

In the High Court of South Africa  
KwaZulu-Natal Division, Pietermaritzburg

Case No : AR 172/13

In the matter between :

Saziso Xaba

Appellant

and

The State

Respondent

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Judgment

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Lopes J

[1] On the 19<sup>th</sup> October 2012 the appellant was convicted of one count of robbery with aggravating circumstances read with the provisions of s 51 and Schedule 2 of the Criminal Law Amendment Act, 1997, and a further count of murder, also read with the provisions of s 51 and Schedule 2 of the same Act.

[2] The appellant was sentenced to twelve years imprisonment on Count 1 and twenty years imprisonment on Count 2, both counts to run concurrently. The court further directed that the non-parole period in respect of the imprisonment should be fifteen years.

[3] This matter comes before us by way of leave to appeal granted by the learned Acting Judge on the 19<sup>th</sup> October 2012. The central issue in the case was the identification of the appellant as one of the attackers of the deceased. In this regard, reliance was placed by the State upon the evidence of Mr K P Khanyile.

[4] Mr Khanyile testified that on the 23<sup>rd</sup> April 2011 and at about 7.30 in the evening he was at his residence emerging from his house, and going to another building on the premises, when he heard two persons greet him. One was the appellant and the other was Qolo, who is now deceased. He knew the appellant from the area and Qolo was his neighbour. He went to the outhouse and upon returning to the main house could still hear the voices of the appellant and Qolo on the road nearby. He heard them asking a third person, who turned out to be the deceased, who he was, because he was unknown in the area.

[5] Mr Khanyile then went out and observed Qolo and a third person, Vete, attempting to take a bag away from the deceased. When he resisted Vete stabbed the deceased in the face and the appellant stabbed him in the back.

[6] At that stage the deceased attempted to run away and as he was fleeing he was being pursued by the appellant and Qolo. After that Mr Khanyile went back into his house, emerging later when he heard people talking outside. He saw the deceased lying on the ground with people around him. The appellant, Qolo and Vete were no longer on the scene.

[7] Alexandre N, the older brother of the deceased testified that the deceased was [.....] years old at the time of his death, and shortly before the deceased was attacked Mr N had given him his gym bag to carry home. His description of the bag coincided with that given by Mr Khanyile.

[8] Mandla Richard Majozi, who lived near Mr Khanyile, testified that on the day in question he had been called by his children who said that a boy had been stabbed outside. He left his home and took the deceased to the Poly Clinic in his own motor vehicle. He realised when they removed the deceased from his motor vehicle that he was lifeless.

[9] The appellant was the only person who testified in his defence, and he claimed that he was not at the scene of the crime on the day in question. He said that that night he had been staying with his cousin M.M, and that M.M had subsequently passed away. He said that he knew Mr Khanyile but had not seen him on that day. He said that he knew the two people who had been identified by Mr

Khanyile, who were approaching the scene of the attack on the deceased, namely Sphamandla and Bongani. The appellant had stayed at his cousin's home because his uncle, who was still alive, wanted to use the room in which they both lived to entertain his girlfriend. When he was at the home of M.M he had been in the company of three people, Lucky, Musa and MacD. None of these persons testified in support of the appellant's alibi.

[10] In assessing the evidence of Mr Khanyile, the learned Acting Judge was alive to the fact that he was a single witness, and that fact, together with his evidence relating to the identity of the appellant had the consequence that she approached his evidence with what she described as 'extreme caution'. The issue of identification was central to her judgment because the appellant raised the defence of an alibi, denying that he was present at the scene of the attack upon the deceased, a [...] year old youth.

[11] The approach to be used in matters of identification was set out by Holmes JA in *S v Mthethwa* 1972 (3) SA 766 (AD) at 768 A – C where the learned Judge of Appeal stated :

'Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest : the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused, the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if

any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence and the probabilities..’

[12] The learned Acting Judge made favourable findings of credibility and demeanour in respect of Mr Khanyile. She looked for facts in the evidence which supported his version of events. These facts, whilst not exhaustive, included :

- (a) the fact that Mr Khanyile knew the appellant, having known him for approximately five years (which is to be seen together with the fact that the appellant knew Mr Khanyile);
- (b) the fact that Mr Khanyile recognised the voice of the appellant (the appellant suggesting only that Mr Khanyile did not see him properly, and visually misidentified him);
- (c) the fact that the post mortem report supported the evidence of Mr Khanyile with regard to a stab wound on the forehead and one in the back of the deceased, which accorded with the evidence of what Mr Khanyile said he had seen;
- (d) the evidence that Mr Khanyile gave regarding the bag of which the deceased was robbed, the description and size of which consistent with the evidence given by the deceased’s brother Mr N;
- (e) the fact that Mr Khanyile was able to describe the attack on the deceased in great detail;
- (f) the improbability that Mr Khanyile would have testified falsely in circumstances where he identified Sphamandla and Bongani who were near the scene. Bongani, who was still alive and in the area could conceivably

have given evidence contrary to Mr Khanyile's identification of the appellant as one of the attackers if he had been called to give evidence.

[13] I mention that there is a contradiction in the judgment of the learned Acting Judge. At one stage she refers to the fact that, according to Mr Khanyile, Vete stabbed the deceased in the face and the appellant stabbed him in the back. Although this accords with the evidence of Mr Khanyile, the learned Acting Judge later stated in her judgment that Mr Khanyile had testified that although Vete was present, Mr Khanyile did not witness him stabbing the deceased or chasing after him together with the accused and Qolo. Whilst it is true that the evidence of Mr Khanyile was that the appellant and Qolo chased after the deceased, it is not correct that Mr Khanyile testified that he did not witness Vete stabbing the deceased. In this regard the learned Acting Judge appears merely to have confused Qolo and Vete. I do not believe that that confusion in any way detracts from the judgment of the learned Acting Judge, who in my view set out a full and complete analysis of the evidence and correctly accepted the evidence of Mr Khanyile and the other State witnesses and rejected the evidence of the appellant.

[14] In my view the judgment of the learned Acting Judge cannot be faulted and I would confirm the conviction of the appellant on both counts.

[15] With regard to the question of sentence the learned Acting Judge appreciated shortly after sentencing the appellant that she had erred in not allowing counsel for

the State and the defence to address her on the question of the imposition of a non-parole period as provided for in s 276 B of the Criminal Procedure Act, 1977. (In this regard see *S v Stander* 2012 (1) SACR 537 (SCA)). That this was a misdirection was conceded by counsel for the State. Notwithstanding the misdirection by the learned Acting Judge, I do not believe that there is any good reason for this court to interfere with the length of the imprisonment imposed upon the appellant.

[16] Although the appellant was a first offender, the circumstances of the offence clearly warrant the punishment imposed. The deceased was a [...] year old youth. Not content with robbing him, when he offered resistance, the appellant and his co-perpetrators stabbed the deceased in order to persuade him to part with the bag he was carrying. Thereafter, and when he had parted with the bag and attempted to run away, the appellant and Qolo chased after the deceased and inflicted further stab wounds upon him. In my view there was nothing which was placed before the learned Acting Judge which would have warranted the interference by this court with a lighter sentence. In the exercise of her discretion as the sentencing judge, I cannot find that she acted improperly or that the sentences which she imposed induce a sense of shock.

[17] In the premises I make the following order :

1. The conviction of the appellant on both counts in the court a quo is confirmed;
2. The periods of imprisonment to which the appellant was sentenced in the court a quo are confirmed.

3. The appeal is upheld to the extent that the direction by the learned Acting Judge that a non-parole period of fifteen years imprisonment should be applicable to the appellant is set aside.

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K Pillay J : I agree.

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Bezuidenhout AJ : I agree

Date of hearing : 27<sup>th</sup> January 2014



Date of judgment : 14<sup>th</sup> February 2014

Counsel for the Appellant : S B Mngadi (instructed by the Legal Aid Board)

Counsel for the Respondent : K Essack (instructed by the Director of Public Prosecutions)