HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: A150/2021

(1) REPORTABLE: NO (2) OF INTEREST TO OTHER JUDGES: NO (3) REVISED. DATE: 01 DECEMBER 2022 SIGNATURE

In the matter between:

PRINCE NDLOVU Appellant

and

THE STATE Respondent

Summary: *Criminal law – evidence – identity of knife-wielding robber – complainant credible witness and sufficient opportunity to make proper observances in broad daylight – subsequent identification at identity-parade – appearance and facial features of appellant confirmed by dock-identification – no evidence of an alibi – appeal dismissed.*

ORDER

The appeal against conviction and sentence is dismissed.

J U D G M E N T

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] The appellant's appeal against his conviction and sentence depends on whether he had been correctly identified by the complainant.

Background facts

[2] On 27 July 2016, the complainant was robbed in broad daylight at around 14h00 while he was walking along Johnstone Street, Sunnyside, on his way to church. He had finished his shift at the Department of Correctional Services earlier that day.

[3] The complainant was accosted by two men, one approaching him from the front and one from behind. The man in front grabbed the complainant "on his chest" with his left hand and demanded a cellphone. The man at the back tripped the complainant, causing him to fall. The first man then drew a knife, dragging the complainant towards some bushes, still demanding a cellphone. The complainant, fearing for his life, handed over his Apple iPhone 6 and told the men about a second phone, a Samsung in his back pocket. The man behind the complainant searched him and took the cellphone while the first robber stabbed the complainant in his left shoulder. The robbers then fled the scene and jumped over the fence of an adjacent schoolyard.

[4] The complainant jumped up and started yelling. Still bleeding, he attempted to pursue his attackers and saw them running into a nearby abandoned white house. When the complainant got to the abandoned house, he was told that his assailants were no longer there.

[5] Police who had been alerted by members of the public arrived on the scene shortly thereafter. They took descriptions of his assailants from the complainant, notably that the one with the knife had a dark complexion, a goatee and that his lips "sort of overlap" and that he had been wearing a red "hoodie".

[6] One of the policemen searched the abandoned house and found a red hoodie and a blood-stained knife in one of the rooms. A witness, Erik, whom the police met at the abandoned house and who was the one who had pointed out the hoodie and the knife, told the police that he had seen two men running into the house and that one had been wearing the red hoodie. In the meantime, the police had arranged for the complainant to be taken to the hospital by ambulance.

[7] Less than two weeks later, the complainant was asked to attend an identity parade. The parade was arranged by a police captain with 30 years of experience. He was assisted by a warrant officer and a constable who ensured that potential witnesses, such as the complainant, do not have contact with or sight of the persons lined up in an identity parade. Yet another warrant officer took photographs of the proceedings. None of these policemen were either investigating or arresting officers in the case.

[8] The complainant identified two persons at the identity parade. One was the appellant who had been arrested the day after the incident by an investigation officer who had revisited the abandoned white house. The person sleeping in the house had directed him to yet another abandoned house close to a nearby bridge where he had confronted the appellant and arrested him. The second person identified by the complainant was simply a person forming part of the line-up and was not a suspect. When confronted with this erroneous identification during cross-examination, the complainant explained that he had more opportunity to note the features of the assailant confronting him from the front, wielding a knife, than the scant opportunity he had in respect of the person who had tripped him from behind. The complainant testified that he was "100% certain" of the identification of the appellant but uncertain about the second person. He confirmed his identification by referring to the appellant's appearance in the dock. The magistrate had also recorded her observation of the peculiar "overlapping" of the appellant's lips.

[9] There is one distinct feature of the appellant's appearance, which is additionally featured in the trial. The appellant apparently had two fingers (a part of fingers) missing from his right hand. The complainant said he had not noticed

this and only knew that the appellant had been able to wield the knife in his right hand and been able to stab the complainant therewith. The arresting officer testified that the complainant had told him of this feature of the appellant, while the complainant denied this.

[10] The version put in cross-examination to the state witnesses during the trial, at which the appellant had been legally represented, was that of an alibi. This had also featured in the appellant's plea explanation. According to this, the appellant was accompanying his girlfriend to the Bosman Street train station on the day in question and at the time that the robbery had taken place.

[11] The question on appeal is whether the magistrate in the court of first instance had correctly assessed the evidence in convicting the appellant, particularly in respect of the issue of the identity of the perpetrator.

The law regarding the identification of persons

[12] The magistrate correctly recognized that even an honest witness can make a mistake regarding the identification of a person.[1]

[13] Therefore, even if a witness is found to be credible, the reliability of his identification evidence must still be evaluated. In this regard it has been found as follows: "*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, for instance, lighting, visibility, eyesight, the proximity of the witness, the opportunity for observation, both as to time and situation, the extent of his prior knowledge of the*

[1] *R v Masemang* 1950 (2) SA 488 (A) at 493

accused, mobility of the scene, corroboration, stability, the accused's face, voice, build, gait, dress, the results of the identity parade and, of course, evidence by or on behalf of the accused".[2]

[14] In addition, the magistrate took into account that the complainant was, as far as direct identification evidence went, a single witness. The customary cautionary rules applied in this regard.[3]

Evaluation

[15] The magistrate had found the complainant to be a credible witness, and from a reading of the record, there is nothing apparent to doubt this finding.

[16] The complainant had sufficient opportunity to observe his assailant: they were in close proximity, it was broad daylight, they had the opportunity to exchange words, and the assailant had a number of distinguishing features such as a dark complexion, a goatee, and a peculiar or distinguishing overlap of his lips.

[17] The complainant also observed the knife and the red hoodie that his assailant wore. He pursued this assailant and observed the assailant entering a white abandoned house. Constable Mulaudzi, who was also found to be a credible state witness, found a bloodied knife and a red hoodie inside the abandoned white house shortly after his arrival on the scene. This objective circumstantial evidence lends credence to the complainant's version and adds weight to his observations. The

[2] *S v Mthetwa* 1972 (3) SA 766 (A) at 768A – C.

[3] *S v Sauls and Others* 1998 (3) SA 172 (A).

magistrate had also correctly ignored the hearing evidence of the witness "Erik" referred to in paragraph 6 above.

[18] The appellant had waived his right to legal representation being present during the identity parade, and apart from this fact, the magistrate had correctly found, on the strength of the other four police officers, that the identity parade had been properly conducted. It is at this parade that the complainant pointed out the appellant. The complainant's error in incorrectly identifying an incorrect person in the identity parade as being the second assailant is understandable due to the lack of observation opportunities in contrast with those regarding the appellant.

[19] The complainant's identification of the appellant was strengthened by his dock identification of the appellant during the trial and the objectively noted facial feature of the appellant relating to the feature of his lips.

[20] The failure to notice that some fingers or parts thereof were missing from the appellant's right-hand does not detract from any of the above elements and occurrences of identification.

[21] The fact that the arresting officer claimed that the complainant had told him about this feature or missing fingers also do not detract from the other elements of identification. This policeman's memory and the reliability of his evidence in this regard is also to be questioned. The magistrate had found him to be a "less reliable" witness. His evidence was disregarded as in any way corroborative of the complainant's identification evidence.

[22] The contradiction between the evidence of the complainant and the arresting officer is not material when compared to the totality of the evidence. Still, it becomes even less material when one considers that the appellant had not put up any version, let alone any evidence in support of the suggested alibi. Of course, the appellant as an accused may remain silent, but when, as in the present case, no evidence is placed before a court to dispel the other identifying evidence referred to above, I am of the view that the magistrate had correctly found that evidence to be conclusive.[4]

[23] In my view, the conviction should stand, and the appeal against it should fail.

[24] Regarding the issue of sentence: the conviction was one of robbery with aggravating circumstances, resulting in a senseless stabbing of the complainant. As such, it attracted a minimum sentence of 15 years imprisonment.[5] The appellant had a previous conviction of possession of drugs. He was 43 years old at the time, had two minor children who were either in the care of their mother or social workers. He not only has a grade 12 qualification but also has a certificate as a bodyguard and was schooled in martial arts. He was employed as a "bouncer". At the time at the time of sentencing the appellant had spent over a year and eight months in custody awaiting trial. Taking everything into account, including the prevalence of this type of crime, the magistrate sentenced the appellant to 15 years imprisonment of which 5 years were suspended on condition

[4] See also: *S v Francis* 1991 (1) SACR 198 (A) and *S v Nooroodien* 1998 (2) SACR 510 (NC).

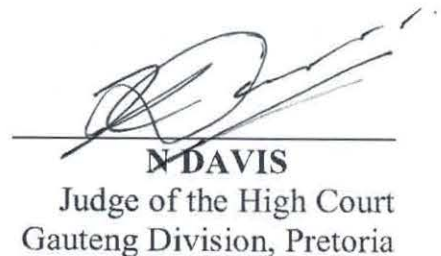
[5] Section 51(1) of the Criminal Law Amendment Act 105 of 1997.

that the appellant not be convicted of robbery with aggravating circumstances committed during the period of suspension.

[25] The magistrate, in a reasoned judgment, took all the relevant sentencing factors into account and I find that she had not misdirected herself in any way. The sentence does not induce a sense of shock, and neither is so disproportionate that this court, on appeal, should interfere therewith.

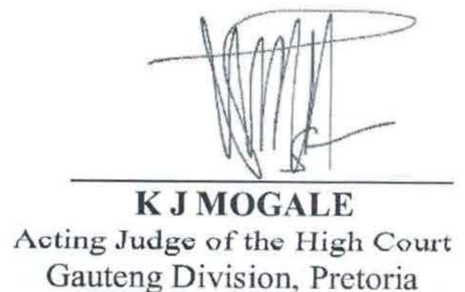
Order

[26] Accordingly, I suggest that the appeal against conviction and sentence be dismissed.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

I agree.



K J MOGALE
Acting Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 13 October 2022

Judgment delivered: 01 December 2022

APPEARANCES:

For the Appellant:	Mr H L Alberts
Attorney for the Appellant:	Legal Aid South Africa, Pretoria
For the Fourth Respondent:	Adv L A More
Attorney for the Fourth Respondent:	Director of Public Prosecutions, Pretoria