

SOUTH AFRICA / JUDGMENT

S v Hasane and Others (K/S 01/2017)

[2020] ZANCHC 28 (12 May 2020)

[2020] ZANCHC 28**COURT**

Northern Cape High Court, Kimberley

BEFORE

Tlaletsi JP

CASE / FILE NUMBER

K/S 01/2017

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THE STATE
v
RICHARD
HASANE
First Accused
TSHAME FRANK BAXANE
Second Accused
ZONIZELO RICHARD
MAGAWU
Third Accused
THOMPSON MNCEDISI
MPHONDOMISA
Fourth Accused
MATTHEUWS
LEGODU
Fifth Accused

JUDGMENT

Tlaletsi JP

Judgment

Introduction

and charges

1. Accused number 1 is Richard Hasane, a 34-year-old adult male and a South African citizen from house number [...], in the district of Kuruman.
2. Accused number 2 is Tshame Frank Baxane, a 32-year-old adult male and a South African citizen from house number [...], in the district of Postmasburg.
3. Accused number 3 is Zonizelo Richard Magawu, a 37-year-old adult male and a South African citizen from house number [...], in the district of Postmasburg
4. Accused number 4 is Thompson Mncedisi Mphondomisa, a 41-year-old adult male, South African citizen from house number [...], in the district of Postmasburg.
5. Accused number 5 is Matthews Legodu, a 49-year-old male, South African citizen from house number [...] in the district of Postmasburg.
6. There was accused number 6, Paulus Mzeleni Mgcera who the charges against him have been withdrawn. Reference will however be made to him in the course of this judgment as his name came up from time to time in the cause of this trial.

7. All five accused are appearing in this Court on five charges each. The first two charges are murder, read with the provisions of section 51 of the Criminal Law Amendment Act, 105 of 1997. The third charge is kidnapping read with the provisions of section 51 of the Criminal Law Amendment Act. The fourth charge is contravention of section 3(1) read with sections 1, 120(1) and 121 of the Firearms Control Act, 60 of 2000. The fifth charge is contravention of section 90 read with sections 1, 120(1) and 121 of the aforesaid Firearms Control Act.
- [1] See *S v V* 2000 (1) SACR (SCA) at 455 A-C; *S v Van der Meyden* 1991 (1) SACR 447 (WLD) at 449j-450b.
- [2] 2003(1) SACR 134 (SCA) at para 15.
- [3] *S v Nooroodien and other* 1998 (2) SACR 510 (NC) at 516 c.
- [4] *S v Hlapezula and another* 1965 (4) SA 439 (A) at 440 D – E.
- [5] *S v Francis* 1991 (1) SACR 198 (A) at 205 E – F.
- [6] *S v Gentle* 2005 (1) SACR 420 (SCA) at paragraph 18; *S v Scott-Crossley* 2008 (1) SACR 223 (SCA) at paragraphs 7 and 8.
- [7] *R v Ncanana* 1948 (4) SA 399 (A) at 405 and 406; *S v Masuku and another* 1969 (2) SA 375 (N); *Khumalo and Another v S* [1998] 2 All SA 294 (N) at 304; *S v Engelbrecht* 2011 (2) SACR 540 (SCA) at paragraph 17.
- [8] 1998
- (4) SA 296 (T); *S v Boesak* 2000 (1) SACR 633 (SCA).
- [9] SNYMAN CRIMINAL LAW 6TH EDITION at pages 253 – 255.
- [10] *S v Cooper and Others* 1976(2) at SA 879A-H
- [11] *S v Majosi and others* 1991 (2) SACR 532 (A) at 536 I – 537 E; *S v Nkabinde and others* 2017 (2) SACR 431 (SCA).
- [12] *S v Nooroodien* (supra) at 516 i - 518 a; *S v Mgedezi and others* 1989
- (1) SA 687 (A) at 705 I – 706 B.
- [13] Section 257 of Act 51 of 1977; *S v Nooroodien* (supra) at 526 e – f; *S v Morgan and others* 1993 (2) SACR 134 (AD) at 173 j – 174 g.
- [14] *S v Maelangwe* 1999 (1) SACR 133 (NC) at 149 a – 151 e.
- [15] *S v Mbuli* 2003 (1) SACR 97 (SCA) at paragraph 71; *S v Molimi and another* [2006] ZASCA 43; 2006 (2) SACR 8 (SCA) at paragraphs 37 and 38.
- [16] Reference will be made to it at a later stage. It is the motor vehicle that would be used to convey would be assassins to Postmasburg from Danielskuil and back.

- [17] Record page 76 to 77 (25/10/2018).
- [18] It will be noted that Colonel Louwrens's version is that he did not go the following day. This contradiction is exploited by accused number 3.
- [19] This is in contradiction with the evidence of W/O Sekgweleo and D/S Moshe which is however immaterial.
- [20] See footnote 18 above.
- [21] The evidence suggests that Moss could be W/O Sekgweleo who came to the scene. He has testified about the same events at the scene.
- [22] At the time of the investigations she used the surname Palm which is reflected in her Forensic statement.
- [23] The swabs are taken from Ford Ranger van.
- [24] Also taken from the Ford Ranger van.
- [25] There were some items such as a piece of a leaf, a broken branch with leaves, a piece of a tissue paper and silver beer bottle cap found from the Avanza Toyota on 19 August 2016 which ultimately did not have any bearing on the case.
- [26] It is to be noted that this conclusion was specifically not admitted by accused number 3 in the admissions made in terms of section 212 of the Act. His main contention is why in the first samples obtained no blood could be found. There is however no alternative version provided. This aspect is covered in the evidence of Colonel Louwrens.
- [27] On this aspect accused number 5 testified that he was in a City Golf that he bought for his son.
- [28] Reference was made to her statement, Exhibit W, to the police and some contradictions with her evidence. She also mentioned that there were omissions in her statement.
- [29] Accused number 3 claims that he was receiving a call from a clerk from the police station called Larry who forgot his phone in the Avanza when he gave him a lift to work. However, a call made at this time appears on the call data of his phone which he claims got missing on the 15th August 2016.
- [30] Detective Warrant Officer Nortje confirmrd that on 22 August 2016 he downloaded data from the CCTV cameras at the cell phone shop and handed same to Colonel Louwrens as part of the investigations. He downloaded it as it was stored and did not do anything to it such as enhancing it. His evidence was not challenged.
- [31] The state tendered the evidence of Ms EOUDIA CHADINHA whos was the chief financial officer at Kgatelopele Municipality. Her evidence related to tenders awarded to and payments made to accused number 5 during the period prior 17 August

2016. The information is contained in a letter to the SAPS admitted as Exhibit J. The total amount paid to him for services rendered is R20 232 864.
08. Her evidence became common cause.
- [32] Detective Warrant Officer Nortje confirmed that he downloaded the video footage from several CCTV cameras at Anglo-American offices and handed it to Colonel Louwrens. It was footage from several views from the street admitted as Exhibits 4 to
6. These were also not challenged.
- [33] These clips indicate that the Ford Ranger and the Jetta were at the Kolomela Hub at the same time.
- [34] Exhibit R page 3 to 15.
- [35] This message came out to be the controversial one calling him to attend a meeting in Postmasburg in relation to a tender.
- [36] See Exhibit R page 22 (1 of1).
- [37] The call duration on page 22 of Exhibit R is eight seconds on the call data for the suspect number. The difference is made by the fact that the time is only reflected in hours and minutes without seconds, whereas the call data for Baaitjie's number is reflected in seconds as well. The one on page 22 is therefore rounded to the nearest tenth.
- [38] Exhibit R pages 16 to 36.
- [39] The evidence of Lekgotla and partly that of accused number1 suggest that the suspect number and handset were not yet in the Jetta when these communications took place.
- [40] Exhibit R page 177.
- [41] Compare this aspect with the evidence of Boitumelo, the presence of accused number 3 at the cell phone shop and the evidence of Colonel Louwrens on the sale of the SIM card and the remaining string of other SIM cards.
- [42] Page 26 of Exhibit R.
- [43] The usage profile became a bone of contention by accused number 3 who contended that page 26 of Exhibit R does not specifically state that the suspect number was used in the handset.
- [44] This is the handset that accused number 3 says it was stolen from the Avanza motor vehicle.
- [45] Exhibit R page 45.
- [46] Record page 52 to 53 (8/11/2018).
- [47] Exhibit R page 104, second line from the bottom of the page.

[48] Exhibit R page 44.

[49] Exhibit R page 49 to 53.

[50] This call is disputed by accused number 4.

[51] Exhibit R page 64; Record pages 66 to 67 (8/11/2018).

[52] Exhibit R page 65 to 85.

[53] The State argues later that these calls from accused number 2 and Lekgotla at more or less the same time confirms that they were

waiting for accused number 4 who was delaying them to travel to Postmasburg.

[54] Lekgotla made a call to his brother at the time from Groenwater. It is also to be noted that at 20:26:32 there is a contact between accused number 2's number and that of accused number 5 with a call duration of 112 seconds. At that time, it indicates that accused number 5 was covered by the Groenwater tower and no longer Danielskuil. This aspect will be made clear when accused number 5's number ending with 4322 is discussed.

[55] Exhibit R page 177.

[56] Exhibit R page 114 to 136.

[57] According to accused number 3 the Nokia N70 was not in his possession as it was stolen from the Avanza.

[58] Exhibit R page 137 to 146.

[59] Exhibit R page 147 onward.

[60] Exhibit R page 159

[61] Note the explanation of this call by both accused number 1 and 5.

[62] Exhibit R page 195.

[63] Compare with the evidence of Lekgotla that the Nokia N70 was placed in the Jetta in Danielskuil which accused number 1 claims he did not see it happen.

[64] Note the respective versions of accused no's 1 and 4 on this call.

[65] See the explanation given by accused number 4 and 5 about this call which is intended to eliminate any contact between accused number 1 and number 5 in particular. The explanation is that accused number 4 met accused number 5 and borrowed his phone to call

this number from which there was a missed call and the person who picked up said he is Tiro Lekgotla and accused number 4 immediately

dropped the call upon hearing that.

[66] This conclusion was not disputed and became common cause.

[67] This point is argued by accused number 3.

[68] It is to be recalled that Colonel Ramela sent the particulars of Baaitjie's message and the suspect number to Upington as

directed by her commander for the processing of the application to the service provider for the data.

[69] It is a coincidence that airtime is loaded onto the SIM card at a time the state alleges that a new SIM card was acquired at that time and used for the first time then. This negatives the explanation that accused number one was using a cell phone forgotten in his car.

[70] The contents of the affidavit were not placed in dispute.

[71] Ms Heyneke's explanation of the anomaly appears to be the only plausible explanation in the circumstances. Accused number 5 cannot benefit from the anomaly because his version is simply that he was not at those places when he made and received the calls.

[72] By this averment accused number one is in fact saying his girlfriend illegally possessed a diamond.

[73] Accused number 2 had his evidence mixed up between the 17th and the 18th.

[74] See: SCHWIKKARD AND VAN DER MERWE PRINCIPLES OF EVIDENCE 4TH EDITION (2016) at page 93

[75] Record: Page 33 lines 9 – 19 (06/11/2018)

[76] He must have personally known that he participated in the commission of the serious offences.

[77] Record: Page 80 line 18 to page 87 line 25 (12/06/2019)

[78] KRIEGLER SOUTH AFRICAN CRIMINAL PROCEDURE at page 23 – 53; See also in general: S v Miller and others 2016 (1) SACR 251 (WCC).

[79] See: S v Reddy and others 1996 (2) SACR 1 (AD) at 8 c – 9 e

[80] Record: Page 77 line 9 to page 83 line 24 (01/08/2019);

[81] Exhibit LLL paragraph 12; Record: Page 8 line 10 to page 9 line 22 (01/08/2019); Page 56 lines 12 to 20 (01/08/2019).

[82] Record: Page 76 line 9 to page 87 line 10 (31/07/2019); Page 1 line 18 to page 6 line 19 (01/08/2019).

[83] Record: Page 8 line 25 to page 12 line 8 (01/08/2019); Page 42 line 20 to page 46 line 11 (01/08/2019); Page 46 line 22 to page 50 line 1 (01/08/2019); Page 51 line 10 to page 52 line 12 (01/08/2019).

- [84] Record: Page 12 line 19 to page 31 line 21 (01/08/2016).
- [85] Record: Page 32 line 10 to page 42 line 10 (01/08/2016).
- [86] Record: Page 53 line 3 to page 57 line 10 (01/08/2019); Page 61 line 4 to page 64 line 20 (01/08/2016).
- [87] Record: Page 62 line 7 to page 63 line 8 (01/08/2019)
- [88] Record: Page 64 line 19 to page 65 line 19 (01/08/2019).
- [89] Record: Page 71 line 10 to page 73 line 8 (01/08/2019).
- [90] Record: Page 8 line 1 to page 11 line 2 (02/08/2019).
- [91] Record: Page 13 line 14 to page 17 line 3 (02/08/2019)
- [92] Record: Page 20 line 19 to page 23 line 4 (02/08/2019); Record: Page 23 line 11 to page 27 line 10 (02/08/2019); Page 8 line 4 to page 9 line 2 (05/08/2019).
- [93] Record: Page 17 line 4 to page 19 line 18 (02/08/2019)
- [94] Record: Page 27 line 12 to page 30 line 15 (02/08/2019); Page 1 line 1 to page 11 line 25 (23/08/2019)
- [95] Record: Page 30 line 16 to page 31 line 15 (02/08/2019).
- [96] Record: Page 31 line 16 to page 32 line 25 (02/08/2019).
- [97] Record: Page 9 line 11 to page 10 line 15 (05/08/2019).
- [98] Record: Page 11 line 20 to page 14 line 20 (05/08/2019).
- [99] Record: Page 15 line 1 to page 17 line 11 (05/08/2019)
- [100] S v Gentle 2005(1) SACR 420 (SCA).
- [101] S v Hlapezula and Others 1965(4) SA 439 (AD) at 440E; S V Mia and Another 2009(1) SACR 330 (SCA) at para (12).
- [102] KRIEGLER (supra) at page 3 – 6 warns about making cases involving identification parades too complicated. The police directives, the rules which were developed in practice and even the opinions expressed by the text books, are all guidelines and “not laws cast in stone”.
- [103] See also Exhibit BBB
- [104] Exhibit R: Page 104.
- [105] Record: Page 56 lines 15 – 23 (27/11/2018).
- [106] Record: Page 37 line 4 to page 45 line 15 (06/08/2019); Page 37 line 9 to page 38 line 11 (07/08/2019).

- [107] Record: Page 49 line 20 to page 51 line 4 (06/08/2019); Page 55 line 1 to page 56 line 21 (06/08/2019).
- [108] Record: Page 52 line 3 to page 53 line 8 (06/08/2019).
- [109] Record: Page 3 line 14 to page 12 line 25 (07/08/2019).
- [110] Record: Page 26 line 16 to page 30 line 2 (07/08/2019).
- [111] Record: Page 30 line 5 to page 36 line 16 (07/08/2019).
- [112] Record: Page 40 line 4 to page 41 line 1 (07/08/2019).
- [113] Record: Page 43 line 18 to page 44 line 2 (07/08/2019).
- [114] Record: Page 44 line 6 to page 47 line 18 (07/08/2019)
- [115] Record: Page 47 line 20 to page 52 line 15 (07/08/2019);
- [116] Record: Page 52 line 18 to page 59 line 6 (07/08/2019).
- [117] Record: Page 59 line 16 to page 61 line 2 (07/08/2019); Page 63 line 1 to page 65 line 6 (07/08/2019); Record: Page 65 line 8 to page 66 line 25 (07/08/2019).
- [118] Record: Page 68 line 16 to page 69 line 19 (07/08/2019).
- [119] Record: Page 69 line 20 to page 71 line 26.
- [120] Record: Page 73 line 26 to page 81 line 2 (07/08/2019).
- [121] Record: Page 40 line 14 to page 41 line 20 (13/08/2019)
- [122] Record: Page 45 line 26 to page 48 line 14 (13/08/2019)
- [123] Record: Page 48 line 15 to page 49 line 4 (13/08/2019)
- [124] Record: Page 49 line 5 to page 63 line 14 (13/08/2019); pages 49 to 66 of the same record.
- [125] Record: Page 60 line 20 to page 66 line 25 (13/08/2019).
- [126] Record: Page 67 line 1 to page 70 line 15 (13/08/2019)
- [127] Record: Page 70 line 16 to page 71 line 24 (13/08/2019)
- [128] Record: Page 72 line 21 to page 76 line 15 (13/08/2019).
- [129] Record: Page 76 line 18 to page 80 line 6 (13/08/2019).
- [130] Record: Page 80 line 11 to page 92 line 3 (13/08/2019).
- [131] Record: Page 92 line 20 to page 98 line 24 (13/08/2019); see also the cross-examination by the State on this aspect at page 95 to 97 of 13 August 2019. He conceded that he did not instruct his legal representative about the SD card then.

- [132] Record: Page 2 line 6 to page 6 line 9 (14/08/2019); Page 17 line 18 to page 21 line 4 (14/08/2019).
- [133] Record page 33 line 1 to 20 (13/08/2019).
- [134] Record page 29 of Exhibit R.
- [135] Record: Page 32 line 8 to page 41 line 8 (14/08/2019); Page 14 line 16 to page 17 line 3 (15/08/2019).
- [136] Record: Page 2 line 10 to page 13 line 2 (14/08/2019).
- [137] Record: Page 13 line 8 to page 14 line 25 (14/08/2019)
- [138] Record: Page 24 line 18 to page 26 line 3 (14/08/2019)
- [139] Record: Page 31 line 16 to page 32 line 5 (14/08/2019)
- [140] Record: Page 42 line 17 to page 47 line 25 (14/08/2019)
- [141] Record: Page 50 line 14 to page 52 line 16 (14/08/2019)
- [142] Record: Page 55 line 6 to page 76 line 13 (14/08/2019)
- [143] Record: Page 76 line 14 to page 83 line 7 (14/08/2019)
- [144] Record: Page 83 line 16 to page 85 line 1 (14/08/2019)
- [145] Record: Page 89 line 10 to page 94 line 2 (14/08/2019)
- [146] Record: Page 95 line 3 to page 98 line 19 (14/08/2019)
- [147] Record: Page 9 line 23 to page 12 line 15 (15/08/2019)
- [148] Record: Page 12 line 16 to page 14 line 8 (15/08/2019)
- [149] Record: Page 20 line 16 to page 22 line 16 (15/08/2019)
- [150] Record: Page 23 line 5 to page 27 line 11 (15/08/2019)
- [151] (Page 40 line 15 to page 48 line 12 (15/08/2019)) and Denver Baaitjie (page 52 line 11 to page 69 line 15 (15/08/2019)).
- [152] Record: Page 24 line 20 to page 26 line 10 (19/08/2019)
- [153] Record: Page 26 line 12 to page 29 line 4 (19/08/2019)
- [154] Record: Page 29 line 17 to page 37 line 16 (19/08/2019)
- [155] Record: Page 37 line 15 to page 40 line 8 (19/08/2019)
- [156] Record: Page 40 line 9 to page 41 line 22 (19/08/2019)
- [157] Record: Page 41 line 24 to page 45 line 2 (19/08/2019)

- [158] Record: Page 45 line 3 to page 47 line 8 (19/08/2019)
- [159] Record: Page 3 line 2 to page 4 line 2 (22/08/2019)
- [160] Record: Page 6 line 6 to page 14 line 3 (22/08/2019)
- [161] Record: Page 11 line 9 to page 16 line 17 (22/08/2019).
- [162] Record: Page 16 line 18 to page 19 line 2 (22/08/2019)
- [163] Record: Page 19 line 8 to page 22 line 24 (22/08/2019).
- [164] Record: Page 23 line 12 to page 29 line 25 (22/08/2019).
- [165] Record: Page 30 line 8 to page 33 line 2 (22/08/2019).
- [166] Record: Page 33 line 3 to page 35 line 2 (22/08/2019); Page 43 line 1 to page 44 line 18 (22/08/2019).
- [167] Record: Page 35 line 4 to page 42 line 24 (22/08/2019).
- [168] Record: Page 45 line 8 to page 48 line 20 (22/08/2019).
- [169] Record: Page 52 line 25 to page 55 line 20 (22/08/2019).
- [170] Record: Page 56 line 1 to page 58 line 6 (22/08/2019).
- [171] Record: Page 58 line 7 to page 60 line 10 (22/08/2019).
- [172] Record: Page 60 line 11 to page 61 line 8 (22/08/2019).
- [173] Record: Page 62 line 23 to page 65 line 14 (22/08/2019).
- [174] Record: Page 65 line 15 to page 68 line 8 (22/08/2019).
- [175] Record: Page 68 line 9 to page 79 line 3 (22/08/2019).
- [176] Record: Page 79 line 4 to page 83 line 24.
- [177] Record: Page 83 line 1 to page 84 line 25 (22/08/2019).
- [178] Record: Page 87 line 12 to page 90 line 6 (22/08/2019).
- [179] Record: Page 91 line to page 93 line 25 (22/08/2019).
- [180] Record: Page 94 line 1 to page 95 line 17 (22/08/2019).
- [181] Record: Page 95 line 22 to page 102 line 15 (22/08/2019).
- [182] Record: Page 102 line 16 to page 103 line 21 (22/08/2019).
- [183] Record: Page 63 line 23 to page 65 line 25 (27/08/2019).
- [184] Record: Page 66 lines 1 – 22 (27/08/2019).

- [185] Record: Page 69 line 14 to page 74 line 8 (27/08/2019).
- [186] Record: Page 74 line 17 to page 75 line 2 (27/08/2019).
- [187] Record: Page 78 line 8 to page 90 line 2 (27/08/2019); Page 2 line 2 to page 8 line 14 (28/08/2019).
- [188] Record: Page 8 line 13 to page 14 line 14 (28/08/2019)
- [189] Record: page 88 line 3 to 15 (27/08/2019)
- [190] Record: Page 14 line 15 to page 23 line 8 (28/08/2019)
- [191] Record: Page 24 line 3 to page 26 line 20 (28/08/2019)
- [192] Record: Page 26 line 25 to page 27 line 23 (28/08/2019).
- [193] Record: Page 28 line 3 to page 30 line 14 (28/08/2019).
- [194] Record: Page 34 line 9 to page 35 line 2 (28/08/2019)
- [195] Record: Page 35 line 9 to page 43 line 14 (28/08/2019).
- [196] Record: Page 43 lines 15 to 20 (28/08/2019).
- [197] Record: Page 49 lines 11 – 21 (28/08/2019).
- [198] Record: Page 49 line 24 to page 52 line 3 (28/08/2019)
- [199] Record: Page 52 line 15 to page 56 line 1 (28/08/2019).
- [200] *S v Baleka and others* (1) 1986 (4) SA 192 (T) at 199 F – G.
- [201] *S v Baleka and others* (supra) at 194 D; *S v Baleka and others* (3) 1986 (4) SA 1005 (T) at 1023 F – I; See also: *S v Nieuwoudt* [1990] ZASCA 74; 1990 (4) SA 217 (A); *Motata v Nair NO and another* 2009 (1) SACR 263 (T).
- [202] The references are to the pages in Exhibit XX.
- [203] Record: Page 67 line 16 to page 68 line 19 (28/08/2019).
- [204] Record: Page 70 line 2 to page 74 line 17 (28/08/2019)
- [205] Sec 252A (6) of Act 51 of 1977.
- [206] Section 252A (1) and (3) of Act 51 of 1977.
- [207] *S v Kotze* 2010 (1) SACR 100 (SCA) at 111 g; *S v Naidoo* 2010 (1) SACR 369 (KZP) at 371 e – 372 f (this is footnote 16).
- [208] *S v Kotze* (supra) at 110 g – 111 c.
- [209] *S v Matsabu* 2009 (1) SACR 513 (SCA) at paragraphs 8 and 9

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Prepared on 11 October 2026 · Esheria