THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 46/2013

In the matter between:

MMABANGISENI VICTOR MAKUMBANE **First Appellant**

MURAVHA WILLEM MUNYAI **Second Appellant**

TAKALANI NEKHWEVHA **Third Appellant**

and

THE STATE **Respondent**

Neutral citation: *Makumbane v The State* (46/2013)[2014] ZASCA 116 (18 September 2014)

Coram: NAVSA ADP, WALLIS AND WILLIS JJA.

Heard: 10 September 2014

Delivered: 18 September 2014

Summary: Criminal procedure – special entry in terms of s 317 of Criminal Procedure Act 51 of 1977 – can only be made by trial court – application to lead evidence on appeal – in circumstances could not be used to overcome failure to testify at the trial – fair trial – complaint of inadequate representation – sentence.

ORDER

On appeal from: Limpopo High Court, Thohoyandou (Makhafola J sitting as court of first instance):

1 The applications for leave to appeal against conviction are dismissed.

2 Leave to appeal against the sentences imposed on the applicants is granted.

3 The appeals against sentence are upheld.

4 The sentence on count 1 (murder) is set aside and replaced by a sentence of 20 years' imprisonment in respect of all three appellants.

5 The sentence on count 2 (assault with intent to commit grievous bodily harm) of three years' imprisonment is confirmed in respect of all three appellants.

6 The sentence of three years' imprisonment imposed on the second and third appellants in respect of count 3 (kidnapping) is confirmed and it is ordered that this sentence is to run concurrently with the sentence imposed in respect of count 2.

JUDGMENT

Wallis JA (Navsa and Willis JJA concurring)

[1] This is an application for leave to appeal against conviction and sentence, joined with applications for the making of a special entry and leave to lead further evidence on appeal. The events leading to it were briefly the following. On the evening of 10 October 2008, two young

men, Tshilate Tshilidzi and Tshifaro Funanani were taken to a grinding mill near Tshishaulu in Limpopo and beaten. Mr Tshilidzi died as a result and Mr Funanani was severely injured. The applicants were among seven local residents, all men of mature years and having some stature in the community, who were charged with the murder of Mr Tshilidzi and the attempted murder of Mr Funanani. All three applicants were also charged with kidnapping Mr Funanani and the first and third applicants with the kidnapping of Mr Tshilidzi.

[2] After a trial, at which Mr Funanani was the principal witness for the prosecution, six of the seven accused, including the three applicants, were convicted by Makhafola J of the murder of Mr Tshilidzi; all of the accused were convicted of assault with intent to do grievous bodily harm in relation to Mr Funanani and the second and third applicants were convicted of kidnapping Mr Funanani. On the murder count all of the accused that were convicted, were sentenced to life imprisonment and on the other counts terms of imprisonment were imposed to run concurrently with the sentence of life imprisonment. Leave to appeal against both conviction and sentence was refused. An application to this court for leave to appeal, including applications for leave to lead further evidence on appeal and an application for the making of a special entry, was referred for oral argument by this Court in terms of s 21(3)*(c)*(ii) of the Supreme Court Act 59 of 1959. The parties were required to be prepared, if called upon to do so, to address the merits of the appeal.

[3] I deal first with the facts. The evidence of Mr Funanani concerning the events of that evening was not seriously challenged. The first and second applicants made formal admissions that they had beaten him with a sjambok although only a few strokes, as did some of the other

accused. The third applicant made a similar admission in relation to Mr Tshilidzi as did the remainder of the accused. The effect of those admissions was to place all three of them at the scene where the beatings took place and to admit their participation in at least some kind of collective assault on the two young men to which all seven accused and possibly others were party. Although the admissions were made in relation to the use of a sjambok, the evidence of Mr Funanani that they were in fact beaten with a length of fairly robust cable was accepted by the judge in the light of the opinions expressed by Drs Mutshembele and Onwugbolu, that the injuries sustained by Mr Funanani and the deceased were more consistent with their having been beaten with a cable, rather than a sjambok. There is no basis for rejecting that conclusion.

[4] In cross-examination of Mr Funanani the applicants disputed his further evidence that he and the deceased were suspended by their ankles from some beams and beaten severely while suspended. They did not give evidence to contradict him but relied on the absence in the medical report on Mr Funanani and the post-mortem report in respect of Mr Tshilidzi of any injuries consistent with that having occurred. However, even if one disregards this part of Mr Funanani's evidence as an attempt to exaggerate the severity of the beatings the two men received, it does not affect the fact that all seven accused, together possibly with others, participated in a collective assault on these two young men, which left the one dead and the other with extensive bruises and lacerations.

[5] It was suggested in argument that the evidence was insufficient to show that the applicants were participants in that part of the assault on Mr Tshilidzi that resulted in the head injuries that caused his death. However, it is clear that the assault was a concerted one and there is no

basis for postulating an interruption in it where the applicants withdrew from the proceedings and others inflicted the fatal blow or blows. Had there been evidence to that effect from any of the applicants that might have been a different matter but in the absence of such evidence and the lack of any serious inroads in cross-examination into the credibility of Mr Funanani, the inevitable conclusion, on the evidence before the trial court, was that all of the applicants participated in the two assaults and that one of them led to the death of Mr Tshilidzi. On that evidence the convictions for murder and assault with intent to commit grievous bodily harm were proper. Similarly, the convictions of the second and third applicants on the kidnapping count could not be challenged.

[6] Faced with that the applicants sought to introduce fresh evidence at the appeal and also asked this court to make a special entry arising from the manner in which the advocate who represented all seven accused throughout the trial conducted their defence. However it is clear that only the trial court can make a special entry as s 317(2) of the Criminal Procedure Act 51 of 1977 says that an application for a special entry shall be made to the judge who presided at the trial, subject to that judge's availability. That is entirely logical as a special entry may often, as would the one here suggested, require evidence of the irregularity that does not appear from the record of the trial. The application for a special entry was accordingly dismissed in the course of the hearing.

[7] The application to lead further evidence on appeal suffered the same fate. Again the reasons are straightforward. The purpose of the application was nothing more than to enable the applicants to reopen the case in order to give the evidence that they elected not to give at the trial, the nature of which broadly emerges from the record of the evidence led

in mitigation of sentence. The record shows that they made a conscious decision when legally represented not to give evidence. An application on appeal to lead evidence that was available and that they elected not to give at the trial is plainly impermissible. Hence the dismissal of the application.

[8] As the argument developed it became apparent that the applicants' real complaint was that they had not had a fair trial. The basis for this contention was that all the accused had been represented by the same advocate throughout the trial. The advocate had advised them to make certain admissions in the conduct of their defence those being the admissions referred to in para 3 of this judgment. Then when it came to the defence case they say that they were advised that the best course to follow was for accused number two to give evidence and for the remaining accused, including all three applicants, not to enter the witness box. Their further complaint is that the evidence of accused number two was exculpatory of him, but reinforced their presence at the scene and participation in the assaults on Mr Funanani and Mr Tshilidzi.

[9] The difficulty with this argument is that it is simply not borne out by the record of events both before the trial commenced and while it ran its course. Counsel, a Mr Mushasha, was retained to represent all seven accused. The question of any possible conflict was specifically raised with him and the accused at a hearing before the commencement of the trial when the matter was adjourned. The assurance was then given that there was no conflict among the accused. At that stage counsel had consulted with his clients and having been asked for an assurance gave it. When the trial commenced before Makhafola J the first witness was Mr Funanani. He gave his evidence and was cross-examined by Mr

Mushasha. It was during the cross-examination that all of the accused, including accused number two, tendered certain admissions about their involvement in the events on 10 October 2008. In addition, at various stages in the course of the cross-examination, questions were put to the witness prefaced by 'my instructions are'. In the course of his cross-examination the court required him when putting matters to the witness to identify which of the accused would say what was being put and he did so. Had that been incorrect one would have expected it to be drawn to counsel's attention. Whilst the accused were not all highly sophisticated men they were not without experience and acumen. The first applicant was a general officer employed by the tribal council; the second applicant was a police officer of thirty years standing; and the third applicant was a self-employed motor mechanic. What was put to Mr Funanani was consistent with the admissions handed in and also consistent with what the first and third applicants said when giving evidence in mitigation of sentence.

[10] Importantly, at the end of the cross-examination of Mr Funanani, counsel sought the leave of the court to approach his clients and ensure that he had covered all the matters on which they wished him to cross-examine. It was only after he had taken these instructions that he completed the cross-examination. At that stage, and before re-examination Mr Mushasha indicated that he would have to withdraw because of a lack of funds to pay his fees. The accused were so intent on his continuing to represent them that they asked for and secured a brief adjournment in order to raise the necessary funds. In the result Mr Mushasha continued to represent them for the rest of the trial. It is plain from this that the complaints now made that he procured that they make admissions harmful to their interests are ill-founded. I turn then to

consider the complaint about their closing their cases without leading evidence and relying solely on the evidence of accused number two.

[11] The first applicant closed his case without giving evidence. This was before accused number two commenced giving evidence. In view of the similarity of the admissions made by all the accused it appears plain that there was a deliberate decision in conjunction with counsel to call accused number two, who was the best educated and presumably the most articulate of the accused, to describe the events of that evening. The fact that he said that he left the place where the beatings occurred at an early stage, before Mr Tshilidzi was brought to the mill, did not serve to implicate the remaining accused, and particularly the applicants, any further in the events beyond the scope of their existing admissions. The applicants heard the evidence of accused number two and had they wished to add anything to it or qualify it in any way they were free to do so. Equally there was nothing in his evidence that prevented any of them giving similarly exculpatory explanations of their conduct, but had they done so they would have been exposed to cross-examination about inconsistencies between their evidence and that of accused number two. Once the latter's evidence was complete it was open to any of the five remaining accused to give evidence, if they wished to do so, and it is probable that the court would even have been willing to allow the first applicant to do so if he had sought leave to reopen his case. It would hardly have mattered to the course of the trial had he given evidence after accused number two. Most importantly, if there was indeed any conflict of interest, as contended in the application for leave to appeal, it would undoubtedly have emerged once the second accused finished giving evidence. That it did not do so clearly indicates that no such conflict manifested itself or existed.

[12] In the result there is no merit in the applicants' complaint that they did not receive a fair trial. The application for leave to appeal against their convictions must therefore be refused. But there remains an application for leave to appeal against the sentences imposed upon them. In regard to the sentences on the counts of assault with intent to commit grievous bodily harm and kidnapping it is not suggested that these were in any way untoward. The attack focussed on the sentences of life imprisonment for the murder of Mr Tshilidzi. That sentence had been imposed in terms of s 51(1) of the Criminal Law Amendment Act 105 of 1997 read with Part I of Schedule 2 to that Act, because the death of Mr Tshilidzi was occasioned by persons acting in the furtherance of a common purpose.

[13] The trial court held that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence. In my view it misdirected itself in at least two respects in reaching that conclusion. First it categorised the killing of Mr Tshilidzi as 'gruesome, dastardly, insensitive, rampant, heinous, vicious and careless in the most extreme' a combination of adjectives that was not only internally inconsistent but over-stated the position. That much is clear from the concession by counsel for the State that the accused did not have any direct intention to kill the deceased. It is clear that this was a case of local vigilantism, where a community beset by a particular type of crime – the theft of electrical cables – and consequent inconvenience to their daily lives set out to solve the crime by kidnapping and beating the suspected perpetrators in order to elicit confessions and deter them from repeating their offence. They did not set out to kill their victims, but they killed Mr Tshilidzi because they did not appreciate the seriousness of some of the

blows they struck, which caused his head injuries. Their lack of appreciation of the possible consequences of their conduct was probably fuelled by the liquor they were consuming at the time.

[14] The other factor that seemed to weigh heavily in the judge's consideration of the question whether there were substantial and compelling circumstances justifying the imposition of a lesser sentence was some evidence that Mr Funanani's mother was being ostracised by a section of the community who supported the actions of the accused and were hostile to their prosecution. However, that could not be laid at the door of the applicants and was a matter extraneous to the judge's function. It should not have been taken into account.

[15] For those reasons I think that the judge erred in regard to sentence and that we are at large to reconsider the issue. In my view this was a serious case involving as it did the perpetrators taking the law into their own hands. That must always be discouraged however much communities may be frustrated by a high incidence of crime and any apparent inability of the police to prevent crime in general and solve crimes once perpetrated. So does the fact that they did not set out to kill either Mr Funanani or Mr Tshilidzi. Lastly, as I have already mentioned the three applicants had hitherto led useful lives making a contribution to the community in which they lived. There is every reason to think that the imposition of a substantial term of imprisonment will bring home to them what they have done wrong and that, having served that term of imprisonment, they will be rehabilitated and able to resume useful lives in the community.

[16] These factors must be taken together with the fact that life imprisonment is the most stringent sentence that our courts can impose.[1] Then there must be an overall assessment of whether on the facts of this case a sentence of life imprisonment is proportionate to the offence committed by the applicants.[2] In making that latter assessment the court will always be conscious of other cases in which it has had to consider the appropriate sentence to be imposed for serious crimes, and the assessment in those cases of which crimes are truly the most heinous and warrant the heaviest sentence. I see no point in reciting those cases as they all turn on their own facts, but they inevitably form a backdrop to the sentencing process in terms of the legislation prescribing certain minimum sentences for serious crimes. In the present case I think that the factors I have identified in the context of the case as a whole and my assessment of whether the sentence of life imprisonment is appropriate here, leads to the conclusion that there were substantial and compelling circumstances justifying a departure from the statutorily prescribed minimum sentence. For those reasons the applications for leave to appeal against sentence should be granted and the appeals upheld to the extent set out in the next paragraph.

[17] I have already held that there were substantial and compelling circumstances justifying a departure from the sentence of life imprisonment on the charge of murder. In my view that sentence should be set aside and replaced with a sentence of 20 years' imprisonment in respect of each of the applicants. The sentences on the other two counts were appropriate for those offences, but were originally as required by law made to run concurrently with the sentence of life imprisonment in

[1] *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) para 13.
[2] *S v Vilakazi* 2009 (1) SACR 552 (SCA) paras 18-20.

each case. I do not think it appropriate for them to run concurrently with the sentence for the murder of Mr Tshilidzi as they related to crimes perpetrated against Mr Funanani. But insofar as he was concerned they formed part of a single train of events. I accordingly think that they should be confirmed and that it should be ordered that they run concurrently with one another. That has the result that an effective sentence of 23 years' imprisonment is imposed for all the crimes of which the applicants have been convicted.

[18] The following order is accordingly made:

1 The applications for leave to appeal against conviction are dismissed.

2 Leave to appeal against the sentences imposed on the applicants is granted.

3 The appeals against sentence are upheld.

4 The sentence on count 1 (murder) is set aside and replaced by a sentence of 20 years' imprisonment in respect of all three appellants.

5 The sentence on count 2 (assault with intent to commit grievous bodily harm) of three years' imprisonment is confirmed in respect of all three appellants.

6 The sentence of three years' imprisonment imposed on the second and third appellants in respect of count 3 (kidnapping) is confirmed and it is ordered that this sentence is to run concurrently with the sentence imposed in respect of count 2.

M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant:	L M Manzini
Instructed by:	Justice Centre, Thohoyandou
For respondent:	A I S Poodhun
Instructed by:	National Director of Public Prosecutions.