THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

CASE NO: 245/05

Reportable

In the matter between

JOSHUA MAKATU **Appellant**

and

THE STATE **Respondent**

Coram**:** **SCOTT, LEWIS, VAN HEERDEN JJA**

Heard: 12 May 2006
Delivered: 30 May 2006

Summary: Appellant indicted and convicted for murder subject to s 51(2) of the Criminal Law Amendment Act 105 of 1997, but sentenced to life imprisonment subject to s 51(1) of that Act. Sentence set aside. Finding that murder was premeditated not supported by evidence. Sentence reduced to 12 years' imprisonment.

Neutral citation: This case may be cited as Makatu v State [2006] SCA 70 (RSA)

JUDGMENT

LEWIS JA

[1] The appellant was indicted in the Venda High Court on three charges: murder, subject to the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997 ('the Act'); theft of a firearm; and possession of a firearm in contravention of the Arms and Ammunition Act 75 of 1969. The charge of theft was withdrawn at the commencement of the trial. The appellant pleaded guilty to the other two charges. He was convicted by Hetisani J on both counts, and sentenced to five years' imprisonment on the charge of unlawful possession of a firearm, and life imprisonment in terms of s 51(1) of the Act on the charge of murder. The appeal, which lies with the leave of this court, is against sentence alone.

[2] Section 51(1), read with Part I of Schedule 2 of the Act, requires the imposition of a minimum sentence of life imprisonment for murder when (inter alia) it is planned or premeditated. Section 51(2), read with Part II of Schedule 2, of the Act requires the imposition of a minimum sentence of 15 years' imprisonment for murder in other circumstances. Hetisani J, although convicting the appellant on a charge governed by s 51(2), imposed a sentence of life imprisonment in terms of s 51(1), having come to the conclusion after hearing evidence relating to sentence that the murder was premeditated.

[3] The appellant argues that the imposition of a sentence in terms of s 51(1), when the indictment refers to s 51(2), is a blatant misdirection. Even if the murder had indeed been premeditated – a question to which I shall turn – an accused has the right to know at the outset what charge he has to meet.

The State properly conceded this point. Since the enactment of the Act this court has held that it is incumbent on the State to specify the case to be met in such a way that an accused appreciates properly not only what the charges are but also the consequences.

[4] In *S v Legoa*[1] Cameron JA approved the principle set out in *S v Seleke*[2] that:

'To ensure a fair trial it is advisable and desirable, highly desirable in the case of an undefended accused, that the charge-sheet should refer to the penalty provision. In this way it is ensured that the accused is informed at the outset of the trial, not only of the charge against him, but also of the State's intention at conviction and after compliance with specified requirements to ask that the minimum sentence in question at least be imposed.' (The translation is that of Cameron JA in *Legoa*.[3])

The court nonetheless held in *Legoa* that there is no general rule that the indictment must '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'. The essential question to be asked is whether the accused's 'substantive fair trial right, including his ability to answer the charge, has been impaired'.[4] The court held that the substantive fair trial right of the appellant had been infringed. The offence charged was dealing in dagga. The charge-sheet did not specify the value, but the trial court had convicted the appellant and sentenced him under s 51(2)(a)(i) of the Act, read with Part II of Schedule 2, to 15 years' imprisonment (a minimum sentence) because the value of the dagga exceeded R50 000. The appellant had pleaded guilty before knowing

[1] 2003 (1) SACR 13 (SCA).
[2] 1976 (1) SA 675 (T) at 682H, a decision of a full court.
[3] Para 23.
[4] Para 21.

that the minimum sentence provisions would be invoked: indeed the charge-sheet had referred to the penalties applicable under the Drugs and Drug Trafficking Act 140 of 1992. The appellant had thus been misled. The minimum sentence was accordingly set aside.

[5] Following *Legoa* this court in *S v Ndlovu*[5] held that the relevant sentence provisions of the Act must be brought to the attention of an accused in such a way that the charge can be properly met before conviction. Mpati JA[6] said, after referring to *Legoa*):

'The enquiry, therefore, is whether, on a vigilant examination of the relevant circumstances, it can be said that an accused had had a fair trial. And I think it is implicit in these observations that where the State intends to rely upon the sentencing regime created by the Act a fair trial will generally demand that its intention pertinently be brought to the attention of the accused at the outset of the trial, if not on the charge-sheet then in some other form, so that the accused is placed in a position to appreciate properly in good time the charge that he faces as well as its possible consequences. Whether, or in what circumstances, it might suffice if it is brought to the attention of the accused only during the course of the trial is not necessary to decide in the present case. It is sufficient to say that what will at least be required is that the accused be given sufficient notice of the State's intention to enable him to conduct his defence properly.'

The court set aside the minimum sentence imposed for the unlawful possession of a firearm since the appellant had not been pertinently warned that the minimum sentence might be imposed, rendering the trial, in that respect, substantially unfair.

[5] 2003 (1) SACR 331 (SCA).
[6] Para 12.

[6] The appellant in this matter was charged with murder that on conviction, would render him liable to a sentence of 15 years' imprisonment in terms of the Act. He was convicted on that charge. He was then sentenced on the basis that he had been charged with and convicted of what amounted to a different offence – premeditated murder that, under s 51(1) of the Act, renders an accused liable to imprisonment for life. The imposition of that sentence is an obvious and grave misdirection. It must be set aside and this court is required to consider the appropriate sentence.

[7] As a general rule, where the State charges an accused with an offence governed by s 51(1) of the Act, such as premeditated murder, it should state this in the indictment. This rule is clearly neither absolute nor inflexible. However, an accused faced with life imprisonment – the most serious sentence that can be imposed – must from the outset know what the implications and consequences of the charge are. Such knowledge inevitably dictates decisions made by an accused, such as whether to conduct his or her own defence; whether to apply for legal aid; whether to testify; what witnesses to call and any other factor that may affect his or her right to a fair trial. If during the course of a trial the State wishes to amend the indictment it may apply to do so, subject to the usual rules in relation to prejudice.[7]

[8] I turn now to the evidence led by the appellant in mitigation of sentence, and which prompted Hetisani J to decide that he was obliged to impose a sentence of life imprisonment in terms of s 51(1) of the Act. The appellant pleaded guilty to murdering his wife at Siloam Location, in the

[7] See the provisions of s 86 of the Criminal Procedure Act 51 of 1977, especially s 86(2).

district of Dzanani, on 22 April 2003. The post-mortem report, admitted with his consent, showed seven gun shot wounds on her chest and neck, the cause of death being gun shot wounds that lacerated her large cardiac blood vessels. It is not clear whether the seven wounds were all entry wounds.

[9] The appellant testified that he had been a soldier in the South African National Defence Force for 18 years prior to the incident. He and the deceased had married in November 1997. They had one child together, but had lived also with the deceased's child from a previous relationship, and the appellant's two children, also from a previous relationship. At the time of the murder the appellant and the deceased were separated. Their relationship had soured, according to the appellant, because the deceased had maintained contact with the father of her child without his knowledge; had taken money from the appellant's bank account with no acceptable explanation; had not used money he had given her for various purposes for those purposes and had had extra-marital affairs but had refused to sleep with him.

[10] Two days before the murder, the appellant's and the deceased's families had met in an apparent attempt to effect a reconciliation. The deceased had not been amenable and had refused to let a family representative speak for her. She said she was not willing to live with the appellant any longer. On 22 April he had decided to go to her office to tell her that he had a firearm belonging to her brother, Mr Khamusi Mulaudzi. Mulaudzi, the appellant testified, had given the firearm to him for safekeeping when he was drunk and not in a position to be safely in possession of a

weapon. The appellant had the firearm in his possession when he went to the deceased's office.

[11] It subsequently transpired that the weapon had in fact been owned by Mr Khathutshelo Ramantswana, who gave evidence for the State in aggravation of sentence. Ramantswana maintained that the appellant had stolen the firearm from him on 19 April. At the time he was drunk and had fallen asleep in a taxi while in the company of the appellant and Mulaudzi. Indeed, when Ramantswana had gone to a police station to report that his firearm had been stolen he was so drunk that the police would not take a statement from him. Mulaudzi, who also testified in aggravation of sentence, denied that he had given the weapon to the appellant.

[12] When the appellant went into the deceased's office she immediately told him that she was not interested in him and that he should move out of the house that he was busy renovating for them. This triggered bad memories of what she had done and said in the past. 'It was then at that spur of the moment I felt hurt and started shooting at her'. After firing shots at her the appellant had turned the gun on himself, apparently shooting himself through the chin, the bullet exiting through his forehead. I shall revert to his testimony about the injuries inflicted to himself.

[13] Hetisani J did not accept the evidence of the appellant that he had gone to see the deceased to tell her that he had her brother's firearm. He inferred from the fact that the appellant had obtained a firearm shortly before he had killed his wife, and had used that rather than his service weapon, that

he had planned her murder before going to her office. The inference could be drawn also, said the judge, from the fact that the deceased appeared intent on divorcing the appellant and he feared loss of her share of the joint estate. He was, it was suggested, motivated by greed.

[14] There are other inferences to be drawn, however, and the evidence does not support a finding that the appellant had taken the firearm with the intention of shooting his wife, nor that he was motivated by the fear of losing her share in the joint estate. It cannot be said that the State established that his version was not reasonably possibly true. Indeed, the State did not even attempt to do so. The evidence of Mulaudzi and Ramantswana was led after conviction and only in aggravation of sentence. Of course if the murder had been premeditated by the appellant this would weigh very heavily in determining the appropriate sentence for the appellant. But premeditation is not, in my view, established from the fact that the appellant acquired unlawful possession of another person's firearm shortly before killing the deceased, nor from possible motives of depriving his wife of her share of the joint estate. I consider, therefore, that the conclusion of the court below that the murder was premeditated is wrong.

[15] Section 51(2), read with part II of Schedule 2 of the Act, renders the appellant (as a first offender) liable to a sentence of 15 years' imprisonment unless 'substantial and compelling circumstances exist which justify the imposition of a lesser sentence'.[8] The meaning of the term 'substantial and compelling circumstances' justifying the imposition of a lesser sentence was

[8] Section 51(3)(a) of the Act.

set out by this court in *S v Malgas*.[9] In brief, the court held that in determining whether there are substantial and compelling circumstances, a court must be conscious that the legislature has ordained a sentence that should ordinarily be imposed for the crime specified, and that there should be truly convincing reasons for a different response. But it is for the court imposing sentence to decide whether the particular circumstances call for the imposition of a lesser sentence. Such circumstances include those factors traditionally taken into account in sentencing – mitigating factors. Of course these must be weighed together with aggravating factors.

[16] The appellant is a first offender. (If he were not then the minimum sentence would be 20 or 25 years depending on whether he was a second or subsequent offender.[10]) He has served in the military for 18 years without incident. He pleaded guilty. During the course of evidence he showed remorse. He was in a state of great anguish at the time when he killed the deceased. He wished, for the sake of their children, to save the marriage but the deceased had refused to do so. In his view, she had cheated him both sexually and with the misuse of funds. The appellant had killed his wife when memories of her conduct had assailed him. He had then attempted to kill himself. He sustained serious injuries. Although he recalled shooting himself only in the chin, he also had a wound in his chest. His upper palate was injured so that at the time of the trial he could not smell anything. His nervous system was damaged which has impaired the functioning of a hand and a leg. He had not been given appropriate treatment while awaiting trial in prison.

[9] 2001 (1) SACR 469 (SCA).
[10] Section 51(2)(a)(ii) and (iii).

Furthermore the appellant is liable for the support of his children who live with indigent members of the family. His older brother gave evidence in mitigation supporting the testimony of the appellant in all these respects.

[17] All these circumstances, in my view, are to be taken into account in determining whether a sentence of 15 years' imprisonment is unjust. Likewise, however, I must take into account those factors that aggravate the crime. The appellant shot his wife, the deceased, several times. The brother of the deceased testified that the family circumstances have become very hard since her death. Domestic violence is rife and should be not only deplored but also severely punished. Family murders are all too common. Society, the vulnerable in particular, requires protection from those who use firearms to resolve their problems. The sentence imposed must send a deterrent message to those who seek solutions to domestic and other problems in violence.

[18] Taking all these factors into account, I am satisfied that although the appellant should be given a lengthy sentence of imprisonment, a sentence of 15 years would be unjust. A sentence of 12 years' imprisonment would send a strong deterrent message to the community, but would take account of the very difficult personal circumstances of the appellant.

[19] Although the appellant does not suggest that the sentence of five years' imprisonment for unlawful possession of a firearm is inappropriate he asks this court to order that it run concurrently with the sentence for murder. It appears that the judge below did not even consider whether the sentence

should run concurrently. Indeed, in his judgment on sentence no mention is made of the conviction for unlawful possession of a firearm. The failure to consider whether the sentence should run concurrently with that for murder is a misdirection in itself. In my view the two sentences should run concurrently.

[20] Accordingly the appeal is upheld. The sentences imposed by the court below are replaced with the following:

'On count 1 (murder) the accused is sentenced to 12 years' imprisonment.

On count 2 (unlawful possession of a firearm) the accused is sentenced to five years imprisonment, which is to run concurrently with the sentence imposed on count 1.'

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C H Lewis
Judge of Appeal

Concur: Scott JA and Van Heerden JA