IN THE KWAZULU-NATAL HIGH COURT,
PIETERMARITZBURG REPUBLIC OF SOUTH AFRICA

REPORTABLE

Case No: AR490/09

In the matter between

Margret Langa **Appellant**

and

The State **Respondent**

JUDGMENT

Delivered on: 23 April 2010

STEYN J

[1] The appellant, charged with 3 other accused appeared before Magid J on 7 counts that included 2 of murder, 2 of kidnapping, 1 of robbery with aggravating circumstances, 1 of unlawful possession of a firearm and a count of malicious injury to property. On 5 June 2002, after a protracted trial, she was convicted by the learned trial judge on 6 of the counts, namely, two counts of murders, two counts of kidnapping and of theft and malicious injury to property. She was sentenced to life imprisonment on count one, twenty (20) years' imprisonment on count two, ten (10) years' imprisonment on each of counts 3 and 4 and seven (7)

years' imprisonment on each of counts 5 and 7. The appellant now appeals against the sentences imposed, on the following grounds:

> *"1. She is the wife of accused 2 and might have been influenced by her husband;*
> *2. The sentences induce a sense of shock; and*
> *3. The Court should have taken into account her status as a primary care giver when it decided upon an appropriate sentence."*

[2] Mr Marimuthu, acting on behalf of the appellant, conceded that it is trite that a court of appeal would only interfere with a sentence of another court, if the sentence is shockingly inappropriate or tainted by a misdirection. He also conceded that no substantial or compelling circumstances were tendered before the court *a quo*. In his view the term of life imprisonment imposed on the appellant is harsh in the given personal circumstances of the appellant. He contended that the court *a quo* ought to have considered the interests of the minor children when passing sentence. In his oral submissions, after being probed by the Court, Mr Marimuthu also submitted that the court *a quo* was misdirected in its view that the Criminal Law Amendment Act, 105 of 1997[1] should be applied.

1 Hereinafter referred to as the CLAA.

[3] Ms Senekal, acting on behalf of the Respondent, submitted that the sentences imposed by the trial court were neither irregular nor inappropriate in the circumstances of the case. Most importantly, she argued, the facts show that the appellant was never influenced by her husband. She contended that the appellant played a very active role in initiating the killing of the first deceased and the horrific events that followed thereafter.

Provisions of the Criminal Law Amendment Act

[4] Regarding the provisions of the CLAA, it is correctly observed that the indictment never refers to the Act nor were the appellant or her co-accused informed of the relevant provisions of the Act as required in *S v Ndlovu*; *S v Sibisi.*[2] In my view, however, this case falls within one of the exceptions listed by our Supreme Court of Appeal in *S v Legoa*.[3] The appellant *in casu* clearly acquired the requisite knowledge of the penal jurisdiction from the summary of facts. (*Legoa supra* at para 21 as confirmed in *S v*

2 2005 (2) SACR 545 (W). Also see *S v Ndlovu* 2003 (1) SACR 331 (SCA).
3 2003 (1) SACR 13 (SCA).

Thembalethu[4]*).*

In my view, the duty to inform an accused, especially an unrepresented accused of the penal provisions is to put such accused in a position to exercise an informed decision, whether legal representation should be obtained especially in matters where the CLAA, finds application.

In *casu* the appellant was legally represented and it is clear that the summary of facts show that a sentence of life would be attracted should the appellant be convicted. Gorven J and Govindasamy, in their majority judgment disagree with me and henceforth I consider it necessary to repeat that part of the summary of facts, which in my view leaves no doubt that the murder was planned and premeditated and that it informed the accused sufficiently that the crimes fall within the ambit of the CLAA:

> *"2. During May 1999 Msweli and accused 2's relationship become acrimonious as accused 2 failed to pay Msweli and other employees their salaries. Msweli decided to leave the employ of accused 2 and set up a funeral business in competition with accused 2 in Greytown. Accused 2's business floundered as a result thereof.*
>
> *3. Accused 2 and his wife, who is accused 3, <u>decided to</u>*

4 2009 (1) SACR 50 (SCA).

kill Msweli. In June 1999 he approached accused 1, 4 and Lucky Siyabonga Gumede ("the assailants") for assistance. They then decided, agreed and conspired to kill Msweli. To this end they armed themselves with the firearm mentioned in count 6 and accused 2's licensed firearm.

4. *On the day in question accused 3 lured Msweli to her husband's office on the pretext of discussing business with him. There the assailants awaited his arrival*.

11. At all material times hereto the accused and Lucky S Gumede *acted in execution of common purpose to commit the crimes mentioned in the indictment."*
(My emphasis).

The CLAA in terms of Schedule 2 provides that the prescribed sentence of life imprisonment should be imposed in cases of murder when:

"(a) it was planned or premeditated,
(b) the victim was –
(i) a law enforcement officer performing his or her functions as such, whether on duty or not, or
(ii) a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1 to the Criminal Procedure Act, (51 of 1977), at criminal proceedings in any court.
c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit one of the following offences:
(i) Rape; or
(ii) Robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act; or
(d) the offence was committed by a person, group or persons on syndicate acting in the execution or furtherance of a common purpose on conspiracy."[5]

5 See Schedule 2 of the CLAA, Part 1 as amended by s 27(1) of Act 33 of 2004.

(My emphasis).

In my view, having duly considered the averments contained in the summary of facts, there could have been no doubt that the CLAA applies. It cannot be said that the accused and her accomplices only became aware of the application of the law after conviction. It cannot be said that the facts referred to in Schedule 2 of the CLAA was not fixed at the time of the conviction. *Legoa*[6] requires no more than the facts being fixed at the time of the conviction.

Should I be wrong in my view that the trial court was misdirected, in not requiring formalism that reference should have been made to the CLAA, then it remains my considered view that such misdirection would not suffice to vitiate the sentence.

[5] It is trite law that a court of appeal may only interfere with the sentence imposed by the trial court if the presiding officer has committed a material misdirection.[7] In my view the misdirection in this case, if found to be one, did not impact on

6 *Supra* para 14.
7 See *Kriegler Hiemstra Suid-Afrikaanse Strafproses* 5th ed at 808.

the court *a quo's* exercise of its discretion to the extent that a sentence of life imprisonment would not have been imposed. Simply put it cannot be regarded as a material misdirection. In my view Gorven J in his approach, on behalf of the majority, considers the misdirection as so material to vitiate the proceedings.

I consider it therefore necessary to deal more fully with irregularities and the consequences of such before a court of appeal. It is trite law that *'no conviction on sentence shall be set aside and altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect.*'[8]

It is further trite law that procedural irregularities can be divided in two categories. Those that are fundamentally irregular by which the proceedings as a whole are tainted to the extent that the proceedings are *per se* vitiated. To put it into context and within the ambit of s 322 of the Act, these irregularities *per se* result in a failure of justice.[9]

8 See s 322(1)(c) of the CPA.
9 See s 322(1) of the CPA read with s 309(3) of the Act.

There is however another category of irregularities which are deemed to be of a lesser degree, since they do not vitiate the proceedings as a whole. Simply put, these irregularities do not result in a failure of justice *per se*. In consideration of the reasons given in the majority judgment written by Gorven J it is evident that we disagree on the classification of the procedural irregularity in this case.

In *S v Moodie*[10] the *locus classicus* on procedural irregularities, Holmes JA stated:

> *"(1) The general rule in regard to procedural irregularities is that the Court will be satisfied that there has in fact been a failure of justice if it cannot hold that a reasonable trial court would inevitably have convicted if there had been no irregularity.*
> 2) *In an exceptional case, where the irregularity consists of such a gross departure from established rules of procedure that the accused has not been properly tried, this is* per se *a failure of justice, and it is unnecessary to apply the test of enquiring whether a reasonable trial court would inevitably have convicted if there has been no irregularity.*
> 3) *Whether a case falls within (1) or (2) depends upon the nature and degree of the irregularity."*[11]

In defining the concept of 'failure of justice' the Court stated as follows:

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10 1961 (4) SA 752 (A).

11 *Op cit* at 758F-G. Also see *Hlantlalala and Others v Dyantyi NO and Another* 1999 (2) SACR 541 (SCA); *S v Shikunga and Another* 1997 (2) SACR 470 (NmS); and *S v Smile and Another* 1998 (1) SACR 688 (SCA) at 691f-i.

"As to the meaning of "failure of justice" the Afrikaans text has to be considered because the 1944 and 1955 Acts were signed in Afrikaans. The former uses the word "regskending" and the latter contains the expression "geregtigheid nie geskied het nie". All these linguistic variants harmonise in meaning when one bears in mind what was said by De Wet JA in R v Rose *1937 AD 467 at 476-7:*

> *"Now the term 'justice' is not limited in meaning to the notion of retribution for the wrongdoer: it also connotes that the wrongdoer should be fairly tried in accordance with the principles of law. In interpreting the proviso and seeking a test to apply, this Court has decided in a series of cases that it will be satisfied that there has in fact been a failure of justice if it cannot hold that a reasonable trial court would inevitably have convicted if there had been no irregularity."*[12]

Further at 756E:

"This is a sound general test which works well in most cases of irregularity. But it is not an exclusive test, and the courts have more than once recognised that in an exceptional case an irregularity can be of such a nature as per se *to amount to a failure to justice, and to be so held, without the necessity of applying the foregoing test."*

In *S v Mushimba en Andere*,[13] Rumpff JA elaborated on the meaning of 'failure of justice'[14] when he stated:

"Die Strafprosesordonnansie vereis dat indien daar 'n onreëlmatigheid plaasgevind het, 'n skuldigbevinding alleen dan tersyde gestel kan word indien geregtigheid inderdaad nie geskied het nie. Die "geregtigheid" waarna hier verwys word, is nie 'n begrip wat veronderstel dat die beskuldigde noodwendig onskuldig is nie. Geregtigheid wat geskied het in hierdie sin is die resultaat wat 'n bepaalde eienskap van verrigtinge aandui. Die eienskap toon aan dat aan vereistes wat grondbeginsels van reg en regverdigheid aan

12 See *Moodie supra* at 756B-D.

13 1977 (2) SA 829 (A).

14 Also see *S v Carter* 2007 (2) SACR 415 (SCA) at para 29.

> *die verrigtinge stel, voldoen is. Die vraag of onreëlmatige of met die reg strydige verrigtinge in verband met 'n vehoor van 'n beskuldigde van so 'n aard is dat dit gesê kan word dat van daardie grondbeginsels nie nagekom is nie, en geregtigheid dus nie geskied het nie, sal afhang van die omstandighede van elke geval en sal altyd 'n oorweging van publieke beleid vereis."*

I agree that post 1994 a further category of irregularities[15] should be added to this list, namely a constitutional irregularity I however disagree with the view expressed by Gorven J that the irregularity in *casu* resulted in the accused being deprived of a fair trial.

In my view substantive fairness has always been granted to any person accused of a crime in terms of our common law. With the advent of South Africa adopting a bill of rights, such fairness is guaranteed in terms of the Bill.[16] As early as 1995 the Constitutional Court in *S v Zuma*[17] with reference to the fairness of a trial:

> *"The right to a fair trial conferred by the provision [s 25(3) of the interim Constitution] is broader than the list of specific rights set out in paras (a) to (j) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. In* S v Rudman and Another; S v Mthwana *1992 (1) SA 343 (A), the Appellate Division, while not decrying the importance of fairness in criminal proceedings, held that the function of a*

15 Some constitutional scholars prefer not to use the term irregularities but rather illegalities.

16 See s 25(3) of the interim Constitution of the Republic of South Africa and s 35(3) of the Constitution, 1996.

17 1995 (1) SACR 568 (CC).

> *Court of criminal appeal in South Africa was to enquire 'whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted.' "*

In my view what is required post 1994 is that all criminal trials be conducted in accordance with notions of basic fairness and justice, and it remains the duty of criminal courts to give content to the notion of fairness.

In *Key v Attorney–General, Cape Provincial Division, and Another*[18] Kriegler J remarked as follows, with regard to the applicable principles of a fair trial:

> *"In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human right bodies, enlightened Legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in Ferreira v Levin, fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted."*[19]

18 1996 (2) SACR 113 (CC).
19 At para 13.

(My emphasis)

As mentioned earlier the appellant was, aware at the initial stages of the trial of the applicability of the CLAA and at no time was she in my view, deprived of a fair trial. It is prudent and desirable that reference be made to the Schedules of the CLAA, but in the case of an omission it is not absolute that each and every omission would result in an irregularity that would *per se* vitiate the proceedings.[20]

In my view the constitutional test as defined by Theron J in *Msithing*[21] is useful and relevant and should be used in determining a constitutional irregularity. She dealt with it as follows:

> *"[10] To my mind, the constitutional test as developed by our courts over the past ten years or so may be summarised as follows: a fundamental irregularity which violates an accused's right to a fair trial must result in a failure of justice. If the irregularity is not of a fundamental nature the focus shifts to what would have happened but for such irregularity. The setting aside of a conviction based on the violation of the right to a fair trial in circumstances of a minor 'tainting' of the proceedings will undermine the 'pressing social need' to prosecute crime."* (Footnotes ommited)

20 See *S Terblanche 'Aspects of minimum sentence legislation: judicial Comment and the courts' jurisdiction'* SACJ (2001) 14 at 18:

> *"Generally the penalty provisions relevant to the particular crime should be mentioned in the charge sheet …… It is not an absolute requirement however, since the prosecution may not always be in a position to foresee that the offence will ultimately fall under the descriptions contained in Schedule 2." (Footnotes of original text omitted).*

21 2006 (1) SACR 266 (N).

(My emphasis)

What is required in the context of a fair trial, in the instance of any irregularity, is that the irregularity should have resulted in an unfair trial, and constituted a failure of justice. Such an approach would be in accordance with principles stated in *S v Dzukuda and Others; S v Tshilo*[22] *and S v Jaipal.*[23] In my view the irregularity in *casu* cannot be regarded, given the circumstances of this case, as a failure of justice that deprived the appellant of a fair trial.

[6] I shall now turn to issues raised by counsel for the appellant: 1) the appellant acted under the influence of her husband, accused number two; 2) the trial court failed to sufficiently consider appellant's role as primary caregiver when it imposed a sentence of life imprisonment.

[7] The record reveals that the learned trial judge was acutely

22 2000 (2) SACR 443 (CC).

23 2005 (1) SACR 215 (CC) where Van der Westhuizen J states as follows:
'Therefore a failure of justice must indeed have resulted from the irregularity for the conviction and sentence to be set aside. In construing when an irregularity had led to a failure of justice, regard must be had to the constitutional right of an accused person to a fair trial. If an irregularity has resulted in an unfair trial, that will constitute a failure of justice as contemplated by the section and any conviction will have to be set aside …. The meaning of the concept of a failure of justice in s 322(1) must therefore be understood to raise the question of whether the irregularity has led to an unfair trial.' (At 231c-e).

alive to the fact that the appellant, at any given time, could have acted under the influence of her husband. The learned trial judge dealt with it as follows:

> *"Well there is one thing I want to ask you, perhaps I should have asked Mr Nankan, is there any indication on record that accused 3 was under the influence of accused 2? Well I suppose you would say on the evidence as accepted by the Court there is not any such indication, because on Ms Mbambo's evidence it was accused 3 who was talking about killing Msweli.*
> *MS MHLANA: That is correct, M'Lord.*
> *MAGID J: And on Ms Mbambo's evidence it was accused 2 that walked away and had an argument with her on the topic. The fact remains he did plan the whole business. Was she under his influence? There use to be – before women became rather more important than they are today – oh, than they were then, sorry, I beg your pardon, women are very important today, but there used to be a thought that if a woman committed an offence in the presence of her husband, it was done because she was under the influence of her husband. Would you say that that does not apply any more?*
> *MS MHLANA: Yes, M'Lord."*

The trial court correctly remarked that the evidence as accepted by the Court does not bear testimony to any such influence exerted as alleged by the Appellant.

[8] The following facts were accepted by the Court. That the appellant together with her husband, accused no. 2 decided and planned to kill a former employee, Sibusiso Msweli. They together with accused no.'s 1 and 4 conspired to kill Msweli. The person that was hired to kill Msweli was Lucky

Gumede, an accomplice, whose trial was finalised when the case against the appellant and her accomplices was heard. Mr Gumede was serving a sentence of life imprisonment when he testified against the accused and her accomplices. The evidence relied upon by the court *a quo* showed that the appellant initiated the killing of Mr Msweli and that she lured the aforementioned deceased to their funeral parlour where they conduct business under the false pretence that she wanted to discuss business with him. The second deceased, Dudu Dladla, was in the unfortunate position of being at the wrong place at the wrong time. It was the appellant who instructed that Ms Dladla be killed because she had witnessed too much. The trial court in addition found that it was the appellant that gave the directions to the place where the murders should be committed and who was instrumental in the elimination of Ms Dladla. After the appellant observed the execution of the murders, she left the scene where the crimes were committed in the company of the accomplices. None of the above facts as accepted by the Court give any indication of any influence being exerted on the appellant by her husband. It is against this factual background that the Court considered an appropriate sentence.

[9] The following was stated by the Court in its sentencing judgment:

> *"The murder was committed for purely financial and economic reasons and to get rid of a business competitor. There are simply no circumstances, let alone substantial and compelling, which would justify the imposition in respect of that count of murder in respect of either of you of anything less than a life sentence. "*(My emphasis*).*

[9] In my view the learned trial judge was correct in his assessment to impose life imprisonment. As has been stated by our Supreme Court of Appeal, recently, in *S v Johaar*[24] in cases of serious offences the aim of rehabilitating an accused should play a lesser role and more emphasis should be placed on deterrence and retribution. Griesel AJA, states:

> *"In ieder geval moet die oogmerk van rehabilitasie in die geval van ernstige misdade soos hierdie dikwels terugstaan vir oogmerke soos afskrikking en vergelding. Soos dit gestel is in* S v Mhlakaza*:*
>
> > *'Given the current levels of violence and serious crimes in this country, it seems proper that, in sentencing especially such crimes the emphasis should be on retribution and deterrence … Retribution may even be decisive …' "*[25]
>
> (Original footnotes omitted).

[10] This brings me to the issue raised by Mr Marimuthu that the Court should have considered the role of the appellant as a

24 2010 (1) SACR 23 (SCA).
25 *Supra* at 31c-e.

caregiver of minor children. I am again not persuaded that the Court *a quo* was wrong in its decision to impose a sentence of life as being appropriate even though the appellant is a mother of 6 (six) minor children. On the facts placed before the trial Court it is apparent that the Court was fully aware of the fact that the appellant's children should be cared for and duly considered the fact.

[11] The seriousness the offences committed by the appellant, coupled with societal interest in the punishment of crime, clearly outweighed the interests of the appellant and her children in the present matter. Although the appellant was sentenced before the Constitutional Court's direction in *S v M,*[26] the nature of the crimes of which she had been convicted, is so serious that it warrants life imprisonment. This court is however mindful that the children of the appellant should not be subjected to undue hardship and thereby indirectly punished for their mother's heinous crimes. In my view the interests of the appellant's children could be taken care of by issuing a special order akin to the order granted by Van Heerden AJ (as she then was) in *S v*

26 *S v M* (*Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC).

Howells[27] and affirmed on appeal in *Howells v S.*[28]

[12] For the above reasons I propose that the following order be made:

1. The appeal against the sentences be dismissed.
2. The Registrar of this court is requested to immediately approach the Department of Social Development with the following request:
    2.1 That the Department of Social Development investigate the circumstances of the appellant's 6 (six) minor children without delay and take all necessary steps to ensure that:
        2.1.1 the children are properly cared for in all respects;
        2.1.2 the children remain in contact with the appellant during her period of imprisonment, and have contact with her, insofar as it is permitted by the Department of Correctional Services; and

27 1999 (1) SACR 675 (C).
28 [2000] JOL 6577 (SCA).

2.1.3 everything reasonably possible be done to ensure that the appellant be re-unified with her children and that the interests of the family be promoted.

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STEYN J

_____
GORVEN J

_____
GOVINDASAMY AJ

Date of Hearing:	3 February 2010
Date of Judgment:	23 April 2010
Counsel for the appellant:	Adv P Marimuthu
Instructed by:	Pietermaritzburg Justice Centre
Counsel for the respondent:	Adv S Senekal
Instructed by:	The Director of Public Prosecutions, Pietermaritzburg