THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 97/2015

In the matter between:

THOMAS RECKSON MUKONA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Mukona* v *The State* (97/15) [2015] ZASCA 128 (28 September 2015)

Coram: Leach, Willis and Mathopo JJA

Heard: **28 August 2015**

Delivered: **28 September 2015**

Summary: Criminal appeal against conviction and sentence ─ appellant convicted of murder, arson and three counts of attempted murder ─ failure by appellant to refute State case ─ effect of failure by the appellant to refute the State's case ─ appellant also failing to give evidence in mitigation of sentence ─ conviction upheld ─ sentences ordered to run concurrently.

ORDER

On appeal from: The Limpopo High Court, Thohoyandou (Hetisani J sitting as court of first instance):

1. The appeal against convictions is dismissed.

2. The appeal against sentence in respect of counts 1, 2, 3 and 4 is dismissed.

3. The appeal against the sentence in respect of count 5 is upheld. The sentence imposed is set aside and replaced with the sentence of 15 years imprisonment.

4. The sentences imposed in respect of counts 2, 3, 4 and 5 are ordered to run concurrently with the sentence imposed in respect of count 1. The total effective sentence is thus life imprisonment.

JUDGMENT

Mathopo JA (Leach and Willis JJA concurring):

[1] In October 2002, the appellant, Mr Mukona, was convicted of murder, three counts of attempted murder and one count of arson in what was then known as the Venda High Court (Hetisani J)[1] on 22 October 2002. Having found that there were no substantial and compelling circumstances justifying a deviation from the minimum sentence prescribed under s 51(1) of the Criminal Law Amendment Act 105 of

[1] That court was subsequently renamed the Limpopo High Court, Thohoyandou after 1 March 2009, and it was again renamed the Limpopo Local Division from 23 August 2013. See Renaming of High Courts 2014 (3) SA 319.

1997 (the Act), the trial court sentenced him to life imprisonment in respect of the murder of his son (Moboya); ten years imprisonment in respect of the arson count; ten years imprisonment on each of the attempted murders of Mr Freddy Thagwana (Mr Thagwana) and his former wife, Ms Reneth Mulondo (Ms Mulondo); and, lastly, 35 years imprisonment in respect of the attempted murder of his daughter Mulanda. The sentences in respect of the three counts of attempted murder (counts 3, 4 and 5) were ordered to run concurrently with the sentence in respect of murder (count 1). In the result, the total effective sentence imposed on the appellant was life imprisonment. Kganyago AJ who dealt with the application for leave to appeal against convictions and sentences, granted leave to appeal to this court on 13 June 2012.

[2] The undisputed evidence of the State is that the appellant was unhappy that his former wife, Ms Mulondo, had formed a relationship with Mr Thagwana and that they were living together as husband and wife. The evidence of Ms Mulondo is that the appellant tried on several occasions to win her back but she declined his advances. This incensed the appellant to the extent that he tried to influence Mr Thagwana to break up with Ms Mulondo by suggesting that Ms Mulondo was only interested in Mr Thagwana because of his money. There is also evidence that the appellant visited Mr Thagwana's workplace twice and tried to influence him to terminate the relationship with Ms Mulondo.

[3] When all these attempts failed, jealousy got the better of the appellant as the facts of this case will illustrate. At midnight on 20 October 2001 Mr Thagwana and Ms Mulondo were woken from their sleep to find their house on fire. They tried to extinguish the blaze but to no avail, and were only able to escape being burnt to death by escaping

from a window. Mr Thagwana sustained burns on the shoulders and Ms Mulondo suffered burns on the arm and both required medical treatment for their burns. After reporting the incident at the police station, they went home and then noticed an open two litre petrol container and a small blue shawl lying next to the entrance of the door. The shawl was folded and soaked in petrol and had clearly been used to start the fire. Ms Mulondo recognised the shawl as belonging to her daughter, Mulanda, who together with her son, Moboya, was living with the appellant at the time. She informed the police about her findings. According to her evidence, this shawl was given to Mulanda by one of the appellant's girlfriends, Ms Elisa Netshiphugana (Ms Netshiphugana). Even though Ms Mulondo could not explain with certainty how she identified the shawl, her evidence that it belonged to her daughter and that the children had never visited Mr Thagwana's homestead was not challenged. The tenor of her evidence is that the appellant must have brought the shawl to the scene.

[4] Ms Netshiphugana, a former lover of the appellant, testified that Mulanda had stayed with her for a long period of time and that she gave the shawl to her to carry her toys. When she was shown the photographs of the shawl in court, she without hesitation stated that it was indeed the same shawl that she had given Mulanda. In cross-examination she readily conceded that she could not identify any distinguishing features of the shawl, but was adamant that this was the shawl which she had given to Mulanda. Ms Netshiphugana's evidence in essence corroborated to a large extent the evidence of Ms Mulondo.

[5] As a result of this shawl, Inspector Makungo and his colleague Nemabolo went to the appellant's house, travelling in a marked police vehicle. After asking for directions to the appellant's home they

eventually saw him coming out his house. They called him but he ignored them and ran away towards and disappeared into the bush. Nemabolo knew the appellant very well. It was broad daylight, visibility was good, and there is no possibility of mistaken identity.

[6] At the time the police had a suspect in another case in their vehicle. They took this person to the police station and then returned to the appellant's home. In a rondavel, they found the appellant's two children, both of whom had been chopped in the head with an axe. The son, Moboya was dead but Mulanda, although grievously injured, was alive and was moving her hand. Paramedics and a fingerprint expert and photographer were also called to the scene.

[7] Nelson Nematshema, a police officer, photographer and fingerprint expert testified that, at the scene of the arson, he took photographs of the shawl as well as a two litre container which was containing petrol. At the appellant's homestead she found two children one deceased and the other alive. Next to the children was an axe. He uplifted the fingerprints from the left-hand side of the handle of the axe and the fingerprints were later found to match that of the appellant.

[8] Very little, if any, is in dispute between the State and the defence with regard to the facts and circumstances surrounding the burning down of Mr Thagwana's homestead. More especially is this the case because the appellant elected not to testify and thus did not materially dispute the State's case.

[9] The State's case in respect of the arson and attempted murders of Mr Thagwana and Ms Mulondo rested on the inferences to be drawn from

the evidence of the two complainants as well as that of Ms Netshiphugana and the police officers who attended the scene of the arson, where the shawl was found. The uncontroverted evidence of Mr Thagwana and Ms Mulondo is that the children of the latter had never visited the former's homestead. Indeed, the appellant refused them permission to visit their mother at Mr Thagwana's homestead. Ms Netshiphugana, the appellant's former girlfriend testified that she gave the shawl to the appellant's daughter. She gave a general description of the shawl but in essence she was adamant that the shawl found at Mr Thagwana's homestead, was identical to the one she had given to the appellant's child. Despite this, the appellant elected not to take the stand and refute the allegations.

[10] We were urged to accept that, once the State witnesses conceded that they could not say with certainty that the shawl found at the scene was the same shawl as the one belonging to Mulanda, the inference as to the guilt of the appellant could not be drawn and that there was no case for the appellant to answer. When assessing circumstantial evidence, a court needs, however, to be careful not to approach such evidence on a piecemeal basis but to consider the evidence in its totality. (See *S v Reddy* 1996 (2) SACR (A) at 8C.) In this regard the two cardinal rules of logic in the often quoted the dictum of *R v Blom*[2] must be borne in mind. In the present matter, each separate piece of evidence linking the appellant to the burning down of Mr Thagwana's homestead viewed on its own and analysed in isolation may not be sufficient for a conviction. However, approaching the evidence holistically, as one must, the totality of the evidence against the appellant that pointed towards him being the person

[2] *R v Blom* 1939 AD 188 at 202-203.

responsible. (See *S v Van der Meyden*[3] and *S v Trainor*.[4])

[11] All that evidence called for an answer yet the appellant chose to counter it with nothing preferring to shun the witness stand. The choice to remain silent in the face of the weight of evidence implicating him in a criminal conduct is suggestive of the fact that he had no answer for it. The cumulative effect of the circumstantial evidence against the appellant, coupled with his failure to testify, leads to the inescapable inference being drawn that he was the person who set the homestead of Mr Thagwana on fire. Any lingering doubt about this is dispelled by his reaction of fleeing from the police when they wanted to talk to him immediately after the event.

[12] In setting a fire of this nature, the inference is further inescapable that the appellant's sole purpose was to cause the death of those in the house. He must have realised at that stage that prospects of reconciling with Ms Mulondo were non-existent and for this reason he decided to try and kill her and the new man in her life. Accordingly there is no merit in the appeal against convictions for arson and attempted murders of Mr Thagwana and Ms Mulondo.

[13] The evidence implicating the appellant to the murder and attempted murder of his children is straightforward. An important fact which weighs heavily against him is that shortly before the children were discovered he was seen running away from his homestead by two police officers. When they tried to chase him he disappeared into the bush or mountain. The police officers later went to his house where they found the children in a

[3] *S v Van der Meyden* 1999 (1) SACR 447 (W) at 449h-450b.
[4] *S V Trainor* 2003 (1) SACR 35 (SCA) paras 8 and 9.

bloodied state, already dead at that time and next to them were an axe and a brown rope. The other child was severely assaulted and was bleeding. There was blood all over the floor and no one else in the house. The fingerprints uplifted from the axe matched those of the appellant. Sight must not be lost of the fact that the children were living with the appellant. No one save for the appellant was seen leaving the homestead. Despite all this strongly incriminating evidence, the appellant elected not to testify to explain why he absconded. His version put in cross-examination that he had left early for work that day cannot be accepted in the light of the direct and undisputed evidence of the two police officers who saw him running away from them at 10h30 in the morning. It also does not explain why, on his own version put in cross-examination, he would have left his two young children unattended for a month before he was arrested. The submission by his counsel that the children could have been attacked by an intruder was rightly rejected by the trial court. All these factors ineluctably point towards the guilt of the appellant. The only inference that could be drawn is that he was responsible for the murder and attempted murder of his children. It follows that the appeal against convictions must fail.

[14] In this court the sentence was attacked on two grounds. First, that the court below applied the provisions of the Act without prior warning to the appellant. Secondly, that the sentence imposed by the trial court was shockingly inappropriate because the trial court relied on brief personal information before sentencing the appellant and failed to direct that a presentencing report be obtained. It was argued that, because of the paucity of the information the trial court was in no position to properly exercise its discretion in determining the appropriate sentence, and

misdirected itself in failing to call for more facts, including pre-sentencing reports.

[15] There is no merit in this contention. The appellant's personal circumstances were adduced from the bar by his counsel as follows: (a) He is 44 years old with four children, one of whom he has murdered; (b) He is employed earning a salary of R90,00 per day. He was not a first offender. He has three relevant previous convictions, one for murder committed during 1991 (for which he was sentenced to 14 years' imprisonment, four years of which were conditionally suspended) and two for assault with intent to do grievous bodily harm committed during 1990 and 2001. All these offences indicate a propensity for violence. The appellant was represented throughout the trial. The facts which were submitted were those which counsel for the appellant deemed sufficient to assist the court in mitigation. There is no evidence to suggest that other relevant facts were suppressed by him or deliberately omitted. All that was submitted adequately described the appellant personal circumstances and there is no suggestion that more could have been added or rather that he was denied an opportunity to do so. In my view there is no basis to attack the trial court's approach and conclusions on this ground.

[16] Regarding the trial court's alleged failure to forewarn the appellant of the applicability of the minimum sentencing provisions of the Act, counsel for the state rightly contended that the appellant was legally represented and he must have been aware of the provisions of the Act. The reason is that, during the sentencing stage, his counsel alluded to the provisions of the Act. In my view, there is nothing to show that the

appellant was prejudiced by the State's failure to draw attention in the charge sheet to the minimum sentences he faced. (See *S v Ndlovu*.[5])

[17] In this court counsel for the appellant conceded, correctly in my view, that the provisions of the Act are applicable. His argument that the trial court should have found that substantial and compelling circumstances existed is not supported by any evidence due to the appellant's reluctance to adduce any such evidence. As a result of that approach, the trial judge had no option but to apply the provisions of the Act and did not deviate therefrom for flimsy reasons. (See *S v Malgas*[6] and *S v Matyityi*.[7]) The facts of the case in any event called out for the imposition of life imprisonment on the charge of murder.

[18] There is no doubt that the offences were serious to the extreme. What is aggravating is the fact that the arson, murder and attempted murders were committed in the sanctity of the complainants' homes. The children had looked to the appellant for protection and guidance. Instead he abused his position of trust, and killed and injured them. This must have been emotional, traumatic and devastating for the young defenceless children to have had to suffer at the hands of their father. As a result of the assault, Mulanda has been semi-paralysed and been left mentally impaired. She is probably fortunate to have survived but will forever live with the fact that her condition was caused by her father. The appellant showed no remorse for his actions and persisted on his innocence and did not testify or adduce evidence aimed at demonstrating his remorse or contrition.

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[5] *S v Ndlovu* 2003 (1) SACR 331 (SCA).
[6] *S v Malgas* 2001 (2) SA 1222 (SCA).
[7] *S v Matyitya* 2011 (1) SACR 40 (SCA).

[19] Even though the trial court ordered the sentences in count 1, 2, 3, 4 and 5 to run concurrently with the sentence imposed in count 1 (life imprisonment), no explanation was given why a sentence of 35 years was imposed in respect of the attempted murder of the appellant's child Mulanda. I am satisfied that although the appellant deserves a lengthy period of imprisonment, 35 years imprisonment is totally out of proportion to the nature of the offence, the interest of society and fails to take into account the personal circumstances of the appellant. In my view a sentence of 15 years imprisonment would give recognition to the justifiable abhorrence invoked by the callousness of the deed whilst not destroying the appellant on the altar of general deterrence. The appeal against sentence therefore succeeds to this limited extent only.

[20] I therefore make the following order:

1. The appeal against convictions is dismissed.
2. The appeal against sentence in respect of counts 1, 2, 3 and 4 is dismissed.
3. The appeal against the sentence in respect of count 5 is upheld. The sentence imposed is set aside and replaced with the sentence of 15 years imprisonment.
4. The sentences imposed in respect of counts 2, 3, 4 and 5 are ordered to run concurrently with the sentence imposed in respect of count 1. The total effective sentence is thus life imprisonment.

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R S Mathopo
Judge of Appeal

Appearances

For Appellant:	A L Thomu
	Instructed by:
	Bloemfontein Justice Centre, Bloemfontein
For Respondent:	R J Makhera
	Instructed by:
	Director of Public Prosecutions, Thohoyandou
	Director of Public Prosecutions, Bloemfontein