THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 700/2015
Not reportable

In the matter between:

ERNEST VUSI MAJAZI ZWANE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Zwane v The State* (700/15) [2016] ZASCA 19 (17 March 2016)

Coram: Majiedt and Seriti JJA, Plasket AJA

Heard: 02 March 2016

Delivered: 17 March 2016

Summary: Criminal Law – Appeal against conviction on count of murder and sentence of life imprisonment – Appeal on conviction dismissed – Failure to bring to the attention of the appellant provisions of s 51 of Criminal Law Amendment Act 105 of 1997 vitiates the imposition of minimum sentence of life imprisonment – Sentence set aside and replaced with 20 years' imprisonment.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Hurt, Msimang and Van der Reyden JJ sitting as court of appeal).

1 The appeal against conviction is dismissed.
2 The appeal against sentence succeeds. The sentence of life imprisonment imposed by the trial court is set aside and replaced with 20 years' imprisonment.
3 The sentence is antedated in terms of s 282 of the Criminal Procedure Act 51 of 1977 to 18 March 2002.

JUDGMENT

Seriti JA (Majiedt JA and Plasket AJA concurring)

[1] The appellant, Mr Ernest Vusi Majazi Zwane, was arrested on 17 November 2000. He appeared in the KwaZulu-Natal Local Division of the High Court, Durban, on 6 March 2001. He faced one count of murder, one count of attempted murder and one count of robbery with aggravating circumstances as defined in s 1(l)(*b*) of the Criminal Procedure Act 51 of 1977. On 11 March 2002 he was convicted on the murder count and acquitted on the other two counts. On 18 March 2002 he was sentenced to life imprisonment.

[2] The appellant applied for leave to appeal against conviction and sentence. On 28 March 2002, he was granted leave to appeal to the Full Court only against sentence. On 14 February 2003 his appeal was dismissed by the court a

quo. The appellant, with leave of this Court, now appeals against both his conviction and sentence.

[3] The main issues in this appeal are whether there is sufficient evidence which identified the appellant as one of the deceased's assailants and whether the trial court was correct in invoking the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997 when imposing sentence on the appellant.

[4] It is necessary to set out the facts in some detail. It is not disputed that on 31 July 2000 at about 19h30 and at KwaMashu Township, Durban, Mr Bafana Emmanuel Zondi (the deceased) was shot 11 times and sustained multiple bullet wounds which caused his death.

[5] The state relied on the evidence of six witnesses, namely Mrs Rose Zandile Msomi (Msomi), Messrs Fanifani Khanda Nene (Nene), Simphiwe Katshana Mkhwanazi (Mkhwanazi), Sergeant Andrè Visser (Visser) and Inspector Vusumuzi Mthethwa (Mthethwa). Msomi testified that on the night in question, at about 19h30, the deceased came to her tuck-shop to buy some items. She served the deceased who bought chips and coca-cola cold drink, and whilst preparing to give the deceased change, she heard gunshots being fired from outside. She fell on the ground and hid herself. Before the shooting the deceased was standing at the window waiting for his change. Later she saw the deceased lying on the floor of the veranda of the tuck shop, apparently struck by the bullets. From the time that the deceased gave her money to the time that she heard the first gunshot she did not see anybody come up to the deceased. She did not know if Nene was also on the scene at the time of the shooting. She further testified that Nene arrived at the scene later and that she did not know the appellant.

[6] Nene testified that the deceased was his brother and that they stayed in the same house. He knew the appellant and they used to play soccer together at school. He had known the appellant for about five years. On the night in question, he was at home, but not the deceased. He went to the tuck shop to look for the deceased where he found him. The vicinity of the tuck shop was well lit. He asked for a cigarette from the deceased and thereafter left him in the vicinity of the tuck shop. Shortly thereafter he heard sounds of gunshots. He hid himself in nearby shrubs. He saw two men coming towards the tuck shop and each of them had a gun. The deceased ran towards the tuck shop and he was shot. The two men who had firearms and who were shooting at the deceased were the appellant and one Bongani Henry Kwenyama (Kwenyama).

[7] Nene further testified that there was another group of people that was following the two gunmen. There were eight to nine boys and some of them also carried firearms and also fired shots at the deceased. From the time that he saw the deceased's assailants for the first time that evening to the time they left the scene, could have been five to seven minutes. After the departure of the deceased's assailants he went to where the deceased lay. Thereafter he went home and made a report to his mother.

[8] Under cross examination Nene was referred to one of the two statements he made to the police and in particular to one paragraph which reads as follows: '… At about 19h30 I accompanied the deceased Bafana Zondi to buy cigarettes at Msomi's tuck shop'. It was pointed out to him that that was not consistent with his evidence in court and Nene said he could not recall why in his statement he mentioned that he accompanied the deceased to the tuck shop. He further said that the appellant and Kwenyama were in front of the group and they were firing shots and the group behind these two individuals only started to

fire shots as they came closer to the deceased, directing those shots at the deceased who was lying on the ground. He further said that he recognised both the appellant and Kwenyama by their facial features and he did not pay attention to their clothes. He told the police that his brother was killed by Kwenyama and the appellant. At the scene of crime he did not tell anyone that the deceased was killed by the appellant and Kwenyama. He also did not tell his mother that the appellant and Kwenyama had killed his brother as his mother did not know them. Both the appellant and Kwenyama were known to him. He further said that he did not see Mkhwanazi at the scene of the crime.

[9] Mkhwanazi testified that the deceased was his friend and on the day of the incident the deceased found him standing alone at the veranda of the tuck shop. This is the veranda where customers stand when they are being served through the window by Msomi. The deceased went to the window where the counter was to purchase some goods. He then saw a group of boys coming towards the tuck shop and firing gunshots. In that group he identified Maxoli, Cewu, Kwenyama and Mtshakandos. He further said that one of the boys in that group looked like the appellant. He knew the appellant as they grew up together and attended the same school. He did not see the appellant clearly when he heard the shots being fired. The person who looked like the appellant was behind three boys who were in front of the group at the time of this incident.

[10] Under cross examination he said that the deceased found him at the verandah of the tuck shop and the area was well lit. He did not see Nene talking to the deceased nor had he seen Nene at the scene. He was asked if the appellant was one of the boys who were shooting and he said: ‘It’s possible that it was not him but somebody who looked like him. I’m not sure.’ He further testified that when the shooting started he ran away. In the statement that he made to the

police on 29 March 2001 he said that the appellant, Bongani, Ma-Iron (which is the nickname of Bongani Henry Kwenyama), Cewu, Bincu, Maxoli, Manyuka and Meshenkhandazi were part of the group of boys and were armed with hand guns and rifles.

[11] Visser testified that on 17 November 2000 he was part of a group of police officers who were patrolling L Section, KwaMashu. They were following up information they received regarding certain suspects including the appellant. They were five police officers in one motor vehicle and Sergeant van der Merwe was driving the motor vehicle. Whilst driving around L Section approaching the house where the appellant was supposed to be, he noticed the suspect they were looking for. The suspect started running away when he noticed the police motor vehicle. He and his colleague, Inspector Reid, jumped out of the motor vehicle and chased the suspect. They caught up with the suspect (who is the appellant herein) and arrested him. At the time of the arrest of the appellant, his constitutional rights were explained to him. Under cross examination he denied that the appellant was assaulted at the time of his arrest.

[12] Mthethwa testified that he first saw the appellant on 18 November 2000 at Durban North Police Station where the appellant was detained. He booked the appellant out of the cells to take his finger prints and to obtain a statement from him. He took the appellant to his office. He used a pro forma document to obtain a warning statement from the appellant. He explained to the appellant his constitutional rights and the appellant elected to remain silent. Mthethwa further said that the appellant then said that he was ‘present when the deceased was shot to death as we two groups from L Section were fighting. I then elect to give the detailed statement before the magistrate’. After the pro forma document was completed, the appellant signed it. He further testified that when he took the

warning statement the appellant did not mention to him that he was assaulted or threatened by anybody. He obtained a statement from Nene on 3 August 2000 and in the said statement Nene mentioned amongst others that the appellant was at the scene of the crime. Under cross examination he denied that the appellant was assaulted either prior to or during the time when he obtained his statement or thereafter.

[13] The appellant testified that on 17 November 2000 he was at home sitting in the sun. He was called by a certain Bongomusa who told him that there was a telephone call for him. He ran home and on his way he came across a police officer carrying a fire-arm which he pointed at him. He furthermore testified that police officers assaulted him at the time of his arrest. He was detained at Durban North Police Station. The following day the investigating officer collected him from his cell and took him to an office and took his finger prints. Thereafter the investigating officer said to him that he wanted to take his statement. The appellant further testified that he informed the investigating officer that he was not going to say anything as he knew his rights. The investigating officer together with other police officers assaulted him, forcing him to sign the statement prepared by the investigating officer. He ultimately signed the document that was given to him to sign. Thereafter he was taken to his cell. He denied that he told the investigating officer that he was at the scene of the crime.

[14] Under cross examination, he said that the statement he signed was not written in his presence. He was given four blank pieces of paper to sign. He further testified that he told the investigating officer that there was no need to warn him about his rights because he knew his rights. The police officers, during their interrogations were not forcing him to admit that he killed the

deceased or that he was at the scene of the crime. The appellant was asked what prevented him from visiting his family at LA 563 KwaMashu and he said that his family was in Umlazi 'so it was not easy for me to pay a visit to strange people who were occupying that particular place.' He further said that at the time of the commission of the offence he was employed as a conductor on a taxi.

[15] Mrs Thandekile Mxele, the aunt of the appellant, testified that she resides at Umlazi as was also the case in 2000. Prior to staying at Umlazi she was staying at 563 KwaMashu. She further testified that the accused after his release from prison did not visit KwaMashu until some time in August 2000. She further said that the appellant was not employed. Under cross examination she said she left house LA 563 KwaMashu at the end of 1998 and her daughter and a girl with whom she is related remained in the house. She did not know where the appellant was on 31 July 2000.

[16] In convicting the appellant the trial court correctly made a favourable credibility finding in respect of the state witnesses and rejected the evidence of the appellant. The trial court further said that 'Nene's evidence was not seriously challenged in any way and in our view he testified to the best of his ability about his recollection of the traumatic events which occurred on the night in question. Having regard to the fact the appellant was well known to him, that the lighting in the area was sufficiently bright for him to make a correct identification, that he observed the group of assailants from a close distance and that he had adequate time to make a correct identification, we are satisfied that he correctly identified the accused as one of the assailants'. I agree with the views expressed by the trial court. The appellant's version was not reliable and the trial court correctly rejected it.

[17] The appellant's counsel submitted that the trial court misdirected itself by admitting in evidence the warning statement of the appellant. Counsel further contended that the appellant was not informed that he had a right not to incriminate himself and that he had a right not to confess or admit anything and the right to be assisted by legal representative in making a warning statement.

[18] The appellant testified that at the time that the investigating officer was taking his warning statement he advised the investigating officer that he knew his constitutional rights. This statement by the appellant indicates that he was well aware of his constitutional rights which were explained to him by the investigating officer. The contentions that when the appellant signed the warning statement he was not aware of his constitutional rights and that he was forced to sign the statement have no merits. The trial court correctly accepted the evidence of the state witnesses and rejected the appellant's version.

[19] The appellant's counsel contended that the trial court misdirected itself by relying on the evidence of Nene who was a single witness and whose evidence was not satisfactory in all material respects.

[20] Section 208 of the Criminal Procedure Act provides that an accused may be convicted of any offence on the single evidence of any competent witness. In *Stevens v S* [2004] ZASCA 70; [2005] 1 All SA 1 (SCA) para 17 Navsa and Van Heerden JJA said:

> 'As indicated above, each of the complainants was a single witness in respect of the alleged indecent assault upon her. . . It is, however, a well-established judicial practice that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility. . . . '

[21] In *S v Mahlangu* [2011] ZASCA 64; 2011 (2) SACR 164 (SCA) para 21 Shongwe JA said:

'…The court can base its finding on the evidence of a single witness, as long as such evidence is substantially satisfactory in every material respect, or if there is corroboration. The said corroboration need not necessarily link the accused to the crime.'

[22] The area where the deceased was shot was well lit. Nene had a period of about five to seven minutes to observe the deceased's assailants, the appellant was well known to him and the discrepancies between the statement he made to the police and his testimony in court are not material. Nene's evidence as to the identification of the appellant as being one of the boys who were at the scene of the crime is corroborated by the appellant's admission mentioned earlier. In the admission the appellant placed himself at the scene of the crime when the deceased was shot and killed. In my mind, there is no danger that the appellant could have been wrongly implicated in the killing of the deceased. This Court's powers to interfere on appeal with the findings of a trial court are limited. In the absence of any material misdirection by the trial court, its findings are presumed to be correct and will only be disregarded if the evidence show them to be incorrect. There is no indication that the findings of the trial court are incorrect and therefore the appeal against conviction should fail.

[23] I now turn to the issue of sentence. In mitigation of sentence, the appellant's counsel advised the trial court that he was 17 years old at the time of commission of the offence, that he was a first offender and that he had been in custody for one year and four months. Section 51 of the Criminal Law Amendment Act provides that the regional court or a high court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life in the absence of substantial and compelling

circumstances. Murder which was planned or premeditated falls under Schedule 2. The trial court invoked the provisions of s 51 and sentenced the appellant to life imprisonment.

[24] The appellant's counsel submitted that the trial court misdirected itself by sentencing the appellant in terms of the provisions of s 51 of the Criminal Law Amendment Act in circumstances where the said provisions were neither contained in the indictment nor brought to the attention of the appellant at the commencement of the trial. The respondent's counsel conceded that the indictment made no reference to the minimum sentence applicable to the charge and that the trial court did not apprise the appellant of any applicable minimum sentence.

[25] In *S v Ndlovu* 2003 (1) SACR 331 (SCA) at 337a-c Mpati JA, after analysing certain authorities, said:

'And I think it is implicit in these observations that where the State intends to rely upon the sentencing regime created by the Act a fair trial will generally demand that its intention pertinently be brought to the attention of the accused at the outset of the trial, if not in the charge-sheet then in some other form, so that the accused is placed in a position to appreciate properly in good time the charge that he faces as well as its possible consequences. . .'

In *Makatu v S* [2013] ZASCA 149; 2014 (2) SACR 539 (SCA) para 23 Bosielo JA said:

'The trial judge was guilty of a number of misdirections which to my mind are so gross that they vitiate the sentences imposed. First, in sentencing the appellant to imprisonment for life for murder, he states that the murder was committed under circumstances where the offence justified the sentence prescribed under Part I of Schedule 2 of the Criminal Law Amendment Act. A major problem here is that the indictment never made mention of this section or the Act. It does not even give any details to indicate if there are any aggravating features which would bring it within the ambit of the minimum sentencing regime.'

[26] My view is that the sentence of life imprisonment imposed on the appellant must be set aside because it was never brought to his attention that the state in the event of conviction, would ask the court to invoke the provisions of s 51 of the Criminal Law Amendment Act. Both counsel were of the same view. The appellant's personal particulars are on record. He was very young when he committed the offence under consideration. There are reasonable prospects that he might be rehabilitated. There are also certain aggravating factors. The deceased was brutally murdered for no apparent reason. No reasons can justify the murder of a person particularly in the manner in which the deceased was murdered. The appellant showed no remorse and maintained throughout the trial that he was innocent. In my view a sentence of 20 years' imprisonment will be appropriate in this case.

[27] In the circumstances I make the following order:

1 The appeal against conviction is dismissed.

2 The appeal against sentence succeeds. The sentence of life imprisonment imposed by the trial court is set aside and replaced with 20 years' imprisonment.

3 The sentence is antedated in terms of s 282 of the Criminal Procedure Act 51 of 1977 to 18 March 2002.

W L Seriti
Judge of Appeal

APPEARANCES:

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