THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case no: 130/2022

In the matter between:

NKOMO XOLANI BATISTA	**1ST APPELLANT**
MAVHUNDUSE EMMANUEL J	**2ND APPELLANT**
THEBE MAXWELL	**3RD APPELLANT**
NYATHI NOBLE	**4TH APPELLANT**

and

THE STATE	**RESPONDENT**

Neutral citation: *Nkomo and Others v The State* (Case no 130/2022) [2024] ZASCA 61 (26 April 2024)

Coram: MBATHA, MABINDLA-BOQWANA, MATOJANE and WEINER JJA and SEEGOBIN AJA

Heard: 22 February 2024

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Summary: Criminal law and procedure – distinction between recognition and identification of a suspect. Factors applicable.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Meyer J, Van der Linde J (concurring) and Wright J (dissenting) sitting as court of appeal):
The appeal is dismissed

JUDGMENT

Matojane JA (Mbatha, Mabindla-Boqwana and Weiner JJA and Seegobin AJA concurring):

[1] This appeal is against the judgment of the full court of Gauteng Division of the High Court (Pretoria). The majority of the full court, with Meyer J and Van der Linde J concurring, dismissed the appeal and upheld the guilty verdicts of the appellants, whilst Wright J dissented. The appeal is with the leave of this court.

[2] The appellants and four others were convicted in the Gauteng Division of the High Court sitting in Palmridge (trial court) by Mophosho AJ on 29 April 2014. The convictions were for murder, robbery with aggravating circumstances and malicious damage to property. The trial court found that the appellants and their erstwhile co-accused acted in furtherance of a common purpose in committing the crimes.

[3] Accordingly, on 3 May 2013, the trial court handed down the sentences for each accused and each charge. For the charge of murder, each received a life sentence. Additionally, they were each given fifteen-year prison terms for robbery with aggravating circumstances and a three-year term for malicious damage to property. The three-year sentence was to be served simultaneously with the

fifteen-year sentence. The trial court granted the appellants leave to appeal to the full court on both conviction and sentence.

[4] On 19 September 2017, the majority of the full court acquitted the other four appellants and confirmed the convictions of the present appellants. Their conviction for robbery with aggravating circumstances was altered to a competent verdict of theft

[5] In the trial court, the state led the evidence of two eyewitnesses, Mr Godknows Nkosiyazi Motloung and Mr Memory Skhumbuzo Phiri. All the appellants testified in their defence. It is common cause that Mr Motloung, Mr Phiri and all the appellants are undocumented immigrants from Zimbabwe. At the time of their arrest, they were all involved in illegal gold mining activities at an abandoned mine in Matholeville near the Durban Deep shooting range in Roodepoort.

[6] Mr Motloung, the complainant in the counts involving robbery and malicious damage to property and also a witness to the murder charge, testified about an incident that occurred around 16h00 on 21 June 2012. He was waiting next to his pickup truck near the shooting range to get money for petrol from his friend Sunny. He noticed his other friend, Mr Solomzi Livingston Jafta (the deceased), being chased by a group of about nine men throwing stones at him. As the group advanced towards him, the deceased tried unsuccessfully to get into his truck, and he ran towards the shooting range instead.

[7] According to his testimony, the first appellant, Mr Xolani Batista Nkomo, pursued the deceased into the shooting range area. At the same time, he was armed with a stone in one hand and what he referred to as a ‘reinforce’ in the other. The first appellant, Emmanuel J Mavhunduse, also had stones in his hands and took part in the attack. Mr Motloung also observed the third appellant, Mr Thebe

Maxwell, striking the deceased with a reinforcing rod while the deceased lay on the ground. He also saw the fourth appellant, Mr Noble Nyathi, stabbing the deceased with a panga knife during the assault. Crucially, the witness, Mr Motloung, recognised the attackers as individuals he had been well-acquainted with for a considerable period before this incident, as they were all involved in illegal mining activities in the area.

[8] As the deceased was chased past him, he asked the first appellant what was happening but received no response. Frightened by what he witnessed, Mr Motloung ran away and observed the attack on the deceased from a clear, treeless area about 15-20 metres away. He saw the appellants attacking the deceased with stones and an assortment of weapons. The deceased was left seated against a fence, appearing to be dead. The group then returned to his truck, from which he had fled and damaged it with stones and an axe. They removed the battery, radio, and other items from the truck.

[9] The second state witness, Mr Phiri, testified that on 21 June 2012, between 14h30 pm and 16h00 pm, he was with the deceased and Mr Motloung. He saw a group of about twenty people carrying stones, axes and metal bars. The appellants were amongst the mob. The mob chased the deceased, pursuing him behind Mr Motloung's car and then to the shooting range. According to him, some group members remained behind and hit the car. Mr Phiri could see some of the group assaulting the deceased at the shooting range. He knew the appellants well, as they were fellow illegal gold miners from Zimbabwe.

[10] Mr Phiri testified further that he witnessed the group splitting near Mr Motloung’s pickup truck, with some of them pursuing the deceased onto the shooting range and the rest remaining at the truck. He had an unobstructed view of the attack both near the pickup truck and at the shooting range. After the assault, the mob left the scene, and the deceased was found lying on the ground. Mr Phiri

and his friends were worried the attackers might return, so they vacated the area, returning about 30 minutes later. Mr Phiri did not provide details about the events after they returned.

[11] Each of the appellants testified that they knew Mr Motloung and Mr Phiri. They categorically denied any involvement in or presence during the attack nor being involved in the damage to property, theft, and criminal incident that took place at the shooting range. Their defence was a bare denial of participation in or being in the proximity of the scene of the crimes they were accused of.

[12] The trial court found all the appellants, including their erstwhile co-accused, guilty on three mentioned charges, concluding that they acted in furtherance of common purpose in committing the crimes. The court accepted the testimony of Mr Motloung, who implicated all the appellants, and the testimony of Mr Phiri, who specifically identified the appellants as being involved. While it found some inconsistencies with the evidence provided by Mr Motloung and Mr Phiri, the trial court was satisfied with Mr Motloung's testimony and found it to be sufficient to convict all the appellants of acting jointly to commit the crimes.

[13] The full court questioned the reliability of part of Mr Motloung's testimony due to inconsistencies between his initial statements to the police and his later testimony during the trial. Initially, he had only implicated the four appellants in the attack on the deceased. However, in a later statement, he also accused four other appellants without satisfactorily explaining this change. As a result, the full court acquitted the other appellants, whom Mr Motloung did not name in his initial statement to the police. The appeals of the present appellants were dismissed, save for their convictions for robbery, which were overturned and replaced with a competent conviction for theft. Their sentences on this charge were reduced to one year, to be served concurrently with their three-year sentence for malicious damage to property.

[14] In a dissenting judgment, Wright J stated that he would have granted the appeals with respect to all eight appellants on all three counts. He expressed concern about Mr Motloung's inability to name all the attackers in his initial statements to the police. Wright J stated that this inconsistency significantly weakened the reliability of Mr Motloung's identification of all the appellants, not just those he failed to name initially. He noted further that the missing pages and conflicting descriptions on the identification parade forms raised questions about the identification's reliability.

[15] It is undisputed that criminal acts took place. The sole point of contention is whether the appellants were positively identified as the individuals responsible for committing those acts. The fundamental principle of our law that cannot be overstated is the presumption of innocence for the accused until proven guilty beyond reasonable doubt. If there remains any reasonable doubt about the accused's guilt after considering the evidence, the accused must be acquitted.[1] Reasonable doubt is based on reason, logic, and a common sense evaluation of the evidence presented, not on prejudices or emotions. In my view, what is needed is a degree of certainty that falls between absolute certainty and probable guilt.

[16] Conflicting evidence did emerge in the state’s case but not on the issue of the identity of the appellants as perpetrators. Mr Phiri contradicted Mr Motloung on how the events unfolded. He also contradicted the evidence he gave to the police and his oral evidence in court. The full court found his evidence to be unreliable and stated that the trial court should not have relied on his evidence.

[17] Mr Motloung is a single witness regarding the identification of the appellants. The potential risks of mistaken identification require a thorough assessment of the reliability and credibility of such evidence before placing

[1] *S v Van Der Meyden* 1991 (1) SACR 447. *S v Jackson* 1998 (1) SACR 470 at 476 E-F

significant weight on it. Factors that impact the reliability of the identification evidence are, amongst others, the lighting, visibility, mobility of the scene, proximity of the witness and their opportunity for observation and, importantly, in this case, Mr Motloung's prior familiarity with the appellants.[2]

[18] Mr Motloung knew the appellants for a long time. The crucial factor was not merely identifying them but recognising these individuals.[3] In my view, the recognition of a known individual by an eyewitness is a more reliable form of identification evidence compared to the identification of an unfamiliar person due to the witness's prior acquaintance with the recognized individual

[19] The murder of the deceased occurred in broad daylight, providing clear visibility. Mr Motloung had an unobstructed view of the group chasing the deceased. He was in close physical proximity to the group, especially when they ran towards his pickup truck and passed by him. He even spoke with the first appellant as the mob passed by him. He had sufficient time and an advantageous position to observe the events and individuals involved clearly. In these circumstances, there is no room for mistaken identity. I find his evidence of the identification of the appellants to be clear and satisfactory in all material respects.[4]

[20] Mr Motloung's recognition of the appellants coincided with admissions made by the appellants themselves under Section 220 of the Criminal Procedure Act 51 of 1977. These admissions, submitted as evidence and included in the record, confirmed the accuracy of the identification parade record, the photographs taken of them during the parade, and their admission that Mr Phiri

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[2] (see *S v Mthetwa* 1972 (3) SA 766 (A), at p 768A-C) and to that of a single witness (*S v Sauls and Others* 1981 (3) SA 172 (A), at pp 179G – 180G), especially a single witness with regard to identification (see *S v Miggell* 2007 (1) SACR 675 (C) at 678d-f),

[3] See *R v Dladla and others* 1962 (1) SA 307 (A) at 310C; *S v Kolea* 2013 (1) SACR 409 (SCA), para 21.)

[4] Section 208 of the Criminal Procedure Act provides that an accused may be convicted of any offence on the single evidence of a competent witness. See *R v Mokoena* 1956 (3) SA 81 (A); *S v Webber* 1971 (3) SA 754 (A) at 758G; *S v Sauls and Others* 1981 (3) SA 172 (A) at 179G-180G**;** *S v Stevens* [2005] 1 All SA 1 (SCA) at 5 and *S v Gentle* 2005 (1) SACR 420 (SCA) para 17.

identified them during the parade. Although Mr Phiri's evidence is not relied upon, the appellants' admissions regarding Mr Phiri pointing them out corroborated and aligned with Mr Motloung's identification of them based on his personal recognition. While the fourth appellant was not in the line-up at the identification parade on 20 August 2012, Mr Motloung recognised him as being amongst the group that chased and attacked the deceased.

[21] The missing pages and conflicting descriptions on the identification parade forms forming the basis of Wright J's findings were never an issue before the trial and the full courts. They cannot be raised for the first time on appeal.

[22] For all these reasons, the full court cannot be faulted for accepting as credible and reliable the evidence of Mr Motloung about identifying the appellants as perpetrators. I am satisfied on the totality of the evidence that even if there were contradictions in Mr Motloung's evidence, it related to the appellant's whose convictions were set aside.

[23] As to the sentence, it was submitted on behalf of the appellants that in imposing a minimum sentence of life imprisonment on the appellants, the trial court failed to apply its mind and inform itself whether there were substantial and compelling circumstances present to deviate from the minimum sentence prescribed. In S v Pillay,[5] this Court had this to say:

'...merely because a relevant factor has not been mentioned in the judgment on sentence, it does not necessarily mean that it has been overlooked, for "no judgment can ever be perfect and all-embracing"... Moreover, the value to attach to each factor taken into account is also for the trial Court to assess.'

[24] Determining the appropriate sentence in a criminal case is pre-eminently a matter for the trial court's discretion. In this role, the trial court has a broad

[5] *S v Pillay* 1977 (4) SA 531 (A)

discretion to (a) decide which factors should be considered in determining the extent of punishment and (b) assign relative importance or value to each factor taken into account when making that determination.[6] The trial court considered that the appellants were first offenders, and their ages ranged from 22 to 38 years. It further found that the murder was committed in the execution of a common purpose and was executed with brazen and callous brutality in broad daylight, which it found to be an aggravating factor.

[25] I am satisfied that the court exercised its sentencing discretion judicially and that all the relevant factors and circumstances were duly considered and taken into account in finding that there were no compelling and substantial circumstances that warranted the imposition of a lesser sentence.

[26] In the result I make the following order:
The appeal is dismissed.

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K E MATOJANE
JUDGE OF APPEAL

[6] *S v Kibido* 1992 (2) SACR 214 (SCA) at 216G-J, S v Pillay 1977 (4) SA 531 (A) at 535 A - B

APPEARANCES:

For the appellants:	J M Mojuto
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For the respondent:	R Barnard
Instructed by:	The Director of Public Prosecutions, Johannesburg
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