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IN THE HIGH COURT

(BISHO)

CASE NO.: CC26/2001

In the matter between:

THE STATE

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versus

1. ANELE JIZANA
2. MKHULULI LUNINGO
3. MALIBONGWE CINGO

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JUDGMENT:

EBRAHIM J: The three accused, Anele Jizana, Mkhululi Luningo and Malibongwe Cingo are charged with one count of murder and an account of robbery with aggravating circumstances as detailed in the indictment. All three the accused pleaded not guilty to these charges and elected in terms of section 115(1) of the Criminal Procedure Act, 51 of 1977 not to indicate the basis of their defence to either of the charges.

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Prior to the State adducing the evidence of any witnesses each of the accused made certain admissions. These were reduce to writing and are set out in **EXHIBITS "A", "B" and "C"**. In terms thereof the accused have admitted the identity of the deceased and that the deceased had died on 22 September 2000 as a result of a gunshot injury to the chest. They also admitted that the deceased did not sustain any further injury from 22 September 2000 until the post-mortem examination was carried out on 28 September 2000. The findings of Dr DT John as set out in the post-mortem report dated 28 September 2000

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have been accepted as being correct. These admissions were duly recorded in terms of section 220 of the Criminal Procedure Act.

Mr Twani who appears for the State then tendered the evidence of certain witnesses. The first witness was Bonginkosi Bethwell Kwinana an inspector in the South African Police Services with 14 years experience. He was the investigating officer in this matter and had arrested the three accused and a person named Bongani Nkonki from whom he had recovered a 9 mm Norinco firearm, namely **EXHIBIT "1"**. He had charged Nkonki with being in possession unlawfully of the firearm as Nkonki was unable to produce a licence to establish that he was entitled to possess the firearm. Inspector Kwinana also recovered a pair of shoes and a belt, namely **EXHIBITS "2" and "3"** from accused no. 3. He stated that the belt had been handed to him by accused no. 3 at the Mdantsane Magistrate's Court and that accused no. 3 had said that he had obtained it from accused no. 2. He took the belt and shoes to the deceased's girlfriend Miss Nomabali Gillie who identified the items as the property of the deceased.

Cross-examination by Mr Gabelana who appears for accused no. 1 and Miss Ntobe who appears for accused no. 2 did not elicit anything new. Cross-examination by Mr Manjezi who appears for accused no. 3 revealed that Inspector Kwinana had recovered the firearm, that is **EXHIBIT "1"**, from Bongani Nkonki on 2 October 2000. The charge of being in unlawful possession of a firearm had been withdrawn against Nkonki as he was to be used as a State witness. Inspector Kwinana insisted that accused no. 3 had approached him and handed the belt to

him. He had recovered the shoes from accused no. 3 who was wearing them. This had occurred in Mdantsane five days after accused no. 3 had been arrested in Cape Town. He then admitted that this took place three weeks after accused no. 3 had been arrested and said that he had been mistaken in saying that it was five days.

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In reply to questions from the Court Inspector Kwinana stated that the serial number on the firearm was only partially visible, this was due to rust. The first and third number of the serial number were indecipherable, while the remaining numbers were as follows: 0 (that is the second number and then from the fourth number onwards) 8984.

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In response to questions during re-examination by Mr Twani he confirmed that the firearm had been sent for forensic ballistic testing and that he had received the report in respect of these tests. In reply to further questions from Mr Gabelana he said that a cartridge case had been found near the body of the deceased, and this had been sent for ballistic tests.

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Nomabali Gillie testified that the deceased had been her boyfriend for about 2 years. Inspector Kwinana had shown her the pair of shoes and the belt and had asked her if they were similar to those which belonged to the deceased. She had indicated that they were and identified the belt as it had cuts on the inside. The shoes she identified by a white line on the side of the soles. The shoes had been worn by the deceased for about 6 months. This witness was not cross-examined by either Mr Gabelana or Miss Ntobe.

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It emerged during cross-examination by Mr Manjezi that she had identified the shoes merely because of the white line of the soles. She had known that the make of the shoes was Barker, but was unaware if there were other models with similar soles.

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Bongani Nkonki testified that on 22 September 2000 some time after 8 pm he was in the company of the three accused. They had intended going to a shebeen, but on arrival they had changed their minds as there were only a few people present. They decided instead to go to NU 9 in Mdantsane where they resided. In the course of walking there they had to pass the premises of a motor vehicle repair business. In a lane opposite these premises they saw a man walking. Accused no. 1 said that the man was an 'imbayi' that is a fool and suggested that they enter the alleyway. The witness Nkonki was reluctant to do so and wanted them to carry on to NU 9. In spite of his objections they entered the lane. Each of the accused was in possession of a firearm and accused no. 3 ordered the man to lie down. The man did not comply and accused no. 1 then shot him. The witness Nkonki says that he ran away when he heard the shot and hid behind some nearby shacks. He heard the deceased exclaimed: "You have finished me gentlemen." He saw the deceased lying on the ground and accused no. 2 and accused no. 3 standing next to the body. Shortly thereafter accused no. 3 came to him and showed him a wallet with two R10 notes inside. Accused no. 2 was carrying a pair of shoes, a belt and a bottle of brandy which he had taken from the deceased. The witness Nkonki was shown **EXHIBITS "2" and "3"** and identified these as the shoes and belt that accused no. 2 had taken from the deceased. He said that he identified

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the shoes by the white line in the soles and the belt because it was black. He also identified the firearm, **EXHIBIT "1"** as the firearm which accused no. 1 had used to shoot the deceased. Accused no. 1 had given the firearm to him when they were at the shacks and had asked him to keep the firearm for accused no. 1. Accused no. 1 was to fetch it later. He had not asked accused no. 1 why he wanted him to keep the firearm.

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After the witness Nkonki had completed his evidence in chief the Court enquired from Mr Twani why the State had not considered him to be an accomplice since if he was an accomplice he should have been informed of the provisions of section 204 of the Criminal Procedure Act, No. 51 of 1977. Mr Twani's response was that the State had not considered the witness to be liable for prosecution for the charges in the indictment. The Court thereupon asked both counsel for the State and the legal representatives of the accused to address the Court in regard to whether or not the witness should at this stage still be informed of the provisions of section 204. After hearing argument the Court ruled that while the witness, Bongani Nkonki, might possibly not be considered to be an accomplice in the commission of the offences of murder and robbery, he was open to being prosecuted as an accessory after the fact or for obstructing the course of justice, or for defeating the ends of justice, moreover he could certainly be prosecuted for being unlawfully in possession of a firearm without a licence to possess same. Accordingly the State should have requested the Court to inform him of the provisions of section 204 of the Criminal Procedure Act prior to him testifying. However, despite the State having failed to do so, the Court

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felt obliged, even at this stage, to convey these provisions to him and consequently proceeded to inform him of the provisions of section 204.

Mr Gabelana thereafter proceeded with cross-examination. It emerged that the firearms in the possession of accused no. 2 and accused no. 3 5 were not loaded with ammunition as the magazines had not been inserted. Nkonki was unable to say why they had cocked their firearms but presumed it was to frighten the deceased. He had run away as soon as he heard the gunshot. Even though he and accused no. 1 slept at the same place he did not find it strange that accused no. 1 had 10 handed the firearm to him for safekeeping. When he was asked to comment on the fact that the cartridge case found at the scene had been subjected to ballistic tests and in terms thereof could not be found that it had been fired from the firearm which the police recovered from the witness, he insisted that this firearm had been used to fire the fatal shot. 15 He insisted further that accused no. 1 had killed the deceased and denied that he was falsely implicating accused no. 1. A man Bulelani and a girl Pumsa were present when accused no. 1 handed the firearm to him.

During cross-examination by Miss Ntobe it emerged that he had looked 20 at the shoes and belt which accused no. 2 was carrying. The shoes were red in colour and had a white line on the soles. The belt was black with a silver buckle. The firearm which accused no. 2 had in his possession was a Star Norinco firearm. He had seen the Colt 45 mm firearm in the possession of accused no. 2 on a previous occasion. He 25 then said that he had made a mistake and that it was in the possession of accused no. 3 who had told him that it belonged to accused no. 2.

Nkonki admitted that he had made a statement to Inspector Kwinana on 7 April 2001. He denied stating therein that he had been in possession of a Colt 45 mm pistol, even when it was pointed out to him that this appeared in the statement. He could not remember very well that he had also made a statement on 3 October 2000. Although he had stated therein that accused no. 2 had been in possession of the Colt 45 mm pistol, this was a mistake. This pistol had been in the possession of accused no. 3. He had also made a mistake in testifying that accused no. 2 had been in possession of the 9mm Star Norinco firearm. It was accused no. 1 who had been in possession thereof as he had stated in his statement. He maintained that accused no. 2 had been in possession of the red shoes, belt and brandy. He denied that he and accused no. 2 had been together earlier that day.

Cross-examined by Mr Manjezi he then said that accused no. 3 had not been in possession of the Colt 45 mm pistol at the time of the offences. This firearm the police had recovered from a man Welilani. He knew it was a Colt 45 mm pistol as accused no. 3 had told him so and had also said it belonged to accused no. 2. He had hidden at the shack when the shot was fired as he was shocked. He had not waited there for the others until they had completed the robbery. He had not been afraid to keep the firearm which accused no. 1 had handed to him. There was no ammunition in the firearm and he had kept the magazine separately. There was no bullets in the magazine either.

In reply to a question the witness referred to: "That thing that we did." When asked by the Court to explain this remark he stated that he had

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meant to say that the incident had happened that Friday. Further cross-examination revealed that he had told the police that he had not carried the firearm, but that accused nos. 1, 2 and 3 had done so. At the time of his arrest he had told the police that accused no. 1 had handed a firearm to him. When he was arrested he had been drinking and could therefore not remember very well what he had been questioned about. He told the police of the firearm, as accused no. 1 had not told them that he had handed the firearm to him. He had told the police that accused no. 1 had killed the deceased, he claimed that accused no. 3 had also told the police this when accused no. 3 was arrested. He was only told that he would be a witness in this case after he had been convicted and sentenced in another trial. He had not been arrested on the charges of murder and robbery, but only for being in possession unlawfully of the firearm. He had told the police everything and denied that his version of the events were untrue. In reply to questions from the Court he said that accused no. 1 was the only person to fire a shot at the deceased. Accused no. 1 had handed the firearm which he had used to shoot the deceased to him, the witness Nkonki. It was this firearm which the police had found at his place. He had realised that accused nos. 1, 2 and 3 were going to rob the deceased when they entered the alleyway in which the deceased was walking. After the shooting he said to the others that they should leave, but did not say anything further. Although he had realised that they had committed a crime, he had not told anyone of what had transpired,

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The testimony of DT John confirmed that he had conducted a post-mortem examination on the deceased on 28 September 2000. He

confirmed his findings as set out in the post-mortem report, **EXHIBIT "G"**. The cause of the deceased's death had been a gunshot wound to the chest. He was not cross-examined by any of the legal representatives.

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The State then handed in **EXHIBIT "H"** which was a report on the ballistic tests carried out in respect of the firearm **EXHIBIT "1"** and another firearm a 9mm short calibre FEG model PA63 semi-automatic pistol. The tests revealed that it could not be established that the 9mm calibre fired cartridge case which had been recovered at the scene of the shooting of the deceased had been fired from either of these weapons.

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This concluded the case for the State.

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Accused no. 1 Anele Jizana testified in his own defence. He denied any knowledge of the murder and robbery and denied that he handed a firearm to Bongani Nkonki. He also denied being in the company of Nkonki and accused nos. 2 and 3 as Nkonki had claimed. Although he and Nkonki were related they were not on good terms. He was not cross-examined by either Mr Gabelana or Miss Ntobe.

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Cross-examination by Mr Twani was essentially on the issue of why Nkonki would falsely implicate him and of the fact that his defence amounted to a bare denial. Apart from this nothing else of note emerged.

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This concluded the case for accused no. 1.

Accused no. 2, Mkhululi Luningo, also testified in his own defence. He admitted that he had briefly been with Bongani Nkonki during the day on 22 September 2000, but denied being present when the deceased was robbed and killed. He had not been in the company of Nkonki and accused nos. 1 and 3 that evening. He denied that he had been in possession of a Colt 45mm pistol at any time, and had not shown such a firearm to Nkonki. Neither Mr Gabelana or Mr Manjezi cross-examined accused no. 2.

The cross-examination by Mr Twani was confined putting to him the allegations made by Nkonki to the effect that he was involved in robbing and killing the deceased. He denied these allegations and claimed that Nkonki was lying.

This concluded the case for accused no. 2.

Accused no. 3, Malihongwe Cingo, also testified in his own defence. He also denied any involvement in the robbery and murder of the deceased. He had not been with Nkonki as the latter had claimed. He admitted that he was wearing the shoes, **EXHIBIT "2"**, when he was arrested, the shoes had been taken from him by Inspector Kwinana. He denied that these shoes belonged to the deceased. He also denied that he handed the belt to Inspector Kwinana.

It emerged during cross-examination by Mr Twani that accused no. 3's aunt had bought the shoes for him when he visited her in Cape Town. He had told Inspector Kwinana that the shoes belonged to him, but when Inspector Kwinana swore at him he gave him the shoes and has claimed that he was now being falsely implicated. Inspector Kwinana had also asked him to be a State witness, but he had refused. He had stolen the belt at the police station and given it to accused no. 2 who then gave it to Inspector Kwinana. The belt had been in a room with various other items belonging to prisoners. He had been told to fetch his own property from the room and had then taken the belt as well.

This concluded the case for accused no. 3.

Counsel for the State and the legal representatives of all the accused addressed argument to the Court. I do not intend to recount these arguments save to say that Mr Twani contended that Bongani Nkonki was a truthful witness and that his evidence was reliable. His evidence implicated all three the accused in the murder and robbery and they should therefore be convicted of these crimes. The legal representatives for the accused contended that Nkonki was an untruthful witness. His evidence was unreliable and could not be accepted. In the absence of his evidence the remaining evidence was insufficient to link the accused to the crimes. Moreover the evidence of Bongani Nkonki was uncorroborated. Accordingly the accused would be entitled to be acquitted.

In evaluating the evidence adduced by the State it is clear that the only

direct evidence linking the accused to the offences is that of Bongani Nkonki. His claim that the firearm which the police recovered from him had been used by accused no. 1 to shoot the deceased has not been corroborated by the forensic ballistic tests carried out on the weapon and the cartridge case found at the scene. He also contradicted himself in regard to whether accused no. 2 or accused no. 3 had been in possession of a Colt 45 mm pistol at the time of the robbery and murder. This pistol is of course not the murder weapon. Even though he says that accused no. 1 handed the murder weapon to him in the presence of two people, namely Bulelani and Pumsa, the State failed to call either of them to corroborate his story in this regard. His claim that he had no knowledge of firearms was patently contradicted by his own evidence. He referred with consummate ease to the makes of firearms and the calibers of firearms. It is clear that he tried to mislead the Court that he had no knowledge or very little knowledge of firearms. Then while he claims that he was shocked when the shot was fired and ran from the scene and hid behind the shack, he willingly and without question accepted to keep the firearm when accused no. 1 supposedly handed it to him. His reaction to the shooting of the deceased and the robbery is equally puzzled. At no stage did he discuss it with any of those involved, nor make any other enquiries with regard thereto. Nkonki was a very poor witness. His replies to straight forward questions were evasive or contradictive. His explanation of what occurred and the conduct of himself and the accused was filled with improbabilities. His story was unconvincing. It is clear that he has failed to take the Court into his confidence and has not told the full story of what occurred that evening. There was no apparent reason for him not to be open and

honest with the Court. If he was innocent of any wrongdoing as he claimed one would have expected him to be completely open and frank with the Court and not have attempted to paint the picture that at the end of the day he has left the Court completely confused as to what he was trying to convey. Significantly at one stage he inadvertently admitted that he had been involved in what had taken place. But thereafter proceeded to deny that this is what he had meant to say. I am not persuaded that he has been truthful in relating the events of that evening and that his evidence can be relied upon as being the truth.

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The identification of Miss Gillie of the shoes and the belt as being the property of the deceased is questionable to say the least. At best her identification of these items can only be said to establish that they are similar to a pair of shoes and a belt that belonged to the deceased. The identifying mark, namely the white line on the sole of the shoe, clearly appeared to be a normal type of mark on such a shoe and there was nothing significant in that whatsoever. It forms part of the sole of the shoe. This so-called identifying mark goes no further than that. The same applies in respect of the belt. The identifying marks are nothing more than normal wear and tear on the belt. Her claim that these items were the property of the deceased cannot be accepted as being reliable.

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The fact that Inspector Kwinana found accused no. 3 wearing the shoes is insufficient to link him to the murder of the deceased. Similarly even if Inspector Kwinana had obtained the belt from accused no. 3, which accused no. 3 has denied is the case, it is also insufficient to proof his guilt. Even though all three accused in their testimony simply denied

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any involvement in the crimes this in itself is not sufficient for a Court to find that they are guilty of the crimes of which they had been charged.

There is no onus on them to prove their innocence. It is the State that bears the onus of proving their guilty beyond a reasonable doubt. The evidence of Bongani Nkonki is uncorroborated and of a poor quality. It would be unsafe to rely on his evidence to prove the guilt of the accused.

The evidence adduced by the State has failed to reach the standard of proof that requires that their guilt be shown beyond a reasonable doubt.

At best it has created a suspicion that the accused may have been the perpetrators of the crimes set out in the indictment, but an accused cannot be convicted on mere suspicion. The doubt I am left with in terms of their guilt is sufficient and reasonable in the circumstances.

I am not required to find that they are completely innocent, but as soon as there exists a reasonable doubt of their guilt they are entitled to the benefit of such doubt no matter how much I or anyone else may suspect that they are guilty. The fact that they have simply raised a bare denial as a defence does not assist the State. I emphasise that the State has a duty to prove their guilt beyond a reasonable doubt.

I need to mention that I have not been impressed with the level of professionalism with which the police conducted their investigation in these crimes. If greater diligence had been shown additional evidence could surely have been obtained in order to facilitate a more successful prosecution of these offences. I must also express my concern that the failure of the prosecution to identify the need for additional evidence such as the testimony of the persons Bulelani and Pumsa for example before proceeding with the prosecution of the trial. Similarly the failure to recognise that Bongani Nkonki should have been regarded as an

accomplice right from the outset must be criticised.

In the final analysis, in view of the poor quality of the evidence adduced
by the State I find that the guilt of the three accused has not been 5
proved beyond a reasonable doubt.

Accordingly ALL THREE ACCUSED ARE FOUND NOT GUILTY AND
DISCHARGED ON BOTH THE OFFENCE OF MURDER AND THAT OF
ROBBERY WITH AGGRAVATING CIRCUMSTANCES. 10

Y EBRAHIM	:	JUDGE	
HIGH COURT	:	BISHO	15
(2 AUGUST 2001)			