

SOUTH AFRICA / JUDGMENT

S v Hlela and Others (CC27/96)

[1997] ZAECHC 1 (4 February 1997)

[1997] ZAECHC 1**COURT**

High Courts - Eastern Cape

BEFORE

Y Ebrahim

CASE / FILE NUMBER

CC27/96

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IN THE SUPREME COURT OF SOUTH AFRICA

(CISKEI PROVINCIAL DIVISION)

CASE NO. CC 27/96

THE STATE

versus

MOIMGEZI DAVID HLELA Accused No. 1

ZOLA MKAPA Accused No.2

LUYANDA NQUBELAIMGA Accused No.3

EBRAHIM, AJ: In the indictment served on the three accused they are charged with two counts of murder and two counts of attempted murder. Count 1 is the murder of Babalo Bangela, Count 2 the murder of Lizo Tom, Count 3 the attempted murder of Msindisi Wilson Seyisi, and Count 4 the attempted murder of Pepe Mzimkhulu.

At the commencement of the trial Mr Kruger, who prosecutes on behalf of the State, applied for the indictment to be amended by withdrawing

Count 2 and substituting in its stead the charge of the attempted murder of Lizo Tom. The amendment was necessitated, it seems, by the difficulty confronting the State in proving that the deceased's death on 24 May 1995, some eleven days after he had been shot on 13 May 1995, was due to the injuries he had sustained during the incident. Mr Mathee, counsel for the three accused, did not oppose the amendment and the indictment was amended accordingly.

All the accused pleaded not guilty to the charges and, in terms of s 11 5

- (1) of the Criminal Procedure Act 51/1977, disclosed the basis of their defence. They denied being present when the offences were committed, in effect relying on an alibi.

Formal admissions:

Certain formal admissions were made by the accused, contained in the document marked Exhibit 'A', and these were recorded in terms of s 220 of the Criminal Procedure Act 51 /1 977. In respect of Count 1 it was admitted that the deceased, Babalo Bangela, had died at the scene of the shooting from a gunshot wound and that the contents of the relevant post mortem report were correct. In respect of Counts 2 & 4, it was admitted that the respective complainants sustained various injuries inflicted in the incident referred to in the indictment and the summary of facts. These admissions relieved the State of the burden of leading evidence to prove that the death of the deceased in Count 1 was not due to any injuries which may have been inflicted subsequently to those sustained during the said incident.

Medical reports and physical evidence:

Mr Kruger handed in the various medical reports, namely, the following: in respect of Count 1 the post mortem report (Exhibit 'B') regarding the deceased, Babalo Bangela; in respect of Count 2 the medical report (Exhibit 'C') relating to the injuries sustained by the deceased, Lizo Tom; and, in respect of Count 3 the medical report (Exhibit 'D') relating to the injuries sustained by the complainant, Pepe Mzimkhulu. Mr Mathee had no objection to these reports and accepted their contents. By agreement, Mr Kruger also handed in five

- (5) empty 9mm cartridge cases which were recovered at the scene of the crimes. He stated that the results of the ballistic tests, conducted to ascertain whether the cartridges were fired from the 9mm firearms which each accused had in his possession, were negative.

Undisputed evidence of the events:

The charges which the accused face arise out of events which occurred on the morning of 13 May 1995 at the taxi rank in Bisho. These are that at about 11,00am a small group of men armed with guns alighted at the taxi rank from a motor vehicle which is described by three of the witnesses as a Conquest motor car and was either silver or brownish in colour. One of these men approached the deceased, Lizo Tom (who is cited in Count 2 and is nicknamed 'Whitey'), uttered certain comments and smacked him.

I should mention that the witnesses differ slightly in regard to what was uttered but this is not of much import as it has not been disputed that the individual exclaimed, 'What are you doing to our vehicles' or words to that effect. Be that as it may, almost simultaneously a single gunshot was heard followed by a burst of gunfire whereafter

the men returned to their vehicle and sped away. This shooting caused the death of Babalo Bangela and inflicted injuries on Lizo Tom and Pepe Mzimkhulu. The taxi rank, where the shooting occurred, is an open area where the vehicles are parked in parallel rows waiting for passengers with different rows for those taxis which proceed either to King Williams Town or Zwelitsha. There is also a shelter with a wall which is of shoulder height and this affords the passengers protection from the elements as well as separating the taxis in the different rows.

Additional issues not in dispute:

The following issues are also not in dispute, namely:

1. There has been, and still is, serious conflict between the different taxi organisations, namely, the Border Alliance of Taxi Associations (BATA), the Bisho and King William's Town Taxi Association (BIKITA) and the UNCEDO Taxi Association operating in King William's Town and Bisho. In 1989 the relationship between BATA and BIKITA had deteriorated into open conflict. BATA had then moved to another taxi rank a few minutes walk away from the one which the two organisations had shared previously.
2. The three accused are authorised in terms of licenses to lawfully be in possession of the firearms which were taken by the police and on which the ballistic tests, referred to earlier, were conducted.

An identification parade, the results of which are recorded on form SAP 329, Exhibit 'E', was held by the police at the King William's Town police station on 27 February 1996. This form, which was handed in by Counsel for the accused with the concurrence of the State, records that the witness, Sigqibo Mayekiso, identified the three accused and took four minutes to do so whereas the witnesses, Aron Potwana and Msindisi Wilson Seyisi, were unable to identify anyone. A further witness, Wiseman Mbata, who did not testify, identified a person named W Funta as one of the assailants. (It needs to be noted that W Funta is not an accused before this Court and the State has not tendered any explanation for him not having been joined as a co-accused. Nor has the State contended that the identification parade was conducted properly and that the identifications are consequently reliable and correct.) I shall at a later stage comment further on this.

Accused nos. 1 and 2 were arrested at about 12.00 noon on the same day as the shooting while en route in a taxi from Ginsberg to King William's Town. The firearms in the possession of accused nos. 1 and 2 were taken by the police and submitted for the aforesaid ballistic tests. A Mr Sigutya who was travelling with them was also arrested and was a co-accused until this case was transferred to the Supreme Court for trial.

Accused no. 3 was arrested some 2 months later, on 31 July 1995, and had been engaged in his normal business as owner and driver of a taxi during the intervening period and was not a fugitive from justice. The firearm in his possession was taken by the police and also submitted for ballistic tests.

The owner of the taxi driven by M W Seyisi is a Captain Landu who was stationed at Zwelitsha in 1995.

The person who had died at the scene of the shooting is the person referred to in the post mortem report, Exhibit 'B'.

Having detailed the issues which are not in dispute I turn now to the State's case which is dependent on the evidence of four eye-witnesses. I shall endeavour not to set out in detail the evidence of each witness and try to confine myself to those relevant aspects which fall outside the undisputed facts.

Evidence of State witnesses:

The first witness, Sigqibo Mayekiso, was waiting at the Bisho taxi rank to convey passengers to King William's Town when the Conquest motor car arrived. Three men alighted and he heard a gunshot but did not see who had fired it. He fled on foot to the offices of the Bisho Municipality where he lay down on the grass in an attempt to hide. He could not see anything but heard shots being fired all over Bisho, as he says. When it was quiet he returned to the taxi rank where he found a boy dead and an older man shot in the foot. He had seen the men, who arrived in the Conquest, on previous occasions but did not know their names.

He, and to some extent the other witnesses as well, was submitted to lengthy cross-examination by counsel for the accused. From this it emerged that when the Conquest stopped at the head of the row at right angles to it this witness was busy packing the parcels of a passenger into the kombi. Neither the seats of the kombi nor the windscreen had obstructed his vision. He saw the attackers briefly, the incident having happened in a few seconds, and was able to recognise their faces but could not provide any identifying features. In his statement to the police he had said the assailants were 'unknown black males' but this was an error on the part of the police as he had told them that 'three black men got out'.

He contradicted his evidence in regard to whether it was accused no.1 or accused no.2 who had slapped 'Whitey' and said that the court interpreter had interpreted his evidence incorrectly. He had not seen a white Jetta at the scene as indicated in his statement to the police. He denied that the statement had been read back to him even though it reflected that this was done. He denied that he had discussed the incidents with anyone else or that he had heard the names of the accused being mentioned after the incident. The three accused were members of BATA but he did not know them until the day of the attack at the Bisho taxi rank. Later, he conceded that he knew Accused No. 3 from the time that they had shared the same taxi rank and was used to seeing the faces of all three accused.

In response to questions from the Court he said that he had never discussed the incident with any person, not even with the passenger

whom he had transported home afterwards, as he was shocked.

The next witness, Aaron Potwana, said that only two men had alighted from the Conquest motorcar which he described as brownish in colour. He had fled and hid behind another kombi and heard a bang and saw smoke. With this he crawled under the kombi and while hiding there he saw another motor car, a white Jetta, arrive. The Jetta drove through the area of the taxi rank while its passengers fired shots and those in the Conquest did likewise. He knew and recognised the people in the Conquest, the one being Accused no. 1 and the other Accused no. 2. He estimated that the gunfire lasted about five minutes. After the vehicles left, he emerged from under the kombi, inspected his vehicle and found that the windscreen and radiator had been struck by bullets.

During cross-examination he said that he knew accused nos. 1 and 2 from the time that they drove taxis at the market square taxi rank which the organisations had shared prior to the split. He did not know Accused no. 3 and denied that they had both been employed as drivers by a Mr Bokwana of Mdantsane. He did not have a firearm and had never seen a BIKITA member with one.

He was questioned in detail on where the various taxis were parked. Immediately the shooting started he had run from where he was

standing at the shelter and had taken cover between two of the taxis in the King William's Town row. He crawled underneath that of the deceased, Lizo Tom, whom he referred to as Nkosinathi. He differed from the witness Mayekiso in regard to where the Conquest had stopped and maintained that it had stopped next to the row of kombis and not at the front at right angles to the first kombi. He only saw two people and did not hear anyone say anything nor did he see either of the men slap anyone. He had also not seen one of them point a firearm at the complainant, Msindisi Wilson Seyisi. Although his kombi and another were between him and the assailants, he could see what was happening. He had recognised the face of accused no. 2 and had told the police he could identify him if he saw him again. At the King William's Town police station he had pointed out accused nos. 1 and 2 when they were seated in a police vehicle. But, in the statement which he had made to the police subsequently he had not stated that he was able to identify the two accused. He conceded that it had been read back and explained to him before he signed it.

In response to questions from the Court he said that he had spoken only to the police and not to anyone else at the scene. At the King William's Town police station he had been asked by a detective from Zwelitsha to look at the two people who were sitting in the police vehicle.

The next witness, Msindisi Wilson Seyisi, saw two men alight from the Conquest. One was accused no. 3 (known as Madlebe) who approached

'Whitey'. While he could have identified the second person previously he could not do so now. This person had pointed a gun in his direction and fired a shot. He saw smoke in his vicinity but was not struck. He ran to the public toilet to take cover and while there heard further shots being fired. After it was quiet he returned to the scene where he found people had been injured.

Under cross-examination he said that was not aware that Mr Landu, the owner of the vehicle driven by him, was a policeman. He knew accused no. 2 but he was not one of the two people who had alighted from the Conquest motorcar. The car had stopped next to Whitey's kombi and not at the front of the row as stated by the witness Mayekiso. He did not see in which direction the shot had been fired but only saw smoke moving towards him.

In reply to a question from the Court he confirmed that he had not spoken to anyone regarding what had occurred that particular morning.

The complainant in Count 4, Pepe Mzimkhulu, testified that it was a small car, darkish or silver grey in colour. Three men had jumped out and one of them slapped 'Whitey' across the face. At that stage he turned and ran. A young man, running close to him fell down causing him to stumble and at the same time he heard a shot and felt something piercing his left foot. The motorcar was driving up and down on the other side of the wall and shots were being fired from it. This continued for a considerable period of time before the car drove off. He returned to his vehicle where he found the passengers lying inside on the floor. He asked them to disembark and when they refused he drove to Zwelitsha where they disembarked and he returned home. Later he went to hospital to obtain treatment for his injury. He had not seen the person previously who had alighted from the motorcar but identified him as being accused no. 2.

During cross-examination he said that a man remained behind the steering wheel of the car. However, he accepted that in his statement to the police he had said that the driver had alighted but adhered to his evidence that the driver had remained in the car. He was shocked and in pain and could have made a mistake. Although events were fresh in his mind when he spoke to the police he had been unable to say how many assailants there were. This he also attributed to being shocked and in pain. The person had a light complexion with a moustache but he had told the police that the man was clean-shaven. This was a misunderstanding as he had referred to the person's jawline. He conceded that he had told the police that he was unsure whether he could identify the person again. Further contradictions emerged between his statement to the police and his evidence.

When questioned by the Court he said that the word 'Madlebe' referred to a person whose ears were larger than usual. But, he had not told the police that one of the persons was called 'Madlebe'.

This concluded the State's evidence and I turn to that of the accused. Evidence of the accused:

Accused no. 1, Mongezi David Hlela, testified in his own defence. He arrived at the BATA taxi rank in King William's Town at about 10.00am on 13 May 1995 and parked his kombi at the end of the row of taxis waiting to transport passengers to Keiskammahoek. He walked to the local BATA office where he met a Mr Sigutya who told him that he was looking for a spare part for his kombi and wanted to go to Ginsberg to see someone about it. He was asked to accompany Mr Sigutya and he then requested accused no. 2, Zola Mkapa, to accompany them. They boarded a taxi to Ginsberg and went to the house where Mr Sigutya hoped to obtain the spare part. He entered while they waited outside and when he returned he said he had not found the person.

They boarded a taxi to return to King William's Town and en route it was stopped by the police and a policeman named Mazomba informed accused no. 1 that he had been looking for him for a long time. The police took possession of a firearm which he had with him and took them to the King William's Town Police Station to await the arrival of the Ciskei police. While seated in a police vehicle in front of the police station a group of people arrived, amongst them the witnesses, Potwana, Seyisi and Mayekiso, and someone said 'Here is Hlela'. He could not recall if the witness, Mzimkhulu was present.

Cross-examination was directed, understandably, towards establishing at what time accused no. 1 had arrived at the King William's Town taxi rank and when he, Mr Sigutya and accused no. 2 had departed for Ginsberg and returned to King William's Town. Other questions elicited that when the police took possession of his firearm they inspected it by smelling it. Prior to leaving Keiskammahoek that morning he had fired about three to four rounds in order to test the gun. Further, he had known Mayekiso since 1988 and Potwana, Seyisi and Mzimkhulu since

1989. They would have known him as he was an official of BATA and were implicating him falsely as he belonged to a rival organisation.

In the course of re-examination he said that Mr Sigutya had initially also been an accused in the case but the charges were withdrawn

against him when the matter was referred to the Supreme Court for trial.

The testimony of accused no. 2, Zola Mkaapa, was that on the morning of 13 May 1995 he arrived in King William's Town from Keiskammahoek and parked his taxi in one of the rows at the BATA taxi rank. Shortly thereafter accused no. 1 arrived and asked him to accompany him and Mr Sigutya to Ginsberg. His version of events accorded with those given by accused no. 1. He also handed his firearm to the police when they stopped the taxi and had seen the witnesses, Potwana and Seyisi, at the King William's Town police station. He denied being at the Bisho taxi rank with the shooting and suggested that it was possible that the witnesses were implicating him falsely because of the conflict between BATA and BIKITA.

Again cross-examination centred on the time he arrived at the King William's Town taxi rank, the time of departure to Ginsberg in the company of the others and the time of their return. His answers were similar to those provided by Accused no. 1.

Accused no. 3, Luyanda Ngubelanga, testified that he was a member of BATA and operated a taxi between Mdantsane, Bisho and King William's Town. He denied being present when the shooting occurred at the Bisho taxi rank and had heard about it at the BATA offices in King William's Town. He had engaged in his normal business activities from 13 May 1995 to the 31 July 1995 when he was arrested.

Cross-examination of accused no. 3 was brief and aimed at establishing how he had become aware of the shooting and his whereabouts on that particular day.

In re-examination he stated that another individual was also known as 'Madlebe' and was similarly a member of BATA. This was not contested by the State.

In response to the Court's questions accused no. 3 said that he could not recall that the police had asked him where he had been on the day of the shooting. He received a document from the police requesting him to report to the Cambridge police station and, when he did so, was arrested.

The witness Pepe Mzimkhulu was recalled to enable defence counsel to canvass the issue of the other person known as Madlebe but this did not elicit anything of significance. After handing in copies of two interdicts relating to the dispute between BATA and BIKITA counsel for the accused closed their case.

It is appropriate perhaps, at this stage, that I comment on the feud which is raging between the different taxi organisations and which the defence brought into sharp focus in this trial. Taxi violence is virtually pandemic throughout the country and has resulted in a number of innocent passengers and bystanders being seriously injured and killed. The taxi industry is dependant on the support of the public and its purpose should be to serve them efficiently and with the utmost care and safety. Thus, when the safety of passengers is threatened no stone should be left unturned in order to apprehend and prosecute the individuals who are responsible for what can only be described as indiscriminate violence. My evaluation of the limited evidence before me compels me to the conclusion that the police investigation of this shooting may not have been as thorough as the circumstances warrant. I have the uneasy feeling that there seems to have been a reticence to probe too deeply lest certain facts emerge which may redound to the detriment of various parties. The evidence reflects that at least one policeman, a Captain Landu, owns a taxi which operates from the BATA taxi rank in King William's Town. I have no doubt that his business is contrary to police regulations, yet he has been permitted to continue with it. I fail to comprehend why steps have not been taken to stop him from continuing with this.

There are many cogent reasons why a member of the police force should not be permitted to engage in business activities let alone be allowed to operate a taxi. In the present climate of violence which has engulfed the industry this is not only unacceptable, but highly inflammatory to say the least. Such a situation lends itself to all manner of speculation concerning possible bias on the part of members of the police force. More importantly, the potential for actual bias and probably even corruption is immense. In such circumstances, it is easy to understand why those in the taxi industry have viewed the actions of the police in their attempts to deal with the violence, with grave suspicion.

I am requesting counsel for the State to convey my comments in this regard to the proper authorities so that immediate steps may be taken to remedy this unhealthy state of affairs. I need not over-emphasize the importance of these investigations being conducted in a transparent manner by impartial and independent investigators so that there may be no doubt in the minds of any interested parties and the general public that justice will prevail.

I proceed now to deal with the evidence. Both counsel have presented detailed arguments and I am appreciative of their pertinent

submissions. While I do not propose detailing their arguments I shall perforce, in my evaluation of the evidence and in setting out my reasons for accepting or rejecting same, refer to several of the submissions made by them.

Assessment of the evidence:

The essential question to be determined in this matter is whether it has been established beyond reasonable doubt that the accused were correctly identified as being present at the scene of the shootings on 13 May 1995 and that they are the persons who perpetrated the crimes as set out in the indictment.

Mr Kruger has presented what seemed to be a rather persuasive argument regarding the identification of the accused by the witnesses. He has contended that it is unlikely that a witness would, in an effort to falsely implicate an accused, only identify one or other of them and not all three. In this regard it is to be noted that at the identification parade all three accused were identified by the witnesses Mayekiso as the persons who were involved in the shootings. At the identification parade Potwana and Seyisi were unable to identify any of the persons, but in court Potwana identified accused nos. 1 and 2, and Mzimkhulu accused no. 2, as being members of the group of assailants. I need to mention that for some or other reason Mzimkhulu was not called upon to attend the identification parade.

At first sight Mr Kruger's argument, as I have said, seems to have merit in it but on closer analysis its persuasiveness diminishes due to the difficulties confronting the state in respect of the identification of the accused. The more significant aspects thereof are these:

1. In his statement to the police Mayekiso did not identify any of the accused neither directly nor by suggestion and referred to the assailants only as 'unknown black males'.
2. The unexplained delay in holding the identification parade and the failure to follow prescribed procedures in how it should be conducted raises the issue of the acceptability of the identification of the accused by Mayekiso. Mr Kruger, it must be conceded, did not attempt to persuade me that the difficulties confronting the State in this regard could be ignored or excused but asked merely that the evidence in this regard be weighed against all the other evidence.
3. The fact that accused nos. 1 and 2 were seated in a police vehicle outside the King Williams Town police station a few hours after the shootings where they could be seen, and were in fact seen, by one or other of the witnesses and other interested parties.
4. The absence of evidence to indicate that the witnesses provided the police with any details identifying the assailants and that this led to the arrest of the accused.

5. The absence of any independent witnesses - independent in the sense that they are neither members of any of the taxi organisations nor employed as a driver of a taxi or in some other capacity. There were clearly a number of passengers at the scene and some of them must have seen what occurred.

There are some eighteen rules of practice, as they are termed, which are to be observed when conducting an identification parade, see Du Toitetal, Commentary on the Criminal Procedure Act at pages 3-5 to 3-12. Counsel for the accused referred me in particular to rules 2 and 6 and the non-observance thereof by the police. On their own a breach of these may not in every case necessarily be sufficient to warrant a rejection of the identification made by a witness. But, in the present instance the failure to adhere to these, when considered with the other aspects I have mentioned, does not lay the necessary basis to enable a finding to be made that the pointing out of the three accused is reliable and correct. See

R v Shekeie and Another 1953 (1) SA 636 (T) at 638F-G. It follows that I do not accept the evidence of Mr Mayekiso in identifying the accused as the individuals who committed the shootings or that they were members of the group who did so. I do not find it to be credible and reliable.

Similarly there are problems with the identification of the different accused by the witnesses, Potwana, Seyisi and Mzimkhulu. They identified the accused in court and I need hardly underscore the manifest dangers of dock identification. See S v Maradu 1994 SACR 4 10 (W) at 4 13g-j and 4 14a.

In the circumstances of this matter there is an even greater danger in accepting the identification without corroboration as it cannot be said that the witnesses are by any means independent observers. They have tried to distance themselves from the dispute which exists between the different taxi organisations but they are by no means disinterested parties and are obviously affected by developments. I am mindful of the fact that the witnesses had to observe what was happening and attempt to identify the assailants while shots were being fired at or around them. But this does not mean that I may disregard the material shortcomings in the manner and actual identification of the accused as the assailants. I am not satisfied that the witnesses, in the circumstances that prevailed, had proper or ample opportunity to observe the assailants. Accordingly, I find that their evidence that the accused are the assailants is not credible and reliable.

In view of this I do not consider it necessary to evaluate any further evidence, nor the lack thereof, whether in respect of the ballistic tests or the failure to identify either of the vehicles used in the shootings or to link the accused to the vehicles in one way or another. Further, no onus rests on the accused to prove their alibi. The onus is on the State to prove its case against them beyond a reasonable doubt. In any event, it has not been shown that the alibi of any of the accused is palpably false and I am unable to reject the alibi of each as not reasonably possibly true.

I find that State has not discharged its onus in proving beyond a reasonable doubt that the accused are the individuals who

perpetrated the crimes set out in the indictment or that they were members of the group of assailants who committed the shootings.

Accordingly, all the accused are found not guilty on all the counts set out in the indictment and are discharged. Y EBRAHIM ACTING JUDGE OF THE SUPREME COURT OF SOUTH AFRICA (CISKEI PROVINCIAL DIVISION) Date: 4 February 1997 Heard on the 12/11/96, 13/11/96, 14/11/96, 18/11/96, 19/11/96, 21/11/96, 25/11/96, 26/11/96, 27/11/96 & 6/12/96.

Judgment

delivered on the 4 February 1997 Counsel for the State Mr Kruger Counsel for the Accused Mr Mathee

I find that State has not discharged its onus in proving beyond a reasonable doubt that the accused are the individuals who

perpetrated the crimes set out in the indictment or that they were members of the group of assailants who committed the shootings.

Accordingly, all the accused are found not guilty on all the counts set out in the indictment and are discharged.

Y EBRAHIM

ACTING JUDGE OF THE SUPREME COURT OF SOUTH AFRICA

(CISKEI PROVINCIAL DIVISION) Date: 4 February 1997

Heard on the 12/11/96, 13/11/96, 14/11/96, 18/11/96, 19/11/96, 21/11/96, 25/11/96, 26/11/96, 27/11/96 & 6/12/96.

Judgment

delivered on the 4 February 1997

Counsel for the State Mr Kruger

Counsel for the Accused Mr Mathee

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