THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 271/19

In the matter between:

LUNGISANI BRIAN BOTSOTSO NXELE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Nxele v S* (271/19) [2020] ZASCA 6 (12 March 2020)

Coram: PONNAN and NICHOLLS JJA and LEDWABA AJA

Heard: 18 February 2020

Delivered: 12 March 2020

Summary: Murder – Life imprisonment – Failure to mention provisions of Criminal Law Amendment Act constituting a misdirection – common law jurisdiction.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Booyens, Ploos van Amstel and Van Zyl JJ, sitting as court of appeal):
The appeal against sentence is dismissed.

JUDGMENT

Ledwaba AJA (Ponnan and Nicholls JJA concurring)

[1] This is an appeal, with the special leave of this court, against a judgment of the full court of the KwaZulu-Natal Division of the High Court, Pietermaritzburg, which confirmed a sentence of life imprisonment imposed on the appellant by a single judge of that division.

[2] The appellant, who was legally represented, pleaded guilty to the charge and was convicted of murder. He was consequently sentenced to life imprisonment.

[3] The facts giving rise to the charge of murder are briefly as follows. The deceased, Mr Moses Shelane, was a taxi owner and driver. The deceased and Mr Siqubele Jiyane had a dispute. Jiyane requested Mr Sbongalo Ndlovu to arrange a person to kill the deceased for the sum of R10 000. Ndlovu secured the services of the appellant. Jiyane, together with Ndlovu and the appellant, planned the murder of the deceased and provided the appellant with a firearm. In accordance with the plan, the appellant and Ndlovu boarded the deceased's taxi as ordinary passengers and sat behind him. During the course of the journey, when the taxi had stopped, the appellant fired a shot which struck the deceased in the back of his head. The deceased died at the scene. According to the appellant, he was only paid R1 500 instead of R10 000 as promised.

[4] Counsel for the appellant placed on record before the trial court the following mitigating circumstances: the appellant was 19 years old when he committed the offence; he was unmarried; he was a first offender; he was in Grade 11 at school; he had a child aged one year three months and another child was expected to be born around April 2010; his father had abandoned the family; he was convicted of housebreaking and theft after he had committed the murder; he could not exercise a mature judgment; he was influenced by Jiyane and Ndlovu; he made a confession and cooperated with the police and he was remorseful.

[5] He further argued that the appellant's circumstances, cumulatively considered, constitute substantial and compelling circumstances and that a long term of imprisonment should be imposed instead of life imprisonment.

[6] In imposing sentence, the trial court took into account that the murder was premeditated and that it was enjoined to impose a sentence of life imprisonment, unless it found substantial and compelling circumstances to exist. It could find none.

[7] Counsel for the appellant contended that the sentence was vitiated by an irregularity inasmuch as the indictment did not make reference to s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Act). This court has held, with reference to the provisions of s 51 of the Act, that the question whether the accused's constitutional right to a fair trial has been breached at the sentencing phase, can only be answered after 'a vigilant examination of the relevant circumstances'. See *S v Legoa* 2003 (1) SACR 13 (SCA) and *S v Ndlovu* 2003 (1) SACR 331 (SCA) para 12.

[8] In *Legoa* para 21 the following observations were made:

‘The matter is, however, one of substance and not form, and I would be 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. A general requirement to this effect, if applied with undue formalism, may create intolerable complexities in the administration of justice and maybe insufficiently heedful of the practical realities under which charge-sheets are frequently drawn up. The accused might in any event acquire the requisite knowledge from particulars furnished to the charge or, in a Superior Court, from the summary of substantial facts the State is obliged to furnish. 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.'

[9] Recently, in *S v Tshoga* [2016] ZASCA 2015; 2017 (1) SACR 420 (SCA) this court had to consider whether life imprisonment was competent where the provisions of the Act were not mentioned in the charge-sheet at all, nor was any reference made to the Act during the trial, or before conviction. The possibility of life imprisonment was mentioned for the first time during the magistrate's judgment convicting the appellant. In the high court, where the matter had been referred for sentence, life imprisonment was imposed. On appeal to this court, counsel submitted that as the charge-sheet had not made reference to the prescribed minimum sentences, the appellant's fair trial right had been infringed by the imposition of life imprisonment. In the majority judgment of the court Schoeman AJA in para 22 said the following:

'. . . I am of the view that a pronouncement that the Act had to be mentioned in the charge- sheet or at the outset of the trial would be elevating form above substance. Every case must be approached on its own facts and it is only after a diligent examination of all the facts that it can be decided whether an accused had a fair trial or not.'

[10] In *Tshoga* the appellant's application for leave to appeal was dismissed by the Constitutional Court in *M T v S; A S B v S; September v S* [2018] ZACC 27; 2018 (2) SACR 592 (CC) on the basis that 'most of the issues raised were questions of fact and, on the points of law, it is not in the interests of justice to consider them at this stage'. However, at para 40 the Constitutional Court did state that:

'It is indeed desirable that the charge sheet refers to the relevant penal provision of the Minimum Sentences Act. This should not, however, be understood as an absolute rule. Each case must be judged on its particular facts. Where there is no mention of the applicability of the Minimum Sentences Act in the charge sheet or in the record of the proceedings, a diligent examination of the circumstances of the case must be undertaken in order to determine whether that omission amounts to unfairness in trial. This is so because even though there may be no such mention, examination of the individual circumstances of a matter may very well reveal sufficient indications that the accused's section 35(3) right to a fair trial was not in fact infringed.'

[11] In this case, although it appears that the Act was not specifically mentioned in the indictment, both counsel and the trial court approached the matter as if the Act found application. At the trial, counsel for the State submitted that the imposition of life imprisonment as a minimum sentence is applicable and he further referred to *Malgas*[1].

[12] Before the full court, counsel for the appellant accepted that it is quite plain that everybody was on the same page that if substantial and compelling circumstances do not exist, life imprisonment should be imposed. Later the following is recorded:

'VAN ZŸL J: . . . The State has dealt in paragraph 5 of Miss Senekal's heads with the fact that the indictment did not contain any reference to the minimum sentencing provisions of Act 105 of 1997. Are you taking that point on appeal or not?

MR BUTLER: M'Lord, as I mentioned earlier in my opening address, I did not really focus on that point. Obviously if Your Lordships find that is an important point . . . [intervention]

VAN ZŸL J: It seems to me that it is probably six of one and half a dozen of the other, because on the authorities Miss Senekal advanced here, the effect of that is that where an accused has not been warned, and I cannot imagine that Mr Du Toit had not discussed it with him. Because he is an experienced practitioner, all – known to us all, but assuming that he had not been warned of the provisions of the Act, that in itself would entitle the Court to impose a sentence of less than the prescribed minimum. But the Court has, in

[1] *S v Malgas* 2001 (1) SACR 469 (SCA).

this case, a common law jurisdiction in any event to impose life, so that the same considerations it seems to me would apply whether the provisions of the Act had been drawn to his attention or not.

. . .

VAN ZŸL J: And that in the final analysis it is probably not likely to make a difference to the outcome, but I thought I would raise it with you because it is raised in Miss Senekal's heads and you had not addressed the point at all in your submissions to us.

MR BUTLER: No, M'Lord, I was thinking very much along the lines of Your Lordship that maybe a slightly different angle that having regard to the way the matter was dealt with, and the whole discussion was about substantial and compelling circumstances, and the learned Judge and obviously both counsel were well aware that that was . . . [intervention]

VAN ZŸL J: Well that was the tenor of the debate.

MR BUTLER: Yes, it was.

VAN ZŸL J: In making it – when Mr Du Toit made submissions to the Court.

MR BUTLER: Absolutely, it was very pointedly on that aspect.

VAN ZŸL J: One would infer that everybody was alive to the provisions of the Act . . . [intervention]

MR BUTLER: That is so.

VAN ZŸL J: . . . without having expressly stated that.

MR BUTLER: That is so. Sorry, M'Lord, I cannot really take that matter much further. I do submit that it – yes, it probably does not sway the matter one way or the other markedly.'

[13] The full court held:

'In my view, the crime of which the appellant stands convicted, is of such a nature that I do not believe that the court *a quo* erred, or misdirected itself, in taking the approach that no substantial and compelling circumstances existed, which would justify a sentence of less than imprisonment for life. But, even if it would be held that the court *a quo* was wrong in applying the provisions of Act 105 of 1997 to the present matter and should rather have sentenced the appellant in the exercise of its common law jurisdiction, then, in my view, the Court was entirely correct in imposing a sentence of imprisonment for life.'

[14] The reasoning of the full court cannot be faulted and I agree with it. The trial court properly considered the facts and relevant circumstances of this case. The appeal should be dismissed.

[15] In the result the following order is made:
The appeal against sentence is dismissed.

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A P Ledwaba
Acting Judge of Appeal

Appearances

For appellant:	P Andrews
Instructed by:	
	PMB Justice Centre, Pietermaritzburg
	Bloemfontein Justice Centre, Bloemfontein
For respondent:	J M Khathi
Instructed by:	
	The Director of Public Prosecutions, Pietermaritzburg
	The Director of Public Prosecutions, Bloemfontein