

Sneller Verbatim/Jhb/JduP

IN THE HIGH COURT OF SOUTH AFRICA(WITWATERSRAND LOCAL DIVISION)JOHANNESBURG

CASE NO: 200/00

2001.03.29

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DELETE WHEN ENTERED INTO APPLICATION	
(1) REPORTABLE	<i>no</i>
(2) OF INTEREST TO OTHER JUDGES	<i>no</i>
(3) REVISED	<i>✓</i>
DATE <i>21/4/2001</i>	SIGNATURE <i>[Signature]</i>

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In the matter between

THE STATE

and

ANDREW MATSHIMELA

Accused

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J U D G M E N T

WILLIS, J: The accused, Andrew Matshimela, stands indicted on six different counts.

The first count is murder, it being alleged that on or about 23 July 1997, and at or near Alexandra in the district of Randburg, the accused did unlawfully and intentionally kill Albert Masendamela.

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The second count is theft, it being alleged that upon or about the date, and at or near the place mentioned in count 1, the accused did unlawfully and intentionally steal an R5 assault rifle, with ammunition, the property of the South African Police Service.

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The third count is the unlawful possession of a machine gun, in contravention of section 32(1)(a) read with sections 1 and 39 of Act 75 of 1969, it being alleged that upon or about the date and at or near the place mentioned in count 1, the accused did unlawfully have in his possession a machine gun, to wit an R5 assault rifle.

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The fourth count is unlawful possession of ammunition, in contravention of section 32(1)(e) read with sections 1 and 39 of Act 75 of 1969, it being alleged that upon or about the date and at or near the place mentioned in count 1, the accused did unlawfully have in his possession ammunition, to wit an unknown amount of 5,56 x 45mm rounds which were intended to be fired from a machine gun.

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The fifth count is theft, it being alleged that upon or about 1 September 1997, and at or near Alexandra in the district of Randburg, the accused did unlawfully and intentionally steal a motor vehicle, to wit a Toyota Corolla, with registration SHS832T, the property of Maureen and/or Michael Louis Eskatchovitch.

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The sixth count is unlawful possession of counterfeit bank notes, in contravention of section 2(d)(i) of Act 16 of 1965, it being alleged that upon or about 1 September 1997, and at or near Lombardy West in the district of Johannesburg, the accused did unlawfully have in his possession 5 x R200 forged bank notes without lawful authority or excuse.

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The accused pleaded not guilty to all counts. He exercised his rights in terms of section 115 of the Criminal Procedure Act, 51 of 1977, not to give any plea explanation. He was represented throughout by Ms Mogolane, an advocate of this court.

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The accused was, at the time of commission of these crimes, a sergeant in the South African Police Service. He was stationed at Alexandra.

It is common cause that the accused shot and killed the deceased, Albert Masendamela on 23 July 1997 in Alexandra. It is common cause that he did so by firing an R5 rifle, which is a machine gun. It is common cause that he obtained this rifle from the police station at which he was stationed. It is common cause, and appears clearly from the evidence as a whole, that the deceased was shot and killed as a result of a bullet wound that entered his body from the back. Indeed, it is clear that the deceased was running away from the accused at the time that he was shot and killed.

The evidence of Superintendent Meyer is important. He had been in the police service for some 20 years, and was stationed at the time in Pretoria in the Public Order Unit. He approached the accused on 1 September 1997 at the Alexandra police station, whereupon the accused attempted to slip out from a side door. His evidence was that the accused pointed out to him a Toyota Corolla motor vehicle which he was using. It was clear to him that this vehicle was a stolen vehicle. He also found in that vehicle an R5 assault rifle. It is clear that this R5 assault rifle was not the one which had been used to shoot at the deceased. It had a different serial number from that firearm.

The records at the Alexandra police station did not show that the accused had removed either of these R5 assault rifles with the permission of those in charge. There was no record whatsoever in any of the registers kept for this purpose of the accused having "booked

out" these firearms.

The accused was arrested there and then on the grounds of being in possession of a stolen motor vehicle. They thereupon went to the home of the accused which was occupied by him, living upon his own. This was at 34 Lombardy West Townhouses, Glasgow Road. In the house were found an unusually large number of watches, and were in excess of the number that a person would ordinarily be expected to keep for private use. He also found five forged R200 bank notes and a .38 revolver in respect of which the accused was unable to show any licence.

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The director, Matibi, also stationed at the Alexandra police station, confirmed that there was absolutely no record whatsoever of the accused having lawfully removed an R5 assault rifle from the Alexandra police station. He testified that it was only in the most unusual and exceptional of circumstances, where there were especial dangers, that policemen were allowed to use R5 assault rifles in the course of their duties.

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It is clear from the evidence as a whole that there had been an ongoing dispute between the accused and the deceased over a Toyota Corolla vehicle which the accused had bought from the deceased. The accused alleges that on the day before he shot and killed the deceased, the deceased together with another person had hijacked him and robbed him of his vehicle and his police issue firearm. He says that the next day he came upon the deceased. He saw the deceased reach in the direction of his hip, which was covered by a shirt, believed that he was in danger, and thereupon shot the

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deceased. He said that he had not intended to kill the deceased but had aimed for the lower part of his body, but the (inaudible) of the firearm, after the first shot was fired, caused it to lift in the air and hence the fatal bullet hit the deceased.

The accused said that the vehicle in question, which he had been driving on 1 September 1997, had been given to him as security in respect of the deposit which he had paid for the vehicle which he had originally bought from the deceased. He had kept this vehicle in a safe place, and by a remarkable coincidence the first time that he had driven it since it had been given to him was on 1 September 1997 when he intended to return it to the family of the deceased.

There are a number of unsatisfactory aspects to the accused's version.

It is incredible to believe that he, as an experienced police officer, could believe that it would be appropriate for him to investigate an alleged crime of robbery perpetrated against himself. There is no record of the accused having reported the alleged robbery of the motor vehicle and the firearm on 22 July 1997. Remarkably he cannot recall who he reported the alleged robbery of the vehicle and firearm to, although he says that he reported it at the Alexandra police station where he worked.

Statements made by the accused, lodging a complaint in respect of this alleged robbery, contain a number of contradictions and inconsistencies with his evidence in this court.

Despite his extensive experience as a police officer he would have us believe that he did not suspect that the Toyota Corolla which

he was driving on 1 September 1997 was a stolen vehicle. He nevertheless concedes that the chassis number had been removed from the windows of the vehicle in question, and that this immediately would alert a police officer to the possibility of the vehicle having been stolen.

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It seems to me that in all probability the complaint about the alleged robbery of the vehicle and firearm was laid only after he had killed the deceased. It is extraordinary that the deceased would have hijacked the accused to obtain possession of this vehicle. The accused and the deceased were well-known to one another, and therefore it is obvious that it would have been a simple matter for the accused to have arranged the arrest of the deceased immediately after the hijacking, or at the very least early in the morning of 23 July 1997.

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I accept however that the evidence as a whole suggests that the deceased did unlawfully deprive the accused of his possession of both this firearm and the vehicle. This does not necessarily mean that this occurred as a result of a robbery, or that it occurred in the alleged hijacking.

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The accused's denial that he was in possession of the counterfeit cheques as well as the revolver, at his home, is rejected. I also reject his version that he was lawfully in possession of the R5 assault rifle that was used to shoot and kill the deceased.

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I accept the evidence of Superintendent Meyer, that it was clear that the vehicle which the accused was driving on 1 September 1997 was a stolen vehicle, and that in the circumstances the inference is overwhelming that the accused must have been aware of the fact that

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it was a stolen vehicle.

Documents were handed to court indicating *prima facie* that Tebogo Debrah Masendamela, the sister of the deceased, had been at the material time the owner of a Toyota Corolla. She impressed me as a credible witness, and denied having been the owner of such a vehicle at that time. These papers do not indicate that necessarily that was the vehicle which the accused was driving on the day in question. Nevertheless, as I have already indicated, Superintendent Meyer gave absolutely credible evidence that the vehicle in question was obviously a stolen one. A theft is a continuing offence and therefore the accused, knowing that the vehicle was a stolen one and using it, continued in the act of theft thereof. 5 10

It is therefore clear from the evidence as a whole that the accused must have stolen the R5 assault rifle which was used to kill the deceased, and accordingly that he is guilty on count 2, the count of theft. 15

It is also clear that he must be found guilty on counts 3 and 4, the unlawful possession of arms and ammunition.

For the reasons I have already outlined above he must be found guilty of the theft of the Toyota Corolla having registration number SHS832T. 20

It is also clear that he must be found guilty of unlawful possession of counterfeit bank notes.

With regard to the first count, the murder count, it is as I have already indicated common cause that the accused shot and killed the deceased. It is also common cause that he must have shot and killed 25

the deceased, while the deceased was running away from him, with his back turned towards him. Accordingly the accused could not reasonably have believed that his life was in danger. I also am of the view that he could not reasonably believe that he was entitled to shoot at the deceased, because he was fleeing, as a suspect on an alleged charge of robbery. The accused on his own version of events was fully aware of the fact that the R5 assault rifle was a lethal weapon. He said that he did not intend to kill the deceased. Nevertheless, when you fire a machine gun upon a person, a person such as he trained as a police officer must have foreseen, and by necessary inference did foresee, the possibility of death ensuing, and nevertheless continued recklessly with his conduct of shooting at the deceased.

Accordingly in my view the form of intention, when the accused shot at the deceased, would have been *dolus eventualis* at the very least. All the elements for the crime of murder have therefore been established.

I accept that the accused may well have acted in a moment of great anger and under great stress. This cannot, as a matter of law, render an otherwise unlawful act, lawful.

Will the accused please stand while I pronounce verdict on each of the six counts:

Count 1: the murder of Albert Masendamele on 23 July 1997, you are found guilty as charged.

Count 2: the theft of the R5 assault rifle, you are found guilty as charged.

Count 3: the unlawful possession of a machine gun in contravention of section 32(1)(a) read with sections 1 and 39 of Act 75 of 1969, you are found guilty as charged.

Count 4: the count of unlawful possession of ammunition in contravention of section 32(1)(e) read with sections 1 and 39 of Act 75 of 1969, you are found guilty as charged.

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Count 5: the theft of the Toyota Corolla, having registration number SHS832T, you are found guilty as charged.

Count 6: the charge of unlawful possession of counterfeit bank notes in contravention of section 2(d)(i) of Act 60 of 1965, you are found guilty as charged.

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ON BEHALF OF THE STATE:

ADV THENGA

ON BEHALF OF THE ACCUSED:

ADV MOGOLANE

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