

SOUTH AFRICA / JUDGMENT

Shongwe v S (991/2019) [2024] ZASCA 127 (26 September 2024)

[2024] ZASCA 127

COURT

Supreme Court of Appeal

BEFORE

Mabindla-Boqwana, Kgoele, Mantame

CASE / FILE NUMBER

991/2019

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FLYNOTES:

CRIMINAL – Murder –
Robbery aggravating –
Version of appellant that he and
deceased were lovers and had a fight – Arguing against
premeditation and that intention
to take belongings was formed
after the assault – Deceased tied up and mouth stuffed –
Indicating intention to
kill and well-orchestrated plan –
Deceased not only assaulted but hands and feet tied up –
Clearly amounting
to robbery with aggravating circumstances –
Appeal dismissed.
THE SUPREME COURT OF
APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 991/2019

In the matter between:

LINDOKUHLE PERCY SHONGWE APPELLANT and THE STATE RESPONDENT

Neutral citation: Shongwe v The State (Case no 991/2019)

[2024] ZASCA 127 (26 September 2024)

Coram: MABINDLA-BOQWANA and KGOELE JJA and MANTAME AJA

Heard: 19 August 2024

Delivered: 26 September 2024

Summary: Murder – robbery with aggravating circumstances – whether murder premeditated – whether appellant wrongly convicted of robbery with aggravating circumstances instead of theft – whether the intention to steal occurred after the killing – convictions confirmed.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Makhoba AJ, sitting as court of first instance):

The appeal is dismissed.

Kgoele JA (Mabindla-Boqwana JA and Mantame AJA concurring)

- [1] The appellant, Mr Shongwe, was convicted of murder, robbery with aggravating circumstances, and theft in the Gauteng Division of the High Court, Johannesburg (the high court). He was sentenced to life imprisonment in respect of murder, 15 years' imprisonment for robbery with aggravating circumstances, and two years' imprisonment for theft. The high court granted the appellant leave to appeal to this Court in respect of the murder conviction only. The appellant successfully petitioned this Court for leave to appeal the robbery with aggravating circumstances conviction. The appeal is therefore limited to the murder and the robbery with aggravating circumstances convictions only.
- [2] The facts which are common cause are that Mr Solomon Sinkenyani Ngodi (the deceased), stayed alone. He regularly kept in touch with his family members telephonically. His relatives became worried when they could not get hold of him on his phone for a week, with him not visiting them for several days or attending a funeral one Saturday morning. Upon enquiring from one another about his whereabouts, they eventually discovered his body on 10 December 2017 inside his bedroom, dead. The deceased's home was locked when he was found and there were no traces of any forced entry. Several neckties were found tied around his neck, hands, and legs. His mouth was stuffed with a cloth or neckties, and another necktie was tied around his mouth while it was so stuffed. The cause of death was described by the doctor who conducted the postmortem as 'asphyxia due to ligature strangulation'.
- [3] Further investigations by the police revealed that the bank card of the deceased was used at an ATM in a garage at KwaZulu-Natal (KZN). The video footage of this garage showed the appellant drawing the money at that ATM. The tracker, which was fitted onto the vehicle of the deceased, led the police to where he was found in possession of the deceased vehicle together with the deceased belongings amongst others, his house key and a wristwatch.

- [4] There is no direct evidence linking the appellant to the offence. In addition to being found in possession of the deceased belongings, the State led the evidence of his fingerprints which were uplifted at the deceased's home, the video footage that depicted him drawing money from the ATM, including the statement made by him to Lieutenant Colonel Calvin Makamu (Mr Makamu) wherein he made several admissions.
- [5] The appellant raised an alibi defence denying ever being at the deceased's premises. He also denied making any statement to Mr Makamu. His explanation for being found in possession of the deceased's vehicle and his belongings was that he was given a lift by a certain Bheki and Senzo, who surreptitiously left him with the vehicle that had the deceased's banking cards and other belongings that were recovered.
- [6] The high court rejected the alibi defence tendered by the appellant and convicted him of murder, robbery with aggravating circumstances, and theft. The high court found the murder to have been premeditated. As indicated above, he was sentenced to life imprisonment in respect of murder, 15 years' imprisonment for robbery with aggravating circumstances, and two years' imprisonment for theft. All the sentences were ordered to run concurrently.
- [7] The appeal is based on two grounds. First, that the evidence did not establish beyond a reasonable doubt that the murder was premeditated. Second, that it could be gathered from the statement that was made to Mr Makamu, that the appellant formed the intention to take the deceased's belongings after the assault. As a result, he should have been convicted of theft and not robbery with aggravating circumstances.
- [8] It is worth mentioning that counsel representing the appellant indicated in his submissions that the findings of the high court in relation to evidence of the State-witnesses and its rejection of the appellant's version was not being challenged on appeal. The only issues were the premeditation question as well as the incorrect conviction on the robbery with aggravating circumstances. To decipher the proper context of the genesis of the submissions made by the appellant's counsel, it is an opportune time to quote the contents of the statement made to Mr Makamu, as the appeal is centered around it. It reads:

'On Monday 2017/12/04 I was at Diepkloof Zone 4 with my partner Mr Solly with whom we started dating each other back in 2013. We have been drinking intoxicating alcoholic beverages together for the whole day as I have visited him since Friday 1 December 2017. At about 19:00 I received a call from the mother of my daughter Owethu who resides in Richards Bay, KZN where I am originally from. Solly became aggressive as a result of this call. At the time we were sitting in the dining room. Solly ended up hitting me with a clinched fist and I also did the same to him where we ended up fighting until at the bedroom. Solly then held me aside and I pushed him where he hit the wall with his head and fell down. I opened the drawer, took three ties, tied his hands, legs and neck. As I wanted to pull him with the tie, I noticed that he was no more breathing. I then took his TV set, car keys and drove home at Braamfischerville, Dobsonville. I tried to contact

him but only to find his cellphone was ringing inside the M/vehicle which I took at his place and was a Silver Toyota Corolla. On Saturday 9 December 2017, I drove to Richards Bay where I was arrested the same day.'

[9] It is trite law that the question of whether the crime was premeditated or not depends on the circumstances of each case.[1] This Court considered a similar question in numerous decisions already.[2] The import of these decisions is that apart from pre-planning, premeditation can be inferred from the proven facts of the matter. In paragraph 13 of *Kekana v the State* (Kekana 2014), this Court said:

'...[i]t is not necessary that the appellant should have thought or planned his action a long period of time in advance before carrying out his plan. Time is not the only consideration because even a few minutes are enough to carry out a premeditated action.'

[10] Counsel for the appellant submitted that there was no evidence of prior planning or premeditation on the part of the appellant. In this regard, he argued that the high court failed to take into consideration the circumstances that were set out in the statement made by the appellant to Mr Makamu. The circumstances amongst others were that the deceased was killed during a fight between two lovers; the assault and the tying up of the deceased was due to a fight between them. According to him, if one had regard to these facts, the opportunity to use force occurred suddenly and it would seem, unexpectedly so when the appellant pushed the deceased against the wall. I pause to mention that these submissions were startlingly made for the first time in the hearing of the appeal in this Court. The appellant attempts to seek refuge from a statement he disavowed during the hearing before the high court.

[11] Be that as it may, I do not agree with the appellant's submissions. Apart from the fact that the appellant cannot have his cake and eat it, premeditation, like in the circumstances of this matter, can be inferred from the facts found proven by the high court. In coming to its decision, the high court took into consideration all the circumstances of the murder, including the appellant's conduct during the relevant period. Firstly, the deceased died because of 'asphyxia due to ligature strangulation'. The conduct of the appellant at that time, ie stuffing a cloth or a necktie in the deceased's mouth and wrapping another necktie around his mouth, on its own, signaled an intention on the part of the appellant that the deceased should suffocate and eventually die. The deceased's body was tied and he was snuffed in the mouth to prevent him from seeking any help. It is also a signal of the intention not only to kill but of a well-orchestrated plan.

[12] Considering how the deceased was tied up on the hands and feet, there was no way in which he would have had the strength to untie himself. The photographs also depict that electrical cords were plugged into the wall and connected to the heater. The probability that he had the intention to electrocute the deceased in addition to the tying cannot be excluded. In my view, this was a carefully thought-out plan to ensure that the death of the deceased materialised eventually, come what may.

[13] Lastly, in addition to being incapacitated, the appellant locked the door of the deceased's bedroom and the butler door leading to the outside. In the Kekana 2014 matter, the locking of the deceased in the room and further setting of the house on fire after spilling petrol in the passage, kitchen, and dining-room, were regarded as proof of premeditation. The Court concluded in that matter that the conduct indicated that the

appellant was 'carefully implementing a plan to prevent [the deceased] escape and to ensure that she died in the blaze'.[3]

[14] There is no doubt that on the facts of this matter, there are overwhelming proven facts whereupon the high court could infer premeditation. It is also clear that the high court did not convict the appellant on the murder charge based on the statement made to Mr Makamu only. It was but one piece of the puzzle to complete the mosaic of what happened that day.

[15] The attack on the conviction of robbery with aggravating circumstances is that a possibility exists that the intention to misappropriate the deceased's belongings was formed after the deceased was killed, or at least, after the appellant believed the deceased to be dead. The argument advanced is that, from the statement made to Mr Makamu, it is clear that the deceased's belongings were taken after he fell. According to the appellant's counsel, this simply means that the intention to steal was formed after the assault and not because of it, therefore, the appellant should have been convicted of theft and not robbery with aggravating circumstances.

[16] The argument in relation to the conviction of robbery with aggravating circumstances is misplaced. The evidence is clear that the deceased was not only assaulted but his hands and feet were tied up. Tying is another form of overcoming resistance from a victim, and this took place in this case before the properties of the deceased were taken as indicated in the statement made to Mr Makamu. In addition, the room was ransacked and left in the state depicted in the photographs. What took place clearly amounts to robbery with aggravating circumstances.

[17] The appellant's conduct even after the killing, also ineluctably impelled the finding that the murder and the robbery with aggravating circumstances had been premeditated. If there was merely a fight between two lovers that went wrong as suggested on behalf of the appellant, various questions remain unanswered. These are, why was it necessary for the appellant to take the deceased's vehicle and also, withdraw his money from the bank?

[18] Accordingly, the challenge to the convictions of premeditated murder and robbery with aggravating circumstances cannot be sustained. It follows that this Court cannot interfere with the convictions of the appellant on both counts.

[19] In the results, the appeal is dismissed.

A M KGOELE

JUDGE OF APPEAL

Appearances

For appellant: Instructed by: M Milubi Legal Aid South Africa, Johannesburg Legal Aid South Africa, Bloemfontein For respondent: Instructed by: H H P Mkhari Director of Public Prosecutions, Johannesburg Director of Public Prosecutions, Bloemfontein.

[1] Raath v S

[2008] ZAWCHC 72; 2009

(2) SACR 46 (C) para 16.

[2] Kekana v The State (629/13) [2014] ZASCA 158 (1 October 2014) para 13; S v Kekana [2018] ZASCA 148; 2019 (1) SACR 1 (SCA) para 21; Benedict Moagi Peloeole v DPP Gauteng [2022] ZASCA 117; 2022 (2) SACR 349 (SCA); [2022] 4 All SA 1 (SCA) para 42.

[3] Kekana v The State (629/2013) [2014] ZASCA 158 (1 October 2014) para 14.

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