

SOUTH AFRICA / JUDGMENT

S v Ximiya (CC91/2014) [2015]

ZAECGHC 34 (19 February 2015)

[2015] ZAECGHC 34

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M Makaula

CASE / FILE NUMBER

CC91/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CASE

NO: CC 91/2014

In

the matter between:

THE

STATE

vs

LUYANDA

XIMIYA.....Accused

JUDGMENT

MAKAULA J:

[1] The facts of this matter are common cause between the state and the defence. The only issue to be decided is whether the accused was compelled by those whom he committed the offences with to commit them.

[2] The accused faces the following charges:

2.1 Murder;

2.2 Robbery with aggravating circumstances;

2.3 Unlawful possession of semi-automatic fire-arms to wit 6.3 mm calibre parabellum star with serial number 3601 and a 9mm calibre Beratta Pistol with Serial No B330164 without licences to possess them;

2.4 Unlawful possession of firearms being a BSA calibre.303 rifle with Serial No 91393, a Schultz Calibre .270 Winnchester Rifle with Serial No 6617 and a J Holles and Sons 12 bore short gun with Serial No 61173 without holding/having licences, permits or authorisation to possess them;

2.5 Unlawful possession of ammunition to wit an unknown number of 9mm, 303, 0270 and 6,35mm calibre catridges without holding/having licences, permits or authorisation to possess the said ammunition.

[3] The deceased is a 71 year old, Mr Jonathan Stephanus Troskie who was shot and killed in his farm Bassonberg situated in the district of Somerset East on 12 December 2013. The deceased's wife, Idelette Troskie, who is also a victim in count 2, testified that on the evening of 12 December 2013, she was at her home with the deceased and their four grandchildren watching television. The lights suddenly went off. The deceased and two of her grandchildren went to the generator room to check what was happening.

[4] When the deceased returned, he reported that the trip switch had tripped but what was strange was that the generator was on.

After a short while, the lights went out again. He again reported that the same thing occurred. On the third occasion he went back to the generator room. At that time, she and the children were preparing to go to bed as per the advice of the deceased.

[5] While the deceased was still outside, she heard two loud bangs. She asked one of her grandchildren to go and check what was happening and why the deceased was taking long to come back to the house. Whilst the child was still outside, she heard terrible noise coming from outside. She realised that something was wrong and she ventured outside. She suddenly saw two men chasing after her grandchildren. One of those men said in Afrikaans "Vang die skelems" and the other in English "we are going to kill all of you bhuti." One of them grabbed hold of her and the other her grandchild and dragged her back to the house and hit her with a blunt object on her forehead and left jaw. She fell to the floor and could feel that she was bleeding profusely and blood from her injury was blinding her. She was dragged to her bedroom while her assailants were demanding safe keys. Riaan, one of her grandchildren gave them the safe keys. They took her to her office where she helped them to unlock the safe. They took all the fire-arms mentioned in the indictment which were in the safe and demanded money. She told them she had no money in the house however she recalled that there was R300.00 which was in an envelope in the TV room. Riaan went to fetch it and gave it to them. They also demanded car keys which she also gave to them. They took three cellphone sets which were kept at the only spot in the house which had cellphone signal/reception. Her assailants locked them in the office and left in the deceased's motor

vehicle.

- [6] After a while, he asked Riaan to go out through the window to check if the assailants were still around. He came back to report that they had left. They all went out through that window. Riaan found his cellphone in the TV room and they called her son who farmed in the neighbouring farm. She realised that they had taken her wrist watch and three rings which she had left in the TV room. She valued her mother's ring to be R10 000.00, her engagement ring at R50 000.00 and her wedding ring at R5 000.00.
- [7] It is worth-mentioning at this stage that the rings and wrist watch were recovered from the accused. The fire-arms were also found at a veld on the road to Cookhouse. The motor vehicle was also found abandoned next to that road with some damages. It is a Toyota Camry which she valued at about R50 000.00. The deceased's wallet and the cellphones were never recovered. She testified that she has not fully recovered from the injuries she sustained. She cannot use her left jaw when chewing otherwise the forehead and the bridge of her nose have fully recovered.
- [8] Andries Troskie, a 41 year old son of the deceased, farms on a farm neighbouring that of the deceased. He received a call on the evening in question. He rushed to the deceased's house. On arrival he found the deceased lying on the floor of the engine room. He had passed on. He testified that his father had numerous sheep on the various camps surrounding the farm house.
- [9] Warrant Officer Kuhn arrested the accused through the cellphone data. The accused never advised him that he had been coerced to commit the offences.

[10] The chief post mortem findings are the following injuries:

- 10.1 Gunshot wound face right;
- 10.2 Tract of wound goes through 5th cervical spinal cord;
- 10.3 Bullet found lodged in posterior chest on left.

The cause of death is "Gunshot wound neck and spinal cord-unnatural cause of death."

[11] The medical certificate of Mrs Idelette Troskie was also handed up by consent. The J88 which was completed by Dr TJA Louw reflects the following injuries:

- 11.1 Deep laceration of ±6cm over forehead and bridge of nose;
- 11.2 Severe swelling of face with bruises over face and scalp;
- 11.3 Active bleeding from laceration fracture of the left mandible, nasal and frontal bones present.

The conclusion was "severe blunt force was used to cause facial injuries."

[12] Mrs Troskie was further treated by Dr Hein Slabbert who is a Maxillofacial and oral surgeon. She was admitted at Greenacres hospital on 13 December 2013 with the following injuries:

12.1 Laceration forehead, fractured left zygomatic arch, fracture of outer wall of frontal sinus, nasal bone fracture with displacement of nasal bridge, ethmoid fractures, blow-out fracture of the right orbital floor, fracture of the left mandibular ramus, coronoid process and condyle.

[13] On 14 December 2013 she received the following treatment:

13.1 Open reduction and internal fixation frontal bone, nasal bridge, nasal bones and closure of soft tissue lacerations.

[14] On 10 January 2014 she received the following treatment:

14.1 Closed reduction of mandibular fractures using Erich arch bars and intermaxillary fixation.

[15] Various other documents were handed up by consent. Amongst those are (a) a statement made by the accused to Captain Mpambani, (b) a pointing out, notes and photos conducted by Captain Van der Merwe. I shall deal later on with the relevance of these documents.

[16] The accused testified that on 12 December 2013 he was invited by one Zolani to go with him to steal sheep from a certain farm. He agreed. He met Zolani who was in company of two unknown males. They all boarded a truck which dropped them about 23km outside town. The four of them alighted and proceeded on foot through one of the farms (which later turned out to be that of the deceased). Shortly after they alighted, one of the two unknown males produced fire-arms and said if they do not find sheep, they would proceed and rob the farm owner. The accused refused to do that.

[17] The other man with a fire-arm told the accused that he was not going to turn back as the accused would go and report the matter to the police and if he did, they would "shoot the shit out of him and leave him there". Zolani told him to keep quiet and just proceed with them. They proceeded to the deceased's farm house as they could not find

sheep. On arrival at the deceased's house, they stood next to a dam. There was a generator house next by. They instructed him to go and switch it off.

[18] With the use of the light from his cellphone, he switched off the lights by tripping the lights from the trip switch. He went back to the others. The deceased came out and put on the lights and went back to the house. They tripped the lights again on two occasions. On the third occasion, whilst the deceased was in the generator room, the two unknown males went to the deceased in the generator room. He heard three gunshots emanating from the generator room. After a while he and Zolani were ordered by the two gentlemen to go round the house to the front door while they went around on the other side. They complied.

[19] A young boy emerged from the front door carrying a fire-arm. Zolani grabbed the child and took the fire-arm. He entered the front door and saw Mrs Troskie lying in a pool of blood on the floor. He went past her proceeding to a bedroom. He saw a cellphone, 3 rings, a wrist

watch and a wallet on the dressing table and took them. He also found a sum of R300.00. At all material times he acted under pretence so that the two gentlemen should believe that he was with them in the commission of those offences. Mrs Troskie and the children were taken to the office and Zolani emerged with the safe keys, meanwhile the accused was standing on the doorway of the office.

[20] Zolani opened the safe and removed fire-arms and money bags containing coins. Five rifles and two small fire-arms were taken out of the safe. Zolani demanded car keys and later came back saying they must leave. He was driving the deceased's car. They drove off with all the items and fire-arms. He refused to go with them to Port Elizabeth saying he was going to his place of employment to work the following day. Zolani drove towards Cookhouse. On the way, Zolani stopped and gave him R80.00, the three rings, the wrist watch and cellphone as his share. He refused to take the fire-arms. They threw the fire-arms on the other side of a fence next to the road. The car would not start when they wanted to leave. They abandoned it and proceeded towards Cookhouse. He parted ways with them and proceeded to his girlfriend's place to sleep. At that time they were hitchhiking to Port Elizabeth.

[21] On Monday, 16 December 2013, he got wind that a friend of his Clifton had been arrested in connection with a call that was made to him from the cellphone he took from the deceased's house. He went to the police station with a view that he was to tell the police that Clifton did not know about the robbery and confess to them that he was the person who was involved. Whilst at the charge office, Clifton pointed him out to the investigating officer as the person who called him. He was arrested and detained. He was questioned

about the cellphones and he told the investigating officer about it contrary to the uncontroverted evidence that the accused denied

knowledge of the phone hence they had to go and detain him in Port Elizabeth for further interrogation.

[22] The accused was cross-examined at length by Mr Robinson, counsel for the state. I should mention upfront that the accused was a poor witness who contradicted himself on numerous occasions. He gave inconsistent accounts of his defence and failed to mention in his statements to Captain Mpambani, Captain Van der Merwe and to the investigating officer that he was forced to take part in the commission of these offences. Furthermore the accused was not honest in his evidence.

[23] He testified that the statement to Captain Mpambani was freely and voluntarily made and a correct reflection of what he told him. When confronted by Mr Robinson that he never mentioned that he had been forced to take part in the commission of the offences he chopped and changed. Initially he testified that he informed Captain Mpambani about all that occurred and he read the statement back to him and was satisfied with it. However, when pressed further about omitting to mention his defence to him, he changed to say that he did advise Mpambani that he was forced to participate in the commission of these offences. The accused further stated that he advised Captain Mpambani that he omitted to

record his defence.

[24] The accused was inconsistent when asked whether he advised Captain Van der Merwe about being forced to commit the crimes. He initially said Van der Merwe told him that he was merely interviewing him for purposes of the pointing out and the taking of photographs. When questioned further, he said he did not remember whether he told him or not. He was further astounded that his legal representative, Mr Solani did not put to investigating officer during cross examination that he told him about being coerced into the commission of the offences

because that was the reason why the investigating officer took him to Port Elizabeth for questioning. This should be viewed in the backdrop of the evidence of the investigating officer that he did not question the accused at Cookhouse Police Station.

[25] The accused further lied when he testified about the person he identified at St Albans Prison as one of the unknown persons he was with on the day of the commission of the offences. In his evidence he testified that

immediately on seeing that person, he phoned a police officer by the name of Knoetze from Cookhouse and told him. He did not meet with the investigating officer in prison. When confronted with the version put to the

investigating officer, which he admitted to be his instructions, that it was him who phoned and met the investigating officer in prison, he responded by saying, maybe it is different because of the manner in which he put it. It was further put to the investigating officer that he did not question him at Cookhouse contrary to the accused's version that he was questioned about the cellphone number and a cellphone.

[26] The investigating officer testified that Zolani was killed in a robbery. That was not disputed. When the accused testified and confronted that his defence is an afterthought since he knew that Zolani was dead he disputed that alleging that Zolani was alive.

[27] The facts of this case are not commensurate with the defence of the accused. The facts prove that the accused played a major role in the commission of these offences. Even the sharing of the robbery spoils proves to be contrary to what the accused want me to believe. The accused in the first instance, set out to steal sheep with Zolani. That suddenly changed on arrival at the house of the deceased it is the accused who tripped the lights thrice. It is also him who (though not alone) entered the house and took amongst other things, the three rings, a sum of R300.00, the wrist watch and a wallet. There is uncontroverted evidence from Mrs Troskie that at all times the deceased carried his wallet in his person, the same wallet accused says was amongst the items she received.

Furthermore I believe the evidence of Mrs Troskie that the sum of R300.00, the other items were in the TV room and not the bedroom. It is the evidence of both the accused and Mrs Troskie that two men appeared from each side of the house. Their evidence tallies that one of the two men who appeared from the same side grabbed hold of her grandchild. The accused confirms that he

and Zolani appeared from the same side and Zolani grabbed the child. Mrs Troskie testified as that man grabbed the child, the second man from the same direction grabbed her and dragged her inside the house and assaulted her. Logic dictates therefore that if both the accused and Mrs Troskie agree on this aspect of the evidence, that person could be none other than the accused.

[28] The deceased's son testified that he had been at the farm that afternoon and left in the early evening. He testified that there were sheep in the camps. The accused got to the farm at dusk. Therefore, there is absolutely no way they could not have seen the sheep. That they did not steal the sheep indicates that they did not go there for that purpose but to rob the deceased and his family.

[29] The accused received the bulk of the items which were robbed from the farm if one has regard to the fact that all the fire-arms were discarded and the motor vehicle abandoned. The only items as per the list of stolen items that were not recovered are a pair of takkies, two bags, a torch, 3 towels and house and farm keys. The reason why the accused went to the charge office on the day of his arrest is not cogent. He remained seated at the charge office until Clifton pointed him out to the investigating officer as the person who called him. Why he did not report to the police officers on duty and ask for the person who arrested Clifton is not clear. The assumption that he wanted to find out about the information the police heard about the robbery is more plausible.

[30] The actions of the accused during and after the robbery do not support his version that he was coerced into committing these

offences.

I therefore reject the defence of the accused and find him guilty in all counts.

M MAKAULA

JUDGE OF THE HIGH COURT

Counsel for the State: Adv Robinson

Counsel for the Accused: Mr Solani

Heard on: 16, 17 & 18 February 2015

Delivered on: 19 February 2015

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