

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case No: A84/2022

- (1) Reportable: NO
(2) Of interest to other judges: NO
(3) Revised.

31 January 2025

MHE Ismail

In the matter between: -

MHLONGO THEMBINKOSI EMMANUEL

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be December 2024.

Ismail J: (Concurring Yacoob & Strydom JJ)

(1) The appellant was convicted by Makume J of murder in contravention of section 51(1) of the Criminal Procedure Act, 105 of 1997 (CPA), and of defeating the ends of justice.

(2) He appeals to this court after he was successfully granted leave by the Supreme Court of Appeal to appeal against both conviction and sentence.

(3) The trial court gave a comprehensive judgment consisting of 79 pages (See volume 1 of the record, pages 886 to 964). I do not propose to summarize all the evidence presented during the trial as this was comprehensively done by the *court a quo*, however, I will give a brief purview of the matter for a proper understanding of this appeal.

(4) During the trial, the prosecution relied upon the evidence of Mr Xolani Magangane (Xolani) who testified in terms section 204 of the Criminal Procedure Act. Xolani testified that he was with the appellant, when the appellant killed the deceased by stabbing her. This witness testified that he was given money by the appellant to purchase a knife to kill the deceased.

(5) Xolani's evidence was that, on the day that the deceased was killed, they, the appellant, the deceased and Xolani, travelled in the appellant's Audi motor vehicle from Mall of Africa to an isolated bushy area, where the deceased was killed. Xolani was to remain with the deceased's body in the veldt whilst he, the appellant went home to change his motor vehicle and his clothes. To this end the appellant drove away from the scene in his Audi motor vehicle leaving Xolani and the deceased at the place where the crime was committed.

(6) A short while later the appellant went to fetch Xolani, in his company vehicle, a Ford Fiesta.

(7) Xolani testified that he was paid by the appellant for his efforts, namely the murder of the deceased.

(8) The appellant's version was that Xolani was given a lift from Newcastle to Johannesburg at the behest of the appellant's faith healer Mr Mdeni. He denied that he hired Xolani to kill the deceased. His version was that he transported Xolani to Witbank and Orange Farm as the latter testified. This was done since Xolani had to perform certain errands for Mdeni and that he merely transported Xolani as a favour to Mdeni.

(9) During the course of this judgement, I will deal with the following aspects which the trial court assessed in determining the guilt or innocence of the appellant.

9.1 The section 204 witness's evidence;

9.2 The accused's alibi;

9.3 The appellant's version that the witnesses, Xolani, Mdeni and Nosipho conspired against him in that they were responsible for the death of the deceased, they conspired to implicate him in the crime.

(10) It is trite that an appeal court will only interfere with the trial court's findings if that court erred in some or other respects in arriving at the conclusion that it did. See: *S v Dhalmeoyo* 1948 (2) SA 677 (A).

(11) The *court a quo* alluded to the fact that the witness Xolani was a single witness, however, the court considered his evidence with that of Mdeni and Nosipho as well as the accused's evidence and it found corroboration for his version regarding why he came to Johannesburg – (See paragraph [4] of the judgement).

(12) According to them, the appellant wanted to hire Xolani to guard his property, whereas the appellant suggested that Xolani came to Johannesburg to perform errands on behalf of Mdeni. Xolani was the only witness who implicated the appellant in the murder. The trial court dealt with this aspect on the basis that he was an accomplice and that his evidence must be viewed with caution as he had a motive to falsely implicate the appellant – (See paragraphs 199-204 of the judgment).

Having considered Xolani's evidence and the inherent dangers of accomplice evidence, the trial court, at paragraph 225 of the judgment stated:

"Having taken the above into consideration I come to the conclusion that Xolani came to court and told the truth about the presence of the accused at the murder scene."

If Xolani acted alone in killing the deceased, how would the appellant have known where to fetch him after the murder, namely where Xolani was picked up by the appellant. Furthermore, the appellant's version was that he brought the witness to Johannesburg at the request of Mdeni. This begs the question, why was he so accommodating to transport Xolani to the various places mentioned earlier, to attend to Mdeni's errands when he was employed, and he had his own work to perform.

(13) On a cautious and careful analysis of the evidence I am in agreement with the trial court's findings, that the appellant was present at the scene with Xolani when the deceased was killed. It matters not whether the actual killing of the deceased was done by Xolani or by the appellant, as the State relied on common purpose. The crucial inquiry is whether the appellant was present at the time or not. If he was present as suggested by Xolani the trial court's findings would be correct. Whereas if he was not, he ought to have been acquitted.

(14) An important consideration in this matter is the telephonic records of the appellant, which were evidence in the trial. They suggest that during the crucial time when the murder was committed that the mobile phone of the appellant did not indicate where the appellant was, for a period of almost 2 hours. No records indicate his movements or where he was. His phone was therefore either switched off, or he was in a place with no signal continuously for two hours. The appellant's version that he was travelling between Midrand and Lenasia during those two hours does not explain the vacuum, since his route would at the very least have given him intermittent signal.

Alibi

(15) The issue of the appellant's alibi was raised by him during the trial namely that he was not at the murder scene. His version was that he drove from Midrand to Lenasia to Ntsiki's place, (former girlfriend) to collect money from her. The appellant testified that he spoke to an Indian lady at the premises who could confirm his

presence in Lenasia at the relevant time. Strangely, that witness was not called to elaborate and confirm his alibi.

I am acutely aware that the prosecution must prove the alibi of the appellant to be false and it is not for the accused/appellant to prove that it is true. See *R v Biya* 1952 (4) SA 514 (A), *R v Hlongwane* 1959 (3) SA 337 (A) at 341 where the court said:

"The correct approach is to consider the alibi in the light of the totality of the evidence and the court's impression of the witnesses."

(16) In this regard, the appellant's cell phone records do not assist him by reflecting that he was in Lenasia at that time, nor does Nontsiki, who testified that she was at her house in Lenasia, and nobody came to alert her that the appellant was looking for her.

If the appellant was in Lenasia at that crucial time when the deceased was killed it logically follows that he could not have been at the murder scene as Xolani testified. On this score it is only the appellant's say so that he was in Lenasia as opposed to Xolani who places him at the murder scene and Nontsiki's evidence that she was at her house at the time when the appellant testified that he went to look for her. There are no phone records to verify his presence in Lenasia at that time.

The appellant's alibi and the State's version are mutually destructive of each other regarding the time of the murder. The trial court in assessing the issue of the appellant's alibi alluded to the fact that his alibi was not to be viewed in isolation, but that it had to be seen in totality with all the evidence. (See paragraph 242 of the judgment, see also *R v Hlongwane* supra).

The issue of the Audi vehicle

(17) The evidence of the investigating officer was to the effect that he wanted the Audi vehicle to be examined forensically, however, the appellant gave him various reasons regarding the whereabouts of the vehicle. Eventually he told the investigating officer, that he could not furnish the name of the purchaser, nor the address, notwithstanding the purchaser having the same surname as the appellant.

It is clear from reading the record on this issue, that he was playing cat and mouse with the police regarding the Audi vehicle as he did not want the vehicle to be examined

by the police. One must ask the rhetorical question why? The irresistible inference is that the appellant knew that any test conducted on the vehicle would be fatal to his case.

(18) This evidence must be seen with Xolani's version that the appellant left him at the scene with the deceased in order to change his vehicle and clothes. This was done because he realized that the vehicle could incriminate him and link him to the murder.

(19) On behalf of the appellant, it was submitted that Xolani is a single witness, and the defence relied upon the judgment of Holmes JA in *S v Hlapezula* and others 1965 (4) SA 439 (A) et 440 d-f where the court stated:

"First, he self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particular where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description-his only fiction being the substitution of the accused for the culprit."

and *Selebi v S* 2012 (1) SACR at para 34 where Mthiyane DP stated:

"... evidence of a single witness or liar can be admitted if there is sufficient corroboration of the said evidence by other witnesses."

(20) I am of the view that it is quite correct that Xolani was not a witness of the highest credibility, however his evidence must be viewed not in isolation but in conjunction with all the evidence. His version to some extent is corroborated by Mr Mdeni's evidence and Nosipho's evidence, Mdeni corroborated Xolani's version regarding the payment by the appellant. He also corroborated Xolani, who testified that Xolani came to Johannesburg to work for the appellant and that he Mdeni did not send Xolani to perform errands on his behalf.

(21) In determining the accused's innocence or guilt the ultimate question to be asked was whether the appellant was present with Xolani when the deceased was killed, the

answer to this question has been dealt with above. In this regard the issue of the Audi vehicle is of primary importance and is not a collateral issue. To this end one ponders why the appellant was so reluctant to co-operate with the police regarding the Audi vehicle. In my view the appellant realised that the Audi was akin to a smoking gun hence his reluctance to divulge where the car was.

Common Purpose

(22) The State's case was that the section 204 witness and the appellant acted with common purpose to perpetrate the murder. I have dealt with that aspect earlier in paragraph [13] of the judgement. I do not propose to deal with the 5 requirements set out in *S v Mgedezi* 1989 (1) SA 687 (A) as they are trite and known to all the parties. The sole issue is whether the appellant was present as suggested by Xolani or whether he was not there.

(23) In the circumstances, I am of the considered view that the conviction of the appellant was proper and that the trial court did not err or misdirected itself in arriving at the conclusion that the appellant was guilty of the charges.

Sentence

(24) Ms. More, on behalf of the appellant, submitted that the trial court erred when it found that there were no substantial and compelling circumstances which permitted the court to impose another sentence than the prescribed sentence of life imprisonment.

(25) She submitted that the appellant's personal circumstances looked at cumulatively equated to substantial and compelling circumstances.

(26) The appellant was a married man and a father of 6 children, which he supported. He had no previous convictions. It was submitted that a lengthy term of imprisonment would have had the necessary deterrent effect in that, the appellant was capable of rehabilitation.

(27) In *S v Vilakazi* 2009 (1) SACR 552 (SCA) Nugent JA stated at para [58]:

"The personal circumstances of the appellant, so far as they are disclosed in the evidence, have been set out earlier. In cases of serious crime, the personal circumstances of the offender, by themselves, will necessarily recede into the background."

(28) One should not lose sight of the fact that this was a premeditated murder with implications of gender-based violence. These crimes are rampant in our society, and notwithstanding the State endeavouring to educate the populace to refrain from violence against women and children. The spate of attacks on them continues unabated. The courts are obliged to impose appropriate sentences for such attacks upon the weak and vulnerable persons in our society.

(29) Furthermore, Marais JA in *S v Malgas* 2001 (1) SACR 469 stated:

"Unless there are, truly convincing reasons to deviate from the prescribed sentences, the court should not depart from the prescribed sentences lightly or for flimsy reasons."

See also: *S v Matyityi* 2011 (1) SACR 40 (SCA)

(30) In my view the sentences imposed were appropriate and the trial court applied its mind to the issue of sentence. In the circumstance the appeal in respect of sentence should be dismissed.

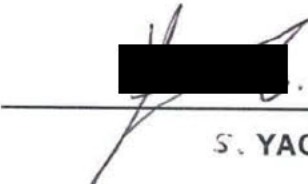
(31) I make the following order:

31.1 The appeal against both the conviction and sentence imposed on the appellant is dismissed.


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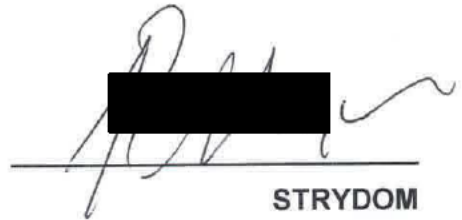
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

I concur


S. YACOOB J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

I concur



STRYDOM

JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Appearances:

For the Applicant:

Advocate BMT More

Instructed: by Legal-Aid (JHB)

For the Respondent:

Advocate A. De Klerk

Instructed: by NPA (JHB)

Heard : 25 November 2024

Judgment : January 2025