

SOUTH AFRICA / JUDGMENT

# Zikhali v S (AR171/2024) [2025] ZAKZPHC 51 (23 May 2025)

[2025] ZAKZPHC 51

## COURT

Kwazulu-Natal High Court, Pietermaritzburg

## BEFORE

Mossop, Chetty

## CASE / FILE NUMBER

AR171/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

Appeal

No: AR171/2024

In

the matter between:

NHLANHLA  
NDABAZEZWE ZIKHALI  
APPELLANT  
and  
THE  
STATE  
RESPONDENT

Coram:

Chetty and Mossop JJ

Heard:

16 May 2025

Delivered:

23 May 2025

ORDER

On

appeal from: the Ngwelezane Regional Court (sitting as the court

of first instance):

1. The appeal against conviction is dismissed.
2. The appeal against sentence is upheld and the sentence of life imprisonment imposed upon the appellant is set aside and is replaced with a sentence of 20 years' imprisonment.
3. The sentence is antedated, in terms of the provisions of s 282 of the Criminal Procedure Act 51 of 1977, to 12 March 2024.

## JUDGMENT

MOSSOP J (CHETTY J concurring):

### Introduction

- [1] The appellant was convicted in the Ngwelezane Regional Court of the murder of Ms Winile Zwane (the deceased), a woman with whom he had been involved in a romantic relationship. He was sentenced to life imprisonment and now appeals against both his conviction and sentence.

The appellant's defence

- [2] When called upon to plead to the charge, the appellant pleaded not guilty, and his legal representative indicated that the appellant would assert that he was not at the place where the deceased was killed but had left there earlier that day and had gone to Mtubatuba. His defence was, thus, an alibi and this was disclosed at the commencement of the trial.

Alibis

- [3] It is so that there is no onus on an accused person to establish an alibi. Where such a defence is raised, it is the task of the State to disprove it and to establish that the accused person was at the scene of the crime. In *R v Mokoena*,<sup>[1]</sup> the court held that:

'If the onus is upon the Crown to rebut the alibi, as it certainly is, then the evidence as a whole must be considered and the fact that the accused and his witness told stories, which in some respects disagree, does not mean that the Crown case has been proved beyond reasonable doubt.'

- [4] It follows that if an alibi might be reasonably true, the accused must be acquitted. As was pointed out in *Mokoena*, the correct approach is to consider the alibi in the light of the totality of the evidence presented to the court. In evaluating the evidence of an alibi, Holmes AJA observed in *R v Hlongwane* that:<sup>[2]</sup>

'At the conclusion of the whole case the issues were (a) whether the alibi might reasonably be true and (b) whether the denial of complicity might reasonably be true. An affirmative answer to either (a) or

(b) would mean that the Crown failed to prove beyond reasonable doubt that the accused was one of the robbers.'

[5] The Supreme Court of Appeal in *S v Musiker*[3] observed that once an alibi has been raised, it had 'to be accepted, unless it was proved to be false beyond reasonable doubt'.

In *S v Burger and others*,[4] the same court held that it was worth noting that mere lies for an alibi defence do not warrant 'punishment for untruthful

evidence'. However, where an alibi is presented and it contradicts the evidence presented before the court, and the alibi

later turns out to be a lie or a falsehood, this lie, together with the other evidence of the accused as a whole, may point towards the accused person's guilt in certain cases.

The medical evidence

[6] Given the observations made by the eyewitnesses to the murder, it is first necessary to consider in some detail the post-mortem report of the pathologist, Dr F van Niekerk (Dr van Niekerk), who performed the examination of the deceased's body. His report, received by the trial court with the consent of the defence, noted:

'Stab wounds – Chest

Stab wounds – Right Hip

Stab wounds – Right Loin Area.'

[7] Expanding upon what he observed, Dr van Niekerk recorded that:

'There is a plus minus 5cm x 1cm stab wound just below the right clavicle to the anterior chest wall. Massive blood loss occurred in the right thoracic cavities. There are four other stab wounds to the chest. There is a stab wound through the right hypochondrium. There is plus minus 720ml blood in the chest cavities.'

[8] Dr van Niekerk went on to state that:

'The blade penetrated the apex of the right lung and the right pulmonary artery. A stab wound penetrated the lobe of the right lung...

The blade penetrated the right lobe of the liver...

There is a stab wound through the right kidney.'

[9] Dr van Niekerk thus found the cause of death to be:

'Multiple Stab Wounds – Bilateral Haemopneumothorax.'

The eyewitnesses

[10] The submission of counsel for the appellant in his heads of argument that:

‘[t]he conviction of the appellant is founded on the evidence of a single eye witness (sic) who was a friend of the deceased ...’

must immediately be dispelled. There were two State witnesses who testified to the events that led to the death of the deceased, not just one. Before us, counsel for the appellant, Mr Chiliza, correctly acknowledged this to be the case.

[11] The evidence adduced before the regional court, and which was not contradicted by the appellant, was that the deceased and he had been in a romantic relationship but that he had ordered the deceased to leave the home that they shared, as he did not approve of certain aspects of her conduct. Rendered without a roof over her head, the deceased had taken up lodgings with the second State witness, who was Ms Ntombi Ntuli, referred to by all as ‘Ma Mthethwa’ (Ma Mthethwa). The deceased had been residing with her for approximately three days before her life was taken from her.

[12] Both Ma Mthethwa and the first State witness, Ms Nomonde Ncwane (Ms Ncwane), testified that they had been drinking beer on the day that the deceased was murdered, namely 27 February 2023. Ma Mthethwa had not been drinking as long as Ms Ncwane, as she had left the place where they were drinking and had gone home early to commence cooking the evening meal. Ms Ncwane candidly described her state of sobriety as being:

‘... drunk ... but I was not too drunk ...’

[13] At around 21h00, Ms Ncwane explained that she was at her mother’s homestead when she observed the deceased passing by and she called out to her. She testified that the deceased appeared to be in a happy mood as she was singing. The deceased tarried for a while at Ms Ncwane’s mother’s homestead. Ms Ncwane testified that there was ample electric lighting at the home and there was a powerful floodlight in close proximity to the homestead that lit up its immediate environs.

[14] Ms Ncwane explained that the appellant, who was known in the area by the moniker ‘Sgora’, then arrived at her mother’s home, walking quickly. She testified that she had known him for approximately two years and that he resided in the same area as she did. Upon his arrival, he pulled the deceased by the arm, and she fell, or was pushed, to the ground. The appellant then stamped on her with his feet and asked her where the police were that she had apparently called for him. He taunted her to call them again.

[15] Ms Ncwane estimated that all this, and what happened next, occurred approximately two and a half to three metres away from her. The appellant then produced a knife, reported by both eyewitnesses to be an Okapi knife, and commenced stabbing the deceased. Stabbing blows were inflicted to the deceased’s chest and the left side of her stomach, just below the rib cage.[5] Ms Ncwane said that she fled to the nearby home of Ma Mthethwa and reported to her what was happening.

- [16] Ma Mthethwa testified that upon the arrival of Ms Ncwane at her home, she immediately went to the scene of the attack upon the deceased. Disagreeing with the evidence of Ms Ncwane, she estimated that the time then was around 19h00. Upon her arrival, she observed the deceased lying on her side and the appellant was still in attendance. He was stabbing the deceased just below the breast and was stabbing her 'very fast'. She made her observations of the scene, and therefore of the appellant, from a distance of approximately three metres.
- [17] The findings of Dr van Niekerk at the autopsy that he conducted on the deceased's body were considered in some detail earlier in this judgment. The observations of the two eyewitnesses accorded with what Dr van Niekerk found upon examining the deceased's body.
- [18] Ma Mthethwa testified that at one stage, the appellant rose up from the deceased's body and pointed his finger at her and said to her:

'You, Ma Mthethwa.'

This gave her a further opportunity to identify the murderer. Ma Mthethwa was certain that it was the appellant, whom she had known for approximately seven years. They both resided at Slovo Village.

- [19] In her evidence in chief, the State prosecutor enquired from Ma Mthethwa what she would say if it was put to her that the appellant was not at the scene of the crime. Her response was:

'I will dispute that, Your Worship, because I am being truthful. I know even his walk, that is the accused's walk. And the clothes that he was wearing on that day, Your Worship.'

- [20] Ma Mthethwa conceded that she had been drinking beer earlier in the day but said that she was sober at the time that she observed the appellant stabbing the deceased. Under cross-examination, she could not be made to depart from her version of events. When asked whether she simply assumed that the appellant carried, and utilised, an Okapi knife, her rejection of this proposition was detailed and convincing:

'Your Worship, I am not assuming. I have seen him before carrying a knife and I saw him again when he was stabbing the deceased. As he was in a process of stabbing, when he was pulling up his hand and stab, I could see the blade. And I could see the ring that is usually put in an Okapi handle, Your Worship.'

- [21] The appellant's version was put to Ma Mthethwa thus:

'The accused will tell this Court that he left in the afternoon on the very same day, and he went to Mtubatuba. At the time when the deceased was killed, he was not in the area.'

That proposition elicited the following reply:

'He was there, Your Worship, I saw him at the scene, Your Worship.'

The appellant's case

[22] The appellant testified in his defence and confirmed that he had ordered the deceased to leave his home. He acknowledged that he had seen the deceased on the day of her death in the street near Ma Mthethwa's home. He had informed her that he was going to Mtubatuba, and he had then departed for that place. He was asked by his counsel whether he told anyone else about his intention to go to Mtubatuba and responded in the following fashion:

'Most people knew, especially my customers because I sell charcoal at Slovo, so I did inform my customers that I will be gone from Monday until 2 to 3 weeks because it was a season to harvest reeds.'

[23] He testified that he returned to his home on 9 March 2023 and was arrested the next day and repeated that he was at Mtubatuba when the deceased was murdered.

[24] The solidity of the appellant's alibi began to exhibit some vulnerability when he was asked earlier in his testimony about what time he had left to go to Mtubatuba. He initially said he had done so at 15h30. When his legal representative put the version of the first State witness to the appellant, namely that she had seen him on the evening of 27 February 2023 at her mother's home, the appellant responded as follows:

'I do not know because I left around - I left Slovo around 15:00. So, what happened after or later in the afternoon I do not know anything about.'

The time that he allegedly left his home had, thus, shifted.

[25] The issue of the lighting at the scene of the murder was canvassed by the appellant's legal representative with the appellant. The earlier evidence of the two eyewitnesses was that an external floodlight had cast light over a large area, permitting the murder of the deceased to be easily observed. To this, the appellant commented as follows:

'There was a light that provided light in that area but it was switched off.'

That version was never put to any of the State witnesses. Their evidence on the adequacy of the external light accordingly went undisturbed and unchallenged and must be accepted.

[26] The second State witness, Ma Mthethwa, had given a description of the appellant's clothing during her evidence. She had described him as wearing white oversized trousers and a khaki-coloured shirt. The appellant admitted that he owned a khaki-coloured shirt. As regards the white trousers, after initially denying that he owned such trousers, and asserting that he had black trousers that he would wear when going 'coal harvesting,' his legal representative asked him again whether he possessed white trousers. He changed his answer and responded thus:

'I did, Your Worship, prior the incident, maybe November towards the end of 2022 but I later damaged it.'

- [27] The appellant could think of no reason why either of the two State witnesses would falsely put him at the scene of the murder. He mentioned that he had once bravely entered a burning house that belonged to Ma Mthethwa and rescued her six-month-old baby from certain death. Ma Mthethwa, in his opinion, should therefore be well-disposed towards him. All that he could advance in his explanation of the eyewitnesses' damning evidence was that they were mistaken.
- [28] Under cross-examination, the appellant then denied that he forced the deceased to leave his home. When it was pointed out to him that the evidence led by the State witnesses to this effect had not been challenged, the appellant countered this difficulty by stating that he did not know that he was supposed to deny this evidence.
- [29] As regards the observations made by Ma Mthethwa at the scene of the murder when she identified the appellant as the murderer, the appellant agreed that the distance from which she made her observations, approximately three metres, was a very short distance.

He explained further as follows:

'Yes, the distance is very short. There is nothing that can obstruct a person to identify a person they know but, however, I was not there.'

- [30] In making that statement, the appellant inadvertently identified the very essence of the matter. He had been known to the State witnesses for several years. And they were both in close proximity to the murderer at the place where the murder was carried out and from where they made their observations. The scene was lit by an external floodlight. In those circumstances, it would be important for him to offer compelling evidence of why a mistake was being made by the State witnesses in describing him as being the murderer.
- [31] While I have already explained that the appellant bore no onus to establish his alibi, he would, perhaps, have been able to dispel the powerful case presented by the State by calling a witness, or witnesses, who could confirm that he had left Mtubatuba and was at his family home at the critical time. But the appellant called no witness of any kind to substantiate his version. None of his charcoal purchasing customers came to testify that they knew he was not in the area at the time of the murder. None of his family members came forward to state that he was at the family homestead in Mtubatuba.

## Analysis:

conviction

- [32] The evidence adduced by the State was that of two witnesses who had known the appellant for several years and who made their observations regarding the murderer's identity from a short range. The presence of the floodlight permitted such observations to be made. Experience and common sense teach that persons who have known each other for extended periods of time are unlikely to misidentify each other, especially at close range. The appellant himself conceded this to be the case. Even if the evidence of the first State witness

was discounted because she had been drinking earlier, which I do not believe that it should have been, the evidence of Ma Mthethwa placed the issue of the identity of the murderer beyond doubt.

- [33] To this, the appellant offered an unconfirmed alibi. In my view, an alibi is only as good as its details and the details in the appellant's alibi are, in my view, singularly lacking. The alibi, in truth, is simply provided by the applicant himself. That unsubstantiated version cannot in the circumstances raise a reasonable doubt as regards the direct eyewitness testimony of the two State witnesses. Their familiarity with the appellant and their immediate proximity to the scene of the murder renders it entirely unlikely that the appellant's self-proclaimed alibi might reasonably be true. It follows that his denial of complicity in the murder of the deceased must also be false, and the reasoning referred to in Burger therefore finds application.
- [34] In my view, after a balanced consideration of all the evidence, the State established beyond reasonable doubt that the appellant was at the scene of the crime and that he was the murderer of the deceased. The court a quo was accordingly correct to accept the evidence of the State witnesses, notwithstanding the admitted condition of the first State witness. The evidence of the two eyewitnesses demonstrated the falsity of the alibi. The appellant was, therefore, correctly convicted.

### Analysis:

sentence

- [35] The appellant was sentenced by the trial court to life imprisonment for brutally butchering the deceased, the woman with whom he had, until very recently, been content to share a home with. The basis for the imposition of that sentence was the allegation by the State that the appellant was guilty of premeditated murder, as contemplated in s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Act).[6] If the appellant was guilty of planning the death of the deceased and then executing that plan, then that is the end of the appeal, for the sentence imposed upon him would have been entirely appropriate and would be the ordained sentence in terms of the Act.
- [36] It, however, cannot simply be assumed that because the deceased's death was violent and cruel, her murder was premeditated or planned. There very often is evidence of premeditation that the State can lead. It can be adduced, for example, by witnesses who have knowledge of events that led up to the crime being committed. But sometimes there is no such evidence, and the court is then required to employ inferential reasoning by considering the facts found to have been proven and to then deduce from those facts whether it was established that the commission of the offence was premeditated or not.
- [37] In *S v Raath*, [7] the court remarked that the legislature had made no attempt to define the meaning of 'planned' or 'premeditated'

when crafting the Act. The court expressed itself on the issue as follows:

‘Clearly the concept suggests a deliberate weighing-up of the proposed criminal conduct as opposed to the commission of the crime on the spur of the moment or in unexpected circumstances. There is, however, a broad continuum between the two poles of a murder committed in the heat of the moment and a murder which may have been conceived and planned over months or even years before its execution ... only an examination of all the circumstances surrounding any particular murder, including not least the accused's state of mind, will allow one to arrive at a conclusion as to whether a particular murder is “planned or premeditated”. In such an evaluation the period of time between the accused forming the intent to commit the murder and carrying out this intention is obviously of cardinal importance but, equally, does not at some arbitrary point, provide a ready-made answer to the question of whether the murder was “planned or premeditated”.’

[38] In its reasoning, the court in Raath appeared to draw no distinction in meaning between the words ‘planned’ and ‘premeditated,’ and they were

both considered to describe the same type of conduct. However, a distinction was drawn between the meaning of those two words in *S v PM*, [8] a matter decided five years after Raath was decided. ‘Premeditated’ was found to mean: [9]

‘... something done deliberately after rationally considering the timing or method of so doing, calculated to increase the likelihood of success, or to evade detection or apprehension.’

‘Planned’, on the other hand, was found to mean a reference to:

‘... a scheme, design or method of acting, doing, proceeding or making, which is developed in advance as a process, calculated to optimally

achieve a goal.’

It seems to me that the court strained, unnaturally, to divine a difference in meaning in the two words.

[39] In *S v Jordaan*, [10] decided four years after PM, the court found the attempt to discern a difference between ‘premeditated’ and ‘planned’ to be unconvincing and concluded that the element of ‘rational consideration’ referred to by the court in PM in its definition of ‘premeditation’ was equally inherent in any exercise of planning.

[40] The Supreme Court of Appeal was presented with an opportunity to consider the meaning of the two words in *Montsho v S*. [11] However, Petse JA, with whom the rest of the court concurred, stated that:

‘In the view I take of the matter, I do not consider that there is any benefit to be derived, on the facts of this case, in formulating a general definition of whether the phrase ‘planned or premeditated’ denotes a single concept. The inquiry as to whether or not any given facts would at the very least sustain an inference to be drawn from them as to whether or not an accused had

manifested a plan or premeditation to commit the offence in issue can properly be determined on a case by case basis. Thus the circumstances in which a crime was committed and the peculiar facts of each case will determine whether or not the commission of the crime was planned or premeditated.'

[41] In my view, both words amount to the same thing, and I am inclined to follow the reasoning in Raath and Jordaan. After all, the dictionary meaning of 'premeditated' is:

'To think out and plan an action, especially a crime, beforehand.'[12]

The definition of the one word thus includes a reference to the other word.

[42] Was there any evidence that the murder was premeditated or planned? No direct evidence on that score was led by the State. The only witnesses called by the State were those who witnessed the brutal attack, but they did not speak about what may have led to it. There was no evidence of the appellant's state of mind. There was, however, evidence that the appellant had ordered the deceased from his home a few days before he killed her but none of the State witnesses seemed to have any knowledge of why he wanted her to leave his home. The ejection of the deceased from his home provides no certainty that the appellant intended to kill the deceased. On the contrary, it would tend to indicate that was not his intention. Furthermore, on the day of the murder, there was nothing to indicate that the appellant knew where the deceased was and it is possible that he randomly came upon her. The evidence presented by the State was extremely limited and involved the appellant coming across the deceased at the scene, grabbing her by the arm, asking her where the police were, forcing her to the ground, and then stabbing her to death. The murder was carried out in full view of several witnesses.

[43] In coming to the conclusion to which I am inescapably drawn, I do not lose sight of the words of the Supreme Court of Appeal in *Kekana v S*, [13] when it was stated that:

'... it 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.'

[44] I am, however, on the scarcity of the evidence adduced by the State, unable to confidently conclude that this callous murder was premeditated or planned. It could just as easily have happened without any planning, occurring spontaneously in a fit of rage. The fact that it was carried out in the presence of witnesses tends to suggest that to be the case. As was said in *Dlomo v S*: [14]

'There are too many variables that would need to align to make it a premeditated murder. I do not accept that the time between the

appellant seeing the deceased at the bottle store and the moment that he shot him constitutes evidence of premeditation. If that were the case, virtually all murders would be premeditated.'

[45] Furthermore, the fact that the appellant carried an Okapi knife in his pocket is no indication of a prior intention to commit murder. Indeed, Ma Mthethwa testified that she had often seen the appellant with such a knife. I am, in the circumstances, not persuaded that the State established that the murder was premeditated.

[46] In the circumstances, the sentence imposed upon the appellant cannot stand. Murder that is not premeditated falls within Part II of Schedule 2 to the Act and imprisonment for a period of 15 years is the ordained minimum sentence. That minimum sentence may be reduced upon the establishment of substantial and compelling circumstances being established. Conversely, it may also be increased, subject to the provisions of s 51(2) of the Act, which read as follows:

‘Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in –(a) Part II of Schedule 2, in the case of –

(i) a first offender, to imprisonment for a period not less than 15 years;

...

Provided that the maximum term of imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than five years.’

[47] In this matter, the appellant was in custody awaiting trial for a period of seven months, which must be factored in when arriving at an appropriate sentence. He was a first offender, was 44 years of age when sentenced and was unmarried but had two children. He was a self-employed charcoal manufacturer who earned approximately R7 000 per month from this enterprise.

[48] Nothing of any significance was adduced by the defence to justify a finding that substantial and compelling circumstances had been established to warrant a softening of the prescribed minimum sentence and the regional magistrate was correct, in my view, in finding that there were none. The violence and the cruelty of his attack upon the deceased in any event suggests that a more, rather than a less, severe sentence must be imposed upon the appellant. Our society is beset with the scourge of violent, gender-based crimes where women are the helpless victims. This sad indictment of our society must be combatted by the imposition of appropriate sentences that will serve to deter others from committing similar acts.

[49] After reflection, I am of the view this is an instance where the prescribed minimum sentence should be increased by the permitted period allowed by the Act and that a sentence of 20 years’ imprisonment should replace the sentence of life imprisonment. The sentence shall be antedated to the date upon which sentence was first imposed upon the appellant.

Order

[50] I would accordingly propose the following order:

2. The appeal against sentence is upheld and the sentence of life imprisonment imposed upon the appellant is set aside and is replaced with a sentence of 20 years' imprisonment.

MOSSOP J

I agree and it is so ordered:

CHETTY J

APPEARANCES

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[1] R v Mokoena 1958

(2) SA 212 (T) (Mokoena) at 217G-H.

[2] R v Hlongwane [1959] 3 All SA 308 (A); 1959 (3) SA 337 (A) at 339C-D.

[3] S v Musiker [2012] ZASCA 198; 2013 (1) SACR 517 (SCA) para 15.

[4] S v Burger and others [2010] ZASCA 12; 2010 (2) SACR 1 (SCA) (Burger) para 30.

[5] A reference to the 'left' side of the deceased's body would be made from the observer's point of view and would thus be a reference to the right side of the body.

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- [6] Section 51(1) of the Act prescribes a sentence of life imprisonment for any person convicted of an offence mentioned in Part 1 of Schedule 2 to the Act. That part of the schedule includes the offence of murder when it was planned or premeditated.
- [7] S v Raath 2009
- (2) SACR 46 (C) (Raath) para 16.
- [8] S v PM 2014
- (2) SACR 481 (GP) (PM).
- [9] Ibid para 36.
- [10] S v Jordaan and others 2018
- (1) SACR 522 (WCC) (Jordaan) para 127.
- [11] Montsho v S [2015] ZASCA 187 para 13.
- [12] Oxford South African Concise Dictionary 2 ed (2016).
- [13] Kekana v S [2014] ZASCA 158 para 13.
- [14] Dlomo v S [2022] ZAKZPHC 33; 2023 (1) SACR 314 (KZP) para 27.
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