IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A240/2017

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

15/12/2017
DATE

SIGNATURE

In the matter between:

Lazarus Kgotso Phiri — **1st Appellant**

Johannes Nchimane — **2ND Appellant**

and

State — **Respondent**

Coram: **Munzhelele AJ, Janse van Nieuwenhuizen J, Cambanis AJ**

Heard: **8 December 2017**

Delivered: **15 December 2017**

JUDGMENT

MUNZHELELE AJ

Background

[1] This is an appeal in terms of section 309 of the Criminal Procedure Act 51 of 1977, by the appellants Lazarus Kgotso Phiri and Johannes Nchimane, against the sentence imposed by Honourable Nkabinde J in the High Court of South Africa (circuit local division) held at Rustenburg. The appellants were sentenced on 20 September 2002.

[2] The 1st appellant was sentenced on two (2) counts:

- Count 1: murder, sentenced to life imprisonment; and
- Count 2: robbery with aggravating circumstances, sentenced to 15 years imprisonment. These sentences were ordered to run concurrently.

[3] The 2nd appellant was sentenced on five (5) counts:

- Count 1: murder, sentenced to life imprisonment
- Count 2: robbery with aggravating circumstances, sentenced to 15 years imprisonment.
- Count 3: rape, sentenced to 15 years imprisonment
- Count 4: unlawful possession of firearm in contravention of section 2 of act 75 of 1969, sentenced to 15 years imprisonment
- Count 5: unlawful possession of an unknown total of ammunition, in contravention of section 36 of Act 75 of 1969, sentenced to 15 years imprisonment.

Sentence in respect of counts 2, 4, and 5 to run concurrently with the sentence in respect of count 1.

[4] The appellants were legally represented by Mr Gillissen and Ms Henzen throughout their trial proceedings.

[5] The appellants were convicted on 16 September 2002 and sentenced on 20 September 2002, in terms of the provisions of the Criminal Law Amendment Act 105 of 1997 (the Act). The Honourable Judge imposed minimum sentences on all counts.

[6] Leave to appeal the sentence was granted by the Honourable Deputy Judge President, A Ledwaba at Gauteng Local Division in Pretoria on 7 June 2017.

Facts of the case

[7] Wessels Johannes Nel and his fiancée Anna Martina Grobler were attacked by three armed men in their Isuzu double cab van, which was parked under the tree along Rustenberg Kloof on 22 March 2001. At this incident, Anna Martin Grobler was also raped, whereas Wessels Johannes Nel was shot several times by one of the appellants. The post-mortem revealed that the deceased died from gunshot wounds. The appellants also robbed several items from the victims. Some of the items were found at the 1st appellant's residence by inspectors Opperman and Van der Merwe. The firearm which was used in the commission of these crimes was seized from the 2nd appellant's house under the mattress.

[8] Appellants denied the commission of the crimes they were charged with by the state and requested the court to acquit them. However, the appellants' finger prints matched with the ones uplifted from the bakkie. From the totality of the evidence presented before the judge, the appellants were convicted.

Issue

[9] The following were the issues to be decided

- Whether the failure to inform the appellants clearly and properly either at the beginning of the trial or during the trial of the exact nature, the details and the consequences of the offences that they faced, has denied them of their right to a fair trial.
- Whether failure to make reference to the provisions of the Act in respect of the minimum sentence on the indictment renders the trial unfair to the appellants.

Submissions by the appellants

[10] The appellants in their heads of argument state that the indictment does not make reference to the provisions of section 51 of the Act. In addition, the appellants argue that they were never made aware that the trial court contemplated imposing sentence as provided for in the Act. Due to these omissions, the appellants argue that their right to a fair trial was denied.

[11] The appellants further argues that counts four (4) and five (5), which is a contravention of section 2 (when there is more than one firearm) and 36 (when the rounds of ammunition are more than 100) does not fall under the Act, and their sentences are within the discretion of the Judge. Thus, the maximum sentence for such offences, in terms of section 39 of Act 75 of 1969, is imprisonment for a period not exceeding 10 years. However, in circumstances where there is only one firearm or less than 100 rounds of ammunition, the sentence to be imposed is a fine not exceeding R12 000 or imprisonment for a period not exceeding three years.

Submissions by the respondent

[12] The respondent opposes the appellants' arguments that the appellants suffered any prejudice during the trial proceedings due to the fact that the provisions of the Act were not mentioned in the charge sheet; and that they were not made aware of the applicability of the minimum sentence provisions.

The Law

[13] In the case of *S v Malgas* 2001 (1) SACR 469 (SCA) at para 12, Marais JA held that:

'... a court exercising appellate jurisdiction cannot, in the absence of a material misdirection by the trial court , approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by such court simply because it is not preferred. To do so would be to usurp the sentencing discretion of the trial court. See the case of *S v Bailey 2007* (2) SACR 1 (C, *R v Dhlumayo & Another* 1948 (2) SA 677 (A).

Evaluation

[14] It is common cause that the appellants in this matter were not made aware of the provisions of the Act and that the indictment was also not read with the provisions of the Act. They were therefore not apprised of the implications and consequences of the imposition of a sentence of life imprisonment or any other minimum sentence.

[15] 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 appellants at the outset of the trial, if not in the charge sheet then in some other form, so that the appellants are placed in a position to appreciate properly and in good time the charge faced with as well as its possible consequences. It is sufficient to say that what would at least be required is that the appellants be given sufficient notice of the state's intention to enable them to conduct their defence properly.

[16] The offences of the case in question occurred on 22 March 2001. The Act became applicable on or after 1 May 1998. Thus, the appellants should have been informed about the applicability of the Act and the sentence consequences thereof. The charge sheet should have been read with the provisions of the Act, particularly because at the time of this trial the Act was still new and most people were not familiar with its application. In circumstances where the state would want to rely on an increased penal jurisdiction, failure to provide sufficient details in the charge sheet regarding the offences for which the appellants were charged, including the relevant legislation; and to advise appellants fully and properly of the charge either at the beginning of the trial, at any stage of the trial, but before the end of the trial proceedings, might lead to the conclusion that the appellants did not receive a fair trial. The objective behind this is not only to avoid a trial by ambush, but also to enable the appellants and the state to prepare adequately for the trial.

[17] According to section 35(3) of the Constitution of South Africa, the appellants had a right to be informed of the charges with sufficient details to answer, because the Bill of Rights specifies that every accused has a right to a fair trial. Similarly, it was desirable under the common law though not essential that the charge sheet should set out the

facts that the state intends to prove in order to bring the appellants within an enhanced sentencing jurisdiction See *S v Moloi* 1969(4) SA 421 (A).

[18] In *S v Makatu* 2006 (2) SACR 582 (SCA) para 7 the court said that:

'as a general rule , where the state charges an accused with an offence governed by the provisions of section 51 of the Act 105 of 1997 such as premediated murder it should state this in the indictment. The accused faced with a sentence for life imprisonment must from the outset know what the implications and consequences of the charge are'.

[20] In *Machongo v S* (20344/14) [2014] ZASCA 179 (21 November 2014) para 10 it was held that:

'Where an indictment makes no mention of the applicability of the Criminal Law Amendment Act 105 of 1997 and the possibility of an accused being sentenced to a prescribed minimum sentence, and the trial judge also did not warn the accused of its applicability, such failure constitutes a fatal irregularity resulting in an unfair trial in respect of the sentence. In such a case the appeal court must consider the sentence afresh and 'considering a sentence afresh must ineluctably mean setting aside of the sentence of the trial court, inter alia, and conducting an inquiry on sentence as if it had not been considered before. In other words, the appeal court must disabuse itself of what the trial court said in respect of sentence. . .' (Para [11]).

[21] However, the case of *Moses Tshoga v The State* (635/2016) 2016 ZASCA 205 (15 December 2016) at para 22 it was held that:

'I am of the view that a pronouncement that the Act had to be mentioned in the charge sheet or at the outset of the trial would be elevating form above substance. Every case must be approached on its own facts and it is only after a diligent examination of all the facts that it can be decided whether an accused had a fair trial or not.'

The case of *Machongo* and the case of *Tshoga* were both decided in the Supreme Court of Appeal. They were both decided by three appeal judges concurring. The decisions related to the situation in which an indictment makes no mention of the applicability of the Act and the possibility of an accused being given a prescribed minimum sentence, and the trial judge not having warned the accused of its applicability. However, the decisions about the question *supra* differ. The court in

Machongo's case is of the opinion that making no mention of the applicability of the Act and the possibility of an accused being given a prescribed minimum sentence, constitutes a fatal irregularity resulting in an unfair trial in respect of the sentence; whereas in *Tshoga*'s case the court was of the opinion that every case must be approached on its own facts and it is only after a diligent examination of all the facts that it can be decided whether an accused had a fair trial or not.

[22] Similarly, the constitutional case of *Ndlovu v The State* [2017] ZACC 19, Khampepe J on a unanimous judgment said that:

'..... due to lack of consistency approach to the fairness issues by the lower courts, this matter raises a point of law of general public importance which ought to be considered by this Court' (See, for example, S v Tshoga [2016] ZASCA 205; 2017 (1) SACR 420 (SCA); Nndateni v The State [2014] ZASCA 122; S v Kolea [2012] ZASCA 199; 2013 (1) SACR 409 (SCA); S v Mashinini [2012] ZASCA 1; 2012 (1) SACR 604 (SCA); S v Thembalethu [2008] ZASCA 9; 2009 (1) SACR 50 (SCA); S v Makatu [2006] ZASCA 72; 2006 (2) SACR 582 (SCA); S v WV 2013 (1) SACR 204 (GNP); Mahlaba v S [2016] ZAFSHC 127; and S v Langa 2010 (2) SACR 289 (KZP). S v Legoa [2002] ZASCA 122; 2003 (1) SACR 13 (SCA) and Machongo v S (20344/14) [2014] ZASCA 179).

However, in the *Ndlovu* case, Mr Ndlovu was convicted of rape, read with section 51(2); accordingly, the Regional Court was required in terms of section 51(2) to impose a minimum sentence of 10 years (as he was treated as a first offender).The Regional Court's jurisdiction was limited in terms of section 51(2) to imposing a maximum sentence of 15 years. Thus, the Regional Court did not have jurisdiction to impose life imprisonment in terms of section 51(1) of the Minimum Sentencing Act.

This means that the Constitutional Court in Ndlovu's case took a view that if the charge sheet or indictment does not contain certain averments, the trial court cannot acquire jurisdiction above what is contained on the charge sheet. This implies that if one wants to use the provisions of the Act during sentencing, same should have been clearly stated on the indictment. This decision is in line with the provisions of section 35(3) of the Constitution which provides that every accused has a right to be informed of the

charge with sufficient detail to answer. Although the courts had been reluctant to lay down a general rule as to what constitutes sufficient detail in the charge sheet.

Having considered the above in this case in question, I have decided to follow the decision on the *Machongo*'s case which stated that, *'where an indictment makes no mention of the applicability of the Criminal Law Amendment Act 105 of 1997 and the possibility of an accused being sentenced to a prescribed minimum sentence, and the trial judge did not warn the accused of its applicability, such failure constitutes a fatal irregularity resulting in an unfair trial in respect of the sentence'.*

Thus, it is unfair for the appellants not to be informed, either through the charge sheet or during plea proceedings or at the trial with regard to the applicability of the Act. To be informed about such a patently serious matter at the end of a trial as it happened in this case, defeats the very purpose envisaged by s 35(3) of the Constitution. Put simply, such would be a trial by ambush which is neither desirable nor permissible in a constitutional democracy underpinned by a Bill of Rights.

[21] With regard to the contravention of section 2 and 36 of Arms and Ammunition Act 75 of 1969 these offences had their own penal provisions in terms of section 39 of the same Act. There are no minimum sentences involved in these two offences. Therefore, after consideration of previous cases like *S v Seleke en andere* 1976 (1) SA 675 (T), *R v Zonele & others* 1959 (3) SA 319 (A), I can safely say that it was highly unfair to confront the 2nd appellant for the first time, after he had pleaded and been convicted of an offence under a different statute with different penal provisions, to thereafter proceed and sentence him under the Act.

[22] I find that the trial court misdirected itself when considering sentence in terms of the provisions of the minimum sentence provisions as envisaged in the Act. Thus, I will have to interfere with the said sentences imposed on the appellants. I have also found that there exists a striking disparity between the sentences imposed by the trial court and the sentences this appeal court would have imposed, on the contravention of

section 2 and 36 of the Arms and Ammunitions Act 75 of 1969 [see *S v Whitehead* 1970 (4) SA 424 (A)].

[23] The normal inherent sentencing jurisdiction of the high court is applicable and the court will have to consider the sentence afresh [See *S v Ndlovu* 2003(1) SACR 331 (SCA) para 12]. The appeal court possesses the power, which resides in the provisions of s 276 of the Criminal Procedure Act 51 of 1977. This court in *DPP, Western Cape v Prince* 2012 (2) SACR 183 (SCA) para 31 observed that s 276 is 'the source of the power of ... courts to impose sentences .... Absent s 276, neither the magistrates' courts nor the high courts would be entitled to impose sentence on people who commit common law crimes'.

[24] When considering the sentences afresh, the appeal court has to consider whether the sentences imposed should run concurrently or consecutively. The fact that a sentencing court will order that the sentence will be served consecutively with the imprisonment for life should be avoided and left in the hands of the appropriate department. A sentencing court does not concern itself with parole provisions and when an accused might be released on parole, in determining an appropriate sentence.

[25] The Correctional Services Act 111 of 1998 section 39 provides that:
'Subject to the provisions of paragraph *(b)*, a person who receives more than one sentence of incarceration or receives additional sentences while serving a term of incarceration, must serve each such sentence, the one after the expiration, setting aside or remission of the other, in such order as the National Commissioner may determine, unless the court specifically directs otherwise, or unless the court directs that such sentences shall run concurrently but-

(i) Any determinate sentence of incarceration to be served by <u>any person runs concurrently with a life sentence</u> or with sentence of incarceration to be served by such person in consequence of being declared an habitual criminal or a dangerous criminal;

[25] I now turn to the facts of this case to consider and adjudicate on the sentence afresh. This appeal court must interrogate and adjudicate afresh the triad in respect of sentence as stated in *S v Zinn* 1969 (2) SA 537 (A) at 540G-H. Its task would be to impose a sentence which it thinks is suitable in the circumstances, without comparing it with the one imposed by the trial court.

[26] In *S v Malgas* 2001 (2) SA 1222 (SCA). and endorsed in *Dodo* 2001 (3) 382 (CC) it was held:

'that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence 'consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender.'

Personal circumstances of the appellants

[27] Not much was said about the accused's personal circumstances. The appellants did not have previous convictions. The first appellant was 30 years of age. The appellants did not at any stage show remorse as defined in the case of *S v Matyityi* 2011 (1) SACR 40 (SCA).

The interest of the community

[28] There is no doubt that the interests of society need to be protected. It is settled law that courts must send a strong message that crime will not be tolerated – however courts should not be expected, by society, to avenge and apply the rule of an eye for an eye. The sentence to be imposed ought to be balanced without over-emphasising one part of the triad over another. The objects of punishment – retribution, rehabilitation and deterrence also ought to be balanced.

Seriousness of the offence

[29] The nature of the offences is no doubt serious. Murder is in my view, the most serious offence as the deceased cannot be replaced and no amount of compensation or

punishment of any nature can substitute his life – hence s 11 of the Constitution protects life by providing that – 'Everyone has the right to life'. It is clear from the evidence that murder was not pre-planned; however, the 2nd appellant possessed a firearm which had bullets as is clearly evidenced by the fact that the deceased died from the gunshot wounds. The deceased and his fiancée were relaxing in their own motor vehicle and suddenly were attacked by the appellants and the fiancée was also raped. The firearm was found under accused no. 2's mattress when he was apprehended. He sought to attribute a higher degree of seriousness to which courts ought to respond positively with heavy sentences – This court in *Director of Public Prosecutions North Gauteng: Pretoria v Gcwala & others* (295/13) [2014] ZASCA 44 (31/3/14) observed that 'People who take another's life for financial gain must be severely punished'.

[30] It is undisputed that the robbery with aggravating circumstances was pre-meditated and executed according to plan, since they had a firearm when they approached the victims who were not armed at the scene of the crime.

Impact of the offence to the victim

[31] It is high time that we should start to emphasize the rights of the victims more than emphasizing the rights of the perpetrators. While the sentences that I am going to mete out will also consider the circumstances of the accused, the interest of the victim were also appreciated in the circumstances. See *Milton Zwane & others* v *The State,* (1296/2016) [2017] ZASCA 179 (1 December 2017) para 12.

Emphasizing the plight of the victim was also considered in the case of *State v Matyityi* 2011(1) SACR 40 (SCA) where Ponnan JA stated that:

'Internationally the concerns of victims have been recognised and sought to be addressed through a number of declarations the most important of which is the UN Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power. The Declaration is based on the philosophy that adequate recognition should be given to victims and that they should be treated with respect in the criminal justice system. In South Africa victim empowerment is based on restorative justice. Restorative justice seeks to emphasise that a crime is more than the breaking of the law or offending against the state – it is an injury or wrong done to another person. The Service Charter for Victims of Crime in South Africa seeks to accommodate victims more effectively in the criminal justice system. As in any true participatory democracy its underlying philosophy is to give meaningful content to the rights of all citizens, particularly victims of sexual abuse, by reaffirming one of our founding democratic values namely human dignity It enables us as well to vindicate our collective sense of humanity and humanness. The

Charter seeks to give to victims the right to participate in and proffer information during the sentencing phase. The victim is thus afforded a more prominent role in the sentencing process by providing the court with a description of the physical and psychological harm suffered, as also the social and economic effect that the crime had and in future is likely to have. By giving the victim a voice the court will have an opportunity to truly recognise the wrong done to the individual victim.

[32] Having taken into account all the facts, factors and circumstances relevant for imposing a suitable sentence, the aggravating factors far outweigh the mitigating factors – it is difficult, I must say, to find any mitigating factors which can justify a lenient sentence. In consideration of the cumulative effect of the sentences, I have considered to order a custodial sentence. I am of the view that the sentence imposed by the high court must be set aside and be replaced with an appropriate sentence.

[33] In the result:

1. The appeal against the sentence by both the appellants is upheld.
2. The sentences of high court are set aside and replaced by the following:

   <u>First Appellant</u>
3. Count 1: on the charge of murder the First Appellant is sentenced to 30 years imprisonment
4. Count 2: On the charge of robbery with aggravating circumstances the First Appellant is sentenced to 15 years imprisonment.
5. Sentence on Count 2 on the charge of robbery with aggravating circumstances is ordered to run concurrently with 30 years' imprisonment on Count 1.
6. The sentences are antedated to 20 September 2002 in terms of section 282 of the Criminal Procedure Act 51 of 1977.

   <u>Second Appellant</u>
7. Count 1: on the charge of murder the Second Appellant is sentenced to 30 years imprisonment
8. Count 2: On the charge of robbery with aggravating circumstances the Second Appellant is sentenced to 15 years imprisonment.
9. Count 3 : the Second Appellant is sentenced to 10 years imprisonment
10. Count 4: the Second Appellant is sentenced to 5 years imprisonment
11. Count 5 : the Second Appellant is sentenced to 2 years imprisonment

12. The sentences on Count 3 and Count 5 are to run concurrently with the sentence imposed on Count 1.
13. The sentences are antedated to 20 September 2002 in terms of section 282 of the Criminal Procedure Act 51 of 1977.

M.M. MUNZHELELE AJ
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree,

C. CAMBANIS AJ
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.