SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 457/2018

In the matter between:

LEONARD THANDLIBUFILE NTULI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Leonard Thandlibufile Ntuili v The State*, (457/2018) [2018] ZASCA 164 (29 November 2018)

Coram: Tshiqi, Swain and Dambuza JJA, Mokgohloa, and Mothle AJJA

Heard: 01 November 2018

Delivered: 29 November 2018

Summary: Criminal Procedure – sentence – failure to warn an accused person of the applicability of the Criminal Law Amendment Act – failure not resulting in unfair trial – leave to appeal to high court against sentence imposed by regional court refused.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Murphy J sitting as appeal court on petition)

The appeal against the order of the court a quo granted on the 18 April 2006, refusing leave to the appellant to appeal against the sentences imposed in the regional court for the district of Gauteng held at Springs, is dismissed.

JUDGMENT

Mokgohloa AJA (Tshiqi, Swain and Dambuza JJA and Mothle AJA):

[1] The appellant was convicted in the regional court, Springs (trial court), of attempted theft (count 1), four counts of robbery with aggravating circumstances (counts 2, 3, 5 and 6), and one count of theft (count 4). He was sentenced to four years' imprisonment in respect of attempted theft, 15 years' imprisonment on each count of robbery with aggravating circumstances, and six years on a count of theft. The sentences on count 1, 4, 5 and 6 were ordered to run concurrently with the sentence on count 3. The effective sentence was therefore 30 years' imprisonment.

[2] The appellant unsuccessfully applied to the trial court on 19 July 2005, in terms of s 309 B of the Criminal Procedure Act 51 of 1977 (the CPA) for leave to appeal against both conviction and sentence to the Gauteng Division of the High Court, Pretoria (the high court). On the 18 April 2006, the appellant unsuccessfully petitioned the high court, in

terms of s 309 C of the CPA, for leave to appeal against conviction and sentence. Thereafter, the appellant successfully applied to the high court (Murphy J), for leave to appeal to this court against the refusal of leave, but only in respect of sentence.

[3] In S V Khoasasa[1] it was held that a petition for leave to appeal to a high court in terms of s 309C of the CPA was in effect an appeal against the refusal of leave to appeal by the magistrates court in terms of s 309 B of the CPA. The court concluded that such refusal of leave to appeal by the high court was a 'judgment or order' of the high court as contemplated in ss 20(1) and 20(4) of the Supreme Court Act (the SC Act)[2], given by the high court on appeal to it. Accordingly, in terms of s 20(4)(b) of the SC Act the refusal of leave to appeal by the high court, was appealable to this court with the leave of the high court (being the court against whose order the appeal was to be made) or where leave was refused, with the leave of this court. The order appealed against was the refusal of leave with the result that this court could not decide the appeal itself.

[4] As pointed out by this court in S v Matshona[3], the issue to be determined is not whether the appeal should succeed but whether the high court should have granted leave, which in turn depends upon whether the appellant could be said to have reasonable prospects of success on appeal.

[5] The provisions of the SC Act are applicable to the appeal, and not the provisions of the Superior Courts Act 10 of 2013 (the Act), which repealed the SC Act as from 23 August 2013. Although the High Court granted leave to the appellant to appeal to this court against sentence on 5

[1] S v Khoasasa 2003 (1) SACR 123 (SCA) paras 14, 19-22
[2] Supreme Court Act 59 of 1959
[3] S v Matshona 2013 (2) SACR 126 para 4

November 2014, after the repeal of the SC Act, the appellant filed his application for leave to appeal against the refusal of his petition in respect of sentence only, on 1 August 2012. In terms of s 52 of the Act the proceedings were therefore pending as at the commencement of the Act, and had to be continued and concluded as if the Act had not been passed. In S v Gonya[4] it was held that the reference to proceedings 'pending in any court' in terms of s 52 of the Act, must include criminal proceedings. In addition, in S v Carneiro[5], it was held that the operation of the Act could not be retrospective, but prospective only.

[6] The convictions and sentences arose from the following six separate incidents and involved hijackings and thefts of motor vehicles on different dates. It is necessary to examine this evidence, in order to determine whether the appellant has reasonable prospects of success on appeal to the High Court, in respect of the sentences imposed.

[7] On the evening of 26 August 2002 Mr Larry Learnford (Mr Learnford) was driving his Toyota Hilux double cab vehicle. He arrived at his home and stopped in the driveway. As he opened the driver's door to exit the vehicle he was accosted by an armed unknown man who took the vehicle's keys and his cellphone from him. A second armed man appeared, demanded a firearm and instructed him to lie down on the drive way. Fortunately, Mr Learnford did not have a firearm. The two men then drove off with his vehicle. The vehicle was recovered shortly thereafter by a tracking company with the face of its radio having been stolen.

[4] S v Gonya [2016] ZASCA 34
[5] S v Carneiro 2018 (1) SACR 197 (SCA) para 7

[8] On the afternoon of 6 April 2002, Mr Andries Swanepoel had parked his vehicle, a Volkswagen Jetta, in the street in Farrarmere, Benoni. The vehicle windows were closed and the doors were locked. Upon his return, he noticed two men inside his vehicle. He shouted at them and they got out of the vehicle and ran away. They were picked up by another motor vehicle, a blue Opel Kadet. He examined his vehicle and noticed that the electrical wires of the alarm had been tampered with.

[9] On the evening of 18 September 2002, Mr Leonard Nevel was driving with his mother in a BMW motor vehicle. They had just stopped in front of their home when two armed men approached them and opened the doors of the vehicle. The men took all their personal belongings, dragged them out of the vehicle and ordered them to lie down. The two men then drove off in the vehicle which was recovered that evening.

[10] On 15 August 2003 Ms Suzette Henning parked her motor vehicle, a Volkswagen minibus, at the Jan van Riebeeck School and went to collect her child. When she returned she saw her vehicle being driven away. It was recovered later that day with its interior damaged.

[11] Two days later, on 17 August 2003 at midnight, Mr Roger Gumede was driving his BMW motor vehicle and had stopped at a red robot. Another vehicle then drove past and stopped in front of his vehicle. An armed man emerged from this vehicle, opened the door of Mr Gumede's vehicle and ordered him out of it. He then noticed two further men, armed with firearms. They demanded the keys to his motor vehicle, searched him, and took all his personal belongings. He was instructed to lie down underneath his vehicle. He refused. The three men then entered his vehicle and drove off. The vehicle was recovered shortly thereafter with

the radio and CDs missing.

[12] On 12 December 2003 at 08:45, Ms Karin Keay was driving her BMW motor vehicle, taking her mother home. She stopped in the driveway of her mother's home and her mother alighted from the vehicle. As she was reversing out of the driveway, an armed man approached and opened the driver's door through the open window. He ordered her out of the vehicle then drove off in it. She then noticed a white Mercedes Benz motor vehicle with men inside it, which drove off together with her vehicle. It was recovered later that day undamaged with her personal belongings missing.

[13] The main ground of appeal raised for the first time on appeal was that the trial court erred in sentencing the appellant in terms of the provisions of the Criminal Law Amendment Act (Minimum Sentences Act)[6] because the charge sheet made no reference to the Act. It was also contended that the trial court failed to warn the appellant of its applicability and implications for him in respect of the sentences that may be imposed.

[14] Counsel for the appellant argued that the failure to mention or forewarn the appellant of the applicability of the provisions of the Minimum Sentences Act, resulted in a serious misdirection that vitiated the proceedings and rendered the trial unfair in respect of sentence. Regarding the effective sentence of 30 years' imprisonment, he contended that the sentence was shocking and disproportionate.

[6] Criminal Law Amendment Act 105 of 1997.

[15] The respondent's counsel conceded that the provisions of the Minimum Sentences Act were not set out in the charge sheet. He however argued that the appellant's counsel at the trial was aware that the provisions of the Minimum Sentences Act were applicable. In support of this submission, he referred to the record where it was recorded that the appellant's counsel had addressed the trial court on whether there were any substantial and compelling circumstances that justified a deviation from the minimum sentences to be imposed in terms of the Minimum Sentences Act. He contended that no prejudice was suffered by the appellant because his counsel was, at all times during the trial, aware that the Minimum Sentences Act was applicable.

[16] As regards the need to warn the accused of the applicability of the Minimum Sentences Act, this Court stated the following in *Machongo v S*[7]:

'It is settled that failure to forewarn or to mention the applicability of the minimum sentence is a fatal irregularity resulting in an unfair trial in respect of sentence. The question is, having come to the conclusion that a misdirection has been committed, what next should the appeal court do? The answer is and has always been that the appeal court must consider the sentence afresh'.

[17] However the Constitutional Court in *MT v S; ASB v S; September v S*[8] stated:

'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 Sentence 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 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

[7] S v Machongo (20344/14) [2014] ZASCA 179 (21 November 2014)
[8] M T v S; A S B v S; September v *S* [2018] ZACC 27; 2018 (2) SACR 592 (CC); 2018 (11) BCLR 1397 (CC) para 40.

trial was not in fact infringed.'

[18] I agree with counsel for the respondent that the failure to warn the appellant of the applicability of the Minimum Sentences Act did not render the proceedings unfair, because it is not clear how the appellant could have conducted his defence differently had he known that the Minimum Sentences Act was applicable. I say so because the evidence against the appellant was overwhelming. His fingerprints were found on several of the stolen vehicles and he was unable to furnish an explanation for their presence, which was reasonably possibly true. His defence, was so fanciful that it was correctly rejected by the trial court.

[19] Regarding the severity of the sentence, the appellant submitted that an effective sentence of 25 years' imprisonment would be appropriate.

[20] In *S v Bogaards*[9] the following was stated:

'Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with the sentences imposed by court below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.'

[21] Robbery with aggravating circumstances of a motor vehicle is a serious offence. The robberies in the present matter were committed over a period of time and each count related to a different incident. The victims were either followed to their homes or the robbers lay in wait for them. The appellant operated in a group, and several of the members were armed during the robberies. The robberies were well planned using an

[9] S v Bogaards [2012] ZACC 23; 2012 (12) BCLR 1261 (CC); 2013 (1) SACR (CC) para 41.

additional vehicle to assist with a speedy getaway, if necessary. All these facts show that the group was organised and the crimes were pre-planned.

[22] In sentencing the appellant, the trial court took into consideration his personal circumstances, the nature and seriousness of the offence as well as the interest of the society. It also took into account the cumulative effect of the sentence and ameliorated it by making an order that certain sentences run concurrently.

[23] There is accordingly no basis on which to find that the sentence imposed by the trial court is disproportionate or shocking and that no other court would have imposed such a sentence. There is no striking or disturbing disparity between the trial court's sentence and that which this Court would have imposed. This court would accordingly not be entitled to readily interfere with the sentence imposed by the trial court. The appeal against the refusal by the high court to grant leave to the appellant to appeal against the sentence imposed by the regional court, must accordingly fail.

[24] The following order is granted:

The appeal against the order of the court a quo granted on the 18 April 2006, refusing leave to the appellant to appeal against the sentences imposed in the regional court for the district of Gauteng held at Springs, is dismissed.

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FE MOKGOHLOA

ACTING JUDGE OF APPEAL

APPEARANCES

For the Appellants:	J M Mojuto
Instructed by:	Justice Centre, Bloemfontein
	Justice Centre, Pretoria
For the Respondent:	K van Rensburg
Instructed by:	Director of Public Prosecutions, Bloemfontein
	Director of Public Prosecutions, Pretoria