Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION – MAHIKENG

CASE NO: CAF01/2020

In the matter between:

FORTUNATE BALOYI **APPELLANT**

AND

THE STATE **RESPONDENT**

CRIMINAL APPEAL

DJAJE AJP; REID J & KHAN AJ

Heard: **10 NOVEMBER 2023**

Delivered: The date for the hand-down is deemed to be on **25 JANUARY 2024**

ORDER

The following order is made:

1. The appeal against sentence in count 2 is upheld.
2. The sentence in count 2 is replaced with the following:
   "The appellant is sentenced to twenty (20) years imprisonment"
3. The sentence in count 1 and 4 is ordered to run concurrently with the sentence in count 2.
4. The sentence is antedated to **18 September 2015**.

JUDGMENT

DJAJE AJP

[1] This is an appeal on sentence after the appellant was granted leave by the Supreme Court of Appeal. The appellant was convicted by the high court sitting as a circuit court in Temba with one count of murder, two counts of robbery with aggravating circumstances, possession of a firearm and ammunition. He was sentenced to 15 years each for the two counts of robbery, life imprisonment for murder and 2 years imprisonment for possession of firearm and 1 year for possession of ammunition. This matter was decided on paper as requested by the parties.

[2] The appellant and his co-accused appeared before court together. This appeal is only brought by the appellant. The offences in this matter were committed on separate dates. The first robbery took place on **10 January 2015**. The complainant testified that on that day he was off duty as a police officer. He gave three men a lift

who along the way robbed him of his service pistol. This evidence was not disputed. The other robbery was on **11 January 2015** at a tavern. The complainant testified that the appellant and his co-accused robbed him an amount of R500-00 after shooting. At the same tavern the appellant was seen looking for the deceased. The witness who testified stated that he saw the appellant shooting the deceased eight times and the deceased died after being taken to the clinic.

[3] The appellant was positively identified by the witnesses as having committed the two robberies and the murder. He was also convicted of having been in possession of a firearm and ammunition on **12 January 2015**.

[4] The appellant testified that he was at the tavern on **11 January 2015** but denied robbing or shooting anyone. In relation to the robbery of **10 January 2015** the appellant denied robbing the complainant his service pistol.

[5] During sentence the court *a quo* found that the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 were applicable and that the sentence to be imposed for murder, is that of life imprisonment. The finding of the court *a quo* was that the murder was pre-meditated. In the counts of robbery as well, the court found that the provisions of section 51(2) of the Criminal Law Amendment Act were applicable and sentenced the appellant

to the minimum sentence of fifteen years' imprisonment. In sentencing the appellant, the court, *a quo* found no substantial and compelling circumstances.

[6] In the main….. the appellant's ground of appeal is that the charge of murder put to him did not refer to the applicable subsection of section 51(1) of the Criminal Law Amendment Act. It was argued that as a result of that omission the appellant did not get a fair trial and that the sentence on the charge of murder should be set aside.

[7] The respondent's argument referred only to the fact that the court *a quo* was correct in finding that no substantial and compelling circumstances existed to deviate from the prescribed minimum sentence of life imprisonment.

[8] In **S v MT 2018 (2) SACR 592 (CC)** at paragraph [38] to [40] the following was said in relation to the drafting of a charge and the applicability of the Minimum Sentences Act:

> *"[38] The cases before us come after a number of Supreme Court of Appeal judgments with differing approaches to the necessity of citing the Minimum Sentence Act's provisions in the charge sheet. The starting point is Legoa, where the Supreme Court of Appeal held that it was not desirable to lay down a general rule as to what is required in a charge sheet and that whether an accused's right to a fair trial, including their ability to answer the charge, has been impaired will depend on "a vigilant examination of the relevant circumstances". Since then, the Supreme Court of Appeal has primarily dealt with cases where charge sheets cite the incorrect section of the Minimum Sentences Act. In*

Ndlovu, this Court held decisively that, where an accused is convicted in a Magistrate's Court of an offence under an incorrect section of the Minimum Sentences Act, that Court will only have jurisdiction to sentence under that section,

[39] This precedent has not created a hard-and-fast rule that each case where an accused has not been explicitly informed of the applicability of the Minimum Sentences Act will automatically render a trial unfair. However, a practice has developed to include the relevant section of the Minimum Sentences Act in the charge sheet because of this precedent.

[40] It is indeed desirable that the charge sheet refers to the relevant penal provision of the Minimum Sentences Act. This should not, however, be understood as an absolute rule. Each case must be judged on its particular facts. Where there is no mention of the applicability of the Minimum Sentences Act in the charge sheet or in the record of the proceedings, a diligent examination of the circumstances of the case must be undertaken in order to determine whether that omission amounts to unfairness in trial. This is so because even though there may be no such mention, examination of the individual circumstances of a matter may very well reveal sufficient indications that the accused's section 35(3) right to a fair trial was not in fact infringed."

[9] There are a number of decisions from this Court on this issue of incorrect section referred to in the charge sheet. **See : MS v The State case no CA 40/2017 per Djaje J and Petersen AJ; Josias Mokobane v S CA 26/2017 per Hendricks J (as he then was) and Petersen AJ.** In all these matters this court found that it is important for the court to make a finding on the applicable section as failure to do so results in a serious misdirection. All these

decisions are in line with the decision of the Constitutional Court in **S v MT** referred to above.

[10] The Supreme Court of Appeal in **S v Makatu 2006 (2) SACR 582 (SCA)** at par 7 stated:

> *"[7] As a general rule, where the State charges an accused with an offence governed by s51(1) of the Act, such as premeditated murder, it should state this in the indictment. This rule is clearly neither absolute nor inflexible. However, an accused faced with life imprisonment- the most serious sentence that can be imposed- must from the outset know what the implications and consequences of the charge are. Such knowledge inevitably dictates decisions made by an accused, such as whether to conduct his or her own defence; whether to apply for legal aid; whether to testify; what witnesses to call and any other factor that may affect his or her right to a fair trial. If during the course of a trial the State wishes to amend the indictment it may apply to do so, subject to the usual rules in relation to prejudice".*

[11] The appellant in the heads of argument referred to the matter of **Machongo v S 20344/14[2014] ZASCA 179 (21 November 2014)** about the importance of forewarning an accused with the applicability of the minimum sentence and that failure to do so is a fatal irregularity resulting in an unfair trial in respect of sentence.

[12] The indictment in respect of the murder charge against the appellant stated as follows:

*"In count 2 which is murder read with section 51(1) of the Criminal Law Amendment Act and other related section thereto, the allegations are that on **12 January 2015** and at or near Pakwe Tavern in Winterveld in the district of Odi, the accused did unlawfully and intentionally kill Samuel Nkosi, an adult male person by shooting him with a firearm."*

[13] In its judgment the court *a quo* found that the murder was premeditated by stating as follows:

"Therefore I am satisfied that on this count of murder the person that shot and killed the deceased by shooting him eight times, it is accused 2.

I am also satisfied that you did so having premeditated, meaning having planned to do that. It was not an action that took place on a spur of a moment because there are witnesses that said they saw you looking for him and even promising to kill him and it clearly shows that you had a clear intention of killing the deceased because of the fact your friend, accused 1, whom you assisted at the particular time when he was the complainant in count 3 and 4, this time actively disassociated himself from the commission of this offence of the killing of the deceased because he stopped you. He did not join you like you joined him. That is why he is not facing this charge.

Another fact that showed that you had a clear intention and even premeditated to shoot the complainant is that you shot him when he was not doing anything to you. You further killed him when you were still accusing him of going by spreading rumours that you are fond of shooting people. You fired eight shots even when he was on the ground defenceless."

[14] Section 51(1) of the Criminal Law Amendment Act states that:

"Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an

offence referred to in Part 1 of Schedule 2 to imprisonment for life Murder, when-

(a) it was planned or premeditated;"

[15] The indictment in this matter clearly did not refer to the murder being premeditated, all that stands in the indictment is that section 51(1) of the Act is applicable and not that the murder was premeditated or planned. This resulted in a misdirection by the court *a quo* and the appeal court must consider the sentence afresh.

[16] In considering a sentence afresh the following was said in **Machongo v S (*supra*)** at par [11]:

"……Considering a sentence afresh must ineluctably mean, setting aside 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- it 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."

[17] The appellant in this matter was 25 years old on the date of the incident. He was detained from the date of arrest **12 January 2015** until the date of sentence, **18 September 2015**. At the time of sentencing he had no previous convictions or pending cases. He was residing with his mother and two siblings. The appellant had

two children aged seven years and three months respectively. He completed his matric and was furthering his studies doing a paramedic basic ambulance assistance training. When testifying in mitigation, the appellant stated that *"My feelings are or call upon me to ask for apology before this Court or from this Court as well as the family members of the deceased".* He further indicated that he did not have anything against the conviction. This can be seen as a sign of remorse.

[18] There is no doubt that the offence of murder is very serious and there is no amount of punishment that can bring the deceased back to life. On the day of the incident the appellant was going around looking for the deceased and saying that he is going to kill him and indeed he did kill him. The deceased was shot and not only was he shot once, but several times. At the time he was shot the deceased was defenceless. The appellant knew that the deceased was a police officer but was determined to carry out his intention. The community needs to be protected from heinous criminal activities such as senseless killing of human beings. The family of the deceased has lost a member of their family who they will never see again. He was also a member of the South African Police Service which means the nation has also been robbed of his life.

[19] Looking at the facts of this case, the personal circumstances of the appellant, the mitigating and aggravating features, as well as the submissions by both counsel, the sentence imposed by the court *a quo* should be set aside and replaced by an imprisonment term

which will run concurrently with the sentences in the two counts of robbery with aggravating circumstances.

Order

[20] Consequently, the following order is made:

1. The appeal against sentence in count 2 is upheld.
2. The sentence in count 2 is replaced with the following:
   "The appellant is sentenced to twenty (20) years imprisonment"
3. The sentence in count 1 and 4 is ordered to run concurrently with the sentence in count 2.
4. The sentence is antedated to **18 September 2015**.

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J T DJAJE

ACTING JUDGE PRESIDENT

NORTH WEST DIVISION; MAHIKENG

I agree

_____

FMM REID

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION; MAHIKENG

I agree

_____

J KHAN

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION; MAHIKENG

APPEARANCES

DATE OF HEARING	**:**	**10 NOVEMBER 2023**
DATE OF JUDGMENT	**:**	**25 JANUARY 2024**
COUNSEL FOR THE APPELLANT	**:**	**ADV P M KGOMO**
COUNSEL FOR THE RESPONDENT	**:**	**ADV T MUNERI**