

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A83/2009

In the appeal between:-

JOSEPH MPHALE

Appellant

and

THE STATE

Respondent

CORAM: MOCUMIE, J *et* DANZFUSS, AJ

HEARD ON: 20 AUGUST 2012

DELIVERED ON: 30 AUGUST 2012

MOCUMIE, J

[1] This is an appeal from the Regional Court, Bloemfontein.

The appellant appeared in the Regional Court on one count of housebreaking with the intent to rob and robbery. He pleaded guilty and was convicted as charged and sentenced to fifteen years imprisonment in terms of the Criminal Law Amendment Act 105 Of 1997 (*“the Criminal Law Amendment Act”*).

His leave to appeal the sentence was dismissed by the trial

court but granted on petition by this Court on 28 August 2008.

[2] It is common cause between the State and the defence that the Regional Magistrate convicted the appellant on a lesser charge of housebreaking with intent to rob and robbery and not housebreaking with intent to rob and robbery with aggravating circumstances. The question is whether the trial court was correct in imposing the prescribed sentence mandated for robbery with aggravating circumstances within the purview of the Criminal Law Amendment Act.

[3] Mr Van der Merwe on behalf of the appellant submitted that the trial court erred when it imposed fifteen years in terms of Criminal Law Amendment Act as the appellant was not charged with robbery as read with section 1 of the Criminal Procedure Act 51 of 1977 (*“the CPA”*) and section 51 of the Criminal Law Amendment Act on the following grounds.

3.1 The charge sheet made no reference to any aggravating circumstances surrounding the commission of the housebreaking and robbery;

3.2 The Regional Magistrate did not alert the appellant to the

possibility of the imposition of the fifteen years prescribed term of imprisonment upon conviction as it is mandatory to do so regardless of the fact that the appellant was legally represented; and

3.3 That the irregularity committed by the Regional Magistrate was material and prejudicial to the appellant and affected his right to a fair trial.

- [4] On the severity of the sentence, he submitted that had the Regional Magistrate not erroneously applied the Criminal Law Amendment Act, he would not have imposed fifteen years but at least eight or six years imprisonment taking into account the appellant's favourable circumstances. In the event that this Court found that it could amend the charge to disclose the more serious charge, there were compelling and substantial circumstances which justified the trial court to have deviated from the prescribed fifteen years imprisonment as the appellant pleaded guilty and thereby showed remorse over what he had done; had been in custody awaiting trial over a year and a six months; and part of the property stolen which was in his possession was recovered.

- [5] It is correct as Mr Botha, on behalf of the State, conceded that the Regional Magistrate indeed convicted the appellant as per the transcribed record on housebreaking with intent to commit robbery and robbery. The relevant part of the transcribed record referred to on page 12 reads:

“... [E]k is tevrede dat beskuldigde 1 is skuldig aan huisbraak met die opset om te roof soos hy dit gepleit het in die omstandighede.”

On page 13 the record reads:

“UITSPRAAK

HOF: Wat beskuldigde 1 aanbetref wat aanklag 1 betref waarop hy skuldig gepleit het, is ek tevrede deur die artikel 112(2) verklaring asook die addisionele inligting verskaf op vrae van die hof dat hy skuldig is aan huisbraak met die opset om te roof en roof en hy word **SKULDIG** bevind.”

- [6] It is also correct as Mr Botha conceded further that there is no mention of the specific section(s) of the Criminal Procedure Act and the Criminal Law Amendment Act applicable in this particular case on the charge sheet, indicating the aggravating circumstances which existed at the time of the commission of the offence.

The annexure to the charge sheet reads:

ANNEXURE/AANHANGSEL

CASE NO: SH 38/05

SAAK NO

COUNT NO: 1

AANKLAG NO:

The State versus

Joseph Mphale + 3

HUISBRAAK MET DIE OPSET OM TE ROOF EN ROOF

Dat die beskuldigde (s) skuldig is aan die misdaad van Huisbraak met die opset om te roof en roof (gelees met die bepalings van artikel 262 (1) en artikel 260 van die Strafproseswet 51 van 1977) ook saamgelees met die strafwysingwet 105 van 1997. (My own emphasis)

Deurdat op of omtrent die 9/12/2004 en te of naby Van Zyl straat, Brandfort in die Streekafdeling van Vrystaat die beskuldigde(s) wederegtelik en opsetlik die huis van Mev Spies oopgebreek en binnegegaan het met die opset om te roof en toe daar wederegtelik en opsetlik vir Mev Spies aangerand het en met geweld uit haar besit goedere soos per aangehegte lys geneem het, synde haar eiendom of eiendom in haar regmatige besit.”

- [7] Mr Botha was however at pains to persuade this Court that these two aspects that he conceded were mere technicalities

that in no way prejudiced the appellant. In his view the appellant was legally represented throughout the trial in the Regional Court. The appellant and his legal representative were aware of the reference to the Criminal Law Amendment Act albeit it not in compliance with numerous decisions of the Supreme Court of Appeal. The appellant and his legal representative acquiesced with the trial court when the legal representative addressed it on the existence or non-existence of compelling and substantial circumstances in terms of the Criminal Law Amendment Act.

[8] He submitted furthermore that during his application for leave to appeal, the appellant did not raise the ground that the Criminal Law Amendment Act was not applicable. It was the first time that this was raised on appeal. I disagree with this reasoning. The failure by the accused and his legal representative to object to what patently irregular procedure is can never turn such an irregular act into a lawful or regular one.

[9] He submitted that the pronouncement of the conviction of 'housebreaking with intent to rob and robbery' by the

Regional Magistrate was a *bona fide* mistake. That the Regional Magistrate, based on the circumstances of the case, should have convicted the appellant with 'housebreaking with intent to commit robbery and robbery with aggravating circumstances.' That this Court is in as good a position to correct that erroneous verdict and return the correct one.

[10] In respect of the sentence, he submitted that the circumstances of this case were serious in that two elderly people were attacked in the safety of their home. Although not severely assaulted or harmed with weapons they were traumatised as a result of this ordeal and items worth R50 000,00 plus were stolen from their home with only four retrieved from the appellant. The sentence of fifteen years ,so he argued, was appropriate regardless of whether the Criminal Law Amendment Act was applicable or not.

[11] On a vigilant examination of the transcribed record,¹ which the State accepted to reflect correctly what transpired during

¹ The enquiry whether the accused's substantive fair trial right, including his ability to answer the charge ,has been impaired, depends on a vigilant examination of the relevant circumstances.(See **S v Legoa** 2003 (1) SACR 13 (SCA) paras 20 & 21 which was shortly followed by **S v Ndlovu** 2003 1 SACR 331 SCA at para 12)

the trial and which the trial court at no stage disavowed, it is clear that the State did not prosecute the appellant for housebreaking with intent to commit robbery and robbery with aggravating circumstances read with the provisions of section 1 of the CPA and section 51(2) of the Criminal Law Amendment Act read with Part II Schedule 2.² It is also clear from the appellant's s112 statement that the appellant pleaded guilty on the lesser charge; that the State accepted that plea as tendered and that the Regional Magistrate convicted him on that tendered plea.

- [12] It is also clear that at no stage prior to his conviction was the appellant appraised of the possibility that he could be sentenced to fifteen years in terms of the Criminal Law Amendment Act and in line with a plethora of judgments of the Supreme Court Appeal which state categorically that the charge sheet must indicate which section of the Criminal Law Amendment Act will be applicable in order for the appellant

² Section 51(2)(a)(i) read with Part II of Schedule 2 reads:

“ Notwithstanding any other law but subject to subsections (3) and (6) ,a regional court or a High court shall sentence a person who has been convicted of an offence referred to in

(a) Part II of schedule 2,in the case of-

(i) a first offender, to imprisonment for a period not less than 15years...

PART II

Robbery –

- (a) when there are aggravating circumstances...;”

to have an opportunity to prepare himself properly for his trial.³

[13] It is trite that in terms of s304 (2)(c)(iv) and 309 (3) it is still possible to amend the charge on appeal or review, being the *‘order as the magistrate’s court ought to have given.’* The essential question is whether there is any reasonable possibility of prejudice to the accused if the amendment is granted. The test is thus whether the accused will be worse off than (s)he would have been had the charge in its amended form existed when (s)he initially asked to plead.⁴ In my view, for this Court to amend the charge as well as the verdict pronounced to ‘housebreaking with intent to commit robbery and robbery with aggravating circumstances as suggested by the State will not only highly prejudice the appellant, but will fly in the face of the right to a fair trial as envisaged in Section 35(3) (a), (b) and (n) of the Constitution and will lead to injustice.⁵ As **Cameron JA** stated with regard

³ **Phithela Mapule v The State** 817/11[2012] ZASCA 80 (30 may 2012) with reference to **S v Legoa** fn 1 above ; **S v Ndlovu** fn 1 above ; **S v Makatu** 2006 (2) SACR 582 (SCA) paras 3 & 7. See also **Mashinini v The State** (502/11) [2012] ZASCA 1 (21 February 2012).

⁴ See **Hiemstra’s Criminal Procedure** and cases cited at 14-19.

⁵ Section 35(3) (a), (b) and (n) of the Constitution provides:

“Every accused person has a right to a fair trial, which includes the right-

(a) to be informed of the charge with sufficient detail to answer it;

(b) to have adequate time and facilities to prepare a defence,

to the constitutional right to a fair trial in **S v Legoa**⁶

“Under the common law it was therefore "desirable" that the charge-sheet should set out the facts the State intended to prove in order to bring the accused within an enhanced sentencing jurisdiction. It was not, however, essential. The Constitutional Court has emphasised that under the new constitutional dispensation, the criterion for a just criminal trial is "a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution of the Republic of South Africa Act 108 of 1996 came into force". The Bill of Rights specifies that every accused has a right to a fair trial. This right, the Constitutional Court has said, is broader than the specific rights set out in the sub-sections of the Bill of Rights' criminal trial provision. One of those specific rights is "to be informed of the charge with sufficient detail to answer it". What the ability to "answer" a charge encompasses this case does not require us to determine. But under the constitutional dispensation it can certainly be no less desirable than under the common law that the facts the State intends to prove to increase sentencing jurisdiction under the 1997 statute should be clearly set out in the charge-sheet.

The matter is, however, one of substance and not form, and I would be reluctant to lay down a general rule that the charge must in every case recite either the specific form of the scheduled offence with which the accused is charged, or the facts the State intends to prove to establish it.”

This has been reinforced by the CPA, section 84(1).⁷

(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing;

⁶ See fn 2 above at paras 20 and 21

⁷ Section 84(1) provides:

“Subject to the provisions of this Act and any other law relating to any particular offence, a charge shall set forth the relevant offence in such a manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge...”

[14] With regards to sentence, despite the aggravating circumstances the State correctly pointed out, the trial court was also bound to take into account the favourable mitigating factors the appellant placed before it. I am convinced that had the trial court had a balanced view of these two and not erroneously invoked the provisions of the Criminal Law Amendment Act it would have imposed a sentence less than fifteen years. On this basis, this Court is entitled to interfere with the sentence imposed as it is severe and unjust.

[15] Having considered the mitigating and aggravating circumstances of this case alluded to in the above paragraphs I am of the view that fifteen years imprisonment is unjust and disproportionate to the crime, the criminal and the interests of society. To impose it would lead to injustice.⁸ Taking into account that the appellant had spent a year and six months in custody awaiting trial, he had pleaded guilty accepting responsibility for the wrong he had committed and other favourable circumstances already alluded to, I am of the view that, a sentence of eight years would be appropriate and balanced.

⁸ See **S v Malgas** 2001(1) SACR 469 (SCA)

[17] Having said that, it must be reiterated as the Supreme Court of Appeal⁹ has repeatedly warned that it is important for prosecutors to be more careful when drafting charge sheets and indictments to ensure that these reflect all the elements of the offence including, as in this case, the relevant statutory provisions applicable, section 1 of the Criminal Procedure Act 51 of 1977 and section 51 (2) of the Criminal Law Amendment Act 105 of 1997. I think it is even more important for the prosecution as the *dominis litis* in its opening address informs the court that the sections referred to are applicable and request that the court warns the accused person(s) appearing of this fact.

[18] It is also incumbent on the trial court to ensure that the attention of the accused person(s) is drawn to this fact to avoid any injustice such as this from occurring irrespective of whether the accused is legally represented or not. The Supreme Court of Appeal has stated so many times and the Constitution of South Africa demands that much from all presiding officers.

⁹ See **Mashinini v The State** fn 2 above at para [28] with reference to the same remarks made in **Legoa** and **Makatu** above.

[19] In the circumstances the following order is made:

1. **The appeal succeeds.**
2. **The conviction of the Regional Magistrate on housebreaking with intent to rob and robbery is confirmed.**
3. **The sentence of fifteen years imprisonment is set aside and substituted with the following:**

“The accused is sentenced to eight years imprisonment.”
4. **This sentence is antedated to 28 August 2006 in terms of section 282 of the Criminal Procedure Act, 51 of 1977.**

B. C. MOCUMIE, J

I concur.

F. W. A. DANZFUSS, AJ

On behalf of appellant:

Mr. P. L. van der Merwe
Instructed by:
Legal-Aid SA
BLOEMFONTEIN

On behalf of respondent:

Adv. J. P. du P Botha
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