

SOUTH AFRICA / JUDGMENT

S v Makeleni (CC74/2015) [2016] ZAECHGC 66 (18 August 2016)

[2016] ZAECHGC 66

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Bloem

CASE / FILE NUMBER

CC74/2015

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

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO. CC 74/2015

In

the matter between:

THE
STATE
Applicant
and
MANDLA
LUCAS
MAKELENI
Accused/Respondent

JUDGMENT

ON RESERVATION OF QUESTIONS OF LAW

Bloem J.

- [1] The alleged questions of law which the state requested this court to reserve for consideration by the Supreme Court of Appeal arise from my finding that the state failed to prove that the respondent used violence on the deceased with the intention of causing him to submit to the taking of his cellphone, firearm and ammunition (the items).

[2] The respondent was charged with murder (count 1), robbery with aggravating circumstances (count 2), unlawful possession of a firearm

(count 3) and unlawful possession of ammunition (count 4). I convicted him on counts 1, 3 and 4. In respect of count 2 I found him not guilty but convicted him on the competent verdict of theft of the items because, in my view, the state failed to prove that the respondent used violence on the deceased with the intention of causing him to submit to the taking of the items. In terms of section 319 (1) of the Criminal Procedure Act[1] the state has now requested that I reserve the following alleged questions of law for consideration by the Supreme Court of Appeal:

“1. Did the trial Court err in interpreting the definition of the crime of robbery (in casu with aggravating circumstances as defined in section 1 (1) of the Criminal Procedure Act)?

2. Did the trial Court err in applying the test regarding inferences to be drawn from circumstantial evidence, in reaching a conclusion that the circumstantial evidence does not demonstrate an intention to rob?
3. Did the trial Court err in not applying the binding authority (as set out in S v Moloto 1982 (1) SA 844 (A) and referred to with approval in Mahlumza and Another v S 2015 (2) SACR 385 (SCA)) regarding the application of excessive violence during a robbery which then caused death, justifying a separate conviction for murder?”

[3] Section 319 (1) of the Criminal Procedure Act reads as follows:

“If any question of law arises on the trial in a superior court of any person for any offence, that court may of its own motion or at the request either of the prosecutor or the accused reserve that question for the consideration of the Appellate Division, and thereupon the first-mentioned court shall state the question reserved and shall direct that it be specially entered in the record and that a copy thereof be transmitted to the registrar of the Appellate Division”.

[4] The factual background against which the alleged question of law must be determined is that the respondent, who knew that money was kept in the deceased’s apartment by a company, Afro Fuel, was seen on 27 June 2015 leaving the deceased’s apartment, returning and thereafter leaving it again. Despite the fact that there was no eye witness to the commission of the above offences, I found that the only reasonable inference to be drawn from the proved facts was that it was the respondent who murdered the deceased and took the items. Two of the factors that contributed to that finding were that the respondent was seen inside

the deceased’s apartment on the CCTV footage and upon his arrest on 9 July 2015 the items were found in his possession. I found him not guilty on the charge of robbery because, firstly, there was no evidence as to how he killed the deceased (save that it must have been a brutal attack because of the number, nature and position of the wounds on the deceased’s body) and, secondly, there was, in my view, no evidence that he subjected the deceased to violence with the intention to cause the deceased to submit to the taking of the items.

[5] Robbery consists in:

5.1. the theft of property[2];

5.2. by using violence or threats of violence;

5.3. which cause the victim to submit to the taking of property; and

5.4. the violence is used with the intention to cause the victim to submit to the taking of the property[3].

[6] The essential elements of the crime of robbery are theft, violence or threats of violence, the violence or threat of violence must cause submission to the taking and the intention firstly to steal and secondly to use force to overcome the victim's resistance to the stealing of the property[4].

[7] In section 1 (1) of the Criminal Procedure Act "aggravating circumstances" in relation to robbery or attempted robbery means:

"(i) the wielding of a fire-arm or any other dangerous weapon;

(ii) the infliction of grievous bodily harm; or

(iii) a threat to inflict grievous bodily harm,

by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence".

[8] Obviously the presence or absence of "aggravating circumstances" is considered only after robbery has been proved. Put differently, whether or not there are "aggravating circumstances" will be considered only where robbery has been proved. In other words where no robbery has been proved the presence or absence of "aggravating circumstances" is irrelevant.

[9] Mr Mtsila, counsel for the state, submitted that, based on all the facts found proved, I should have found that the only reasonable inference to be drawn was that the respondent killed the deceased with the intention to cause him to submit to the taking of the items. However, that inference is based on another inference, namely that the respondent went to the deceased's apartment armed with a knife and a crowbar. There was no direct evidence to show that the respondent went to the deceased's apartment with a knife and a crowbar. There was also no evidence to suggest that the deceased did not own a knife and a crowbar before his death. The respondent is seen in the deceased's apartment on the CCTV footage with a crowbar and a knife. Mr Mtsila submitted that the deceased took the crowbar to the deceased's apartment to open the safe to steal the money therein and use the knife on whoever offered resistance to his intention of stealing the money in the safe. It is not an unreasonable possibility that the knife and crowbar were in the deceased's apartment upon the respondent's arrival. In *R v Blom*[5] Watermeyer JA stated at 202 to 203 that in reasoning by inference there are cardinal rules of logic, set out hereunder, which cannot be ignored.

9.1. The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

9.2. The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

[10] I have already found that there was no evidence to prove that, when he stabbed the deceased, the respondent did so with the intention of causing the deceased to submit to the taking of the items. It is furthermore not an unreasonable possibility that, after the respondent had broken into the house and taken the items, he was disturbed by the deceased as he was leaving the apartment with the items. The respondent thereafter stabbed and killed the deceased to avoid him being identified at a subsequent trial. In that case the taking of the items would have taken place before violence was used on the deceased with the result that it could not be said that he robbed the deceased. But, these are all possible inferences, not necessarily based on all the proved facts. Absent proven facts as a basis, a reasonable inference cannot be drawn. In the circumstances, that the respondent had the intention to use force to overcome the deceased's resistance to the stealing of the property is not the only reasonable

inference to be drawn from the facts found proved.

[11] From the definitions of robbery and "aggravating circumstances" referred to in paragraphs 5, 6 and 7 above, it cannot, in my view, be said that I erred in interpreting those definitions or the application of those definitions to the facts of this matter. There is accordingly no need to reserve the first question for the consideration by the Supreme Court of Appeal.

[12] I am furthermore of the view that, on the proved facts, I was unable to draw the inference that the state sought to demonstrate an intention to rob. There is also no need to reserve the second question for the consideration by the Supreme Court of Appeal.

[13] One of the issues that the Constitutional Court dealt with in *S v Basson*[6] was the distinction between a question of law and question of fact in the context of section 319 of the Criminal Procedure Act.

Paragraphs 48 and 49 thereof read as follows:

"The approach of our Courts to this classification may for present purposes be summarised as follows:

- (a) A finding by a court that facts that must be proved in a given case have been proved beyond a reasonable doubt is a finding of fact. It is true, as contended by the respondent, that the process of arriving at the finding of fact involves the application of a standard determined by law: the facts must be proved beyond a reasonable doubt. The legal rule applicable defines the degree of probability or certainty that must exist in the mind of the trier of fact before the fact in question can be said to be proved. The fact that a legal rule defines how certain a court must be about a fact before that fact can be said to be proved does not render the

finding one of law. The reason for this is that the legal rule is intrinsic to the process by which a fact is proved, embodies no further definition and is not in dispute. It has nothing to do with the evaluation of facts already proved for the purpose of deciding whether some legal standard has been observed.

- (b) Trial courts often draw inferences from existing facts according to given rules. Not all inferences of this kind are questions of law. As Botha J said in *S v Petro Louise Enterprises (Pty) Ltd and Others*[7]:

"I am unable to accept counsel's widely-based and generalised proposition that in all cases the question whether a particular inference is the only reasonably possible inference to be drawn from a given set of facts is a question of law. To accede to the proposition in such general terms would, I consider, open the door to the possibility of large numbers of appeals being brought under s 104 of Act 32 of 1944, contrary to the limited scope of that section which I conceive the Legislature contemplated."

It is relevant in this connection that s 319 of the Criminal Procedure Act is also aimed at limiting appeals by the State".

- [14] Leach JA dealt with this aspect in *Director of Public Prosecutions, Gauteng v Pistorius*[8] as follows:

"[22] However, in a case such as this, where effectively the state seeks to appeal against the acquittal of the accused (in this instance on the charge of murder) and the appeal is brought under the provisions of s 319 of the CPA, different considerations apply. Of course the state may well feel justifiably aggrieved by a trial court acquitting an accused person when, on the facts of the case, a conviction should have followed, but in such a case, as was observed by Corbett CJ in Magmoed, 'the traditional policy and practice of our law' is that an acquittal by a competent court in a criminal case is final and conclusive and may not be questioned in any subsequent proceeding."

- [23] Consequently, as opposed to an accused who has the benefit of appealing against a conviction based on alleged incorrect factual findings, the state may not appeal against an acquittal based solely on findings of fact. And as Chaskalson CJ pointed out in *Basson*:

'Prior to 1948 [the state] could also not appeal against a finding of law made in a trial before a Judge which resulted in the acquittal of an accused person. In 1948 the Criminal Procedure Act then in force was amended to make provision for the reservation of questions of law at the instance of the State in terms substantially similar to s 319 of the present Act.'

- [24] In the light of these decisions, the state has no right to appeal save where there is a statutory right bestowed on it to do so. In this instance its right is limited to the three questions of law reserved, quoted above. This court cannot interfere, for example, with the factual decision made by the trial court rejecting the state's version that there had been a disagreement between the accused and the deceased that led the deceased to hide herself in the toilet to escape from him, before being shot. The matter must therefore proceed, as was accepted by the state, on the basis both that its rejected version cannot be reconsidered and that it has not been shown that the accused had acted with the direct intention to kill the deceased.

The state's case before this court therefore revolved primarily on whether the trial court had erred in regard to the issue of *dolus eventualis*”.

- [15] The state made reference to *S v Moloto and Mahlumza and Another v S* in paragraph 3 of the alleged questions of law that it wanted reserved for consideration by the Supreme Court of Appeal.

Moloto is authority for the principle that where the facts indicate that the accused attempted to kill the victim in connection with a robbery, the state is entitled to have him charged with robbery and attempted murder. The court may find him guilty on the two separate offences, provided that he used excessive violence that exceeded the limits and bounds of robbery and that it was proved beyond reasonable doubt that he also had the intention to kill and not merely to use violence aimed at temporarily incapacitating the victim. The appellants in *Mahlumuza and Another v S* were convicted in the regional court of robbing Mr and Mrs Neethling (count 1) and of attempting to murder Mr Neethling (count

- 2) and Mrs Neethling (count 3). An appeal to the North Gauteng High Court was unsuccessful. The Supreme Court of Appeal found that the finding that the acts of violence committed against the Neethlings in robbing them exceeded the limits or bounds of robbery are unsustainable on the facts. It found that the violence committed against them was perpetrated only with the intent of depriving them of their belongings, by inducing them to submit to the deprivation and to overcome any resistance they might have offered. The appeal against their conviction on counts 2 and 3 was accordingly upheld. Of importance is that in both cases the Supreme Court of Appeal held that each case depends on its own peculiar facts. In this case there was no evidence to prove that, when the respondent killed the deceased, he did so with the intention of depriving him of the items. In the circumstances, *S v Moloto and Mahlumza and Another v S* are distinguishable from the facts of the present matter.

- [16] Corbett CJ in *Magmoed v Janse van Rensburg and Others*[9] made a helpful distinction between, on the one hand, an enquiry into whether the facts found to be proved establish the offence

charged, and, on the other, one that seeks to decide if the proved facts establish a factual ingredient of the offence. The

learned Chief Justice said the following at 94a-d:

“It is a genuine question of law (a) whether the evidence against an accused was such that there was a case to go to the jury or that there were grounds upon which the jury could legally convict the accused of the crime charged; or (b) whether the proven facts bring the conduct of the accused within the ambit of the crime charged. ... Category (b) involves an enquiry as to the essence and scope of the crime charged by asking whether the proven facts in the particular case constitute the commission of the crime. This is clearly a question of law. But, in my opinion, a question of law is not raised by asking whether the evidence establishes one or more of the factual ingredients of a particular crime, where there is no doubt or dispute as to what those ingredients are.”

[17] There is no doubt that, to prove the commission of the crime of robbery, the state must prove each of the above elements thereof. I found that the state failed to prove that, when the respondent stabbed the deceased, he did so with the intention of overcoming the deceased's resistance to the stealing of the items. There is no doubt or dispute about the need for proof of the factual ingredients for the crime of robbery to have been committed. In this case the factual ingredients for the mens rea element of the crime of robbery (i.e. the intention to cause the victim to submit to the taking of the property) are absent.

Whether or not those ingredients are present is a question of fact. A question of law is not raised simply by asking whether the evidence establishes one or more of the factual ingredients of a particular crime, especially when there is no doubt or dispute as to what those ingredients are.

[18] All three alleged questions of law relate to the finding that the state failed to prove that the respondent used violence on the deceased with the intention of causing him to submit to the taking of the items. I am of the view that they are questions of fact, rather than law and accordingly fall beyond the scope of what the Supreme Court of Appeal may decide under section 319. That being the case the state's request must be refused.

[19] In the result, the state's request for the reservation of the alleged questions of law for consideration by the Supreme Court of Appeal is refused.

G H BLOEM

Judge of the High Court

For the State:

Adv Mtsila, Office of the Director of Public Prosecutions, Grahamstown

For the accused/respondent: Adv C Stamper, instructed by Legal Aid South Africa, Grahamstown

Date of hearing:

12 August 2016

Date of delivery of the judgment: 18 August 2016

[1] Criminal Procedure Act, 1977 (Act No. 51 of 1977).

[2] In this regard JRL Milton in the second edition of South African Criminal Law and Procedure, Vol III (Common-law crimes) deals with this aspect as follows on page 616: "The intent to steal (also called *animus furandi*) exists where X (1) intentionally effects a *contrectatio*,

(2) intending to deprive the owner permanently of the property, (3) knowing that the property is property capable of being stolen and

(4) that he is acting unlawfully in taking it".

- [3] S v Benjamin en 'n Ander 1990 (1) SA 590 (AD) at 958H.
- [4] S v Moloto 1982 (1) SA 844 (A) at 850B-C where Rumpff CJ said the following: “Roof is diefstal wat deur middel van geweld, of dreigement van geweld, gepleeg word. Dit bestaan uit twee wederregtelike handeling, nl. geweldpleging of bedreiging van geweldpleging, teenoor die slagoffer, asook die ontneming en toe-eiening van die slagoffer se goed. Dit geskied met die opset om te steel, dit wil sê om die slagoffer se goed te neem en toe te eien, asook met die opset om die slagoffer deur die geweldpleging, of bedreiging van geweldpleging, tydelik vir doeleindes van die pleging van die roof so weerloos te maak deur sy weerstand uit te skakel sodat hy hom aan die rower onderwerp om nie sy goed te verdedig nie of hom daarby berus dat die rower sy goed steel.”
- [5] R v Blom 1939 AD 188.
- [6] S v Basson 2004 (1) SACR 285 (CC)
- [7] S v Petro Louise Enterprises (Pty) Ltd and Others 1978 (1) SA 271 (T) at 280B.
- [8] Director of Public Prosecutions, Gauteng v Pistorius 2016 (2) SA 317 (SCA).
- [9] Magmoed v Janse van Rensburg and Others [1992] ZASCA 208; 1993 (1) SACR 67 (A).

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/ZAECGHC/2016/66.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/s-v-makeleni-unknown-topic-aecghc-2016>

Prepared on 9 October 2026 · Esheria