THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 183/11

In the matter between:

SIBONGAKONKE LORRAINE MBUYISA **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Mbuyisa v The State* (183/11) [2011] ZASCA 146 (26 September 2011)

Coram: Cloete, Ponnan and Leach JJA

Heard: 26 August 2011

Delivered: 26 September 2011

Summary: Application for leave to appeal ─ applicant having pleaded guilty but seeking to appeal against both conviction and sentence ─ no prospects of success on appeal.

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Lamont J sitting as court of first instance):

The appeal is dismissed.

JUDGMENT

LEACH JA (CLOETE and PONNAN JJA concurring)

[1] Arising out of an incident which occurred at Vosloorus on 22 March 2009 the appellant, a woman in her mid-20s, was tried in the regional court on a charge of attempted murder. The state alleged in its charge sheet that she had attempted to kill the complainant by pouring paraffin over him and setting him alight. Following a plea of guilty, the appellant was convicted as charged and sentenced to eight years' imprisonment, half of which was conditionally suspended for four years.

[2] The appellant thereafter sought the assistance of a fresh attorney who, on 10 September 2009, filed an application seeking leave to appeal to the high court against both the appellant's conviction and sentence. This application was refused by the regional court, and a further petition to the judge president of the South Gauteng High Court under s 309C(2)(a) of the Criminal Procedure Act 51 of 1977 was similarly rejected. Undeterred, the appellant proceeded to apply to the high court for leave to appeal to this court against the refusal of her petition and, on 17 November 2010, was granted such leave, the high court indicating that it felt it may have applied an incorrect test in evaluating the question of her prospects of success.

[3] Of course, the issue facing the high court in considering the petition was not

whether the appellant's appeal ought to succeed but, simply, whether there was a reasonable prospect of it doing so. The notion of a reasonable prospect of success on appeal has recently received the attention of this court on a number of occasions and, for present purposes, it suffices to refer to the presently unreported judgment[1] in *Smith v S* [2011] ZASCA 15 para 7 where the following was said:

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court.[2] In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

[4] I turn to consider the prospects of success on appeal. In regard to the conviction, the matter is unusual as the appellant seeks to impugn her conviction despite having pleaded guilty to the charge, having stated in a written plea explanation under s 112(2) of the Criminal Procedure Act that she had indeed attempted to kill the complainant and having confirmed the correctness of that statement when questioned by the magistrate.

[5] The attack upon the conviction is twofold. The first prong of the attack is based on the contents of the appellant's written plea explanation. In the charge put to the appellant it was alleged that on or about 22 March 2009 at Vosloorus she had 'wrongfully and intentionally' attempted to kill the complainant 'by pouring him with paraffin and setting him alight'. While the grammar of this averment is atrocious, the allegations it contains are clear. To this the appellant tendered a plea of guilty and her attorney read into the record a written statement under s 112(2), signed by the appellant, which read as follows:

'I am the accused person in this matter and I understand the charge preferred against me by this honourable court to which I plead guilty. I confirm that I committed the said offence on the date and place as per annexure to the charge sheet within the jurisdiction of this court.

---

[1] Delivered on 15 March 2011.
[2] *S v Mabena & another* 2007 (1) SACR 482 (SCA) para 22.

I admit that I did unlawfully and intentionally attempt to kill the complainant by pouring him with paraffin and lighting him. I acted without any justification in law. I knew that my actions were against the law and a punishable offence.' (My emphasis.)

[6] When asked by the magistrate if she confirmed the correctness of this statement, the appellant replied in the affirmative and was duly convicted as charged. However, despite all of this it was argued on her behalf that there was a reasonable prospect of another court setting aside her conviction as her written plea explanation had amounted to no more than a regurgitation of the allegations in the charge sheet and was thus lacking in essential details relevant to the facts underlying the charge. In advancing this argument, the appellant's attorney seized upon the unfortunate phrase 'pouring him with paraffin' used in the charge sheet and repeated in the s 112(2) statement as the basis for his contention that there had been merely a regurgitation of the facts alleged in the charge which, in the light of the decisions in *S v Mshengu* 2009 (2) SACR 316 (SCA) and *S v Chetty* 2008 (2) SACR 157 (W) in particular, he submitted was impermissible.

[7] However, while it is no doubt undesirable for allegations contained in the charge sheet to merely be repeated in a s 112(2) statement, there is no inflexible rule that an accused who uses certain of the phraseology in a charge cannot be convicted. Each case is to be considered in the light of its peculiar facts and circumstances. What s 112(2) requires is a written statement in which the accused sets out the facts upon which he or she admits his guilt. Where these facts do not cover the essential elements of the charge ─ for example in *Chetty's* case where on a charge of fraud it was not clear whether the person had been induced to act to his or her prejudice as a result of the accused's admitted representation ─ a conviction should not follow. Thus in *Mshengu's* case, in which the offender's age was such that he was rebuttably presumed not to be criminally responsible, it was held that a simple regurgitation of the contents of the charge did not establish that he was indeed capable of forming the necessary criminal intent.

[8] There are no such difficulties in the present case. The essential gravamen of the charge was that the appellant had attempted to kill the deceased by pouring paraffin over him and then setting him alight. This she clearly admitted in the emphasised section of the statement, even if in doing so she used the same

unfortunate phrase that had been used in the charge sheet. But the same import would have been conveyed if, for example, she had said she had 'doused' complainant with paraffin or used some similar description. She clearly intended to admit that she was guilty as she had intended to kill the complainant and that she had acted unlawfully and without excuse. Not only did her statement cover the essentials of the charge but it also set out the essential facts upon which she admitted her guilt, namely, that she had poured paraffin over the complainant and set him alight. It is not without significance that the appellant was legally represented at the time, a factor that alleviates the concern expressed in cases such as *S v M* 1982 (1) SA 240 (N) at 244D-E that an unsophisticated person may plead guilty without fully comprehending what doing so encompassed.

[9] I therefore conclude that there is no prospect of the appellant's first attack upon her conviction succeeding. In order to appreciate the appellant's second attack, it is necessary to detail what happened during the sentencing stage of proceedings in the trial court.

[10] During the course of their arguments on sentence, both the appellant's attorney and the prosecutor made factual statements in regard to material background facts. In his address, the appellant's attorney said:

'Your worship this accused is regretting her actions. According to her the reason why she assaulted the complainant in the manner described in the charge sheet she suspected that the complainant is the one who stole her items and when this complainant was questioned by the accused and the members of the community everything went out of control your worship, the dominant factor being anger and desperation on the part of this accused your worship. The complainant was then assaulted. He was poured with paraffin by this accused (and) set alight by the people who were there.

Your worship this accused did not act alone, she was part of a group your worship. The actions by this accused your worship is regrettable. She is not supposed to take the law into her own hands your worship. Even though she did open the case afterwards but she was not supposed to do what she did. It is a terrible mistake, she concedes your worship. She is sorry for what she did.'

[11] In the light of the statement that the complainant had been 'set alight by the people who were there' it was argued that the magistrate ought to have appreciated

that the appellant may have been incorrectly convicted as she had not set the complainant alight and that, as the regional magistrate ought to have entertained doubt as to her guilt, he should have invoked the provisions of s 113 of the Criminal Procedure Act and entered a plea of not guilty.

[12] In *S v Olivier* 2010 (2) SACR 178 (SCA) this court pointed out that while formalism often takes a back seat during the sentencing stage of criminal proceedings when a court is often merely informed of uncontentious facts such as the accused's personal circumstances, different considerations apply in so far as the nature and circumstances of the crime are concerned. Majiedt AJA went on to state:[3]

'All too often prosecutors adopt a lackadaisical approach to sentence, permitting ex parte averments to be made willy-nilly in the defence's submissions from the bar, notwithstanding that it is at variance with the information in the docket. . . . Quite often this is attributable to slothfulness on the part of prosecutors. It is a practice which must be deprecated, since it does not serve the interests of the judicial system.'

[13] In the present case, both sides made themselves guilty of failing to call evidence of the material circumstances under which the offence was committed Nevertheless, there appears not to have been any material dispute between them. In his address the prosecutor stated that there were two others who participated in the assault upon the complainant and confirmed that the appellant had not set the complainant alight in the complainant's presence. He also gave a few further details which the appellant did not contest. From this it appears to have been common cause that the complainant worked for the appellant as a gardener; that on returning to her home on the day in question the appellant discovered that it had been broken into and certain items, in particular a radio, had been stolen; that the appellant suspected the complainant as being the guilty party and, together with other members of the community, she went to his home; that the complainant was taken back to the appellant's home and confronted with the theft; that when the complainant denied being responsible, he was assaulted and dragged to a nearby place in the veld where the appellant poured paraffin over him while other persons poured petrol on the lower half of his body; and that the complainant was then set alight, albeit not by the appellant but by another.

[3] Para 11.

[14] As the appellant was not the person who set the complainant alight, it was argued that she may not have had the necessary intention to kill him but, for example, may have merely wished to extract a confession from him. In the light of her guilty plea and the facts which are common cause, this can safely be rejected. The appellant was clearly one of a crowd who actively participated in dousing the complainant with highly inflammable fluids in order to set him alight. The fact that the hand of another struck the flame that actually did so does not in law exculpate her as she and the complainant's other attackers were clearly acting with a common purpose. Obviously, for that reason, she pleaded guilty. If it had not been her intent to kill the complainant, she would hardly have said that it was. It is not without significance that at no stage in her petition did the appellant ever offer any exculpatory version or seek to distance herself from the contents of her s 112(2) statement.

[15] In my judgment the appellant's conviction is unassailable and there is no reasonable prospect of an appeal succeeding in that regard. That brings me to the proposed appeal in respect of her sentence.

[16] The appellant was in her mid twenties at the time. She was gainfully employed and the single mother of a six year old child. It was argued that the regional magistrate erred in not enquiring into the circumstances of her child and what would happen to the child if the appellant was sentenced to imprisonment. It was also argued that the regional magistrate had misdirected himself by not having considered another form of punishment such as correctional supervision, a compensatory order in favour of the complainant, or some other form of restorative justice.

[17] In my view there was no such misdirection. The advantages of both correctional supervision and orders of restorative justice should not be devalued by their use in cases in which such sentences are inappropriate. The barbarity of the attack upon the complainant and the severity of this crime cry out for a salutary sentence, and although the rehabilitation of an offender is always a factor to be borne in mind, the brutal nature of the attack rendered this one of those cases where punishment tends to become to the fore. In the particular circumstances of this case, neither correctional service nor an order of restorative justice would be at all

appropriate. And although I accept that it is important for a court to pay regard to the interests of the children of a parent who is to be sentenced for a crime ─ compare *S v S (Centre for Child Law as amicus curiae)* 2011 (2) SACR 88 (CC) and *S v M (Centre for Child Law as amicus curiae)* 2008 (3) SA 232 (CC) – it is apparent from this constitutional jurisprudence that where a custodial sentence is called for it should be imposed.

[18] In my judgment, this is one of those cases where a lengthy period of imprisonment is demanded. To impose any other type of sentence in a case of such barbaric violence will tend to bring the law into disrepute. Indeed, in my view, the magistrate erred in imposing too light a sentence, something he himself had come to realise by the time of the application for leave to appeal when he stated that he had erred in suspending half the sentence. Even a sentence of eight years' imprisonment was probably inadequate and, had this case come before this court on appeal rather than by way of an application for leave to appeal should be granted, the appellant would have been in grave danger of having her sentence increased.

[19] In these circumstances there does not seem to me to be any reasonable prospect of success on appeal. Indeed these proceedings were ill-advised as, if the appellant were to be granted leave to appeal, she would face the very real prospect of a far heavier sentence being imposed. Be that as it may, the high court's decision to refuse the appellant's petition for leave to appeal was correct, and the appeal to this court must fail.

[20] The appeal is dismissed.

_____

L E Leach

Judge of Appeal

APPEARANCES:

For Appellant:	E S Classen Instructed by: David H Botha, Du Plessis & Kruger Incorporated Johannesburg Symington & De Kok Bloemfontein
For Respondent:	M P D Mothibe Instructed by: The Director of Public Prosecutions South Gauteng High Court Johannesburg The Director of Public Prosecutions Bloemfontein