

SOUTH AFRICA / JUDGMENT

S v Simelane (Roelofse AJ) [2020] ZAMPMBHC 3; CC60/17 (4 March 2020)

[2020] ZAMPMBHC 3**COURT**

Mbombela High Court, Mpumalanga

BEFORE

Roelofse

CASE / FILE NUMBER

CC60/17

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Source record**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA, MPUMALANGA DIVISION HELD AT THE
GRASKOP CIRCUIT COURT****CASE****NO: CC60/17****In****the matter between:****THE
STATE
and
BHEKI
THEMBA SIMELANE****JUDGMENT****Roelofse AJ:**

- [1] This is a case about a traditional healer from Chochocho, four of his clients, their dead bodies and their possessions.
- [2] The accused is Mr Bheki Themba Simelane. Mr Simelane professes to be a traditional healer who completed his training in 1998 and

since then has been practicing as a traditional healer from the Chochocho Trust in Mpumalanga. The State alleges that Mr Simelane

murdered and robbed four of his clients, three males and one female. In addition, the State alleges that Mr Simelane attempted to murder the female's son.

- [3] Mr Simelane was arraigned on nine counts arising from four separate incidents.
- [4] Count 1 is one of murder that Mr Simelane on 16 November 2013 and at or near Chochocho Trust unlawfully and intentionally killed Mr Henry Themba Twala. Count 2 is one of robbery with aggravating circumstances in that Mr Simelane with force took from Mr Twala his Volkswagen Polo.
- [5] Count 3 is that Mr Simelane, on 14 February 2014, near Chochoco Trust, unlawfully and intentionally killed Mr Samuel Mandla Sithole. Count 4 is one of robbery with aggravating circumstances in that Mr Simelane with force took from Mr Sithole his Volkswagen Polo.

The charge further proceeds to allege that the accused dumped Mr Sithole in a pit latrine.

- [6] Count 5 is that between 27 and 28 December 2014, near Kabokweni, the accused unlawfully and intentionally killed Mr Pullen Henry Mhlongo. Count 6 is one of robbery that Mr Simelane took with force from Mr Mhlongo's possession is Opel Corsa. The count

further proceeds to allege that Mr Simelane dumped Mr Mhlongo's body in an open field.

- [7] Count 7 is that on 15 February 2016 near Sukani Trust Mr Simelane unlawfully and intentionally killed Ms Kosha Enicah Ndlovu by poisoning her to drink a poisonous muti. Count 8 is that on 15 February 2016 near Sukani Trust the accused assaulted Ms Ndlovu and

took with force from her possession her Ford Echo motor vehicle. It further alleges that Mr Simelane caused Ms Ndlovu to drink Mr Simelane's muti which incapacitated Ms Ndlovu.

- [8] Count 9 is that on 15 February 2016 near Sukani Trust, Mr Simelane unlawfully and intentionally attempted to kill Mr Goodhope Thembalihle Malambe by serving him with a muti mixed with other unknown substances.

- [9] Mr Simelane pleaded not guilty to all the charges and elected not to give a plea explanation in terms of Section 115 of the Criminal Procedure Act 51 of 1977 ("the CPA").

- [10] Certain exhibits were handed in by agreement between the State and Mr Simelane. Those exhibits consisted of post-mortem reports and

photo albums relating to the discovery of the deceased. I shall refer to some of these exhibits when it becomes necessary further in this

judgment.

[11] Formal admissions were made by Mr Simelane in terms of section 220 of the CPA regarding: the identity of the deceased; the deceased's causes of death; the time of their deaths; the manner in which their bodies were found; the photo albums compiled showing where the deceased's bodies were discovered; that their bodies suffered no further injuries since its discovery and the post-mortems; the deceased's ownership of their vehicles and the time Mr Simelane consulted with the deceased.

[12] Principally therefore, in dispute between Mr Simelane and the State, was whether: the deceased were murdered and robbed; whether

there was an attempt to murder Mr Malambe; and whether it was Mr Simelane who perpetrated the crimes.

EVIDENCE FOR THE STATE

MR TWALA'S ALLEGED MURDER AND ROBBERY (COUNTS 1 AND 2)

Mr Dingaan Twala

[13] Mr Twala is Mr Henry Themba Twala's brother. The deceased's girlfriend informed him that the deceased did not return home. Mr Twala searched everywhere for the deceased. Mr Twala called his friends, other family members and hospitals and finally

reported the matter to the Police. When the post-mortem result was released, Mr Twala, his brother and sister went to Mr Simelane. They went to Mr Simelane because they were not satisfied with the autopsy finding that the deceased had died of natural causes. Mr Twala knew Mr Simelane because the deceased had consulted Mr Simelane. Mr Twala accompanied the deceased to Mr Simelane on one occasion. Mr Twala went to Mr Simelane so that Mr Simelane could consult with the ancestors so that they could discover why the deceased had died.

[14] Mr Simelane threw some bones and told Mr Twala that somebody had followed the deceased and Mr Simelane showed in the direction of

Maputo. He told Mr Twala that the perpetrators were using the deceased's vehicle. Mr Simelane told Mr Twala that he would

give them muti with to wash the deceased's clothes in and hang it to dry. He would also give them muti to spray in the deceased's

yard in order to get clarity on what happened to him.

[15] Mr Simelane also told Mr Twala that he would assist them by performing some ritual on the deceased's body so that the deceased could take revenge. Mr Simelane required R 2000 for this service. Mr Twala testified that Mr Simelane performed a rituals on the deceased's body on the day before the funeral at the mortuary. Mr Simelane accompanied Mr Twala and his brother to the mortuary. The rituals included the making of small cuts on parts of the

deceased's body including the deceased's tongue. Mr Simelane further placed two knives in the deceased's hands. Mr Simelane told them that in that way, the deceased will revenge against his murderers. They paid Mr Simelane R 2000. On the day of Mr Simelane's arrest near Witbank for the possession of the deceased's vehicle, Mr Twala received a call from Mr Simelane who told him that he has information regarding the deceased. When Mr. Twala called back, a police official answered the phone.

Mr William Jumbo Twala

[16] Mr William Jumbo Twala who is Mr Dingaan Twala and the deceased's brother in all relevant aspects confirmed the testimony of Mr Dingaan Twala. It is not necessary to repeat Mr Jumbo Twala's evidence.

Ms Sipewe Gladys Simelane

[17] Ms Simelane is Mr Simelane's aunt. On 19 November 2013, Ms Simelane was at her home. Mr Simelane arrived in a Volkswagen Polo. Mr Simelane asked if he could leave the vehicle there because the road to his house was bad. Mr Simelane asked Ms Simelane if he could park the vehicle in her garage. Ms Simelane has not seen the vehicle prior to that date. Mr Simelane told Ms Simelane that he would come and collect the vehicle later. The vehicle remained there for three days. Ms Simelane told Mr Simelane that she wanted to go to Emalahleni. Mr Simelane agreed to take her there if she put fuel into the vehicle. Ms Simelane had to go to fetch her children. Ms Simelane and Mr Simelane together with her daughter left for Emalahleni at 05:00. Mr Simelane drove the vehicle. On their way back to Mbombela, the vehicle was stopped by the Police. The Police told Ms Simelane that the vehicle was stolen. All of them were arrested. Ms Simelane did not know that the vehicle was stolen. Mr Simelane told Ms Simelane that he had bought the vehicle.

Mr Godfrey Mandlenkosi Fankome

[18] Mr Fankome testified that he was introduced to the accused by a school friend. He lives in the same community as Mr Simelane. Mr

Simelane told Mr Fankome that he bought a vehicle. Mr Simelane told Mr Fankome that the vehicle was at his aunt's home. Mr Fankome accompanied Mr Simelane to Mr Simelane's aunt's home. There Mr Fankome saw an orange Volkswagen Polo in the garage. Mr Simelane told Mr Fankome that he has purchased the vehicle. Mr Fankome drove in the vehicle with Mr Simelane. He also dropped Mr Simelane off with the vehicle to Mbombela where he dropped Mr Simelane off.

MR SITHOLE'S ALLEGED MURDER AND ROBBERY (COUNTS 3 AND 4)

Ms Maureen Sibongile Sithole

Ms Sithole was the deceased Mr Sithole's wife. Her husband left their home on 14 February 2014 at 05:00. That was the last time that she saw him. Mr Sithole left the home in his Volkswagen Polo. She reported that her husband went missing at the White River police station. After she reported

the disappearance of her husband to the Police, they requested her to get a statement of her husband's cell phone account. Ms Sithole obtained a statement from Vodacom. She took the statement to the Police in White River. She also gave the statement to the deceased's nephew, Mr Zakhele Johannes Sithole. Mr Zakhele Sithole was a police officer. He assisted in the search for Mr Sithole.

[19] The last number that was called was checked on the cell phone statement. It was determined that it was Mr Simelane's number

as he answered when the number was called. Ms Sithole went to Mr Simelane's home together with the Police. Ms Sithole does not know Mr Simelane at all. Mr Simelane was not at home on that day. She accompanied the Police to a carwash where Mr Sithole's vehicle was parked. Two boys approached. One of them had Mr Sithole's car's keys. They said that they were sent by Mr Simelane to collect his possessions from the vehicle. There was no one close to the vehicle when it was discovered. Ms Sithole testified that she does not know the boys. The vehicle was taken to the police in White River. Ms Sithole testified that her husband was in good health and had no health issues. Ms Sithole said that she would not know whether Mr Sithole consulted Mr Simelane.

[20] On 28 February 2014, Ms Sithole was called to attend an identity parade. She stood in a line up with nine other women. Mr Simelane was brought in but failed to indicate any person. Ms Sithole testified that the police informed her that the suspect told them that Ms Sithole was with him when Mr Sithole died.

Mr Zakhele Johannes Sithole

[21] The deceased was Mr Sithole's uncle. Mr Sithole is a sergeant in the South African police service. Mr Sithole was informed

by Ms Sithole that her husband was missing. On 17 February 2014 Mr Sithole dialled the last number on Mr Sithole's cell phone

statement. Mr Simelane answered the call. Mr Simelane identified himself. Mr Simelane gave directions to his home. Mr Sithole went to Mr Simelane's home. Mr Sithole has not met Mr Simelane before this day. Mr Simelane told Mr Sithole that he does not know a person with the deceased Mr Sithole's name. Two days later, Mr Simelane called to inform Mr Sithole that he had information to share. He went to Mr Simelane's home.

I stopped Mr Sithole's evidence because it became apparent that what he might be testifying about would be inadmissible and best be heard as part of a trial within a trial.

MR MHLONGO'S ALLEGED MURDER AND ROBBERY (COUNTS 5 AND 6)

Mr Kayzer Chivoli Mhlongo

[22] Mr Mhlongo testified that he is the deceased Mr Mhlongo's brother. He saw the deceased on 23 December 2014. The deceased gave

him a pair of shoes. That is when he last saw the deceased at the deceased's home. The deceased had a red Opel Corsa. On the day he last saw the deceased, the vehicle was parked in the deceased's garage. On 28 December 2014, Mr Mhlongo went to the deceased home. The deceased was not there. Mr Mhlongo saw water running from inside the house. It was later determined that it was the geezer that leaked. Mr Mhlongo saw the deceased's vehicle at the Masoi police station.

Mr Moses Simanga Mnisi

[23] On 12 January 2015, Mr Mkhambane was a constable in the South African police service that was stationed at the Masoi police station. He was on duty and travelled along the R538 road when he observed a red Corsa Lite. Mr Simelane was the driver. He arrested Mr Simelane.

Mr Sipho Sydwel Mhlongo

[24] Mr Mhlongo is a traditional healer. He testified that he referred the deceased Mr Mhlongo to Mr Simelane for treatment. Mr Mhlongo referred the diseased to Mr Simelane because Mr Mhlongo could not deal with the deceased's problems.

MS NDLOVU'S ALLEGED MURDER AND ROBBERY AND THE ALLEGED ATTEMPTED MURDER UPON MR MALAMBE (COUNTS 7 TO 9)

Mr Goodhope Thembalihle Malambe

[25] Mr Malambe is eighteen years old. Ms Ndlovu was his mother. He lived with his mother in Simelane Trust. Mr Malambe's mother

and father are separated. On 15 February 2016, he was with his mother at their home. Ms Ndlovu's vehicle was in the garage at their home where she normally parked it. During the afternoon, his mother received a phone call. She informed Mr Malambe that later in the day he would have to open the gate to that house for the visitor. At approximately 20:00, Mr Malambe's mother called upon him to open the gate. He was suspicious because it was extraordinary for his mother to get visitors so late. Mr Malambe knows Mr Simelane is a traditional healer because he visited Mr Simelane with his mother twice. It was Mr Simelane who arrived. His mother told him that Mr Simelane was a person that was going to assist them with their problems. Mr Malambe identified Mr Simelane in the dock.

[26] Mr Malambe heard his mother and Mr Simelane speaking. He did not concentrate on their conversation. Mr Malambe went to his bedroom

to get his cell phone. At that time Mr Simelane and the deceased was in the kitchen. Mr Simelane showed Mr Malambe two plastic containers containing a mixture of some sort. Mr Simelane told Mr Malambe to drink the mixture in one of the plastic cups as it would assist him. Upon arriving in the kitchen, Mr Malambe saw his mother finishing the mixture in her glass. Mr Malambe testified that prior to drinking the mixture, he did not suffer from any medical condition.

[27] Mr Malambe started feeling ill after about five minutes after drinking the mixture. Mr Malambe went to his bedroom to lie down. He thought that he was tired because you had a busy day. Mr Malambe lost consciousness. He regained brief spells of consciousness while he was in his room. He wanted to call for help but he could not do so. He could not move. Mr Malambe realised that his hands and his feet were tied together with what appeared to be shoelaces. He regained full consciousness in the Temba Hospital. Mr Malambe testified that Ms Ndlovu owned a Nokia Asha cell phone. Mr Malambe testified that Ms Ndlovu was well when he left the kitchen.

Mr Abson Ndlovu

Mr Ndlovu is the deceased's father and the first witness's grandfather. He stays approximately 3 km from the deceased. On 16 February 2016, at approximately 06:00 he was at home when he received a call from the police who told him that they heard screams coming from his daughter's home. Mr Ndlovu, accompanied by the police, went to his daughter's home. The house was locked and they had to break down the front door in order to get access to the house. The yard gate was also locked. Mr Ndlovu had access through the gate to the yard with a key the deceased had given him because he did some chores for her. When they entered the house, they heard noises were coming from Mr Malambe's room. The door was locked. They broke the door open and found Mr Malambe inside with his hands and feet tied with what appeared to be shoelaces. Mr Ndlovu testified that Mr Malambe was soiled with faeces. It looked as if he was rolling around in his faeces. Mr Malambe could not talk. Mr Malambe was placed in a basin so that he could be cleaned.

[28] Mr Ndlovu and police proceeded to Ms Ndlovu's room. The door was also locked and had to be broken open. Inside the room they

found Ms Ndlovu lying on her stomach on a blanket next to her bed. Mr Ndlovu tested for a pulse but found that Ms Ndlovu was already cold and dead. Mr Malambe was taken to a clinic from where he was taken to Temba hospital.

[29] Mr Ndlovu testified that a door leads from the house to the garage. The door was open. The garage door appeared to be locked. Mr

Ndlovu identified the garage door in photograph 2 in exhibit I. There was a key that was broken off inside of the garage door lock. Mr Ndlovu testified that not a single document was found in the deceased's home. The deceased had a folder in which she kept

certain documents such as Mr Ndlovu's medical records. This folder was missing. Also missing was a big TV the deceased had in the lounge. Mr Ndlovu testified that the deceased had a cell phone but that he does not know what the brand was. Mr Ndlovu testified that nobody would have been able to get out of the house because there was no keys and all the doors were locked. The windows also burglar bars.

[30] Mr Ndlovu saw the deceased approximately one month before she was discovered dead in her home and according to him, she did not have no health problems

Dr Mhangì Abemba

[31] Dr Abhemba treated Mr Malambe at the Temba hospital. He saw Mr Malambe on 17 Fairbury 2016 after his admission on 16 February 2016.

Mr Malambe also suffered from post-traumatic stress. The doctor prescribed antibiotics and pain medication.

Ms Marina Hlupìwe Sambo

[32] Ms Sambo was employed by Mr Simelane's girlfriend as a domestic worker. She looks after Mr Simelane and his girlfriend's

children. On 16 February 2016, she was at home when Mr Simelane arrived there with a motor vehicle. Mr Simelane parked the vehicle in her yard underneath a tree. Mr Simelane told Ms Sambo that he wanted to leave the vehicle there because the vehicle was overheating and, as he was driving the vehicle for the whole day, the vehicle was "tired". Mr Simelane told Ms Sambo what is that he would be back the following day to fetch the car. Mr Simelane told Ms Sambo that he bought the vehicle from a Mr Ndlovu in Thulamahashe.

[33] The following day, the police arrived and informed Ms Sambo that the car was stolen and that somebody was killed. It was put to Ms Sambo that Mr Simelane never told her where you got the vehicle from. Ms Sambo, under cross-examination, testified that the children

told her that Mr Simelane informed them that he had bought them a new car.

Mr Kululu Sibusiso Mkhambane

[34] Mr Mkhambane testified that on 5 September 2016, the police arrived at his home and asked him about a Nokia Asha cell phone. Mr Mkhambane told the police that he was no longer in possession of the cell phone as he has exchanged the phone. Mr Mkhambane testified that Mr Simelane gave him the cell phone on 16 February 2016. Mr Simelane gave him the cell phone because they were friends. Mr Mkhambane met Mr Simelane at church where they worshiped together. Mr Mkhambane also went to Mr Simelane's house. He knew that he was a traditional healer.

TRIALS WITHIN TRIALS ON THE ALLEGED MURDER AND ROBBERY OF MR TWALA AND MR SITHOLE (COUNTS 1 TO 4)

[35] After having led the evidence of the aforesaid witnesses, the State commenced with two trials within a trial relating to counts 1

to 4.

[36] In the first trial within a trial, the State sought to introduce two statements that were made by Mr Simelane in respect of the murder of Mr Sithole (Counts 2 and 3). One statement was made to Captain Nkosi and the other to Magistrate Rust. In addition, the

State sought leave to introduce evidence in a pointing out that was made by Mr Simelane.

[37] The second trial within a trial related to Counts 1 and 2 (Mr Twala's murder). The State sought leave to introduce a statement that was made to Captain Nkosi as well as a pointing out by Mr Simelane.

[38] I am not going to deal in detail with the trials within a trial because I have granted leave to the State to present the statements and pointing out and gave full reasons for my decision for doing so. I rejected Mr Simelane's version that he was not informed of his right to legal representation and that he was forced through assault with by certain police officials to make the statement and told what to say. The evidence contained in the statements and the two pointing outs are therefore part of the evidence that I must consider as a whole.

[39] I now proceed to deal with the evidence forthcoming from Mr Simelane's pointing outs and his statements were made to the Police and the Magistrate.

[40] Captain VS Thobela of the South African Police Services conducted Mr Simelane's pointing out in respect of Counts 3 and 4 (the murder of Mr. Sithole). Details of the events of the pointing out is contained in annexure "A" to the pointing-out form that was completed by Captain Thobela. According to the details, Mr Simelane took Captain Thobela to his home. At Mr Simelane's home, he pointed out the room where he mixed up muti for Mr Sithole. Thereafter Mr Simelane took Captain Thobela to a mountain nearby, Mr Simelane's home. At the mountain, Mr Simelane pointed out the place where Mr Sithole died and he also pointed out a pit latrine where Mr Sithole was dumped after he died. It is important from the notes to the pointing out that Mr Simelane said that Mr Simelane and Ms Sithole dumped Mr Sithole into the pit latrine.

[41] In his statement to Captain Nkosi, Mr Simelane told Captain Nkosi that Ms Mr Sithole's wife consulted him about her husband

and wanted medicine to control her husband and to use his money. Mr Simelane alleges that Ms Sithole promised him R18,000.00 and a vehicle for the medicine. Mr Simelane told Captain Nkosi that Mr and Ms Sithole came to him on 20 February 2014. He gave Ms Sithole the medicine and he instructed Mr and Ms Sithole to go to the mountain. Mr Simelane says that he accompanied Mr and Ms Sithole to the mountain. Ms Sithole administered the medicine to her husband. Mr Simelane says that he was standing at a distance while Ms Sithole administered the medicine to her husband. After a while, Ms Sithole called Mr Simelane and told him that Mr Sithole fell down. He saw that Mr Sithole was lying down and that he was dead. According to Mr Simelane, Ms Sithole came up with a plan to cover up her husband's body with leaves. They did so and left Mr Sithole behind. Mr Simelane says that Ms Sithole gave him Mr Sithole's vehicle and promised to give him the papers to change ownership of the vehicle.

[42] In his statement to Magistrate Rust, Mr Simelane also implicated Ms Sithole in the crime.

[43] Evidence in respect of the pointing out relating to Counts 1 and 2 (Mr Twala's murder). Same was adduced by Lieutenant Zungu. According to Lieutenant Zungu, Mr Simelane pointed out the position where Mr Twala died. Mr Simelane pointed out where he parked

Mr Twala's vehicle and told Lieutenant Zungu that he walked with Mr Twala to the river. Mr Simelane pointed out where Mr Twala passed away while he watched. Mr Simelane told Lieutenant Zungu that he took Mr Twala's clothes to his house and took Mr Twala's car to his aunt.

[44] In his statement to Captain Nkosi, Mr Simelane set out a similar version as his testimony in this trial save for that he also told Captain Nkosi that he returned to the river and found that Mr Twala was dead. Mr Simelane also said that he was scared and told no one of the incident. He also confirmed that he took Mr Twala's vehicle to his aunt's home.

[45] The State closed its case. The defence did not apply for discharge in terms of Section 174 of the CPA. Mr Simelane elected to testify.

MR SIMELANE'S TESTIMONY

THE ALLEGED MURDER AND ROBBERY OF MR TWALA (COUNTS 1 AND 2)

[46] In respect of Mr Twala's murder, Mr Simelane testified that he knew Mr Twala because Mr Twala was one of his patients. He testified that Mr Twala visited him on 16 November 2013 at his "practice" in the morning. Mr Twala was Mr Simelane's

client since 2011. Mr Twala sought help because he had certain enemies. Mr Simelane treated Mr Twala by burning something like

incense on hot coals on the ground. He also put medicine on the coals. He covered Mr Twala with a cloth so that he could inhale the smoke. Thereafter, Mr Simelane made muti for Mr Twala to bath with. He put it in a basin and took Mr Twala to a river for Mr Twala to wash in the river.

[47] On arrival at the river, Mr Simelane made further muti and put it into a pink basin for Mr Twala to wash with. Mr Simelane testified

that some of Mr Twala's clothes was left at his house because he was supposed to treat Mr Twala's clothes against his

enemies. Mr Twala was wearing other clothes when they went to the river. Mr Simelane says that he left Mr Twala at the river while he was busy washing himself. Mr Simelane left in Mr Twala's vehicle. Mr Simelane says that he left with Mr Twala's vehicle because Mr Twala owed him money and that there was an agreement between them that he could keep Mr Twala's vehicle until Mr Twala paid Mr Simelane the money he owed him.

[48] Mr Simelane further testified that he left Mr Twala at the river while he was busy with his treatment because he did so in all instances when he took his patients to the river to wash. Mr Simelane confirmed that he took Mr Twala's vehicle to his aunt's

place for her to keep overnight. He also confirmed that on his aunt's request that he take her to Witbank to fetch her children. Mr Simelane told his aunt that he bought the vehicle. Mr Simelane says that he did not see Mr Twala after he left him at the river. Mr Simelane said that he did not know that the vehicle was reported stolen and confirmed that he was arrested with his aunt near Middelburg. Mr Simelane says that he made a statement to Captain Nkosi because he was assaulted and "tubed". Mr Simelane

says that the Police told him what to say in his statement. He also said that he was taken to the river where Mr Twala died prior to the pointing out.

THE ALLEGED MURDER AND ROBBERY OF MR SITHOLE (COUNTS 3 AND 4)

[49] In respect of Mr Sithole's murder, Mr Simelane testified that he knew Mr Sithole because he was one of his customers. He testified that he did not see Mr Sithole on 14 February 2014, neither did he treat him on that date. In his testimony, Mr Simelane denied

that he knows Ms Sithole and he also denied that he made any medicine for her. He testified that he made the statement to the police and the Magistrate because he was assaulted by the Police. Mr Simelane repeated that he made the statements to Captain Nkosi and the Magistrate after being told what to say.

THE ALLEGED ROBBERY AND MURDER OF MR MHLONGO (COUNTS 5 AND 6)

[50] In respect of Mr Mhlongo's murder, Mr Simelane testified that Mr Mhlongo was referred to him by another traditional healer. Mr Simelane was arrested for possession of Mr Mhlongo's motor vehicle. Mr Simelane testified that Mr Mhlongo borrowed it to him. Mr Simelane says that he was in possession of Mr Twala's motor vehicle for 7 days. Mr Simelane does not know how Mr Mhlongo died.

THE ALLEGED MURDER AND ROBBERY OF MS NDLOVU AND THE ALLEGED ATTEMPTED MURDER UPON MR MALAMBE (COUNTS 7 TO 9)

[51] In respect of Ms Ndlovu's murder and the attempted murder of Mr Malambe, Mr Simelane testified that he was called by Ms Ndlovu to her home. It was not the first time that Ms Ndlovu called Mr Simelane to her home and she also attended to his practice sometime. On the day he visited Ms Ndlovu, she told him that there were people that wanted to take her vehicle and also wanted to kill her. She requested Mr Simelane to take her vehicle elsewhere. Mr Simelane says that he prepared muti and sprinkled it all over Ms Ndlovu's house. Mr Simelane confirms that Mr Malambe was also present. Mr Simelane says that Ms Ndlovu gave him her car keys. He took her car and parked it where his children were residing. The last time he saw Ms Ndlovu was when he removed the vehicle. In his testimony, Mr Simelane denies that he gave muti to Ms Ndlovu and Mr Malambe.

EVALUATION

[52] That was a summary of the evidential material before this Court. I now have to determine whether or not the State has proven its case against Mr Simelane.

[53] The standard of proof in criminal disputes is proof beyond a reasonable doubt. The State bears this burden of proof. In *S v Van der Meyden* 1999(1) SACR 44 (W), with regards to the proper application of the test, Nugent J, at 449I to 450B, said as follows:

“The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the

court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.”

[54] According to the indictment, the State would be relying upon similar fact evidence for a conviction. During his address on conviction, Mr Wilsenach, who appeared for the State, informed the court that the State would be relying upon circumstantial- and similar fact evidence in its quest for Mr Simelane’s conviction. Ms Erasmus, who represented Mr Simelane, did so bravely within the constraints presented by her duty to this court. She, rightly so, during her address, Ms Erasmus conceded that the totality of the evidence was a mount to high to conquer for Mr Simelane.

[55] Evidence presented at a trial provides proof no matter what the standard of proof to be applied is. Evidence must be admissible. Evidence is admissible if it was lawfully procured and relevant. Evidence is unlawfully procured, and therefore inadmissible, if it is procured unconstitutionally or procured in such a manner that the admission of such evidence will lead to a trial which is unfair to either of the parties. Evidence is relevant if there is a connection between the issues in dispute and the evidence to be presented.[1]If there is no connection between the evidence to be presented and the issues in dispute, such evidence will be irrelevant and inadmissible.

In order to make a finding, all the evidence properly admitted at a trial, must be evaluated. A piecemeal evaluation of evidence is an improper approach.[2] The evaluation of evidence and the relevance thereof requires the application of logic not only found in the law but also found in human experience. See *Matthews v State* 1960 (1) SA 752 (A) at 758 B-C. where Schreiner JA said as follows:

“Relevancy is based upon a blend of logic and experience lying outside the law. The law starts with this practical or common sense relevancy and then adds material to it or, more commonly, excludes material from it, the result being what is legally relevant and therefore admissible...Katz case is authority for asking oneself whether the questioned evidence is only, in common sense, relevant to the propensity of the appellants to commit crimes of violence, with the impermissible deduction that they for the reason

were more likely to have committed the crime charged, or whether there is any other reason which, fairly considered, supports the relevance of the evidence.”

[56] The treatment of circumstantial- and similar fact evidence is trite. In respect of proof through circumstantial evidence the requirements are: The inference sought to be drawn must be consistent with all the proved facts, if it is not, then the inference cannot be drawn; and the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.[3] In respect of similar fact evidence, the relevance of the evidence is of crucial importance. The probative value of the similar fact evidence determines whether it would be admissible. Similar fact evidence with sufficient probative value must be received.[4] I evaluate the evidence before the court with the aforesaid principles in mind.

[57] In his testimony, Mr Simelane confirms that he treated Mr Twala during the morning of 16 November 2013. Mr Simelane makes a formal admission that Mr Twala died on the same day and that Mr Twala’s cause of death was unascertained at the autopsy. He also admits that Mr Twala was last seen alive in the morning of the day he died. During the pointing out, Mr Simelane pointed out the

place where Mr Twala died and says that he was there when Mr Twala died. Mr Simelane admitted that he was arrested on 30 November 2013 while in possession of Mr Twala’s vehicle. Mr Simelane testified that he was in possession of Mr Twala’s vehicle in terms of a treaty between him and Mr Twala. Yet Mr Simelane discloses none of this to Mr Twala’s brother who contacted Mr Simelane to aid them with the search of Mr Twala and later, the perpetrators of his murder. Mr Twala’s brothers and sister also requested Mr Simelane to perform certain rituals on Mr Twala’s body which he did and was paid for by Mr Twala’s family. Mr Simelane even informs Mr Twala’s brothers that the perpetrators are on their way to Mozambique with Mr Twala’s vehicle when all along Mr Simelane was in possession of the vehicle. Mr Simelane only contacts Mr Twala’s brother when he is arrested at Middelburg for being in possession of Mr Twala’s stolen vehicle. I reject Mr Simelane’s version that he did not murder Mr Twala and that he did not unlawfully take Mr Twala’s vehicle.

[58] In his testimony, Mr Simelane distances himself from the statements he has made to Captain Nkosi and Magistrate Rust. In those statements, Mr Simelane admitted his involvement in the death and disposal of Mr Sithole’s body in the pit latrine. He also

distances himself from the pointing out he made to Lieutenant Zungu. The reason for distancing himself is, according to Mr Sithole, because the Police had assaulted him and told him what to tell to Captain Nkosi and Magistrate Rust. In my view, these are lies for in his statement to both Captain Nkosi and Magistrate Rust, Mr Simelane directly implicated Ms Sithole in Mr Sithole's murder. There would be no logical reason at all for the Police to force Mr Simelane to implicate Ms Sithole and therefore in a manner exculpate Mr Simelane if Mr Simelane was their suspect. The version by Mr Simelane in his statement to Captain Nkosi that Ms Sithole would give him R 18 000 and a motor vehicle if he would assist her with medicine to use against Mr Sithole is so far-fetched in light of all the evidence presented in these counts that it must be a lie. In any event, upon Mr Simelane's own version, he did not point out Ms Sithole at an identity parade arranged for this purpose. Furthermore, Mr Simelane admits that he used Mr Sithole's vehicle, showed it to his friends and told them that he had bought it.

- [59] Mr Simelane testified that Mr Mhlongo was referred to him by another traditional healer and that he was arrested while in possession of Mr Mhlongo's vehicle. Mr Simelane denies in his testimony that he ever treated Mr Mhlongo and says that he was in possession of Mr Mhlongo's vehicle after Mr Mhlongo had borrowed it to him. In his testimony, Mr Simelane denies that he murdered and robbed him of his vehicle. I reject Mr Simelane's version in its totality for there is no doubt in my mind that, based on the facts in this and the other charges, Mr Simelane followed the same *modus operandi* in the murder of Mr Mhlongo. I have no difficulty doing so despite the post-mortem report stating that Mr Mhlongo died of "HYPERTENSIVE HEART DISEASE (natural process). Photo's 1 and 2 in Annexure "G" shows Mr Mhlongo's body as it was found in a forest. The photos show that Mr Mhlongo is lying on his stomach near what appears to be a stream. Next to the body is a plastic container such as the ones used to sell milk. Nothing else is seen near the body. According to Mr Mhlongo's brother, he appeared to be well when he saw him some days before. Mr Simelane testified in respect of Counts 1 and 2 that he usually took clients to a river to wash themselves as part of his treatment. In my view, the autopsy report only records an underlying medical condition. Again, having regard to the totality of the evidence before this court, I find that the post-mortem result does not conclusively disclose the cause of death to the exclusion of all other causes. I do so not on the basis of any speculation or conjecture. Science, only having regard to the physical presentation of Mr Mhlongo's body, may have concluded that he died as a result of a "natural process". However, there is a difference between scientific proof and legal proof. As I have said above, legal proof is obtained by the evaluation of evidence in its entirety. This court has the benefit of such evidence. I can simply not accept the scientific finding that Mr Mhlongo has died of some "natural process" for what it is having regard to the weight of the body of evidence that is before me which shows otherwise.

MS NDLOVU'S ALLEGED MURDER AND ROBBERY AND MR MALAMBE'S ALLEGED ATTEMPTED MURDER (COUNTS 7 TO 9)

[60] In his testimony, Mr Simelane admits that Ms Ndlovu was one of his clients and that he consulted her on the day before she was found

dead. He also admits that he took her motor vehicle with him when he left her home after the consultation. Mr Simelane denies that he administered oral medicine to Ms Ndlovu and Mr Malambe during the consultation. He also denies that he murdered Mr Ndlovu, that he robbed her and that he attempted to kill Mr Malambe. Mr Simelane's version to explain his possession of Ms Ndlovu's vehicle is that she asked him to keep it safe for her because she was afraid that people would take the vehicle from her. In his formal admissions, Mr Simelane admits in his section 220 statement that he administered a potion to Ms Ndlovu and Mr Malambe when he visited Ms Ndlovu's home the evening. I reject Mr Simelane's version outright. After all, he proclaimed that he had bought the car. I have no reason not to accept Mr Malambe's version on the effects the potion Mr Simelane gave him had upon him. I am mindful that Mr Malambe is a single witness in this regard and apply caution. However, his grandfather, Mr Ndlovu and Dr. Abemba's evidence corroborates Mr Malambe's testimony regarding his condition and how he was found in all respects.

[61] All the deceased were Mr Simelane's clients. Mr Simelane has administered some form of treatment to Mr Twala, Mr Sithole and Ms Ndlovu shortly before they died.[5]In respect of Mr Mhlongo, Mr Simelane was asked for his assistance after the referral. All of the deceased disappeared, never to be seen again alive, and died under suspicious circumstances. None of the deceased had shown any outward signs of decease or injury. In each instance, Mr Simelane was in possession of each of the deceased's vehicles shortly after they had died. In each instance, the deceased approached Mr Simelane for advice shortly before they died. Mr Simelane's modus operandi was in all respects similar in all the incidents. In addition, Mr Simelane's explanation for the possession of the deceased's

vehicles are so improbable that it is rejected as lies.

[62] Each of the murders, if viewed in isolation, may have raised doubt if all the elements of murder were proven, especially in light

of the findings on the causes of death in the autopsy reports. However, evaluating the evidence in its totality and as a whole,

including Mr Simelane's explanation and, especially, the similarity of the events, logic dictates that there can be no doubt

whatsoever (and therefore no other finding) that all the deceased died at the hands of Mr Simelane. It is the only inference that can possibly be made. It is simple, if there was doubt that was reasonable, Mr Simelane was entitled to the benefit of that doubt. In this matter, there is in my mind no doubt whatsoever that Mr Simelane murdered all the deceased and attempted to murder Ms Ndlovu's

son by administering to them some or other lethal concoction.

[63] In addition, I have no doubt whatsoever that the deceased were murdered for one reason and one reason alone and that was to unlawfully get their property, especially their vehicles. Mr Simelane's intention, at all times, was to overcome the victims' resistance to the theft of their vehicles, and in the case of Ms Ndlovu, also her television, cell phone and documents. This constitutes robbery. I also have no doubt whatsoever that the administering the concoction constitutes aggravating circumstances.

[64] The State has proven without any doubt that the deceased were murdered and robbed and the attempted murder upon Mr Malambe and that

it was Mr Simelane who committed the crimes.

[65] In the premises, the accused is convicted on all counts as set out in the indictment.

JH ROELOFSE

ACTING JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION

DATE OF JUDGMENT: 17 January 2020

APPEARANCES:

For the State: Adv Wilsenach

For the defence: Adv Erasmus from the Legal Aid Board of South Africa

[1] Nduna v State 2011 (1) SACR 115 (SCA)

[2] Rex v De Villiers 1994 AD 493, 508-9; Rex v Mthembu 1950 (1) SA 670 (A)

[3] R v Blom 1939 AD 188

[4] S v Gokool 1965 (3) SA 461 N at 475 E.

[5] This Mr Simelane admitted in his section 220 statement and also in his testimony.

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