

SOUTH AFRICA / JUDGMENT

S v Matjeke (049/2016) [2016] ZAGPJHC 130 (3 June 2016)

[2016] ZAGPJHC 130**COURT**

South Gauteng High Court, Johannesburg

BEFORE

T.V. Ratshibvumo

CASE / FILE NUMBER

049/2016

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Source record**THE****HIGH COURT OF SOUTH AFRICA****GAUTENG****LOCAL DIVISION, JOHANNESBURG****CASE****NO: 049/2016****DATE:**

3 JUNE 2016

In

the matter between:

THE

STATE

And

WILLIAM

JABULANE MATJEKE

Summary

Trial

– Criminal law – Murder – Premeditated murder

– Driver of a motor vehicle fleeing the shooting

scene and

deciding to drive back to avenge the shooting of his passenger by

driving into a man he perceives to be the gunman –

wrong person

knocked down and killed – Impact of mistaken identity –

Accused having formed the intention to kill –

Dolus directus.

Driving under the influence of alcohol – reckless and negligent

driving – duplication of charges. Driving

with the

concentration of alcohol in blood above the statutory limit –

blood to be drawn within two hours.

The accused, a taxi driver stopped at a hiking spot at night. Five hikers refused to get in because he only had space for one passenger left in his motor vehicle. The accused and some of his friends got out and pushed the hikers around prompting one of them to draw a firearm and shoot at the motor vehicle driven by the accused as the latter flee. A short distance away, one passenger indicated he was hit by a bullet. The accused decides to drive back to avenge this with the intention to drive into the gunman with a motor vehicle. Some of his passengers are opposed to this idea, two of whom even get off the car and walk on foot alongside the road. The accused drove back to the shooting scene and found no one. On his way back he drives into one of the two men walking on the side road killing him, thinking that he was the person who fired shots at his motor vehicle. It turned out that he killed one of the men who alighted from his car when he decided to drive back. Concentration of alcohol in his blood which was drawn some 4 hours later was found to be 0.05 gram per 100 ml. The prosecution charged the accused with several charges including murder, drunken and reckless driving of a motor vehicle. Held, that, a mistake in the identity of the victim targeted does not alter the fact that the accused formed a direct intention to kill a human being. Held, further, that for a conviction on driving the motor vehicle under the influence of alcohol, evidence needed to establish that the accused drove in manner that displayed that he was under the influence of alcohol. That a conviction on this charge based on the killing of the deceased could be duplication of charges. Held, further, that driving into the deceased and killing him not indicative of driving under the influence of alcohol and /or reckless driving when a decision to knock him down was taken prior to the driving. That evidence established that the motor vehicle was driven well prior to the collision. Held, further, that driving a motor vehicle with concentration of alcohol in one's blood above the statutory limit is not indicative

of
the mannerism of driving, but that it is an offence on its own. That
sec 65 (3) of Act 93 of 1996 requires that blood should
be drawn
within two hours from the time of the commission of the offence.
Held,
further, that in driving back to the shooting scene, the accused
premeditated the commission of the crime of murder and sec 51
(1) of
Act 105 of 1997 was applicable.

JUDGMENT

RATSHIBVUMO AJ:

1. William Jabulane Matjeke (the accused), stood trial on five charges:
 - Count 1: Murder. The State alleged that on 07 March 2015 at Diepsloot, Randburg, the accused unlawfully and intentionally killed Tshililo Gift Mshueu, a male person.
 - Count 2: Attempted murder. The State alleged that on the date and place as per count 1, the accused unlawfully and intentionally attempted to kill Johnson Chauke by attempting to bump or drive over him with a motor vehicle.
 - Count 3: Robbery with aggravating circumstances. It was alleged that on the date and place as per count 1, the accused robbed Ignatius Phela of his cash, R220.
 - Count 4: Contravening sec 65 (1) (a)/(b) of Act 93 of 1996 – Driving a motor vehicle under the influence of intoxicating liquor. This is alleged to have taken place on a public road on the date and place as per count 1. The alternative charge is that of contravening sec 65 (2) (a)/(b) of Act 93 of 1996 – Driving a motor vehicle while the concentration of alcohol in his blood was above 0.02 gram per 100 ml, to wit, 0.05 gram per 100 ml.
 - Count 5: Contravening sec 63 (1) of Act 93 of 1996 – Driving a motor vehicle recklessly or negligently. This is alleged to have taken place on a public road on the date and place as per count 1. The alternative charge is that of contravening sec 64 of Act 93 of 1996 – Inconsiderate driving.
2. The accused was legally represented by counsel, Mr. Mncwango attached to Justice Centre Johannesburg. The State made it clear that in case of conviction, a sentence in accordance with sec 51 (1) and 51 (2) of Act 105 of 1997 would have to be imposed in respect of count 1 and count 3 respectively. The accused pleaded Not Guilty to all the charges. No plea explanation was tendered.
- 3.

Introduction:

3.1 It is not foreign for the courts to battle the question on whether a motor vehicle can be used as a weapon the same way a criminal would pick a handgun to go and kill. Mr. Chretien once found himself facing a charge of murder over the events of one Saturday evening in 1979 (13 January).[1] That fateful night, he had argued with members of a group before driving away. He decided to drive back into the group, bumping them with his motor vehicle causing the death of one of them. Thirty six years later, on a Saturday evening (07 March 2015), the accused in this matter finds himself in a similar situation. Coincidentally, after arguing with members of a group, he drives away the same way Chretien did, before driving back to face the same group. The motor vehicle bumps into Gift Mshueu who dies instantly.

3.2 Shakespeare once said about alcohol; it provokes the desire but takes away the performance. [2] It would appear from the facts in Chretien and in this case, alcohol consumption plays a prominent role in turning a motor vehicle into a weapon that could be used in committing murder. In casu, unlike in Chretien, the court has the privilege to hear what caused the accused to drive back. The accused was not a lone occupant of the motor vehicle but there were other passengers with whom such a decision was communicated. The question before the court today is not the impact of intoxication on the criminal capacity of the accused. The crux in this case is rather the factual determination on who steered the motor vehicle into the deceased and for what reason.

Summary of facts:

4. A total of eight witnesses testified during the trial, six for the State and two for the defence.

Case for the State

5. Ignatius Lesiba Phela: He testified on how he, on 07 March 2015, attended a birthday party at Cosmo City at the invitation by the accused whom he constantly

referred to as Willie. He had gone to the party in the company of the accused, the accused's girlfriend and four other men, including Phineas and Kabelo. They had gone there in the accused's Toyota Venture that he also used also used as a taxi. At the party they all celebrated drinking alcohol. Their departure from the party was troublesome and so was the rest of their journey.

6. They were seven in a motor vehicle when they left around 20h00. The accused was the driver and he occupied the front passenger seat. The journey took an exorbitant amount of time due to unfortunate events that followed, and he only reached his home in Diepsloot after 01h00. As they drove away, they were all drinking alcohol. At some stage, the accused stopped for two men who were hiking. One of them happened to be known to the accused as a colleague in the taxi industry. The accused stopped again at a spot where five men were hiking. These men would not enter saying the motor vehicle was full. The insistence by the driver that they get in

irrespective of their stance resulted in an argument. He and the driver got out of the motor vehicle to confront them.

7. Gunshots were fired from this group before they could reach them. As a result, they ran back to their motor vehicle and the driver sped off. As they drove away they realised that one of their male companions was hit with a bullet. The accused indicated that he wanted to drive back to confront those people. He testified that he was opposed to since those men were armed and they were not. The accused said he would bump them using his motor vehicle. Despite his protests, the accused drove back to the hiking spot.
8. As they drove back, they saw two men walking on the side of the road. They argued among themselves inside the motor vehicle as to whether these could be the same men who fired the shots or not. He testified that he told the driver that the pedestrians could not be the ones because the hikers were all wearing work suits and were chubby, unlike the two pedestrians. Irrespective of this, the accused veered the motor vehicle off the road to go and bump them. All of a sudden, he saw a man on the windscreen and the motor vehicle stopped in the bushes. After the motor vehicle stopped, they could not see the man who was knocked by the motor vehicle. All he found was his wallet and one canvass shoe on the ground, and he picked up that wallet. He suggested that they should search for the body of the man knocked down in the bushes so they could leave it at a view of other road users, but the accused would have none of that since he was by then concerned over his damaged motor vehicle.
9. They pushed the car in order to start it and they drove away. As they drove away, another argument ensued resulting in a physical fight. The cause for the fight was that the driver accused him of taking out cash from the wallet he had picked up instead of handing it over intact with its contents. He however denied that he took some cash from that wallet. While driving, the accused assaulted him with a fist while Phineas, a man who was seated behind his seat, held him on his neck by the arm. As he was held like that, the accused managed to search him and took a cell phone and about R220 from him. The accused even took out a knife threatening to stab him with it. They struggled for the possession of this knife and when he got hold of it, he threw it out of the moving car. From the assault, he sustained an open wound on his head. A healed scar of about 5 cm still reflected as he gave evidence. He was also injured on his right eye as a result of being hit with a fist by the accused.
10. They continued fighting until they reached Diepsloot Police Station. When he reported the incident to the police, they did not take him serious since he was drunk. They eventually informed him that they would send police vans to the scene of impact. They also referred him for medical treatment. Days, later, he wanted to withdraw the robbery charge after his R220, was paid back to him by Kabelo, the accused's brother. However the prosecution refused to withdraw the charge. He enjoyed a cordial relationship with the accused since they grew up together, and that their mothers are very close to each other.

11. He denied the defence's version to the effect that it was him who suggested that they should drive back to the shooting scene to fight back. He also denied that the accused only agreed to drive back so that he could look at those men for him to be able to point them out to the police. He also denied that he was the one who grabbed the steering wheel and swerved the car to where the deceased was walking. He challenged the defence saying had accused made that report to the police, they would have arrested him instead. The reason he was not arrested is that he did not make it to the police since it was an afterthought.
12. Johnson Chauke: He testified that he was with the deceased, Gift Mshueu on 07 March 2015, the day he died. The deceased was his friend. They had known each other from 2006 when he arrived in Gauteng. On that fateful day, they were together while the deceased was driving a taxi. When the deceased knocked off that evening, the two of them went to a hiking spot to for taxis to Diepsloot. It was not long before the accused came driving his Toyota Venture and he stopped for them. The accused and the deceased greeted as they knew each other. The accused even told the deceased not to pay since they were colleagues. As a result, the deceased paid R10 which payment was for this witness.
13. They drove off travelling along Malibongwe Drive before turning into R114 towards Diepsloot. Everyone inside the motor vehicle including the driver was consuming alcohol. Although he was seated at the back where he could not see the type of alcohol the driver was consuming, he could see that Amstel beer was being passed from one person to another.
14. At the area called Makumane they stopped for five men who were hiking by the side of the road. As these men communicated with the driver, they seemed not to understand each other. The driver, the front passenger and the two men from the seat behind the front seat got out and the two groups pushed each other. One of the hikers drew a firearm. Upon seeing the firearm the driver and his companions ran back to the car. The gunman then fired three shots at the car and the driver sped off. They drove about 500 meters before one of the men in car indicated that he was hit by a bullet. The accused responded saying he was not going to drive away and just leave the people who shot his companion. He then pulled to the right hand side of the road and stopped the motor vehicle. The deceased pleaded with him not to drive back.
15. The only female passenger who was said to be the accused's girlfriend also pleaded with him not to drive back. It was at that stage that the deceased suggested to the witness that they should rather get out of the motor vehicle instead of going back with the others because they could get injured. The two of them alighted from the motor vehicle and proceeded with the journey towards Diepsloot on foot. They were walking on the right hand side of the road on the gravel part, away from the tarred road. They

walked on the motor vehicle tyre tracks caused by the motorists who drive on the shoulders of the road to avoid traffic congestion on the tarred road. The deceased was walking on the left track closer to the tarred road and the witness was on the right one, further from the tarred road facing oncoming traffic. He phoned Fhatuwani who resided in the same yard as him to come pick them up as it was unlikely that they would get another lift.

16. As they were walking, he noticed motor vehicle lights from behind them. At that stage, the car was being driven on their side of the road at a high speed. He ran away even further from the road into the bushes. He noticed that the deceased was hit by a car and he realised that it was the same Toyota Venture they had alighted from moments earlier. He could not tell how this car veered from the left side of the road to the right side where they were walking.
17. After hitting the deceased, the car stopped. As he remained hiding in the bushes, he heard the car occupants asking each other saying 'where are they?' The tall grass and darkness helped him to remain unseen as opposed to them who were exposed to the motor vehicle lights and its white colour. They then talked about pushing the motor vehicle back to the road since its engine was off. They pushed it, it started and they drove off.
18. When Fhatuwani arrived, he showed him the point of impact and where the Toyota Venture started to swerve off since there were markings in the bushes. They walked following the tyre tracks into the bushes until they found the deceased lying in the bushes, lifeless. He was lying some 30 meters from where he was walking when the motor vehicle hit him. No matter how loud the witness shouted his name, Gift Mshueu was not going to respond; for he was no more. Fhatuwani took him to the police station in order for him to report the incident.
19. At the police station they found the same Toyota Venture and the same occupants. Upon seeing him, the accused told the police, 'here is the person who was walking with the person that I knocked down.' The accused also told the police that he and the deceased are the ones who fired shots at his motor vehicle. At the end, he was allowed to tell his version culminating in him going with the police to the scene where they found the deceased's body where he had left it moments earlier.
20. He denied the defence's version to the effect that the deceased is the one who argued with the men who were hiking but refused to get into the motor vehicle saying as a hiker himself, he had no reason to do so. He also disputed that the accused was the only person who got out of the motor vehicle to confront the men who were hiking. The fact that he had not consumed alcohol that day gave him certainty of what happened inside the motor vehicle, in particular, the fact that the driver also consumed alcohol. For the duration that he was a passenger inside the motor vehicle, the accused was driving normally. He could not tell with certainty if the motor vehicle would have hit him too had he not run into the bushes.

21. Fhatuwani Andries Ndou: He is the witness that Johnson Chauke (Chauke) phoned to pick them up after he and the deceased had alighted from the car driven by the accused. He confirmed Chauke's evidence on what happened when he arrived there and that he is the one who took Chauke to the police station.
22. Warrant Officer Jeremia Manare Mabotja: He is a police officer with 25 years' police experience and he is stationed at Diepsloot. He testified that on 07 March 2015 he visited the scene of the incident and later proceeded to the police station where he organised the pathologists and a photographer to attend to the scene. He interviewed the accused after warning him of his constitutional rights as the suspect. The accused confirmed that he was indeed the driver and that he was willing to make a statement.
23. The accused informed him that he was from a party in Cosmo City and that he was travelling in the company of the people who were outside the charge office at that stage. As he drove along he gave a lift to the deceased who was in the company of Chauke. He told him that he drove further and came across other people who were hiking. He stopped and offered them a lift. Some of the passengers inside his motor vehicle told him that there was no more space. He then drove off. As he was driving, gunshots were fired from outside. One of his passengers indicated that he was hit with a bullet. He then stopped and told the passengers that they had to

drive back to fight those people. He then drove back to face the people who fired the shots at his motor vehicle.

24. The accused further told him that as he drove, some of the passengers complained to him that it would be risky to go and confront armed people while they were not armed. After hearing this, he made another turn driving back to Diepsloot. As he was driving, he saw the people who fired the shots walking on the side of the road. He drove his motor vehicle to them and knocked down one of them. Throughout this interview, the accused reeked of alcohol and his speech was slurred. The accused also confirmed that he had consumed alcohol. He then informed the accused that he was arresting him for driving under the influence of alcohol. He arrested

the accused between 00h30 and 00h45. Between 00h45 and 01h00, he sent the accused for his blood to be drawn for alcohol tests.

25. Tshifhiwa Emmanuel Musinyali. He is the investigating officer in this matter. He visited the scene of the incident some four or five months later in the company of Chauke. His role was to draft the sketch plan which was accepted and marked as Exhibit E.
26. Constable Tshiamo Joseph Thapedi: He is the police officer who received the accused from W/O Mabotja and took him for blood to be drawn at Lodium Health Centre. They saw the doctor around 02h20. The blood was placed in a forensic bag with seal number AM814598. He handed over the forensic bag to SAP 13 storage and it was registered under SAP 13 no. 179/2015

27. With this evidence, case for the State was closed.

Case for the Defence:

28. Jabulane William Matjeke: He is the accused. He testified that on 07 March 2015 he was from a party in Cosmo City, driving to Diepsloot. They were seven in the motor vehicle. He was in the company of his friends Ignatius Phela & Herman Seopa, his lover Marry Rammoki, his younger brothers Kabelo Matjeke & Phineas Matjeke and his cousin, Ngoana William Matjeke. At the party he consumed three to five bottles of Black Label beer and he was under the influence of alcohol although he could understand what was happening. He and Herman had arrived at the party around 11h00 and they left between 20h15 and 20h20.

29. As he drove his car, he did not consume alcohol. On the way, he stopped to give a lift to two people who were hiking heading to Diepsloot. When they entered his motor vehicle, he realised that one of them was the deceased whom he knew as Rasta, a fellow taxi driver. He again stopped for three men who were hiking also heading to Diepsloot. This he did after the deceased had suggested that he should stop and squeeze in those people. His Toyota Venture was certified to carry only 10 passengers and there were nine

already. One of the men opened the front door and another opened the rear one.

30. There was an argument with the men who were to have boarded at the back over the space in his motor vehicle. He got out from his motor vehicle and went to the back as he realised their journey was not going to be pleasant. Once at the back he saw that one of the men was carrying a firearm facing down. He then went back to the motor vehicle quickly. He saw from the mirror, a gunman

approaching his door. He immediately drove off fleeing. He heard three gunshots, two of which hit his motor vehicle as he later

confirmed at the police station. After driving for a while, Herman Seopa indicated that he was hit with a bullet on his right foot and he started to cry.

31. Ignatius Phela (Phela) then indicated that they could not just leave when someone had been shot suggesting that they should go and fight back. He then made a turn driving back. His intention was not to revenge or fight back as suggested by Phela, but to observe the culprits so that he would be able to identify them to the police later. Marry was also shot on her right foot, but at that stage she was not aware of it. Only Marry was opposed to that idea of driving back. Herman who was crying throughout only kept quiet after he made a turn to the scene of the shooting.

32. Whilst driving, they kept arguing on whether he should continue driving to the shooting scene or drive home. By then he had also calmed down. He made a turn and drove back away from the shooting scene. After a short distance, Phela saw the two men walking on the right side of the road and shouted "here are those people." He looked up but did not see them; for the car was driving towards the bushes. This was caused by Phela who held the

steering wheel and forced it to turn. He could not apply the brakes in time to stop the car. He heard the sound of the car knocking something and it nearly capsized. When it stopped, they all

got out except Herman who was injured. They inspected to see what caused the knocking sound but they found nothing. They pushed the motor vehicle back to the road and drove off.

33. When Phela got back into the motor vehicle he was carrying a grey wallet that the accused thought it was his own wallet. As he drove on, Phineas alleged that as they were pushing the motor vehicle, Phela was busy searching a person. That information did not sit well with him. He however did not know who that person was, for he was not aware that he had knocked a person at that stage. He then confronted Phela accusing him of turning the steering wheel causing him to knock down a person. They then started arguing over why he had searched a person.
34. The argument led to a physical fight which started when Phela hit him with a fist on his chest and he hit him back. At that stage, Phineas who was seated behind Phela grabbed him (Phela) with an arm on the neck. He testified that while Phineas held Phela by the neck, he managed to search him. In his pocket he found a grey wallet which had R50. The R50 note was torn into two in the struggle that ensued. He could not remember finding Phela's cell phone as he searched him. They drove up to Diepsloot Police Station. Phela kept turning causing the motor vehicle to hit the concrete pots put on the sides of the road near the police station. These caused the motor vehicle to be damaged further breaking its head lamp.
35. He confronted Phela as to why he would cause all these he responded that he wanted the accused to be like him as he had been in prison. At the police station he waited his turn to be served. As he waited, a man entered the police station and he recognised that man as the person who was carrying a firearm at the hiking spot. This man was later known as Chauke. He then told his companions that the said man was the one who was carrying a firearm. His companions confirmed that he was indeed the same person.
36. The moment Chauke gave his report to the police; the accused explained that Chauke was the one who held a firearm at the shooting scene. Chauke however denied this saying he is the one who was with Rasta, the deceased. Only then did he realise that he was indeed the man who was with the deceased. Up until then he was not aware that the deceased was no longer in their company. He did not see the deceased alight from the motor vehicle. He then asked Chauke where Rasta was. Chauke responded saying the person bumped by the accused was Rasta. The accused testified that upon hearing that, he was so concerned that he felt like fainting.
37. He testified that he had a turn to tell his side of the story. The police realised that he reeked of alcohol. They were not interested in hearing from him, so they took him to the other side of the wall and handcuffed him. It was there where W/O Mabotja found him and asked as to what happened and he explained. He could not recall if he told W/O Mabotja that he drove

back in order to observe the gunman since he was shocked that he knocked down a person he knew. He denied telling W/O Mabotja that he drove after the deceased until he bumped him.

38. He denied that he took R220 from Phela. He denied having been in possession of a knife. He admitted having punched Phela and that he sustained a swollen eye. He also admitted that Phela bled from the head after he hit him with a fist that had a ring in one of the fingers. He disputed that he was travelling at a high speed saying he was driving at 40 km/h. He also testified that he only heard that Kabelo paid the money to Phela when he was released from prison. Kabelo told him that this happened after Phela

came to his place to demand money.

39. Kabelo Matjeke (Matjeke) also testified for the defence. He is a younger brother to the accused, born of the same mother. At the time he gave evidence he resided with the accused in the same yard but not the same house. He was one of the passengers in the taxi driven by the accused that night. His evidence corroborated that of the accused and as such I see no reason to repeat the same here, except where necessary.
40. He also testified that he was seated between Marry and Phineas on a seat behind the front one. He could not hear everything discussed between the accused and Phela. He did hear Phela shout, 'here are those people' but did not see them because he immediately bent his head down to avoid being hit in case the said people would shoot again. He did not see or hear the sound of a motor vehicle collide with anything except when hitting a ditch where it finally stopped. He also testified that although he did not see the man who fired shots at the hiking spot, when the accused pointed out Chauke as the said person, he and other companions confirmed to the accused that he was indeed the said person. In so doing, he admitted that they were falsely accusing Chauke.
41. With this evidence, case for the defence was closed.
42. Closing Address: The State' counsel addressed the court asking for conviction in respect of counts 1, 2 & 3. He submitted that in respect of count 1, evidence showed that the accused premeditated the commission of the crime of murder. He conceded that a conviction could not stand in respect of the remaining counts for reasons that it would be duplication of the charges. The defence' counsel submitted that the accused should be acquitted in respect of all the charges. The reason for this was that Phela, the key State witness was too drunk and as a single witness, he was unreliable.
43. It is trite law that for a conviction to follow, the State must prove its case beyond a reasonable doubt. It is part of this dictum that there is no duty on the accused to prove his innocence and that in case there is a version for the defence, and should the same be reasonably possibly true, he would be entitled to an acquittal. These are not separate and independent tests, but the expression of the same test ('the proper test') when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the

accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other. In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence – S v Van der Meyden[3].

44. This approach has been referred to with approval in a number of decisions handed down by both the High Courts and Supreme Court of Appeal. In S v Combrink[4], Shongwe JA said “It is trite that the state must prove its case beyond reasonable doubt and that no onus rests on an accused person to prove his innocence. The standard of proof on the state and the approach of a trier of fact to the explanation proffered by an accused person has been discussed in various decisions of this court and of the high courts (see R v Difford;[5] S v Van der Meyden[6]). It suffices for present purposes to state that it is well settled that the evidence must be looked at holistically.”
45. It is common cause that the accused was the driver of a Toyota Venture that knocked down and caused the death of the deceased. He was behind the steering wheel at the time of the impact. At that stage, there were seven occupants in the motor vehicle including the accused, Matjeke and Phela. It was Phela who after the collision, got into the motor vehicle carrying a wallet belonging to the deceased. An argument ensued between Phela and the accused over that wallet or the contents thereof culminating in a physical brawl in which the accused punched Phela who consequently sustained a swollen eye and an open wound on the head. The accused also searched Phela while driving, with the help of Phineas who while seated behind Phela, managed to grab him on the neck from behind using his arm.
46. All the occupants of the motor vehicle at the time of collision had consumed alcohol that day. The driver drove the motor vehicle well or normally. He had a confrontation with the men who were refusing to board his motor vehicle after he had stopped for them. The confrontation led to him fleeing in a motor vehicle while one of the said men fired three shots, two of which hit his motor vehicle. Upon realising that one of the passengers was injured, the accused drove back to the spot where the shots were fired. When

the men could not be found, he drove back. It was as he drove back that his motor vehicle was made to collide with the deceased who was walking with Chauke on the right hand side of the road.

47. It is further common cause that Chauke and the deceased had been passengers in the said motor vehicle having been offered a lift shortly before they could reach the hiking spot where shots were fired. The two were still passengers in the motor vehicle when a decision was taken to drive back to the shooting scene, and they decided to rather alight than to risk the danger of being shot at. It is further common cause that when the accused saw Chauke at the police station, he accused him of being the person who

together with his companion, fired shots at him or his motor vehicle.

48. Issues for determination: Was the accused on duty as he drove his motor vehicle that evening? Counsel for the defence argues the relevancy of this aspect in that the minimum quantity of alcohol acceptable in the blood system of a professional in terms of Act 93 of 1996 (the National Road Traffic Act), applies only if the said professional driver is on duty. There is dispute further as to whether Phela wanted the accused to drive back to the shooting scene or he was opposed to that.
49. There is also a dispute as to why the accused finally turned the motor vehicle and drove to the shooting scene. Either he drove back in order to go and avenge the shooting, or he merely wanted to observe the face of the assailant so he could identify him to the police. Was it the accused who deliberately aimed his motor vehicle into bumping the deceased or it was Phela who took control of the steering wheel causing the motor vehicle to swerve out to knock him? Was anything taken from Phela by the accused when he searched him?
50. Inadmissible evidence: Evidence was led through W/O Mabotja on the report that was made to him by the accused. In closing address, the defence submitted that such evidence should be declared inadmissible because it amounted to a confession and a number of prerequisites for a valid confession were missing. The said statement is to the effect that when the accused saw the deceased and Chauke walking, he charged unto them into the bushes until he bumped into the deceased. The State conceded that such a statement amounted to a confession and is inadmissible.
51. In criminal trials defence' counsel needs to stand guard against inadmissible evidence being led. It is incumbent on the defence to object so the court is able to rule on the admissibility of such evidence before it is on record. One would expect that with the common practice that the contents of the docket are disclosed before the trial, the defence would be on alert as to what evidence each witness is likely to give when called to testify. In that case the court can be informed well in advance that the admissibility of evidence or a portion thereof is contested. In so doing, a trial within a trial could be held for the determination of the admissibility of such evidence.[7]
52. The duty to avoid inadmissible evidence is not exclusively on the defence' shoulders. The public prosecutor's paramount

duty is to help the court to ascertain the truth and arrive at justice as opposed to securing a conviction at all cost.[8] Had both counsel been alert to their responsibilities during trial, the court would not be faced with having to sift the evidence on record to declare on its admissibility at this stage of the trial. It is however not uncommon for the courts to have to rule on the admissibility of the evidence on record; for judicial officers, by reason of their training and experience can disabuse their minds of any irrelevant personal beliefs, inadmissible evidence or predispositions.[9]

53. A confession is an unequivocal acknowledgement of guilt which, if it were made in a court of law, would amount to a plea of guilty.[10] There is no doubt that the alleged statement is an admission of all the elements on a crime of murder or at least other crimes that are competent verdicts in respect of that charge.[11] Sec 217 of Act 51 of 1977 (the Criminal Procedure Act) provides,

217. Admissibility of confession by accused

(1) Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence: Provided -

(a) that a confession made to a peace officer, other than a magistrate or justice or, in the case of a peace officer referred to in section 334, a confession made to such peace officer which relates to an offence with reference to which such peace officer is authorized to exercise any power conferred upon him under that section, shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or justice; and... [own emphasis]

54. Given the fact that the accused was admittedly not sober when W/O Mabotja interviewed him, his rank and that it was not reduced to writing, this should explain why the State's counsel made a concession, and I think rightly so. The piece of evidence in contention is therefore declared inadmissible and the court would not have to attach any weight on it for purposes of judgment.

55. Single witness: It is so that Phela is a single witness in respect of all the charges the accused faces. When faced with evidence of a single witness,

cautionary rules have to apply – see *R v Mokoena*[12]. In that matter, De Villiers JP pointed out that for evidence of a single witness to bring about a conviction it must be satisfactory in all material respect. However, in *S v Sauls and Others*[13], the Appellate Division pointed out that “the cautionary rule may be a guide to a right decision, but it does not mean that the appeal must succeed if any criticism, however slender, of the witness' evidence was well founded.” To this end, the Appellate Division held that the cautionary rule does not replace common sense. In holding this, the appeal court was amplifying

section 208 of the Criminal Procedure Act which provides that conviction may follow after evidence of a single competent witness.

56. Credibility: Just like all the cases where the State's version is on the opposite end of the field as compared to that of the defence, the case stands or falls on the credibility of the witnesses. Phela proved to be a credible and reliable witness. After he was subjected to lengthy cross examination, he remained steadfast to his version and was able to demonstrate how illogical the defence version was, as it was put to him. He did not show any

bias against the accused. In fact he enjoyed a cordial relationship with the accused who he described as being close to him from their days at school and their mothers being close to each other. At some stage he even wanted to withdraw the charges he had laid against the accused but the prosecution declined.

57. He could have exaggerated the case against the accused by claiming that the accused took his cell phone which would only be in line with common sense, but he opted not to, saying he did not see him take it out of his pocket. He did not just give evidence painting the accused in black and placing himself on holy ground. Where necessary, he placed himself in the wrong like when he testified on how he joined the accused to go and confront the hikers who were refusing to enter the motor vehicle. Surely that was an act

of provocation or aggression on the people who had a right to choose if they wanted to be passengers in the motor vehicle driven by the accused, especially when it would be overload.

58. Phela's version of events is in line with all the undisputed facts. The accused's version on the other hand lacks common sense and logic and it is not in line with the undisputed facts. The accused wants the court to believe that he was not on duty or driving his motor vehicle for financial gain, yet the reason for this fiasco is that he desperately wanted passengers who would pay him even though he did not have space for them to sit in the motor vehicle.
59. The accused further wants the court to accept that he drove back in order for him just to observe the man who fired shots at him, yet he testified that when he left the shooting scene, he had seen the gunman very well. I do not see a need to observe this armed man for the second time irrespective of the risks involved, unless there were extra reasons. Phela's version that it was the accused who decided to drive back so he could revenge, finds corroboration from Chauke who at that time was still a passenger in the motor vehicle. Chauke indicated that the deceased opted that they should get out of the motor vehicle after he failed to persuade the accused that he should not drive back.
60. The accused also claims that he was driving at 40 km/h on a straight road when Phela brought to his attention that there were people on the road. The court finds it improbable that if such was to have happened, the accused would fail to see the said pedestrians since he was facing the same direction they were. In fact he was in a better position to see them since they were on the right and the motor vehicle is right hand driven.
61. It is also highly improbable that as Phela forced the motor vehicle to drive across the centre line, the oncoming lane and then to the deceased who was out of the road, travelling at that speed, he would fail to timeously apply the brakes for the motor vehicle to stop. The version by both the accused and his brother Matjeke to the effect that even after the collision, they did not know they had hit a person is not only contradicted by Phela, but also by Chauke who while he remained hiding, he could hear the accused and his companion ask each other as to "where are they?"

62. The fact that none of the other six passengers in the motor vehicle observed Phela grab the steering wheel to cause it to collide with the deceased leaves the accused's version more than just suspicious. Five of those passengers happened to be his relatives. The court struggles to understand the cause of the fight between the accused and Phela after the collision, on the version of the accused. The accused claims to have been touched by the allegation that Phela was searching a person, yet he did not know who the person was or under what circumstances that person was searched, especially if this would lead to a physical fight.
63. Phela's version to the effect that he was attacked because the accused believed that he was handing over a wallet after emptying it first makes sense; for this can be a reason for people to fight. Phela's version is in line with Chauke's in that Chauke alleges that the motor vehicle occupants did not search and find the body of the deceased. There is no way therefore that Phela could have searched the deceased. Chances of such allegation being made by Phineas albeit false appear to be unlikely. Even if it was made, it clearly would be false and therefore not justifying any deed of taking anything from Phela
64. For these improbabilities, the court cannot find the accused and Matjeke as credible witnesses. Had the collision been caused by Phela as testified by the accused, one would have expected that the accused would have told this to the police at the earliest possible stage. Instead, just as Chauke testified, the accused informed the police that he knocked down a person who was shooting at him. This version is more in line with what Phela and Chauke said that the accused drove back in order to avenge the shooting of his companion and he did this using a motor vehicle.
65. The accused also alleged that as they continued arguing, while he drove back to the shooting scene, he was convinced that he should turn back since he had by then cooled a little. But when he was pressed for answers, he alleged that he drove to the shooting scene and did not find the men and as a result, he drove back towards Diepsloot. This is clearly a contradiction.
66. The court finds that the accused drove back the motor vehicle with the sole intention to knock down the man who had shot at his motor vehicle. The court also finds that the accused was under the mistaken belief, as he still was when he saw Chauke at the police station, that Chauke and the deceased are the men who fired shots at his motor vehicle. For this reason, the accused did what he had driven back to do, which was to avenge the shooting of his companion. The court also accepts Phela's version that his own cash was taken by the accused who was under the mistaken belief that Phela had emptied the wallet instead of giving it with all its contents.

67. There is therefore no evidence that the accused drove the motor vehicle under the influence of alcohol, or recklessly. To the contrary, Chauke who had not consumed any alcohol alleged that the motor vehicle was driven well. The court is also of the view that this could be a duplication of charges. The accused either intentionally used his motor vehicle as a weapon or an instrument to commit murder; or he caused the death because of being under the influence of alcohol.
68. If the court accepts Chauke's version that he only ran away after the deceased was already knocked down, it cannot be that had he not fled, the accused would have bumped him. The reason why Chauke remained in hiding after the collision could be that he feared that the accused would drive the motor vehicle again and knock him down too. This however does not mean that in the same

collision that killed the deceased, the accused also wanted Chauke to be knocked down.

69. The court accepts that the crime of contravening sec 65 (2) (d) of the National Road Traffic Act can be committed in conjunction with other crimes that the accused faces in count 1, 2 and 3. However sec 65 (3) of the National Road traffic Act provides,

If, in any prosecution for an alleged contravention of a provision of subsection (2), it is proved that the concentration of alcohol in any specimen of blood taken from any part of the body of the person concerned was not less than 0,05 gram per 100 millilitres at any time within two hours after the alleged contravention, it shall be presumed, in the absence of evidence to the contrary, that such concentration was not less than 0,05 gram per 100 millilitres at the time of the alleged contravention, or in the case of a professional driver referred to in section 32, not less than 0,02 gram per 100 millilitres, it shall be presumed, in the absence of evidence to the contrary, that such concentration was not less than 0,02 gram per 100 millilitres at the time of the alleged contravention. [own emphasis]

70. This lacuna should explain why the State abandoned its push for a conviction on the alternative charge to count 5 given the hours that lapsed from the last time the accused was behind the steering wheel until blood was drawn from him. The calculation of two hours does not start at the time of arrest as W/O Mabotja suggested in his evidence, but from the time the suspect was in the driver's seat while the engine was running, unless the time of arrest is the same time the driver was in the driver's seat while the engine is running.[14]
71. According to Phela, the deceased may have been knocked down around 22h00 and they arrived at the police station with the accused driving the motor vehicle between 22h00 and 22h30. The blood should therefore have been taken from the accused by no later than 00h30. According to Const Thapedi, blood was only drawn from the accused at 02h20. This count cannot stand. For these reasons the question on whether the accused was on duty does not arise for purposes of a conviction, but surely plays a role on the credibility

finding as highlighted above.

72. It is clear from the facts that alcohol may have had a minimal role in influencing the accused that evening. This could explain why both the accused and Phela did not notice Chauke and the deceased alight from the motor vehicle. The possibility that the deceased and Chauke may have sneaked out to avoid further confrontation with the visibly irritated accused cannot be excluded either. There is however no evidence to suggest that his criminal capacity was impaired or diminished in any manner. This was not even alleged.
73. What is certain is that the accused drove back after uttering the words to the effect that he could not just drive away and leave the people who injured his companion. He further indicated that he planned to drive into them. The accused may not have desired to knock down and kill his colleague whom he referred to as Rasta. He however drove back with the intention to do what he did which was to drive into the person he believed fired shots at his motor vehicle moments earlier. Even after the impact, the accused still believed he knocked down the person who fired the shots, as he declared to his companions at the police station.
74. The identity of the victim is immaterial on a charge of murder. In *Director of Public Prosecutions, Gauteng v Pistorius*[15] the court of appeal held,

“What was in issue, therefore, was not whether the accused had foreseen that Reeva might be in the cubicle when he fired the fatal shots at the toilet door but whether there was a person behind the door who might possibly be killed by his actions. The accused’s

incorrect appreciation as to who was in the cubicle is not determinative of whether he had the requisite criminal intent. Consequently, by confining its assessment of *dolus eventualis* to whether the accused had foreseen that it was Reeva behind the door, the trial court misdirected itself as to the appropriate legal issue.”

75. What made the Supreme Court of Appeal to find that Mr. Pistorius had the criminal intent in the form of *dolus eventualis* is not his lack of knowledge of who was behind the door, whether it was the intruder or Reeva; but his reconciliation with the possibility that there could be a person who may die when he fires the shots into the door. In this case, the accused did not have to reconcile himself with any possibility because he formed a direct intent to kill and he drove into a man that he indeed killed, only to find he killed the wrong man. The mistake in the identity cannot alter the fact that he had formed *dolus directus* to commit murder.
76. Premeditation: The last aspect is whether there was any premeditation as argued by the State. In evaluating if murder was premeditated; the period between the accused forming the intention to kill, and its carrying out is of cardinal importance, but not determinative of premeditation.[16] In my view, the difference between murder committed in a spur of the moment compared to premeditated murder is not about the period that lapses between the forming of the intention and executing it, but the opportunity one has to change one’s mind. Had the accused killed the man who fired shots at him or a member of that group at the time of the shooting; that would have been committed without any premeditation on his part.

77. In *S v Mgibelo*[17] Mudau AJ (as he then was) did not attach much weight to the 16 hours that lapsed from the incident that could be said to be the

provocation of the accused (finding her lover with another woman in bed) to the time she committed the murder; but the opportunity she had to change her mind after making that decision. When one is provoked and decides to kill there and then, he or she lacks the opportunity to decide and consider whether to change that decision while away from the scene of execution. I am satisfied therefore that the accused had moved away from the shooting scene and no one was in danger at that stage. The accused stopped on the side of the road which allowed the deceased and Chauke to alight. At that stage, the accused planned the murder and how he would execute it. At that peaceful moment on the side of the road, he also had the opportunity to change his mind and not go ahead with his plans. He however decided to drive back in search of the person he had decided to kill. That in my view was premeditation to commit murder.

78. The court finds that the case for the State was proved beyond a reasonable doubt and that the version of the defence is improbable. The defence' version is as such rejected as not being reasonably possibly true.

79. The accused is found Guilty as charged in respect of counts 1 & 3. He is however found Not Guilty in respect of counts 2, 4 & 5. Section 51 (1) and 51 (2) of Act 105 of 1997 is applicable in respect of counts 1 and 3 respectively.

T.V. RATSHIBVUMO

ACTING JUDGE OF THE HIGH COURT

Dates Heard: 25 & 31 May; 01 & 02 June 2016

Judgment

Delivered: 03 June 2016

For the State: Adv. Mkhari

Instructed by: Director of Public Prosecutions

Johannesburg

For the Accused: Adv. Mncwango

Instructed by: Legal Aid South Africa

[1] *S v Chretien* 1979

(4) SA 871 (D) and *S v Chretien* 1981 (1) SA 1097 (A)

[2] *Macbeth*, Act II Scene III.

[3] 1999

- (1) SACR 447 (W)
- [4] 2012
- (1) SACR 93 (SCA)
- [5] 1937 AD 370 at 373
- [6] Supra at 448F-I
- [7] S v Magwaza 2016 (1) SACR 53 (SCA)
- [8] S v Maliga 2015
- (2) SACR 202 (SCA) at 208G
- [9] President of the Republic of South Africa and Others v South African Rugby Football Union and Others[1999] ZACC 9; 1999
- (7) BCLR 725 (CC) at para 40.
- [10] R v Becker 1929 AD 167
- [11] See sec 258 of Act 51 of 1977.
- [12] 1932 OPD 79
- [13] 1981
- (3) SA 172 (A) at 180 E
- [14] S v Tentelil [2003] 1 All SA 327 (C)
- [15] (96/2015)
- [2015] ZASCA 204 (3 December 2015) at para 32.
- [16] S v Raath 2009
- (2) SACR 46 (C)
- [17] 2013
- (2) SACR 559 (GSJ)

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