




**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

**CASE NO: 52/2018**

(1)	REPORTABLE: <del>YES</del> /NO
(2)	OF INTEREST TO OTHER JUDGES: <del>YES</del> /NO
(3)	REVISED: <del>YES</del> /NO
23 August 2019	
	

In the matter between:

**The State**

**And**

**Jabulani Harold Masango**

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**Judgement**

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**Mogotsi AJ**

[1]The State moved an application for a further postponement of the case for a directive to stop prosecutions. No indication was given to the defence and the court

that such application could be made and the defence objected thereto as that infringes on the accused right to a fair trial.

The court deemed the state case to be closed and the defence brought an application for the accused's discharge in terms of section 174 of Criminal Procedure Act, No51 of 1977(CPA)

[2]Mr Masango is a male adult charged with the following offences;

Murder, attempted murder, unlawful possession of a fire arm ( sec 3 of Act 60 of 2000) and unlawful possession of unknown number of 9mm ammunition without being a holder of license, permit or authorization ( sec 90 Act 60 of 2000)

[3] The accused pleaded not guilty to all four charges but made the following admissions which were then recorded in terms of section 220 of Act 51 of 1977 (as amended);

That the deceased was Thamsanqa Simon Amos Maseko whose reputed age was 29.As informed death took place on 3<sup>rd</sup> September 2017.

The cause of death was "**Multiple gunshot wounds with blood loss**"

[4] The state led the evidence of Fabian Paulos who grew up with the accused attending different schools but using a train as mode of transport. The witness also knew the deceased who used to stay in section Q and the witness stays in section M of Mmamelodi.

[5] On the 3<sup>rd</sup> September 2017 he proceeded to Maseko square to get a drug called nyaope .There he found the deceased in this matter,Thami who was selling drugs,Sicelo who is also deceased, the two Tshepos,Letlhogonolo and Thabang.Upon his arrival all the named people were around the fire smoking. He cannot say with certainty whether the deceased was smoking drugs or not but he knows that he was a drug dealer.

[6] The deceased was injured on his lower back as he was stabbed in a fight he had earlier on.

[7] Mr Paulos placed his order of drugs but before he could receive it the accused stopped by driving a Volkswagen Polo, there was a female passenger in that car. Accused alighted and proceeded to the boot of his car while asking the deceased in a calm manner why he fought his brother. The deceased walked towards the accused. Accused took out a bottle of liquor (dampie) from the boot of his car.

[8] It could have been between 23H30- 24H00. Although there was an Apollo light and street lights on where the incident happened it was dark. They were under a shelter which was not lit. He did not pay attention to the parties and he actually had his back against them.

[9] Accused opened the back door of his car and shots rang thrice. He doesn't know who fired. He got struck by a bullet on his inner part of the left ankle and he ran away until he got a lift from a motor vehicle driven by his friend.

[10] The driver of the car returned to the scene where they found the deceased injured. They took him and proceeded to Mmamelodi hospital where the two received medical treatment. Paulos got discharged the following day. Along the way to the hospital the deceased only complained about pains but never made mention of who shot at them.

[11] The evidence of Dr Donovan Paul Loots is briefly that he noticed the following injuries on the deceased when he performed a post mortem examination on 5th September 2017; Death occurred on

Par 4.1 A penetrating wound measuring 10mm in maximal diameter. It had a microscopic appearance of a distant entrance gunshot wound. A single full metal jacketed projectile was retrieved from the superficial subcutaneous soft tissues of the left upper thigh.

4.2 (a) A 9mm wound in maximal diameter on the posterolateral aspect of the right upper thigh approximately 72 cm above the level of the heel which appeared to be a distant entrance gunshot wound

4.2(b) On the medical aspect of the right upper thigh approximately 56cm above the level of the heel irregular wound with lacerated edges and extrusion of the underlying subcutaneous soft tissues. The wound measured 2cm by 1cm and had a microscopic appearance of an exit wound

[12] The entrance and exit wound gunshot wounds in paragraphs 4.2 (a) and 4.2 (b) respectively were connected by a projectile tract which entered the posterolateral aspect of the right upper thigh in relation to the penetrating wound 4,2(a) and transversed the deep soft tissues and muscular structures of the thigh in the direction which progresses from right to left in a slightly downward direction. The projectile tract subsequently severed the femoral artery and exited the thigh in relation to the irregular wound described par.4.2(b).Extensive soft tissue and intramuscular haemorrhage caused by the tract formed by the projectile

4.3 A laceration measuring 2.5 by 0.2cm in the middle of the occipital region of the hairy scalp

4.4 A longitudinally oriented incised wound measuring 1cm in maximal length on the lateral aspect of the face/ cheek

4.5 An obliquely oriented superficial abrasion measuring 3cm in length on the posterior aspect of the right shoulder/neck

4.6A curvilinear superficial stab wound measuring 1.3 cm in maximal length on the left upper back below the scapular approximately 11 cm left to the midline

4.7 A longitudinally oriented superficial abrasion measuring 5cm by 1 cm on the left lower back

[13]There were no defence injuries noted on the hands of the deceased

[14] The bladder showed a perforating defect associated with haemorrhage in relation to the gunshot wound tract wound in par 4.1 which transversed pelvic region from the right to the left in an almost coronal plane and slightly downward direction. The projectile penetrated the right thigh perforating the right iliopsoas muscle. The wound tract progressed to the pelvic region, perforating the bladder and tangentially

lacerating the left iliac vessels, before exiting the pelvis and fracturing the left inferior pubic ramus and these are the injuries that according to Dr Loots caused a lot of loss of blood resulting into the death. The stab wounds would have just caused minimal loss of blood.

[15] The doctor further testified that whoever fired must have done so at a distance of not less than 20cm from the deceased as the projectile did not leave behind residue, gun power or suit.

[16] The state applied that hearsay evidence in the form of a conversation between;  
 a)Thamsanqa the deceased in this matter and Captain Tshibvuma , b)Statements of the deceased Sicelo Zulu and  
 c)Mpho Samuel Mause Mooketsi (whom the State could not allegedly trace) be admitted in terms of section 3 (1) ( c) of Act 45 of 1988

[17] Due to the unreliable and contradictory evidence the court made a finding that enough was not done to get Mooketsi who stays in Mamelodi and who was at some stage seen by the investigating officer jumping the wall fence and running away.

[18] The court adjourned the matter to get the evidence of Mr Mooketsi but the state led the evidence of the mother who could only come with unsubstantiated allegations that Mr Mooketsi was threatened by unknown people not to come to court. She proved to be a poor and unreliable witness

[19] The deceased in this matter passed on before he could make a statement. The reliability of the statement of the late Mr Sicelo Zulu could not be established. The evidence is that those who were there were smoking drugs. His state of sobriety could not be ascertained.

[20] In exercising its discretion to admit the hearsay evidence the court examined why the evidence could not be given by the two deceased but also went on further to look at the purpose for which the evidence would be tendered for. Even if it could be argued that they did identify a suspect whether such evidence is untested by way of

cross examination, could still be reliable taking into consideration the issue of drugs coupled with the fact that it was dark where the shooting occurred according to Mr Paulos.

[21] In considering reliability of such statements the court will consider whether the declarant had any motive to lie, bias, whether the statement was adduced through leading questions, whether the statement was dully made under oath, affirmation or warning of the importance of telling the truth, whether the declarant could have suffered from any mental impairment due to intake of alcohol, drugs, shock, a degree of sedation. These issues were not clarified by the State. The honesty or credibility of a person who obtained such statement(s). The list is not exhaustive. So in this matter the possible state of mind of those who may have smoked drugs before was a factor to be considered.

[22] Whether under the given circumstances there is a compelling justification for admitting and relying on such evidence. The court examined the circumstances around making such statements as the circumstances in which a statement was made may provide satisfaction as to its truth and accuracy. The truth and accuracy may in turn serve as a safety valve for and oath or more in particular, cross examination of the maker of such a statement.

[23] The court also considered the probative value of such evidence and dismissed the application because to admit such statements would not have been in the interest of justice. Instead, that would have unfairly prejudiced the accused.

[24] The court dismissed the application as it would not be in the interest of justice to admit such evidence and that would also unfairly prejudice the accused.

[25] The accused denies firing any shot or even being in possession of a fire arm on that day. The state did not even deal with what he may have said in his warning statement.

[26] No one saw him firing or having a fire arm or ammunition on that evening

## **Onus**

[27] The duty remains on the state to proof the guilt of the accused beyond reasonable doubt and the version of the accused need only be reasonably possibly true

S.174 CPA as follows:

*[28] If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.*

This section deals with the judicial discretion which must be exercised by the court as well as the quantum of evidence

[29] In ***S v Shuping***<sup>1</sup> a test was formulated as follows at 120-121

“At the close of the State case,when discharge is considered,the first question is (i) Is there evidence on which a reasonable might convict;if not (ii) is there a reasonable possibility that the defence evidence might supplement the State case? If the answer to either question is yes,there should be no discharge and the accused should be placed in his defence.”

[30] The criticism of ***Shuping's*** case in ***Lubaxa***<sup>2</sup> relates to the second leg of the enquiry, which permits an accused person to be placed on his defence, even when there is no case to answer, merely in the expectation that “the defence evidence” might supplement the prosecution’s case has usually been said to conflict with the presumption of innocence or to infringe the accused’s right of silence and his

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<sup>1</sup> S v Shuping & Others 1983(2) SA 119(B)

<sup>2</sup> S v Lubaxa 2001 (2) SACR 703 (SCA) par. 14-15).

freedom to refrain from testifying ...

The SCA in *Lubaxa* (above) resolved that an accused person is to be discharged when there is no evidence other than the possibility that he or she might incriminate himself or herself during testimony. The right to be discharged at that stage of the trial does not necessarily arise, in my view, from considerations relating to the burden of proof (or its concomitant, the presumption of innocence) or the right of silence or the right not to testify but arguably from a consideration that is of more general application. Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be 'reasonable and probable' cause to believe that the accused is guilty of an offence before a prosecution is initiated( *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129(A) at 135C-E), and the Constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial, in my view, would at that stage be stopped, for it threatens thereafter to infringe other Constitutional rights protected by s 10 and s12".

[31] At this stage of the trial credibility will play a very limited role, *S v Mphetha*<sup>3</sup> where Williamson J held that relevant evidence can only be ignored if "it is of such a poor quality that no reasonable person could possibly accept it." This sentiment was reiterated by Kgomo J in *S v Agliotti* <sup>4</sup>

[32]The state led the evidence of a single witness who in his own words was "high" after not sleeping and taking liquor and nyaope/heroine drugs.

[33]The state argued that a remark made by the accused when he enquired why did the deceased fight with his brother and the fact that a shot came from accused direction is circumstantial evidence implicating the accused. The question is whether

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<sup>3</sup> *S v Mphetha & Others* 1983 (4) SA 262

<sup>4</sup> *S v Agliotti* 2011 (2) SACR 437 (GSJ) at 456-457



such circumstantial evidence if there is any is meting out the two cardinal rules as set out in *R v Blom*<sup>5</sup>

*"In reasoning by inference there are two cardinal rules of logic which cannot be ignored: (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.)"*

[34] It appears from the evidence that there were many people gathered there and no one knows whether any one of them was armed or not. There is no evidence of any of them being in a fighting mood. There was no argument preceding the shooting. So, shots could have been fired from anywhere in that open space. It could be those who were within sight or even another person who was not within sight if one considers that these people were in an open space and also the evidence of Dr Loots that the deceased was not fired at a close range but by someone who could have been more than 20 cm away. The deceased in this matter was involved in a fight earlier on with the accused brother. There is no evidence which exclude a possibility of any other person other than the accused firing some shots. Although some parts were illuminated there was also a dark spot.

[35] Without proper investigation and presentation of the case, it may be difficult to unearth the truth when it comes to the killings happening in the underworld of drugs. The fact that the accused was calm and was not armed ads to another possibility that it may not have been him. He also handed himself to the police. The state did not lead evidence of when in relation to him reporting at the police station was he informed that the police were looking for him. The only witness led by the state contradicted himself material on the issue of whether he saw who fired shots or not. His state of sobriety on the day in question is also a matter of concern.

### **Conclusion**

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<sup>5</sup> *R v Blom* 1939 AD 188 at 202:

**Conclusion**

[36] The evidence presented by the State falls far below the threshold in *Lubaxa*<sup>6</sup>'s case.

In the circumstances I come to the conclusion that there is no *prima facie* established against the accused on any of the charges (including competent verdicts) preferred against the him.

**Order**

Accused is found not guilty and he is discharged on all four counts.

  
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D Mogotsi

Acting Judge of the Pretoria High Court

**Appearances**

For the State

Adv. MR Molatudi (DPP)

For the Accused

Ms MMP Masete (Legal Aid)

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<sup>6</sup> *S v Lubaxa* 2001 (2) SACR 703 (SCA) par. 14-15).