THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case no: 20344/14

In the matter between:

RAPHAEL MACHONGO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Machongo v S* (20344/14) [2014] ZASCA 179 (21 November 2014)

Coram: Shongwe JA, Mathopo and Gorven AJJA

Heard: **11 November 2014**

Delivered: **21 November 2014**

Summary: Criminal Procedure – sentence – failure to forewarn an accused person of the applicability of the Minimum Sentence Act is an irregularity which may result in an unfair trial in respect of sentence – an appeal court will be at large to consider sentence afresh upon finding that a misdirection existed – considering sentence afresh must mean that the appeal court ought to disabuse itself from what the court a quo said in respect of sentence and that such power to sentence resides in the provisions of s 276 of the Criminal Procedure Act 51 of 1977.

ORDER

On appeal from: North West High Court, Mafikeng (Gutta J, Djaje and Chwaro AJJ concurring sitting as court of appeal):

1. The appeal against sentence is upheld
2. The order of the full court dismissing the appeal is set aside and replaced with the following:

'a) The appeal against sentence is upheld

b) The sentences of the trial court are set aside and replaced with the following:

(i) Accused number 2 is sentenced to 25 years' imprisonment on the charge of murder.

(ii) Accused 2 is sentenced to 15 years' imprisonment on the charge of robbery with aggravating circumstances.

(iii) The whole sentence on the charge of robbery with aggravating circumstances is ordered to run concurrently with the 25 years' imprisonment on the murder charge.'

3. The sentences are antedated to 18 November 2004 in terms of s 282 of the Criminal Procedure Act 51 of 1977.

JUDGMENT

Shongwe JA (Mathopo and Gorven AJJA concurred)

[1] This appeal is with the special leave of this court, limited to sentence only. The appellant was convicted of murder (count 1) and sentenced to life imprisonment and also of robbery (count 2) with aggravating circumstances as

defined in s 1*(i)* of the Criminal Procedure Act 51 of 1977 (CPA) and sentenced to 20 years' imprisonment. The appellant was acquitted on counts 3 and 4 (unlawful possession of a firearm and ammunition).

[2] His application for leave to appeal against his conviction was unsuccessful, however leave was granted by the trial court against sentence only. The court a quo dismissed his appeal against sentence and antedated the sentence to 18 November 2004. Hence the special leave to appeal was granted by this court.

[3] The facts are simply that on 10 September 2002, the appellant together with two others planned to steal or rob a Toyota Venture (minibus) for purposes of using the parts thereof. As they were walking in the street they noticed the deceased's Toyota Venture, parked next to the gate. They saw the deceased closing the gate. They attacked him – he produced a firearm – but they overpowered him and dispossessed him of his firearm. The appellant took the firearm and a shot was fired, the deceased died as a result. The appellant and two others drove off with the deceased's Toyota Venture and they were arrested later on the same evening and charged with murder and robbery with aggravating circumstances. The charges were withdrawn against the third suspect who was made a state witness in terms of s 204 of the CPA.

[4] The main ground of appeal to the full court was that the trial court erred in relying on the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (Minimum Sentence Act), because no mention was made in the indictment to inform the appellant of the applicability of the Act. Nor did the trial judge warn the appellant of its applicability. In granting leave to the full court the trial judge acknowledged that he erred in applying the provisions of the Minimum Sentence Act. The appellant contended that failure to mention and

to warn him of these provisions ipso facto resulted in the miscarriage of justice. (See *S v Ndlovu* 2003 (1) SACR 331 (SCA) para 12 and the case cited therein)

[5] The full court agreed that the omission to mention the applicability of the minimum sentence regime was irregular and constituted a misdirection entitling it to interfere with the sentence. (See *S v Ndlovu* supra) however, it concluded that 'the normal inherent penal jurisdiction of the high court is applicable and the court will have to consider the sentence afresh'. It then embarked on an exercise to consider the aggravating as well as the mitigating factors. It concluded that from the facts of this case and evidence on record, the sentences of life imprisonment on the murder charge and 20 years' imprisonment on the charge of robbery with aggravating circumstances are neither shockingly inappropriate nor induce a sense of shock. Lastly it said that the sentences imposed by the trial court were fair and justified in the circumstances.

[6] Before us the appellant contended that the trial court misdirected itself by relying on the provisions of the minimum sentence when no mention was made at all of its applicability in the indictment. Also that the full court did not consider the sentence afresh but simply regurgitated the sentence imposed by the trial court without more. On the question of the robbery with aggravating circumstances, counsel for the appellant submitted that a sentence of 15 years' imprisonment would be appropriate. Counsel for the State did not contend otherwise. I consider a sentence of 15 years to be appropriate in the circumstances.

[7] The respondent conceded that the failure to mention or forewarn the appellant of the applicability of the provisions of s 51(1) and (2) of the Minimum Sentence Act, indeed, resulted in an unfair trial in respect of sentence – and also that the full court applied an incorrect test by saying:

'[21] It is trite that a court of appeal will only interfere when the sentence imposed by the trial court is vitiated by an irregularity or misdirection or when the sentence is shockingly severe, disturbingly inappropriate and totally out of proportion to the offence committed.'

[8] On the murder charge the respondent contended that these types of murders are overly prevalent in the country and therefore this court should send a strong message by imposing the heaviest sentences in offences of this nature.

[9] This court in *S v Makatu* 2006 (2) SACR 582 (SCA) para 7 said:

'[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.'

(See also: *S v Ndlovu* (supra); *S v Legoa* 2003 (1) SACR 13 (SCA) para 23 and *S v Seleke & andere* 1976 (1) SA 675 (T) at 682H (a decision of a full court); recently *Kgantsi v S* (732/11) [2012] ZASCA 76 (25/5/12) and *P N v S* (828/13) [2014] ZASCA 24 (27/3/14).

[10] It is settled law that failure to forewarn or to mention the applicability of the minimum sentence is a fatal irregularity resulting in an unfair trial in respect of sentence. The question is, having come to the conclusion that a misdirection has been committed, what next should the appeal court do? The answer is and has always been that the appeal court must consider the sentence afresh. What then does considering the sentence afresh mean?

[11] Certainly it does not mean what the full court said in para 21 of its judgment referred to in para 7 above. I therefore agree with counsel for the respondent that the test applied was incorrect. Considering a sentence afresh must ineluctably mean, setting aside of the sentence of the trial court, inter alia, and conducting an inquiry on sentence as if it had not been considered before. In other words, the appeal court must disabuse itself of what the trial court said in respect of sentence – it must interrogate and adjudicate afresh the triad in respect of sentence as stated in *S v Zinn* 1969 (2) SA 537 (A) at 540G-H. Its task would be to impose a sentence which it thinks is suitable in the circumstances, without comparing it with the one imposed by the trial court. The full court erred in my view by stating that an appeal court 'will only interfere when the sentence imposed … is vitiated by an irregularity … or when the sentence is shockingly severe, disturbingly inappropriate and totally out of proportion …'. What the full court did was not considering the sentence afresh but compared what it had in mind with what was imposed.

[12] In paragraph 5 above a statement made by the full court is quoted which gives the impression that a high court possesses inherent penal jurisdiction – whereas it does not – what it possesses is the power, which resides in the provisions of s 276 of the CPA. This court in *DPP, Western Cape v Prins* 2012 (2) SACR 183 (SCA) para 31 observed that s 276 is 'the source of the power of … courts to impose sentences …. Absent s 276, neither the magistrates' courts nor the high courts would be entitled to impose sentence on people who commit common law crimes'.

[13] Counsel for the respondent also raised the question that the high court does not possess inherent penal jurisdiction. He submitted that a trend is developing in their division to refer to an inherent jurisdiction when an appeal court has to consider sentence afresh. He also referred to certain paragraphs of

the appellant's heads of argument where the phrase 'inherent jurisdiction' is mentioned. I have already said that the power of an appeal court in respect of sentencing resides in the provisions of s 276 of the CPA and nowhere else. It is not only salutary practice but advisable too that practitioners need to be careful not to loosely use some of the expressions or phrases when preparing their arguments. My impression (shared by my colleagues of course) is that inherent jurisdiction may have been loosely used, but in actual fact meaning the ordinary powers conferred by s 276 of the CPA.

[14] It is not in dispute that the trial court erred and misdirected itself in respect of sentence as the appellant had not been forewarned of the applicability of the Minimum Sentence Act. It is also not in dispute that the full court erred in its approach by using an incorrect test when sentencing the appellant afresh. These series of misdirections placed this court at large to consider the sentence as if it had not been considered before.

[15] I now turn to the facts of this case to consider and adjudicate on the sentence afresh. The personal circumstances of the appellant are that he was 32 years old when the offences were committed and 34 years old at the time when he was sentenced. He spent almost two years awaiting trial while in custody. He left school at standard 4 and was employed as a taxi driver earning R300 per week. He is unmarried and has no minor children. He is a first offender. It appears from the evidence that he initiated (master-minded) the operation to rob and steal Ventures or Toyota vehicles with an intention to strip the vehicles and sell the parts. The motivation of crimes was to make more money – not that he did not earn at all but because he wanted to augment his wages. The agreement with his fellow perpetrators was that if they could not steal it they would take it by using force – so violence was envisaged.

[16] The nature of the offences is no doubt serious. Murder is in my view, the most serious offence as the deceased cannot be replaced and no amount of compensation or punishment of any nature can substitute his life – hence s 11 of the Constitution protects life by providing that – 'Everyone has the right to life'. It is clear from the evidence that murder was not pre-planned, however, the appellant possessed a firearm without bullets as they failed to find some – probably to use it to scare their victim. The deceased was armed with a firearm which he produced upon being attacked, unfortunately one of the perpetrators (accused no. 1) kicked his hand and the firearm fell whereupon he was fatally shot – it is unknown as to who fired the shot. The firearm was found on accused no. 1's lap when they were apprehended. It is therefore common cause that the murder must be regarded as serious, though the respondent's counsel argued that murder occurring during a robbery was prevalent in this country and he referred us to some statistics which indicated an increase of this type of murders. He sought to attribute a higher degree of seriousness to which courts ought to respond positively with heavy sentences – This court in *Director of Public Prosecutions North Gauteng: Pretoria v Gcwala & others* (295/13) [2014] ZASCA 44 (31/3/14) observed that 'People who take another's life for financial gain must be severely punished'.

[17] There is no doubt that the interests of society need to be protected. It is settled law that courts must send a strong message that crime will not be tolerated – however courts should not be expected, by society, to avenge and apply the rule of an eye for an eye. The sentence to be imposed ought to be balanced without over-emphasising one part of the triad over another. The objects of punishment – retribution, rehabilitation and deterrence also ought to be balanced.

[18] It is undisputed that the robbery with aggravating circumstances was pre-meditated and executed according to plan – though murder was not part of the plan. However it remains serious – hence the legislature deemed it necessary to prescribe a minimum sentence. When the deceased was shot, he was unarmed and posing no threat – taking the vehicle without shooting him could have been achieved without any resistance.

[19] The appellant did not at any stage show remorse, (see *S v Matyityi* 2011 (1) SACR 40 (SCA) para 14). The facts and evidence before this court are squarely incongruous with a non-custodial sentence.

[20] Taking all the factors into consideration – the aggravating factors far outweigh the mitigating factors – it is difficult, I must say, to find any mitigating factors which can justify a lenient sentence. In consideration of the cumulative effect of the sentences, I have considered to order the sentence on the robbery charge to run concurrently with the sentence on the murder charge. The murder and robbery occurred almost simultaneously during one process of removing the vehicle.

[21] The following order is made:

1. The appeal against sentence is upheld
2. The order of the full court dismissing the appeal is set aside and replaced with the following:

'a) The appeal against sentence is upheld

b) The sentences of the trial court are set aside and replaced with the following:

(i) Accused number 2 is sentenced to 25 years' imprisonment on the charge of murder.

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(iii) The whole sentence on the charge of robbery with aggravating circumstances is ordered to run concurrently with the 25 years' imprisonment on the murder charge.'

3. The sentences are antedated to 18 November 2004 in terms of s 282 of the Criminal Procedure Act 51 of 1977.

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J B Z SHONGWE
JUDGE OF APPEAL

Appearances

For the Appellant:	N.L Skibi
	Instructed by:
	Legal Aid SA, Mahikeng;
	Justice Centre, Bloemfontein.
For the Respondent:	N.J Carpenter
	Instructed by:
	The Director of Public Prosecutions, Mmabatho;
	The Director of Public Prosecutions, Bloemfontein.