

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

CASE NO: AR 335/2019

In the matter between:

THULANI SDISHI ZWANE

FIRST APPELLANT

SIHLE MICHAEL MAZIBUKO

SECOND APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

MPONTSHANA A.J.:

[1] The appellants together with two co accused were indicted in the Regional Division of KwaZulu- Natal, Ladysmith with a charge of murder, read with the provisions of section 51(1) or (2) of the Criminal Law Amendment Act 105 of 1997. It was alleged that on 27 September 2015 they unlawfully and intentionally killed Patrick Mzolo, the deceased.

[2] The record of proceedings of the 7 March 2016 reads: “10hrs SP informs court that the four accused were charged of murder. State will allege that it was a premeditated murder. Accused informed of the provisions of Section 51 of Act 105 of 1997 (prescribe: Murder)” and the annexure to the charge sheet dated 07 March 2016,

at page 4, states that the accused are guilty of the crime of Murder (read with Section 51(1) or (2) of the Criminal Law Amendment Act 105 of 1997)".

[3] The appellants were legally represented throughout the trial proceedings. The appellants pleaded not guilty and raised the defence of an alibi. Both appellants were convicted as charged and sentenced to life imprisonment in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997.

[4] This appeal proceeds against both conviction and sentence. The appeal is opposed by the state. The appellant sought condonation of the late filing and extension of the period referred to in section 309B (1) of the Criminal Procedure Act, 1977. Despite the length of time it took the applicant to bring the application before this Court, the potential prejudice the applicant stands to suffer in the wake of the alleged violation of his right to a fair trial if condonation is refused far outweighs the prejudice that would be suffered by the State if condonation is granted.

[5] Summary of the facts is that on 27 September 2015 the deceased was accused number 1's boyfriend. The deceased was lured to Mazibuko's, the second appellant's home at Mbulwane under the pretence that there was someone who was going to sell a site to the deceased. The deceased was expected to pay cash for the said site which would be shared amongst Mazibuko and his co accused, but the deceased did not have the money. When the deceased left Mazibuko's place there was no longer public transport. The deceased decided to walk home accompanied by Mazibuko and his co accused. On the way Mazibuko and his co accused robbed the deceased of his cellphones, assaulted him by inflicting stab wounds with knives and threw him into the river where he was found dead.

[6] The first issue is whether the state failed to adequately inform Mazibuko of the application of the minimum sentencing regime at relevant time commencement of the trial and the effect of the alleged failure.

[7] Section 51(1) of the Act, read with Part 1 of Schedule 2, provides for the imposition of a minimum sentence of life imprisonment on a conviction of murder when it was planned or premeditated, unless there are substantial and compelling factors which justify the imposition of a lesser sentence. In terms of section 51(2) of the Act, read with Part II of Schedule 2, the minimum sentence to be imposed on a conviction of murder in respect of a first offender is 15 years' imprisonment unless there are substantial and compelling circumstances.

[8] The Mazibuko submits that the application of the provisions of the minimum sentence act was not clearly explained to him at the beginning of the proceedings, the state failed in its duty to furnish him with every detail of the charge he was facing as a result his right to a fair trial was severely prejudiced.

[9] The State contends that the essence of the charge sheet which Mazibuko was confronted with was that Mazibuko was charged with murder read with section 51(1) or (2) of the minimum sentence Act and clearly stated that the appellant was facing a charge of premeditated murder which in law attracts the application of the provisions of the minimum sentence Act.

[10] The State contended further that the Mazibuko has to show that his right to a fair trial was factually infringed by the fact that the charge sheet referred to section 51(1) or (2) instead of section 51(1) only. Further that Mazibuko was legally represented at all times during the trial proceedings in the regional court and that Mazibuko's legal representative was aware of the application of the provisions of the minimum sentence Act, during his address on sentence he argued that compelling circumstances exist

which will justify the imposition of a sentence which is lesser than life imprisonment. The state contends further that it is not Mazibuko's complaint that he was not forewarned of the potential imposition of a life sentence and that the invocation of the provisions of the minimum sentence Act took him by surprise in this appeal.

[11] In **S v MT 2018 (2) SACR 592 (CC) para 40** the court held that 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.

[12] In *S v Kekana 2019 (1) SACR 1 (SCA)* Makgoka JA pointed out that the purpose of stipulating that a particular charge should be read with specific minimum sentence provisions of the Criminal Law Amendment Act, is essentially two-fold (at [24]): 'First, to alert the accused of the applicability of the prescribed minimum sentence. Second, to afford the accused an opportunity to place facts before the court on which a deviation from the prescribed sentence would be justified, nothing more'.

[13] The charge sheet stipulates that the charge is to be read with section 51(1) or (2) of the Criminal Law Amendment Act, it is not clear as to which of the two subsections of section 51 is applicable. It does not appear on the record where it was explained to Mazibuko which of the two subsections of section 51 is applicable. This ambiguity and lack of explanation infringes Mazibuko's right to a fair trial which entails being informed with sufficient particularity of the charges labeled against him. However it is clear and unambiguous from the record that the Mazibuko pleaded not guilty to a charge of murder.

[14] The second issue is whether the trial court was correct in accepting the evidence of Mr Thulani Ndlovu (accused 2), an accomplice who testified for the state as a section 204 witness.

[15] In *S v Hlapezula and others* [1965] 2 all SA 9 (a) the court said that it is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description, his only fiction being the substitution of the accused for the culprit. Accordingly, even where section 257 of the Code has been satisfied, there has grown up a cautionary rule of practice requiring (a) recognition by the trial Court of the foregoing dangers, and (b) the safeguard of some factor reducing the risk of a wrong conviction, such as corroboration implicating the accused in the commission of the offence, or the absence of gainsaying evidence from him, or his mendacity as a witness, or the implication by the accomplice of someone near and dear to him; see in particular *R. v. Ncanana*, 1948 (4) S.A. 399 (A.D.) at pp. 405-6; *R. v. Gumede*, 1949 (3) S.A. 749 (A.D.) at p. 758; *R. v. Nqamtweni and Another*, 1959 (1) S.A. 894 (A.D.) at pp. 897G-898D. Satisfaction of the cautionary rule does not necessarily warrant a conviction, for the ultimate requirement is proof beyond reasonable doubt, and this depends upon an appraisal of all the evidence and the degree of the safeguard aforementioned.

[16] The evidence of Thulani Ndlovu, the accomplice witness is the only evidence which describes in detail how the assault which caused the demise of the deceased occurred. The evidence indicates that Thulani Ndlovu was not only present but he also participated in the commission of the offense. He stated that the appellants and the deceased were walking behind him and the first accused was in the front. He testified

that while on the way the deceased's house and after crossing a river there was commotion behind him, Thulani Ndlovu, when he turned and looked back he saw appellant grabbing the deceased by his neck forcing the deceased to fall.

[17] Thulani Ndlovu stated further that Mazibuko searched the deceased, took the deceased cellphones and bank cards from the pockets of the deceased's pants and demanded for personal identity numbers for the said bank cards from the deceased. That the deceased refused to give the personal identity numbers (PIN) of his, the deceased's bank cards and the first and second appellants continued to assault the deceased by stabbing him with knives.

[18] Thulani Ndlovu stated further that at some stage the second appellant threw a knife to Thulani Ndlovu and invited him, Thulani Ndlovu to also participate in the assault and that he, Thulani Ndlovu did accept the said knife and also stabbed the deceased on the arms. He Thulani Ndlovu told the deceased that the deceased should cooperate by telling the Mazibuko and his co accused his, the deceased's personal identity number (PIN) for his bank cards after otherwise they are going to kill him, the deceased. The deceased eventually blurted his PIN out.

[19] Thulani Ndlovu stated further that Mazibuko then cautioned that the deceased knew him, Mazibuko, therefore he the deceased should be killed otherwise the deceased would report Mazibuko to the police. Mazibuko stabbed the deceased on the chest once with a knife whilst Mazibuko's co accused stabbed the deceased on the chest twice with a knife. Mazibuko and his co accused thereafter asked him, Thulani Ndlovu, to help drag the deceased and throw him, the deceased into a river. Thereafter they, Thulani Ndlovu, Mazibuko his co accused proceeded to the deceased's flat to look for money.

[20] The evidence of the police officers who attended the scene of the crime corroborated Thulani Ndlovu's evidence in that they did observe that there were marks on the ground showing that something had been dragged from the path towards the river where the body of the deceased was found.

[21] The pictures taken by the police which forms part of the exhibits which were admitted by consent in terms of section 220 of the Criminal Procedure Act contain three holes on the deceased chest which is consistent with the evidence of Thulani Ndlovu.

[22] The affidavit of Dr Ntshangase and the post-mortem report which was admitted by consent in terms of section 220 of the Criminal Procedure Act, states the cause of death was thoracic breathing as a result of the deceased having been stabbed on the chest.

[23] However the state did not rely on common purpose. In relation to the involvement of Mazibuko and his co accused in the incident, the court a quo considered Thulani Ndlovu's evidence and found that Thulani Ndlovu's evidence was corroborated by forensic evidence and the cellphone reports which were admitted in terms of section 220 of the CPA. Further that the state had made a strong *prima facie* case that Mazibuko and his co accused were not only present at the scene where the deceased was severely assaulted, but that they actively participated in that assault by stabbing the deceased on the chest with knives.

[24] The learned regional magistrate in his reasons for convicting Mazibuko and his co accused of murder being aware of the fact that common purpose was never averred either in the charge sheet or proved in evidence took into consideration the fact that there is overwhelming evidence implicating Mazibuko and his co accused which remains uncontested. It was impermissible for the regional magistrate to have invoked the principle of common purpose as a legal basis to convict Mazibuko and his co accused on a count of murder as this never formed part of the state's case.

[25] The approach adopted by the regional magistrate, that of relying on common purpose which was only mentioned at the end of the trial is inimical to the spirit and purport of s 35(3)(a) of the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution) under the heading 'Arrested, detained and accused persons'. The requirement embodied in s 35(3) is not merely formal but substantive. It goes to the very heart of what a fair trial is. It requires the state to furnish every accused with sufficient details to put him or her in a position where he or she understands what the actual charge is which he or she is facing. In the language of s 35(3)(a), this is intended to enable such an accused person to answer and defend himself in the ensuing trial. Its main purpose is to banish any trial by ambush. *Msimango v The State* (698/2017) [2017] ZASCA 181 (01 December 2017). Therefore the conviction on the count of murder cannot stand.

[26] Mazibuko and his co accused chose not to take the court into their confidence by not stating their version of events. The evidence accumulatively indicates that Mazibuko and his co accused were present at the scene and they participated in the assault that resulted in the death of the deceased therefore the conviction itself cannot be justifiable. It is a well-established principle that a trial court's decision must be based on the totality of evidence available to the court.

[27] Last issue is whether the sentence is so harsh and inappropriate such that it induces shock. It is not necessary to deal with this issue in details because of the conclusion that the application of the minimum sentence was not explained at the commencement of the trial and ambiguity on the charge sheet. The result of this conclusion is that Mazibuko and his co accused should have been convicted of attempted murder therefore the sentence of life imprisonment automatically falls to be replaced by an appropriate sentence.

[28] Although the concept of a fair trial is a cornerstone of our criminal law jurisprudence, not every minor irregularity vitiates the right to a fair trial and nullifies the entire proceedings. In this case the ambiguity on the charge sheet with regarding which subsection of the section 51 is relied upon by the state and the lack of explanation with regard to the application of the minimum sentence the appellants should address by excluding reference to section 51 of the Criminal Law Amendment Act and changing the conviction from that of “convicted as charged” to a conviction of attempted murder.

[29] For these reasons I make the following order

(a) Condonation is granted

(b) The appeal against conviction to the charge of murder read with section 51(1) or (2) of the Criminal Law Amendment Act upheld

(c) The conviction of murder is set aside and replace with a conviction of attempted murder

(d) The appeal against sentence of life imprisonment upheld

(e) The sentence of life imprisonment is set aside and replaced with a sentence of 12 years imprisonment antedated to 25 June 2018.

MPONTSHANA AJ

I agree and it is so ordered.

P C BEZUIDENHOUT J

JUDGMENT RESERVED:

8 SEPTEMBER 2023

JUDGMENT HANDED DOWN:

24 JANUARY 2024

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