IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Reportable

CASE NO: A 422/2011

In the matter between:

ZWELANDILE SALOMAN	**First Appellant**
THEMBINKOSI MEKUTO	**Second Appellant**
SIBONGILE LUPHUMLO MPUQE	**Third Appellant**
MZAYIFANIE NGEBEZA	**Fourth Appellant**

And

THE STATE	**Respondent**

JUDGMENT: 5 August 2013

DAVIS J

[1] On the morning of 18 December 2007 two security guards transporting money from Pick n Pay in Hermanus to Absa Bank in Hermanus came under attack from a group of armed robbers who shot at the guards. The guards then dropped the bags which contained the money which they had intended to transport to the Hermanus branch of Absa Bank. During this shooting, one guard was hit, as a result of which he sustained fatal wounds. He died on the scene. The other guard was also hit but he was protected by his bulletproof jacket and thus survived. The vehicle, in which the group fled, collided with a pavement a few kilometres away from the scene of the robbery and came to a standstill.

[2] Four men were then arrested by the police in the immediate vicinity of where the car was abandoned. The bags containing money and firearms which

had been employed in the robbery were recovered. Another suspect handed himself over to the police at a later stage. All five were charged with robbery with aggravating circumstances, murder, attempted murder, possession of firearms without holding licences, unlawful possession of ammunition and theft of a motor vehicle.

[3] After a trial, Matojane AJ convicted all the accused in respect of the charges for robbery with aggravating circumstances, murder, attempted murder, possession of firearms without holding licences and unlawful possession of ammunition. First and second appellant were also convicted of theft of a motor vehicle.

[4] Matojane AJ imposed the following sentences: All the accused were sentenced to fifteen years imprisonment for robbery with aggravating circumstances, life imprisonment for murder, fifteen years imprisonment for attempted murder, fifteen years imprisonment for possession of firearms without holding licences and unlawful possession of ammunition. In respect of the theft of a motor vehicle, he sentenced both first appellant and second appellant to a term of imprisonment of six years. All these sentences were to run concurrently.

[5] First appellant was granted leave to appeal against conviction and sentence. Second, third and fourth appellants were granted leave to appeal against sentence only.

The first appellant

[6] Mr van der Berg, who appeared on behalf of the first appellant, concentrated his submission in justification of the appeal against conviction, on the admissibility of a written statement which had been made by first appellant and the consequent failure of appellant's attorney, Mr Jiyana, to provide competent legal representation during the process leading up to the written statement which had been made by first appellant.

[7] The background to this written statement can be summarised thus: Sergeant Phambela, the investigating officer, was well known to first appellant. He testified that on 18 December 2007 he was called to the scene of the crime and saw first appellant in a video footage which was provided to him by representatives of Pick n Pay, Hermanus. He then proceeded to look for first appellant. He left his telephone number with appellant's girlfriend and told her that first appellant was a suspect in a robbery case that he was investigating. First appellant then contacted Sergeant Phambela telephonically who informed him that he was going to arrest him. In a further phone call, first appellant told Phambela that he was at the police station and was in conversation with Phambela's superior, Inspector Manyana.

[8] Sergeant Phambela arrived at the police station, found first appellant with Inspector Manyana and placed him under arrest. There is no dispute that first appellant was then informed of his rights. First appellant informed Sergeant Phambela that his lawyer was on his way to the police station but, nonetheless, Sergeant Phambela was free to provide him with further information as to the reasons for his arrest. Phambela informed first appellant that he was in

possession of evidence by way of video footage that revealed that first appellant was involved in murder and robbery in Hermanus, as a result of which first appellant made an oral statement.

[9] Phambela testified that first appellant's lawyer Mr Jiyana telephoned first appellant. The latter instructed Mr Jiyana to wait outside the police office as he was speaking with the investigating officer. First appellant then informed Phambela that he would make a statement after consulting with his lawyer.

[10] According to Mr Jiyana, who was also called as a witness after first appellant waived his attorney/client privilege, he was kept waiting for more than forty-five minutes while first appellant spoke with the police.

[11] When Mr Jiyana consulted with his client, he questioned first appellant with regard to the conduct of the police during the period that he (Jiyana) was not present. He then asked first appellant "what exactly is it that he wanted to tell the police". According to his testimony:

> "[H]e was very emphatic that in his knowledge that what he did does not amount to armed robbery. He stated to me that the persons who were the suspects had already been arrested and according to the information by Mr Manyana had given statements that implicated him. He stated to me that he was approached by them and that they requested him to transport – they requested him to transport them from Strand to Zwelihle."

Mr Jiyana also testified that he had informed first appellant of his constitutional rights and the process to be employed in a bail application. Within this context, he explained to his client that as he had "handed himself over, should a bail

application go on that element on its own it would qualify as an exceptional circumstance, which could warrant the granting of bail."

[12] Mr Jiyana further testified that, after having conducted this consultation with first appellant, the latter confirmed that he did indeed want to give a statement to the police. Accordingly, Mr Jiyana accompanied first appellant to Detective Superintendent Barkhuizen's office at Kuilsriver Police Station to have a statement reduced to writing and videotaped. The video indicates clearly that Mr Jiyana was present during the meeting with Superintendent Barkhuizen during which first appellant gave his statement.

[13] Of particular relevance to the determination of first appellant's case is the following portion of the statement made in terms of s 217 (1) (B) of the Criminal Procedure Act 51 of 1977 ('the Act').

> "Do expect any advantages or privilege should you make a Statement?
>
> Reply: No I just want to explain the part I took on the robbery.
>
> The deponent is informed that, despite any statements otherwise, he cannot expect and will not receive any advantage or privilege whatsoever should he make a statement. He is asked whether he understands this explanation.
>
> Reply: Yes
>
> You understand that you are not entitled to any privileges, would you make a statement, do you nevertheless wish to make a statement?
>
> Reply: Yes
>
> Have you made any statement, oral, or in writing, to anybody else about these events. If "Yes" – to whom, when and where?
>
> Reply: I only told the Police at Bellville verbally – I did not sign anything.

Why do you wish to repeat this statement?

Reply: N/A

Are you in custody. If “Yes” by whom were you arrested and when?

Reply: Yes. I handed myself over to the police at Bellville South after I heard the police are looking for me.

You have told me that you have not been assaulted, coerced, encouraged or threatened to make a statement. You have also told me that no promises were made to you to induce you to make a statement. You are nevertheless implored to tell me if there is anything which you regard as improper or which you do not understand, which caused you to be here today to make this statement. I assure you that I can protect you from and will bring it to the attention of the proper authorities and ask them to investigate it. Do you want to add anything to what you have already told me?

Reply: No

Do you understand the previous explanation?

Reply: No.

Have you take any drug of liquor before being brought here?

Reply: No

Will the statement that you intend making, consist of facts of your own knowledge and the truth, or did anyone tell you what to say in you statement?

Reply: It is something that I know it is something that comes from me.

19:18: Mr Jiyana asked if he is satisfied and can we can continue?

Yes, I am satisfied.”

[14] In the statement which first appellant then gave to Superintendent Barkhuizen, he said:

"First of all I want to mention that I am here about a robbery at Pink n Pay."

He then went on to say:

"I was at home when three black men came and asked me to take them to Hermanus. It was the first time I had gone to Hermanus and we were told by one guy by the name of Malusi, accused number six that every Monday at Pick n Pay there is money that is taken to the bank. Malusi was told by the other guy by the name of Chaklas, Chaklas works at Pick n Pay."

He then said:

"My trust that I was given was to check the money when it was taken from Pick n Pay to the bank. I was always on the guard but I fell asleep as I was sitting in the car. I heard the ambulance that was when I woke up.

So I woke up and went to the bank and upon arrival I saw that there was a security guard that was shot, I'm not involved in the shooting of security guard, I'm also not involved in taking the money, I was not even the car that was found by police with four guys in it. It is after that that I took my car and drove back home. That is all I can say."

[15] Mr Wolmarans, who appeared on behalf of the State, conceded that, even though there was evidence of a fingerprint of first appellant on the outside of the stolen vehicle, absent the statement which was made by first appellant to Superintendent Barkhuizen, there would have been insufficient evidence to convict first appellant beyond a reasonable doubt. For this reason, the submissions of appellant's counsel concerning the right to a fair trial and the argument concerning the failure of Mr Jiyana as first appellant's lawyer to protect his clients right against self-incrimination at the pre-trial stage were critical to the determination of this appeal.

South African law

[16] The right to legal representation has been held to imply effective legal representation see **S v Halgryn** 2002 (2) SACR 211 (SCA); **Beyers v DPP Western Cape and others** 2003 (1) SACR 164 (C); **Pretorius v Magistrate Durban** 2013 (2) SACR 153 (KZP). In **S v Thandwa and others** 2008 (1) SACR 613 (SCA) the Supreme Court of Appeal said at para 8:

> "It also follows clearly from the structure of s 35 that an accused person has the right to represent himself without to enter position of counsel. If the unwanted or inept advice of counsel improperly or unfairly thwarted his exercise of that right, his right to a fair trial would have been infringed."

[17] As was stated in **Halgryn**, *supra* at para 14:

> "Whether a defence was so incompetent that it made the trial unfair is a factual question… The assessment must be objective, usually, if not invariably, without the benefit of hindsight … The court must place itself in the shoes of defence counsel, bearing in mind that the prime responsibility in conducting the case is that of counsel who has to make decisions, often with little time to reflect … The failure to take certain basic steps, such as failing to consult, stands on a different footing from the failure to cross-examine effectively or the decision to call or not to call a particular witness. It is relatively easy to determine whether the right to counsel was rendered nugatory in the former type of case but in the latter instance, where counsel's discretion is involved, the scope for compliant is limited."

Before turning to the facts, it is helpful to canvass United States jurisprudence where the content of the right to counsel has been developed more fully.

United States law

[18] There is jurisprudence in the U.S.A dealing with the constitutional implications of the failure of counsel within the context of the test for a fair trial which provides assistance in the determination of the obligations which counsel is required to fulfil towards his or her client in a position similar to that of first appellant. In **Strickland v Washington** 466 US 668 (1984), the United States Supreme Court defined a fair trial as one where 'evidence subject to adversarial testing is presented to an impartial tribunal and where the right to counsel plays a crucial role'. The court recognised that a person's right to counsel necessarily includes the right to effective assistance of counsel:

> "That a person who happens to be lawyer is present at a trial alongside the accused however is not enough to satisfy the constitutional demand. The Sixth Amendment recognises the right to the assistance of counsel because it envisages counsels playing a role that is critical to the ability of adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether attained or appointed, who plays the role necessary to ensure that the trail is fair." (685 – 686)

In a compelling dissent in **Strickland**, *supra,* Marshall J criticised what he considered to be the vague test laid down by the majority. Possibly in consequence thereof, the burden required to be discharged by a defence counsel in order to ensure that a fair trial is conducted was increased in the United States in judgments delivered in later cases. See, for example. **Wiggins v Smith** 539 US 510 (2003), where the Supreme Court found defence counsel ineffective based on the failure to conduct an adequate investigation into the client's

background in order to present an adequate case in mitigation of sentence. In **Rompilla v Beard** 545 US 374 (2005), the court at 327 said:

> "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused admissions or statements to the lawyer of facts constituting guilt or the accused stated desire to plead guilty."

These cases reveal the willingness of courts to flesh out the content of the minimum (or basic) obligations of counsel if a trial is to be considered to be fair.

Evaluation

[19] It is to the facts of this case that I must now turn in order to determine objectively whether Jiyana's conduct was so incompetent as to compromise firs appellant's right to a fair trial.

[20] Whether a competent defence counsel would have permitted his client to have made any statements before Superintendent Barkhuizen, as was done in this case, is itself questionable. However, it is unnecessary to resolve this particular question. Of far greater importance to the resolution of this case is the following evidence: Mr Jiyana and first appellant agreed that the latter would make a statement which was not to be self-incriminating. That statement was clearly to be formulated along the lines of first appellant's discussion with Mr Jiyana, that is he had conducted himself in terms and within the scope of his business as a taxi driver and had this agreed to a request by the remaining

appellants to transport them from the Strand to Zwelihle. He had nothing to do with an armed robbery.

[21] That first appellant gave a markedly different statement to the one agreed with Mr Jiyana is explained in the following passage of evidence given by Mr Jiyana under cross examination.

> "Now, you've listened to all of that, Mr Jiyana, the short answer to the question was, yes, I expected him not to incriminate himself in the robbery, just a short answer? --- Yes.
>
> Thank you. And he was first alerted to the fact that he was in fact incriminating himself in a robbery when he – when he made his statement of the utterances before Barkhuizen.
>
> --- Come again.
>
> You first – your first inkling that he was to incriminate himself as being involved in the robbery came when he was making his statement to Barkhuizen. --- Yes."

To the extent that there was any doubt about the meaning of this answer, Mr Jiyana was later asked the following:

> "You understand that we are now talking about Mr Saloman's statement proper?... Yes. Now something in that statement cause you surprise and shock, yes?
>
> --- Could you reply? Yes – yes and the surprising and shocking words would have reached your ears first in Xhosa? --- Yes. Before becoming part of the record in English. --- Yes"

A further passage is equally significant:

> "Now, your client is making his statement to Barkhuizen and you pick up to your shock and surprise that he is departing from the advice and agreement which had prior - taken place prior. --- Yes, I did realise that.

> Now, different reasons might have existed for that departure, but one of them at least might have been that Mr Saloman had not completely understood the advice or did not understand that he was in fact incriminating himself, a possibility certainly amongst other possibilities. --- With due respect counsel, I disagree with you."

[22] There were two different bases by which the State sought to justify Mr Jiyana's conduct. In the first place, the submission was made that there was not much time to object to his clients conduct once first appellant had begun to speak to Barkhuizen. However, given that Mr Jiyana would have understood the version given by first appellant in Xhosa before it was translated, he would have been afforded additional time to realise and understand the manifest nature of the incriminatory evidence that his client was now providing to the police.

[23] Mr Jiyana then claimed that, as an attorney, he should not have jumped up to interfere with the proceedings as "I should not show my emotions". The following passage of evidence under cross-examination is illustrative:

> "Physically, why could you not physically have intervened? --- Okay, you will realise that before the statement itself is read, there is a few questions that were asked to Mr Saloman and – and the responses to – from Mr Saloman and to myself was – was in the affirmative. So, and in the picture that I had of the – of the confidence that Mr Saloman had of giving a statement and the version that Mr Saloman had given me, I didn't see that it could have been any different and I could not have jumped, because had he indicated any sense of being uncomfortable before he gave – gave his statement, it would have justifiable for me to stand up or interrupt."

In amplification, Mr Jiyana said:

> "I was there as an attorney. I did not jump up, because as a professional I should not show my emotions. What interpretation should the court place on that? --- If – I will make practical examples. In practice, if you have a client giving his – his evidence on of – that evidence is taken as his version and as an attorney, you cannot either put words into the client's mouth or suggest what, on oath, the client might say. So, at that time, that was a statement which was on oath and all the questions that had been asked to – to check whether was Mr Saloman comfortable, they were all answered in affirmative. Now, I – I had the imagination of, and the knowledge of the fact that this evidence on oath that was going to be used in future."

[24] This evidence, read as a whole, supports first appellant's case that, by his failure to intervene in the interests of his client, Mr Jiyana's conduct fell well short of that which could reasonably be considered to be effective assistance to a client within the context faced by first appellant. Jiyana made absolutely no effort to protect his client's constitutional rights. He failed to intervene when the statement which was made by his client to the police deviated significantly from that which had been the product of the consultation between himself and his client. In his own words, he was surprised and shocked at the contents of first appellant's statement to Barkhuizen. He made no attempt to intervene in order to procure an opportunity to consult with his client, pursuant to the altered statement which was being made to Superintendent Barkhuizen in order, at the very least, to warn his client of the implications of the content of this new statement.

[25] In summary, he brought no professional skill, judgment or knowledge to the advantage of his client. He sat passively during the deposition and lamentably failed to protect his client's interests or indeed advise his client properly about the implications of the latter's conduct. In the phrase employed in **Halgryn**, *supra,* he failed to take basic steps to represent his client properly.

[26] In the result, the failure to act as a reasonably competent attorney would have done in this situation ensured that first appellant incriminated himself without a proper consideration of the legal consequences of his conduct. As was stated in **S v Melani** (2) 1996 BCLR 174 (E) at 188 G:

> "Infringement of fundamental rights resulting in an accused being conscripted against himself through some form of evidence emanating from himself would strike at one of the fundamental tenants of a fair trial, the right against self-incrimination."

[27] The conduct of Mr Jiyana in this case, or more accurately expressed, the lack of any adequate conduct, goes to the heart of the fairness of a trial and first appellant's constitutional protection against self-incrimination. This failure to act as a reasonable attorney falls fully within the purport of the foreign cases referred to and those South African cases cited that have dealt with the constitutional right to a fair trial.

[28] For these reasons, the statement of first appellant which was tendered by the State, as the key piece of evidence, was a product of a manifest failure of first appellant's right to counsel to take basic steps to protect his client's rights. Accordingly, the statement should not have been admitted into evidence. As

indicated earlier, absent this statement, there was insufficient evidence on which to convict first appellant and he must therefore be acquitted of all charges.

Appellants two, three and four

[29] The essential argument lodged against the sentences imposed upon appellants two, three and four was that the court *a quo* sentenced these appellants incorrectly in terms of s 51 (1) of Act 105 of 1997. ('1997 Act')

[30] In the indictment, the provisions of s 51 (2) of the 1997 Act were cited in respect of the counts of murder and attempted murder. In terms of s 51 (2) (c) an offence involving the assault when a dangerous wound is inflicted with a firearm carries a minimum sentence for a first offender of five years. The submission made by Ms Bayat, on behalf of these appellants, was that in the case of fourth appellant, he was a first offender and accordingly this particular provision regarding a minimum sentence should have been applied by the court *a quo*. As the court *a quo* had applied the incorrect provision of the 1997 Act, these sentences were wrongly imposed and this court was thus at large to determine an appropriate sentence.

[31] The importance of the charge sheet referring precisely to the penalty provision was emphasised by Cameron JA in **S v Legoa** 2003 (1) SACR 13 (SCA). But, as Lewis JA said in the later decision of **S v Makatu** 2006 (2) SACR 582 (SCA)at 586:

> "The Court held nonetheless in **Legoa** that there is no general rule that the indictment must 'recite either this specific form of the scheduled offence with

which the accused is charged, or the facts of State intends to prove to establish it'. The essential question to be asked is whether the accused 'substantive, fair trial right, including his ability to answer the charge has been impaired'."

Lewis JA went on to say at para 7:

"As a general rule, where the State charges an accused with an offence governed by S 51 (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 the consequence 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."

In the present case, all of the appellants were legally represented. In addition, the record reveals that when first appellant pleaded not guilty to count one, the Court said:

"The State has informed the Court that the law relating to a minimum sentence is applicable. Do you understand what that entails?"

"ACCUSED 1: No, I don't understand.

COURT: Mr Salomon, I just want to establish, has your lawyer, legal representative explained to you what minimum sentence laws entail.

ACCUSED 1: No, he did not explain to me.

COURT: Counsel, can you come to our rescue, can you just explain to him quickly what the law entail?

MR VAN DER BERG: I beg your pardon M'Lord?

COURT: Can you explain to – the accused is saying that he doesn't know what – doesn't know what the law relating to minimum sentence entails.

MR VAN DER BERG: Yes, M'Lord. The sentences were mentioned – in respect of both the counts, subject to that. The sentences were mentioned, but there was no discussion there and then, because of course the focus was on the merit of the matter.

COURT: Yes, I thought maybe you could briefly, quickly explain to him what the … (intervene)

MR VAN DER BERG: Thank you for the opportunity.

COURT: Thanks, thanks very much. So, do you now understand what the law relating to minimum sentences entails?

ACCUSED: I do understand."

As the Court required first appellant's legal representative to explain the implications of the 1997 Act and provided time for counsel to so comply with this instruction, it is highly unlikely that the other counsel would have omitted to undertake the same exercise at that time. This conclusion is supported by the absence of any objection by counsel for any of the appellants to take issue with this question throughout the trial and even during the sentencing process.

[32] It is difficult therefore to see in what way, within the specific factual matrix of this case, that the fair trial rights of these appellants were compromised. To the extent that minimum sentence legislation in terms of s 51 (2) of the 1997 Act should have been applied to the murder charge and further to the charge involving the assault, the further issue arises as what this Court should do, if it was at large in respect of sentence; in other words, should this court then conclude that the sentences that were imposed upon these appellants were

proportionate to the crimes that had been committed which, conclusion in turn, would justify this Court confirming these sentences.

[33] The crimes, which were committed by these appellants, were of so vile a nature that a court is surely entitled to conclude that the sentence should reflect 'society's revulsion of such conduct'. As Matojane AJ said when he passed sentence:

> "The interests of society are particularly relevant when the victim of violence is an innocent person who was killed in a cold blooded and callous manner as a result of greed. Three of the accused came up to the guards from nowhere and shot at the unsuspecting deceased and his colleagues several times at close range… the gunshots were aimed at the vital organs of the deceased showing a calculated and conscious intention to kill him instantly instead of using less fatal means of overpowering him as he was not offering any resistance. The deceased's colleagues, complainant in the attempted murder charge, escaped death to sheer luck, his bulletproof vest unlike that of deceased had a metal under it which saved him from a brutal death." Para 8

[34] I agree entirely with this description of the crimes so committed, and hence the sentences imposed in this case, notwithstanding the arguments put up in mitigation of sentence, in particular that appellant four was a first offender and that the appellants were relatively young at the time of the commission of the crime.

[35] In my view, the jurisprudence of **Legoa**, *supra* and **Makatu**, *supra*, compel a court to look at the substance of the argument about a fair trial. In substance,

these appellants' right to a fair trial was not compromised. However, even if I were to hold that the incorrect minimum sentence legislation was used in the indictment and that the court *a quo* had thus misdirected itself, I would not be inclined to alter the sentences, given the planned brutality of the conduct of the appellants. The court *a quo* was correct to say that there were insufficient substantial and compelling circumstances in this case. Indeed, there were aggravating circumstances by virtue of the nature of the crime which was committed.

[36] In the result, the appeal against conviction and sentence of the first appellant is upheld and that of appellants two, three and four are dismissed. The order of the court *a quo* is set aside and replaced as follows:

1. Accused one is acquitted of all charges.
2. The conviction and sentences of accused two, three and four are confirmed.

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DAVIS J

I agree

_____

GOLIATH J

I agree

_____

HENNEY J