

SOUTH AFRICA / JUDGMENT

S v Biyela (CCD16/2020) [2021] ZAKZPHC 54 (18 June 2021)

[2021] ZAKZPHC 54**COURT**

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Lopes, S Milozewski

CASE / FILE NUMBER

CCD16/2020

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA,
KWAZULU
NATAL DIVISION, PIETERMARITZBURG,
NORTH
EASTERN CIRCUIT, MTUNZINI****Case****No. CCD16/2020****In**

the matter between:

The
State
and
Minenhle
Siboniso
Biyela Accused**JUDGMENT**

Lopes J,

- [1] The accused in this matter, Minenhle Siboniso Biyela ('Mr Biyela') has been charged with one count of murder, in that on the 20th October 2019 and in the Nyamazane area in the District of Maphumulo, he murdered Siphakamiso Clement Mzobe. He is also charged with robbery with aggravating circumstances of a Canik 9mm Parabellum pistol and a cellular phone from Mr Mzobe during the attack upon him.

Both of the counts are read with the provisions of s 51 and Part I and Part II respectively of Schedule 2 to the Criminal Law Amendment Act 1997.

[2] In the indictment it is alleged that Mr Biyela and Mr Mzobe were known to each other, because Mr Mzobe was the neighbour of Mr Biyela's grandmother. At the time of the incident Mr Mzobe owned the Canik 9mm pistol and a cellphone. It is alleged that prior to the incident Mr Biyela and one Khanyisani Nkosi ('Mr Nkosi') decided to rob Mr Mzobe of his pistol and other valuables. On the evening of Sunday, the 20th October 2019, they concealed themselves in an outside toilet and kept a look-out for Mr Mzobe as they knew that he would walk that way in order to reach his home. When he approached them, they exited the toilet and accosted him at gunpoint, whereupon they shot him. Mr Mzobe died at the scene of his gunshot wounds. Mr Biyela and Mr Nkosi then took possession of Mr Mzobe's pistol and cellular phone, and they fled the scene. It is alleged that they acted in concert and in the furtherance of the execution of a common purpose in committing the murder and robbery.

[3] At the outset of the trial Mr Biyela pleaded not guilty and made a statement in terms of s 115 of the Criminal Procedure Act, 1977, the facts contained in which were admitted in terms of s 220 of the Act.

[4] Mr Biyela pleaded not guilty and recorded the following summary of events:

(a) During October of 2019 he was visited by his friend Khanyisani Nkosi whilst he was staying at his grandmother's home. He had invited Mr Nkosi to stay with him at home at Maphumulo because he had been experiencing some personal problems. Mr Biyela's grandmother was Phambakile Mhlongo. Although the statement in terms of s 115 records that his grandmother is Nomathemba Irene Mhlongo, that was clearly an error because, although she is a grandmother or relation

of Mr Biyela, the grandmother he intended to refer to was Phambekile Mhlongo.

(b) On the 20th October 2019, Mr Nkosi suggested that they go to a nearby shop. They proceeded on their way to do so. On the way it started raining and Mr Biyela and Mr Nkosi took shelter in an outside toilet.

(c) At that stage Mr Nkosi became alerted to the fact of a person approaching and said that he wanted to rob that person of his firearm.

(d) Mr Biyela protested that Mr Mzobe was his neighbour and that Mr Nkosi must not do that. At that stage Mr Biyela was not aware that Mr Nkosi was himself carrying a firearm.

(e) They thereafter continued on their journey to the shop. Whilst walking there, they came across Mr Mzobe. This was at night with no light shining. However, Mr Mzobe recognised Mr Biyela and they greeted each other.

- (f) Suddenly Mr Nkosi started shooting Mr Mzobe who fell to the ground. Mr Nkosi then removed Mr Mzobe's firearm and cellphone from his person.
- (g) Mr Biyela became afraid of Mr Nkosi because of what he had witnessed, and when Mr Nkosi instructed Mr Biyela that they should leave, he did so, and they went to his grandmother's home.
- (h) The next morning Mr Nkosi instructed Mr Biyela to leave with him and go to Umlazi. Mr Biyela did so because he was afraid to disagree with Mr Nkosi who had killed his neighbour. Mr Biyela was also afraid of the reaction of the community.
- (i) At Umlazi, Mr Nkosi instructed his friends to kill Mr Biyela, presumably lest he betray them. The friends of Mr Nkosi then shot Mr Biyela in the leg, but he managed to escape.
- (j) Mr Biyela denied having told Mr Nkosi that Mr Mzobe carried a firearm.
- (k) He also denied ever having seen Mr Nkosi with a firearm. The first time he saw the firearm was when Mr Nkosi drew it to shoot Mr Mzobe.
- [5] The grandmother of Mr Biyela, Phambekile Mhlongo, testified that Mr Biyela was her grandson and had come to stay at her home. He had brought with him Mr Nkosi. They slept in what was described as Ms Nene's RDP house, outside the premises.
- [6] According to Mrs Mhlongo, Mr Biyela and Mr Nkosi came and went during a period of approximately two weeks, whereafter Mr Mzobe was murdered and they left the premises the next morning. Mr Biyela and Mr Nkosi were in the company of Mrs Mhlongo at her home on the night of the 20th October 2019 at approximately 5:00pm. Mr Mzobe then left. Mrs Mhlongo made no secret of her dislike of Mr Nkosi, describing him as a rogue and a criminal. She was also clearly sceptical of Mr Biyela's suggestion that they were going to a shop when Mr Mzobe was attacked. When it was suggested to her that Mr Biyela was not aware that Mr Mzobe discharged his firearm from time-to-time, she suggested that he was 'playing games'.
- [7] Another twelve State witness testified. No evidence of the shooting itself was tendered because the only witnesses to it were Mr Nkosi and Mr Biyela. The State relied principally on the evidence of a confession and a pointing-out, both by Mr Biyela. The two trials-within-a-trial were combined by consent of the parties. The principal objections to the admission of the evidence were:
 - (a) Mr Biyela had been severely beaten by the police officers who arrested him. He was so traumatised by this experience that he simply did what he was told to do by the police officers. As a result, neither the confession nor the pointing-out were made freely and voluntarily.
 - (b) Mr Biyela was not apprised of his Constitutional rights by Lt. Colonel Zulu who conducted the pointing-out. In addition, the pointing-out

notes were not read back to him afterwards. There was no suggestion that Lt. Colonel Zulu had in any way intimidated Mr Biyela, but, because he was a police officer, Mr Biyela was afraid of him.

(c) With regard to the confession, for the reason that he was afraid of police officers, he did not make it freely and voluntarily. His Constitutional rights were not explained to him, especially the right to legal representation, Lt Colonel Devnath, to whom the confession was made, did not read the statement back to him after he made it, matters were put into the statement which he never said, and answers given by him were disputed in respect of six paragraphs.

[8] At the end of the trial-within-a-trial I made an order that the objections to both the pointing-out and the confession were dismissed, and they were admissible for the following reasons:

(a) The entire version of the assault upon him was wholly improbable. This was because the officers who arrested him at his Maphumulo home were members of the National Task Team, specialising in political crimes. They were not looking for Mr Biyela for this case, but for a Greenwood Park case, and they testified that they did not know of the Maphumulo case into the death of Mr Mzobe. Indeed, the investing officer, Sergeant Ndimane, stated that Mr Biyela was not considered a suspect in February 2020 when he was arrested. Mr Biyela was taken from his home to Durban North police station overnight and transferred to Durban Central police station the next day. The National Task team wanted him nearby in order to be able to question him. Indeed, this was, of itself, not indicative of no assault upon Mr Biyela, but he steadfastly maintained that during the assault in his home when he was arrested the police officers kept questioning him as to why he had killed Mr Mzobe.

(b) The State witnesses all gave their evidence in a straightforward manner, without inconsistencies or improbabilities. The evidence of Mr Biyela was, by contrast, very poor, and improbable. His fear of police officers, was, in my view, a contrived one because:

(i) It was only the assault at his initial arrest which caused his alleged anxiety.

(ii) He was taken out of the hands of those police officers completely, and testified that he did not feel otherwise in any way threatened during the pointing-out and the confession.

(iii) He did not tell the Magistrate at his first appearance of the assault, allegedly because he never knew that he could.

(iv) he did not tell his legal-aid counsel who appeared for him at hearings after his first appearance, allegedly because he did not know that he could do so. He only told his present counsel because he asked Mr Biyela if he had been assaulted during the confession. The fact of the assault was raised for the first time during this trial.

- (v) The evidence of Dr Deoraj, who examined Mr Biyela four days' after the alleged assault, was that no evidence established that he had been assaulted as he alleged – kicked multiple times with booted feet by two police officers whilst lying handcuffed (both feet and hands). Despite giving Sergeant Ndimande details about the killing of Mzobe, he did not tell him about the assault, or request that a charge be laid against his attackers.
- (vi) Mr Biyela said that he agreed to do the pointing-out because Sergeant Ndimande gave him courage by assuring him nothing would happen to him if he did so. He also stated that at no stage did Sergeant Ndimande force him to do anything.
- (vi) In contradiction to what he first said, Mr Biyela stated in answer to my questions, that he had told Sergeant Ndimande about the assault, but Sergeant Ndimande simply laughed at him, which he always did. This was something he had not told his counsel.
- (c) The interpreter used during the confession was Nkosikhona Vincent Ngiba, a clerk employed in the South African Police Force, and a first-language Zulu speaker. He clearly has a good command of English, and told the Court that in 2014 he completed a National

Diploma in Human Resources Management at the Mangasuthu University of Technology. His lectures, text books and exams were all in English. He had been requested by Lt Colonel Devnath to act as interpreter. He said that everything that was written in the confession and the pro-forma question sheet accompanying it, were as interpreted by him to Lt. Colonel Devnath.

- (d) Mr Ngiba was a most impressive witness, and I have no hesitation in accepting his evidence as the truth. As did Lt. Colonel Devnath, he testified that Mr Biyela was relaxed and comfortable throughout. When the interview was complete, Mr Ngiba read back the contents of the documents to Mr Biyela, who confirmed them and signed accordingly.
- (e) Lt Colonel Zulu told the court that he had read Mr Biyela his constitutional rights four times. He also read back the inspection

notes to Mr Biyela.

[9] After the trial within-a-trial, by consent, I made an order that the contents thereof would form evidence in the main trial. Mr Mlotshwa, who appeared for the State, closed his case. Mr Masondo, who appeared for Mr Biyela, then called him to testify again. At the outset of his second testimony, Mr Biyela stated that he wished the Court to use his confession statement to Lt. Colonel Devnath. He then proceeded to put forward a defence of compulsion – that he was so afraid of Mr Nkosi, he went along with his plans to rob and kill Mr Mzobe.

[10] Aspects of his evidence which now emerged from Mr Biyela second testimony, and which were either not previously testified to, or which were now contradicted are as follows:

- (a) Mr Nkosi was the notorious and feared leader of the 'Desperadoes' gang.
- (b) The gang dealt in the drug 'whoonga', and carried out killings.

- (c) Their hallmark, following the film upon which they based their existence was that they all carried firearms. Mr Nkosi was on parole, having been released from prison a year previously.
- (d) Mr Nkosi and Mr Biyela embarked on a journey to go to Maphumulo first, and then to Stanger to obtain more firearms for other gang members. They intended to go to Maphumulo first, and then to Stanger. It was not Mr Biyela's idea to take Mr Nkosi to Maphumulo to rob and kill Mr Mzobe – that was Mr Nkosi's idea. Mr Biyela was scared to 'go against' him because 'he shoots'. As Mr Biyela put it, Mr Nkosi invited that into his mind.
- (e) Mr Biyela then said that he was touched by the plight of Mr Nkosi because he was fleeing his enemies, and was apparently wanted by the police for the murder of his friend. He told Mr Biyela that if they left together, his enemies would not expect him to leave with Mr Biyela.
- (f) On the way to Maphumulo in a taxi, Mr Nkosi showed Mr Biyela his firearm. After eating oranges with Mr Mzobe at the house of his

grandmother, Mr Nkosi said they should rob Mr Mzobe and take his firearm. He foresaw that that would, inevitably, have involved

killing Mr Mzobe, because he would resist the taking. Mr Nkosi had had ample opportunities to see that Mzobe carried a firearm with him at all times.

- (g) Mr Biyela claimed that he warned or reprimanded Mr Nkosi because Mr Mzobe was his neighbour, Mr Nkosi assured him that he would do a 'clean job' – meaning, as he had previously stated that there would be no witnesses and that he would kill Mr Mzobe 'nicely'.
- (h) Mr Biyela said the contents of his confession statement was correct, save that he had gone along with Mr Nkosi because of his fear of him. In his statement the following is recorded:

'After arriving at Maphumulo, we discovered that we no longer have to go to Lindelani since there was a firearm at White City, next to Ma-Eleven. I informed Khanyisani that in order for us to get hold of the firearm from the owner, he would have to rob and shoot the owner because the owner is my neighbour.

"Did you know the owner" – Yes, the owner was known to me as Siphamandla Mzobe.'

- (i) Mr Biyela stated in his s115 statement that Mr Nkosi was his friend, something he later sought to distance himself from. Significantly, he records that he became afraid of Mr Nkosi after he had shot Mr Mzobe. In his confession statement it is recorded:

'Myself and Khanyisani planned to rob and kill Mr Mzobe we planned this together.

"Do you have anything else to say?"

I informed Khanyisani that I am young and that he must carry out the shooting because he (Khanyisani) was used to killing people.'

[11] At this stage of the trial the evidence of Mr Biyela, his s 115 statement and his s 220 admissions had become so contradictory and confused, it was difficult to say with any confidence that anything he said could be relied upon, save perhaps his confession statement. His defence of compulsion was raised only after he had lost his objections to the admission of the pointing-out evidence and the confession statement. It is, in my view, clearly contrived. Initially Mr Biyela would have the Court believe he was scared of the police officials. The only indication of a fear of Mr Nkosi, in his s 115 statement, was after he witnessed the shooting of Mr Mzobe. The probabilities overwhelmingly favour a finding that Mr Biyela told the truth when he said that he and Mr Bkosi planned the killing together. He may well have even feared Mr Nkosi, particularly after Mr Nkosi tried to have him killed to silence him as a witness against Mr Nkosi. As for the defence of compulsion to explain his part in the killing:

- (a) Mr Biyela and Mr Nkosi spent over two weeks together at Mr Biyela's grandmother's home. The plot was clearly hatched before the day of Mr Mzobe's killing because they had gone to find guns as the purpose for the trip. The suggestion of taking Mr Nkosi to church at a nearby school was denied by Mrs Mhlongo, who said that only the Easter services were done at the school.
- (b) Mrs Mhlongo also said that Mr Nkosi and Mr Biyela were coming and going during the time they spent at her home. She was an excellent witness, despite having no formal education whatsoever. We have no hesitation in accepting her version in preference to that of Mr Biyela. This means that there must have been ample opportunity for Mr Biyela to do something about his fear of Mr Nkosi – report to the local police, warn Mr Mzobe, speak to others or simply leave the area and go into hiding far away, as he claimed to have done after Mr Nkosi tried to have him killed.
- (c) Having helped to plot the robbery and murder of Mr Mzobe, it is insufficient for Mr Biyela to claim, as he did, that Mr Nkosi put the idea into his head.
- (d) Mr Biyela did not state that Mr Nkosi ever threatened him prior to the killing, in order to coerce him into taking part. That was an essential element for him to have established in order to succeed in a defence of compulsion. Vague suggestion and fears do not suffice. The defence raised is the more improbable because Mr Biyela was aware of the reputation of Mr Nkosi – on his version a man who never hired hit-men to do his dirty work, but did the killings himself. Mr Biyela could give no rational explanation for freely associating with known criminals who operated a drug-dealing gang. He simply contented himself by saying they liked his company because he is 'free-spirited'.

[12] I have consulted a number of authorities on the issue of compulsion. They include:

- (a) *S v Bradbury* 1967 (1) SA 387 (A).
- (b) *S v Goliath* 1972 (3) SA 1 (A).

- (c) S v Mandela 2001 (1) SACR 156 (C).
- (d) S v Petersen en Andere 1980 (1) SA 938 (A).
- (e) S v Kibi 1978 (4) SA 173 (E).
- (f) R v van der Merwe 1950 (4) SA 124 (O).
- (g) Lungile v S [2000] 1 All SA 179 (SCA).

These judgments all stress that the circumstances of each case has to be taken into account, and the onus is ultimately on the State to establish that there was no compulsion. Mr Masondo, correctly in our view, conceded that the defence faced difficulties with regard to succeeding on the defence of compulsion. The State, by virtue of its case, and the poor performance of Mr Biyela, has established that there was no compulsion sufficient to sustain a defence to the crimes with which Mr Biyela was charged.

[13] In all the circumstances, we have no hesitation in concluding that Mr Biyela is guilty on both counts one and two as charged. Given the planning of the robbery and the murder, and the circumstances of their commission, the murder falls within the ambit of s 51(1), read with (a), (c) and (d) of Part I of Schedule 2 to the Criminal Law Amendment Act, 1997, and the robbery falls within the ambit of s 51(1), read with Part II of Schedule 2 to that Act.

Mr Biyela, you are accordingly convicted on count one of murder and on count two of robbery with aggravating circumstances, as set out in the indictment.

Lopes J

S Milozewski (Assessor)

Date of hearing: 8th June 2021 – 18th June, 2021.

Date of Judgment: 18th June 2021.

For the State: Mr N Mlotshwa (Instructed by the Attorney-General).

For Mr Biyela: Mr SG Masondo (Instructed by Legal-Aid).

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Prepared on 10 October 2026 · Esheria