



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 14 June 2024

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Masango and Another v The State (203/2022) [2024] ZASCA 98 (14 June 2024)

Today the Supreme Court of Appeal (SCA) handed down judgment dismissing the appellants' application for leave to appeal against the refusal of the petition on their convictions and the first appellant's application for leave to appeal against the refusal of the petition on his sentence.

The facts were briefly that: on 1 December 2015 between 09h30 and 10h00, Ms Ndlovu (a house keeper) witnessed a robbery at her employer, Mr Porter's house, being committed by the two appellants. On the day in question the appellants managed to deceive Ms Ndlovu to believe that they were there on the instruction of Mr Porter to take measurements for the installation of air conditioners. She allowed them access to the house and once they were inside the house they informed her that they were not there for her but for Mr Porter's things and she needs to shut up. They took her phone and when she screamed, she was slapped. She was subsequently tied up and blind folded. They then proceeded to steal laptops, TV screens, a sound system, her cell phone and a car, a red BMW 3 series, which was in the garage. The car was found between 12h00 and 13h00 on the same day by police officers in the possession of the two appellants. The appellants were then arrested and convicted of robbery with aggravated circumstances read with s 51(2) of the Criminal Law Amendment Act 105 of 1997 in the Regional Court for the District of Soweto held at Protea (the regional court). The first appellant was sentenced to twenty years' imprisonment and the second to fifteen years' imprisonment on 24 January 2017. On 16 October 2017, leave to appeal was refused against both conviction and sentence in relation to both appellants by the regional court. The appellants then petitioned the Gauteng Division of the High Court, Johannesburg (the high court) for leave to appeal against both conviction and sentence in terms of s 309C of the Criminal Procedure Act 51 of 1977 (the CPA). On 25 February 2019, leave to appeal was refused by the high court. The appellants approached this Court for special leave to appeal, in terms of s 16(1)(b) of the Superior Courts Act 10 of 2013 (the Superior Courts Act). On 18 December 2019, special leave to appeal the dismissal of the petition was granted by this Court to the first appellant. The second appellant also approached this Court and sought special leave to appeal against conviction only, leave was granted by this Court on 15 February 2022.

The issue to be determined by this Court was whether the high court should have granted leave to appeal.

The appellants' main argument on conviction was that Ms Ndlovu was a single witness. The second was that her identification of the appellants was a dock identification and does not carry enough evidential value to allow for a conviction. She testified that she had never seen the appellants prior to the incident. She then identified the first appellant in court as the person who took her phone and slapped her. She said that she was able to identify him in court, as he was the one who talked to her all the way to the house and she remarked that he treated her kindly. She pointed the second appellant out as the person who carried a notebook and a measuring tape. She did not attend an identification parade as she was not available on the day that it was held. She was willing to attend on another day, but was never informed of another date. Under cross-examination, she testified that Mr Porter showed

her a photograph that was sent to him and asked her whether the man in the photograph was one of the culprits. She said the photograph was of the first appellant. This turned out to be incorrect.

The SCA held that in order for it to determine whether the high court should have granted leave to appeal depended upon whether the appellants could be said to have reasonable prospects of success on appeal. Therefore, there must be a sound, rational basis for the conclusion that there were prospects of success on appeal. The SCA held that the law regarding dock identification was trite and the dangers inherent in it had been restated repeatedly. In this matter however, the SCA held that the BMW was found in the possession of the appellants within a very short period of time after the robbery, so the doctrine of recent possession found application. The SCA further held that Ms Ndlovu's evidence was corroborated by the fact that the vehicle was found in the appellants' possession. Furthermore, according to the SCA, it was also important to note that Ms Ndlovu initially did not suspect anything and her powers of observation were not initially tainted by fear. Therefore the high court was correct in refusing leave to appeal the convictions.

Regarding the sentence of the first appellant, the SCA held that it is trite that sentencing falls within the discretion of the trial court. Furthermore, according to the SCA there was nothing to indicate that the regional court misdirected itself or did not exercise its discretion properly and judicially. Additionally, the SCA held that in the circumstances, the high court was correct in refusing leave to appeal. The appellants, according to the SCA, did not succeed in proving that they had reasonable prospects of success on appeal. As a result, the appellants' application for leave to appeal against the refusal of the petition on their convictions was dismissed. Additionally, the first appellant's application for leave to appeal against the refusal of the petition on his sentence was also refused.

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