THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 1255/2017

In the matter between:

DONALD KHOBANE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Donald Khobane v The State* (1255/2017) [2019] ZASCA 179 (02 December 2019)

Coram: Cachalia, Saldulker and Mokgohloa JJA, Tsoka and Dolamo AJJA

Heard: 13 November 2019

Delivered: 02 December 2019

Summary: Whether failure to refer to the minimum sentence legislation in the charge sheet prejudiced the appellant – whether such failure infringed on the appellant's right to a fair trial – special leave in terms of s 17(1)(b) of the Superior Courts Act 10 of 2013 having been granted – special circumstances not established – appeal struck off the roll.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Ismail J and Rome AJ sitting as a court of appeal):
The Appeal is struck from the roll.

JUDGMENT

Dolamo AJA (Cachalia, Saldulker and Mokgohloa JJA, Tsoka AJA concurring)

[1] This matter has been meandering through the courts since 2012, after the appellant was convicted of theft in the regional court and sentenced to 15 years' imprisonment. The appeal is against sentence only, the appellant having been granted special leave by this court.

[2] The appellant, was convicted by the Alexandra Regional Court (Magistrate Mr Schnetler) on one count of theft of R3 million from Nedbank, where he was employed. He was sentenced to 15 years imprisonment. The sentence was imposed in terms of s 51(2) of the Criminal Law Amendment Act 105 of 1997 (the CLAA). The trial court found no substantial and compelling circumstances to deviate from the minimum prescribed sentence.

[3] The salient facts which gave rise to the appellant's conviction and sentence are as follows: the appellant was employed by Nedbank as an 'ATM consultant'. He was responsible for replenishing cash in the various ATMs under his control in and around Johannesburg. For this purpose he was issued with keys and combination numbers to enable him to unlock and access these machines. On 30 July 2009, after the appellant had failed to report for work, his colleagues took over and attended to the ATMs which were under his jurisdiction and control. His absence led to the discovery, by his colleagues, of a shortfall from the various machines of more than R3 million.

[4] The appellant never returned to work and was eventually arrested on 19 August 2009 in KwaZulu Natal. He was brought back to Gauteng where, on 24 August 2009, he made a confession to Captain Robson of the South African Police Service. In the confession he admitted to the theft of the missing money. The appellant, however, claimed to have been under the influence of a so-called spiritual healer known as 'Professor Zao'; that it was this trickster who told him that he (the appellant) had a 'symbol of wealth' in his hands; that he must take out from the ATMs as much money as he can, so that 'Zao' would use the money to cleanse him, and after this cleansing, the appellant would never again experience financial problems and thereafter, the appellant would return the money back to the ATMs.

[5] In the trial the appellant disavowed his confession. He challenged its admissibility on the ground that it was not freely and voluntarily made. After a trial-within-a-trial, the magistrate ruled the confession admissible. This confession and the evidence of other witnesses led to the appellant's conviction of theft and the sentence of 15 years' imprisonment.

[6] Immediately after his conviction and sentence on 4 September 2012 the appellant, who enjoyed legal representation throughout the trial, applied for leave to appeal in terms of s 309B of the Criminal Procedure Act 51 of 1977 (the CPA). The application was summarily dismissed by the magistrate. After the dismissal of his application, the appellant petitioned the high court in terms of s 309C of the CPA for leave to appeal but was also unsuccessful. His appeal against the dismissal of his petition was met with the same fate. He thereafter applied to this court in terms of s 20(4)(b) of the now repealed Supreme Court Act 59 of 1959[1] for leave to appeal the dismissal of his petition. Such leave to appeal was granted on 8 September 2015, but only against sentence.

[7] Pursuant to leave to appeal against sentence being granted, this court heard the appeal against the dismissal by the high court of the application for leave to

[1] Section 20(4)(b) provided that: No appeal shall lie against a judgment and order of the court of a provincial or local division in any civil proceedings or against any judgment or order of the court given on appeal to it except

(a) …

(b) In any case with the leave of the Court against whose judgment or order the appeal is to be made or, where such leave has been refused, with the leave of the appellate division.

appeal against the sentence, and on 26 September 2016 the following order was granted:

> '1. The appeal is upheld.
>
> 2. The order of the court below refusing leave to appeal is set aside and replaced with the following:
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> Leave to appeal to the Gauteng Local Division of the High Court, Johannesburg, is granted'.[2]

[8] Armed with the order from this court the appellant returned to the high court where he prosecuted his appeal against sentence. The appeal was heard in the high court (Ismail J and Rome AJ) and was subsequently dismissed. This, however, did not deter the appellant as he again applied to this court, in terms of s 16(1)(b) of the Superior Courts Act 10 of 2013 for special leave to appeal against sentence. Special leave was granted on 27 October 2017. It is this appeal that we are seized with.

[9] The question for determination is whether there are special circumstances for this court to hear the appeal against sentence.

[10] An appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal (SCA) upon special leave been granted by the SCA[3]. In

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[2] *Khobane v S* [2016] ZASCA 124.
[3] Section 16 (1)(b) of the Superior Courts CLAA.

S v Van Wyk[4] it was held that an applicant for special leave must show:

> '…in addition to the ordinary requirement of reasonable prospects of success, that there are special circumstances which merit a further appeal to this court. This may arise when in the opinion of this court the appeal raises a substantial point of law, or where the matter is of very great importance to the parties or of great public importance, or where the prospects of success are so strong that the refusal of leave to appeal would probably result in a manifest denial of justice.'

[11] Did the appellant in this matter meet the requirements as set out in the case of *Van Wyk supra*? A brief assessment of the merits shows that the appellant did not meet these stringent requirements.

[12] The appellant attacks the sentence of 15 years' imprisonment on two fronts: in the first place, he argued that he was never warned that he faced a sentence of 15 years' imprisonment in terms of s 51(2) of the CLAA. In the second place, he submitted that the sentence was shockingly inappropriate.

[13] The appellant's first challenge to the sentence of 15 years' imprisonment is premised on the assumption that the charge sheet did not forewarn him of the provisions of s 51(2) of the CLAA that, on conviction, he faced the prospects of a sentence of 15 years' imprisonment unless the court found the existence of

[4] *S v Van Wyk* 2015 (1) SACR 584 (SCA) para 21.

substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence. I pause to state that the portion of the mechanical recording of the proceedings in the regional court relating to the charges being put to the appellant, his concomitant plea and his admissions and warnings by the court, if any, were not transcribed and as such are not part of the record. We are accordingly not privy to what had transpired at that stage of the proceedings. It is, however, common cause between the parties that the charge sheet made no reference to the provisions of s 51(2) of the CLAA, nor was the appellant warned at the commencement of the proceedings that he faced the prospects of a minimum sentence. However, during the sentence proceedings the issue of the applicability of the positions of s51(2) of the CLAA and the existence or lack of substantial and compelling circumstances arose. It is on this basis that the matter was dealt with in the court below, and it is on the same basis that it is dealt with in this court.

[14] The appellant submitted in the court below that it would not be appropriate at all to apply the provisions of the CLAA where this was not brought to his attention at the start of the proceedings. He sought to find support for his contention in the judgments of this court, in particular in *S v Kolea*[5], where it was held that if the State intends to rely on the minimum sentencing regime created in the CLAA, this should be brought to the attention of the accused at the outset of the trial. Since

[5] *S v Kolea* 2013 (1) SACR 409 (SCA) para 7.

this was not the case in this matter, the appellant argued, that he did not enjoy a fair trial and that he was prejudiced by this omission i.e. the failure to refer in the charge sheet to s 51(2) of the CLAA.

[15] After reviewing the authorities on the question of whether failure to refer to the provisions of the CLAA in the charge sheet amounted to a failure of justice and subsequently concluding that indeed it was a serious irregularity, the high court (Rome AJ) held that the enquiry nevertheless was still whether the appellant had a fair trial, which included an ability to present evidence in mitigation of sentence or in his approach to the sentence hearing. On a conspectus of all the relevant circumstances, the court below arrived at the conclusion that appellant had not been prejudiced and the sentence was befitting of the offence and the personal circumstances of the appellant.

[16] In this court, as in the court below, the appellant persisted with his argument that the charge sheet did not make reference to s 51(2) nor were its provisions brought to his attention in any way; and that as a result he did not enjoy a fair trial and had consequently suffered prejudice. Before us, counsel for the appellant, when pressed, was unable to articulate the prejudice allegedly suffered by the appellant. In the end, he was constrained to only submit that the sentence was shockingly inappropriate and that the appellant was entitled to a reduction of the sentence due to the protracted nature of the process.

[17] A review of the authorities on the fairness or otherwise of a trial where the charge sheet omitted to mention the applicable sections of the CLAA are clear. In *S v Legoa*,[6] the appellant had pleaded guilty and was convicted of dealing in 216,3 kilograms of cannabis. Having found that the weight of the cannabis brought it within the ambit of s 51(2)(a)(i), read with Part II of Schedule 2, the trial court sentenced the appellant to 15 years' imprisonment. On appeal, the court held that one of the specific fair trial rights of an accused is to be informed of the charge against him with sufficient detail as to enable him/her to answer it. Cameron JA was, however, 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. The learned judge concluded that 'whether the accused's substantive fair trial right, including his ability to answer the charge, has been impaired will therefore depend on a vigilant examination of the relevant circumstances'.[7]

[18] In *S v Ndlovu*[8] the same sentiments as in *Legoa* were expressed. Mpati JA, held that the enquiry is whether, on a vigilant examination of the relevant circumstances it can be said that an accused had a fair trial. Their views were followed and endorsed in the judgments of Ponnan JA and Petse AJA in *S v*

[6] *S v Legoa* 2003 (1) SACR 13 (SCA).
[7] *Legoa* para 21.
[8] *S v Ndlovu* 2003 (1) SACR 331 (SCA) para 12.

Mthembu[9] and in *S v Mashinini*[10] where Ponnan JA (in a minority judgment) held that the fair trial enquiry does not occur in vacuo but is first and foremost a fact-based enquiry.

[19] In *Kolea*, the appellant was charged with rape and convicted under s 51(2) of the CLAA but the provisions of s 51(1) of the CLAA were invoked to sentence him to life imprisonment. Mbha AJA, obiter dictum, remarked that:[11]

> '[7] The accused's right to be informed of the charge he is facing, and which must contain sufficient detail to enable him or her to answer it, is underpinned by s 35(3)(a) of the Constitution, which provides that every accused person has a right to a fair trial. The objective is not only to avoid a trial by ambush, but also to enable the accused to prepare adequately for the trial and to decide, inter alia, whether or not to engage legal representation, how to plead to the charge and which witnesses to call. It follows that, if the state intends to rely on the minimum sentencing regime created in the CLAA, this should be brought to the attention of the accused at the outset of the trial. The question which must be answered though, is what does sufficient detail in the charge entail.'

But, concluded that there was never any complaint, throughout the trial in which the appellant was legally represented, that he was in any way prejudiced in the conduct of the proceedings. The appellant's reliance on *Kolea*'s case is therefore misplaced.

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[9] *S v Mthembu* 2012 (1) SACR 517 (SCA).
[10] *S v Mashinini* 2012 (1) SACR 604 (SCA) para 18.
[11] *Kolea* fn 10 para 7.

[20] A reading of the trial record in the present matter belies the appellant's assertion that the application of the minimum sentence prescribed for the offence for which he was convicted was not brought to his attention. The record shows that as the appellant's legal representative was busy addressing the court in mitigation of sentence, the magistrate interjected and asked her as follows:

> 'COURT: Do you think there is any substantial or compelling reasons why the court should deviate from the minimum sentence?'

To which she replied by advancing the argument that appellant was influenced to commit the offence by the trickery of the so-called Professor 'Zao' who had promised him wealth if he were to take money from the ATM. Appellant's attorney went further and added:

> 'we request the court to deviate from the minimum sentence. He has already served a sentence from the day of his arrest up until today.

[21] It is evident from these extracts that the appellant's legal representative was aware of the application of the minimum sentencing regime. She was not taken aback by the magistrate's question nor did she display any misunderstanding of what was required of her in relation to advancing substantial and compelling circumstances, which would justify a deviation from the minimum prescribed sentence. Instead, she was able to advance the belief by the applicant in 'Zao' as to constitute substantial and compelling circumstance in an attempt to persuade the court to deviate from

the minimum prescribed sentence. There is accordingly no merit in the argument that appellant was prejudiced by the non-reference to the provisions of s 51(2) of the CLAA.

[22] In the result I find that there are no special circumstances advanced by the appellant justifying a further appeal to this court. Consequently, the following order is made:

The appeal is struck from the roll.

M J Dolamo
Acting Judge of Appeal

APPEARANCES:

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