



## 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:** 20 March 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***

*Nong and Masingi v The State (787/2021) [2024] ZASCA 25 (20 March 2024)*

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Today the SCA dismissed the appeal against the decision of the Gauteng Division of the High Court, Johannesburg. (The high court).

The appellant and his co-accused were convicted in the Regional Court, Johannesburg on a count of robbery with aggravating circumstances read with s 51 of the Criminal Law Amendment Act 105 of 1997 (the Act). On 6 November 2017 the first appellant was sentenced to 12 years' imprisonment and the second appellant was sentenced to 15 years' imprisonment. The magistrate, on 21 June 2018, refused the appellants leave to appeal against their conviction but granted leave to appeal in respect of sentence. Aggrieved by the outcome of their application for leave to appeal, the appellants lodged a petition for leave to appeal in respect of their conviction in terms of s 309C of the Criminal Procedure Act 51 of 1977 (the CPA), in the Gauteng Division of the High Court, Johannesburg (the high court). This petition was dismissed by the full bench of that division (Mokgoatheng J and Grant AJ). It bears mentioning that on 21 June 2020 the appeal against sentence was heard by the high court and dismissed. In terms of s 16(1)(b) of the Superior Courts Act 10 of 2013 (Superior Courts Act), the appellants lodged applications for special leave against the dismissal of their petitions seeking leave to appeal against their conviction. On 13 March 2021 the first appellant was granted special leave to appeal against the dismissal of his petition seeking leave to appeal against his conviction. The second appellant was granted special leave to appeal against the dismissal of his petition of his conviction on 28 September 2022.

The facts were briefly as follows: The complainant, Kwanele Arnold Dube, testified that he was robbed at gun point by two assailants. He was not aware that the gun being used was in fact a toy gun or air pistol. After being robbed he managed to follow his assailants and was present when they were apprehended and the toy gun retrieved. In order to apprehend them he sought assistance from one of his colleagues in the Community Policing Forum (CPF), Simphiwe John Mthembu (Simphiwe). After receiving a call from the complainant, Simphiwe arrived on the scene and assisted in the arrest of the appellants and retrieved the toy gun from one of the appellants. The complainant also testified that whilst he and Simphiwe were on the scene, Constable Ndaonde was in attendance and Simphiwe handed the toy gun to him.

The issue herein was not the merits of the appeal but rather, whether the high court ought to have granted leave to appeal. Therefore the merits were curtailed to determining only whether the appellant had reasonable prospects of success and should accordingly be granted leave.

Before this Court, counsel for the appellants, submitted that the trial court misdirected itself as it failed to take cognisance of the fact that the complainant was a single witness where the main issue in the trial was that of identification. In respect of both a single witness and that of identification, it was argued that the trial court ought to have demonstrated an awareness and an appreciation of the cautionary rule applicable in the circumstances. The appellants also placed reliance on the fact that the incident happened very quickly, as per the testimony of the complainant, and as such he did not have an

'adequate opportunity to observe the assailants' who robbed him. Furthermore, the appellants challenged the trial court's reliance on Simphiwe's evidence as providing corroboration of the complainant's version, even though it acknowledged that there were some discrepancies in their evidence, for example who conducted the search of the appellants. As such, the appellants contended that the evaluation conducted by the trial court did not heed the applicable principles when dealing with such evidence.

On the other hand, the State, submitted that the trial court did not commit a misdirection. It contended that besides the single witness being honest, sincere and having exuded subjective assurance, there still had to be certainty beyond reasonable doubt that the identification made by that witness was reliable. The State conceded that identification evidence was generally unreliable and it had to be approached with caution. However, counsel for the State submitted that its case also relied on the complaints evidence as corroborated by Simphiwe and Constable Ndaonde who attended at the scene.

The SCA held that the difficulty faced by the appellants regarding the issue of identification, was that they placed themselves on the scene where the alleged robbery took place. On their own version they, according to the SCA, interacted in close proximity with the complainant when he wanted to search them. The SCA further held that the appellants in some material respects corroborated the complainant's version by stating that Simphiwe was one of the persons who arrived on the scene, apprehended them, and that thereafter, Constable Ndaonde arrived on the scene. Their evidence that the toy gun was handed over by Simphiwe to the Constable Ndaonde in their presence corroborates the complainant's and Simphiwe's version of events which took place on the scene. The SCA also held that, the totality of the evidence reflects that the complainant was robbed at gun point. A toy gun was retrieved by Simphiwe on the scene, in the possession of the first appellant when they were apprehended. The account given by Constable Ndaonde was that a toy gun was recovered and handed directly to him on his arrival at the scene. This, held the SCA, was indicative that the appellants had failed to show that there were reasonable prospects of success on appeal. Therefore, the high court had not misdirected itself when it refused the petition to appeal against the conviction and as a result, the appellants' application for leave to appeal against the refusal of the petition on their conviction should be dismissed.

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