

IN THE HIGH COURT

(BISHO)

CASE NO.: CC52/03

DATE: 9 SEPTEMBER 2003

In the matter between:

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THE STATE

versus

LULAMILE KAMA

JUDGMENT

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EBRAHIM J

The accused, Lulamile Kama, has been charged with one count of murder; one count of robbery with aggravating circumstances; one count of theft; one count of contravening section 2 read with certain other provisions of the Arms and Ammunition Act, 75 of 1969; namely that he unlawfully and intentionally possessed a firearm without the necessary licence to do so; and one count of contravening section 36 read with certain other provisions of the aforesaid Arms and Ammunition Act, 75 of 1969, namely that he unlawfully and intentionally possessed ammunition while not in lawful possession of an arm capable of firing the ammunition.

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The accused pleaded not guilty to all the charges and elected, in terms of section 115(1) of the Criminal Procedure Act, 51 of 1977, not to disclose the basis of his defence to all the charges save for count 2. In regard to the charge of robbery the basis of the accused's defence, as disclosed by Ms Wotshela who appears for him, was that the goods mentioned in the charge had been left at his shack by one Andile Matoti.

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The accused then left these goods at the home of Sivuyile Jali for safekeeping. On his arrest the accused had told the police where the goods could be found. The accused was asked by the Court whether he confirmed what Ms Wotshela had conveyed as the basis of his defence, and he confirmed that it was correct. 5

Ms De Kock, who appears for the State, tendered in evidence the post-mortem report in terms of section 212(4) of the aforesaid Criminal Procedure Act. Ms Wotshela confirmed that the defence had no objection to the admission of the report and further confirmed that the contents of the report were also being admitted as being correct. This 10 report is **EXHIBIT "A"**.

The first witness to testify for the State was Nowest Mpakati, the sister of the deceased, Jongephi John Tom. Her testimony was very brief and was to the effect that she last saw the deceased alive on 28 June 2002. At that stage the house was also in order. On 1 July 15 2002 she returned and then discovered that her brother was dead and that a television set and hi-fi system had been removed from the house. A few days later she identified the items as those of her brother at the police station.

The only issue which Ms Wotshela canvassed during cross- 20 examination was if the witness knew who had removed the items. Ms Mpakati replied that she was unaware who had done so, but had been told by the police who the individual was.

She confirmed in re-examination that the correct address of the house was 8434 NU3, Mdantsane. 25

In reply to a question from the Court she stated that the hi-fi system and television set had been in the house on 28 June 2002.

Sivuyile Jali was next to testify. The following is a summary of his testimony: He and the accused had been friends prior to the accused moving to another address. On a Sunday, towards the end of June 2002, at about 8 pm he was watching television when he heard the door of the shack outside the house being opened. He went to investigate and found the accused coming out of the shack. He asked the accused what was happening and the accused replied that he had placed some items in the shack. When he asked the accused why he had not asked for permission the accused merely said that he would return later and then left. Accompanied by his brother the witness entered the shack and discovered that a television set and a hi-fi system had been left there. Two days later the accused returned but instead of removing the goods said that he would come back later to fetch them. But the accused never returned. The witness could not remember the make of the hi-fi system, but said that the name of the television set was Sinotec. Some time thereafter, and during his absence, the items were removed by the police. After his arrest the accused had telephoned him one day and asked him to change the date on which he had brought the goods to the shack. The witness says that he refused to do this.

During cross-examination by Ms Wotshela he was questioned on the statement, namely **EXHIBIT "B"**, that he had made to the police. In the statement he had said that it was a Sony hi-fi system and that he did not know what the make of the television set was. The witness replied that he had subsequently remembered that it was a Sinotec television set. In reply to further questions he stated that the accused had not told him where he had obtained the television set and hi-fi system. The accused had also not told him that he wanted to store the goods there

for safekeeping. He denied that the accused had been with him the previous day. He disputed the accused's claim that he had not returned a few days later. He insisted that the accused had telephoned to ask him to change the date on which he had brought the goods.

During re-examination he said that when the accused telephoned his sister, that is the witness's sister, had answered the telephone.

Siphiwo Ernest Tetwa, an inspector in the South African Police Services testified that he knew the late Inspector Xolela Kakaza. On 28 August 2002 he had taken a statement from Inspector Kakaza.

Mrs De Kock then indicated that the State intended introducing the statement as evidence. Ms Wotshela informed the Court that the

defence did not have any objection to the State doing so. The statement, **EXHIBIT "C"** was shown to Inspector Tetwa who identified it as the statement that the late Inspector Kakaza had attested to before

him. The witness testified further that as a result of information that he received he arrested the accused at a shack at NU3 on Friday, 5 July 2002. He had also conducted a search of the shack occupied by the accused and found a diary with the name "X Kakaza" on it. He had recognised the handwriting in the diary. It was that of Xolela Kakaza,

the person whose statement he had taken. In addition to the diary he found a firearm manual and a cleaning kit for a firearm. These items had later been identified by Xolela Kakaza as his property. The items were

entered in the SAP 13 register by the witness. After arresting the accused he and the accused had a conversation. As a result thereof the accused took him to a shack at the home of Sivuyile Jali at NU3 in Mdantsane. Inside the shack he found a hi-fi system, a television set, a TV aerial and a remote control for the television set. These items were

identified by Ms Nowest Mpakati as the property of her deceased's brother, Jongephi John Tom. At no time had the accused told him that the goods had been given to him by someone else.

During cross-examination it emerged that he had asked the accused where he had obtained these items. The accused had told him that he got the items from the deceased's house, no. 8434. The witness had recorded this in his own statement. When he conducted a search he had been accompanied by other policemen, but he was the person who found the items in the accused's shack and then showed them to the accused. These items were the diary and the firearm cleaning kit. The accused was being untruthful if he claimed that this had not happened. He confirmed that the accused had conveyed to him that he had stored the hi-fi system, television set, aerial and remote control at the shack at the house of Sivuyile Jali.

In reply to questions from the Court, Inspector Tetwa stated that the accused was staying in the shack where the diary and cleaning kit for the firearm had been found. It was at the offices of the police in West Bank that the accused had told him about the television set and hi-fi system at the shack at Sivuyile's place.

Zukile Welcome Bawuthi testified that he was a captain in the South African Police Services and a member of the Serious Violent Crime Unit in East London. On 5 July 2002 he accompanied Inspector Tetwa and other policemen to a house no. 7968 at NU3 Mdantsane. They were investigating a case of murder. Present at the premises were the accused and his girlfriend. They obtained permission to search the premises. During the search Inspector Tetwa found a diary with the name of the late Inspector Kakaza on it. He also found a cleaning kit for

a firearm and a firearm manual. All these items were shown to the accused.

During cross-examination Captain Bawuthi stated that the purpose of the search had been to look for a firearm, but they did not find it. He refuted the accused's claim that the accused had not been invited to watch while they searched. He also denied that they had brought the diary, the firearm cleaning kit and manual with them. These items had been found in the shack during the search. He conceded that the shack may not have been numbered 7968 and also further conceded that there might not have been a number on it at all.

In reply to the Court's questions Captain Bawuthi said that this had been the only occasion when he encountered the accused and his girlfriend in the shack.

Nomawhethu Jali testified that she was the sister of Sivuyile Jali. She knew the accused as he used to visit her brother. She could not recall when the accused was arrested. However, during this year, that is 2003, the accused had telephoned her home and she then spoke to him. The accused had identified himself and she then handed the telephone to Sivuyile and left the room.

During cross-examination it emerged that the accused had telephoned her home a number of times. The last time he had done so was not long before his arrest, but she could not remember the date.

Kolekile Mnqamelo testified that he was an inspector in the South African Police Services. On 30 June 2002 he was called to the murder scene at the house 8434 Mdantsane at about 21:10 pm. He in turn called an Inspector Charles to scene who took certain photographs. These appear in **EXHIBIT "D"**. At the scene he found the deceased lying

on the floor. His body was still limp and there was a bullet wound in the area of his waist.

Cross-examination did not reveal anything of significance.

In reply to questions from the Court he confirmed that the room, as depicted in the photographs, was in disarray. The drawers of the dressing table had been opened and clothes and blankets had been strewn around.

During re-examination he stated that he had established that a television set, a hi-fi system and a firearm, all belonging to the deceased, were missing.

Dr Dominic Turlanka John testified that he was the senior medical officer at Cecilia Makiwane Hospital. On 2 July 2002 he conducted a post-mortem examination on the body of the deceased and prepared a written report, which is **EXHIBIT "A"**. His examination revealed that the deceased had died as a result of a gunshot injury to the abdomen. The bullet had entered the left side of the abdomen and travelled downwards and to the opposite side of the body and was about to exit.

Dr John was not cross-examined and his testimony was left unchallenged.

Thereafter the defence handed in a document **EXHIBIT "E"** setting out various admissions by the accused in terms of section 220 of the aforesaid Criminal Procedure Act. These related to the identity of the deceased and that the wound and injuries he sustained had caused his death. It was also admitted that he had not sustained any further injuries prior to the post-mortem examination being carried out. The findings and conclusions of Dr John were also admitted as being correct.

Mrs De Kock then moved for an amendment to the indictment to

reflect the number of the house in count 1 as 8434 instead of 5434. She also sought the deletion of the word 'took' in count 3 and the substitution therefor of the phrase 'knowingly had in his possession stolen goods, to wit'. The defence did not raise any objections to the application and the amendments were thereupon granted. 5

Thereafter the State case was closed.

Ms Wotshela then brought an application in terms of section 174 of the aforesaid Criminal Procedure Act for the accused to be discharged in respect of all the charges. This was opposed by the State. After considering the submissions of the defence and the State the Court 10 refused the application.

The accused elected not to testify and the defence case was closed without any evidence being tendered.

Both the State and the defence addressed the Court on the merits. I shall not repeat the submissions which have been made and confine 15 myself to the gist thereof. Mrs De Kock contended that the State's evidence stood uncontested as the accused had not testified. On the basis of the evidence certain inferences could be drawn. The accused, she said had admitted to Inspector Tetwa that he had obtained the television set and hi-fi system from the home of the deceased. In the 20 absence of any further explanation from the accused the inference was that the accused had murdered the deceased and robbed him of these items. Since the deceased had been shot the assailant must have been in possession of a firearm and ammunition. The fact that the firearm and ammunition had not been recovered did not preclude a conviction on 25 these charges. She contended, therefore, that the accused should be convicted of all the charges.

Ms Wotshela on the other hand contended that the accused should be acquitted of all the charges. The evidence did not implicate the accused in the murder and robbery of the deceased, nor did it show that the accused had been in possession of a firearm and ammunition. The accused could also not be convicted of the theft of the television set and 5 hi-fi system as these had been handed to him for safekeeping by someone else. The accused could also not be convicted of the theft of the diary and the firearm cleaning kit. She submitted that the police had lied about finding these items at his house. The police, she submitted, had planted these items there during the course of the search. 10

In evaluating the State case the following is evident:

1. The deceased did not die of natural causes. He had died as a result of a gunshot injury to his abdomen.
2. The deceased in all likelihood died a few hours before his body was discovered at about 9pm or 10 pm on 30 June 2002. 15
3. The room in which the deceased's body was found was in disarray. It had the appearance of having been ransacked. Clothing, blankets and other items were strewn around. The drawers of a dressing table were standing open and the contents were in disorder. 20
4. The television set, hi-fi system, remote control and TV aerial which the police recovered in a shack at the house of Sivuyile Jali were the property of the deceased. These items had been at the house of the deceased until 28 June 2002 at the very least.
5. On a Sunday, most probably 30 June 2002, the accused arrived 25 at the house of Sivuyile Jali and stored these goods in the shack on the premises.

6 The accused, himself, informed the police that these goods were
 stored in the shack and in consequence thereof the goods were
 recovered. These goods were thereafter identified by the
 deceased's sister as the property of the deceased.

7 A diary and a firearm cleaning kit, the property of the late Xolela 5
 Kakaza were found in a shack which was the home of the accused
 during the course of a search by the police for a firearm.

8. The police did not recover any firearm, nor any ammunition
 relating to the offences in the indictment.

What the evidence establishes, therefore, is that the deceased was 10
 murdered. There is, however, no direct evidence of who perpetrated
 this crime. The State contended that the inference can be drawn that
 the accused is the perpetrator since he had admitted that he had got the
 television set, hi-fi system and the remote control and TV aerial from the
 deceased's house. I do not agree. The fact that the accused may have 15
 taken the items from the deceased's home, does not enable one to
 simply infer that he shot and killed the deceased. There is no evidence
 which indicates or permits the inference to be drawn that the accused
 took the items when the deceased was shot. It cannot reasonably be
 excluded that the accused may have taken the items in an incident quite 20
 unrelated to the killing of the deceased and without having associated
 himself with the deceased's murder. Even though one may be
 suspicious that he was involved, there is insufficient evidence to justify
 the inference that he is the person who murdered and robbed the
 deceased. The evidence also falls short of permitting the inference to 25
 be drawn that the accused associated himself, or had common purpose
 with, the person or persons who perpetrated the murder and the robbery.

Despite the accused electing not to testify his failure to do so does not strengthen the State's case against him in respect of the charges of murder and robbery. The State case is based on circumstantial evidence and is dependent on certain inference being drawn in order to prove his guilt on these two charges. As I have stated, such inferences cannot reasonably be drawn.

Having said that, there is, however, the accused's admission to Inspector Tetwa that he had got the items from the deceased's house.

This evidence emerged during cross-examination and was not disputed on behalf of the accused. Ms Wotshela submitted that the accused

claimed that he was merely keeping the goods for another person namely Andile Matoti who had left them at his place. Even though this was

disclosed in terms of section 115(1) of the aforesaid Criminal Procedure Act, 51 of 1977 as the basis of the accused's defence on the charge of

robbery it does not assist him. The section 115 statement is not evidence. Accordingly the only version before the Court is that which

had emerged from the evidence tendered by the State. There is *prima facie* evidence that the television set, the hi-fi system, the remote control

and the TV aerial were wrongfully and unlawfully removed from the house of the deceased. That is, that they were stolen. While the

evidence of the State witnesses does not reveal that the accused was seen removing the goods he admitted to Inspector Tetwa that he had

done so. If the accused had wanted to dispute this admission he should have testified in his defence. He elected not to do so. On the basis of

the evidence the conclusion is justified that the accused stole these items from the deceased's home. There is no evidence of any nature to

suggest that it was someone else, let alone a person named Andile

Matoti.

Sivuyile Jali was not the best of witnesses. Yet, despite his shortcomings as a witness, there is no doubt that he told the truth when he testified that the accused had stored the television set, hi-fi system, remote control and TV aerial in a shack in the yard of his, that is Sivuyile's, property. Indeed it was specifically put to Sivuyile Jali during cross-examination that the accused had brought the goods there precisely for that purpose. His evidence substantiates that the accused was in possession of the goods and that the accused intended fetching the goods at a later stage. I accept that he has told the truth in this regard. While the evidence fails to establish that the accused robbed the deceased it proves beyond a reasonable doubt that the accused stole the television set, hi-fi system, remote control and TV aerial.

The position in respect of count 3 which is the theft of a diary and a firearm cleaning kit is similar. These items were found in his house and in his presence. The suggestion by Ms Wotshela that the items were planted there by the police during the course of their search of the premises is wholly unsubstantiated. Here, too, if the accused wanted to dispute the evidence adduced by the State he should have testified in his defence. At the very least he could have called his girlfriend to testify on his behalf. In electing not to do so the State case has been left unchallenged. Accordingly the conclusion is justified that the accused was in possession of the diary and firearm cleaning kit which had been stolen from Xolela Kakaza.

Miss Wotshela submitted that Inspector Tetwa and Captain Bawuthi were lying witnesses and were falsely implicating the accused in the theft of the diary and the firearm cleaning kit. However, when

asked by the Court to provide substantiation for this submission Ms Wetshela was unable to do so. I am not surprised, since there was no factual basis for such a conclusion. Both Inspector Tetwa and Captain Bawuthi were credible witnesses and I find their testimony to be reliable. There was no indication that they were untruthful, or that they have conspired to tell a false story. I find that they were honest witnesses and that they had truthfully described what had occurred when they searched the accused's premises. They corroborated each other. I find therefore that the State has proved that the accused was in possession of the diary and the firearm cleaning kit which was the property of Xolela Kakaza.

In the absence of any explanation from the accused in regard to how these items came to be in his premises the only reasonable inference is that he stole the items from Xolela Kakaza. The evidence establishes this beyond a reasonable doubt.

In regard to counts 4 and 5, namely the possession of a firearm without the necessary licence to do so, and the unlawful possession of ammunition, Mrs De Kock has rightly conceded that the evidence does not establish actual possession on the part of the accused. The basis upon which the State seeks a conviction is that possession should be inferred since the deceased had died from a gunshot injury. She contended that were the Court to find that the accused had shot the deceased then the Court could infer that the accused must have been in possession of a firearm and ammunition. I am not persuaded that such reasoning would have been permissible, even if the Court had found that the accused had murdered the deceased. The State has not produced a firearm nor any ammunition. In the absence thereof a conviction

could hardly be justified. Accordingly any further speculation in this regard is unnecessary. The evidence fails to establish that the accused is guilty of the offences set out in counts 4 and 5.

In the result the accused is found guilty of the following:

- A. In respect of count 2 of the offence of theft, which is a competent verdict on a charge of robbery in terms of section 260 of the Criminal Procedure Act, 51 of 1977. 5
- B. In respect of count 3 of the offence of theft as charged.

In regard to counts 1, 4 and 5 the accused is found not guilty and discharged on the charge of murder and of contravening sections 2 and 36 of the Arms and Ammunition Act, 75 of 1969. 10

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JUDGE, BISHO, HIGH COURT

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