R700. Accused No 3 went to fetch the firearm. Accused No 3 had the firearm in his possession when they returned. In cross-examination it was put to Mr Tau that he was arrested for the illegal possession of a firearm, which he admitted. It was further put to him that he identified Accused No 3 because Accused No 3 was in police custody at the same time. Mr Tau denied that he knew that Accused No 3 had been arrested on the same

case. The court a quo found that the evidence of Mr Paul Blouw provided support for Mr Tau. On 21 April 2007 he was with Mr Tau. He was present when Mr Tau bought the firearm. He identified Accused No 1 and 2 in court as the persons who were present when the firearm was sold. He said he did not see Accused No 3. On that day Mr Tau came to see him, and Mr Tau asked Mr Blouw to keep a firearm for him in

Blouw's house, and Mr Blouw agreed to store the firearm.

[19] The court a quo found in the judgment that Accused No 3 was there when the firearm (Exhibit 7) was sold to Mr Tau and that Mr Blouw said accused 3 was one of the men who arrived on that day and he overheard the discussion about the sale of the firearm which did not involve

accused 3. Mr Blouw's evidence was: "Ek het die mannetjie met die rooi top gesien en die een in die middel. Die derde persoon het ek nie gesien nie. ... Nommer 1 en 2". The court a quo appears to have confused Accused No 1 with Accused No 3. In cross-examination Mr Blouw conceded that he was not present on 21 April 2007 at the time of the sale of the firearm. Later in cross-examination it is again put to him:

Q: "But therefore you were not there on the 21st when the gun was purchased?"

A: "Ja ek was nie teenwoordig op die transaksie self nie."

Q: "I am talking now about the 21st?"

A: "Ja die 21ste."

(Vol 5 p. 409 lines 15 – 18).

Later Mr Blouw again says he was present at Frankie's on the 21st. Apart from the confusion about the date, possibly a language problem as to the distinction between the date of the 21st and the witnessing of the transaction, Mr Blouw never says he saw Accused No 3, but Mr Blouw does confirm the sale of the firearm on that day.

[20] The identity of Accused No 3 as having taken part in the housebreaking, robbery and attempted murder, is established by the fact that Accused No 3 was one of the persons who left the firearms and other goods robbed from Ms Vermaak at the house of Mr and Mrs Qoai, and he was one of the persons who collected those items from the house of Mr and Mrs Qoai the following morning. The evidence of Mr Tau, read with the supporting evidence of Mr Blouw and Mr and Mrs Qoai, establishes that Accused No 3 was the person who sold the Heckler and Koch pistol to Mr Tau on 21 April 2007. The four assailants, among whom were the three accused, took the items robbed from Ms Vermaak to Mr Qoai's house within about an hour after the robbery. That evidence in itself is sufficient to establish the guilt of Accused No 3 on counts 5 and 6, because the rifles and pistols listed in counts 5 and 6 were part of the items taken from Ms Vermaak. The evidence on counts 5 and 6 is further bolstered by the evidence of Mr Tau regarding the sale of the Heckler and Koch pistol by the three accused. The guilt of Accused No 3 on counts 3, 4, 5 and 6 has been established beyond

reasonable doubt.

III SENTENCE

[21] The personal circumstances of the accused are set out as follows by Ms Ferreira, for the State:

(1) Accused no 1

He was 22 years old at the time of the offence. He passed standard 7 at school. He is single with no dependent minor children. He was employed as a casual worker at a brick factory at the time of his arrest earning R75 per week. The bulk of the property was recovered and in a way he helped the police with the recovery of some of the items. He is a first offender. At the time of sentence he had been incarcerated for two years, two months and one week since his arrest on 21 April 2007.

Accused no 2

He was 20 years old at the time of the commission of the offences. He passed matric. He was not gainfully employed at the time of his arrest. The bulk of the property stolen from the victim, Ms Vermaak, was recovered and in a way he assisted the police to recover some of it. He is a first offender. Since his arrest on the 21st of April 2007 he had been in custody for two years, two months and one week on the date of sentencing (1 July 2009). He facilitated further arrests.

Accused no 3

He was 25 years old at the time when he committed the offences. He passed standard 6. He is unmarried and the father of two dependent minor children. He was jobless at the time of his arrest. The bulk of the stolen property was recovered and he assisted the police in the recovery of some of the items. Since his arrest on the 22nd of April 2007 he had been in custody for two years, two months and six days at the date of sentence. He unleashed no actual violence on the victim.

[22] The offences were serious. Counts 1 and 2, of which only accused no 2 was convicted, were housebreaking, aggravated robbery and murder. Counts 3 and 4, of which accused no 1, 2 and 3 were all convicted, were housebreaking, aggravated robbery and a very serious attempted murder. In both cases access to the homes was gained through a window that was broken. Both victims were females who were living alone. In both events the victims were tied by their wrists and feet. In both cases the doors of the homes were broken from the inside in order to "break out". All means of communication were taken away from the scenes or disabled.

[23] As to counts 1 and 2, the murder of Ms Claassens, her house was broken into; she was tied up; she was assaulted; there were patches of blood in the house. She sustained a ruptured liver, a ruptured spleen and she suffered internal bleeding. The doctor who conducted the post mortem examination gave the main cause of her death as smothering and internal bleeding. The attack on her was severe and she must have suffered. The court a quo found the form of intent to have been *dolus eventualis*. Serious injuries were inflicted on her, and

she was left for dead, if she was not dead by the time the assailant or assailants left. This leads to the irresistible inference that Accused No 2 (and his co-perpetrators, if any) intended to kill her with direct intent. Only accused no 2 was convicted of the robbery and murder of Ms Claassens. According to the post mortem report, exhibit "B", she was 76 years of age. She was 1,76 metres tall and weighed 76 kg. The State only produced evidence to have accused no 2 convicted on counts 1 and 2. However, even if accused no 2 committed the housebreaking and robbery by himself, there was no need to seriously assault and kill the victim, a frail old lady. The murder was callous and there was no need to kill her in order to facilitate the robbery.

- [24] On the charges relating to the housebreaking at Eva farm, (counts 3 and 4) where Ms Vermaak was the victim, all three accused were convicted. Ms Vermaak testified that she was 53 years old. At the time of the incident she was living alone on the farm. She was unmarried. At 2 am on the Tuesday morning after the Easter Weekend, that was 10 April 2007, the barking of one of her small dogs woke her up. She had left all the lights on in the passage from her bedroom to the kitchen. She got up with her pistol in her hand and walked to the kitchen. She looked through the safety gate to see why the dog was barking. When she saw nothing, she walked to the kitchen to go and fetch her diamond ring she had taken off when she washed the dishes. In the kitchen she saw a hole had been cut into the window. She realised there was trouble. When she turned, two men approached her from the one side of the table and one from the other side. She had her pistol in her right hand. She aimed at the attacker on her right. He grabbed her hand with both hands. The two on the left stormed her and hit and smacked her. She tried to shield the blows with her left hand. The one on the left had a type of panga. The one on the right took the pistol from her and hit her on the head with it, very hard, many times. She tried to fight while the blood was flowing. There were open wounds on her head. They asked her where the man was who looked after the cattle and she said he was off-duty for the long weekend and would only return at 7 am. The men assaulted her and carried her to the bedroom, asking where the money is. She gave them her handbag, which had R200 in it. They threw everything out of the handbag on the bed. They again hit her and fought with her and she thought it was her last day. They tried to press her onto the ground, but she kicked and fought back. Then one of them stood on her head to hold her down. They took the blankets off the bed and threw them over her. They tied her hands and feet with wire. It was very sore when they stood on her head.
- [25] Then they started to throw everything out of the cupboards, saying they were looking for money. At a stage when she was sitting against the wall, one of the men threw a little antique table at her and the table's leg broke off. She does not know what hit her. The wounds on her head were bleeding; her whole body was full of blood. That was at the beginning. The attack on her lasted about two hours. She was at some stage hit with a panga, but had no sensation. They instructed her to get up, but she slipped in the blood.
- [26] Ms Vermaak identified one of the assailants as the leader. He gave instructions. He was running the robbery. He was Accused No 1.

- [27] The three men were all armed. One had a pistol; one a knife and the other a panga. The person with the panga hit her in the face with the flat side of the panga on both sides of her head. She shielded the blows with her arms and when she brought her hands down, she saw two places where blood spurt out of her wrist on the left wrist. She walked with difficulty, because her ankles were tied. The one with the panga hit her on the back all the way to the cupboard where her jewellery was. At the cupboard they took everything. The man who had the panga told her they were going to burn down the house. It is a thatched-roofed house.
- [28] One of the men searched the house and found the safe. She told them where the key to the safe was. At that stage she thought they were going to shoot her and she was very scared. She feigned fainting and fell down in the passage. All three started kicking her. She held her hands in front of her face to shield the blows. They took the rifles and ammunition. They also took her deceased father's three golden watches and her golden watch.
- [29] While she was lying in the passage the man with the pistol came to her, cocked the pistol, pointed it at her and asked her if she tried to get away. He spoke good Afrikaans. She heard that they went to fetch the small truck and brought it to the front door. She recognised the sound, because the exhaust was defective. She then heard the truck depart, stop at the bottom gate and carry on. She was still lying in the passage. Her hands were swollen, because of the wire. She managed to get the wire off her wrists by using her knee. She loosened her ankles. She wanted to faint. She crawled to her bedroom. She got onto the bed and knew she had to wait until 7 am for help. The police arrived just before 7 am. She did not contact anyone, because the assailants had taken her cell phone and cut the land line. When the police arrived at the security gate, she was so confused that she told them to go away, they had already almost killed her. The police had to break open the security door. She was clearly greatly traumatised.
- [30] The injuries of Ms Vermaak are set out as follows in the judgment of the court a quo:
- "[64] She was rushed to the Medi-Clinic in Welkom by an ambulance. She sustained the following bodily injuries: laceration left wrist; laceration right little finger; two blunt wounds on the head; lacerations on both ankles; fractured ribs on the left-hand side of the chest; contusions on the face and body. These are described in paragraph 5 section (c) of Exhibit L by Dr De Wet.*
- [65] She was hospitalised initially for ten days. She underwent a surgical operation during that period to repair the tendon of her wrist. She was discharged but later readmitted for approximately a week. Her treating doctor was Dr J J De Wet, an orthopaedic surgeon of Welkom. Her wrist, especially the right wrist, continues to trouble her; the injuries have not yet healed; her little finger is obviously partially disabled; she apparently requires another operation to repair the deformity. Her injuries were inflicted by the accused, in particularly the panga man, accused 1 and the gunman who is not before the court in these proceedings."

And

“[70] The injuries of the victim were not fatal, but the head wounds / wounds inflicted by means of a panga were severe judging by the way she bled. Luckily she did not sustain brain injury. I have no idea as to how much blood she lost before the ambulance crew arrived and gave her treatment, however judging by the photographs it seems to me that she had profuse bleeding. Since her limbs were fastened with wire, her landline telephone snapped and her cellular phone stolen and her van also stolen, she could have bled to death.

- [71] In the light of the foregoing, I am satisfied that the victim was unlawfully attacked on Eva farm, district Odendaalsrus on Tuesday, 10 April 2007; that she was violently assaulted; that she was, among others, struck with a panga and a gun and that, objectively speaking, one can say she almost bled to death.”
- [31] The power of a court of appeal to increase sentence has a long history, set out in *S v SONDAG AND ANOTHER* 1994 (2) SACR 810 (C), where it is pointed out that the court on appeal has a duty to society to ensure that proper and adequate sentences are imposed (820 b – e). The sentences imposed by the court a quo do not reflect the seriousness of the offences. As to count 2, the murder, the court misdirected itself in stating that the minimum sentence was 15 years imprisonment, where it was in fact life imprisonment due to the fact that the murder was coupled to armed robbery. It is necessary to interfere with the sentences.

Accused No 1 (Respondent in the Cross- Appeal)

- [32] Accused No 1 was only convicted in respect of the attack on Ms Vermaak and the possession of firearms taken there. It did however appear from the evidence of Ms Vermaak that he was the ringleader. He was also the person who did the dealings in hiding and selling the firearms. Ms Ferreira suggests the sentences in column 2 below. In my view the sentences in column 3 are appropriate:

Accused No 1	Sentences	Counts	Charge	Court a quo	State Appeal	Court 3
		Housebreaking and Robbery	10 years	13 years	13 years	4 years
		Attempted Murder	6 years	8 years	8 years	5 years
		Possession of Rifles	2 years	2 years	2 years	6 years
		Possession of Pistols	4 years	8 years	3 years	Effective 13 years
			23 years	20 years		

Accused No 2 (First Appellant)

- [33] Accused No 2 was convicted in respect of two incidents, both involving housebreaking at night and serious assaults on women (one 76, the other 53 years old), the one leading to death, the other to serious trauma. He was sentenced to 12 years for the murder and 4 years imprisonment for the attempted murder. Taken together with the other convictions his effective sentence is 16 years. Further, as Ms Ferreira correctly points out, the minimum sentence for the murder in count 2, coupled to the armed robbery, was life imprisonment, not 15 years as the trial court held. There are no substantial and compelling circumstances to impose a lesser sentence. Ms Ferreira suggests the sentences in column 2 below. In my view the sentences in column 3 are appropriate:

Accused No 2 Sentences Counts Charge Court a quo State Appeal Court 1 Housebreaking and Robbery 10 years 15 years 12 years 2 Murder 12 years Life Life 3 Housebreaking and Robbery 10 years 13 years 13 years 4 Attempted Murder 4 years 8 years 8 years 5 Possession of Rifles 2 years 2 years 2 years 6 Possession of Pistols 4 years 8 years 3 years Effective 16 years Life Life

Accused No 3 (Second Appellant - Ganyaza)

[34] Accused No 3 was convicted on counts 3, 4, 5 and 6. Ms Ferreira suggests the sentences in column 2 below. In my view the sentences in column 3 are appropriate:

Accused No 3 Sentences Counts Charge Court a quo State Appeal Court 3 Housebreaking and Robbery 10 years 13 years 13 years 4 Attempted Murder 4 years 8 years 8 years 5 Possession of Rifles 2 years 2 years 2 years 6 Possession of Pistols 4 years 8 years 3 years Effective 12 years 23 years 20 years

ORDER

1. The appeal is dismissed.
2. The cross-appeal succeeds.
3. The sentences imposed by the Court a quo are amended to read as follows:

3.1 Accused No 1 (Respondent in the Cross-Appeal, Xhego):

Count 3 - Housebreaking and Robbery - 13 years' imprisonment;

Count 4 - Attempted Murder - 8 years' imprisonment;

Count 5 - Possession of Rifles - 2 years' imprisonment;

Count 6 - Possession of Pistols - 3 years' imprisonment.

These sentences are to be served in such a manner that the effective sentence is 20 years' imprisonment.

3.2 Accused No 2 (First Appellant, Ntuli):

Count 1 - Housebreaking and Robbery - 12 years' imprisonment;

Count 2 - Murder – Life imprisonment;

These sentences are to be served in such a manner that the effective sentence is life imprisonment.

3.3 Accused No 3 (Second Appellant - Ganyaza)

3.4 The above sentences are in terms of section 282 of Act 51 of 1977 deemed to have been imposed on 1 July 2009.

A. KRUGER, J

I concur.

S. P. B. HANCKE, AJP

B.C.MOCUMIE, J

On behalf of appellants: Adv. P.W. Nel

Instructed by:

Legal AidBLOEMFONTEIN

On behalf of respondent: Adv. A.M. Ferreira

Director Public Prosecutions

BLOEMFONTEIN

/sp/wm

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