THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 29 September 2015

STATUS Immediate

Negondeni v the State (00093/15) [2015] ZASCA 132 (29 September 2015)

Please note that the media summary is for the benefit of the media and does not form part of the judgment.

Today the Supreme Court of Appeal (SCA) upheld an appeal from the Limpopo Local Division of the High Court, Thohoyandou (Renke AJ) set aside the convictions and sentences in respect of all counts and remitted the case is remitted to the high court for trial de novo before a different judge.

The appellant, Mr Richard Negondeni, had been indicted in the Limpopo Local Division, Thohoyandou High Court (Renke AJ) on a count of murder, a count of robbery and two counts of rape. He pleaded guilty in terms of s 112 of the Criminal Procedure Act 51 of 1977 (the Criminal Procedure Act) and was convicted on all four counts. He was sentenced to life imprisonment on the count of murder, with which lesser sentences imposed on the other counts were ordered to run concurrently.

The indictment alleged, in relation to the murder count, that the appellant killed an the deceased) on 2 April 2002 at Ha-Dumasi, in the district of Thohoyando; in relation to the first count of rape that he did so in respect of the same person at the same place at about the same time; in relation to the count of robbery that, using force and violence, he took the deceased's cellular telephone from her at about the same place and time; and, in relation to the second count of rape, that he committed the crime on 6 February 1999 at the Thohoyando Technical School, his victim having been another woman. The indictment made no reference to the prescribed minimum sentences set out in the Criminal Law Amendment Act 105 of 1997.

In the summary of substantial facts annexed to the indictment it had been alleged that 'before leaving the scene (where the rape of the deceased had been committed), the accused robbed the victim and then stoned her to death.' It is also alleged that the deceased's decomposed body was recovered in the bush at Ha-Dumasi on 11 July 2002 and that: 'The cause of death could not be determined because of the advanced state of decomposition of the deceased's body.' In respect of the second count of rape, the summary alleged that the victim was forcefully taken by the appellant from a shopping complex and then raped in the bush at knife-point.

At the commencement of the appellant's trial on 19 February 2007, the state prosecutor informed the court that he had been given to understand, from the court orderlies, that the appellant no longer wished to be represented by his legal representative, appointed by 'the Law Clinic'. The appellant's legal representative appeared to have been taken by surprise by this and said: 'I have never heard anything. Can he just speak for himself?' The judge then asked the appellant whether he had 'a problem'. The appellant replied that he did not have a problem 'so far' but said: 'It is just that we have not yet finished a consultation.' After further questioning, the appellant repeated his complaint that: 'We have not consulted sufficiently.' The trial judge then said that the trial should proceed but the appellant could consult with his legal representative during the adjournments of the court.

The counts were then put to the appellant. He pleaded guilty to the first count of murder but, immediately thereafter, when asked by the judge to confirm this, said: 'Maybe I did not understand well.' Further discussions took place between the

appellant and the judge whereupon the appellant said: 'I do understand but when I am asked to plead on the charge of murder I am not so sure as to whether I should plead not guilty or I should explain the circumstances.' The court then decided that the matter should stand down to the next day so that the appellant could consult more fully with his legal representative. His legal representative then informed the court that he would not be available the next day. At this, the court said that it would not tolerate any further delays in the proceedings and that it wished proceed with the matter. The trial judge then informed that he had 'personally arranged with experienced counsel, Mr Dzumba, to come down now to see him. Mr Dzumba will take over his defence.'

The next day the trial proceeded with Mr Dzumba appearing as the appellant's legal representative. At the commencement of the proceedings on that day the court asked the appellant whether he was satisfied 'with the change in his legal representation'. The appellant replied: 'I am satisfied.'

The appellant was then asked to plead once more, and on this occasion, he pleaded guilty to all four counts. Mr Dzumba then read into the record a written statement by the appellant in terms of s 112 of the Criminal Procedure Act.

The judge then asked the appellant whether the statement was correct. The appellant confirmed that it was. The judge then enquired from the appellant as to the size of the stone that had been used to hit the deceased. After the appellant had demonstrated, it was agreed among all concerned that it was 'about the size of a soccer ball'. The court then proceeded to find the appellant guilty on all four counts.

The SCA found that it was not clear, beyond reasonable doubt, whether the appellant admitted that his act of hitting the deceased on the head with a stone caused her death. In addition, the appellant's statement that he was shocked, confused and surprised cries out for further enquiry, as it is not clear whether the appellant even admitted that he had acted with the requisite intent – either in the form of dolus directus or dolus eventualis – to kill the deceased, for a conviction on the count of murder properly to be made. It is therefore not even certain whether the correct conviction would have been culpable homicide. The SCA found that the conviction on the count of robbery and both counts of rape may be justified, if one

has regard to the contents of the statement, but clearly the appellant ought not to have been convicted of murder merely on the strength of the s 112 proceedings.

The SCA said that it was clear,from the record that both the trial judge and the appellant's counsel were unaware of what that Act in fact provided. Indeed it led to the judge adjourning in order to discuss the provisions of the Criminal Law Amendment Act with counsel in chambers. This in itself was irregular. It was a discussion which ought to have taken place in open court. Importantly, counsel for the State did not bring the minimum sentencing provisions to the attention either of the appellant or the court before this enquiry was made, and the appellant's plea was therefore clearly tendered without his knowing of them.

The appellant had briefly been led in mitigation of sentence. The trial court then proceeded to sentence the appellant to life imprisonment on the count of murder, holding that it was obliged to do so in terms of the Criminal Law Amendment Act, on account of the close association between the rape and murder of the deceased. The appellant had at no stage in the trial or at any time before that, been warned by the court that, if convicted, he faced the risk of life imprisonment. The court a quo also sentenced the appellant to ten years' imprisonment for the rape of the deceased, two years for the robbery and ten years for the other rape.

The SCA found that, in view of the appellant's patently concerned and hesitant stance at the commencement of the trial, the court a quo was at the outset of the proceedings wrong in insisting that the trial proceed as it did. However well-intentioned the court a quo may have been in appointing Mr Dzumba to act for the appellant, and even though the appellant confirmed the next day that he was satisfied with this arrangement, it was wrong for the court a quo to have prevailed upon him to accept the arrangement. Quite apart from any other difficulties concerning issues of principle that may exist with this course of action, it did not afford the appellant the time for a proper consultation to be held. The legal representative's apparent lack of awareness about the minimum sentencing provisions in the Criminal Law Amendment Act is indicative of the fact that the appellant did not have the quality of legal representation that one could reasonably expect, especially in so gravely serious a case.

The SCA has repeatedly stressed the importance of warning a person of the risk of minimum sentences being imposed. In the circumstances of this particular case, the injustice of the appellant not having been so warned was manifest. Against this background, the appellant did not have a fair trial.

The SCA held that, when the well settled law relating to the procedural fairness of an accused person's trial is applied against the aggregate of the facts and circumstances of this case, one's sense that the appellant did not have a fair trial was compounded. That right was infringed and for that reason the conviction and sentence cannot be allowed to stand.

Against this, the SCA concluded that the State, the victims and their families of serious crimes such as these, including the family of the deceased, also have an interest in the appellant not being allowed to walk free, without further ado.

The SCA decided that, in all the circumstances of this case, the interests of justice will best be served by setting aside the convictions and sentences and remitting the matter for a trial de novo. The SCA found that it was appropriate, against the full canvas of events, to direct that the trial be heard by a different judge.

The SCA also drew attention to the fact that, at the commencement of the appellant's application for leave to appeal, his then legal representative (who had neither appeared at his trial and who did not argue his appeal) stated that he agreed with the conviction and sentence 'meted out by the court' and that he had explained to the appellant that he had 'no prospects of success' in the matter and that, if he wished to proceed, he would have to do so 'on his own'. With that he abandoned the appellant to argue the application in person. The appellant's counsel was criticised for an extraordinary dereliction of the duty of defence counsel to do their best, even if they privately consider the case to be a hopeless one.