



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Reportable:	YES/NO
Of interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: 40/2022

In the matter between:

THE STATE

and

MANQOBA XOLANI HLONGWANE
KHULEKANI DLAMINI

ACCUSED 1
ACCUSED 2

Coram: MOLITSOANE, J

Date of hearing: 24,25,26,27,28,31 October 2022 and 1,2,3 November 2022.

Judgment: 4 November 2022.

JUDGMENT

- [1] On 24 February 2021 at about 22h00 the police attended a scene of crime along the road in Harrismith. They discovered a body of a male person, later identified as KHEHLA SISHANGE MASHAZI (the deceased). The two

accused persons before court were later arrested and charged in respect of that incident.

- [2] Both accused were charged with robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 51 of 1977 (the CPA), read with the provisions of section 51(2), Part II of Schedule 2 of Act, 105 of 1977. The State alleges that on 24 February 2021 and in Harrismith the accused unlawfully and intentionally assaulted the deceased, with intent to steal and with force/ being in possession of dangerous weapons took his motor vehicle, a Nissan Tiida registration number CK 4J YL GP (Tiida) and there robbed him of the said vehicle; and on the same date and place mentioned above did unlawfully and intentionally kill the deceased. Mr Mpemvane appears for the State while Mr Reyneke appears for both accused.
- [3] They both pleaded not guilty and each gave a detailed plea explanation thus defining the issues between them and the State as well as setting out their respective defences. In his plea explanation, Accused 1 explains that he came into possession of the Tiida on 26 February 2021 having borrowed it from one Mtobisi Shabangu in order to deliver food for his child. He indicates that upon receipt of the motor vehicle he noticed that there were blood stains on the door panel of the vehicle. Mtobisi gave an explanation for the blood stains by saying that he had been involved in a fight at a tavern and that blood was his.
- [4] Accused 2 pleaded that on 26 February 2021 he noticed Accused 1 and one Sakhile Hlongwane struggling to push the Tiida out of a ditch. He assisted them and left for his home. He was later arrested on the said day at his home. In essence both accused deny responsibility for the robbery and murder of the deceased.

- [5] By agreement the State handed in a number of exhibits which included a Notice as well as the Reply in terms of section 212(B) of the CPA. Importantly, in the section 212(B) reply the accused disputed that the identification parade which was held was properly conducted. The chain, identity of the deceased and cause of death are not in dispute.
- [6] Mr Goodman Thamsanqa Nkosi, a Constable in the South African Police Service (the SAPS) testified first. He testified that on 24 October 2021 he was on duty with Constable Gwebu. At about 22h00 they attended a scene of crime along the road in Harrismith. Upon arrival on the scene they found a man's body whose face was covered with blood. Upon closer scrutiny he observed a bullet wound on the right cheek of the body. According to him, the body in all probability was brought to that scene as there were tyre marks and fresh blood stains on the road. In cross examination he conceded that seeing that the body was lying on the yellow line of the road, next to the shoulder of the road, a possibility could not be excluded that another driver might have seen the body and that the driver tried to escape it and in the process drove across the body.
- [7] Mr Tshepo Mosia testified and told the Court that he resides in QwaQwa. On 24 February 2021 at about 18h00 he was at home. Accused 1, who he knew arrived at his home in the company of Accused 2 and another unknown person. Accused 1 had a mechanical problem with this Toyota Tazz vehicle. Accused 1 requested to leave his vehicle at the witness' place and was to collect it the following day. He, both accused before court and another unknown person pushed the vehicle of the accused into his yard. After they pushed the vehicle in the yard the three then left.

- [8] The witness apparently went to sleep as he testified that at about 23h00 the same night he was awoken by accused 1. Accused 1 was in the company of Accused 2 and the unknown person. They came in a white Nissan Tiida. Accused 1 asked for a bowl of water as well as soap. According to the witness, accused 1 did not explain why he wanted water and soap. Accused 1 also asked the witness for a rope as they wanted to tow the vehicle they had left earlier with the witness. After he gave him the water bowl and soap he went on his way to look for a rope. Upon his return, he found Accused 1 busy washing the pants he (Accused 1) had been wearing. The pants had blood on them. He also saw accused 2 and the unknown person washing the blood on the Tiida.
- [9] The witness was taken through his attendance at the identification parade. It is his testimony that he pointed accused 1, 2 and another unknown person who is not before court, at the parade. The essence of his evidence at the parade is that he got at the parade, spoke to no one, got through the door into the parade room, made pointing outs, left in the same way that he entered. He later changed his version and said he pointed both accused before court and looked around to see if there was anyone he could point. This change in the version came after he was confronted with the evidence of the photo album which was accepted into evidence as Exhibit I. This exhibit, depicts that the witness only pointed two people on the parade, being the accused before court.
- [10] Dan Senzo Vilakazi is the uncle of the deceased. On 24 February 2021 he received a call from the deceased. That was the last time he spoke to the deceased. The next day, at the request of the police, he came to Harrismith and identified the body of the deceased.

- [11] Thokozani David Zwane is a sergeant in the SAPS. He was on duty with sergeant Sithole on 26 February 2021. He received a call from his Station Commander Colonel Ramlagan as a result of which he and Sithole ultimately followed a certain white Tiida. In pursuing the said vehicle, they were forced at some stage to park their vehicle and pursue the vehicle on foot. As they were approaching certain premises they suddenly saw two males running out of the said premises. They gave chase and managed to catch the said male persons. At that stage the Tiida was parked near the premises. Upon catching the said people, he asked who the owner of the vehicle was. One Xolani Hlongwane responded by saying that he was not the owner of the vehicle but that the vehicle belonged to someone who resided at Zwelitsha.
- [12] They searched the vehicle and noticed stains covering the driver's seat, the steering wheel and part of the driver's door. The two male persons arrested were Xolani Hlongwane and Sakhile Hlongwane. When asked to identify the people they arrested in court, he pointed Accused 2, Mr Dlamini as Xolani Hlongwane. He further testified that the other person he arrested was not before court. Upon enquiring about the blood stains in the vehicle the two said they knew nothing about them. During cross examination he informed court that Xolani said that he had borrowed the vehicle from one Mto. He confirmed that they had seen the two male persons carrying a big bag when going into the house.
- [13] Retired Captain Makhubo and retired Warrant Officer Radebe testified about the identification parade. Captain Makhubo conducted the identification parade while W/O Radebe escorted and or guarded the witness after the pointing out was done. The State closed its case and the defence subsequently applied for the discharge of both accused in terms of section

174 of the CPA. The application was dismissed after which the defence closed its case without leading any evidence.

[14] The State bears the onus to prove its case beyond a reasonable doubt. What is expected from the accused is to give a version which is reasonably possibly true. It is common cause that the State case is based entirely on circumstantial evidence. During the address both Counsels implored this court to have regard to the submissions made in the application for discharge of the accused in terms of section 174 of the CPA. Mr. Mpemvane, for the State implored the court to look at the factual matrix of this case in whole and not to look into the evidence piecemeal. I agree with the said Counsel concerning the approach to the evaluation of the evidence.

[15] The cardinal rule is whether on a conspectus of all the evidence, the state has established beyond a reasonable doubt that the accused committed the offences for which they have been arraigned. The court must caution itself against dealing with evidence in a piecemeal fashion. The court in *S v Reddy*¹ said the following:

"In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oftquoted dictum in *R v Blom* 1939 AD 188 at 202-203, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such "that they exclude every reasonable inference from them save the one sought to be drawn".

[16] Mr Tshepo Mosia is an important link in the version of State in that according to the State he is the person that was with the accused within hours after the discovery of the body of the deceased. He also testified about

¹ 1996(2) SACR 1 (A) at 8C-D.

the blood that he saw on the pants of accused 1 as well as the vehicle of the deceased. However, he is a single witness and in this regard his evidence must be approached with caution. Section 208 of the CPA provides that the accused may be convicted on the evidence of a single reliable witness.

[17] The court in *S v Trainor*² said the following:

“A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity, be evaluated, as must corroborative evidence, if any. Evidence of course, must be evaluated against the onus of any particular issue or in respect of the case in its entirety.”

[18] The evidence of Mosia is riddled with inconsistencies and improbabilities. He testified that the police came to his house and asked him if he knew accused 1 and 2. When the court started clarifying what the police actually said to him on this aspect, he then moved from pillar to post. It became clear to the court that he was being untruthful. The reason for the questioning by court on this aspect was that no evidence had been led that the police were aware that the accused had been present at his premises. His testimony was that the police arrived a day or two earlier and he was not present at home. He called them and they came. When they arrived they started asking about the ownership of the Tazz which was on his premises. No evidence had been led that the Tazz was the subject of any investigation. So it was puzzling as to how the police knew about the presence of the accused at his house to the extent that they would ask him if he knew them. At no stage did he also give the description of any of the accused to the police. This court tried to understand what actually the police said when they asked him about his

² 2003(1) SACR 35 (SCA) para 9.

knowledge and had to try to put the question ad nauseam for the accused to reply thereto to no avail.

[19] He further became evasive as to when the police arrived at his home. Initially the court was under the impression that he was only mistaken. But upon being probed with simple straight forward questions it became clear that he changed his answer every time to suit the question posed. This behaviour unfortunately threw him in the deep end. When he was given the date and day the police might, on his own version, been at his house he vacillated from the next day, which might be the 25 February 2021 or 26 February 2021. The chickens ultimately came home to roost when he now asserted that the police came to his residence on the 24th February 2021. The clear testimony of Constable Nkosi was that he arrived at the scene where the body of the deceased was discovered at around 22h00. Clearly before 22h00 that evening, let alone during the day, the police were unaware of the body of the deceased. They couldn't have been at his home on 24 February 2021. Even with hindsight, this court is still unaware when the police arrived at the home of Mosia or how many times they were at his home.

[20] Mosia was confronted with the statement he made before the police on 10 March 2021. Admittedly the statement was not handed into evidence but the answers he gave from the questions in the statement became admissible. He did not dispute what was put to him pertaining to the statement. As an officer of the Court, Mr Mpemvane could have objected to the questioning had Mr Reyneke appearing for the accused put an erroneous statement. At no stage before he made a statement on 10 March 2021 did Mosia inform the police that he saw blood in the Tiida on 24 February 2021. This most crucial piece of evidence he 'elects' not to tell the police. He does not tell them that accused 1 had blood stained trousers and had to wash them and further that he had to borrow him his own trousers. When so confronted he gave a

puzzling answer, he says he had *‘no knowledge of the origin of the blood as such he had nothing to say about it.’*

[21] It is indeed so as also conceded by the State that there was no need for Accused 1 to attend the identification parade as he was well known to Mosia. The evidence of Mosia and Radebe about the identification parade, however, vitiates the process though. Firstly, Mosia gave an impression that upon arrival at the parade he only sauntered into the parade and made pointing outs and left without speaking to anyone. This would surely be highly irregular as it would militate against the established practice of how an identification parade ought to be held. The recordal of the parade proceedings paints a different picture from the testimony of Mosia. He contradicts the testimony of Captain Makhubo and his recordal of the proceedings as contained in Exhibit K accepted into evidence. The said exhibit indicate that he was asked to point out *‘the suspect, if on the parade, by touching his/her/their shoulder who...on 2021-02-24 at about 22:10 and at R712 road between Harrismith and Phuthaditjhaba killed the deceased’*

[22] He gave an impression that he spoke to no one. What is more puzzling is that it is not his testimony that he witnessed or knew the person or persons who killed the deceased yet the impression created by Exhibit K is that he went to the parade specifically to point the suspect(s) who killed the deceased. One would have expected the identification parade to at least say the he went to the parade to point the people who were at his home with the Tiida.

[23] In his examination in chief he testified that he pointed three people at the parade. In cross examination he recanted his earlier testimony when confronted with the photo album and said he never said he pointed three

people. He tried to improvise by saying that he looked around to see if there was any other person to point out. He was clearly not telling the truth. Exhibit I shows 26 people on the parade standing in a straight line. One can only surmise that Mosia must have gone from one point to the other to make the pointing out. Why would he now try to see if he could point another person.

[24] It is common cause that when Sergeant Zwane followed the Tiida, two people were arrested. One of the said people was accused 1(Xolani Hlongwane). In court Zwane confused Accused 1 with accused 2. Accused 2 was not arrested on the scene. In the statement he made in plea explanation he said he was arrested at home. The State led no evidence as how this accused came to be before court especially in view of the fact that Mosia or any State witness did not describe him to the police. What is important though is that Accused 1 informed Zwane to whom the Tiida belonged and that he had borrowed it. Zwane is not the investigating officer in this matter but he did his preliminary investigation by following what the accused informed him. He could not find Mto. It has however, to be borne in mind that in his plea explanation accused 1 said that the vehicle belonged to Mthobisi which in all likelihood, the name, Mto, might be the nickname of Mthobisi.

[25] It is trite that the accused bears no onus to prove his innocence. The police were made aware of the possession of Accused 1 of the Tiida. I expect Zwane to have informed the investigating officer of this important piece of information and for the latter to follow it up. It appears that same did not happen and it can thus not be held against the accused.

[26] The evidence of Mr Vilakazi is important in so far as it shows that at least on 24 February 2021 the deceased was still alive. It however does not assist the

state as it does not indicate when, as to time, the deceased was still alive. The state urged me to look at the timeline as to when Nkosi and Gwebu arrived at the scene on the road as well as the allegations by Mosia that the accused arrived at his house barely an hour thereafter. This contention does not take into account that there is no evidence that the deceased was robbed at 22h00. For all the court knows the deceased might have been robbed and killed earlier. The evidence of Nkosi compounds the problems of the State in that he opined that the deceased was not killed on the scene where he was found. At what time and when he was killed remain a mystery. There are many inferences that may be drawn in this case as to who killed the deceased. The evidence of Mosia is so unreliable that it must be rejected in its entirety.

[27] In my view the state has failed to prove on the conspectus of all the evidence that the deceased was robbed and killed by the accused persons and as such the State failed to prove its case beyond a reasonable doubt. I accordingly make the following order:

[28] **ORDER**

1. Both accused are found not guilty and are acquitted on both counts.



P MOLITSOANE, J

For the State:

Instructed by:

Adv. L.B. MPEMVANE

Director of Public Prosecutions

BLOEMFONTEIN.

For Accused 1 and 2:

Instructed by:

Mr. J.D. REYNEKE

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