



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO .	
(2) OF INTEREST TO OTHER JUDGES: YES / NO .	
(3) REVISED.	
21/4/2015- DATE	 SIGNATURE

21/4/2015

CASE NO: A 173/2013

In the appeal between:

GODFREY LEBANG

Appellant

And

THE STATE

Respondent

Date of Hearing: **4 March 2015**

Date of judgment: **21 April 2015**

Full Court Quorum: **Bertelsmann J, Preller J et Mothle J**

JUDGMENT

MOTHLE J

Introduction

1. Godfrey Lebang appeals to the Full Court of this Division against the sentences of life imprisonment and 7 years imposed by the High Court, Pretoria on 4 July 2007. The appeal against sentence is with leave of the Court *a quo*, granted on 21 September 2011.

2. Appellant was convicted of one count of murder and another of attempted murder by the Regional Court, Pretoria North. The charge sheet stated that appellant was guilty of the crime of murder read with the provisions of sections 51(2), 52(2), 52A and 52B of the Criminal Law Amendment Act 105 of 1997. However, in court when charges were put to him to plead, the prosecutor did not mention that the charge should be read with any of the provisions of the sections of the Act listed above.

Background

3. The conviction on both counts followed from a standing dispute that appellant had with his brother's wife, Peggy Motswane, whom appellant accused of spreading false rumours against him and who was threatening to engage the service of assassins to kill him. On 11 October 2003, appellant went to

the deceased's house where an altercation between him and the deceased took place. He was furious. He then attacked the deceased with a weapon, accepted by the trial court as a panga. The panga still had a price tag on it.

4. The deceased sustained serious injuries during the attack and she was hospitalised for four days. On her discharge from hospital, she stayed for a few days with her husband before she went to her parent's home where her condition deteriorated. She died just over four months after the attack, which death the trial court found to be as a result of the injuries she had sustained during the attack. At the time of the attack on the deceased, appellant's brother, Sylvester, who is also the deceased's husband, initially attempted to stop and restrain him, but was unsuccessful. The appellant was only restrained and disarmed later when Sylvester, on the second attempt, received assistance from neighbours. Sylvester also sustained serious injuries for which he was admitted to hospital for ten days. The charges of murder on the deceased and attempted murder on Sylvester arise out of this incident.

5. In convicting appellant, the trial court found that the murder had been premeditated. It accepted evidence by Sylvester that prior to the incident, appellant had a standing problem with the

deceased which, in spite of interventions by family members, remained unresolved. Sylvester testified that during the scuffle for control of the panga with a view to disarm him, appellant told him that he had purchased the panga for the purpose of launching the attack. The trial court's finding that he committed the murder with pre-meditation is based on the reasoning that having had sufficient time to stay away from the deceased and thus avoid the attack, appellant nevertheless chose to purchase a panga with the intention to attack the deceased at her house. He had ample opportunity to avoid the incident.

6. Consequently, in terms of the then section 52 of the Act (*which section has now been repealed by section 2 of Act 38 of 2007*), the matter had to be referred to the High Court for appropriate sentencing.

Sentencing in the Court a quo

7. Prior to sentencing, the Court *a quo* was informed that appellant, at the time of the commission of the offence, was aged 28 and earned his income from part-time work (*"piece jobs"*). It was further recorded that he is a first offender and has one minor dependant. Appellant's mother passed on when he was still young and he never had a father during his

upbringing. He went up to grade 7 at school. According to appellant, at the time he was convicted he had been in custody for a period of "*two years, ten months and seven days*" without bail.

8. Sylvester was again called to testify during sentencing and he confirmed that appellant needs to be punished but that he was not supportive of a life imprisonment sentence. He added that the appellant neither showed remorse nor apologised to him and the family of the deceased for his actions.
9. The Court *a quo* also took into account the finding by the trial court that appellant committed the offence with premeditation. It found that there were no substantial and compelling circumstances that would justify a departure from imposing the prescribed minimum sentence. It therefore imposed a sentence of life imprisonment for the murder charge and seven years imprisonment for the attempted murder. The sentence of seven years imprisonment is to run concurrent with the life imprisonment. The Court *a quo* granted leave to appeal only against sentence.
10. During the hearing of the application for leave to appeal, appellant's counsel, Adv. Van Wyk, contended that the

sentence imposed was not consistent with the minimum sentence provisions which the state mentioned in the charge sheet. The charge sheet indicated that Appellant was charged with murder read with section 51(2) of the Act, which on conviction attracted a minimum sentence of 15 years and not life imprisonment.

11. Both in the charge sheet and when charges were orally put to him in the trial court, no mention or reference was made that section 51(1) of the Act which prescribes life imprisonment as the sentence to be imposed on conviction, might be applicable. It does not appear from the record that the appellant was warned, either before pleading or at any stage of the trial, that he faced a minimum sentence of imprisonment for life, for 15 years or any other minimum sentence. This point is now raised in this appeal.

The authorities

12. The problem of the reference to the wrong sub-section was considered by the Supreme Court of Appeal in ***S v Mashinini and Another 2012 (1) SACR 604 (SCA)*** and in ***S v Kolea 2013 (1) SACR 409 (SCA)***. In both cases the charge was rape.

The SCA in these cases followed the earlier decisions in ***S v Legoa and S v Ndlovu 2003 (1) SACR, pages 13 and 331 respectively (SCA)*** where the SCA opined that the accused's right to be informed of the charge he is facing is underpinned by s 35(3)(a) of the Constitution, which provides that every accused has a right to a fair trial. This would include being adequately informed of the possible applicability of the minimum sentence provisions and the implication thereof in case of conviction.

13. The Court in ***S v Kolea supra*** in paragraph 7 of the judgment stated the principle as follows:

"The objective is not only to avoid a trial by ambush, but also to enable the accused to prepare adequately for the trial and to decide, inter alia, whether or not to engage legal representation, how to plead to the charge and which witnesses to call. It follows that, if the state intends to rely on the minimum sentencing regime created in the Act, this should be brought to the attention of the accused at the outset of the trial. The question which must be answered, though, is what does sufficient detail in the charge entail."

14. In these judgments a principle is established that on examination of the relevant circumstances, a court can determine whether on the evidence, it can be said that an

accused had had a fair trial as envisaged in section 35 of the Constitution.

15. In *S v Kolea supra*, 5 judges of the SCA held that a sentencing court is not precluded from imposing a life sentence or referring a matter to a higher court for consideration of sentence, **solely** on the basis that the charge sheet erroneously refers to s 51(2) instead of s 51(1) of the Act. (**My emphasis**). The court confirmed the life imprisonment sentence.

This appeal

16. In *casu* the prosecutor used a charge sheet in the form of a ready-made template, which refers to sections 51(2), 52(2), 52A, 52B of the Act. The template makes no mention of section 51(1). Therefore unlike in *S v Mashinini supra*, the reference to section 51(2) and not 51(1) in *casu* was not erroneously typed. The template used as a charge sheet refers expressly to applicable sections of the Act and excludes section 51(1). A further problem arises in that when the prosecutor orally put the charges to appellant in the trial court, he failed to refer to any of these sections or to the fact that upon conviction, the state intended to rely on the provisions of the minimum sentence

legislation. Consequently, appellant was not warned by the magistrate of the consequence of the applicability of the minimum sentence regime in the event of conviction. This second factor distinguishes this case from the SCA cases cited above, where the accused was verbally informed in court of the applicability of the minimum sentence provisions upon conviction, even though the charge sheet made no reference to section 51(1).

17. Counsel for the state submitted firstly that notwithstanding the fact that Appellant had not been informed of the applicable minimum sentence provisions on which the state intended to rely, he had not been prejudiced because he would not have conducted his defence differently. Secondly, that his legal representative failed to raise this matter during the sentencing proceedings before the Court *a quo*. See ***S v Kolea supra***, ***para [11] et seq.***

18. There is a problem with these submissions. Firstly, there is no evidence on which we can confidently determine retrospectively that the appellant would not have conducted his defence differently if he had been warned of the minimum sentences. Only an accused has a right, with or without legal advice, to decide on his defence and how it should be

conducted. Such decision would entail, amongst others, whether to testify in his or her own defence and/or whether to call or not to call witnesses, and which part of the state's case should be challenged. See the view of the court in ***S v Kolea supra*** as quoted above in paragraph 13 of this judgment. Thus, speculation as to how appellant would have conducted his defence would not assist in resolving the question whether there was or there was no prejudice in the conduct of his defence during the trial.

19. Secondly, the court in ***S v Kolea supra*** firmly established the principle that the legal representative of an accused has a duty to raise any matter concerning a possible breach of the accused's constitutional rights as provided for in section 35 of the Constitution. This more so where it would seem that the court is about to impose a prescribed minimum sentence that was neither referred to in the charge sheet nor brought to the attention of the accused at any stage of the trial.
20. Sadly, in this case the accused's first two legal representatives failed to draw the attention of the court to the fact that the accused was not made aware of the applicable minimum sentence provisions of the Act in case of conviction. The first counsel, Advocate Combrinck, failed to raise the issue when

after conviction, the trial court held proceedings to refer the case to the High Court for sentencing. During the sentence proceedings in the High Court the second counsel, Advocate Mkalipe, failed to inform the Court a quo of this irregularity. It was only during the hearing of the application for leave to appeal that the issue was raised by the third counsel representing appellant, Advocate Van Wyk.

21. It seems to me that the duty to inform the sentencing court about the correct applicable minimum sentence provisions of the Act, should not only lie with the legal representative of an accused, but also with the state. It will not be in the interest of justice for the state, being aware that it did not inform the accused that it will rely on the minimum sentence legislation, to call for a sentence based on minimum sentence legislation to be imposed. If the accused had not been warned that in the event of a conviction the state intended to rely on the minimum sentence provision, there was a duty on the state to inform the court of the omission. Failure by the state to disclose facts of this nature to the court may result in essential information, known to the prosecution, being withheld from court and ostensibly left only to the legal representative of the accused to

deal with. Such conduct will result in an accused being wrongly sentenced and becoming a victim of a miscarriage of justice.

22. The inquiry on appeal whether there was or was no fair trial to the prejudice of an accused, will have to consider this fact, particularly where it appears clearly from the record that there could have been an oversight by counsel of a significant legal issue which an accused would ordinarily be unaware of and incapable of dealing with. In my view, the constitutional right to a fair trial demands that the courts on appeal should intervene in such circumstances.

23. When in *casu* after conviction, the trial court decided to refer the matter to the Court *a quo* for sentencing, there was thus a duty on both the prosecution and appellant's legal representative to inform the magistrate that firstly, when the charges had been put to appellant in court, the prosecution did not make any reference to the minimum sentence being applicable. Consequently, appellant was not warned of the consequences thereof. Secondly, even if it may be accepted that the charge sheet made reference to the applicable minimum sentence regime, the charge sheet referred to section 51(2), which then brought the sentence within the jurisdiction of the trial court.

24. It should further be noted that at the time the trial court convicted appellant on 23 August 2005, the SCA had already delivered its judgment in ***S v Ndlovu supra***, which was reported in 2003. The prosecutor, the legal representative and the presiding officer should have been aware of this decision.
25. Appellant was clearly ambushed by the decision of the Court *a quo* to rely on the minimum sentence legislation, since this fact was not drawn to his attention at the commencement of and during the trial. The Court *a quo* was likewise not informed of this irregularity before it passed the sentence. It appears that appellant probably came to know of the prescribed sentence of life imprisonment for the first time when it was imposed by the Court *a quo*, considering that his first and second counsel seem to have been unaware of the irregularity and thus failed to draw this fact to the attention of both courts. I am therefore of the view that appellant was prejudiced in the exercise of his constitutional rights to a fair trial and the sentence of life imprisonment imposed on him has to be set aside.

Sentence by this court

26. In the recent judgment of the SCA in ***Machongo v S (20344/14) [2014] ZASCA 179 (21 November 2014)*** Shongwe JA opined:

"[10] It is settled law 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...

[11]... 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 triad in respect of sentence as stated in S v Zinn 1969 (2) SA 537 (A) at 540G-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."

27. Having concluded that the failure to forewarn the appellant about the applicability of the minimum sentence resulted in an irregularity in the trial, which in turn vitiates the sentence of life imprisonment, this appeal court has to consider the sentence without reference to the minimum sentence legislation. However the non-applicability of the minimum sentence

legislation does not imply that the sentence should be trivialised.

28. The court in ***S v Sekhipha 2006 (2) SACR 439 (SCA)*** stated that the circumstances which the court must take into account in imposing sentence include the traditional mitigating and aggravating factors, none of which are required to be exceptional.
29. In paragraphs 7, 8 and 9 of this judgment I refer to the personal circumstances of the accused as stated in the Court *a quo*. In this regard, there are some similarities between the present case and that of ***S v Vilakazi 2009 (1) SACR 552 (SCA)***. Both appellants are first offenders. In the Vilakazi case, the appellant was convicted of rape of a girl under the age of 16. He was aged 30 when he committed his first offence. In this case, appellant was convicted of murder and attempted murder and was 28 years old when he experienced his first brush with the law. The appellant in the Vilakazi case has two dependants while the appellant in this case has one dependant. When sentence was imposed In the Vilakazi case, the appellant had been in custody for just over two years. At the time the Court *a quo* imposed the life imprisonment sentence, the appellant in

this case had been in custody for “two years, ten months and seven days.” He had been denied bail. In this regard, the court in the Vilakazi case at page 574 paragraph [60] of the judgment had this to say:

“While good reason might exist for denying bail to a person who is charged with a serious crime, it seems to me that if he or she is not promptly brought to trial it would be most unjust if the period of imprisonment awaiting trial is not then brought to account in any custodial sentence that is imposed.”

30. The offence which the appellant was convicted of is very serious and deserving of a custodial sentence. The pre-meditation with which the murder was committed and the absence of remorse for his actions, even to his own brother, are in themselves aggravating factors. The actions of appellant on that day indicate that he was driven by an uncontrollable rage, for which he no doubt needs treatment before being allowed back in society.

31. It is in the interest of society that *“pre-meditated and callous murders should not be punished too leniently lest the administration of justice be brought into disrepute,” S v Di Blasi 1996 (1) SACR 1 (A)*. However, a sentence of life imprisonment is the ultimate punishment in terms of our law, and should in my view be

resorted to sparingly and be applied only in cases where the circumstances warrant it. Du Plessis J, writing for the Full Court of this Division in the matter of **S v GN 2010 (1) SACR 93 (T)**, stated the following at paragraph 12 of the judgment:

"Where the minimum prescribed sentence is life imprisonment, it is impossible to differentiate otherwise than by imposing a lesser sentence. Thus, where the Act prescribes imprisonment for life as a minimum sentence, the fact that it is the ultimate sentence must also be taken into account. Accordingly, in its quest to do justice, a court will more readily impose a lesser sentence where the prescribed sentence is imprisonment for life. Put differently, where the prescribed minimum is life imprisonment, a court will more readily conclude that the circumstances peculiar to the case are substantial and compelling, to the extent that justice requires a lesser sentence than life imprisonment."

32. In the Vilakazi case, where appellant's sentence was changed from life imprisonment to 15 years imprisonment, the Court at paragraph 58 of the judgment had this to say:

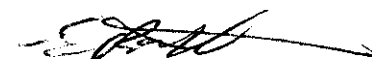
" ... A material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted his or her circumstances might assist in making at least some assessment. In this case the appellant had reached the age of 30 without any serious brushes with the law. His stable employment and apparently stable family circumstances are not indicative of an inherently lawless character."

33. Having regard to appellant's personal circumstances and balancing those with the aggravating factors present and the interests of society, I am of the view that imposing a sentence of life imprisonment would be inappropriate. However, a long term of imprisonment for murder would be justified. The sentence of seven years imprisonment imposed on appellant for attempted murder is in my view appropriate.
34. In the premises, I make the following order:
1. The appeal against the sentence of life imprisonment for murder imposed on appellant by the High Court, Pretoria is upheld. The sentence of life imprisonment is set aside;
 2. A sentence of 18 years imprisonment for murder is imposed, antedated to 4 July 2007;
 3. The appeal against the sentence of 7 years imprisonment for attempted murder is dismissed;
 4. The sentence of 7 years imprisonment antedated to 4 July 2007 is to be served concurrent with the 18 years imprisonment sentence; and
 5. The Commanding Officer of the prison where appellant will serve his sentence must ensure that appellant attends anger management treatment as part of his rehabilitation, for a period of at least 6 months prior to his release.


SP MOTHLE

Judge of the High Court

I agree


E BERTELSMANN

Judge of the High Court

I agree


F PRELLER

Judge of the High Court

For the appellant

Advocate L Augustyn

Instructed by the Legal Aid Board, Pretoria.

For the respondent

Advocate Scheepers

Instructed by the Directorate of Public Prosecution, Pretoria.

21 April 2015