

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A233/08

In the appeal between:-

FREDDY MATABOKO TSIE

First Appellant

EZEKIAL WONDERBOY DIRANGWE

Second Appellant

and

THE STATE

Respondent

CORAM: KRUGER, J *et* VAN ZYL, J *et* LEKALE, AJ

HEARD ON: 24 AUGUST 2009

JUDGMENT BY: LEKALE, AJ

DELIVERED ON: 3 SEPTEMBER 2009

INTRODUCTION AND BACKGROND:

[1] The two appellants were sentenced to long periods of imprisonment for murder and robbery with aggravating circumstances, with the second appellant also being sentenced to a further long jail term for possession of a firearm by

Mabesele AJ, sitting as the trial Judge in this Division, on 26 October 2001.

- [2] The appellants, together with one other person who was acquitted at the end of the trial, had pleaded not guilty to the three charges levelled against them but were, eventually, convicted and sentenced as set out below after they had closed their respective cases, both before the verdict and the sentence, without leading any evidence.
- [3] The first appellant was sentenced to twenty five years direct imprisonment and twenty years direct imprisonment on the charges of murder and robbery respectively.
- [4] The second appellant, on his part, was sentenced to life imprisonment for murder, twenty five years imprisonment for robbery and fifteen years imprisonment for possession of a firearm in contravention of the provisions of section 2 read with section 39 of the Arms and Ammunition Act No. 75 of 1969

before it was repealed by the Firearms Control Act, No. 60 of 2000.

[5] The said sentences were expressly ordered not to run concurrently and the appellants were throughout the trial each represented by counsel.

[6] The appellants felt aggrieved by the sentences and now approach the full bench of this court, with the leave of the trial court, by way of a joint appeal against the same.

SUMMARY OF SUBMISSIONS AND ISSUES IN DISPUTE:

[7] In the Heads of Argument filed for both parties and verbal submissions, counsel effectively agree that there exists cause to interfere with the punishments meted out in respect of charges 2 and 3 on the basis that they are inappropriate as well as shockingly excessive and, further, that the trial court may have, possibly, misdirected itself insofar as they are not in line with recent court decisions.

- [8] Counsel are, however, in dispute over whether or not such cause exists in respect of the sentences imposed for the murder charge – *viz* charge number 1.
- [9] Mr. Nkhahle, for the appellants, contends that the sentences in respect of murder are disturbingly excessive while Mr. Pienaar, on the other hand, maintains, on behalf of the State, that the relevant sentences are well-balanced and are in line with the nature and seriousness of the offence as well as the interest of the society.
- [10] I was left in doubt, after going through the record of the proceedings before the court *a quo* and listening to verbal submissions, as to whether or not the Act on minimum sentences *viz* Criminal Law Amendment Act No. 105 of 1997, was applicable to the charges.
- [11] I, therefore, effectively requested counsel on both sides, *ante omnia*, and as a point of departure to address the court on the following:

- 11.1 whether or not the said Act was applicable, and if so
- 11.2 whether or not the appellants, *qua* accused persons in the court *a quo*, were informed adequately of that fact as well as the consequences of convictions on the relevant charges such as the possibility of life sentences on the murder charge as a prescribed minimum sentence and fifteen years in respect of each of the two other charges.

[12] The foregoing request was motivated mainly by the realisation, on my part, that, contrary to the contentions made in the Heads of Argument filed for the appellant to the effect that it is common cause that the Act applied, no specific mention or reference to the said Act was apparent *ex facie* the record of the proceedings from the verdict stage to and including the end of the sentence stage. Not even during the application for leave to appeal did the learned Judge mention the Act in question specifically save by possible implication when he, *inter alia*, remarked:

“But if murder is committed during robbery, is that not life imprisonment?”

[13] Not even the language of the Act such as

“substantial and compelling circumstances”

is reflected in the record. The only suggestion that the trial Judge, when he imposed the sentences, moved from the premise that the Act was applicable is the kind of sentences he imposed such as life imprisonment for murder and fifteen years for possession of a firearm as well as his statements after the fact of sentencing, viz during the application for leave to appeal.

[14] Even before he imposed a twenty five year prison sentence for murder on the first appellant, the trial Judge did not enter any substantial and compelling circumstances, which he may have found to exist, on the record as required by section 51(3) of the Act.

[15] In the foregoing regard it should be noted that it is now trite that the existence of such circumstances is *a conditio sine qua non* for the trial court to deviate from prescribed minimum sentences by imposing a lesser sentence. For the trial court to be able to impose a sentence lesser than the prescribed one, it must:

- 15.1 be satisfied that there exists substantial and compelling circumstances warranting the same; and
- 15.2 enter such circumstances on the record.

(See section 51(3) of the Act.)

[16] The reason for the latter requirement is probably the fact that:

“... the Legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response...”

(See **S v MALGAS** 2001 (1) SACR 469 (SCA) from 476 h – 477 a – b.)

[17] It follows, therefore, that substantial and compelling circumstances, as the cause for the departure from prescribed sentences, should be identified and apparent, as such, from the record so that they

“could be seen to be... truly convincing reasons for a different response.”

(See **S v MALGAS**, *supra*.)

[18] An assumption, on the part of Mr. Nkhahle, that such circumstances were found simply because a sentence lesser than the prescribed one was imposed is, in my view, thus without legal and factual basis.

APPLICABILITY OF THE PROVISIONS OF THE ACT:

[19] In response to my inquiry Mr. Nkhahle, effectively, submits that it appears that the Act was applicable but that the appellants

were not informed adequately of the case they had to meet as well as the consequences attendant on a conviction.

[20] On the part of the State, Mr. Pienaar contends that, although it was not apparent from the record that the appellants were adequately informed, it was highly probable that their counsel at the trial advised them properly and adequately of the applicability and implications of the Act. In the foregoing regard he points out that counsel involved were well-known and experienced senior counsel who, even at the time of the trial, were already his seniors.

[21] Mr. Pienaar, further, contends that the Act was applicable and that if the court were to find that the appellants, as accused persons in the court *a quo*, were not apprised fully of the applicability of the Act and the consequences of a conviction, then and only in that event, twenty five years imprisonment would be appropriate in respect of the murder charge and in relation to each appellant.

[22] Mr. Nkhahle, on his part, contends that an effective thirty years imprisonment would be appropriate in respect of the appellants.

[23] Sections 51(1) and (2) of the Act as they stood at time of the relevant sentences oblige, in peremptory terms, the court to impose the prescribed minimum sentences on a person whom it has convicted of offences referred to in Parts I, II, III and IV of schedule 2 of the said Act.

[24] The applicable parts of schedule 2 of the Act are to the effect that:

24.1 In respect of Part I and in relation to murder, a death sentence where, *inter alia*, the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act;

24.2 In respect of Part II and in relation to murder in circumstances other than those referred to in Part I, a

sentence of fifteen years for a first offence is prescribed and in respect of robbery, when there are aggravating circumstances, a sentence of fifteen years for a first offence and twenty years for a second offence are prescribed. The same applies in the case of possession of an automatic or semi-automatic firearm, explosives or armament.

[25] In **S v LEGOA** 2003 (1) SACR 13 (SCA) the court per Cameron JA at p. 25 (b – e) quoting and referring to the judgment of Botha J in **S v NZIYANE** 2000 (1) SACR 605 (T) with approval stated that:

“The charge-sheet averred possession of a Norinco pistol and specified that this was a semi-automatic weapon. However, in its verdict the trial court though observing that it was common cause that a Norinco pistol was in general a semi-automatic weapon, failed to make a specific finding to this effect... The court correctly laid emphasis on the 1997 Act’s requirement that the accused must be convicted of the scheduled offence. The minimum sentencing provisions therefore did not apply.

Although the Legislature had not created new offences, it had to appear at conviction that the elements in question were present. Botha J observed (I translate):

‘The words in my opinion convey the meaning that the facts that must be present to make the minimum sentence compulsory must be established at conviction in the sense that they must be included in the facts on which the conviction is based.’”

(See further **S v RAATH** 2009 (2) SACR 46 (C) and **S v GAGU** 2006 (1) SACR 547 (SCA) where the court emphasised that the facts necessary to found application of the Act must be established before conviction.)

[26] In the present matter no mention was made in the charge sheet that the murder was committed during a robbery with aggravating circumstances and that the Norinco pistol was a semi-automatic pistol. Not even in his judgment did the trial Judge make a specific finding that the murder was so committed or that the firearm in question was semi-automatic.

[27] However, it is clear from the record as at the end of the verdict stage that:

“The death of the victim was caused by the accused... in committing robbery with aggravating circumstances.”

(See Part I paragraph (C) of Schedule 2 to the Act.)

insofar as it is patent from the recorded evidence that the appellants entered the deceased's store armed with a Norinco pistol, fatally shot him in the chest as he stood behind the counter and, thereafter, made off with a cash register containing R300,00.

[28] It is further clear from exhibit “D” (p. 676 of Volume 10 of the record), which was handed in during the trial, that the relevant firearm is semi-automatic.

[29] It is, therefore, correct as submitted by counsel on both sides that the Act in question was applicable to all of the three charges insofar as all the jurisdictional facts necessary for the

application of the Act were effectively present as at the end of the conviction stage.

SUBSTANTIVE RIGHT TO FAIR TRIAL:

[30] The next inquiry was whether or not the appellants, as accused persons before the trial court, were informed about the assertions against them with sufficient detail to answer them.

[31] In **S v LEGOA**, *supra*, the court at p. 22 g – 23 (a – e) found that an accused person standing trial has a substantive right to a fair trial in terms of the Constitution of South Africa Act and that the right in question is:

“To be informed of the charge with sufficient detail to answer it.”

[32] As mentioned earlier, although he acknowledges that there is nothing on the record suggesting that the appellants were informed of the applicability of the relevant Act and its sentence implications, Mr. Pienaar eloquently and effectively argues that such an inference may be drawn, as a reasonable one, from

the fact that the appellants were represented by eminent or experienced counsel of senior standing during the trial.

[33] He, however, effectively concedes, correctly so, that such an inference is not based on the record as the material properly before the court.

[34] In **S v NDLOVU** 2003 (1) SACR 331 (SCA) p. 335 (b – c) the Supreme Court of Appeal, per Mpati JA, in rejecting an almost similar submission pointed out that:

“The difficulty with this argument, of course, is that there is no indication whatsoever in the record that the appellant or his legal representative had the slightest idea, prior to the sentence, that the appellant was facing the prospect of imprisonment of fifteen years in terms of the minimum sentencing provisions of the Act.”

[35] Similarly in this matter a submission that the appellants were aware of the consequences of their convictions is, with respect, not grounded on any recorded evidence and, as such, remains

speculative and unreliable. Such a submission, in my view, amounts to inviting the court to go beyond the appeal material properly before it and to rely on Mr. Pienaar's subjective knowledge of the competencies and experiences of the legal practitioners who represented the appellants at the trial, as portrayed by him from the Bar, in order to determine an issue as fundamental as observance of a constitutional right.

[36] In the court's view, such a conduct on the part of a court exercising appeal jurisdiction, would be highly irregular, irresponsible in the extreme, judicially unsound and mischievous at the very least insofar as it would amount to relying either on its own subjective knowledge and impressions of such legal practitioners or that of counsel appearing before it without just and/or legal cause.

[37] The appellants were not alerted to the provisions of the minimum sentence legislation and their sentencing was, thus, substantively unfair. The said fact constitutes a substantial and compelling circumstance for departing from the prescribed

minimum sentences in respect of all of the three charges involved. (See **S v NDLOVU**, *supra*, at 337 g – h.)

EFFECT OF A FINDING THAT SUBSTANTIAL AND COMPELLING CIRCUMSTANCES EXIST:

[38] Once the court had found the existence of substantial and compelling circumstances it was allowed a discretion to impose a lesser sentence by section 51(3) of the Act as it stood before it was amended.

[39] In the light of the foregoing the court, therefore, had a discretion to either impose the prescribed minimum sentence or a lesser sentence in appropriate circumstances contemplated by section 51(3) in its unamended form. The foregoing is apparent from the use of the permissive “**may**” in the original section 51(3) as opposed to the imperative “**shall**” used in sections 51 (1) and (2) of the Act.

[40] The position has since changed with the coming into operation of the substituted section 51 which obliges the court, by the use

of the peremptory “**shall**”, to impose a lesser sentence under such circumstances. The foregoing is also indicative of the fact and buttresses the view that the intention behind and the effect of the old section 51(3) was different from the intention and desired effect of the new section 51(3) which came into operation on 31 December 2007.

[41] The effect of the foregoing new provisions, in my view, is that the court has a discretion to impose whatever a sentence, provided that it is a lesser sentence than the prescribed minimum sentence, once it has found that substantial and compelling circumstances exist.

[42] It follows, therefore, that the sentencing discretion of the court at present is restricted to being exercised downwards from the predetermined or prescribed sentence. In the case where no such circumstances are found to exist the sentencing discretion of the court is restricted to operating upwards from the prescribed minimum sentence.

[43] The court, thus, has to decide how to exercise its limited discretion in accordance with the provisions of the original section 51(3) now that it has found that substantial and compelling circumstances exist.

**LAWFULNESS AND/OR APPROPRIATENESS OF A LESSER SENTENCE
IMPOSED ON THE FIRST APPELLANT:**

[44] It is common cause that before he imposed a twenty five year imprisonment sentence on the first appellant, the trial Judge did not first set out and enter the substantial and compelling circumstances on the record to justify such a lesser sentence as required by the Act.

[45] The wording of the Act is clearly peremptory and, in my view, no lesser sentence could and still may, in law, validly be imposed unless such circumstances have been found and entered on the record so that they may be seen to exist. (See **S v MALGAS**, *supra*.)

- [46] The prescribed minimum sentence applies unless the legally recognised cause for a departure therefrom exists *ex facie* the record.
- [47] The court *a quo* was, thus, in law not entitled to impose a lesser sentence without first having established and entered on the record the prerequisites necessary for it to relinquish the enhanced penal jurisdiction in respect of the scheduled offences.
- [48] The court is, on appeal, generally entitled, in terms of section 322 of the Criminal Procedure Act read with section 22(b) of the Supreme Court Act, to exercise its power to increase sentence in order to bring it in line with the requirements of law, among others. (See **S v TOUBIE** 2004 (1) SACR 530 (W) where a minimum sentence which had the effect of increasing a lesser sentence imposed by the trial court was imposed on appeal in order to bring it in line with the requirements of the minimum sentences Act.)

[49] Mr. Nkhahle contends that a sentence of twenty five years imprisonment is too harsh but could not take the matter any further.

[50] In the case of the first appellant, the sentence imposed is not in accordance with the law insofar as no legally permissible cause existed therefor. It, as such, generally falls to be set aside and replaced with a sentence not less than the prescribed minimum sentence of life imprisonment unless substantial and compelling circumstances are found to exist, on appeal, from the recorded evidence which served before the trial court even if such a court did not identify and enter them on the record as such.

[51] The court has already found the existence of such circumstances with the result that a lesser sentence may be imposed in accordance with the provisions of section 51(3) as it then stood. It does not, necessarily, follow from the said finding that the sentence imposed by the trial court was the appropriate one. The Appeal Court, as the court which made a finding that

there exist substantial and compelling circumstances, has to determine the appropriate sentence.

APPROPRIATE SENTENCES:

[52] The parties are in agreement that the personal circumstances of the appellants are similar and that there exists no cause to differentiate between them for sentencing purposes.

[53] With regard to the third charge of possession of a firearm, it may be mentioned that the charge sheet referred to section 39 of the Arms and Ammunition Act, No 75 of 1969, as opposed to section 51(2) of the Act and, as was found in **S v LEGOA**, *supra*, **at p. 26 a** this fact may have misled the appellants.

[54] In terms of section 39(2)(b)(i) of the Arms and Ammunition Act the maximum penalty for possession of a firearm in contravention of section 2 thereof was R12 000,00 or three years imprisonment.

[55] The fact that there exist substantial and compelling circumstances does not detract from the barbaric and callous nature of the murder which in the words of Marais JA in **S v MALGAS** 2001 (1) SACR 469 (SCA) at 485 d – e:

“remains a particularly heinous crime of the kind which the legislature has singled out for severe punishment and the sentence to be imposed in lieu of life imprisonment should be assessed paying due regard to the benchmark which the legislature has provided.”

[56] A submission by Mr. Nkhahle, in the Heads of Argument, to the effect that the murder involved was not the worst kind of murder is, with respect, unfortunate. Murder is essentially a violation of the victim’s constitutional right to life, which was described by the Constitutional Court in **S v MAKWANYANE** 1995 (3) SA 391 (CC) as the:

“Most fundamental of all rights, the supreme human right”

per Langa J at 479 C; and

“... most basic of rights”

by Kriegler J at p. 478 G; and together with the right to dignity

“... most important of all human rights, and the source of all other personal rights... [that] we are required to value... above all rights”

per Chaskalson P at 451 C – D.

[57] The same applies to robbery with aggravating circumstances which is, as a matter of law and in the absence of substantial and compelling circumstances, visitable with not less than fifteen years imprisonment for the first offence and not less than twenty years for a second offence.

[58] The offence of possession of an automatic or semi-automatic firearm is in the same category, for sentencing purposes, as robbery with aggravating circumstances.

[59] As pointed out earlier the appellants did not tender any evidence in mitigation of sentence. They, thus, remained closed books at the trial with no evidence of remorse on their part whatsoever being apparent *ex facie* the record.

[60] Their vital statistics or personal profiles, in the words of Mr. Nkhahle, remained exactly that, cold statistics which only serve as jackets to the closed books that they were before the trial court.

[61] The said jackets contain scant information and could not possibly give the trial court a sufficient glimpse of the appellants' respective characters. The essence of what the court *a quo* needed to assess, for sentencing purposes, was thus, not before the trial Judge.

[62] The data supplied was no more than cold and hard information which only served to project the appellants as part of the statistics of a growing number of young people who leave school, before matric, for no apparent just cause only to join the

ranks of the unemployed and, eventually, resort to the life of crime. They almost invariably eventually swell the already large numbers of criminals who populate our correctional centres.

[63] In my view, what the trial court seeks to identify in order to determine an appropriate sentence, is not only the superficial information about the accused person standing trial, but most importantly, his unique self, his fears and aspirations, his moral constitution and attitude towards the values of the society so as to be able to determine, *inter alia*, his potential rehabilitation and moral blameworthiness.

[64] The so-called personal profiles of the appellants, on their own, cannot distinguish them from the cold, brutal, heartless and obnoxious criminals with less, if any, value for life and whom the Legislature has identified for sending out a strong message against crime by enacting s51 of the Act. The profiles in question, as their curricula vitae, only serve to identify their age, marital and employment status as well as school achievements but do not pull them out of the criminal pit into which their

convictions, on the charges involved, threw them. The said personal circumstances, *per se*, do not serve as substantial and compelling circumstances, nor do they have any significant mitigatory value. Were it not for the violation of their respective constitutional rights to fair trial, the minimum prescribed sentences would have, in my view, most probably been proportional to them and, as such, appropriate as sentences to be imposed.

[65] In the present matter the court has decided to exercise its limited discretion in a downward direction in the light of the nature of the substantial and compelling circumstances found to exist, which relate to violation of fundamental rights. The foregoing prevails because of the high premium which this court places, as it is supposed to, on the Constitution, as the supreme law, and the Bill of Rights enshrined in it.

[66] The appellants are young men who reached high school and had no family responsibilities, as at the time of the commission of the offences, because they had no children and were not

married. They could, thus, appreciate the full moral repugnancy of their evil and dastardly deeds, among others.

[67] In the circumstances twenty five years imprisonment for murder and eleven years for robbery are, in my view, appropriate for each of the appellants. Even under the common law the courts generally impose these kind of sentences in similar circumstances.

[68] In respect of possession of a firearm in contravention of the provisions of the Arms and Ammunition Act of 1969 three years imprisonment is appropriate for the second appellant.

[69] The parties are in agreement that it would be appropriate for the sentences in respect of murder and robbery to run concurrently so as to temper the cumulative effect of the sentences herein. The court agrees with these sentiments in the light of the fact that the offences were committed at about the same time and one, probably, as a means for achieving the objective of the other.

ORDER:

[70] In the premises the following order is made:

70.1 AD THE FIRST APPELLANT:

- 70.1.1 The appeal succeeds in part;
- 70.1.2 The sentence imposed in respect of murder is confirmed, *viz* twenty five years imprisonment;
- 70.1.3 The sentence imposed in respect of robbery with aggravating circumstances is hereby set aside and in its place the following is substituted:
 - “1. Accused no 3 is sentenced to eleven years on count 2, *viz* robbery with aggravating circumstances.
 - 2. Six years in respect of count 2 is hereby directed to run concurrently with the sentence in respect of count 1, *viz* murder with the result that the effective prison sentence to be served by accused no 3 is thirty years.”

70.1.4 This sentence is antedated to run with effect from the date on which he was originally sentenced, *viz* 26 October 2001.

70.2 **AD THE SECOND APPELLANT:**

70.2.1 The appeal succeeds *in toto* with the result that the sentences imposed in respect of all the counts are hereby set aside and replaced with the following:

- “1. Accused no 2 is sentenced to twenty five years imprisonment on count 1, *viz* murder;
2. Eleven years in respect of count 2, *viz* robbery with aggravating circumstances.
3. Three years imprisonment in respect of possession of a firearm in contravention of section 2 of the Arms and Ammunition Act of 1969;
4. Six years of the eleven year prison term imposed in respect of count 2 is hereby

directed to run concurrently with the sentence imposed in respect of murder with the result that the effective imprisonment sentence to be served by accused no. 2 is thirty three years.”

70.2.2 The said sentences are antedated to start running from 26 October 2001 viz the date on which the accused was initially sentenced.

L.J. LEKALE, AJ

I concur.

A. KRUGER, J

I concur.

C. VAN ZYL, J

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