SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 129/2015

Not Reportable

In the matter between:

GILBERT NGWAKO TLHAKO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Tlhako v The State* (129/15) [2015] ZASCA 140 (30 September 2015).

Coram: Bosielo, Pillay, Dambuza JJA et Van der Merwe, Gorven AJJA

Heard: 26 August 2015

Delivered: 30 September 2015

Summary: Sentence – Imposition in terms of Criminal Law Amendment Act 105 of 1997 – where State intends to rely on sentencing regime created by Act, constitutional right to a fair trial will generally call for such intention to be brought to the attention of accused timeously to enable proper conduct of defence – failure to do so a misdirection

ORDER

On appeal from: Gauteng Division, Pretoria (Jordaan J et De Vos AJ sitting as court of appeal)

The appeal is allowed and the order of the court below is set aside and substituted with the following:

'The appeal succeeds and the sentences imposed by the trial court are set aside and replaced with the following:

"(a) The accused is sentenced to serve a period of 10 years' imprisonment in respect of count 5 and 10 years' imprisonment in respect of count 8.

(b) The accused is declared incompetent to be in possession of a firearm.

(c) The imposition of the sentences is ante-dated to 15 December 2003"'

JUDGMENT

Pillay JA (Bosielo, Dambuza JJA and Van der Merwe, Gorven AJJA concurring)

[1] The appellant was convicted on two counts, (counts 5 and 8) of robbery with aggravating circumstances as defined in s 1 of the Criminal Procedure Act 51 of 1977 on 19 November 2003 in the Polokwane Regional Court. He was acquitted on six other counts. He was then sentenced to 15 years' imprisonment on each count in terms of s 51(2)*(a)(i)* of the Criminal Law Amendment Act 105 of 1997 (the Act). He appealed against both convictions and the sentences to the North Gauteng Division, Pretoria. The appeal against convictions was dismissed, but the court

below granted leave to appeal to this court in respect of the sentences only.

[2] The background to the commission of count 5, is that on 18 July 2001 at about 18h55, the appellant and another, armed with a firearm, confronted Mr Manamela and his wife who were at their vehicle outside their home at Seshego. They were ordered into the back seat of the motor vehicle and driven by the appellant and his associate to the Seshego cemetery where they were robbed of a cellular phone, wallet, credit card, R50 cash and the motor vehicle. The appellant and his fellow robber then fled the scene with their loot. They left their victims at the Seshego cemetery. The motor vehicle was recovered a day later.

[3] Regarding count 8, on 11 August 2001 at about 21h00, Mr Sebola was sitting in his motor vehicle and talking to Ms Madiba in front of her house also at Seshego. A gang consisting of the appellant and two others, armed with firearms, confronted them. Mr Sebola and Ms Madiba submitted to the obvious threat and were taken in his motor vehicle by the gang to the Bloodriver Cemetery. There the gang robbed them of a number of items valued in excess of R6 500 as well as Mr Sebola's motor vehicle. They left their victims at the cemetery and drove off in the motor vehicle, which was recovered with some of the other items a few weeks later.

[4] After conviction the magistrate sentenced the appellant to an effective 30 years' imprisonment having applied the Act. When he appeared in the magistrates' court, the appellant was not charged on the basis that in the event of him being convicted, the provisions of the Act would be invoked. Neither was he at any time during the course of the trial informed or alerted to that possibility. The court below did not make anything of this but granted leave to appeal to this court on the basis that the cumulative effect of the sentences might be found to be too harsh.

[5] It was contended on behalf of the appellant that the magistrate should not have sentenced the appellant in terms of the Act since the appellant was not warned, at any stage of the proceedings, of any intention to invoke the Act nor did the charge sheet make any mention thereof. It was submitted that this rendered the trial unfair and the court below ought to have reconsidered the sentence, which it failed to do.

[6] It was conceded on behalf of the State that the application of the provisions of the Act was indeed a misdirection in the circumstances. It was however submitted that this was insignificant since the effective sentence of 30 years' imprisonment was in any event appropriate. The State therefore supported the sentence and submitted that this court should confirm it.

[7] In *S v Legoa* (33/2002) [2002] ZASCA 122; 2003 (1) SACR 13 at 22G-H, Cameron JA pointed out that:

'The Constitutional Court has emphasised that under the new constitutional dispensation, the criterion for a just criminal trial is "a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal court before the Constitution of the Republic of South Africa Act 108 of 1996 came into force". The Bill of Rights specifies that every accused has a right to a fair trial. This right, the Constitutional Court has said, is broader than the specific rights set out in the sub-sections of the Bill of Rights' criminal trial provision. One of those specific rights is "to be informed of the charge with sufficient detail to answer it". What the ability to "answer" a charge encompasses this case does not require us to determine. But under the constitutional dispensation it can certainly be no less desirable than under the common law that the facts the State intends to prove to increase sentencing jurisdiction under the 1997 statute should be clearly set out in the charge-sheet.'

He was reluctant to lay down any general rule that where the State intended to rely on the Act in the event of a conviction on a charge listed in Schedule 2 of the Act, specific reference to it must be incorporated into the charge sheet. He furthermore cited[1] with approval the following translation from the Afrikaans text in *S v Seleke en andere* 1976 (1) SA 675 (T) at 682H:

"To ensure a fair trial it is advisable and desirable, highly desirable in the case of an undefended accused, that the charge sheet should refer to the penalty provision. In this way it is ensured that the accused is informed at the outset of the trial, not only of the charge against him, but also of the State's intention at conviction and after compliance with specified requirements to ask that the minimum sentence in question at least be imposed."

See: *S v Ndlovu* (75/2002) [2002] ZASCA 144; 2003 (1) SACR 331 at 337A-B; *S v Makutu* 2006 (2) SACR 582 (SCA))

[1]At 24c.

[8] The rationale behind this passage as I understand it, is this: The accused person has a constitutionally protected right to a fair trial, which includes the sentencing process. When he or she is confronted with a charge(s), he or she must be placed in a position to understand exactly the case he/she has to meet so that the defence, if any, can be conducted properly. Implicit herein is also the option of pleading guilty. The failure to alert the accused of the sentencing regime intended to be relied upon, precludes the use of the Act. Applying the Act in such circumstances would, in my view, constitute a misdirection.

[9] While Cameron JA alluded to an unfair trial, it is clear that he was referring only to ~~is~~ the sentencing process. Consequently substantial unfairness in this regard would render the sentencing process and therefore the sentence unfair. As a result it is not the whole trial which is rendered unfair but only sentence. Absent any notice, the Act could not and should not have been applied. By doing so, the sentencing process was rendered substantially unfair and the magistrate thereby misdirected himself.

[10] The effective period of 30 years' imprisonment is extremely harsh, shocking and disturbing. Where it is necessary to punish an offender for multiple crimes, the aggregate of the effective punishment imposed should always be borne in mind and where appropriate, ameliorated. This is especially so where the punishment imposed is one of imprisonment. There is generally a threshold beyond which further incarceration serves no purpose. This is one such instance. The court below was therefore entitled to and should have intervened on that ground alone. It failed to do so. It therefore leaves this court at large to consider the sentences afresh.

[11] At the time of sentence, the appellant was 35 years old. He admitted to one previous conviction involving possession of stolen property in 1995. At that time, he was married and had fathered two children aged ten and three years old respectively. His wife was unemployed and he supported his family. At the time of his arrest, he was gainfully employed at Midway Bricks earning R1 200 per month. So much for his personal circumstances. The victims did not sustain any serious bodily harm during their ordeals. Aside from this, nothing else which could be

regarded as remotely mitigating was submitted. Being over 10 years old, I do not propose to attach too much weight to his previous conviction.

[12] On the other hand he was part of a gang of robbers who in the two aforementioned episodes of his criminal life, kidnapped innocent people and on each occasion took them to a cemetery at night - in itself a traumatic experience for most people. There the appellant and his fellow robbers looted their victims of various items and their respective motor vehicles – on both occasions at gun point. This is precisely what the legislature, guided by the input of society, had in mind when it ordained specific sentences for this type of offence. It illustrates quite clearly, society's abhorrence for such conduct and the seriousness with which it is viewed.

[13] It is well established that in assessing an appropriate sentence, the interests of the accused, the interest of society and the nature of the offence need to be balanced as against each other. The appellant's personal circumstances do not constitute special or outstanding qualities. On the other hand, the frequency with which this type of crime occurs and the repugnance that society has continuously expressed in this regard call for the interests of the appellant to yield to the interest of society which includes the deterrence component. In this case, the aggravating circumstances far outweigh the mitigation and overall, emphasising the interests of society would indeed be in order so that any would-be offender is deterred from committing such crimes. While the sentences must be blended with some mercy, they must also reflect the seriousness of the crimes involved. Indeed these crimes and the way they were executed demand stern and decisive sanction but not so harsh so as to destroy the appellant. As is clear from the above, the appeal must succeed.

[14] It was submitted that the sentences which I intended to impose should be ordered to run concurrently. Having considered this, I have come to the conclusion that it would be inappropriate to do so in these circumstances. First because the two offences are quite distinct from each other having been committed at different places, against different victims, and on different dates. Second as can be seen above, the appellant has already benefitted from reductions of the sentences and any further decrease would render the effective sentence too lenient and therefore

inappropriate.

[15] In the result the following order is made:

The appeal is allowed and the order of the court below is set aside and substituted with the following:

'The appeal succeeds and the sentences imposed by the trial court are set aside and replaced with the following:

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(c) The imposition of the sentences is ante-dated to 15 December 2003"'

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R Pillay

Judge of Appeal

Appearances:

For Appellant:	L M Manzini Instructed by: Pretoria Justice Centre, Pretoria Bloemfontein Justice Centre, Bloemfontein
For Respondent:	P W Coetzer Instructed by: The Director of Public Prosecutions, Pretoria The Director of Public Prosecutions, Bloemfontein