

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER:

SS260/2005

5 **DATE:**

12 APRIL 2006

In the matter between:

THE STATE

and

10 **ZUKO NAPHAKADE**

JUDGMENT

ZONDI, AJ

15

The accused is charged with murder, attempted murder, robbery with aggravating circumstances and unlawful possession of a firearm and ammunition.

20 In count one, that is murder, it is alleged by the State that on or about 18 January 2004 and at 118 Dlephu street, Phillipi in the district of Wynberg, the accused unlawfully and intentionally killed Mabuselo Pamela by shooting him with a firearm.

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In count two, that is attempted murder, it is alleged that on the same time and place the accused unlawfully and intentionally attempted to murder Thobela April by shooting him with a firearm.

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In count three, that is robbery with aggravating circumstances, it is alleged that on the same time and place the accused unlawfully and intentionally threatened Xolani Maselakana (?) with a firearm with the intention to cause him submit, took out
10 of his possession the following goods: ...(indistinct) Synotec 54 cm television set, one Panasonic video machine, one Sony music centre, one suit case, a pair of Old Star takkies, a pair of Adidas takkies, 13 compact discs, 10 video cassettes, 15 music cassettes, cash to the value of R200, a ...(indistinct)
15 phone, Motorola T191 cell phone and the value of these goods was about R17 498.

It is further alleged that the time and place those goods were under Xolani's ...(indistinct) lawful control and that the
20 accused robbed Xolani of the said goods with aggravating circumstances as defined in Section 1 of the Criminal Procedure Act being present.

Count three and four deal with the unlawful possession of a
25 firearm and ammunition in terms of the Arms Control Act

roomed shack. It was electrified and was lit with an electric bulb. The front room of the shack was used as a kitchen and/or a living room. And the back room was utilized as a bedroom. Xolani was watching television in the kitchen
5 together with his two minor children. Mr April thereupon asked Xolani for R20. Xolani told him that he had no extra cash, that what he had was for his children's school fees.

Describing the sitting arrangements in the shack, Mr April
10 testified that he was seated next to the entrance door, the deceased was seated on his left and was close to the front door. Xolani's ...(indistinct) was seated on the right and at a stage Xolani's wife was in the bedroom. As they were talking the front door was kicked open and when they looked in the
15 direction of the door the accused emerged from the door.

The accused ordered them to lie on the floor; the accused was holding a firearm pointing it at them. The accused is the first person to have entered the shack after the door was kicked
20 open, others entered after him. The accused was in the company of about eight people. They all had arms. The accused, after ordering to lie on the floor, took Xolani to the bedroom while pointing a firearm at him. Mr April and the deceased did not lie on the floor, they remained in their seats
25 and mr April pulled his shirt over his face whilst seated and

the deceased covered his face with his hands. While this was happening the other people with the accused were busy removing goods from the house. He also testified that the accused demanded money and cell phones from them. Mr
5 April described the lighting inside the shack as good. He knew the accused; he had seen him before while the witness was staying at Nyanga East.

He testified that the accused used to be a peace worker at
10 Nyanga East, he was working in the community. This would've been in about 2002. He did not know his name then. He became aware of the accused name while ...(indistinct) gang ...(indistinct). The accused became notorious and mr April further testified that while serving as a peace worker the
15 accused patrolled the neighborhood together with other people. He would do patrols either on bicycle or by motor vehicle. He wore a uniform. (Indistinct)... on any occasion to speak to the accused while he was doing his peace keeping work.

20

Mr April stated that he was aware that the accused was a gangster. (Indistinct)... in the company of the gang members and he also witnessed a shooting incident in which the accused was involved. There was an exchange of gunfire
25 between the accused gang and the other rival gang at

Crossroads. He witnessed these activities before November 2003 before he left Crossroads for Phillipi. He had not seen the accused between November 2003 and January 2004. While staying at Crossroads, April would also see the accused
5 at Jaftha's sjebien. He would see him whenever he had the occasion to visit the tavern.

He further testified that before the 18th of January 2004, he never had any problem with the accused. Infact he never
10 spoke to him. Mr April testified that while he was seated, covering their faces, the group of people in the company of the accused was busy removing goods from the house while the accused walked about in the house. He said that he observed the happenings inside the house through the hole in his shirt.
15 He said that his shirt had a hole that was about 1½ centimeters by 1½ centimeters in diameter. He could see movements at the front door area.

Mr April testified that the deceased was called outside by the
20 accused. The accused approached the deceased and tapped him on his shoulder and went with him outside. He did not know what was discussed with the deceased while he was outside, because he remained inside the house. The deceased, however, returned immediately inside the house.
25 The deceased sat where he had been sitting before he went

out. The accused came and stood at the door, whilst standing at the door he shot the deceased twice in the head. After shooting the deceased he turned the firearm to April and shot him in the arm, twice in the leg and once in the private parts.

5 As the accused were shooting them, the two men ...(indistinct) got terrified and held on to each other.

After shooting them, that is the witness and the deceased, the accused closed the door and walked away. When he realized

10 that the deceased were dead his head had slammed on his shoulder. Some three minutes later, Xolani emerged from the room.

Mr April further testified that he was taken to Jooste Hospital

15 where he was admitted for five days. The next day while he was in hospital the police came to him and took his statement, EXHIBIT A. On the 24th of November 2004 he attended an identification parade arranged by the police. The accused was number six on the identification parade and he positively

20 identified him. (Indistinct)... accused was the person who robbed and shot them on the 18th of January 2004.

In cross-examination by Ms Verrier, Mr April testified that on the 18th of January 2004 he was drinking at Jaftha's tavern.

25 This is the tavern he attended on Saturdays and Sundays. On

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that day he bought two beers on credit and the deceased also took two beers on credit. He testified that it was the policy of the current owner not to give a person more than two beers on credit. The credit limit was two beers per customer. When he
5 was asked as to why he was sure that it was the accused who kicked the door, Mr April testified that he heard a bang from the door he looked at it and when it opened he saw the accused. The accused were the first one to enter the house. He further testified that as he was sitting ...(indistinct) face
10 with ...(indistinct) he was able to observe the activities and movements next to the door area, through the hole in his shirt. He also heard voice of people inside the house. The accused demanded money and a cell phone from the owner of the house. He denied that he had made two statements to the
15 police regarding this case. He was aware of only one statement which he made while he was in hospital. The statement was taken from him in isiXhosa and was translated into English. The contents were not read back to him. He was referred to paragraph three of the statement that is EXHIBIT A,
20 in which he had stated that they were ordered to lie down and not to look at their assailants.

He stated that the portion of the statement did not accurately reflect what he had told the police. He stated that he had told
25 the police that they were ordered to lie on the ground. He was

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adamant that it was the accused that shot them. He denied that it was someone else. He saw the accused face through the hole in his shirt. Mr April was asked to draw a sketch indicating the size of the hole, this he did and it was handed in
5 as EXHIBIT B. Mr April further stated that he knew the accused from his previous working days. He knew some other people who were peace workers.

At that stage he did not know the accused by name. He
10 became aware that the accused was Zuko when he became a gang member. He stated that the accused became a gang member after he had left doing peace work. He denied that he was told by the police to point out the accused on the identification parade. He testified that he was merely asked to
15 identify the person who shot him on the 18th of January 2004 and he identified the accused.

During re-examination by mr Wolmerans, mr April was referred to paragraph eight of EXHIBIT A. He confirmed and agreed
20 with its contents.

After agreement between council the accused statement containing admission in terms of Section 420 of the Criminal Procedure Act was handed in as EXHIBIT C and the
25 postmortem report was handed in as EXHIBIT D. The state

thereafter closed its case.

The defense called two witnesses to testify namely the accused and his girlfriend, ms Nhonho Ayanda Silere. 5 Testifying in his own defense the accused denied any knowledge of the allegation against him. He stated that he was not involved in the commission of these offenses which allegedly occurred on the 18th of January 2004 at about half past nine. His defense was that on the day in question and at 10 the time he was at his house in Crossroads. When asked to give account of his movement on the 18th of December 2004, the accused testified that usually he will be with his friends during the day and in the evening he would go home. He was unable to recall when he got home on that day, because he 15 had just returned from the Transkei, but he thought it must have been between 19:00 and 20:00. He had gone to Transkei in December 2003 and returned home some few days before he was arrested on the 21st of January 2004. When he was asked who had been at home with him on the 18th of January 2004 20 the accused stated that when he came back from the Transkei he discovered that his first girlfriend was pregnant. During the day he would spend the day with this first girlfriend and in the evening he would go pick up another girlfriend that is Nhonho who stays not very far from his house. Nhonho's house is 25 about five minutes walk from his place. Nhonho had slept over

at his place. The accused has a family at the back of his house. Nhonho would first spent some time with this family in the main house, before going to the ...(indistinct).

- 5 The accused further testified that in the evening he will only go out of his house to buy cool drink. His girlfriend was with him until the next morning until about 8 of 9 o'clock in the morning when he would walk her home.
- 10 The accused testified that he did not know Thobela April, he had never seen him before, and however confirmed that during 2002 he worked as a peace worker in Nyanga East, it was a one year contract as it expired this contract ...(indistinct)
- 15 were divided in about three groups of 20 people each. He agreed with mr April that the peace workers patrolled the area on bicycle. He stated that he used a bicycle when it was hot during the day and at night he would use motor vehicles. The peace workers mission was to fight crime. He denied that
- 20 when he stopped working as a peace worker he became a gang member. He was always in a group of friends and and therefore they might have thought that they were gang members. He also denied that he was once involved in the shooting incident between the two gang members. He referred
- 25 to an incident where there was a quarrel between the youth of

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Nyanga East and Crossroads. With the involvement of the police, the dispute was however dissolved. This incident, according to him, took place between 2002 and 2003. He denied that he was at the place of the crime on the day in question. The state witness mistook him for someone else. He believes that the police are out to falsely implicate him. He stated that before his arrest on the 21st of January 2004, the police would frequently come to his house and search it. They would harass him. He mentioned Prinsloo, Jansen and Smith as members of the police who use to harass him. Smith is the police officer who arrested him in this case. In particular he sighted Prinsloo as the police officer who always harassed him. Whenever he saw the accused riding in his vehicle, Prinsloo would stop him and search his car. On one occasion Prinsloo followed him up to his home. The police believed that he had guns. Before the accused went Transkei in December 2003, Smith told him that he would get him. The accused also referred to an incident which occurred in November 2003 in which he was driving his motor vehicle and a passenger with him, the passenger had a gun. Smith stopped him and searched his car. When he discovered the firearm he arrested the accused and his passenger.

The accused was subsequently release, because the passenger admitted that the firearm was his.

Under cross-examination by mr Wolmarans the accused testified that he left for Transkei in December 2003 and returned to Nyanga East in January 2004. He believed that he
5 was arrested about eight days after his return from Transkei. It was during this period that realized that his girlfriend was pregnant. During this period he spent his evenings with his other girlfriend, who is Nhonho. He admitted that his first name is Zuko and that during 2002 he worked as a peace
10 worker. He would not dispute that mr April saw him at Jaftha's tavern. He used to go there to play pool.

He stated that there were ...(indistinct) bad blood between him and mr April. The accused also confirmed that his house is
15 located next to Mvasa (?) Primary School. When he was asked if his father had come to visit him while he was in prison his answer was that he never did. His father was a softhearted, kind person who cried when he saw him. His father would then sent his mother to visit him, because she was much stronger.
20 His sisters and his girlfriend also visited him in prison. He testified that when his mother came to visit him in prison he told her about the case. He however never discussed this case with his girlfriend. When he discussed the case with his mother he did not tell her of the date of the incident, because
25 he did not know it. He however stated that when the police

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arrested him, he asked them why he was arrested, they gave him an answer, but he cannot recall the date of the incident as was given to him by the police. He stated that he would've told his mother about the date of the alleged incident. He
5 knew that he was innocent; he was always with his girlfriend every night after his return from the Transkei. He told his girlfriend that she was his alibi witness.

He further testified that when he was arrested by Smith he told
10 him that he had an alibi. When the accused was asked if he had advised his girlfriend to go and make a statement at the police station to the effect that on the day in question she was with him, he stated that he had not done so, because he was not aware that she would do so and he thought that she would
15 be called as a witness. He stated that he could not recall when he came back home on the 18th of January 2004. He normally comes back home between 19:00 and 20:00. The accused believes that the police conspired against him in this matter, because they wanted to get him. He does not know what they
20 wanted from him. As a peace worker he never had any problems with the police. He worked with some of them. His father was aware that the police was harassing him. He however never advised him on what to do. He believes that the police told mr April what to say insofar as his evidence
25 implicating. He stated that on the 18th of January 2004 he did

not have a firearm license.

During re-examination the accused has testified that his pregnant girlfriend in Nandiswa (?). She used to stay next to his place. She has since left the area. When he returned from Transkei in January 2004 he saw her almost every day, but she never slept over at his place.

Ms Nhonho Ayanda Silera thereafter testified for the defense.

10 She knows the accused, before his arrest he was her boyfriend. She testified that on the night of the 18th of January 2004 she was with the accused at his parents' home. She had slept over at his place. She further testified that when he returned from Transkei in January 2004, she would be with him every night. The night before his arrest, she had been with him. The day before his arrest he had picked her up at her place at about 19:00 and 20:00. She left his place at about 8 o'clock in the morning the following day. The accused walked her home. Since his arrest she had visited the accused about seven times at Pollsmoor prison. When she visit him, they never discuss the case. She is not aware that the accused is a gang member. He had two or three friends. (Indistinct) ... never involved in a shooting incident with other people. When she met the accused he was no longer a peace worker.

25

During cross-examination she testified that she became the accused girlfriend during December 2003. She ...(indistinct) for two week when he left for Transkei. Before December 2003

5 she did not know him. She was aware that the accused was arrested on the 21st of January 2004. Before his arrested she had known him for three weeks only. She knows Nandiswa, that is the accused former girlfriend. She has two children with the accused. She was aware that Nandiswa was pregnant

10 when she began to go out with the accused. The accused had told her that they were broken up. She is still in love with the accused and will be happy if he was acquitted so that they can have another opportunity to continue their love relationship. The accused ...(indistinct) returned from Transkei and visit her

15 sometime during the day and late at round about seven in the evening. He will come to her at about five o'clock pm, but never during lunch time. She was not aware that the accused was still seeing Nandiswa. She would be surprised if he does.

20 She further testified that her house is about 20 minutes walk from the accused house. She slept with the accused in his ...(indistinct). She never ate at the accused place and while she was at the accused place, he never ate in front of her. She never sat in the main house and had a chat with the

25 accused family. She testified that they would enter the

premisses through the back entrance. The accused family would not be aware of her presence on the premises. She became aware that the accused was arrested when he telephoned her from the police station. She did not go to see him because she was busy with babysitting. She said that the accused did not tell her why he was arrested and she did not ask him. She also visited him at Pollsmoor prison some three weeks after his arrest. When she visited the accused at prison, they never discussed the case. She was told by the accused from Nduli (?) why he was arrested. She did not know that she would be needed to give evidence for the accused in this case until last week that is the 3rd of April. That is when the accused phoned her and asked her to be his witness. The accused asked her to tell the truth about his whereabouts before he was arrested. She was not aware before the time that the accused intended calling her as his alibi witness. The defense thereafter closed its case.

It was submitted by Mr Wolmarans, for the State, that the state has succeeded to proof beyond the reasonable doubt that the accused was guilty of the offences with which he was charged. He submitted that the evidence of Mr April, although a single witness, should be accepted as ...(indistinct). His identification of the accused was made under favorable conditions being his proximity to the accused at the time of the

incident and his prior knowledge of the accused. The court was asked to regard the evidence of the accused and his witness as false. It was submitted that the evidence of the defense witness was full of improbabilities. The State however
5 continued that ...(indistinct) not succeeded that the accused was not guilty on count three.

On the other hand it was submitted by ms Verrier for the accused, that the accused must be acquitted on all counts. It
10 was submitted that the state's case was based on the evidence of a single witness and who's evidence cannot safely be relied upon and was unreliable and he has ...(indistinct) on various occasions. It was argued that his observation of the accused was very limited and it is possible that he might have made a
15 mistake. It was finally submitted that the state has not succeeded to prove the accused alibi. This basically concluded the submissions made by the parties.

Now the onus is upon the state to proof the accused guilt
20 beyond reasonable doubt. In evaluating the evidence the court has to weigh up all the elements which points towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of ...(indistinct) strengths and witnesses probabilities and improbabilities on both sides.
25 Once the court has done so, it must be decided whether the

balance weighs so heavily in favor of the state as to exclude any reasonable doubt about his guilt. There is no obligation upon the accused to prove his innocence. If his is ... (indistinct) reasonable possibly true he is entitled to his acquittal, even though his explanation is improbable. See in this regard cases of the S v V 2001 (1) SACR 453 SAA and S v Tshabalala 2003 (1) SACR 134 (SCA).

Ms Verrier has correctly pointed out that this matter turns on two issues namely the liability of the single witness' evidence and his ability to identify the accused. (Indistinct)... in terms of Section 208 of the Criminal Procedure Act the court may convict the accused of any offence from the single evidence of any competent witness. However, such evidence must be opposed in question and the test for its acceptance was ... (indistinct) heard in R v Mokwena 1932 PD 79 at 80.

"The corroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by the section. But in my opinion that section should only be relied upon when the evidence of a single witness is clear and satisfactory in every material respect. Thus the section ... (indistinct) where for instance the witness has an interest or ... (indistinct) with the accused. Where he has made a previous inconsistent statement, where he contradicts himself in

the witness box, where he has been found guilty ... (indistinct) dishonesty, where he has not have proper opportunities for aggravation."

5 The second aspect of the case relates to the reliability to the witness evidence regarding the identity of the accused. It is trite that the evidence of identification based upon a witness' recollection of a person's appearance is dangerously unreliable, unless approached with due caution. See in this
10 regard the case of the S v Mthethwa 1972 (3) SA 766 (A). When the identification of a alleged offender is an issue, everything depends on the honesty of indentifying the witness and the probability of his ... (indistinct). See in this regard the S v ... (indistinct) 1990 (2) SACR 450 ... (indistinct) case.

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The State's case is based on the evidence of Mr April and the impression which the court gained from him that he was honest and truthful although there was contradiction in his evidence, such contradiction was not material. He testified on how the
20 door was kicked open while sitting inside Xolani's house. The manner in which the door was opened ... (indistinct) the door. And the first persone he saw in the door was the accused. He was armed with a firearm. Mr April was sitting very close to the door – he was about 30 cm away from it. When entering
25 the house the accused ordered them to lie on the ground. He

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did not lie on the ground, but he and the deceased had covered their faces. And the witness had covered his face by pulling his shirt over his face. His shirt had a hole ... (indistinct) observe movements next to the door area. It was
5 through this hole that he further observed the accused. He recognized the accused. The accused shot him and the deceased before leaving the scene. The next day while he was in hospital he was approached by the police in connection with the matter. He told the police who his attacker was. He
10 described to them where he stays and how he knew him. It is therefore clear that his identification of the accused is not only based on his observation of the accused at the time of the incident, but he had ... (indistinct) the accused. He knows the accused father and what he does. He had seen the accused at
15 Jaftha's tavern before. The accused confirmed that he used to frequently visit this tavern. The witness had no motive to falsely implicate the accused. There was no collusion proofed between him and the police. His statement was taken a day after the incident and while he was lying in hospital. This
20 ... (indistinct) excludes any opportunity or possibility of collusion with the police.

Turning to the defense case the accused defense was an alibi. He testified in his own defense and called a witness to confirm
25 his alibi. The ... (indistinct) position of regard to an alibi is that

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there is no onus on the accused to establish it and if it might be reasonable true he must be acquitted. It does not have to be considered ...(indistinct). It must be considered in the light of the totality of evidence in the case and the court's
5 impression of the witness. See in this regard the case of R v ...(indistinct) 1995 (3) SA 337 ...(indistinct). The accused defense of alibi was weak. The accused witness did not give account of the accused movement on the 18th of January 2004 in the evening. Her testimony was about what the accused
10 would usually do ...(indistinct) before his arrest. This was not evidence of about what he did on the 18th of January 2004. The witness evidence was full of improbabilities. She never knew why the accused was arrested and she was his girlfriend and was his witness. She never raised the matter
15 ...(indistinct) to visit the accused in prison. There were also contradiction between the witness and the accused. According to the accused he had informed her that she was his alibi witness, however, according to the witness she was not aware of this fact until a week ago when she was phoned by the
20 accused. The witness denied neither that she ate at the accused house nor that she met his family in the main house when she came to visit him. The accused evidence is accordingly rejected as false. The court is satisfied with the evidence of the state witness. The evidence indicates that the
25 accused was the man who entered Xolani's house and who

shot the deceased and the witness. He carried the firearm with ammunition for which he had no license.

5 The state considered that the accused is not guilty of count three, that is the charge related with robbery with aggravating circumstances. The witness who would have testified on this count did not testify. Mr April could not give evidence on this count as his face was covered. When the goods were taken out of Xolani's house he did not see what was taken.

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It is the unanimous decision of this court that the accused is **ACQUITTED ON COUNT THREE.** He is found **GUILTY ON COUNT ONE, TWO, FOUR AND FIVE** as charged.

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6/12/2006
Mp

ZONDI, A J