



THE SUPREME COURT OF APPEAL  
REPUBLIC OF SOUTH AFRICA

**MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL**

From: The Registrar, Supreme Court of Appeal  
Date: 27 September 2012  
Status: Immediate

*Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.*

\* \* \*

**DON TOUBIE V THE STATE**

The Supreme Court of Appeal (SCA) today upheld the appeal against sentence, however, held that because of a misdirection by both the trial and court a quo, it was at large to interfere with the sentence and considered sentencing the appellant afresh outside the minimum sentence legislation.

What happened was that the appellant was arraigned before the South Gauteng High Court (JHB) on various charges including robbery with aggravating circumstances in terms of section 1 of the CPA and murder. He was convicted and sentenced to 6 years' imprisonment on the three robbery counts and to 20 years' imprisonment on the murder count amongst others. The trial court, when considering sentence found that there were no substantial and compelling circumstances to justify a lesser sentence than the prescribed one. The indictment did not mention the fact that the murder had been committed under circumstances provided for in section 51(1) read with Part I of Schedule II of the Criminal Law Amendment Act 105 of 1997.

The appellant appealed against the conviction only to the full court (South Gauteng High Court Johannesburg) which partly upheld the appeal by finding that the three robbery counts

were a duplication and dismissed the convictions on counts 2 and 3 of the robbery. It consequently increased the sentences on robbery to 15 years' imprisonment and on the murder to life imprisonment. This it did after duly notifying the appellant of its intention to interfere with the sentence because both the robbery and murder fell within the provisions of the minimum sentence legislation. This increase in sentence caused some consternation to the appellant and resulted in this appeal. Hence the appellant contended that the court a quo (full court) was incompetent to deal with the question of sentence because it did not form the subject of the appeal. This contention was based on the appellant's interpretation of section 22 of the Supreme Court Act 59 of 1959 and section 322 of the CPA.

Based on good authority this court found that section 22 of the Supreme Court Act and section 322(6) of the CPA confers power to an appeal court to impose punishment more severe than the trial court or to impose another punishment in place of or in addition to such punishment. The above interpretation is correct, even if an appellant has noted an appeal against conviction only, the court of appeal is not precluded from exercising the powers granted to it by section 322 of the CPA. The Supreme Court of Appeal (SCA) therefore rejected the appellant's interpretation of section 22 of the Supreme Court Act and section 322 of the CPA.

The matter did not end, there, this court mero motu raised the question that at no stage was the appellant informed of the fact that the State was relying on the provisions of the minimum sentence legislation. Neither did the indictment make mention of the minimum sentence legislation nor did the trial court forewarn him of the implications of relying on the sentencing regime. The full court did, however, notify the appellant of its intention to rely on the minimum sentence legislation but the horse had already bolted. This failure to forewarn the appellant is an irregularity which resulted in an unfair trial in terms of the Constitution. To avoid a further injustice, this court sentenced the appellant afresh in accordance with the trial court's ordinary penal jurisdiction.