# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

## JUDGMENT

**Reportable**
Case No: 698/2017

In the matter between:

**MANDLA MSIMANGO** **APPELLANT**

**and**

**THE STATE** **RESPONDENT**

**Neutral citation:** *Msimango v The State* (698/2017) [2017] ZASCA 181 (01 December 2017)

**Coram:** Cachalia and Bosielo JJA and Tsoka, Ploos van Amstel and Rogers AJJA

**Heard**: 02 November 2017

**Delivered:** 01 December 2017

**Summary:** Criminal Law – appellant convicted of one count of robbery with aggravating circumstances read with s 51(2) of the Criminal Law Amendment Act 105 of 1997 and two counts of attempted murder based on common purpose. No allegations of common purpose in the charge sheet.

## ORDER

**On appeal from:** South Gauteng High Court, Johannesburg (Makume J and Collis AJ sitting as court of appeal):

1 The appeal against the conviction in respect of count 1 is dismissed.
2 The appeal against sentence imposed in respect of count 1 is upheld.
3 The sentence of 20 years' imprisonment in respect of count 1 is set aside and substituted with:
'(a) The appellant is sentenced to 13 years' imprisonment.'
4 The appeal against the conviction in respect of count 3 is upheld and the conviction and resultant sentence are set aside.

## JUDGMENT

**Bosielo JA** (Cachalia J and Tsoka, Ploos Van Amstel and Rogers AJJA concurring):

[1] The appellant stood trial in the regional court, Johannesburg, on three counts. Count 1 was that of robbery with aggravating circumstances as envisaged in s 1 of the Criminal Procedure Act 51 of 1977 (CPA), in that a firearm was used. In addition, the charge alleged that this count should be read with the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997 (CLAA), which prescribed a minimum sentence of not less than fifteen years unless the court has found that there are substantial and compelling circumstances which justify the imposition of a lesser sentence. In count 2, the appellant was charged with attempted murder where the complainant, Mr Dixon Kasinga (Kasinga), was shot with a firearm whilst count 3 was a charge of

attempted murder where Mr Samuel Marumenya (Marumenya) was assaulted with a meat cleaver.

[2] At the end of the trial in the regional court, the appellant was convicted on counts 1 and 3, and was acquitted on count 2. The regional magistrate sentenced the appellant to 20 years' imprisonment in respect of count 1 and five years in respect of count 3. The effective sentence was 25 years' imprisonment.

[3] With the leave of the court below, the appellant appealed against his convictions and sentences on both counts 1 and 3. His convictions were confirmed by the court below but his sentence on count 3 was ordered to run concurrently with the sentence on count 1. His sentence was predated to 22 February 2010. The effective sentence for the appellant was 20 years' imprisonment.

[4] Aggrieved by this, the appellant petitioned this Court for special leave to appeal, which this Court granted on 8 September 2015.

[5] The facts leading to this appeal can be conveniently summed up as follows: Marumenya, a Nigerian national, conducted a recycling business at No 33 Hanau Street, in Jeppes Town, Johannesburg. The premises are situated near Jeppes Men's Hostel. He lived there and also shared the premises with Mr Mfanafuthi Mgwewu (Mgwewu), a local resident who hails from Soweto in Johannesburg and Kasinga, a Malawian citizen.

[6] Marumenya testified that on 17 May 2008, he received information that Zulu speaking people from the Jeppe hostel were attacking foreigners. Mgwewu arrived at Marumenya's home the following morning and informed him that he had seen terrible devastation at the places of some Malawians. Marumenya

testified that Mgwewu told him that some men swore at him and threatened to burn his place down. After speaking to the men who confirmed the imminent attacks of foreigners' properties, Mgwewu went to Marumenya and told him that those men wanted some money as a protection fee against imminent attacks on all foreigners. Marumenya gave Mgwewu R350 to give to them ostensibly as a protection fee.

[7] At about 16h00, two men returned to Marumenya's place. Mgwewu recognised one of the two men as the man to whom he had paid the money that morning. He called him 'Simphiwe' as this is the name he gave him in the morning, apparently to facilitate their communication when the attacks started. He did not know the other person, who is the appellant in this appeal. Unexpectedly, the two men became violent and started to search them. They then herded Marumenya, Mgwewu and Kasinga into a toilet on the premises where they were held hostage and assaulted. Inside the toilet, the appellant hit Marumenya with a firearm on his head and took his cellular phone. The two men demanded money. In an attempt to stop this assault, Marumenya produced his ATM card and offered them some money. When they showed no interest in his ATM card, he offered them a further R1800 which he had in his wallet at his house.

[8] Marumenya testified further that whilst this was happening Simphiwe went to his room where Marumenya had left his fiancé. She was also taken to the toilet where Marumenya, Kasinga and Mgwewu were being held hostage. At this time, Marumenya stood up and tried to negotiate some settlement with the appellant. Apparently, this angered the appellant, and, as a result, he hit him with the barrel of a firearm on his head. The appellant furthermore threatened to shoot him.

[9] Suddenly, a sound of gun fire came from the toilet. The appellant rushed to the toilet. A struggle ensued during which Mgwewu attempted to grab the appellant's hand which held the gun. The appellant shot at Mgwewu and at Marumenya whilst they were approximately one metre apart, but fortunately the bullet missed him. At this stage, Simphiwe disposed him of the speaker and hit him therewith. Whereafter Marumenya fled to the kitchen and returned with a meat cleaver. Simphiwe then took the meat cleaver from him and hit him on his head with the meat cleaver which caused him to lose consciousness.

[10] After he regained consciousness, he discovered that Kasinga had been shot in his mouth. He was seriously injured to the extent that he could not stand up. Both Marumenya and Kasinga were admitted to Johannesburg Hospital Intensive Care Unit for medical treatment. While being attended to at the hospital, Marumenya saw and identified the appellant who was also brought there for medical treatment. He told Kasinga about his discovery. Kasinga also identified the appellant as one of the two men who had earlier assaulted them at Marumenya's home.

[11] The police were called to the hospital where Marumenya identified the appellant to the police as the person who had assaulted and robbed him of his property at his premises. The appellant had a bullet embedded in his wrist and an injury on his ear where Mgwewu had bitten him.

[12] During the ensuing trial, a medical report in respect of Marumenya, the so-called J88, was admitted into the record as an exhibit in terms of s 220 of the CPA. It reflected that Marumenya had suffered multiple scalp lacerations to the head, but not a breaching scalp, and one posterior scalp laceration underlying the back of the skull. Marumenya was referred to a neurosurgeon for further examination.

[13] The State then called Mgwewu to testify. Suffice to say that his testimony corroborated Marumenya's.

[14] It is common cause that in convicting the appellant on count 3, the regional magistrate relied on the doctrine of common purpose even though it was never averred either in the charge sheet or proved in evidence. It was impermissible for the regional magistrate to have invoked the principle of common purpose as a legal basis to convict the appellant on count 3 as this never formed part of the state's case.

[15] Undoubtedly, the approach adopted by the regional magistrate of relying on common purpose which was mentioned at the end of the trial is inimical to the spirit and purport of s 35(3)(*a*) of the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution) under the heading 'Arrested, detained and accused persons'. In fact it is subversive of the notion of the right to a fair trial which is contained in s 35(3)(*a*) of the Constitution which provides in clear terms that:

'(3) Every accused person has a right to a fair trial, which includes the right –

*(a)* to be informed of the charge with sufficient details to answer it.'

[16] Section 35(3) falls under Chapter 2 of the Constitution under the heading, the Bill of Rights. Section 7 of the Constitution commands the State to respect, protect, promote and fulfil the Rights in the Bill of Rights. However, this is subject to legitimate limits in terms of s 36 of the Constitution. The requirement embodied in s 35(3) is not merely formal but substantive. It goes to the very heart of what a fair trial is. It requires the state to furnish every accused with sufficient details to put him or her in a position where he or she understands what the actual charge is which he or she is facing. In the language of s 35(3)(*a*), this is intended to enable such an accused person to answer and

defend himself in the ensuing trial. Its main purpose is to banish any trial by ambush. This is so because our criminal justice is both adversarial and accusatory.

[17] The Constitutional Court enunciated the right to a fair trial as follows in the seminal case of *S v Zuma & others* 1995 (1) SACR 568 (CC) para 16:

'That *caveat* is of particular importance in interpreting s 25(3) of the Constitution. The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paras *(a)* to *(j)* of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. In *S v Rudman and Another; S v Mthwana* 1992 (1) SA 343 (A), the Appellate Division, while not decrying the importance of fairness in criminal proceedings, held that the function of a Court of criminal appeal in South Africa was to enquire "whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted".

A Court of appeal, it was said (at 377)

"does not enquire whether the trial was fair in accordance with "notions of basic fairness and justice", or with the "ideas underlying the concept of justice which are the basis of all civilised systems of criminal administration".

That was an authoritative statement of the law before 27 April 1994. Since that date s 25(3) has required criminal trials to be conducted in accordance with just those "notions of basic fairness and justice". It is now for all courts hearing criminal trials or criminal appeals to give content to those notions.'

Although the Constitutional Court was here dealing with s 25(3) of the Interim Constitution which has now been replaced by s 35(3) of the Constitution, this dictum is still relevant to s 35(3). See also *National Director of Public Prosecutions v King* [2010] ZASCA 8*;* 2010 (2) SACR 146 (SCA).

[18] Both counsel conceded that as the charge sheet is silent on any possible reliance on the doctrine of common purpose, and further that there was no

application for amendment of the charge sheet in terms of s 86 of the CPA, the conviction of the appellant on attempted murder in count 3 cannot stand. I agree.

[19] The second question relates to the appropriateness of the effective sentence of 20 years' imprisonment for robbery with aggravating circumstances where a firearm was used. It is clear from the evidence, looked at holistically, that the sentence of 20 years' imprisonment was erroneously influenced by the circumstances surrounding the conviction for attempted murder on count 3. Now that the conviction on count 3 has been set aside and the sentence of five years' imprisonment have fallen away, the question remains whether the effective sentence of 20 years' imprisonment in respect of count 1 is still appropriate. Put otherwise, whether the sentence is not so disturbingly disproportionate to the conviction that it amounts to substantial and compelling circumstances as required by s 51(3) of the CLAA which justifies a departure from the minimum sentence.

[20] In order to answer this question, it is necessary to revisit the facts and circumstances underpinning the sentence on the charge of robbery with aggravating circumstances. This case has the following serious aggravating factors. These are that the appellant played a prominent and key role in extorting money from the complainant that morning. He took advantage of an atmosphere of xenophobic attacks which rendered the complainant and his employees vulnerable; that he extorted money from the complainant by falsely offering to protect them against the xenophobic attacks; that the entire robbery was based on greed; that the complainant and his employees were subjected to a prolonged and wanton attack.

[21] The evidence tells us further that, after he had successfully extorted money from Marumenya in the morning, the appellant went back to his co-perpetrator where they planned the eventual attack and concomitant robbery; armed with a firearm, they both returned to Marumenya's premises. After they had herded Marumenya, Kasinga, Mgwewu, and Marumenya's fiancé into the toilet, they unleashed a vicious attack on them. As a result Marumenya suffered serious injuries with far-reaching consequences. The medical report tells us that he needed further specialist treatment and according to the neurologist as a result of his injuries sustained during the attack, he damaged his brain in the sense that his feet feel numb. Kasinga in turn was shot in the mouth.

[22] Sadly, there are indications that Marumenya, being a foreigner, was identified as a soft target for the appellant and his friend, Simphiwe. These kinds of assaults by nationals on the foreigners in our country came to be known as xenophobia. During this period, xenophobia had spread like cancer in the country. Needless to state that xenophobic attacks have had a negative effect on our countries' image both continentally and internationally. It is a scourge that we need to root out wherever it rears its ugly head.

[23] For an appropriate sentence, it is important that I consider all the circumstances relevant to sentencing including the appellant's personal circumstances. The appellant was 23 years old at the time; he has two children from different mothers, one is four years old and the other is three years and six months old; he is earning R200 per week for washing taxis; he left school at grade 9.

[24] In terms of s 51(2) of the CLAA, the appellant should have been sentenced to a period of not less than 15 years' imprisonment in the absence of substantial and compelling circumstances. It is true that the regional magistrate

had the power to add a further five years to the minimum sentence of 15 years' imprisonment. However, the increase is not to be done whimsically but on sound legal principle which can withstand scrutiny. This requires any presiding officer who intends to invoke this power to give reasons therefore. Regrettably, the regional magistrate gave no reasons for increasing this sentence with an additional five years. On the evidence as it stands, the increase is not justified.

[25] It remains a salutary principle of our law that presiding officers should give reasons for every decision which they make, particularly if it has adverse consequences for the accused. This principle was enunciated as follows by this Court in *S v Mathebula & another* [2011] ZASCA 165; 2012 (1) SACR 374 (SCA) par 10:

'A regional magistrate has the discretion to impose a sentence exceeding the minimum sentence prescribed by the Act with an additional five years as provided for in the proviso to s 51(2). Such a discretion must, however, be exercised judicially and on reasonable grounds. Where a regional magistrate intends to depart from the prescribed minimum sentence, it is proper and fair that the regional magistrate gives reasons for such a departure. Absent any such reasons, the conclusion becomes inescapable that such a decision is arbitrary or that the sentencing discretion was not exercised judicially. It is not proper for an appeal court to have to speculate about the reasons which motivated the regional magistrate to impose a sentence higher than the minimum sentence prescribed. Such an approach cannot be countenanced as it is subversive to the principles of openness, transparency, accountability and fairness. It is trite that judicial officers can only account for their decisions in court through their judgments. It is through judgments which contain reasons that judicial officers speak to the public. Their reasons are therefore the substance of their judicial actions. Dealing with a similar matter this court enunciated the principle as follows in *S v Maake* [2010] ZASCA 51; 2011 (1) SACR 263 (SCA) para 19:

"It is not only a salutary practice, but obligatory for judicial officers to provide reasons to substantiate conclusions."

The court went on to state the following in para 20:

"When a matter is taken on appeal, a court of appeal has a similar interest in knowing why a judicial officer who heard the matter made the order which he did. Broader considerations

come into play. It is in the interest of the open and proper administration of justice that courts state publicly the reasons for their decisions. A statement of reasons gives some assurance that the court gave due consideration to the matter and did not act arbitrarily. This is important in the maintenance of public confidence in the administration of justice."
See *Strategic Liquor Services v Mvumbi NO & others* [2009] ZACC 17; 2010 (2) SA 92 (CC); 2009 (10) BCLR 1046 CC para 15.'
See also *S v Maake* 2011 (1) SACR 263 (SCA) para 19.

[26] As to whether there were substantial and compelling circumstances to justify a deviation from the prescribed minimum sentence of 15 years' imprisonment, the appellant's personal circumstances were not on their own sufficient to pass muster. However, he had spent 21 months in a correctional centre awaiting trial. This tilts the balance in his favour and makes the sentence of 15 years' imprisonment disproportionate in all the circumstances. Justice and fairness requires that the appellant should be credited with those years.

[27] In the result, the following order is made:

1 The appeal against the conviction in respect of count 1 is dismissed.
2 The appeal against sentence imposed in respect of count 1 is upheld.
3 The sentence of 20 years' imprisonment in respect of count 1 is set aside and substituted with:
'(a) The appellant is sentenced to 13 years' imprisonment.'
4 The appeal against the conviction in respect of count 3 is upheld and the conviction and resultant sentence are set aside.

L O Bosielo
Judge of Appeal

Appearances

| | |
|---|---|
| For the Appellant: | W Karam |
| | Instructed by: |
| | Justice Centre, Pretoria |
| | Justice Centre, Bloemfontein |
| For the Respondent: | LR Surendra |
| | Instructed by: |
| | Director of Public Prosecutions, Pretoria |
| | Director of Public Prosecutions, Bloemfontein |