

Sneller Verbatim/lks

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO: SS 5/01

2002-03-26

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18/4/2002

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In the matter between

THE STATE

and

BRIAN MAKWELA

Accused

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J U D G M E N T

WILLIS, J: Brian Makwela, to whom I shall hereinafter for the sake of convenience refer as the accused, stands indicted on 6 separate counts.

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The first count is robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977, it being alleged that upon or about 13 April 1998, and at or near No. 4 Davidson Road, Bedfordview, in the district of Germiston, the accused did unlawfully and intentionally assault Mark Williams and did there and then with force take out of his possession a Toyota Camry motor vehicle with

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registration number FCZ 852GP, a Seiko wrist watch, a ring, a .38 Special Ruby revolver with serial number 89375, his property or property in his lawful possession and did thereby rob him of the same, aggravating circumstances as defined in section 1 of Act 51 of 1977 being present.

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Count 2, attempted robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977, it being alleged that upon or about 16 September 1998, and at or near 45 Glanville Avenue, Cyrildene, in the district of Johannesburg, the accused did unlawfully and intentionally assault Sergio Antonio Giovanni Bonanni and/or Ivano Bonanni and did there and then with force attempt to rob Sergio Antonio Giovanni Bonanni and/or Ivano Bonanni of a Volkswagen Caravelle motor vehicle with registration number DYR 482GP, their property or property in their lawful possession, aggravating circumstances as defined in section 1 of Act 51 of 1977 being present.

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Count 3, murder, it being alleged that upon or about the date and at or near the place mentioned in count 2, the accused did unlawfully and intentionally kill Sergio Antonio Giovanni Bonanni.

Count 4, robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977, it being alleged that upon or about 17 September 1998, and at or near No. 58 9th Avenue, Orange Grove, in the district of Johannesburg, the accused did unlawfully and intentionally assault Irma Lightfoot and did there and then with force take out of her possession a Nissan Sani motor vehicle with registration number CVZ 809GP, two vacuum cleaners, one wall

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mirror, two paintings, one tapestry, one iron, one Microwave oven, her property or property in her lawful possession and did thereby rob her of the same, aggravating circumstances as defined in section 1 of Act 51 of 1977 being present.

Count 5, a contravention of section 2 read with sections 1 and 5
39 of the Arms and Ammunition Act No. 75 of 1969, it being alleged
that upon or about the dates and at or near the places mentioned in
counts 2, 3 and 4, the accused did unlawfully possess a firearm, to
wit a 9 mm Norindo Model NP 20 pistol with serial number 0305237,
without being the holder of a licence issued in terms of Act 75 of 10
1969 to possess the said firearm.

Count 6, a contravention of section 36 read with sections 1 and
39 of the Act 75 of 1969 (unlawful possession of ammunition), it
being alleged that upon or about the dates and at or near the places
mentioned in counts 2, 3 and 4 the accused did unlawfully possess 15
9 mm parabellum calibre ammunition without being in lawful
possession of an arm capable of firing such ammunition.

The accused pleaded not guilty to all six counts. The accused
was represented throughout these proceedings by Adv Duvenhage.
The State was represented by Adv van Vuuren. 20

Although the accused tendered no plea explanation in terms of
section 115 of the Criminal Procedure Act, he nevertheless made a
number of formal admissions in terms of Section 220 of the Criminal
Procedure Act. These relate in the main to the cause of death of Mr
Sergio Antonio Giovanni Bonanni; the fact that Ms Irma Lightfoot was 25
indeed robbed on 17 September 1998, as alleged; that Mr Mark

Williams was indeed robbed as alleged on 13 April 1998; that a .38 Special Ruby revolver with serial number 89375 was found in the Nissan Sani motor vehicle mentioned in count 4 on 17 September 1998; that five empty cartridges fired by a person other than the deceased at the scene of the crime alleged in counts 3 and 4, were found by Sergeant Deon Izak Ehlers and were duly sent for forensic testing which established that these cartridges were fired from a 9 mm Parabellum Norinco model NP 20 pistol number 0305237 with reference number LAB 41359/98; that this firearm was indeed found by the police in Eden Road, in the district of Johannesburg, on 17 September 1998; that the persons who participated in the attacks mentioned acted in the furtherance of a common purpose; that aggravating circumstances as defined in section 1 of the Criminal Procedure Act were present in every instance; that photo albums compiled by photographers who took photographs at the various scenes correctly reflected the scenes so described. It is also common cause that the accused did not at any stage possess a licence to possess any firearm.

I shall now deal with the more detailed evidence in so far as it relates to each count.

COUNT 1:

Mr Mark Williams testified that he was hijacked by the accused and one other person just outside his home at No. 4 Davidson road, Bedfordview at about 16:00 on 13 April 1998. He said the accused ordered him out of his vehicle and ordered him to hand over his Seiko wrist watch and his wedding ring. He had a good opportunity to

observe the accused. The accused and his companion sped off in his Toyota Camry, registration number FCZ 852GP. In the boot of that vehicle was the .38 Special Ruby revolver with serial number 89375. Later this firearm was recovered by the police and he identified it.

He attended an identification parade held at the station of the Brixton Murder and Robbery Squad at about 10:00 on 27 October 2000. There he identified the accused as being his attacker on 13 April 1998. The ID parade was held under the auspices of Inspector Slabbert. The accused was legally represented at the time.

No serious criticism of the manner in which the parade was held can be made. At the time Mr Williams said "I think this is the guy". He said in court that he was 90% certain of the accuracy of his identification. He said that he was quite naturally hesitant falsely to accuse somebody of complicity in a crime such as this.

COUNTS 2 AND 3:

Captain Rooney attended the scene shortly after a report was made of the attack. He is an expert in hijacking cases and had been attached to the Hijack Specialist Unit for a number of years. He said that the attack bore all the hallmarks of a hijacking which had failed. In other words, no items were removed. The vehicle was still there and the deceased had been shot in a manner which did not suggest any other motive.

COUNT 4:

Sergeant Roux testified that he had received a report at about 20:00 on 17 September 1998 that a Nissan Sani which had been hijacked in Norwood earlier that night had been seen and was being

pursued by the Flying Squad. He made an informed guess that a good route to follow would be to travel along Louis Botha Avenue. A street chase ensued. The Nissan Sani was involved in a collision at the corner of Eden Road and Louis Botha Avenue. Four men jumped out of the Nissan Sani, one of whom was the accused. He gave chase to the accused. The accused ran down Eden Street. He saw the accused throw away an object on the side of the road as he was running. Later a firearm was found by Sergeant Potgieter in this vicinity and, as I have already indicated, it is common cause that this firearm is the 9 mm Norinco model NP 20 pistol with serial number 0305237 referred to in the indictment. Sergeant Potgieter who had been travelling down Eden Street whilst off duty had realised that something was amiss and effected the arrest of the accused. After the arrest of the accused a Detective-Sergeant (who is now deceased) conducted a thorough physical search of the accused and found Exhibit H on the accused. This is a list of vehicles containing details of their model and other specifications, including colour. On this list were Nissan motor vehicles. Sergeant Roux said that in his experience this list was "an order form" used by professional hijackers.

Sergeant Potgieter confirmed that he had arrested the accused whom he had seen running down Eden Street. It is common cause that the Nissan Sani involved in the collision was the Nissan Sani, registration number CVZ 809GP which was robbed from Irma Lightfoot earlier that day (see admission 3 read with admission 5 to count 4).

Mr Duvenhage for the accused made certain criticisms of the evidence of in particular Sergeant Roux and Mr Mark Williams. If I understood him correctly he did not for a moment suggest that these witnesses were dishonest but rather that one should query the accuracy and reliability of their evidence. I shall deal with this aspect in more detail later but consider it appropriate at this stage to observe that the events in question occurred some four years ago and therefore it is entirely to be expected that there will be minor discrepancies in the evidence of any of the witnesses who testified.

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The accused was the only person who gave evidence in his defence. He said that on 17 September he had travelled from Alexandra down Louis Botha Avenue. He had asked the vehicle to stop at the junction with Eden Road. There he alighted and ran down Eden Road on his way to collect clothing from one Minnie Mathebe who resided at 17 Forest Road.

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A number of criticisms can be levelled at the evidence of the accused. In the first place it is extraordinary that he should have been on his own version soaking wet and out of breath running in such desperate hurry to get to Minnie Mathebe to obtain clothing. His explanation for this was that Minnie Mathebe was off duty at work at between 18:00 to 20:00 and he had to get to her before 20:00. On his own version he alighted from the taxi sometime between 19:30 and 20:00. It is difficult to believe that it would have been necessary for him to run at such desperate urgency, even if one accepts that he may have been slightly anxious about keeping his appointment on time. He is entirely unconvincing and contradictory. When asked

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why he did not immediately he was arrested protest to those effecting the arrest if he was entirely innocent. He could give no satisfactory explanation for why Sergeant Roux and Captain Rooney would lie about the note that was found in his possession. He could give no satisfactory explanation for why Sergeants Roux and Potgieter would lie about the firearm. After all, if they had wished to lie about it, it would have been a simple matter to state that the firearm was actually found in his possession. He contradicted himself as to who assaulted him. His evidence given in court as to where he was running in the street contradicts that of Sergeant Potgieter but when Sergeant Potgieter was cross-examined the issue was never placed in dispute. There are other discrepancies between his evidence in court and what was put on his behalf by his counsel.

Although Mark Williams said that he was 90% certain of the identity of the accused, we have the remarkable coincidence that Mr Williams should have mistakenly pointed out the accused as having been involved in the hijacking on 13 April 1998 and his firearm by mere coincident happened to be found in the Nissan Sani that was involved in the collision on 17 September 1998. It is also a remarkable coincidence that both he and Sergeant Roux would be mistaken about hijackings which occurred in very similar manner and in very similar places.

With regard to counts 2 and 3, we have the fact that the firearm which by necessary inference the accused had in his possession when he was running away from the Nissan Sani down Eden Street, was the same firearm which was used to shoot and kill

Mr Sergio Antonio Giovanni Bonanni. One must bear in mind that it is not the accused's version of events that although he was a participant in the hijacking on 17 September 1998, he was not a participant in the attack on 16 September 1998 and was able to give some plausible explanation for how he happened to be in possession of that firearm on the 17th.

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On count 4 we have the fact that Sergeant Roux and Potgieter materially corroborated each other. So also was Sergeant Roux materially corroborated by Captain Rooney.

In my view the best exposition of how one should evaluate evidence in a case such as this is set out in the case of *S v Van der Meyden* 1999 (1) SACR 447 (W). This is the judgment of Nugent J (as he then was). He is now a judge of the Supreme Court of Appeal. He said at 448F:

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"The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent. These are not separate and independent tests but the expression of the same test when viewed from opposite perspectives. In order to convict the evidence must establish the guilt of the accused beyond reasonable doubt which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other. In whichever form the test is expressed,

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it must be satisfied upon a consideration of all the evidence. A Court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt. And so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true." 5

He continues at 449C:

"Purely as a matter of logic the prosecution evidence does not need to be rejected in order to conclude that there is a reasonable possibility that the accused might be innocent. But what is required in order to reach that conclusion is at least the equivalent possibility that the incriminating evidence might not be true. Evidence which incriminates the accused and evidence which exculpates him cannot both be true. There is not even a possibility that both might be true. The one is possibly true only if there is an equivalent possibility that the other is untrue." 10 15

At 449H:

"A Court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence." 20

Finally, at 450B:

"What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable but none of it may simply be ignored." 25

What then do we have if we look at a conspectus of all the evidence? Firstly, we have the utterly unconvincing story of the accused, that he was innocently running in a desperate rush to obtain second-hand clothing from someone he knew in Forest Road. Secondly, we have with regard to count 1 the fact that although Mr Williams said he was only 90% certain of the accuracy of his identification, the firearm that was robbed from him on that particular day was found in the Nissan Sani. 5

With regard to counts 2 and 3 we have the fact that the same firearm that was used to kill Sergio Antonio Giovanni Bonanni was the firearm which by necessary inference the accused had been carrying in his possession when he ran away after the collision involving the Nissan Sani. Whatever criticisms there may be of the accuracy of the evidence of Sergeant Roux, he is, as I have said, corroborated by Sergeant Potgieter and Captain Rooney. Overshadowing all this, is the fact of a so-called order form that was found in possession of the accused. This provides a compelling link with all the different counts. 10 15

And finally, there is the fact of similar fact evidence relating to all these counts in which motor vehicles were hijacked. They were all cases in which firearms were used. They were all cases which took place in the north-eastern suburbs of Johannesburg. They were all cases that took place in 1998. I accept that extreme caution must be exercised in having regard to similar fact evidence. Nevertheless, this Court is not relying purely on similar fact evidence in order to draw an inference of the guilt of the accused. The Court has regard to the similar fact evidence together with the damning evidence of the so-called order form and the chain of linkages which I have already 20 25

mentioned exists between the various crimes.

It is common cause that a common purpose existed every time that these hijackings were committed and therefore one does not have to be absolutely certain as to the precise role of the accused in each incident in order to determine his guilt. 5

It is common cause that aggravating circumstances were present in the robbery counts and the attempted robbery counts. Accordingly it is not necessary to deal with those aspects in any further detail.

Count 1, the count of robbery with aggravating circumstances 10
as defined in section 1 of Act 51 of 1977, that is the robbery of Mr Mark Williams on 13 April 1998, you are found GUILTY AS CHARGED.

Count 2, attempted robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977, that is the attempted robbery 15
of Sergio Antonio Giovanni Bonanni and Ivano Bonanni, you are found GUILTY AS CHARGED.

Count 3, the murder of Sergio Antonio Giovanni Bonanni, you are found GUILTY AS CHARGED.

Count 4, the count of robbery with aggravating circumstances 20
as defined in section 1 of Act 51 of 1977, it is the robbery of Irma Lightfoot at 58, 9th Avenue, Orange Grove on 17 September 1998, you are found GUILTY AS CHARGED.

Count 5, the count of unlawful possession of a firearm, the Norinco, model NP 20, you are found GUILTY AS CHARGED. 25

Count 6, the count of unlawful possession of ammunition, you are found GUILTY AS CHARGED.