

SOUTH AFRICA / JUDGMENT

Khauli and Another v S (A1010/2008) [2017] ZAGPPHC 371 (27 June 2017)

[2017] ZAGPPHC 371

COURT

North Gauteng High Court, Pretoria

BEFORE

M F Legodi, C P Rabie, H Fabricus

CASE / FILE NUMBER

A1010/2008

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA DIVISION)

CASE

NO: A

1010/2008

DATE:

A1010/2008

PETER

MAKUNYE KHALILI

APPELLANT

1

PHILLIP

MOEKETSI

KHALILI

APPELLANT 2

Versus

THE

STATE

RESPONDENT

JUDGMENT

LEGODI. J

- [1] On 30 August 2002 two accused persons (the appellants in this appeal) sharing the same surnames were convicted in the circuit court for the Local Division of the then Transvaal Division of the High Court on charges of robbery with aggravating circumstances (Count 1), murder falling under Part 1 Schedule 2 of Act 105 of 1997 (the Act) read with section 51 (1) of the Act (Count 2); and theft (Count 5). Subsequent to their convictions aforesaid, they were both sentenced to fifteen years' imprisonment, life imprisonment and 6 months imprisonment respectively. The sentences were not ordered to run concurrently. The two appellants were further declared unfit to possess a firearm as contemplated in section 103(1) of the firearm Control Act 60 of 2000.
- [2] On 24 October 2016, Mr Peter Makhunye Khauli (Appellant1) was granted leave by the SCA to appeal against sentence only. Ori 10 November 2016 Moeketsi Phillip Khauli (Appellant 2) was granted leave by Ledwaba DJP to appeal also against sentence.
- [3] At the heart of this appeal, the question is whether failure by the trial court to warn the appellants of the implications of the prescribed minimum sentence in terms of section 51(1) and (2) of the Criminal Law Amendment Act No. 105 of 1997 read with Parts 1 and 2 Schedule 2 constituted compelling and substantial circumstances entitling the court a quo to deviate from the prescribed minimum sentences. And if so, what appropriate sentences should have been imposed on the robbery and murder charges. Any person charged with an offence read with section 51 (1) of the Act is liable to be sentenced to a prescribed imprisonment for life upon conviction unless compelling and substantial circumstances are found to exist. Similarly, any person charged with an offence read with the provisions of section 51 (2) of the Act upon conviction is liable to be sentenced to a prescribed minimum sentence of 15 years' imprisonment unless compelling and substantial circumstances are found to exist.
- [4] Where the State intends relying upon the sentencing regime created by the Act, a fair trial will generally demand that its intention pertinently be brought to the attention of the 'accused at the outset of the trial and if not in the charge sheet, then in some form, so that the accused is placed in a position to appreciate properly in good time the charge that he faces as well as its possible consequences[1]. A Court has to be careful not to stipulate that failure to warn an accused person that he or she faces a prescribed minimum sentence will necessarily result in an unfair trial. A general requirement to this effect, if applied with undue formalism, may create intolerable complexities in the administration of justice and may be insufficiently heedful of the practical realities under which charge-sheets are frequently drawn up[2]

- [5] However, what is stated in paragraph [4] above, should now be seen in the light of the recent constitutional court decision handed down on 15 June 2017 in the matter of *Ndlovu v S* (CCT174/16) [2017] ZACC 19 (15 June 2017) wherein the accused who was charged with rape read with section 51
- (2) of the Act, was convicted as charged but, upon conviction he was sentenced to life imprisonment as if he was charged and convicted of rape read with the provisions of section 51 (1) of the Act. On appeal to the Constitutional Court and after having failed on appeal to the High Court and Supreme Court of Appeal, it was found that the Regional Court which sentenced the accused to life imprisonment lacked the jurisdiction to do so as the accused was not charged and convicted on a charge of rape read with the provisions of section 51 (1) of the Act. I find this principle to be applicable to the present case where the appellants were sentenced in terms of sections 51 (1) and (2) without having been so charged. That is, without reference to any such sentencing regime in the charge sheet.
- [6] Under our constitutional dispensation the importance of an accused person receiving a warning relating to the possible minimum sentence by reference to the relevant penalty clause in the charge sheet is large[3]. The issue is inextricably linked to the right of every person to a fair trial which includes the right to be informed of the charge with sufficient particularity to enable him or her to answer thereto.
- [7] When an accused person has the benefit of legal representation, the reluctance of Magistrates to descend into the arena, even when they have the best interest of an accused person at heart, is quite understandable. A few delicate immersions by the magistrate into the waters of an accused person's defense would not be out of place in balancing the fair trial rights of the accused against the proper prosecution of crime. It would certainly not have been improper for the Magistrate to have asked at the commencement of the trial, whether the appellant knew, that, if convicted, he was at the risk of the prescribed minimum sentence being imposed[4]
- This appears to be in line with the constitutional decision cited in paragraph [5] above.
- [8] For example, in dealing with the responsibilities of the prosecutors and the courts Kmampepe Jin Nlovu's case referred to above held:
- "[55] Section 165 of the Constitution vests judicial authority in the courts and nowhere else. They are the gate-keepers of justice... Furthermore, the acceptance of the evidence relating to the infliction of grievous bodily harm should have made it clear to the Magistrate that the crime fell squarely within the ambit of section 51(1) of the Minimum Sentencing Act.
- [56] In this case, the Magistrate could have and should have taken steps to ensure that Mr Ndlovu was prosecuted or convicted in terms of the correct provision of the Minimum Sentencing Act. Courts are expressly empowered in terms of section 86 of the Criminal Procedure Act to order that a charge be amended. Upon realising that the charge did not accurately reflect the

evidence led, it was open to the Court at any time before judgment to invite the state to apply to amend the charge and to invite Mr Ndlovu to make submissions on whether any prejudice would be occasioned by the amendment. This, the Magistrate failed to do. It was only after conviction, at sentencing, that she sought to invoke the correct provision. This failure is directly implicated in the finding made in this

judgment.

- [57] Furthermore, section 179 of the Constitution provides for a “single national prosecuting authority... structured in terms of an Act of Parliament.” The National Prosecuting Authority Act gives effect to section 179 of the Constitution. Section 2 of the NPA Act provides for a "single national prosecuting authority established in terms of section 179 of the Constitution" and section 20(1)(a) provides that the power to prosecute is vested in the National Prosecuting Authority (NPA); a power exercised on behalf of the people of South Africa.
- [58] When even the most heinous of crimes are committed against persons, the people cannot resort to self-help: they generally cannot prosecute the perpetrators of these crimes on their own behalf. This power is reserved for the NPA. It is therefore incumbent upon prosecutors to discharge this duty diligently and competently. When this is not done, society suffers. In this case the prosecutor failed to ensure that the correct charge was preferred against Mr Ndlovu. It boggles the mind why the proper charge of rape read with the provisions of section 51 (1) of the Minimum Sentencing Act was not preferred. This can only be explained as remissness on the part of the prosecutor that, further, should have been corrected by the Court. This error is acutely unfortunate - victims of crime rely on prosecutors performing their functions properly. The failings of the prosecutor are directly to blame for the outcome in this matter'.
- [9] Same can be said in the preset case. The two appellants appeared in the court a quo together with one other accused person on various charges and were convicted on the charges as indicated in paragraph 1 of this judgment. In the charge sheet no reference was made to the provisions of the Minimum Sentencing Act No. 105 of 1997, neither was any warning given to them during plea stage. It was only during sentencing stage that counsel for the appellants argued for the existence of compelling and substantial circumstances to justify lesser sentences.
- [10] As a general rule, where the State charges an accused with an offence governed by section 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 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 witness to call and any other factors that may

affect his 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[5].

[11] In his written heads of argument, counsel on behalf of the Prosecuting Authority stated:

" 13

In this matter at hand did neither the indictment nor the procedure followed during plea explanation, reflect that

the appellant was appraised of the Minimum

Sentencing Act, 105 of 1997.

14.

It is however clear from the judgment on sentence that counsel for the appellant did address the court on the question of substantial and compelling circumstances.

15.

It then follows logically that the defence did take instructions in the context of the minimum sentencing legislation. Therefore is it respectively submitted that the appellant was appraised of the provisions of the Minimum Sentencing Act."

[12] I cannot agree. Firstly, it was incumbent on the trial court to ensure right at the outset, in particular during plea stage to establish whether the state intends to rely on the provisions of Act 105 of 1977 regarding the prescribed minimum sentences contemplated in section 51(1) and (2) read with Parts 1 and 2 of Schedule 2 of Act 105 of 1997. It cannot be assumed that because counsel for the appellants during sentencing argued the presence of compelling and substantial circumstances, he or she must have informed the appellants of the implications of the provisions of the Act.

[13] Secondly, such information or intimation if any, ought to have been well in time to enable the appellants to consider their positions and properly decide how to conduct their case. Raising the issue of the prescribed minimum sentence for the first time after conviction and during sentencing, was too late to have brought any significant change to the appellants' case. Failure to inform the appellants of the prescribed minimum sentence before their convictions, should be found to have resulted in an irregularity and thus constituted compelling and substantial circumstances entitling this court on appeal to deviate from the minimum sentence.

[14] This then brings us to reconsider sentencing. Considering a sentence afresh, must ineluctably mean, setting aside of 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 trial in respect of sentence as stated in S v Zinn 1969

SA 537 (A) at 540 G-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[6].

[15] Personal circumstances of each of the appellants became clearer during the application for leave to appeal before Shongwe JP (as he then was) on 5 February 2007.

Appellants 1 and 2 were apparently 19 and 17 years respectively at the time of the commission of the offences. Both of them were first offenders. Appellant 1 attended school up to grade 12 and appellant 2 up to grade 9. The offences were committed under the following circumstances: On 1 September 2001 one Aaron Makwakwa and the deceased in count 2 were asleep at their home when approached by the appellants and allegedly suggested that they were selling some goods. When the deceased and Mr Makwakwa responded by saying they were not interested, they were then robbed of R1000 .00 cash. The appellants thereafter tried to lock the deceased and Mr Makwakwa inside the house and as the deceased tried to block them, he was then fatally shot.

[16] Both appellants at the time of the commission of the offences on 1 September 2001 were still very young. Life imprisonment and 15 years' imprisonment were in the circumstances very severe. In my view, the trial court overemphasized the seriousness of the offence; interests of the society and less emphasised the personal circumstances of both the appellants.

[17] The seriousness of the offence, interests of the society and personal circumstances must be evaluated equally without over-emphasis one over the other. The two appellants were sentenced on 30 August

2002. They have already spent about 15 years' in jail. I find 15 years imprisonment on the murder and 10 years imprisonment on the robbery with aggravating circumstances charges to be appropriate in the circumstances.

[18] Consequently, an order is hereby made as follows;

18.1 The appeal against sentence of 15 years' imprisonment and life imprisonment on the robbery and murder charges (counts 1 and 2) respectively, is hereby upheld.

18.2 The sentences so imposed by the trial court are hereby set aside and substituted as follows:

"18.2.1 Count 1 (robbery with aggravating circumstances): Accused 1 and 3 are hereby each sentenced to ten (10) years' direct imprisonment.

18.2.2 Count 2 (murder): Accused 1 and 3 are hereby each sentenced to 15 years' imprisonment.

18.2.3 The sentence of 10 years in count 1 is hereby ordered to run concurrently with 15 years' direct imprisonment in count 2."

18.3 The sentence is hereby ante-dated to 30 August 2002 being the date on which the appellants were sentenced.

18.4 The Director of Public Prosecutions through Counsel who appeared on behalf of the respondent (State) in this appeal is hereby directed to bring this order by the end of the day 27 June 2017 to the attention of the Head of the Correctional Services where the appellants 1 and 2 are being held.

M F LEGODI

JUDGE OF THE HIGH COURT

I agree ,

CP RABIE

I agree,

H FABRICUS

[1] S v Ndlovu 200 3 SACR 331 (SCA) para 7

[2] S v Legoa (1) SACR 13 (SCA) para 7

[3] S v Khobane

[2016] ZASCA 124 September 2016), See also Legoa para 20

[4] Khobane supra at para 16

[5] S v Makatu 2006 (2) SACR 582 (SCA) para 7

[6] Sv Machongo

[2014] ZASCA 179 at para 11 (21 November 2014)

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