

SOUTH AFRICA / JUDGMENT

S v Gungisa and Others (504/05) [2006] ZASCA 149 (31 May 2006)

[2006] ZASCA 149

COURT

Supreme Court of Appeal

BEFORE

Scott, Jafta, Cachalia

CASE / FILE NUMBER

504/05

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THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Not Reportable

CASE NO 504/2005

In the matter between

ZOLA KENNETH GUNQISA AND OTHERS Appellants

and

THE STATE Respondent

Coram: Scott, Jafta JJA and Cachalia AJA

Heard: 3 May 2006

Delivered: 31 May 2006

Summary : Evidence – Reasonable possibility that the defence version is true – Accused entitled to acquittal.

Neutral citation: This judgment may be referred to as Zola Kenneth Gungisa and Others v The State [2006] SCA 76 (RSA)

JUDGMENT

JAFTA JA

- [1] The appellants were convicted of kidnapping and murder in the High Court, Johannesburg. Each appellant was sentenced to 5 years' imprisonment for kidnapping. A sentence of 15 years' imprisonment was imposed on the first, second and fourth appellants for murder. The third and fifth appellants were sentenced to 10 years' imprisonment. The court a quo (Mlambo J) granted leave to the first, second and third appellants to appeal against conviction and sentence. The other appellants' leave was limited to conviction only. Leave was also granted to the respondent to appeal against the sentences imposed.
- [2] The charges against the appellants arose from the following facts. On 21 March 1999 Freddie Maebela and his girlfriend visited the house of Mrs Lindiwe Moloi at Ngcobo Street, Vosloorus. They were travelling in a Toyota Conquest driven by Maebela. Shortly thereafter the second and fourth appellants arrived at the house looking for the driver of the Conquest. Having found Maebela in a bathroom they took him to the Conquest which was then parked some three metres from the house. Before taking away a telephone from the house, the fourth appellant informed Mrs Moloi that they were policemen and that they were taking Maebela to the local police station.
- [3] After their departure with Maebela, Mrs Moloi asked his girlfriend to take some clothes for him to the police station. Mrs Moloi went to inform Maebela's mother that he had been arrested by the police. However, they were later informed that Maebela was not detained at the local police station. With the help of other relatives they searched for him without success. Ten days later a badly decomposed body was discovered in the mieliefields at Dunnottar, not very far from Vosloorus. Relatives identified it as that of Maebela at a mortuary in Springs. A medical examination of the body revealed that he had died as a result of a gunshot to the head. The skull was fractured. The medical evidence as to whether the body could have been that of a person who died ten days previously was equivocal.
- [4] Apart from disputing that the body belonged to Maebela, the appellants denied any involvement in his killing. Their version was briefly this. Some three days before Maebela's arrest, Godfrey Gunqisa was robbed of his Conquest by four men who were carrying firearms. Gunqisa is the brother of the first and the third appellants. On 21 March these appellants received information that the stolen vehicle had been sighted in Vosloorus. They went to look for it. The first appellant was driving an Opel Astra borrowed from a friend and had two companions in the vehicle who are now deceased. The third and fifth appellants travelled together in another vehicle. They picked up the second and fourth appellants at Tsakane Police Station where the latter worked as policemen.
- [5] Shortly after arriving in Vosloorus they saw the vehicle they were looking for. They followed it to Mrs Moloi's house. The second and fourth appellants entered the house while the others remained in the vehicles. In the house they found Mrs Moloi and Maebela's girlfriend to whom they introduced themselves as policemen. They arrested Maebela in the bathroom and informed the women that they were taking him to the local police station. The second appellant placed him in the boot of the Opel Astra before they drove away in a convoy of three vehicles. The Conquest driven by the second appellant was leading. The fourth and

fifth appellants were with him. The third appellant was driving the vehicle in the middle and the first appellant's Opel Astra was at the rear.

- [6] On the way the first appellant noticed that the boot of the Opel Astra was open after hearing a loud noise. He stopped on the side of the road. On examining the boot he observed that Maebela had escaped. As the other vehicles were by then out of sight and he did not know the way to the police station, he drove back to his home at Kwa-Thema in Springs.
- [7] In the meantime the Conquest arrived at the police station. On entering the premises, the fourth appellant was accidentally shot by a firearm while being handled by the fifth appellant. The shooting occurred inside the vehicle. He was hastily taken to hospital. As the second appellant was driving out of the police station, they saw the vehicle driven by the third appellant approaching and they beckoned to him to follow. As they were driving at a high speed, they lost him and he also returned to Kwa-Thema. From the hospital the second and the fifth appellants went back to the police station. The fifth appellant was charged and detained for the shooting. The second appellant made an entry in the occurrence book recording the recovery of the vehicle and the arrest of Maebela.
- [8] While accepting that the appellants had reason to arrest Maebela, the trial court found that their conduct was incompatible with an intention to arrest. The court said:

'They contend that this was a lawful arrest. However there are certain features of their conduct which militate against this having been a lawful arrest. Accused 2 and 4 who are members of the South African Police Services, waited until they knocked off to go to Vosloorus despite having received information about the Conquest being in Vosloorus whilst on duty. They did not alert the police offices at Kwa-Thema Police Station, where the robbery charge involving the Conquest was laid. They went directly to their rendezvous in Vosloorus without reporting to the Vosloorus Police Station, despite the probability of an arrest by them or even backup assistance. They went to Vosloorus without any handcuffs or leg irons. Even assuming that they showed their identification or appointment cards to Rebecca Moloi, their reason for not travelling with Maebela in their vehicle, the Conquest, is indicative of an intent contrary to effecting an arrest.;

I do not find anything in the conduct of the appellants which is inconsistent with an intention to arrest Maebela. They must have decided to arrest him only after they had seen him driving the stolen vehicle. There can be no doubt that his arrest was justified. On this issue their version was also supported by Mrs Moloi who testified that she reported Maebela's arrest to his mother. In the absence of proof that Maebela was murdered by the appellant there can therefore be no justification for a conviction on the charge of kidnapping.

- [9] Turning to the charge of murder, two issues were raised both in this court and in the court below. The first was the adequacy of the evidence identifying the decomposed body as Maebela's body. The second was whether the version that he escaped was false. As had been the position in the court below, counsel devoted much time in argument to the question whether the body was properly identified. I will consider the second issue first.

[10] The trial court did not accept that Maebela had escaped. The court rejected this version on the basis that it was inherently improbable, and said:

‘For accused 1 to simply return to Kwa-Thema, his home, without an attempt to locate the Vosloorus Police Station in order to make a timeous report of Maebela’s escape that evening, is simply not consistent with innocence. Moreover he had family whose house was one kilometre away from the police station. Clearly accused’s version that Maebela escaped from the Astra’s boot is a lie. He wants this court to believe that after Maebela escaped from the boot he simply ceased to exist. This happened in broad daylight and accused 1, himself, saw no one running in the vicinity of where he says he saw the Astra’s boot suddenly open.’

[11] In *S v Shackwell* 2001 (2) SACR 185 (SCA) this court cautioned against the rejection of an accused’s version solely on the ground that it was improbable. There Brand AJA said (at 194g-i):

‘It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused’s version is true. If the accused’s version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused’s version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.’

[12] I am not persuaded that there are improbabilities in the first appellant’s version or that his failure to locate the police station is inconsistent with the conduct of an innocent man. Their objective in going to Vosloorus was to recover the stolen vehicle. Maebela’s escape was of less concern to him. It was for the police to trace him and other suspects in the robbery. In addition, Dr Boleu, the owner of the Opel Astra, supported the first appellant’s version as to the faulty boot. He said at the time of this incident the latch of the boot was faulty and this caused it on occasions to open on its own when the vehicle was driven on an uneven surface. The first appellant had said that he saw it open immediately after he had driven over a speed hump. If we accept, as we must, that Maebela was conveyed in that vehicle, it is reasonably possible that he escaped. He was facing a long term of imprisonment in the event of being convicted. The fact that the first appellant did not see him in the vicinity when he went to close the boot does not detract from this possibility being reasonable. It is obvious that Maebela would hide from the appellants to avoid being captured.

[13] There was no evidence adduced by the State as to where the appellants drove after leaving Mrs Moloi’s house. In this regard their version remains uncontroverted. Moreover, the making of the entry in the occurrence book by the second appellant is irreconcilable with the conduct of a guilty person. In that entry he furnished both his name as well as that of the fourth appellant. He also gave his police number and the police station where both he and

the fourth appellant were employed. He reported that the suspect had been arrested and that 'the suspect is in the other car'. Finally, he recorded that they had removed the telephone from the suspect's house and that it could be collected at the Vosloorus police station. The reason for this, he indicated, was to prevent the other participants in the robbery from being informed of the arrest. This entry is totally inconsistent with the conduct of someone who had just murdered Maebela. Either he would have made no entry at all in the occurrence book or, if he was brazen enough to do so, he would have concocted a story of an escape. The significance of the entry was overlooked by the trial court.

[14] The court also found that the second and fourth appellants handed Maebela to the first appellant for the latter to murder him as an act of vengeance for the robbery on his brother. This finding is not supported by the evidence. It follows that the trial court erred in rejecting the defence version as false. In view of this finding it is not necessary to consider the other issue.

[15] The appeal must succeed. The convictions and the sentences are set aside.

C N JAFTA

JUDGE OF APPEAL

CONCUR:) SCOTT JA

) CACHALIA AJA

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