THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

REPORTABLE
Case no: 635/11

In the matter between:

DON TOUBIE **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Toubie v S* (635/11) [2012] ZASCA 133 (27 September 2012)

Coram: **HEHER, MHLANTLA, BOSIELO, SHONGWE JJA and ERASMUS AJA**

Heard: **31 August 2012**

Delivered: **27 September 2012**

Summary: Criminal law – interpretation of Section 22 of the Supreme Court Act 59 of 1959 and s 322 of the Criminal Procedure Act 51 of 1977 – the effect of a trial court failing to inform an accused person of the applicability of the Criminal Law Amendment Act 105 of 1997.

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Malan J, Khampepe J and Farber AJ sitting as court of appeal)

The appeal is upheld. The order of the full court in paragraphs 4, 5, 6.1 and 6.2 is set aside and replaced with the following:

"The appellant is sentenced as follows:

1 On count 1 (robbery) ten years' imprisonment.

2 On count 4 (murder) 25 years' imprisonment.

3 On count 6 (attempted murder) five years' imprisonment.

4 On count 9 (possession of firearm) three years' imprisonment.

5 On count 10 (possession of ammunition) two years' imprisonment.

6 Five years of the sentence in count 1 and the sentences in counts 6, 9 and 10 shall run concurrently with the sentence in count 4. Effectively the appellant shall serve 30 years' imprisonment. The sentences are antedated to 4 September 2001."

JUDGMENT

SHONGWE JA (MHLANTLA, BOSIELO JJA, ERASMUS AJA concurring)

[1] This appeal arose from what the appellant says was a shopping spree for the new year of 1999 at the Paputsi clothing store in the centre of Johannesburg. Sadly this ended in a horrific robbery of the staff accompanied by random shooting which resulted in the death of an innocent passer-by.

[2] As a result of what I have briefly described above, the appellant was arraigned before Mophosho AJ in the South Gauteng High Court (Johannesburg). He was convicted as follows: three counts of robbery with aggravating circumstances as defined in s 1of the Criminal Procedure Act 51 of 1977 (CPA), and sentenced to six years' imprisonment on each count; murder, and sentenced to 20 years' imprisonment; three counts of attempted murder, and sentenced to six years imprisonment on each count; unlawful possession of firearms, and sentenced to

three years' imprisonment; and unlawful possession of ammunition, and sentenced to two years' imprisonment. The trial court ordered that the sentences on the counts of robbery, attempted murder and unlawful possession of firearms and ammunition 'shall run concurrently with each other, but not with the murder sentence'. Effectively the appellant would serve 26' years imprisonment.

[3] Immediately after the imposition of sentence, the appellant's legal representative (Mr Omar) orally applied for leave to appeal and, inter alia, said the following: -

'M'Lord, I informed the court yesterday of my intention or instructions to pursue application for leave to appeal m'Lord. I did hastily last night apply my mind to the reasons for the application for leave to appeal as far as the conviction is concerned. As far as the sentence is concerned it was very general, but it has been included m'Lord. With the permission of your Lordship, I will hand your Lordship the notice of application for leave to appeal and a copy to my colleague and address your Lordship. May I proceed m'Lord?.'

Unfortunately Mr Omar's address to the court as well as the State counsel's address do not form part of the record before us, nor does the notice of application for leave to appeal as undertaken by Mr Omar. Clearly the record before us is to some extent incomplete and falls short of the requirements in s 316 (4) *(a)* and *(b)* of the CPA which reads as follows:

'(4)*(a)* Every application for leave to appeal must set forth clearly and specifically the grounds upon which the accused desires to appeal.

(b) If the accused applies orally for such leave immediately after the passing of the sentence or order, he or she must state such grounds, which must be recorded and form part of the record.'

The trial court granted leave to appeal to the full court of the South Gauteng High Court (Johannesburg) against conviction.

[4] The full court (Farber AJ, Malan J and Khampepe J concurring) instead of considering the appeal against conviction only, being of the view that the sentences

imposed by the trial court were inappropriate or incompetent, also dealt with the sentences. The court gave due notice to the parties that it intended to revisit the sentences imposed. I shall revert to this aspect later in this judgment. The full court started by analysing the principles of onus of proof in criminal cases, the standard of proof beyond reasonable doubt, the approach to be adopted in determining whether the onus has been discharged in a particular case and the power of an appeal court to upset the factual findings of a trial court (see *S v Toubie* 2004 (1) SACR 530 (W) at 533 *e* – 535 *i*). Nothing turns on the legal principles and the conviction for purposes of this appeal. This appeal concerns a question of law, namely whether the full court was competent to deal with the question of sentence which was not the subject of appeal.

[5] It is necessary to briefly state the background of what actually happened on that fateful day. The State alleged that the appellant together with other persons, who unfortunately were not charged, entered the store brandishing firearms and demanded money and started removing some of the goods in the store. They threatened and assaulted the staff, removed a wrist watch from one Mr Corrie van Zyl, the store manager, a wallet and some jewellery and a firearm from the security officer who guarded the store. After the robbers had removed the goods they left the store. They were confronted by other security officers and a shooting ensued between the robbers and security officers. Passers-by were shot and injured and one was fatally wounded; one of the robbers was also killed during the shoot-out. The appellant, who sustained a bullet wound, was pursued by the security officers and eventually apprehended. The full court described what happened as ‘bedlam of the worst kind’.

[6] The appellant did not testify nor did he call any witnesses. He however handed up a written statement in terms of the provisions of s 115 of the CPA. He placed himself at the scene of the crime as an innocent person who accompanied his friend, one Eugene, to buy shoes. He also admitted that when Eugene discovered that he did not have enough money to pay for the shoes, they decided to leave the store but returned immediately after agreeing to steal them. He denied

having knowledge that his friends possessed firearms and that he had the intention to kill anyone.

[7] The full court, after a careful consideration of the facts and the law, came to the conclusion that the State had proved its case beyond a reasonable doubt on some of the charges. I agree with that conclusion. It stated that three robbery charges (counts 1, 2 and 3) should be treated as one, because to separate them would result in a duplication or splitting of charges. The convictions on counts 2 and 3 were consequently set aside. It found that the State had not proved its case on the attempted murder charges (counts 5 and 7) beyond reasonable doubt and set aside the convictions on these charges.

[8] The full court then turned to the question of sentence and the applicability of s 51 of the Criminal Law Amendment Act 105 of 1997 (the Act) read with Part I of Schedule 2 thereof. It invoked the provisions of s 322 of the CPA after giving the requisite notice to the parties. The full court set aside the sentences imposed in respect of counts 1 and 4 and replaced them with 15 years' imprisonment and life imprisonment respectively. More will be said on the Criminal Law Amendment Act later in this judgment.

[9] Before us the appellant contends that the full court was not competent to deal with the question of sentence at all as it did not form the subject of the appeal. Reliance is placed on the provisions of s 22 of the Supreme Court Act 59 of 1959 which reads as follows:

'The appellate division or a provincial division, or a local division having appeal jurisdiction, shall have power–

(a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by such division, or to remit the case to the court of first instance, or the court whose judgment is the subject of the appeal, for further hearing, with such

instructions as regards the taking of further evidence or otherwise as to the division concerned seems necessary; and

(b) to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require.'

[10] Mr Omar contends that the words 'which is the subject of the appeal' in s 22 *(b)* should be interpreted to mean that because the appeal was against conviction only, the full court could not interfere with the sentence even if it was of the view that failure to interfere would result in an injustice. This argument is without substance and falls to be rejected outright. Subsection *(b)* of s 22 clearly and unambiguously provides that over and above the power to confirm, amend or set aside the judgment or order which is the subject of the appeal, the provincial or local division having appeal jurisdiction is also empowered to 'give any judgment or make any order which the circumstances may require'. (See *S v Citizen Newspapers* (*Pty) Ltd en 'n ander; S v Perskorporasie van SA Bpk en 'n ander* 1981 (4) SA 18 (A) at 19G-H). It was held that where there is no appeal against sentence, the Appeal Court is empowered in terms of section 22 *(b)* of Act 59 of 1959 to give any judgment or make any order which the circumstances may require. Immediately after the words 'subject of appeal' in sub-(b) of s 22 is the word 'and', which is a conjunction, being a word used to connect clauses, sentences or words in the same clause (The Concise Oxford Dictionary – Ninth Edition).

[11] Section 22 of the Supreme Court Act is to a great extent complemented by the provisions of s 322 of the CPA which also deals with the powers of a court of appeal. It reads as follows:

'(1) In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may –

(a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; or

(b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or

(c) make such other order as justice may require:

Provided that, notwithstanding that the court of appeal is of opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect.

(2) Upon an appeal under section 316 or 316B against any sentence, the court of appeal may confirm the sentence or may delete or amend the sentence and impose such punishment as ought to have been imposed at the trial.

(3) Where a conviction and sentence are set aside by the court of appeal on the ground that a failure of justice has in fact resulted from the admission against accused of evidence otherwise admissible but not properly placed before the trial court by reason of some defect in the proceedings, the court of appeal may remit the case to the trial court with instructions to deal with any matter, including the hearing of such evidence, in such manner as the court of appeal may think fit.

(4) …

(5) …

(6) The powers conferred by this section upon the court of appeal in relation to the imposition of punishments, shall include the power to impose a punishment more severe than that imposed by the court below or to impose another punishment in lieu of or in addition to such punishment'.

In the present case the full court dealt with the appeal against both the conviction and sentence. This is notwithstanding the fact that the appellant had appealed against the conviction only. As mentioned earlier the trial court granted leave against conviction and was silent on the sentence. It is apposite to refer to s 316 (3)*(e)* of the CPA which deals with applications for condonation, leave to appeal and further evidence. It reads as follows:

'(3) *(e)* Upon an appeal under this subsection the provisions of section 322 shall apply mutatis mutandis with reference to the powers of the Supreme Court of Appeal.'

[12] In *S v Shenker & another* 1976 (3) SA 57 (A), at 60 A, Galgut JA said

'The grounds must be clearly and specifically set out. It follows that an applicant for leave to appeal would have to set out whether he is appealing against the conviction or sentence or both. However, even if this was not done or even if the trial judge refused leave to appeal against the sentence, the Court of Appeal is not precluded from exercising the powers granted to it by section 369 (1) (b).' (My emphasis)

Section 369(1)*(b)* of Criminal Procedure Act 56 of 1955 is the predecessor to s 322 of the CPA. For a neat and detailed comparison see *S v Toubie* (supra) at 530-556 and the cases referred to therein. Subsection (6) of s 322 undoubtedly confers power to the appeal court to impose punishment more severe than that of the trial court or to impose another punishment in the place of or in addition to such punishment. In the present case it is not in dispute that the clerk to Stegmann J, on 28 January 2003, sent a notice to the legal representative of the appellant alerting him of the possibility that the sentence may be increased in respect of the murder charge from 20 years' imprisonment to life imprisonment in terms of the minimum sentence regime. Mr Omar, on behalf of the appellant, responded and undertook to advise the appellant of his rights. His view was and still is that this appeal was and is about the propriety of the appellant's conviction and not the sentence, hence the contention that the full court was not competent to deal with the issue of sentence.

[13] Section 22 of the Supreme Court Act read together with s 322 of the CPA must be understood to provide that a court of appeal is empowered to confirm, amend or set aside a judgment or order which is the subject of the appeal and give any judgment or make any order which the circumstances may require. (My emphasis) The intention is for a court of appeal to dispense justice. An appeal court cannot close its eyes to a patent injustice simply because the injustice is not a subject of appeal. If, for example, the sentence imposed by the court below is shockingly inappropriate and in excess of what the law permits, the appeal court is empowered to interfere to avoid a miscarriage of justice. *See R v Deetlefs* 1953 (1) SA 418 (A); *R v Myburgh* 1922 AD 249; *S v F* 1983 (1) SA 747 (O) at 752E–754 C; also see s 309(3) of the Criminal Procedure Act). I am not aware of any later decision, and Mr Omar did not refer to one overruling these cases. In the result, I find that his submissions are without substance. Accordingly I find that the full court was

empowered by both s 22 of the Supreme Court Act and s 322 of the CPA to deal with sentence even though it was not a subject of the appeal.

[14] That however is not the end of this matter. This court mero motu raised the question relating to the Criminal Law Amendment Act 105 0f 1997 (the Act). The indictment alleged, and it is not in dispute that the State proved the offence of robbery with aggravating circumstances as defined in s 1 of the CPA. Had the appellant been forewarned, by the trial court, that the State was going to rely on the provisions of the minimum sentence regime the appellant's conduct would have attracted the sentence prescribed in accordance with the provisions of s 51(2)*(a)* read with Part II of Schedule 2 of the Act. In this case the appellant was also convicted of murder in circumstances as defined in s 51 (1) read with Part I of Schedule 2 of the Act. Therefore the sentences in both the robbery and the murder were subject to subsections 3 and 6 which provide that if the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentences than the sentence prescribed, (in the case of robbery 15 years imprisonment is prescribed for first offenders and life imprisonment is prescribed for murder), it shall enter the circumstances on the record and must therefore impose such lesser sentence.

[15] The record of the proceedings is however silent on the question whether the appellant was informed of the provisions of the minimum sentence legislation. The indictment also does not indicate any reliance on the Act. The first time the trial court mentioned the legislation and in particular the non-existence of substantial and compelling circumstances was when it was considering an appropriate sentence. Notwithstanding the findings that no substantial and compelling circumstances existed, the trial court imposed a sentence lesser than the prescribed minimum sentence. In my view, this irregularity is of a double-barrelled nature. First the appellant was not informed of the applicability of the provisions of the minimum sentence regime and second, despite finding no substantial and compelling circumstances, the trial court did not impose the prescribed minimum sentence. Realizing the mistake of the trial court the full court attempted to rectify that mistake,

but, in my view, it was too late for the reasons set out below. The imposition of the increased sentences by the full court caused some consternation to the appellant and resulted in this appeal.

[16] The crimes committed by the appellant fall squarely within the ambit of Part II of Schedule 2 and Part I of Schedule 2 respectively. The robbery was accompanied by aggravating circumstances; therefore, the minimum sentence prescribed is 15 years' imprisonment for a first offender. The murder was committed during the robbery and was committed by a group of persons acting in the execution of a common purpose. At the stage when the full court dealt with the question of the minimum sentence, it was tantamount to closing the stable door after the horse had already bolted. In *S v Jaipal* 2005 (1) SACR 215 (CC) Van der Westhuizen J said that 'an irregularity is an irregular or wrongful deviation from the formalities and rules of procedure aimed at ensuring a fair trial'. (See also *The State v Mofokeng* 1962 (3) SA 551 (A) at 557 and *S v Ramovha* en 'n ander 1986 (1) SA 790 (A) at 795H).

[17] In *S v Ndlovu* 2003 (1) SACR 331 (SCA) para 12, Mpati JA said:

'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 in 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.'

[18] In *S v Legoa* 2003 (1) SACR 13 (SCA) Cameron JA referred with approval to *S v Seleke en andere* 1976 (1) SA 675 (T) at 682H. In *Seleke* the full court said the following:

'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.' (Translation by Cameron JA)

This was said some 18 years before the dawn of our new constitutional dispensation. It is the more relevant to our times than then, that the right of an accused person to a fair trial be observed and protected to avoid a miscarriage of justice.

[19] In *S v Makatu* 2006 (2) SACR 582 (SCA) para 7 Lewis JA held that it is advisable for an accused person to know from the outset what the implications and consequences of the charge against him are. This will assist the accused to decide how he/she was going to conduct the trial, whether to testify and or call witnesses.

[20] Failure to forewarn the accused is in conflict with the provisions of s 35(3)*(a)* of the Constitution, 108 of 1996 (the Constitution) which provides that every accused person has a right to a fair trial which, inter alia, includes the right to be informed of the charge with sufficient detail to answer it. This court is entitled to raise this issue mero motu because the irregularity resulted in an injustice and was prejudicial to the appellant who, in the eyes of the full court deserved life imprisonment for the murder see (s 322(1)*(c)* of the CPA). The appellant was legally represented by Mr Omar, a senior attorney, from the outset of the trial up to this court. I can only assume that Mr Omar should have been vigilant, but this is no excuse to prejudice the appellant.

[21] The question is, whether the irregularity is of such a nature as to render the entire proceedings unfair. The answer is no: because not the entire proceedings are vitiated by the irregularity as this only affects the sentence. The nature of the irregularity of the sentencing procedure is such that it could be safely separated from the proceedings as a whole in such a manner that the conviction for robbery and

murder remains intact to satisfy the requirements of a fair trial (*Phithela Mapule v The State* [2012] ZASCA 80 para 15).

[22] The irregularity in this case lies in the fact that the appellant was not informed of the applicability of s 51 of the Criminal Law Amendment Act, either at the plea stage or during the trial. As the appellant was not informed that he was charged under the Criminal Law Amendment Act the full court erred in sentencing him in terms of that Act. He could only have been sentenced, in accordance with the trial court's ordinary penal jurisdiction. However, I am of the view that it will not serve any useful purpose to refer the matter back to the trial court. This court has all the facts before it and is therefore able to consider the sentence afresh, although the record is incomplete, nothing of importance is lost, as the missing part is the address to court by both counsels. However whatever facts the court a quo had before it, this court also has. This means that the court will consider an appropriate sentence outside the minimum sentence regime. See *Legoa*; *Ndlovu* and *Makutu*. The appellant has been in prison since his arrest in December 1998, which is about 14 years. I have a reasonable apprehension that to refer this matter to the trial court for sentencing will result in further delays. Such would defeat the purpose of s 35(3)*(a)* and *(d)* of the Constitution and result in a more substantial unfairness. It is clear that both the trial court and the full court misdirected themselves on sentence. The sentences imposed have to be set aside. This court is at large to consider the sentence afresh. (See *S v Malgas* 2001 (1) SACR 469 (SCA) para 12) (2001 (2) SA 1222; [2001] 3 All SA 220). I now proceed to deal with the sentence.

[23] I turn now to consider sentence afresh. The offences for which the appellant was convicted are serious offences. I cannot emphasize this more than it is necessary. Innocent people were injured and one died because of the conduct of the appellant and his gang. Society looks up to the courts to protect them and bring to an end the lawlessness and violent crimes that prevail in the country. The appellant must consider himself very lucky that only one person died as it was that time of the year when many people were going about town doing their Christmas and New Year shopping.

[24] The appellant was 26 years old at the time of the commission of the offences, unmarried with three children and a first offender. However, his youthfulness should be seen in the light of his participation in armed robberies. He was a mature adult and must take responsibility of his action. (See *S v Matyityi* 2011 SACR 40 (SCA) para 14). The appellant together with his friends were armed with firearms. When they decided to rob Paputsi store, they knew or ought to have known that the firearms would be used. They knew or should have known that they might encounter resistance and therefore that force would have to be used. The murder of a passer-by is inexcusable and has to be punished with the most severe sentence.

[25] This court endorses what was said in *S v Zinn* 1969 (2) SA 537 (A) regarding the triad. Furthermore this court is alive to the fact that a court must balance the basic triad without over-emphasizing the one against the other in line with the main purposes of punishment. In my view an appropriate sentence is one of long term imprisonment due to the seriousness of these offences.

[26] At the end of the hearing this court was informed that the appellant had been released on parole on 16 May 2012. It would appear that the parole was granted on the basis of the sentences imposed by the trial court and not based on the sentences imposed by the full court The correctional services authorities, apparently did not have the warrant of detention signed by members of the full court. It is recommended that a copy of this judgment be brought to the attention of the head of the correctional services in Boksburg where the appellant was held and another copy to the Minister of Correctional Services.

[27] In the result the appeal against sentence has to succeed, albeit on a point not raised by either the appellant or the State.

[28] The appeal is upheld. The order of the full court in paragraphs 4, 5, 6.1 and 6.2 is set aside and is replaced with the following:

"The appellant is sentenced as follows:

1 On count 1 (robbery) ten years' imprisonment.
2 On count 4 (murder) 25 years' imprisonment.
3 On count 6 (attempted murder) five years' imprisonment.
4 On count 9 (possession of firearm) three years' imprisonment.
5 On count 10 (possession of ammunition) two years' imprisonment.
6 Five years of the sentence in count 1 and the sentences in counts 6, 9 and 10 shall run concurrently with the sentence in count 4. Effectively the appellant shall serve 30 years' imprisonment. The sentences are antedated to 4 September 2001."

J B Z SHONGWE
JUDGE OF APPEAL

HEHER JA (dissenting):

[29] This Court granted the appellant special leave to appeal in terms of s 316(13)(c) of the Criminal Procedure Act 51 of 1977 against the sentence imposed on him by the full court of the South Gauteng Division of the High Court. Leave was limited to the question of whether it was competent for the full court to impose sentence on counts 1 and 4 where no appeal was noted against sentence and where leave was not sought from or granted by the trial court against sentence.

[30] Reference to the application to this Court for leave confirms that the narrow formulation of the order accurately reflected the only ground of appeal relied on by the appellant in seeking leave. Indeed it was also the only ground addressed in the heads of argument of the parties and in the oral submissions made to us.

[31] I agree with my brother Shongwe JA that the full court did not err. Whether relying on s 22(b) of the Supreme Court Act 59 of 1959 or s 322(1)(b) read with s 322(6) of the Criminal Procedure Act 51 of 1977, that court was empowered to set aside sentences imposed by the trial court that did not accord with the law – in this case the minimum sentencing legislation embodied in ss 51(1) and 51(2)(a)(i) of the Criminal Law Amendment Act 105 of 1997 read with para (c) of the definitions of 'murder' in Part I of Schedule 2 and para (a) of the definition of robbery in Part II of Schedule 2 respectively – and to substitute for such sentences those appropriate to the offences albeit that the substitutions resulted in increases in the respective sentences and that the appellant had not appealed to the full court against the sentences but only against the convictions: *S v Citizen Newspapers (Pty) Ltd* 1981 (4) SA 18 (A) at 28D-G; *S v F* 1983 (1) SA 747 (O) at 751; *S v Kirsten* 1988 (1) SA 415 (A) at 421E-G.

[32] Moreover I find no difference in principle between this case and *S v E* 1979 (3) SA 973 (A). There an appellant had been charged with rape but convicted by a judge and assessors of indecent assault. On appeal against his conviction to the full court, that court substituted a conviction for rape and increased the sentence accordingly. On a further appeal this Court said (at 977), after considering the authorities, that where an appeal court is satisfied that the trial court convicted an appellant of a lesser offence than that with which he was charged, because of a wrong finding of fact or law, the appeal court is competent, under the Criminal Procedure Act 51 of 1977, to alter the sentence appropriately and has power either to remit the case for the imposition of a proper sentence or itself to impose such sentence. If the court has that power in relation to an error of law that results in an incorrect conviction it follows that the court should be able to exercise an equivalent power when such an error results in an incompetent sentence.

[33] For these reasons there was no merit in the appeal and it should, in my view, be dismissed.

[34] Shongwe JA concludes, however, that there are other grounds for upholding the appeal, setting aside the compulsory minimum sentences imposed by the court a quo and reconsidering the sentences. For the reasons which follow I am unable to

agree with him.

[35] During the hearing of the appeal a member of the bench drew attention to the omission from the indictment of any reference to the provisions of the minimum sentencing legislation. Counsel for the appellant did not seek to rely on the shortcoming or to amend his grounds of appeal to incorporate such reliance.

[36] An appeal court will in a proper case allow an enlargement of the issues beyond the grounds on which leave has been granted: *Legal Aid Board v The State* 2011 (1) SACR 166 at 176. Whether it will do so depends on the cumulative effect of a number of considerations, such as

(i) whether there is sufficient merit in the ground to warrant its inclusion; (*ibid* at 176b)

(ii) whether any party may be prejudiced by its inclusion; (*ibid* at 176c)

(iii) whether the issue that it raises has been fully canvassed so as to permit of a fair and complete assessment of its merits: cf *Shill v Milner* 1937 AD 101 at 105.

[37] The present case requires a negative answer to all three enquiries. I shall deal with the merits in some detail below. Second, the State was clearly taken by surprise and in no position to address meaningfully the new ground. Third, the record was incomplete in respects vital to a proper adjudication and this problem was exacerbated by the fact that the substance of the complaint had not been drawn to the attention of either of the lower courts and so we do not have the benefit of their views. This last aspect, as I shall show, is of particular importance because of the approach to substantial and compelling circumstances taken by the trial judge in his judgment on sentence.

[38] The powers of this Court on appeal in criminal matters are regulated by s 322 of the Criminal Procedure Act. Subsection (2) provides

‘Upon an appeal under section 316 [which this is] or 316B against any sentence, the court of appeal may confirm the sentence or may delete or amend the sentence, and impose such punishment as ought to have been imposed at the trial.’

[39] Subsection (2) is not made subject to the express proviso to ss (1) that

permits interference with a conviction only if it appears to the court of appeal that a failure of justice has in fact resulted from an irregularity or defect in the record or proceedings. Nevertheless, when, as in this appeal, the irregularity is said to have resulted in an unfair trial, the court's approach on appeal can be no different from that which has been established in relation to ss (1).

[40] An irregularity in proceedings does not automatically result in a failure of justice or an unfair trial. As Cameron JA said in *S v Legoa* 2003 (1) SACR 13 at para 21:

'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.'

See also *S v Mabuza and Others* 2009 (2) SACR 435 (SCA) at 440e-441g. This is an approach that accords with the long-established practice in relation to the determination of whether a failure of justice as contemplated in s 322 has in fact occurred: *R v Rose* 1937 AD 467 at 476-7; *S v Mushimba* 1977 (2) SA 829 (A) at 844H; *S v Jaipal* 2005 (4) SA 581 (CC) at 599D-601E, and it enables a balance to be struck between prejudice to the accused and the interest of the public in knowing that justice has been served. In *Hlantalala and Others v Dyantyi NO and Another* 1999 (2) SACR 541 (SCA) at para 9 Mpati AJA stressed that 'no failure of justice will result if there is no prejudice to an accused'.

[41] No doubt the omission to include reference to the minimum sentencing provisions in the indictment was an irregularity that could have given rise to an unfair trial: *S v Makatu* 2006 (2) SACR 582 (SCA) at 587d. There is however no evidence whatsoever that it had that consequence in the appellant's case nor is there any reason to infer that it did.

[42] The relevant circumstances that bear upon the question of whether the irregularity in the charge caused any prejudice to the appellant are these:

1. The appellant was tried in the High Court and was legally represented throughout the trial and in the two appeals that followed.
2. The appellant has at no stage relied on the irregularity to impugn the trial proceedings. He has not, whether in evidence or by affidavit, alleged that he was

unaware of the minimum sentencing requirements or their implications for his case. Neither has his legal representative asserted his client's ignorance nor informed the court that he failed to draw the appellant's attention to the provisions or explain the implications to him.

3. Prejudice to the appellant is a consequence within his peculiar knowledge and a court need not speculate where he himself is silent. That applies also to his failure to allege that if he had been properly informed of the minimum sentencing provisions from the outset of the trial, or at any time during the trial, his prospects would have improved one iota in relation to sentence.

4. The appellant's attorney, who was responsible for preparing the record on appeal, deliberately omitted all reference to the pre-sentencing proceedings (apparently comprising pages 257 to 311 of the record). Accordingly this Court is not informed of whether the appellant was invited to and did (or declined to) adduce evidence or make submissions in relation to the existence of 'substantial and compelling circumstances' (as envisaged in s 51(3)(a) of the Criminal Law Amendment Act). Neither the appellant nor his attorney has informed us that he was not afforded such an opportunity. From his silence and the fact that the trial court made an express finding concerning the absence of such circumstances it is reasonable to infer that the provisions of the statute were present to the mind of the learned judge and that he had taken the steps necessary and appropriate to arrive at that conclusion.

5. The senior high court judge in Johannesburg addressed a letter to the appellant's attorney in anticipation of the full court appeal in which his attention was drawn to the finding of the trial court that there were no substantial and compelling circumstances within the meaning of the statute. The attorney was accordingly instructed to prepare argument on the competence of the full court to increase the sentences for murder and robbery with aggravating circumstances and the question of whether the trial court should not have imposed the statutory minimum sentences for those offences. The appellant's attorney replied at some length to the letter but he did not raise any question concerning the awareness of his client or the applicability of the prescribed sentences other than in the limited context of the court's power to increase the sentences.

[43] In all the circumstances, there being no countervailing evidence to rebut the

inference referred to in point 4 of the preceding paragraph, this Court has no sound reason to infer that any prejudice to the appellant in fact resulted from the irregularity. Unfairness in the conduct of the proceedings remains no more than conjecture. In my view we cannot interfere on so flimsy a foundation.

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J A Heher
Judge of Appeal

APPEARANCES

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