IN THE HIGH COURT, BLOEMFONTEIN
FREE STATE DIVISION, BLOEMFONTEIN

Appeal No.: A73/2014

In the appeal between:

JOSEPH ZANELE SETHETHO — Appellant

And

THE STATE — Respondent

CORAM: RAMPAI, AJP et TSATSI, AJ

JUDGEMENT: RAMPAI, AJP

HEARD ON: 18 JULY 2014

DELIVERED ON: 27 NOVEMBER 2014

[1] These were appeal proceedings. The appellant was found guilty of two of the three charges. Following his conviction, an effective custodial sentence of 20 years was imposed on him. He was aggrieved by both the conviction and the sentence. He then came to us on appeal with the leave of the trial court. The respondent opposed the appeal on both fronts.

[2] The first charge against the appellant was robbery with aggravating circumstances. The respondent alleged that he and his co-perpetrators committed the crime at the International Airport in Bloemfontein on the 13th July 2006; that they threatened to violently harm the victims; that they were armed with a firearm; that they forcibly overpowered Mr Dewald Grobler and Mr Zanele Matsoso; and that they robbed them of a 9mm pistol and R2,91 million.

[3] It was then alleged that before, during and after the robbery the accused were armed with a dangerous weapon and that they had used it to threaten to inflict serious bodily harms on the victims.

[4] The third charge against the appellant was one of theft. The respondent alleged that he and his co-perpetrators committed the crime in Bloemfontein on 20th October 2005 and that they stole a firearm the property of Gladman Sibisi or in his lawful possession.

[5] The second charge was irrelevant to the appeal.

[6] The appellant was arrested on 15th July 2006, two days after the dramatic robbery at the airport, now renamed the Braam Fischer. His co-accused, Mr Vusi Mazwebe was arrested on 23rd of October 2006.

[7] The two gentleman were tried in the Bloemfontein Regional Court. The appellant, Mr Joseph Zanele Sethetho and his co-accused, Mr Vusi Mazwebe appeared as accused number 1 and accused number 2 respectively. Each of them pleaded not guilty to all the three charges. Mr Dempers, a local attorney appeared for the defence of both accused persons.

[8] The version of the state was narrated by five witnesses. The two accused persons did not testify. Moreover, none of them called anyone to testify on his behalf. The appellant made certain formal admissions and then closed his case. The defence case was then closed.

[9] On 31st July 2008 the verdict of the regional magistrate was announced. The appellant was acquitted in respect of the second charge which was about theft of a motor vehicle. However, he was found guilty as charged in respect of the first charge, in other words, armed robbery as well as the third charge, in other words, theft of a firearm. The appellant's co-accused was acquitted in respect of all the three charges.

[10] Still on 31st July 2008 the regional magistrate sentenced the appellant to five years imprisonment in respect of the third charge and twenty years imprisonment in respect of the first charge. The regional magistrate directed that the appellant served the two sentences concurrently.

[11] The appellant felt hard done by the verdict and the punishment. He then filed an application for leave to appeal on 5th September 2008 he was granted leave to appeal against the conviction and sentence.

[12] As regards conviction, the grounds of the appeal were:

> "1. The presiding officer Honourable Mr Mathews further insisted that the stolen money and fire-arms which were recovered from my parents' home were mine, wherelse (sic) there were other people in the house.
> 2. The fingerprints were never taken from the said stole fire-arms.
> 3. The state prosecutor further rectified the testimony of all the witnesses.
> 4. The state prosecutor further dismissed the testimony of witness no 2 who is my biological mother, saying that the witness testified like that because she is my mother.
> 5. I was incarcerated on the 15 July 2006 and was taken for the identification on the 16 October 2006 which is very long. I appeared in so many occasions before court, even on the media newspapers, and TV."

[13] The appellant, through is counsel, made a concession that the trial court rightly convicted him. This was done at the commencement of the argument on appeal (see paragraph 7 of the Appellant's Heads of Argument). He thereby abandoned his appeal as against conviction. Mr Makhene, counsel for the appellant, orally repeated that he abided by the appellant's written concession.

[14] The concession was correctly made. The evidence against the appellant was formidable. He was unemployed. The police raided his parental home at 4991 Zone 12 Sebokeng in Gauteng (see photo 1, exhibit "c") during the night between 14th July 2006 and 15th July 2006. During the search the police found an amount R291 000,00 cash (vide photos 2, 3, 4, 5, 8, 9, 10, exhibit "c"). The appellant gave no explanation let alone a reasonable one for his possession of

such a huge amount of cash. I mean, where on earth did he, a jobless person, get that sort of money from?

[15] The evidence of the witness, Mr T F Andrews, a police officer, was that he found the money in a blue bag identified as the appellant's bag by his mother. The appellant chose not to challenge such incriminating evidence. Instead he exercised his right to remain silent. Consequently he cannot now be heard to say "there were other people in the house". The evidence was that apart from the appellant's mother and his two little sisters, there were no other people found in the house except for the appellant and his erstwhile co-accused.

[16] Besides the money, the police also recovered two stolen guns in the house (vide photo 2, exhibit "c"). The guns were found in the same bag belonging to the appellant. He was positively identified by Mr Grobler at the police identification parade. He was highly incriminated not only by the evidence tendered by the prosecution's witnesses but also by the formal admissions he made in terms of section 220, Act No 51 of 1977.

[17] In the light of all those circumstances, I could not find any material misdirection or irregularity committed by the trial court. I am indebted to Mr Makhene for the responsible concession he made. I would, therefore decline to interfere with the judgment as regards conviction.

[18] As regards the sentence, the question in the appeal was whether the sentence of 20 years imprisonment imposed on the appellant was appropriate and competent or not. In view of the omission to warn him of the provisions of section 51(2) Criminal Procedure Amendment Act, No 105 of 1997 would be invoked in the event of him being convicted. The entire argument focused on the sentence imposed in respect of the first charge.

[19] It will be recalled that the 20 year sentence concerns the charge of robbery with aggravating circumstances which attracts the prescribed minimum sentence of 15 years imprisonment in the case of a first offender in terms of section 51(2) read with Part 2, Schedule 2 Act No 105 of 1997.

[20] On behalf of the appellant, Mr Makhene argued that nowhere on the record was it indicated to the appellant that the penal provisions of section 51(2)(a) Act No 105 of 1997 would be invoked and applied against him in the event of him being convicted of armed robbery. Counsel submitted that the omission to warn the appellant accordingly rendered his trial unfair and caused him great prejudice. Therefore, he urged us to uphold the appeal and decrimentally adjusts the sentence.

[21] On behalf of the appellant, Mr Mohlala conceded that the appellant was not formally warned in terms of section 51(2) Act No 105 of 1997. Notwithstanding such a concession, counsel submitted that upon consideration of all the evidence and all the other factors relevant to sentencing it could not be said that the sentence imposed on the appellant was disproportionate to the gravity of the crime. He urged us, therefore, to dismiss the appeal and to confirm the sentence. That we could not do and I shall proceed to say why.

[22] The sentence component for the regional judgment was no more than one page long. The regional magistrate said the following:

> "Die hof kan uit die totaliteit van die faktore nie wesenlike en dwingende omstandighede vind nie."

Having made that important finding the court a quo proceeded in terms of section 51(2) Act No 105 of 1997 and sentenced the appellant to 20 years imprisonment.

[23] The record shows that the enhanced penal provision was mentioned for the very first time right at the end of the appellant's criminal trial. Before then the appellant was not warned that the provisions of the enhanced penal legislation might be invoked against him. The written indictment was silent as regards the requisite warning in terms of section 51(2). As a matter of fact there was no averment in the charge sheet that aggravating circumstances as defined in section 1 of the Criminal Procedure Act read with section 250 thereof were

present. Before convicting him the trial court itself did not draw his attention to the prescribed minimum sentence.

[24] A similar factual matrix arose in S v Legoa 2003 (1) SACR 13 (SCA). At paragraph 27 of the decision, Cameron JA, as he then was, remarked that it was highly unfair to confront the appellant with the prescribed minimum sentence after he had pleaded guilty. The learned judge went on to say:

> "More signally, the trial Court in any event lacked jurisdiction entirely to impose the minimum sentence."

[25] In S v Ndlovu 2003 (1) SACR 331 (SCA) para [11] Mpati JA, as he then was, said:

> "Whilst it is desirable that the charge sheet should set out the facts the State intends to prove in order to bring an accused within an enhanced sentencing jurisdiction, to do so is not essential. R v Zonele and Others 1959 (3) SA 319 (A) at 323 A-H; S v Moloi 1969 (4) SA 421 (A) at 424 A-C. But in a recent judgment of this Court Cameron JA reminds us that an accused person has a constitutionally guaranteed right to a fair trial that embraces a concept of substantive fairness."

[26] At paragraph [12] in S v Ndlovu supra, Mpati JA reasoned that where the prosecution intends to rely on the enhanced sentencing regime created by the statute the concept of a substantively fair trial will generally demand that its intention to do so be pertinently brought to the attention of the accused person at the outset of the trial. The idea is that the accused person must be placed in a position to properly and fully appreciate the charge (s)he faces as well as its possible enhanced penal consequences in good time.

[27] Where, as in this instances, the accused was not warned, right at the outset or belatedly before conviction, the right to be informed of the charge with sufficient detail – is undermined – S v Legoa supra and the underlying purpose is frustrated – S v Ndlovu.

> "In invoking the provisions of the Act without it having been pertinently brought 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."

S v Ndlovu supra, on 337 at para [14] per Mpati JA.

[28] In this matter the presiding judicial officer fleetingly glossed over the factors relevant to sentencing. Having done so, the court a quo then invoked the penal provisions of the special statute on sentence. The appellant was then sentenced in terms of section 51(2) Act No 105 of 1977. By so doing the court a quo materially erred, with respect. The regional magistrate lacked the requisite penal jurisdiction to impose the prescribed minimum sentence of 15 years imprisonment applicable in the case of a first offender let alone 20 years imprisonment applicable in the case of a second offender – see section 51(2) read with Part 2 of Schedule 2.

[29] First and foremost it was incumbent upon the prosecution to inform the appellant, as the accused, of the penal implication of the serious form of robbery he was facing – S v Legoa, supra. Usually an accused person is informed by reference, in the indictment, to section 51 Act No 105 of 1997 read with the specific part of the relevant schedule of the statute concerned. Secondly, in the case where there is no such a warning in the high court written indictment or in the regional court written charge sheet it becomes imperative for the trial judge or the trial magistrate to do so. It is a recommendable practice for a judge or a magistrate always to familiarise himself or herself with the averments of the indictment or the charge sheet before the accused is indicted or called upon to plead. Ideally such judicial warning must be given before the stage of pleading – S v Langa 2010 (2) SACR 289 (KZP) 304 e – g at para [23]. In a worst case scenario, a belated warning, advice or information about the enhanced form of sentence must be given before the verdict - S v Langa supra. Drawing the attention of an accused after the verdict is so belated

that the unfairness of the trial on merits can no longer be cured at that stage. Thirdly, an accused person may acquire knowledge of section 51 in other ways than through the charge sheet or judicial initiative – S v Legoa supra, paras [20] and [21]. There are no numerus clausus choses of methods through which an accused person may gain the requisite of the penal provisions of the section. I have to sound a fair warning that, at times, the third method may be riddled with dangerous and risky potholes.

[30] In the instant appeal, the record showed that the sentencing phase of the trial was practically over and done with when, for the very first time during the entire course of the trial, reference was made to section 51(2) and a sentence 5 years worse than the prescribed minimum sentence of 15 years was imposed on the appellant. It was way out of time. It was fatally belated. Prior to the actual imposition of the sentence there had been no mention of the penal provisions of section 51.

[31] The appellant was legally represented. However, it was not expressly contended by Mr Mohlala on behalf of the respondent that because he was, the appellant would have acquired the requisite knowledge of such penal provisions through his legal representation – S v Mvelase 2004 (2) SACR 531 (W). With that decision I am in respectful disagreement. That sort of reasoning is flawed for two reasons: In the first place it requires a trial court to assume that a legal representative, himself or herself had knowledge of such penal provisions. In the second place it requires a trial court to assume that an accused person, through his legal representative, must have acquired such requisite knowledge. It is undesirable to place an accused person, in any given case, in such a double jeopardy merely on the strength of the fact that he had a lawyer on his side.

[32] More than mere legal representative is required to satisfy the court that an accused had the requisite knowledge – S v Mseleku 2006 (2) SACR 574 (D) at 579c where Pillay J correctly observed that an accused person may well have conducted his substantive defence differently had he been aware of the gravity of the enhance sentence he faced in the event of his conviction. It is precisely here where the substantive unfairness of the appellant's trial lies. An informed

accused might, for instance want initiate plea bargaining negotiations or substitute his junior counsel with a senior counsel Such unfairness was occasioned by an omission to warning before he pleaded or at any time before the verdict. What really happened here was so belated that I am inclined to say that the appellant was not at all meaningfully warned. In my view this case was not one of those cases where upon careful and integrated reading of the record as a whole, a legitimate inference can be drawn that as an accused, the appellant had acquired the requisite knowledge in time to enable him to make an informed decision as to how to conduct his defence on the merits.

[33] In S v Langa supra para [33] Gorven J had this to say about a factual matrix pretty much analogous to what we had to grapple with in the instant appeal:

> "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,..."

[34] In the circumstances I have come to the conclusion that the court a quo misdirected itself by invoking the penal provisions of section 51(2) at the final of sentencing. The foundation on which the enquiry as to whether or not substantial and compelling circumstances existed was never laid down. Consequently the invocation as the section was practically impermissible. It was so belated that the omission caused the appellant a great deal of prejudice to his fair trial rights. The court a quo committed a material and thus appealable misdirection. The reliance of the court a quo on the provisions of section 51(2) must be held to constitute the misdirection so material that it rendered the sentence component of the appellant's trial substantially unfair. Therefore, we are required to set aside the sentence in respect of the first charge. Consequently we are entitled to interfere with the sentence and to

consider afresh an appropriate sentence - S v Makatu supra, paragraph [27] and S v Langa supra, paragraph [35].

[35] In resentencing the appellant we took into account the following mitigating factors:

- The appellant was born on 24 June 1977;
- He was 35 years of age at the time he committed the crimes and 37 years of age at the time he was sentenced;
- Details of his formal education regrettably appeared nowhere on record;
- He was incarcerated for two years, from 15th July 2006 on the date he was arrested until 31st July 2006 on the date which he was sentenced;
- He earned his living as a street hawker, prior to his arrest;
- He fathered 3 children, aged 20, 18 and 16 years of age;
- The recovered portion of the stolen money was R291 000,00.

[36] I need to say something about the recovery of stolen goods or part thereof. It is my view, and it is a very firm view, that the appellant deserved to be given credit for the recovered portion of the stolen cash. Not because he was instrumental in the recovery process. We know he was not. We also know that the police were instrumental for the recovery. However, it is not so much the question of who was instrumental for the recovery. The question should rather be what was the impact of the recovery of the stolen goods to the victim? Any cash received or recovered, in this instance, reduced the extent of the victim's impoverishment to a certain degree. Where nothing has been recovered the victim bears the full adverse impact of the impoverishment occasioned by the robbery.

[37] In sentencing the appellant afresh I also took into account certain aggravating factors: The appellant lived in Sebokeng in Gauteng. He committed the crimes in Bloemfontein approximately 400km away from Sebokeng. He was not in it alone. He was a member of a gang. The criminal enterprise was carefully planned. He had very reliable and constructive information about the victims and the movement of the money. He and his co-perpetrators acquired a gun at least. They also all acquired a get-away motor vehicle at least. It would appear

that a cash carrier was monitored and tailed from the South African Reserve Bank in the central business district of Bloemfontein. From the city the cash carrier drove to Braam Fischer Airport. It had a safe passage. It was somewhat unclear as to where the appellant came from. Whether he had been following the cash carrier all the way to the airport by car or whether he had been waiting for its arrival at the airport I could not ascertain from the record.

[38] The cash carrier travelled without any incident to the airport as I have already indicated. The crew of the cash carrier offloaded the cash canisters from the cash carrier and loaded them into the private jet and quickly drove away from the airport. It appeared to me that the appellant and one of the robbers ambushed the jet. They were armed and dangerous. They attacked the pilot and his crew at gunpoint. They forcibly robbed them of money and a firearm. They then fled from the scene using a get-away car. They netted a whooping sum of approximately R3 million.

[39] The brazen audacity of the appellant showed that he was a very dangerous robber. The appellant breached high security measures to gain access into a very secure portion of the airport an there to reach a light aircraft parked in the Aero Care Zone of the airport, an area reserved for the rendering of emergency medical evacuation services. Such an area is reserved for the rendering of life saving medical services during emergencies at airports all over the country. Breach of security in those circumstances was a strongly aggravating factor in my view. The huge amount of cash stolen at the airport when the jet was on the verge of taking off was also a very strong aggravating factor. The actual cash stolen and unrecovered was huge, R2.619 million.

[40] To make matters worse the appellant was not a first offender. He was previously convicted of robbery, unlicensed possession of a fire-arm and unlawful possession of ammunition in Klerksdorp on the 17^{th} August 1998. He was sentenced to an effective custodial sentence of 10 years imprisonment. He committed these crimes 8 years later, seemingly after his release on parole. The appellant was convicted alone. The rest of his gang members in this case were

never apprehended. The recovered cash was a drop in the ocean. The seriousness and the magnitude of the armed robbery of which the appellant was convicted cannot be questioned.

[41] This sort of criminality poses very serious threat to aviation security in the land. Taking money from a pilot inside a cockpit of an aircraft, ready to take-off is major aggravating factor. This sort of criminal conduct has to be eradicated. The appellant expressed no remorse for his conduct. He still persisted that he was wrongly convicted and appealed the verdict notwithstanding formidable evidence against him. In this matter aggravating factors completely eclipsed mitigating factors. In my view the appellant has to be deterrently and retributively punished. There is hardly any indication that rehabilitation is on the horizon here.

[42] Having considered the appellant's personal circumstances, on the one hand viz-a-viz the magnitude, the prevalence and gravity of the crime coupled with the interest of society on the other hand, I am satisfied that a sentence of 18 years imprisonment would be an appropriate punishment for the appellant in respect of the first charge. Any sentence less than that would be disproportionate to the crime committed.

[43] Accordingly I make the following order:

43.1 The appeal fails as regards conviction in respect of the first charge;

43.2 The conviction in respect of the first charge stands;

43.3 The appeal succeeds as regards the sentence imposed in connection with the first charge;

43.4 The sentence of 20 years imprisonment is set aside and it is substituted with the sentence of 18 years imprisonment ante-dated to 31 July 2008;

43.5 The sentence of 5 years imprisonment imposed on the appellant in respect of the third charge is confirmed;

43.6 The two sentences must run concurrently.

M. H. RAMPAI, AJP

I concurred.

E. K. TSATSI, AJ

On behalf of the appellant: Adv. J. S. Makhene
Instructed by:
Legal Aid
BLOEMFONTEIN

On behalf of the respondent: Adv. F. J. Pienaar
Instructed by:
Director: Public Prosecutions
BLOEMFONTEIN

/ebeket