

SOUTH AFRICA / JUDGMENT

S v Zimase (CC19/2014) [2020] ZAECHMHC 24 (18 June 2020)

[2020] ZAECHMHC 24**COURT**

Eastern Cape High Court, Mthatha

BEFORE

M.S. Jolwana

CASE / FILE NUMBER

CC19/2014

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Source record**IN THE HIGH COURT OF
SOUTH AFRICA****[EASTERN CAPE LOCAL
DIVISION: MTHATHA]****CASE****NO. CC19/2014****In**

the matter between:

THE
STATE
VS
PHAKAMILE PRINCE
ZIMASE
Accused**JUDGMENT****JOLWANA J:**

- [1] The accused has been charged with conspiracy and murder in relation to the death of Mrs Nomathamsanqa Mbasa. She was brutally murdered on the 09 June
2012. The accused was initially indicted with Siviwe Paswana (Siviwe). However, when the trial commenced the state applied for the withdrawal of charges against Siviwe and the court was informed that he would testify for the state.

[2] The accused who was now the only one facing the two charges pleaded not guilty to both charges. His legal representative indicated that there would be no plea explanation tendered. The summary of substantial facts provided to the accused in terms of section 144(3) of the Criminal Procedure Act 51 of 1977 (the Act), recorded the following:

“

1.

The deceased, Nomathamsanqa Mbasa, was related to the accused(s) Phakamile Prince Zimase (Accused 1) and Siviwe Paswana (Accused 2).

2.

The accused(s) blamed the deceased for the death of their brother and the families were involved in court processes due to winding up of the estate of the deceased's husband.

3.

The deceased was afraid of the accused(s).

4.

In June 2012 Phakamile Prince Zimase (Accused 1) and Siviwe Paswana (Accused 2) decided to kill the deceased.

5.

They acquired a fire-arm and on the night of the 9th of June 2012 they waited for the deceased to depart from church.

6.

They approached her vehicle, dragged her out of the vehicle and stabbed her/hit her on her head and face.

7.

They then put her body in the canopy of her vehicle and drove a distance where they left the deceased and vehicle.

8.

The deceased died on the scene as a result of “Head Injury; Incised wound of the neck.

9.

In case of conviction the provisions of section 51(1) of Act 105 of 1997 will be invoked in that the offence was committed by a group of persons acting in the execution or furtherance of a common purpose or conspiracy.”

- [3] The state called as its first witness Siviwe Paswana. He testified that he resides in Mount Ayliff. He knows the accused having met him for the first time in March 2012 at a local gym facility. In the afternoon in June 2012 he was with the accused at the gym, to do some exercises. After the gym session they left together but in two different vehicles until they went their separate ways at a 4 way stop intersection. He was driving a white VW Polo motor vehicle and the accused was driving a Hyundai Tucson motor vehicle.
- [4] Shortly after he arrived at his place of residence he received a phone call from the accused who asked him to come to his house also in Mount Ayliff. He advised the accused that he had not yet taken a bath after the gym. The accused insisted that he should come urgently indicating that he would not keep him much longer. He then proceeded to the accused's place of residence. When he arrived there, the accused was with his wife and one Oupa Mbaso (Oupa). He testified that Oupa had also been arrested for this case but passed away before this trial commenced.
- [5] The accused asked him to accompany him and Oupa to Ntabankulu, indicating that they would come back quickly. They left for Ntabankulu in his Polo motor vehicle. He explained that the Polo motor vehicle actually belonged to one Bandile who worked in Ntabankulu. He, Siviwe was also in possession of a toyota tazz motor vehicle belonging to the accused. On the way to Ntabankulu, before they reached town the accused asked him to drop them off at Nozolisa locality in Ntabankulu and that the accused would phone him when he needs him to pick them up again.
- [6] He then decided to go to town in Ntabankulu after dropping off the accused and Oupa at Nozolisa. He met a friend of his, Lazola Zazaza and his friends near the municipal offices. This was after 8:00pm and it was already dark as it was in winter. He joined them in a drinking hole where he also consumed alcohol with them. As he was waiting for the accused and Oupa in that place it was a while without the accused calling him to come and pick them up. He decided to call the accused who eventually answered the phone and told him to pick them up near Matankini at Mdlantaka bus stop.
- [7] He proceeded to Mdlantaka bus stop where he picked up the accused and Oupa. When they got into the vehicle, Oupa remarked that he (Oupa) should not soil the vehicle with blood. However, he did not know whether Oupa had been cut by some wire as they had emerged from a fenced area. He drove them back to Mount Ayliff and dropped them off at the accused's place of residence after which he went home leaving both of them there.
- [8] The following morning at about 11:00 he received a phone call from the accused who told him not to mention their trip to Ntabankulu to anyone. He was later called by Mr Nocuze, a police officer on the same day. Mr Nocuze asked him to come to Mount Ayliff police station. Indeed he went to the police station where he was asked about his whereabouts the previous day. He told him that he was in Mount Ayliff. He was later questioned by Mr Nocuze and captain Mthembu. They asked him again and he told them that he never went to Ntabankulu the previous day.

- [9] At some stage he was arrested by a police officer who told him that he was from the SAPS' provincial office. He was arrested about 3 or 4 months after he was initially questioned by Mr Nocuze and captain Mthembu. The police officer from the Province questioned him about the accused and where he was in June. He told him that he did go to Ntabankulu that day. He also told him that the reason he had not disclosed their trip to Ntabankulu to the police initially was that the accused had told him not to tell anyone about it.
- [10] He was told that he was being arrested for the murder of Mrs Mbasa who had been killed. He knew the deceased Nomathamsanqa Mbasa. She used to come to his home to have her vehicle repaired by his father who was a mechanic. He only heard about her death when the police questioned him. Siviwe was not cross-examined by the accused's legal representative.
- [11] The next witness for the state was Reverend Ben Hlamandana. He testified that he resides at Nozolisa locality at a mission house of the Apostolic Faith Mission Church in Ntabankulu. He is a priest in charge of that church. He knew the deceased who was a member of his church. On the 09 June 2012 he was with a group of about 20 women who had gathered at the church for prayers and intercessions. The people who come for those prayers stayed at the church premises because the prayers lasted for about 3 days.
- [12] The deceased arrived on the first day in her vehicle. However, she was not part of the prayer team who stayed at the church for prayers. The second day of those prayers was the 09 June 2012 and the deceased arrived on that day as well. During the service and prayers the deceased asked for prayers saying that she had a problem. Her request for prayers thus became a prayer item for the group. However, the deceased did not give any details of the problem for which she asked for prayers save to say that she had family problems.
- [13] The prayer service ended at about 22:30 that night. When the deceased was ready to go home he asked her aside to speak to her. He then requested the deceased to come and see him early the following day which was on Sunday before the church services commenced. He wanted to get the details of the problems for which she had asked for prayers. After that he parted ways with the deceased and went to the mission house in the church premises and the deceased proceeded to her vehicle.
- [14] At some point while sitting in his dining room he realized that the deceased's vehicle was still standing in the church yard. He saw this through glass panels on the door of the mission house. The vehicle was standing near the gate but it was not moving. He saw two men loading something at the back of the deceased's vehicle and its tail lights were switched on. He could not tell what was being loaded and could not tell who those two men were. After they finished loading, the men got into the vehicle and drove off.
- [15] The mission is close to the main road to Ntabankulu. It surprised him that the vehicle turned left on the main road whereas the deceased stayed in town in Ntabankulu and therefore her vehicle should have turned right. He phoned the deceased and her phone was picked up by a child who said her mother was still in church. He then asked his wife and another lady to accompany him. He was going to the house of the deceased to see if all was

well with her. He drove towards the gate going out of the church premises. Near the gate he noticed blood on the ground and a doek which belonged to the deceased. He could also see blood leading to where the vehicle was standing at the back of the vehicle where the loading on her vehicle was done by the two men a short while earlier.

- [16] Eventually he reported what had happened at the church at the police station. From the police station they drove around searching for the vehicle but they did not find it. The following morning at about 5:00am he received a phone call from a police officer who told him that the vehicle and the deceased had been found at Bhakubha locality. The accused's legal representative did not cross examine Reverend Hlamandana.
- [17] Mr Mpendulo Bhashe testified that he resides at Bhakubha locality in Ntabankulu. In the morning on the 10 June 2012 he left home in his vehicle. At a certain distance he saw a vehicle on the road almost blocking his way. He looked closely and realized that there was no one in the vehicle but the keys were in the ignition. He also saw blood dripping at the back of the vehicle and on looking closer he saw a dead person inside the vehicle and called the police. This witness was also not cross-examined.
- [18] Captain Mthembu testified that in the morning on the 10 June 2012 he received a call from warrant officer Nocuze who told him that the deceased's vehicle had been found. He drove to where the vehicle was said to be to confirm if it was indeed the deceased's vehicle. When he got there it was indeed the deceased's vehicle and her body was at the back of the vehicle. The deceased was certified dead by the emergency medical services team. He called the forensic team and a photographer to work on the crime scene. The body of the deceased had stab wounds.
- [19] The photographer was warrant officer Mbhele who took pictures and other exhibits at the crime scene. Captain Mthembu further testified that he found a 9mm pistol under the passenger seat of the vehicle and it had some blood on it. It had a serial number 506048. He handed the said firearm to warrant officer Mbhele. After warrant officer Mbhele had finished collecting all possible evidence at the crime scene they both went to the Faith Mission Church which was said to be a crime scene as well. There they found blood near the gate inside the church yard. They also found a doek that was said to belong to the deceased. Warrant officer Mbhele took the vehicle and the firearm together with the other possible evidence he collected from the crime scene with him for further investigation. He only received the firearm back at Ntabankulu police station in

2013 and entered it in the SAPS 13 register as SAP34/2013. He also received a ballistic report in respect of the firearm.

- [20] Under cross-examination by Mr Notununu, the legal representative for the accused he testified that he did not personally make the entry in the SAPS 13 register and did not know who made it at their police station. He also confirmed that in the morning in this court he had been asked by Mr Notununu to bring him the SAP13 register. He confirmed that he and Mr Notununu examined the relevant serial number in the SAP13 register together. It was

then put to him that when they both examined the register the relevant serial number was 506051 and not 506048. He disputed that in the morning when they both examined the serial number it was 506051 insisting that it was in fact 506048.

- [21] Captain Mthembu confirmed that after he and Mr Notununu had inspected the SAP13 register he took it with him in order to make copies of the relevant page with the relevant serial number. Mr Notununu further put it to him that he found him at the photocopy office at which stage the serial number had been changed to read 506048 and not the 506051 that they both saw in the morning. He asked him about the tempering that had now been done on the serial number. Captain Mthembu testified that his encounter with Mr Notununu at the photocopy office had disturbed him as Mr Notununu accused him of having tempered with the entry. He thought that Mr Notununu might have looked at a different page. He however, confirmed that the last two contentious digits were not written with the same pen that had been used to write the other four preceding digits. He also confirmed that there was no signature next to the alteration as it ought to have been countersigned.
- [22] However, he denied that he had made the alteration in the court premises after he and Mr Notununu had both together inspected the serial number which at that stage was not altered. He also confirmed that he had given the firearm he had taken under the seat of the deceased's vehicle to warrant officer Mbhele at the crime scene at Bhakubha. He further testified that warrant officer Mbhele also arranged for the towing of the vehicle and also took the firearm with him to his office in Kokstad for further investigations. He confirmed that the firearm was not photographed at the crime scene.
- [23] He also further testified that the finger prints of the accused were not found in the firearm and the vehicle and that there were no foot prints found at the crime scene which could be linked to the accused. Furthermore the blood of the deceased was never found on the accused. It was put to him that if the entry of the serial number on the SAP13 register is 506048 it had been altered so that the figure that was there before was changed to tally with his evidence in chief. His response was that it appeared that an error had occurred. The relevant page of the SAP13 register was entered into the record as exhibit "B". Captain Mthembu also confirmed that the ballistic report showed that the firearm found at the crime scene belonged to a certain Mr Tiya from Mthatha.
- [24] The next witness for the state was warrant officer Mbhele. He testified that he attended to both crime scenes in this matter on 10 June 2012. He is a finger print expert and photographer. He found captain Mthembu already there at the crime scene in Bhakubha where the vehicle was found with the body of the deceased. He arranged for the deceased's vehicle to be taken to Kokstad for further investigations after the body of the deceased had been removed from the vehicle by the forensic team. At the second crime scene at Faith Mission Church he found blood and a doek of a female person in the yard. He took all the exhibits to his office.

- [25] The following day his duty officer, lieutenant Tlali gave him a firearm saying that he found it in the deceased's vehicle. The doek and the firearm were sent for ballistic and DNA analysis by courier. He confirmed that when he received the firearm from lieutenant Tlali, it had already been sealed. For that reason he could not check the serial number.
- [26] The last witness for the state was an MTN official subpoenaed in terms of section 205 of the Act whose evidence did not take the matter any further. His evidence did nothing more than placing the cellphone number registered in the name of the accused in Ntabankulu on the 09 June 2012, around the area in which the deceased was murdered. According to his evidence the accused's cellphone number was connecting to cellphone towers along the main road to Ntabankulu all the way to the N2 national road.
- [27] This evidence confirmed the evidence of Siviwe whose testimony was that on that evening he had driven the accused and Oupa to Ntabankulu and dropped them off at Nozolisa. Siviwe had also testified that he communicated with the accused by cellphone that night as agreed between them and that he picked up the accused and Oupa at Matankini in Ntabankulu and drove them back to Mount Ayliff. The evidence of the section 205 witness did not bring any new information that established any fact that needed to be proved. He was also not cross-examined.
- [28] That is hardly surprising because it was never put to Siviwe that the accused would deny being taken to Ntabankulu on the 09 June 2012 and being dropped off at Nozolisa, the locality at which the deceased was killed. That the accused and Oupa came to Nozolisa on the night of the murder may be suspicious at best but it does not even come closer to being the evidence that he came to Nozolisa and killed the deceased. His finger prints were never found on the deceased's vehicle. The firearm which captain Mthembu said he found in the deceased's vehicle was not linked to the accused through finger prints. According to captain Mthembu the said firearm belonged to a Mr Tiya. No evidence was led on how Mr Tiya's firearm got to be in that vehicle.
- [29] It gets worse, the serial number of that firearm appears to have been altered in the SAP13 register. No witness was called to explain when and under what circumstances the entry was altered. The original entry appears to have been 506051 and it was altered to read 506048 the latter being the correct serial number of the said firearm. Furthermore, warrant officer Mbhele contradicted the evidence of captain Mthembu. Captain Mthembu's evidence was that he himself got the firearm at the crime scene under the passenger seat of the deceased's vehicle. On the other hand warrant officer Mbhele testified that the firearm was given to him by his duty officer lieutenant Tlali who told him that he found the firearm in the vehicle of the deceased. Warrant officer Mbhele could not check the serial number of the firearm because when the firearm was given to him as it had already been sealed. The State closed its case without calling lieutenant Tlali to testify about how and when he got the firearm.

[30] When the State closed its case the defence applied for the accused to be discharged in terms of section 174 of the Act. The basis on which the defence applied for the discharge of the accused is that there is no evidence in this matter on the basis of which a reasonable court acting carefully could convict the accused. Section 174 reads as follows:

“If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused

committed the offence referred to in the charge or any offence of which he may be convicted, it may return a verdict of not guilty.”

[31] The question that I have to decide is whether the evidence of the state is such that the accused would have a case to answer. At best the evidence of the state from its single relevant witness is that the accused and Oupa were at Nozolisa in Ntabankulu on the night of the murder. It is also the evidence of the state that Paswana and the accused were in cellphone contact that night. But that is where it ends.

[32] In *S v Lubaxa* 2001 (2) SACR 703 the court said:

“[18] I have no doubt that an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself. The failure to discharge an accused in those circumstances, if necessary mero motu, is, in my view, a breach of the rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based

exclusively upon his self-incriminatory evidence.

[19] The right to be discharged at that stage of the trial does not necessarily arise, in my view, from considerations relating to the burden of proof (or its concomitant, the presumption of innocence) or the right of silence or the right not to testify, but arguably from a consideration that is of more general application. Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common-law principle that there should be ‘reasonable and probable’ cause to believe that the accused is guilty of an offence before a prosecution is initiated (*Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 135 C-E), and the constitutional protection afforded to dignity and personal freedom (s10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial, in my view, would at that stage be stopped, for it threatens thereafter to infringe other constitutional rights protected by s10 and 12”

- [33] The state did not lead any evidence whatsoever with regard to count 1, the charge of conspiracy. One gleans from the summary of substantial facts that the state intended to prove that Siviwe and the accused conspired to commit the murder of the deceased. I do not know which witnesses were intended to be called to prove this charge, but not a single witness was called. Siviwe, who later testified for the state did not give any evidence that would prove the charge of conspiracy. Why this charge was not withdrawn in the first place is baffling.
- [34] On the charge of murder, the evidence of the state, as I said before went no further than showing that Siviwe, Oupa and the accused were at or near Nozolisa on the night of the murder. That evidence did not place them or any one of them at the crime scene. Nothing of theirs was found at the crime scene. There were no finger prints which matched any of the three of them which we lifted from the vehicle or even the firearm that according to captain Mthembu, had blood in it. There was not even evidence that the blood on that firearm was that of the deceased. Even the blood that Siviwe said Oupa remarked about, the State did not lead evidence that it was that of the deceased.
- [35] In my view, that the accused, Oupa and Siviwe were at Nozolisa on the night of the deceased's murder, does not even come close to being circumstantial evidence on which some inference could be drawn about who killed the deceased. Inferential reasoning or drawing of inferences therefore does not arise as there is no circumstantial evidence from which to draw inferences.
- [36] The brutality of the murder of Mrs Mbasu is explained in graphic details by Dr Ngcwabe who conducted the medico-legal post-mortem examination. Amongst other injuries Dr Ngcwabe made a chief post-mortem findings of:
- “(1) [an] incised wound of the whole of the left side of the head, going through the skull and exposing the brain.*
- (2) 12cm x 6cm incised wound of the left side of the neck cutting through the left carotid artery and the left internal jugular vein. The wound reaches the cervical vertebrae in depth.”
- [37] In his evidence captain Mthembu mentioned the wounds that the deceased sustained. How he could be so careless and casual in how he handled the crime scene is shocking if regard is had to the brutality of the murder. An innocent life was lost that day and surely the family of the deceased and the entire community of Ntabankulu expected no more than that those responsible for this murder should be held to account for it. Instead, the handling of the evidence became a comedy of errors, especially by captain Mthembu, a senior police officer. The evidence shows that he was the first police officer to arrive at the crime scene. One of the things he did was to contaminate the crime scene instead of waiting for the crime scene and finger print expert, warrant officer Mbhele to arrive. Captain Mthembu's evidence is that he took a blood stained firearm under the seat of the deceased's vehicle, and gave it to warrant officer Mbhele. That firearm was never entered in the SAP13 official register of exhibits until almost a year later. Nobody knows what happened to the finger prints that

might have been

on that firearm. On the contrary, the evidence of warrant officer Mbhele is that the firearm was given to him the following day in Kokstad by his duty officer lieutenant Tlali.

- [38] The tempering of the evidence did not end there. It would have been noticed from the summary of the evidence that the entry of the firearm in the SAP13 register occurred about a year after the murder. It gets worse, the serial number in the SAP13 register was tempered with or altered to read differently. Captain Mthembu was unable to account for the alteration nor was any witnesses called to deal with the alteration. I can only hope that all these mistakes were mere human errors and nothing more than that. Even so, they remain an insult to the women of our country who are victims of violent crimes on a daily basis. It is also an insult to many other police officers who work very hard and tirelessly, at times risking their own lives to ensure that perpetrators of violent crimes especially against women are prosecuted.
- [39] All of this is a clear testimony pointing to a travesty of justice that would have made it difficult to convict the accused even if his finger prints had been found on that firearm. But that does not even arise because there were no finger prints to speak of in the first place. With all of this, it is not clear to me why this matter was enrolled without dealing with these problems as these problems should have been obvious to the state and the police officers who were investigating Mrs Mbasa's murder. As Nugent AJA (as he then was) said in Lubaxa, "[c]learly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely on the expectation that at some stage he might incriminate himself."
- [40] In this case the state failed dismally to present before this Court that minimum of evidence on which the accused might be convicted. This clearly shows that allowing the trial to proceed beyond this point would amount to the denigration of fair trial procedures that are ordained in our Constitution. The seriousness of this case and the brutality of the murder coupled with the lamentable investigation by the police reminds me of the sentiments expressed in *S v Nombewu* 1996 (2) SACR 396 (E) in which the Court said:
- "... It is therefore the duty of the courts in their everyday activity to carry the message to the public that the Constitution is not a set of high minded values designed to protect criminals from their just deserts: but is in fact a shield which protects all citizens from official abuse. They must understand that for the courts to tolerate invasion of the rights of even the most heinous criminal would diminish their constitutional rights. In other words, the Courts should not merely have regard to public opinion, but should mould people's thinking to accept constitutional norms using plain language understandable to the common man."*
- [41] Our constitutional values especially as they relate to fair trial procedures oblige me to grant this application as there is no evidence before me on which a reasonable court acting carefully might convict the accused. In the result the following order shall issue:

1. The application in terms of section 174 of the Criminal Procedure Act is granted.
2. The accused is found not guilty and discharged.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances

Counsel for the State: L POMOLO

Instructed by: NPA

MTHATHA

Counsel for the accused: NM NOTUNUNU

Instructed by: MPUMELELO NOTUNUNU & ASS.

Head on: 15 June 2020

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