

SOUTH AFRICA / JUDGMENT

S v Masilela (SS005/2018) [2018] ZAGPJHC 620 (20 September 2018)

[2018] ZAGPJHC 620

COURT

South Gauteng High Court, Johannesburg

BEFORE

Du Plessis

CASE / FILE NUMBER

SS005/2018

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

JOHANNESBURG

CASE NO: SS005/2018

DATE: 2018-09-20

In the matter between:

THE STATE

and

WANDA MASILELA Accused

J U D G M E N T

DU PLESSIS J: This is the judgment in the matter between the State and Masilela Wanda.

[1] Mr Masilela, the accused is 27 years of age. He is charged as follows:

Count 1: Murder. It is alleged that on 30 May 2017 and at or near Bryanston in the District of Johannesburg North the accused

unlawfully and intentionally killed Mandla Zulu, an adult male, hereafter referred to as the deceased.

The state relies on the minimum sentence provisions contemplated in Section 51(1) of Act 105 of 1997.

Count 2 and 3: Kidnapping, in that on the same date and at or near the same place the accused unlawfully and intentionally deprived the deceased and Nthombikayise Lethukulu Zulu, the deceased wife of their freedom of movement by forcing them to drive around in the deceased vehicle.

Count 4: Robbery with aggravating circumstances as defined in Section 1 of Act 51 of 1977, committed on the same date and place mentioned in count 1.

It is alleged that the deceased Range Rover motor vehicle with content a cell phone and wristwatch were robbed. The state

further relies on the minimum sentence regime provided for in Section 51(2) of Act 105 of 1997.

Count 5: The illegal possession of a firearm in contravention of Section 3 of Act 60 of 2000.

Count 6: The illegal possession of ammunition in contravention of Section 90 of Act 60 of 2000.

- [2] The state alleges that the accused and others acted in a furtherance of a prior criminal agreement to commit the alleged offences. The state is represented by Mr Serepo.
- [3] The accused was legally represented throughout the trial by Mr Mphanza on instruction of Legal Aid SA.
- [4] Before the accused were asked to plead Mr Mphanza confirmed that he had explained the applicable minimum sentence provisions to the accused. I never the less again explained it to him and he indicated that he understood.
- [5] The accused pleaded not guilty to all counts. He gave a plea explanation in terms of Section 115 of Act 51 of 1977 to the effect that on 30 May 2017 at all relevant times he was at his home in Naturena. He denied any involvement in the offences.
- [6] The accused made certain admissions in terms of Section 220 of Act 51 of 1977, which are contained in EXHIBIT A.
- [7] The following are common cause:
 - A. The identity of the deceased.
 - B. The cause of death of the deceased being a gunshot wound to the abdomen.
 - C. That the deceased and/or Nthombikayise Zulu were robbed of a cell phone, wristwatch and a Range Rover motor vehicle.
 - D. That Sepatu Motsima stayed at [...] Complex in Midrand.
 - E. That the cell phone number [...]95 was used on 30 May 2017 to open the gate at the aforementioned complex as per the report and testimony of Heloise Heystek.

F. The call data cell phone number location as per the MTN report and the evidence of Chrishan Pillay.

G. That the accused was pointed out by Nthombikayise Zulu at an identity parade.

H. That upon the recovery of the aforementioned Range Rover it had a bullet hole through the driver's side window.

I. The contents of the ballistic reports that were admitted.

[8] The crisp issues to be decided are as follows:

A. Whether or not the accused was one of the perpetrators who robbed the deceased and his wife and killed the deceased on that faithful evening.

B. Whether the accused kidnapped the deceased and his wife as alleged.

C. Whether the accused at the time illegally possessed a firearm and ammunition.

[9] I now deal with the state case. Ms Sepatu Motsima testified that she and the accused were in a love relationship from January 2017 to 23 May 2017. He visited her regularly at [...] Complex in Midrand. Access to the complex is obtained by either a tag that opens the gate or via a call from the intercom at the gate to the unit of the resident. This intercom was operated by the security at the gate. When a unit number is called to cell phone numbers registered against that unit is called. The gate is then opened by the person whose cell phone number was called in this manner by pressing the number 9 on the cell phone.

[10] According to Ms Motsima she shortly after the start of her relationship with the accused registered his cell phone number

against her unit number. She related the cell phone number of the accused from memory as being [...]95.

[11] The morning of 30th 2017 she went to visit her mother for two weeks and was not at home during that time. She had no contact with the accused after 24 May 2017.

[12] Ms Zulu testified that on 30 May 2017 at approximately 20:30 she and the deceased visited her mother in the Sandton Clinic. On their way home in Bryanston whilst the deceased drove their Range Rover motor vehicle the way was blocked by another vehicle and the deceased had to stop. This was in Quorn Street near Farm Street. They were approached by two males with firearms who got out of the front and left back passengers seats of their vehicle. The one who alighted from the front of the vehicle came to her side. The other one went to the deceased side. The accused alighted from the right back passenger seat. He was standing in front of the deceased vehicle facing towards them.

[13] The perpetrator on Ms Zulu's side ordered her to open her door. She looked at the deceased and he reached for the

vehicle's gearlever. The perpetrator on the deceased side was pointing him with a firearm and at that moment shot at him once through the closed driver's window. She and the deceased then opened their doors and got out of the vehicle. She was instructed to get into the left back of the vehicle and to kneel in the footwell facing towards the right of the vehicle.

[14] The deceased attempted to runaway, but was caught by two of the perpetrators, brought back to the vehicle and placed on the right back passenger seat. The one perpetrator also got into the back of the vehicle next to the deceased. The accused got into the driver's seat and the remaining perpetrator got into the left front passenger seat.

[15] According to Ms Zulu she could see the deceased clearly while the accused clearly while he was standing in front of their vehicle with the headlights shining upon him. There was also a street light shining nearby. She also from her position could see the left side of his face where he was sitting in the driver's seat of the Range Rover. The vehicle's roof lights back and front automatically goes on when the doors are opened. It illuminates the inside of the vehicle.

[16] The perpetrators drove off with her and the deceased. During the drive the accused from time to time talked to the left front passenger. In doing so he turned his face in that direction and she could observe him by means of the street lights and other vehicles headlights as they passed. The streetlights were about 6 meters from the vehicle and the illumination was good. Ms Zulu begged to be dropped off, but

her pleadings were disregarded. The deceased health at some stage started to deteriorate. They were at one time driving along William Nicol Road. Eventually they were dropped off on a house driveway. She had to assist the deceased as he was weak. In the process she asked the accused not to reverse as the deceased legs were still under the vehicle. She managed to get him away from the vehicle. She then noticed that the deceased had been shot on the right side of his upper body.

[17] After the accused and his co-perpetrators drove off she summoned help and the deceased was taken to hospital where he passed away as a result of the gunshot wound.

[18] Ms Zulu observed the accused for approximately a minute and a half while he was standing in front of the vehicle in the light produced by the vehicles headlights. He was about 5 to 6 meters away from her. His face was not covered. He was not armed. During the drive around she observed his face about six to seven times when he talked to the front passenger.

Each of these times the duration of observation was a few seconds. At other times she could see the left side of his face. She and the deceased were in the vehicle with the accused and his co-perpetrators for approximately 20 minutes.

[19] Ms Zulu described the firearm with which the deceased was shot as about 9cm long. The other firearm was about 1 meter long. The deceased was shot through the closed driver's side window.

[20] The deceased was also robbed of his cell phone and Breguet wristwatch. The value of the watch was about R200 000.

The cell phone and watch were not recovered.

[21] Ms Zulu later attended an identification parade at Alexandra Police Station where she identified the accused. She did not know the accused before the incident. She did not again see him before the identification parade was held. She also did not see his photo in the newspapers. The album of photos taken at the parade was admitted as EXHIBIT H.

[22] Ms Zulu identified the deceased Range Rover depicted in the photo album, EXHIBIT D of the scene where it was found in the

Fountain View Complex.

[23] Mr Valerie Marella testified that she is a security officer at the Fountain View Complex. She and her colleague, Mr Thabethe were on duty at the gate of the complex during the evening of 30 May

2017. They were responsible for access control. During that evening a red vehicle arrived at the gate and stopped in front of the guardroom. The accused alighted from the vehicle and told her that he resides in Unit 172. He explained that he was a new tenant and did not yet have a tag to enter, but that his cell phone is registered against the unit. She thereupon called Unit 172 through the intercom and his cell phone rang. He gained access to the complex. When he exited after about 10 to 15 minutes she again assisted him in opening the gate.

[24] When Ms Marella assisted the accused to enter the complex he was about 2 meters from her. They were facing each other.

They were about 3 minutes in each other's company. When he exited they were about 1 meter apart. The outside of the guardhouse was illuminated by electric lighting and visibility was good. When she assisted the accused Mr Thabethe was inside the guardhouse. She did not see when the Range Rover entered the premises as she was also patrolling the complex.

[25] Mr Thabethe testified that during the evening of 30 November 2017 he saw the accused arrived at the complex with a red Isuzu, light delivery vehicle. He was inside the guardroom about four to five paces from the accused. He heard the accused telling Ms Marella that he resides in Unit 172. She assisted him by means of his cell phone. When the accused exited a couple of minutes later the accused was about 2 meters from him.

[26] About 10 minutes after the accused left he arrived at the visitors' gate, driving a black Range Rover. The witness went to assist him and the accused told him that the vehicle is giving him problems and that he is going to park it. He was about 2 meters from the accused. There was

an electric light about 2 meters from the accused right side. He observed the accused for about 20 seconds. The accused drove into the complex and returned about 5 minutes later in foot. He walked past the witness who was then in the guardroom. He could see the accused face. The accused was about 4 meters from him when he passed him. After the accused had exited a silver or light coloured motor vehicle arrived and picked him up. The previous witness was not at the guardhouse when the accused arrived with the Range Rover and left shortly thereafter. Mr Thabethe identified the Range Rover depicted in EXHIBIT D as the vehicle in which the accused arrived at the visitors' gate.

[27] Mr Chrisan Pillay from the cell phone company MTN testified to the effect as per EXHIBIT J2, that the cell phone number [...]95 was in the vicinity in Bryanston when the robbery occurred. It was also later in the Midrand area which is where the Range Rover was found. The call data also showed that there was communication

between this number and Ms Motsima's cell phone number. The cell number referred to above was RICA in the name of Margarita

Stober. The witness explained that this does not necessarily mean that it could not have been in use by another person. These registrations were not always up to date. This witness's evidence was not disputed.

[28] According to the evidence of Ms Heloise Heystek, who testified about the security and access system used at Fountain View Complex and as per EXHIBIT M, Unit 172 was dialled on 30 May 2017 at 23:39:01 and that access to the complex was granted at 23:40:07 and 23:55:42 by cell phone number [...]95. Access to Unit 172 was again granted by the same number on 31 May 2017 at 00:02:39. This evidence was also not disputed.

[29] The undisputed evidence of Ms Sia Raubenheimer and Warden as per among others EXHIBITS K1 and K2 of the movement of the deceased Range Rover through its tracking devices indicates the route followed during the night of 30 May 2017 and where it was eventually found on 31 May 2017 in the Fountain View Complex.

[30] I am not going to deal with the evidence of Sergeant Bodiba and Constable Moyela as they evidence does not materially contribute to the outcome of the case.

[31] The ballistic reports that were admitted by the accused as correct only contributed in so far as it indicates that the cartridge case found on the scene of the robbery where the deceased was shot is of a 9mm parabellum calibre and was fired by a centre fired firearm. It was admitted that the cartridge case referred to in the ballistic report was found on the scene of crime.

[32] Warrant Officer Khalane testified about the identification parade conducted by him on 15 January 2018 and recorded on EXHIBIT L. It was not disputed that the accused was identified by Ms Zulu. According to EXHIBIT L it took her 1 minute to point out the accused in the line up of 14 people. She was emotional and cried when she saw him and pointed him out. It was put in cross-examination that the Investigating Officer was present at the parade. The witness denied this. The Investigating Officer also denied this when he testified.

[33] Constable Libya, the Investigating Officer testified mainly about the investigation of the case and that he eventually arrested

the accused.

[34] I know deal with the defence case. The accused version was that he was at his home in Naturena when the crimes alleged were committed. He denied that he knew Ms Motsima at all and saw her for the first time when she testified. He also never had a cell phone with the [...]95 and that Ms Motsima's evidence in this regard is a fabrication.

According to him Ms Zulu mistakenly identifies him as one of the perpetrators. The same applies to the identification of the accused by Ms Marella and Mr Thabethe. According to him his photo appeared in the newspapers prior to the identification parade. He was however told by Constable Lebya that the photo in the newspapers did not pertain to this case. As a result he agreed to attend the parade. He also denied that he had ever used the surname Nguni, being the surname Ms Motsima allegedly knew him by.

[35] Evaluation. It is axiomatic that the state has to prove its case beyond a reasonable doubt. (See *S v van der Meiden* 1999

(2) SACR 79 (W) 80 and *S v van Aswegen* 2001 (2) SACR 97 (SCA) 101 A). In *Monageng v S* [2009] 1 All SA 237 (SCA) the court described prove beyond a reasonable doubt as:

“Evidence with such a high degree of probability that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that the accused has committed the crime charged. (See R v Mlambo 1957 (4) SA 272 (A) at 738 A and S v Phallo and Others 1999 (2) SACR 558 (SCA) 10-11).”

[36] It is triad that the court must consider the evidence put before it holistically. How to approach the evaluation of conflicting versions of state and defence witnesses is well known and was distinctly enunciated in *S v Radebe* 1991 (2) SACR 166 (T). It does not need repetition.

[37] The state argued that the case against the accused was proven beyond a reasonable doubt and that he ought to be found guilty on all the charges. Comprehensive written heads of argument was submitted.

- [38] The defence also submitted written heads of argument and argued that the accused version may be reasonable possible true, that the state witnesses testifying about the identity of the accused could have been mistaken and that the cell phone number allegedly belonging to the accused was RICA in the name of some other person. I want to thank both counsels for the heads of argument submitted.
- [39] In evaluating the evidence of Ms Zulu, the court is mindful of the fact that she a single witness as to the events of the evening of 30 May 2017. As such the court has regard to the cautionary rule that applies in this regard. Section 208 of Act 51 of 1977 provides that a court may convict on the single evidence of a witness. The court may so convict if the evidence of a single witness is substantially satisfactory in every material respect or if there is corroboration. The corroboration does not have to link the accused to the crime. (See *S v Mahlangu* 2011 (2) SACR 164 (SCA) and *S v Mafaladiso* 2003 (1) SACR 583 (SCA)).
- [40] The evidence pertaining to the identity of the accused as one of the perpetrators also requires a cautionary approach. In this regard the court is mindful of the judgment in *S v Mthethwa* 1972 (3) SA 766 (A). The court does not only have to make a finding about Ms Zulu's credibility in this regard, but also whether she is a reliable witness. (See *S v Ndika and Others* 2002 (1) SACR 250 (SCA) at 256 G). The same cautionary approach applies to the evidence of Ms Marella and Ms Thabethe.
- [41] Having regard to Ms Zulu's evidence as a whole and in the context of a holistic approach to the evidence, I find that she is a credible and reliable witness. She had ample opportunity to observe the accused in circumstances where there was adequate lighting. She was also able to identify the accused on the identification parade that she attended. She had no hesitation in pointing him out. The experience of again seeing him resulted in her being emotional. Her evidence is to some extent also corroborated by the evidence of Mr Thabethe to the effect that he saw the accused driving the Range Rover during the night of 30 May 2017 when he parked it in the Fountain View Complex. He and Ms Marella also had ample opportunity to observe the accused in conditions where the visibility was good. Ms Zulu's evidence was not adversely affected by cross-examination. Despite the fact that she at times was very emotional her evidence was coherent and uttering of truth.
- [42] The evidence of Mr Thabethe and Ms Marella is corroborated by the evidence of Ms Motsima pertaining to the accused cell phone number which according to their evidence and that of Ms Heystek was the number used to gain access to the complex.
- [43] Ms Zulu's identification of the accused as one of the perpetrators is also corroborated by EXHIBITS J1 and J2 to the effect that the accused cell phone with the number as provided by Ms Motsima was in the vicinity of Bryanston during the time of the incident. This evidence also establishes that this cell phone number was later in the Midrand area which is where the Range Rover was found parked.

[44] An accused is entitled to be acquitted if there is a reasonable possibility that his version might be true. That evidence has however to be viewed holistically and in context with all the evidence. This applies to the evaluation of the accused alibi as well. The court has in this regard to consider the totality of the evidence and its impression of the witnesses. (See *S v Hlongwane* 1959 (3) SA 337 (A) at 340 H- 341 B). I am mindful that there is no onus on an accused to prove his or her alibi.

[45] The accused did not impress as a witness. His denial of his relationship with Ms Motsima in the face of the evidence given by her is so improbable that it can without any doubt be rejected as false. The accused did not fare well under cross-examination. He at times became argumentative rather than answering questions. He wanted the court to believe that he was at all times willing to attend the identification parade. However, an application to compel him had to be brought in the Magistrates Court. He opposed this application. The accused denied the version put by his counsel, that Ms Motsima was pressurised by Constable Libya to incriminate him.

[46] The accused version that he was at home on 31 May 2017 is in the light of all the evidence a ruse. He could not remember

anything about those days, not even what day it was. He merely said that he was home because since his release from prison in respect of another matter his girlfriend told him to stay home. He could not even go to the shop. It transpired that his girlfriend worked during the day, but returned home at around 18:00. However, despite the fact that the alleged offences were committed during the night of 30 May 2017 he chose not to call her to confirm his alibi. The accused alibi is rejected as false.

[47] The state relies on a prior agreement as part and partial of a common purpose, the perpetrators had in committing in the murder and robbery. The defence conceded in argument that the averments by the state in this regard as set out in the indictment are clearly a reliance on common purpose. The following facts justify a reasonable inference as the only reasonable inference, (See *Rex v Blom* 1939 AD 188 at 202 ETSEC) that the accused and his four co-perpetrators had reached a prior agreement to rob the deceased and to use the firearms in possession of two of the perpetrators to overcome any possible resistance if necessary. They had a preconceived plan as to how the robbery is to be committed. They blocked the road with their vehicle at the crime scene and forced the deceased in this manner to stop. All the perpetrators arrived in the same vehicle. Each had a role to play. The driver of their vehicle stayed inside it. Two of the perpetrators approached the deceased and his wife where they were now stationary in their vehicle. One of the perpetrators held the deceased at gunpoint and the other one did the same to Ms Zulu. The accused role was to drive the robbed vehicle.

[48] All the perpetrators including the accused made common cause in their conceived plan to rob well knowing that the firearms were to be used in overcoming resistance. This clearly encompasses the real possibility that someone could be killed. This is exactly what

happened. The moment the deceased attempted to put his vehicle in gear to get out of the satiation he was shot by the perpetrator on his side of the vehicle. The accused was observing this. When the deceased tried to run away after having been shot he was captured and brought back to the vehicle. The accused thereafter drove away with the deceased vehicle with the deceased, Ms Zulu and accused two companions onside it. It is obvious that the deceased and Ms Zulu were unwilling passengers. The accused conduct throughout was part and parcel of the execution of the plan. He undoubtedly must have foreseen and therefore did foresee that someone could be killed. He associated himself with the plan and what occurred as a result of the execution of the plan. He was reckless as to whether or not death was to ensue. He therefore had the requisite mens rea also with regards to the murder charge. (See *S v Madlala* 1969 (2) SA 637 (A) at 640 F – H). I have no hesitation in finding that the offences were committed as a consequence of a prior criminal agreement.

[49] The ballistic report contained in EXHIBIT E indicates that the cartridge case found on the scene where the deceased was shot is of 9mm parabellum calibre and was manufactured and design to be fired by a centre fired firearm. This conclusively proves that the firearm used to shoot the deceased was a firearm as defined in Section 1 of Act 60 of 2000. The cartridge case in conjunction with the bullet jacket and core found in the body of the deceased are conclusive to a finding that at least one round of ammunition as defined in Section 1 of Act 60 of 2000 was possessed at the crime scene.

[50] From the principles enunciated in *S v Mbhuli* 2003 (1) SACR 97 (SCA):

“It is clear that to convict multiple accused for the possession of for example an illegal firearm, such a finding is not to be based upon the principle of common purpose, but on the principle of joint possession.”

This entails that the group must have had the intention (animus) to exercise possession of the firearms through the actual detente and the actual detente had to have the intention to hold the firearms on behalf of the group. (See also *S v Nkosi* 1998 (1) SACR 284 (W)).

[51] Taking into account the planned actions of the accused and his co-perpetrators. It is clear that the two perpetrators holding the firearms were holding them on behalf of the group in order to execute their plan. The group had therefore also intended to possess the firearms through the accused to co-perpetrators.

[52] In the result I find on a conspexive of all the evidence that the accused is guilty on all the counts. That is counts 1 to 6 preferred against him.

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On behalf of the State: Adv Serepo

On behalf of the Defence: Adv Mphanza.

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