

SOUTH AFRICA / JUDGMENT

S v Malindi and Another (SS118/2021) [2023] ZAGPJHC 311 (11 April 2023)

[2023] ZAGPJHC 311

COURT

South Gauteng High Court, Johannesburg

BEFORE

Yacoob

CASE / FILE NUMBER

SS118/2021

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: SS118/2021

DATE: 16-03-2023

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between

STATE and Z MALINDI AND ANOTHER Accused

J U D G M E N T

YACOOB J: The accused in this matter are charged with the murder of Mbali Patience Malindi, in terms of section 51(1) of the Criminal Law Amendment Act. The state has alleged common purpose and the two accused have pleaded not guilty.

There is no direct evidence of what happened to Ms Malindi, save that she was found dead by stabbing to the neck in a field near a railway line not far from where she lived. The evidence against the accused is therefore circumstantial. In order to find that their guilt has been proved beyond a reasonable doubt, therefore, it must be the only reasonable inference that is consistent with all the proved facts.[1] The evidence must be considered as a whole.[2]

The state called 13 witnesses. Of these five were police witnesses who testified about the investigation, the arrest and the forensic

evidence.

The first witness was Sergeant Mgiba. He testified about his involvement in the investigation at the crime scene. He is the person who took the first statement from accused 1 Mr Malindi.

The second witness, Sergeant Mongalo, is the person who took most statements on the day of the discovery of Ms Malindi's body. He discovered that there were contradictions between the versions given by other witnesses and those of the accused, and is the person who decided that it was necessary to question the two accused further at the police station.

He testified that when, after the further questioning they returned to the home of Mr Malindi, Mr Gcinikaya Malindi, the

grandfather of Mr Malindi and of the deceased, showed him the room of Mr Malindi, and opened it for him. In searching the room, he found a cardboard box under a chair in which there were personal effects including a cell phone which had been dismantled. There were clothes scattered around the room and he testified that a grey hoodie was found in the room with stains.

Sgt Mongalo could not remember the nature of the stains, how dark they were, where exactly on the hoodie they were, or anything of that nature.

Sergeant Mosane was also at the scene, and involved in the search. He corroborated Sergeant Mongalo's evidence.

The next police witness was Lieutenant Colonel Janse van Rensburg, who testified about the forensic evidence. She confirmed that there was DNA from both the deceased and Mr Malindi on the hoodie. She did not see the hoodie. She did not know to what extent it was stained or where on the hoodie the stains were found. She only tested the samples taken from the hoodie – small pieces cut off with stains on them.

It is worth mentioning at this point that neither the hoodie itself nor photographs of it were produced before this Court.

The final police witness was Sergeant Moloto, who was the investigating officer. He simply testified about the chain of evidence, none of which was disputed in any event, and about the whereabouts of certain witnesses at the time of the hearing.

The state then also called Mr Lungisani Booysen. He was a friend of both the accused. He grew up with them both and he is the cousin of accused 2, that is Mr Magoloza. He testified that on the evening of 17 April 2021, a Saturday night, the night before the discovery of Ms Malindi's body, they were all at the place of Isaac Mazomba, who was also called as a witness, and they were drinking. According to him he arrived there between 8 o'clock and 9 o'clock in the evening. There were also several other friends as well as female friends and girlfriends. According to Mr Booysen, when he arrived, he already found the two accused there, and already drinking.

He testified that the accused went out to get more beers sometime around 11pm or midnight. That they were gone for 45 minutes to an hour. However, before they left, he testified that he saw the accused talking to the deceased outside the yard. This was when he went outside to urinate.

He testified also that when the accused returned, whether it was half an hour, 40 minutes or an hour later, they had changed. Both accused had changed their footwear. Nobody else had noticed this change and nobody else noticed whether they changed any of their other attire.

According to Mr Booysen, they then sat and remained at Isaac's place and drank until 7 o'clock the next morning.

The next witness was Isaac Mazomba, the host of the drinking party. He stated that Mr Malindi was a family friend of his friend, and Mr Magoloza, a cousin of his friend. So, he has known them a while but he does not have a specific friendship with them nor does he have a grudge against them.

He later became the boyfriend of Oyama Makhamba, who at the time of the incident was the girlfriend of Mr Malindi. According to Mr Mazomba, this was the easter long weekend. As a matter of fact, I am entitled to take judicial notice of the fact that the easter long weekend in 2021 was not on that date but nothing turns on that. It was a weekend, even if not a long weekend.

According to Mr Mazomba the two accused were not invited to drink. They arrived. He thinks that they heard noise and came to join them. He says that his mother came and asked them to keep the noise down, around half past 10 or 11 o'clock and then Ms Makhamba arrived. This was around midnight already when Ms Makhamba arrived.

He said then that at around that time, the two accused went to go and get further alcohol. This was after 12 o'clock.

He was aware that the two accused wanted to give money to Ms Malindi; apparently, he heard them talk about it outside the yard. He was not aware of the clothing worn by either of them.

The next witness was Ms Refilwe Mochechane, a friend of the deceased. She is the person who identified the cell phone that was found in a box in Mr Malindi's room as that of the deceased. She was close enough to the deceased that she knew the password for the cell phone, and was able to turn it on for the police.

She testified that she had been with the deceased earlier that day, as well as a few other friends, including one of the deceased's

boyfriends. The deceased and her boyfriend had an altercation.

It appears to be common cause, or at least well known amongst the deceased's friends, that she had more than one boyfriend, and that this appeared to be a cause of contention between herself and the boyfriend with whom she was that evening.

Ms Mochechane testified that she last saw the deceased at about 7 o'clock that evening when she left to go home. At that time her other friends were still with the deceased, that included the boyfriend who also later testified. Ms Mochechane also testified

about who gave the deceased the cell phone, it was one of her other boyfriends, and this is relevant because nobody in the deceased's

family appears to have known that she had a cell phone.

Mr Madonwabe Mloyeni, also known as Mandoza, was the boyfriend who was with the deceased that evening.

Mr Mloyeni, also known as Mandoza, confirmed that he was the boyfriend of the deceased and that they had had a disagreement. According to him, he had other girlfriends and the deceased had other boyfriends, and he did not have a problem with this, but he confirmed that there had been a disagreement.

According to Mr Mloyeni, by the time he left the deceased that evening, the disagreement had been resolved. He also testified that at around 9 o'clock that evening, he heard from the deceased over Facebook, to say do not break up with me. He also said at some point he thought it was not the deceased but someone pretending to be her. He confirmed that the deceased was a troubled child, that she threatened to commit suicide, and that she had troubles because her parents, it was discovered, were not actually her parents, and that one of her parents has committed suicide.

According to him, he left the deceased at about half past 7 outside her place. He did not see anything else.

The next witness was Feziswa Ntsete. She was one of the women who was present at Isaac's place. She got there at about 9 o'clock. They were sitting and drinking. After that the accused and Ms Makhamba went out, according to her, to buy chips. They came back and then she left at some stage later. According to Ms Ntsete, Mr Malindi was wearing dungarees and a white t-shirt. She did not notice a change of attire.

The next witness was Sibusiso Nkosi, who was also a friend of the deceased. He is one of the people who was together with Ms Mochechane and Mr Mloyeni that evening before they left the deceased outside her home.

He confirmed that they had been together and that there had been an altercation between Mr Mloyeni and Ms Malindi, the deceased.

According to him they left the deceased at her place and he and Mr Mloyeni went home. He knows that Mr Mloyeni went home because they stay in the same street.

According to him Mr Mloyeni and Ms Malindi did not have physical altercations, they had arguments like any other couple.

Ms Oyama Makhamba, who was at the time of the incident the girlfriend of Mr Malindi, testified that she is not related to the accused.

She was relatively close to the deceased in the sense that the deceased would go to her home and talk to her and ask her for help

occasionally.

According to her the two accused came to her place and Isaac came and invited them, this was either 6 or 7 PM. Ms Malindi, the deceased, arrived later, around 8 PM.

She arrived after the accused and stayed at Ms Makhamba's house. She did not stay for a long time.

Ms Makhamba testified that Ms Malindi asked for money and for a phone to play music, and she stayed inside Ms Makhamba's bedroom. This was around 9.30 PM when she asked for money. Ms Makhamba did not have money and told Ms Malindi she must ask Mr Malindi for money. Mr Malindi said he did not have cash; he will have to go and fetch it.

According to Ms Makhamba, she was with both accused at all times except for a period of about 10 or 15 minutes. According to her this was after midnight when they went to get more beer from her place, and the two accused went to go and give money to Ms Malindi.

Ms Malindi had been at Ms Makhamba's place until this time. She then overheard the accused speaking, and asked for money. They all went together and were away for about 10, 15 minutes, and were also to get money for the beers.

Ms Malindi did not return with the accused after the 10 or 15 minutes, and Ms Makamba assumed this was because she had the money that she required. They then sat together at Mr Mazomba's place, and Ms Makamba left after 4 AM.

According to Ms Makhamba, the grey hoodie belonged to her. She had given it to Mr Malindi about two weeks before. She also confirmed that Ms Malindi and Mr Malindi shared clothing. She said that the last time she saw Ms Malindi was when the accused left with her to fetch the money, and this was between 11:30 and midnight.

The final state witness was Mr Gcinikaya Malindi. This is the grandfather of both Mr Malindi and Ms Malindi. He testified that on the Saturday evening he was at home. He was watching TV and fell asleep. Around quarter to 8 in the evening he heard voices which he assumed were of Ms Malindi and the two accused. He testified that Ms Malindi slept both in the same room as Mr Malindi and also in the main house. According to him he did not know that Ms Malindi had a cell phone. He had been going to buy her one.

He testified that he saw Mr Malindi wearing the hoodie at the scene where they discovered Ms Malindi's body, but that he was not wearing it at the time when he arrived with the police to search the room.

He testified that the room was kept locked and that he locked the gate at some time in the night. He confirmed that Ms Malindi was a troubled child.

The accused gave evidence on their own behalf. Mr Malindi, accused 1, testified that he last saw the deceased at 9 PM. That is at Ms Makamba's place. He gave her R300 because she wanted to go to Katlehong. He was very close to her. He considered her his younger sister. When she had trouble, she would ask him for things. For example, when she needed sanitary towels or when she needed anything.

He was at university. He only came home for weekends and school holidays. That weekend he had been out drinking and doing things with women since the Thursday night, he had not been at home. He had been wearing the same clothes. According to him, he had been wearing the grey hoodie the whole time since the Thursday, and that when it was discovered he was still wearing it.

Mr Malindi testified that Mr Booysen could not have seen Ms Malindi, because she never came to Mr Mazomba's place, and he was

absolutely certain that he had given her the money at 9 o'clock. He denied having changed clothes at any time during the night.

He testified that he did now know how the blood got onto the sweater, but that because they shared clothes, it was possible that that explained how both of their DNA arrived onto the hoodie.

He explained the various discrepancies between his statement given at the scene and his latest statement by his distress at the loss of a family member. According to him, he was still under the influence of alcohol at the time when they went to the scene after the discovery.

Mr Magoloza, accused 2 testified on his own behalf. He confirmed that they had seen the deceased at the latest at 9 o'clock

that night. He did not see the money being handed to her. According to him, he was inside at Ms Makhamba's place and the two Malindis were outside. He knew that the money had been given because he had been told.

He was not sure of the exact time. At first, he said it was around 9, then he said it was later than 10 o'clock. He confirmed that the two of them had been consuming liquor from the morning and he was under the influence.

He confirmed that he had been told that the deceased wanted the money to go to some friend at Katlehong. He did not know if she had her own phone.

He confirmed that he and Mr Malindi had arrived at Mr Mazomba's place before Mr Booysen arrived, and that he had known Mr Booysen

since they were young.

He also confirmed that he, Mr Malindi and Ms Makhamba went out to get more liquor but disputed the time.

He also denied that Mr Booysen would have seen them with the deceased at Isaac's place or outside Isaac's place.

He confirmed that they then remained at Isaac, that is Mr Mazomba's place, until the morning, when they were informed of the discovery of the body.

It is clear that the majority of the facts in this case are common cause. It is also clear that there is some haziness about the exact time at which things happened. This is not surprising since all the people who were there with the accused were drinking. They had been drinking for much of the weekend. It is not to be expected that they looked at their watches or phones for the time, because nobody would have known that they had to give evidence.

The primary dispute between the version of the state and the version of the accused is the time at which the deceased was last seen with the accused. However, in my view nothing turns on whether it was 9 o'clock or midnight.

Ms Makhamba, who testified that it was closer to midnight, testified that she was with the accused at all times except for a very short period of time when they went away to give this money to the deceased.

Even if one were to consider that the two accused went away and murdered the deceased and came back, they would not have had time to go to where the deceased's body was found, either to commit the murder or to place the body there, to clean themselves up and to return within the short period of time that Ms Makhamba was not with them.

In addition, the other two factors that connect the accused with the deceased are the cell phone, which was found dismantled, and the hoodie. The cell phone was found dismantled in a box in which both accused 1 and the deceased kept things.

The evidence was that none of her family members knew that she had a cell phone and that it was given to her by a boyfriend.

It is entirely believable that she herself dismantled this phone and kept it so that it would not ring and alert her family members that she had it.

This is also believable because she appears to have had multiple boyfriends and it is not clear that her family members knew about

this conduct on her part, and she may well have kept the cellphone secret as part of keeping this conduct secret.

As far as the hoodie is concerned, Mr Malindi junior, that is accused 1, testified he was wearing it. It is unclear why he would testify he was wearing it if he committed the murder and then blood was found on it. Even if he was not wearing it, it was his, he shared it with her and that explains the DNA.

Without having been able to see where on this hoodie the blood was found, how much blood there was, and without even photographs of the hoodie or anybody being able to say in oral evidence with any certainty how much blood was on this hoodie, the hoodie becomes evidence of very little weight.

I am therefore not satisfied that the state has proved beyond a reasonable doubt that the accused have committed this murder.

There are a number of reasonable inferences which could be made, based on the facts that have been proved, and the inference that it was the accused who committed the murder is therefore not the only reasonable inference.

The death of Ms Malindi therefore remains a mystery and the accused are acquitted.

YACOOB J

JUDGE OF THE HIGH COURT

DATE: 11 April 2023

[1] R v Blom 1939 AD 188 at 202-2

[2] S v Reddy and Others 1996

(2) SACR 1 (A)

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