

SOUTH AFRICA / JUDGMENT

## Phakathi and Others v S (CA&R03/17, CA&R71/16, CA&R76/14) [2017] ZAECMHC 47 (29 June 2017) [2017] ZAECMHC 47

COURT

Eastern Cape High Court, Mthatha

BEFORE

RWN Brooks, FBA Dawood

CASE / FILE NUMBER

CA&R03/17, CA&R71/16, CA&R76/14

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

9-+\*-

+\*IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, MTHATHA

CASE No: CA&R03/17

CA&R71/16

CA&R76/14

DATE: 29/06/2017

In the matters between:

M PHAKATHI

B MLONYENI

S LINYANA

AND

THE STATE

J U D G M E N T

BROOKS J

There are three appeals before the Court. For reasons that will become apparent, a single judgment will be delivered dealing with all three.

MKULEKELENI RICHMAN PHAKATHI v THE STATE CA&R03/2017.

On 30 November 2015 the appellant appeared in the Regional Court for the Eastern Cape Region held at Mthatha. The proceedings had been assigned the case number RCNGQ19/15.

The appellant was charged with six offences. Count 1 was a charge of robbery with aggravating circumstances, it being alleged that on or about 2 August 2014, and at or near Ngqeleni the appellant unlawfully and intentionally assaulted Nokwetiso Mlindwa and with force took R40,00 being property in her lawful possession. The aggravating circumstances were that the appellant made use of a firearm during the robbery. Count 2 was a charge of murder, it being alleged that on or about 2 August 2014 and at or near Ngqeleni the appellant unlawfully and intentionally killed Nindika Tyelweni by shooting him with a firearm. Count 3 was a charge of attempted murder, it being alleged that on or about 2 August 2014 and or Ngqeleni, the appellant unlawfully and intentionally attempted to kill Juliwe Kumbulukelo by shooting him with a firearm. Count 4 was a charge of attempted murder, it being alleged that on or about 2 August 2014 and at or near Ngqeleni, the appellant unlawfully and intentionally attempted to kill Mlamli Makangweniso by shooting him with a firearm. Count 5 was a charge of attempted murder, in that on or about 2 August 2014 and at or near Ngqeleni, the appellant unlawfully and intentionally attempted to kill Athini Juliwe by shooting him with a firearm. Count 6 was a charge of attempted murder, it being alleged that on or about 2 August 2014 and at or near Ngqeleni, the appellant unlawfully and intentionally attempted to kill Mongamelo Mevana by shooting him with a firearm.

In respect of count 1 and count 2, the provisions of Section 51 of the Criminal Law Amendment Act 105 of 1997 were applicable, prescribing the imposition of minimum sentences in the event of a conviction and in the absence of the court a quo finding that substantial and compelling circumstances existed which would justify the imposition of lesser sentences.

The appellant was represented in the court a quo. After it had been confirmed by the appellant's legal representative that he had been advised of the applicability of the provisions of the Criminal Law Amendment Act of 105 of 1997 and the implications thereof, the appellant was invited to plead to the charges. He pleaded not guilty to all the charges. The plea explanation tendered on behalf of the appellant in accordance with the provisions of Section 115 of the Criminal Procedure Act 51 of 1977 was a bare denial.

Immediately thereafter the first State witness was called to testify against the appellant. In due course, after the closure of the State case, the appellant gave evidence in his own defence.

On 31 March 2016, having heard argument on the merits, the Magistrate delivered her judgment. She found the appellant guilty of robbery with aggravating circumstances, guilty of murder and guilty of two counts of attempted murder.

No previous convictions were proved against the appellant. No evidence was led in respect of sentence. The Magistrate considered the question of substantial and compelling circumstances and concluded that none were forthcoming from the evidence or from the personal circumstances of the appellant. However she appears to have taken account of an unspecified time in custody since the appellant's arrest as a factor to justify a reduction of the sentence to be imposed on Count 1, the charge of robbery with aggravating circumstances.

The Magistrate imposed the following sentences on the appellant. On Count 1, the charge of robbery with aggravating circumstances, a period of imprisonment of 10 years. On Count 2, the murder charge, the appellant was sentenced to life imprisonment. On the two counts of attempted murder, the appellant was sentenced to five years imprisonment on each count. The Magistrate further determined in accordance with the provisions of the Firearms Control Act 60 of 2000 that the appellant is a person who is unfit to possess a firearm.

On 22 November 2016 the appellant lodged an application for leave to appeal in respect of the convictions and the sentences imposed. This application was only partially successful. On 19 January 2017 the appellant filed a petition with the Registrar of this court in which he sought leave to appeal against the convictions with which he is burdened. The petition was successful and the appellant was granted leave to appeal to this court.

BONGILE MLONYENI v THE STATE CA&R 71/2016.

On 16 July 2014 the appellant appeared in the Regional Court for the Eastern Cape Region held at Port St Johns. The proceedings had been assigned the case number RCPS05/14.

The appellant was charged with murder, it being alleged that on or about 4 May 2012 and at or near Port St Johns the appellant unlawfully and intentionally killed one Wandile Zozi, a male person by shooting him with a firearm.

According to the charge sheet, the provisions of Section 51 of the Criminal Law Amendment Act 105 of 1997 were applicable, prescribing the imposition of a minimum sentence in the event of a conviction and in the absence of the court a quo finding that substantial and compelling circumstances existed which would justify the imposition of a lesser sentence.

The appellant was represented in the court a quo. It is apparent from the record that the Magistrate did not ascertain whether the attention of the appellant had been drawn to the applicability of the provisions of Act 105 of 1997 in his preparation to meet the charge made against him. She ought to have ensured that this had been done before inviting the appellant to plead. See *Thwala v S* (679/2011)

[2012] ZASCA 46, [2012] JOL 29289 (SCA) para [10] to [15]; See *S v Mashinini and Another* 2012 (1) SACR 604 (SCA) para [2] and *S v Negondeni* (039/15) [2015] ZASCA 132, JDR 2077 (SCA) para [12].

The appellant pleaded not guilty. It is apparent from the record that only after recording the plea, the Magistrate may have enquired whether the appellant had been informed about the provisions of Act 105 of 1997 and that his legal representative was able to confirm that this had been done.

No explanation of the basis of the plea of not guilty was made in accordance with the provisions of Section 115 of the Criminal Procedure Act 51 of 1977.

Immediately thereafter the first State witness was called to give evidence. In due course, after the closure of the State case, the appellant gave evidence in his own defence.

After hearing argument on the merits, the Magistrate directed that a further witness be called as a Court witness. Thereafter a further address on the merits occurred. On 29 January 2015 the Magistrate delivered her judgment. She found the appellant guilty on the charge of murder.

No previous convictions were proved against the appellant. No evidence was led in respect of sentence. After hearing argument, the Magistrate found that there were no substantial and compelling circumstances in the matter and she imposed the prescribed minimum sentence of 15 years imprisonment on the appellant. She further directed that there should be a non-parole period of 10 years applicable to the sentence in terms of Section 276(b) of the Criminal Procedure Act 51 of 1977.

On 3 March 2016, the Magistrate dismissed an application for leave to appeal against both the conviction and sentence which had been brought by the appellant.

On 7 September 2016, the appellant filed a petition with the Registrar of this Court in which he sought leave to appeal against both the conviction and the sentence.

On 9 September 2016 the appellant was granted leave to appeal to this court. He is currently on bail awaiting the outcome of this appeal.

SONWABO LINYANA v THE STATE CA&R76/2014.

On 27 February 2014 the appellant appeared in the Regional Court for the Eastern Cape Region, held at Butterworth. The proceedings had been assigned the case number RCB104/2013.

The appellant was charged with two offences. Count 1 was a charge of murder, it being alleged that on or about 19 December 2009 the appellant unlawfully and intentionally killed one Xoliswa Mapelani, a male person, by stabbing him with a knife. Count 2 was a charge of rape, it being alleged that on or about 31 March 2013 the appellant unlawfully and intentionally committed an act of sexual penetration with the complainant, one M. N., by having sexual intercourse with her without her consent and more than once.

In respect of both counts, the provisions of Section 51 of the Criminal Law Amendment Act 105 of 1997 were applicable, prescribing the imposition of minimum sentences in the event of a conviction and the absence of the court a quo finding the existence of substantial and compelling circumstances.

The appellant was represented in the court a quo. After it had been confirmed by the appellant's legal representative that he had been advised of the applicability of the provisions of the Criminal Law Amendment Act 105 of 1997 and the implications thereof, the appellant was invited to plead to the charges. He pleaded not guilty to both charges. A short plea explanation was given in terms of the provisions of Section 115 of the Criminal Procedure Act 51 of 1977. The content thereof is not relevant for present purposes.

Immediately thereafter, the first State witness was called to give evidence. In due course, after the closure of the State case the appellant gave evidence in his own defence.

On 11 April 2014, having heard argument on the merits, the Magistrate delivered his judgment. He found the appellant guilty on both charges.

No previous convictions were proved against the appellant. No evidence was led in respect of the sentence. After hearing argument, the Magistrate found that there were no substantial and compelling circumstances in the matter and he imposed the following sentences on the appellant. On count 1, the murder charge, the appellant was sentenced to 18 years imprisonment. On count 2, the rape charge, the appellant was sentenced to life imprisonment. The Magistrate directed that the sentence imposed on count 1 was to run concurrently with the sentence imposed on count 2.

In due course the appellant was granted leave to appeal in this court.

On 3 November 2015 the appellant filed an application for condonation for the late filing of his notice of appeal. The reason for the delay is given therein as an inability on the part of the appellant's legal representative to establish the name of the prison to which the appellant had been sent to serve his sentence. In my view it would be appropriate to grant condonation in such circumstances.

These three appeals initially appeared on the appeal roll set for this Court on 28 April

2017. It was clear that there was a single element common to all three appeals which would be decisive of their outcome. However, it had been pertinently raised only in the appeal brought by Mkulekeleni Richman Phakathi under case No CA&R03/2017. It was deemed to be in the interests of justice to postpone all three appeals and to direct argument from the various legal representatives on the point. To that end, a further directive was issued to the effect that, where necessary, amended grounds of appeal should be embodied in an appropriate notice.

There has been compliance with the orders issued on 28 April 2017 and the matters are now properly before the Court. In so far as it may be an issue which has not been overtaken by the events of 28 April 2017, condonation is granted for the late filing of the notice of appeal in *Sonwabo Linyana v the State*, case No CA&R76/2014.

The constitution of the courts a quo.

The single issue which is common to the three appeals before Court is the question whether or not, in each instance, the court a quo was properly constituted.

Section 93 ter(1) of the Magistrate's Courts Act 32 of 1944 reads in so far as relevant:

*“The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice,*

- a) before any evidence has been led or
- b) ...

summon to his assistance any one or two persons who, in his opinion, may be of assistance at the trial of the case or in the determination of a proper sentence, as the case may be, to sit with him as assessors or assessors: Provided that, if an accused is standing trial in a court of a Regional Division on a charge of murder, whether together with other charges or accused or not, the judicial officer shall at that trial be assisted by two assessors unless such an accused requests that the trial be proceeded with without assessors, whereupon the judicial officer may in his discretion summon one or two assessors to assist him.”

This section of the Magistrate's Courts Act 32 of 1944 has been in place for many years. Its interpretation has been the subject of a number of conflicting decisions in the various divisions of the High Court of South Africa. These have been identified in the heads of argument filed by Mr Joubert who appeared in all three matters on half of the State. Also included therein are references to, and excerpts from various articles which address from different perspectives the tradition of appointing assessors. Whilst the Court is grateful to Mr Joubert for his thorough preparation on the point, it is not necessary to canvass the conflicting decisions of the various provincial divisions which deal with the interpretation of the section or to enter into debate about the tradition of the appointment of assessors.

The issue has been dealt with crisply in *Gaiya v the State* 2016 (2) SACR 165 (SCA).

Paragraph 7 of *Gaiya* contains the following statement:

*“It is not necessary, in my view, to mention the conflicting judgments referred to by the Court below. They are collected and comprehensively discussed in Chala and Others v Director of Public Prosecutions KwaZulu-Natal and Another 2015 (2) SACR 38 (KZP).”*

Paragraph 8 of *Gaiya* contains the statement of the legal principle which is binding on this Court:

*“In my view, the issue in the appeal is the proper constitution of the Court before which the accused stood trial. The section is peremptory. It ordains that the judicial officer presiding in a regional court, before which an accused is charged with murder (as in this case) shall be assisted by two assessors at the trial, unless the accused requests that the trial proceed without assessors. It is only where the accused makes such a request that the judicial officer becomes clothed with the discretion either to summon one or two assessors to assist him or to sit without an assessor. The starting point therefore, is for the regional magistrate to inform the accused before the commencement of the trial, that it is a requirement*

*of the law that he or she must be assisted by two assessors, unless he (the accused) requests that the trial proceed without assessors.”*

The position of the Supreme Court of Appeal on the issue has been reaffirmed recently in *Lucky Vincent Shange v the State* (613/2016) [2017] ZASCA 51 (2 May

2017) para 5 - 7.

In all three matters before us on appeal the appellants faced murder charges upon which they were convicted. In each matter the magistrate presided in the regional court for the Eastern Cape Region without being assisted by two assessors. In none of the three matters did the magistrates inform the appellant concerned, before the commencement of proceedings, that it is a requirement of the law that the magistrate must be assisted by two assessors. None of the appellants requested that the trial proceed without assessors.

It follows that in all three matters before us on appeal the court a quo was not properly constituted. The resultant proceedings were a nullity. The convictions and sentences imposed upon the

appellants at the conclusion of those proceedings must all be set aside on that basis.

Before making the necessary order, I deem it expedient to take up an opportunity which seldom presents itself in our courts. In his preparation for and presentation of argument in the three appeals before us, Mr Joubert, a prosecutor of many years standing, has distinguished himself. He has demonstrated unreservedly the quality celebrated in *Boucher v the Queen* [1955] SC 16 at 23 to 24, a decision of the Supreme Court of Canada cited with approval in *van der Westhuizen v the State* 2011 (2) SACR 26 (SCA) in which Rand J stated the following:

*“It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before the jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of the prosecutor excludes any notion of “winning or losing”; his function is a matter of public duty than which in civil life there can none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.”*

The following orders will issue:

A. *Mkulekeleni Richman Phakathi v the State* CA&R03/2017

1. The appeal succeeds.
2. The convictions and sentences imposed upon the appellant under case No RCNGQ19/15 are set aside.
3. The appellant is to be released from custody with immediate effect.

B. Bongile Mlonyeni v the State CA&R71/2016.

2. The conviction and sentence imposed upon the appellant under case No RCPS05/2014 are set aside.

C. Sonwabo Linyana v the State CA&R76/2014.

1. The appeal succeeds.
2. The convictions and sentences imposed upon the appellant under case No RCB104/13 are set aside.

-----

RWN BROOKS

JUDGE OF THE HIGH COURT, MTHATHA

DAWOOD J:

I agree. It is so ordered.

FBA DAWOOD J

Appearances:

For the applicants: ADV Z BADLI

Instructed by: Nolangeni & Ass.

No 18 York Road

Opposite Teba Bank

Mthatha

ADV S KEKANA

Instructed by: Legal Aid Board Mthatha

PRD Building,

96 Sutherland Street,

Mthatha,

ADV L BARNARD

Instructed by: Mazibuko Att

1204 Mercury House

820 Anton Lembede Street

Durban

For the respondents: ADV K JOUBERT

Director of Public Prosecution

Broadcast House

Lower Sissons Street

Fort Gale

Date Delivered: 29 June 2017

---

## Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

**ORIGINAL SOURCE**      <https://www.saflii.org/za/cases/ZAECMHC/2017/47.html>

**CASE PAGE**              <https://chat.esheria.ai/case-law/south-africa/phakathi-and-others-v-s-unknown-topic-aecmhc-2017--6a3ea51c3b1caa9129812c17>

Prepared on 11 October 2026 · Esheria