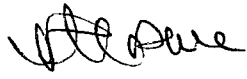




IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED.	
9/3/17	
<u>DATE</u>	<u>SIGNATURE</u>

CASE NUMBER: A895/2015

In the matter between:

BONGANI NDABA

Appellant

and

THE STATE

Respondent

JUDGMENT

MOTHLE J

1. The Appellant was convicted of 1 count of robbery and the other of murder in the Regional Court Benoni on 18 July 2014. The

Court imposed a sentence of fifteen years for Count 1 being the robbery with aggravating circumstances and fifteen years for Count 2, being murder. The Trial Court then ordered that the 10 years of Count 1 shall be served concurrent with the sentence in respect of Count 2. The effective sentence therefore is 20 years imprisonment. Leave to appeal to this Court only on conviction was granted, following a petition to the Judge President of the Gauteng Division.

2. The facts of the case are briefly that on 22 November 2013, the first State witness Sithembele Matola drove with his work colleague one Shabangu to a tuck shop to deliver cold drinks. They were accompanied by a security guard one Mr Zwane who was driving in an escort vehicle. While inside the tuck shop two men arrived who wanted change for R200.00. The attendant refused to assist them. They then decided to buy airtime in order to get the change and thereafter exited the shop just to stand near the door of the shop facing the direction of the truck. After off-loading the drinks, Matola came out of the tuck shop with cash payment for those drinks. As he was about to exit the door of the tuck shop he was pulled back, slipped and fell. There was a person on top of him and they began to wrestle. As they were wrestling, Matola heard gunshots from outside. The

person with whom he was wrestling then stood up and ran away. He had noticed that during the wrestling this person had some object in his hand which he could not identify and when he stood up after the wrestling he realised that the money he had, had disappeared. As he exited he found Zwane standing on the side of the truck next to a man who was bleeding from the hip. He was called to attend an identity parade but pointed out the wrong person.

3. Zwane also testified for the State that on that day he had accompanied Matola as a security escort for the delivery of the cold drinks. After Matola had entered the tuck shop he noticed that there were two people standing outside the tuck shop and at that point he heard someone whistling and noticed two other men crossing the street towards the truck. The truck driver Shabangu got into the truck as Matola was exiting the shop. Zwane noticed that Matola had certain items in his hands and saw how he was grabbed from behind by one of the two men who were standing in front of the tuck shop. That man had a knife in his possession. He further testified that the second person who was standing in front of the tuck shop approached Matola and his assailant and he had a firearm in his possession. This firearm was pointed at Matola. Zwane drew his firearm and

shot at the robber who was in possession of a firearm. He shot this man in the upper arm, he fell, got up and approached Zwane who shot him again on the upper leg. He noticed that the one who was wrestling with Matola got up and ran away. Zwane testified that he fired his weapon at only two people who were wounded, namely the one being one of the persons who attacked Matola and more specifically, the one who wielded a firearm and ran away with the money after being wounded in the upper arm and leg. Secondly he shot the other person who crossed the road who was wielding a knife and apparently joining in the attack. This was the deceased.

4. In his plea explanation, the Appellant admits that he was at the tuck shop with the deceased to try and obtain change of R200 note so that the deceased should give him R100. He states that he was an innocent bystander who was shot in the arm and leg and he ran away. The girlfriend of the deceased however, testifies that earlier in the day, Appellant had phoned the deceased and he then left to meet with Appellant. After the shooting, he noticed that Appellant was running away from the scene and he jumped several fences into different yards and disappeared. When the investigating officer went to look for Appellant, he could not find him in any of the medical facilities or

hospitals nearby. It later transpired that Appellant was admitted in a hospital in Tsakane in Brakpan. He was admitted under a different name and surname. When asked about this, he informed the investigating officer that he does not know how he came there, he had been unconscious and whoever brought him there gave the hospital the different names. He, however, could not explain why he was not taken to the local medical facilities near the scene of the robbery but to a hospital 30 km away from the scene. He could further not explain why after he was discharged he did not inform the police about the shooting as he claimed he was an innocent bystander.

5. The Magistrate rejected Appellant's version as not being reasonably possibly true and accepted the version of the State witnesses, even though both Zwane and Matola pointed out wrong people at the ID parade.

6. This appeal raises two issues namely:

6.1 Whether Appellant was part of the robbery that took place at the scene; and

6.2 If so, whether the conviction of murder for the deceased is good in law.

7. I now turn to deal with these two issues raised in the appeal.
8. There is no dispute that Appellant was on the scene when the robbery took place. Secondly, it is also not disputed that Appellant was known to the deceased whom he has called by cell phone earlier that day. The cell phone was answered by the girlfriend to the deceased. It is also not in dispute that Appellant was shot in the arm and leg, he ran away from the scene and was hospitalised 30km away from the scene in Brakpan under an assumed name. Finally it is not in dispute that Appellant failed to report the shooting to the police upon his discharge from the hospital.
9. The objective facts from the preceding paragraph clearly link the Appellant with the robbery. More so that the money that Matola had received as payment for the cold drinks disappeared during the robbery. If that money was taken by the deceased, it would have been found on him as he died on the scene. I am unable to see any other evidence that would point to the Appellant as an innocent bystander. It is my view that he was part of the robbery.

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10. Insofar as the conviction on murder is concerned, there are two leading cases dealing with instances of such conviction where the surviving robber may be convicted for the death of his accomplice at the robbery scene if it can be proved that they were both armed, foresaw the likelihood of resistance and the use of the firearms in such case. These two reported case are **State v Mulimi and Another**¹, and **State v Nkosi** ². The facts and incident in the Nkosi-case in particular are similar to those in this appeal. One of the robbers was shot and killed by a victim to the robbery.
11. The Appellant contends that for a Court to find a person guilty of murder following the shooting of an accomplice at the robbery scene, the state must prove that the shooter was also a victim and that he was not acting on a frolic of his own. This argument cannot stand for two reasons. Firstly, Zwane who shot and killed the deceased was an interested party. When he shot the deceased he was acting within his scope and cause of his employment as a security guard on duty to protect Matola and Shabangu as they delivered cold drinks and received payment therefore. He was providing security to the two. Therefore in essence he, Matola and Shabangu were victims of the robbery

¹ 2006 (2) SACR 8 (SCA)

² 2016 (1) SACR 301 (SCA).

12. I am thus of the view that the Court *a quo* did not misdirect itself in convicting the Appellant on robbery with aggravating circumstances as well as murder. Under the circumstances, this appeal cannot succeed.

13. In the premises I make the following order:

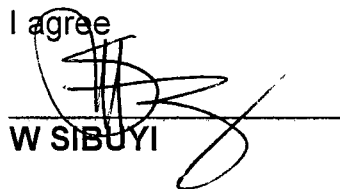
1. The appeal against conviction is dismissed.



S P MOTHLE

Judge of the High Court.
Gauteng Division, Pretoria

I agree


W SIBUYI

Acting Judge of the High Court
Gauteng Division, Pretoria.

For the Appellant: **Adv. LA Van Wyk**

Instructed by the Legal Aid South Africa.

For the Respondent: **Adv. PCB Luyt**

Instructed by the Director of Public Prosecutions.