

SOUTH AFRICA / JUDGMENT

Langa v S (AR498/09) [2010] ZAKZPHC 12 (23 April 2010)

[2010] ZAKZPHC 12

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Gorven, Govindasamy AJ

CASE / FILE NUMBER

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REPORTABLE**IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG****REPUBLIC OF SOUTH AFRICA****APPEAL NO. AR 498/2009**

In the matter between:

MARGRET LANGA Appellant
and
THE STATE Respondent**JUDGMENT**

GORVEN J

I have had the benefit of reading the judgment of Steyn J. I agree with the outcome of the appeal and the order suggested by her. However I do so for different reasons, being respectfully unable to agree on the route taken to arrive at that point.

The main count in the indictment on count 1 was of murder, in that during the period 28 June 1999 to 3 July 1999 and at or near the Inadi Area the appellant unlawfully and intentionally killed the deceased, Msweli. The alternative count on count 1 was of conspiracy to commit murder. As set out in the judgment of Steyn J, the appellant was convicted, along with accused 2, her husband, on the main count. The appeal lies only against sentence and argument focussed solely on the sentence imposed in respect of count 1.

At the commencement of the argument on sentence on this count, Magid J said the following: “Well before we can get there, on the facts found by the Court, this is a life sentence, is it not?” to which proposition counsel for accused 2 agreed as also counsel for the appellant. The latter indicated that he could not submit that there were any substantial and compelling circumstances warranting a departure from the minimum sentence prescribed under the Criminal Law Amendment Act, No. 105 of 1997 (“the Act”).

It is clear that the trial court invoked the provisions of s 51(1) read with Part 1 of Schedule 2 to the Act, in considering sentence under count 1. This provides that, unless substantial and compelling circumstances exist that justify the imposition of a lesser sentence, a court shall sentence to life imprisonment a person convicted of the crime of murder when it was planned or premeditated. S 51(1) is distinguished from the provisions of s 51(2) read with Part II of Schedule 2 which applies to murder other than one which is planned or premeditated. In such a case, the minimum sentence applying to the first such offence is 15 years’ imprisonment.

The application of s 51(1) in arriving at sentence was made clear by Magid J when he said the following in his judgment on sentence:

There are simply no circumstances, let alone substantial and compelling circumstances, which would justify the imposition in respect of that count of murder, in respect of either of you, of anything less than a life sentence.

The first express mention, anywhere on the record, that the sentencing regime introduced by the Act might apply was the comment

referred to above made by Magid J at the commencement of argument on sentence. No mention was made in the indictment or the summary of substantial facts or at any time before this point that these provisions would be relied upon by the State.

There is judicial harmony on the need for the accused to be aware that the State intends to rely on the sentencing regime introduced

by the Act in order for there to be a fair trial.¹ Less clarity exists as to how the accused must become aware, at what stage this must be the case and the consequence of a lack of awareness on his or her part.

In *S v Ndlovu*, the accused was convicted of possession of a semi-automatic firearm for which the Act prescribed a minimum sentence of 15 years’ imprisonment. The charge sheet erroneously referred to s 50, rather than s 51, of the Act. No mention was made in the charge sheet that it was alleged that the firearm was a semi-automatic or automatic one, the allegation being simply that it was a pistol. The contravention of the section of the Arms and Ammunition Act, No. 75 of 1969 that he was charged with carried a maximum sentence, in that Act, of a fine of R12 000 or imprisonment of 3 years or both. Mpati JA (as he then was) dealt with the approach to be taken in a trial to the invocation of the sentencing regime introduced by the Act in the following manner:

And I think it is implicit in these observations that where the State intends to rely 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, if not in the charge-sheet then in some other 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.... It is sufficient to say that what will at least be required is that the accused be given sufficient notice of the State's intention to enable him to conduct his defence properly.²

Mpati JA held that the right of the accused to a fair trial had been prejudiced by the non-disclosure of such an intention by the State. He held that the substantive unfairness of the trial constituted a substantial and compelling reason why the prescribed sentence ought not to have been imposed.³

This followed the decision in *S v Legoa*⁴ where Cameron JA (as he then was) extensively reviewed the history of the approach under the common law relating to legislation

providing for sentencing regimes.⁵ He went on to deal with the enhanced rights of an accused person to a fair trial enshrined in the Constitution of the Republic of South Africa, 1996 ("the Constitution"). Mentioning that the right to a fair trial has been held to be broader than the specific rights set out in section 35, he referred, in particular, to s 35(3) of the Constitution which specifies the right "to be informed of the charge with sufficient detail to answer it". He held that it was no less desirable under the Constitution than under the common law that the charge sheet should set out clearly the facts giving rise to the application of the sentencing regime under the Act. He held, however, that it was undesirable to specify, as a rule, that it be mentioned in the charge sheet. This was, he stated, because the issue is one of substance and not of form. As long as the accused acquired the requisite knowledge that the State intended to rely on this legislation, that knowledge could come about in a number of ways.⁶ He held that the essential question to be answered by the court was "whether the accused had a fair trial under the substantive

fairness protections afforded by the Constitution".⁷

Ndlovu's case held that it was necessary that the State's "intention pertinently be brought to the attention of the accused". No means to do so was specified, although mention of such intention in the charge sheet was said to be the preferred means. Although Mpati JA used the words "pertinently be brought to the attention of the accused", I do not understand by that anything more than that the court should be satisfied that, at an appropriate time, the accused was aware of such an intention on the part of the State, however it may have come to his or her attention. This was also the thrust of the approach in *Legoa*⁸. As indicated above, *Legoa*'s case gave as one reason for not requiring the charge sheet to specify this that the accused may acquire the requisite knowledge in other ways. Whether this is the position in the case before a court is clearly a factual enquiry which considers substance and not form.⁹ There can, therefore, be no *numerus clausus* of ways in which the accused acquires the requisite knowledge.

It was stated in Ndlovu's case that the accused should have the requisite knowledge so as to "appreciate in good time the charge that he faces as well as its possible consequences". This begs the question when such a "good time" might be. In Ndlovu's case Mpati JA spoke of it as being "at the outset of the trial"¹⁰ but deliberately declined to exclude the possibility of a later time sufficing. There seems to be consensus that to obtain the requisite knowledge after judgment on the merits is not in sufficient time. In *S v Makatu*,¹¹ Lewis JA said the following:

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.

The underlying reasoning is that a fair trial demands that an accused has the requisite knowledge in sufficient time to make critical

decisions which will bear on the outcome of the case as a whole, including sentence. One such other factor which comes to mind in addition to those mentioned by Lewis JA is whether an accused should plead guilty so as to be able to submit that, by this, he has shown remorse and have that weighed in the scale of whether substantial and compelling circumstances exist warranting a departure from the minimum sentence prescribed by virtue of s 51(3) of the Act. None of the decisions to be made by an accused listed above can be made after conviction. It is, to my mind, doubtful whether many of them can adequately be made after an accused has initially pleaded to the charge. It is difficult to envisage how the requisite knowledge could achieve the desired end of informing all crucial decisions unless it is obtained at a stage prior to the accused pleading to the charge. In the present matter, however, since the first express mention of a minimum sentence was made after conviction, the cases make it clear that this was not in sufficient time if the appellant had not obtained the requisite knowledge prior to that. It is therefore not necessary for me to decide with any more precision when a "good time" would be unless I find that the appellant obtained the requisite knowledge prior to that. I shall deal with that enquiry at a later stage in this judgment.

Reliance was placed by Steyn J on the fact that the appellant was legally represented. This issue was dealt with in *S v Mseleku*¹². Here the question was whether, if the accused was represented at the trial, it was necessary that the court satisfy itself that the accused had the requisite knowledge. Pillay J rejected the approach of Borchers J in *S v Mwelase*.¹³ In that matter, the accused had been charged with three counts of rape. The provisions of the Act were not mentioned in the charge sheet. The accused was represented. Borchers J distinguished that matter from those of Ndlovu and Legoa where there had also been legal representation but where the charge sheets had misled the accused. She went on to say the following:

There was indeed no reference to the provisions of the Act in the three charges of rape, but the fact that all three charges were framed in identical terms can lead a legal representative to no other conclusion than that the accused is facing charges defined in Part I of Schedule 2 of the Act and that, if convicted, the accused faces the possibility of imprisonment for life. While there might well be a failure to state this fact specifically, there can be no question of the accused or his

legal representative being misled by the charge-sheets in regard to the nature of the sentence which the accused faced.

In Mseleku's case, the accused was charged with raping a 12 month old child. He was represented at the trial. The magistrate reasoned that, since it was mentioned that the complainant was under the age of 16 years, the legal representative would have known that the accused faced the prospect of life imprisonment under the provisions of the Act. Pillay J dealt with this reasoning and that of Borchers J as follows:

Firstly, it is certainly not my experience that an assumption can safely be drawn on the competence of a legal representative... Borchers J herself appears to acknowledge shortcomings of some counsel in the passage I have quoted, stating, however, that it is the exception rather than the rule.

It is the exception which worries me. The assumption could result in an accused not receiving a fair trial and spending a lifetime in prison. An accused person may well have conducted his defence differently had he been aware of the gravity of the sentence he faced...

It is better for the presiding officer to exercise caution rather than assume that the legal representative must have been au fait with its provisions and therefore have drawn the accused's attention to the gravity of the sentencing provisions of the Act, notwithstanding that the indictment makes no reference thereto. As I read Ndlovu's case, the principle enunciated which is binding on this Court, is that the accused be given sufficient notice of the State's reliance on the sentencing regime created by the Act so as to enable the accused to properly conduct his or her defence....

I am in respectful agreement that representation by a legal practitioner does not, without more, mean that it is not necessary

for a court satisfy itself that the accused is aware of the intended reliance by the State on the sentencing regime ushered in by the Act. As mentioned above, the enquiry is a factual one. There may well be situations, for example, where a court can make such a finding of fact by drawing an inference from the conduct of the accused or the legal practitioner. In such a case the test would be satisfied. It still, however, requires an assessment of whether the accused had the requisite knowledge regardless of the question of representation.

What, then, should be the consequence of a finding that the accused did not have the requisite knowledge at the relevant time? In Ndlovu's case, the following was said:

[I]n my view, where the minimum sentencing provisions apply an accused must not be subjected to the risk of being visited with them without having been made fully aware that such will be the case unless substantial and compelling circumstances are present which would justify a lesser sentence.

If the provisions of the Act are applied in arriving at a sentence when the accused only became aware of them after conviction, this, in my view, offends against the substantive fairness provisions of the Constitution and amounts to an unfair trial on sentence. This appears to be the thrust of the decisions in the Legoa, Ndlovu and Makatu cases. If applying the provisions of the Act would give rise to an unfair trial on sentence, the provisions of the Act must be regarded as irrelevant to any consideration of sentence in order for the trial to be fair. If irrelevant considerations are taken into account on sentence, this amounts to a misdirection warranting the setting aside of the sentence and requiring the appeal court to begin the sentencing process de novo, if it is in a position to do so.¹⁴ I am therefore of the view that for a trial court to apply a sentencing regime of which the accused has not had adequate and

timeous knowledge qualifies, par excellence, as a material misdirection. In my view, therefore, the consequence of a trial court applying the provisions of the Act in a situation where the requisite knowledge was lacking amounts to a misdirection warranting the setting aside of the sentence and fresh adjudication of an appropriate sentence.

This was the approach adopted in Ndlovu's case, even though it was not specifically reasoned along those lines. The court dealt with it in the following way:¹⁵

By invoking the provisions of the Act without it having been brought pertinently to the appellant's attention that this would be done rendered the trial in that respect substantially unfair. That, in my view, constituted a substantial and compelling reason why the prescribed sentence ought not to have been imposed. Hence the order that we have already made.

The sentence was set aside and the consideration of an appropriate sentence was approached without reference to the provisions of the Act. The Supreme Court of Appeal invoked the penalty provisions of the Firearms and Ammunition Act applicable to the offence with which the appellant had been convicted.

I do not understand the phrase "a substantial and compelling reason why the prescribed sentence ought not to have been imposed" to mean a "substantial and compelling circumstance" contemplated in s 51(3) of the Act. If this were so, it would amount to holding that the provisions of s 51(3) should apply where it had been held that the provisions of the Act as a whole ought not to have been invoked and that, because the court a quo had done so, it rendered the trial (on sentence) substantially unfair. I understand the phrase to mean, in effect, that to have invoked the provisions of the Act in those circumstances amounted to a material misdirection in the court a quo's approach to determining an appropriate sentence. As indicated above, this appears to have been the manner in which Ndlovu's case was approached.

In *S v Shabalala*¹⁶ the court, relying on Ndlovu's case but without dealing fully with the underlying reasoning for coming to this conclusion, said the following:

The failure to give due notice to the appellant of the applicability of the minimum sentence legislation precludes the imposition of such minimum sentence.

That matter concerned a contravention of the Arms and Ammunition Act 75 of 1969 and reference had been made to the penalty provisions of that Act which carried a minimum sentence of 5 years' imprisonment with a maximum of 25 years'. The appellant had

pleaded guilty. No mention had been made, prior to the address on sentence of the prosecutor, of the provisions of s 51 of the Act. Despite this, the magistrate invoked these provisions and sentenced the appellant to a period of 15 years' imprisonment since he held that no substantial and compelling circumstances were shown to exist. Since this is a judgment of the Full Bench of this Division, we are bound by it unless it can be said to be clearly wrong. For the reasons set out herein, I am of the respectful view that it is correct and should be followed.

In Legoa's case, the accused had been charged with and pleaded guilty to possession of dagga where the penalty provisions of the Drugs and Drug Trafficking Act, No 140 of 1992 were mentioned in the charge sheet. No value of the dagga was mentioned, only the mass of dagga alleged to have been in the possession of the accused. The accused tendered a statement in terms of s 112 of the Criminal Procedure Act, No. 51 of 1977, admitting the mass of dagga but where no mention was made of the value of the dagga. The State accepted the plea and the statement. The accused was convicted on that basis. The State then led evidence of the value of the dagga and invoked the provisions of the Act which, if the value was proved, rendered the accused liable to a minimum sentence of 15 years' imprisonment. Cameron J set aside such sentence and sentenced without reference to the Act. He held as follows:

The appellant was not warned that the minimum sentencing legislation might be invoked. In fact, the charge sheet misled him as to the applicable penalty by referring only to the 1992 Act. The trial court, in convicting him, did not question him or satisfy itself...as to the elements of the form of the offence to which he was pleading guilty. It was therefore highly unfair to confront the appellant thereafter with the minimum sentences. More signally, the trial court in any event lacked jurisdiction entirely to impose the minimum sentence.

This was also the approach in *S v Makatu*¹⁷ although, once again, it was not specifically reasoned as I have done. In that matter the charge of murder was said, in the charge

sheet, to be subject to the provisions of s 51(2) of the Act. The appellant had been sentenced to life imprisonment in terms of s 51(1) of the Act. This gave rise to a similar situation to that confronted by Magid J in the trial court. It differed in that specific mention was made of s 51(2) of the Act whereas no mention was made of the Act or any of its provisions in the present matter. Lewis JA, sitting with two other judges of appeal who concurred in her judgment, said the following:

The appellant in this matter was charged with murder that, on conviction, would render him liable to a sentence of 15 years' imprisonment in terms of the Act. He was convicted on that charge. He was then sentenced on the basis that he had been charged with and convicted of what amounted to a different offence - premeditated murder - that, under s 51(1) of the Act, renders an accused liable to imprisonment for life. The imposition of that sentence is an obvious and grave misdirection. It must be set aside and this Court is required to consider the appropriate

sentence.¹⁸

This leads, then, to the enquiry whether, in the present matter, the appellant had the requisite knowledge. In my view a court

considering all the facts cannot be satisfied that this was the case at any time prior to her conviction. There is nothing in the record, whether by way of the indictment, the summary of substantial facts, the evidence led or the conduct of the appellant or her legal representative, which satisfies me that she was aware of the State's intention to rely on the provisions of the Act at all, let alone s 51(1) as opposed to s 51(2) thereof. It is so that paragraphs 3 to 8 of the summary of substantial facts indicate that accused 2 and the appellant decided to kill Msweli, that they approached 3 persons who agreed to do so, that the appellant lured the deceased to accused 2's office and, on arrival, that he was taken to another place where he was killed after the appellant instructed them to shoot him. It is also so that, on analysis and taken as a whole, these allegations lead to the inference that the murder was alleged by the State to have been planned and premeditated. This appears to be the

basis on which Steyn J came to the view that the "appellant in casu clearly acquired the requisite knowledge of the penal jurisdiction from the summary of facts". I respectfully differ from Steyn J in this finding. That an inference may be drawn that the state alleges that the murder was planned and premeditated from

an analysis of the summary of substantial facts does not, in itself, go far enough in my view. It is necessary to make a factual finding that the appellant herself or her legal representative had drawn that inference. In addition, it is necessary to find as a fact that this was understood to mean that the State intended to rely on the provisions of s 51(1) of the Act. There is no indication at all, whether by way of a plea explanation, the approach to cross-examination of witnesses or anything else, that shows that either the appellant or her legal representative made the connection between the averments contained in the summary of substantial facts and the intention of the State to rely on s 51(1) of the Act.

As will appear from the reasoning above, I also respectfully disagree with Steyn J that the purpose of requiring such knowledge

is to "put such accused in a position to exercise an informed decision, whether legal representation should be obtained". As indicated above, in my view the purpose is far broader than that. I differ also as to whether, since "the appellant was legally represented and it is clear that the summary of facts show that a sentence of life would be attracted should the appellant be convicted", the application of the provisions of the Act did not give rise to a misdirection by the court a quo. I am also respectfully unable to concur in her finding that, even if this amounted to a misdirection, "that such misdirection is not sufficient to vitiate the sentence". I have set out above my reasons for differing from these findings.

That being the case, it is my view that the reliance on the provisions of s 51(1) of the Act by Magid J must be held to amount

to a material misdirection rendering the trial on sentence substantively unfair and requiring the sentence on this count to be

considered afresh.

In considering an appropriate sentence for count 1 it is my view that it should be done without reference to the provisions of the Act. Here I respectfully agree with the assessment of the evidence and relevant factors as they are set out in paragraphs

[6] to [12] inclusive in the judgment of Steyn J. The personal circumstances of the appellant, which I have carefully considered, must be weighed along with the other factors affecting sentence, namely the nature of the specific offence and the interests of the wider community. The facts relating to the crime show that the appellant is the one who initiated the killing, telling accused 2 of her intention to kill the deceased. She and accused 2 contracted three persons to perform the murder and she herself lured the deceased to his death and ordered that the three persons shoot him. The motivation for the murder was economic in nature. The crime is of the most heinous kind and is a major aggravating factor in approaching sentence. The appellant also had the contracted killers commit a further murder to prevent detection. She expressed no remorse for her conduct, persisting in her denial. There is no indication that she is a good candidate for rehabilitation. Even having given due weight to her personal circumstances, I am of the view that the most appropriate sentence for count 1 is one of life imprisonment. This is so even in

the light of the warning that, in imposing such a sentence, a court should be aware that life imprisonment is “the ultimate

sentence that courts in the country [can] impose and it should ... be reserved for the most serious cases”.¹⁹

I accordingly concur in the order proposed by Steyn J.

I concur in the judgment of Gorven J

GOVINDASAMY AJ

1 S v Legoa 2003 (1) SACR 13 (SCA), S v Ndlovu 2003 (1) SACR 331 (SCA) at para 12

2 Ndlovu’s case at para 12

3 Ndlovu’s case at para [14]

4 supra

5 As in *R v Zonele & Others* 1959 (3) SA 319 (A). In that matter, the relevant Criminal Procedure Act had been amended to provide for the sentence of death in cases of robbery and housebreaking where aggravating circumstances were present. It was held that it was desirable, but not necessary, that the charge sheet should particularise the facts that the State intended to prove in order to bring the accused within that enhanced sentencing jurisdiction. See the discussion in *Legoa's* case at para [20].

6 Cameron JA mentioned, in para [21], that it might be acquired “from particulars furnished to the charge, or, in a Superior Court, from the summary of substantial facts”. In *S v Thembaletu* 2009 (1) SACR 50 (SCA) at 53 it was held that the accused had acquired the requisite knowledge. The court there said: “[I]t is clear from the record that the appellant’s legal representative was aware of its provisions”, referring to the Act. Also, in *S v Raath* 2009 (2) SACR 46 (C), although the charge-sheet specified that the provisions of s 51 of the Act were applicable, this notification was ambiguous, since it did not indicate whether the State viewed the murder as planned or premeditated, or simply as an unplanned murder which would attract a minimum sentence of 15 years’ imprisonment. There was also nothing in the record to show that the appellant had been advised of the State’s intention to prove a planned or premeditated murder. *Bozalek J* held, at para [14], that: “In the present matter, in my view, although not directly advised by the State, in either the charge-sheet or the summary of substantial facts, that it intended to make out a case that the murder was planned or premeditated, the appellant must nevertheless have been fully aware of this. This much appears not only from the contents of his plea explanation which I have referred to, but also from the manner in which the appellant’s defence was conducted. In the circumstances I am satisfied that the appellant’s right to a fair trial was in no way infringed and that it was open to the court a quo, upon a finding that the murder was indeed premeditated or planned, to sentence the appellant to life imprisonment.

7 At para [22].

8 At para [20].

9 *S v Legoa* at paras [20] & [21]

10 At para [12]

11 2006 (2) SACR 582 (SCA) at para [7]

12 2006 (2) SACR 574 (D)

13 2004 (2) SACR 531 (W)

14 See *S v Zinn* 1969 (2) SA 537 (A) 540 and the cases which follow on that judgment.

15 At para [14].

16 2006 (1) SACR 328 (N) at 331 d-e

17 *Supra*.

18 At para [6]

19 S v GN 2010 (1) SACR 93 (T) para [4]

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