THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1129/2019

In the matter between:

LEBOGANG PETER MASHILO **APPLICANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Lebogang Peter Mashilo v The State* (1129/2019) [2022] ZASCA 81 (2 June 2022)

Coram: PONNAN, MAKGOKA and CARELSE JJA and MAKAULA and SAVAGE AJJA

Heard: 03 May 2022

Delivered: 02 June 2022

Summary: Application in terms of s 17(2)(*f)* of the Superior Courts Act 10 of 2013 – referred by the President of the Supreme Court of Appeal to a full court for reconsideration and if necessary variation – application – dismissed.

ORDER

On appeal from: Gauteng High Court, Pretoria (Msimeki J with Baqwa J concurring, sitting as a court of appeal)

The application is dismissed.

JUDGMENT

Carelse JA (Ponnan and Makgoka JJA and Makaula and Savage AJJA concurring):

[1] On 9 October 2014, the applicant, Lebogang Peter Mashilo, and his co-accused, Mzwakhe Moagi (Moagi), were charged before a regional court with robbery with aggravating circumstances read with the provisions of s 51(2) of the Criminal Law Amendment, Act 105 of 1997 (the Minimum Sentence Act) in that on 14 January 2014 and in Kwa-Thema they robbed Hajoon Khan (Khan) of his motor vehicle and two cellphones. The aggravating circumstances were the use of a firearm and depriving Khan of his liberty. They were consequently also charged with the kidnapping of Khan and the unlawful possession of a firearm.

[2] Section 51(2) of the Minimum Sentence Act, read with schedule 2 of the Act, provides that:

'2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in –

(a) Part II of Schedule 2, in the case of –

(i) a first offender, to imprisonment for a period not less than 15 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;

(b) Part III of Schedule 2, in the case of –

(i) a first offender, to imprisonment for a period not less than 10 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years;

(c) Part IV of Schedule 2, in the case of –

(i) a first offender, to imprisonment for a period not less than 5 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 7 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years; and

(d) Part V of Schedule 2, in the case of –

(i) a first offender, to imprisonment for a period not less than 3 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 5 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 7 years.'

[3] On 14 October 2014, Moagi was convicted of all three offences as charged. The applicant was convicted of robbery with aggravating circumstances and kidnapping. Both accused admitted a previous conviction

for robbery with aggravating circumstances. On the robbery charge, no substantial and compelling circumstances having been found to be present, both accused were sentenced to the minimum sentence of 20 years. On the kidnapping charge both were sentenced to five years' imprisonment. On the firearm charge, Moagi was given three years' imprisonment. The sentences were not ordered to run concurrently. Effectively, Moagi was sentenced to 28 years' imprisonment and the applicant to 25 years' imprisonment.

[4] Both accused sought leave to appeal. Their application was refused by the regional magistrate. Each separately, petitioned the high court for leave to appeal. In the case of Moagi, it was granted. In the case of the applicant, on 24 May 2014, Msimeki J and Baqwa J dismissed his petition.

[5] In the meanwhile, following the high court's refusal of his petition for leave to appeal, the applicant sought special leave to appeal from this Court. His petition was dismissed.

[6] Dissatisfied with this decision, the applicant applied to the President of this Court in terms of s 17(2)*(f)* of the Superior Courts Act (the Act), which provides:

'The decision of the majority of the judges considering an application referred to in paragraph *(b)*, or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.'

[7] The President referred the application to this Court for oral argument, in terms of s 17(2)(*d*) of the Act.

[8] Section 17(2)*(f)* of the Act was considered by Mpati P in *Avnit v First Rand Bank Ltd.*[1] As appears from para 7 of his judgment:

'A useful guide is provided by the established jurisprudence of this court in regard to the grant of special leave to appeal. *Prospects of success* alone do not constitute exceptional circumstances. The case must truly raise a substantial point of law, or be of great public importance or demonstrate that without leave a grave injustice may result. Such cases will likely to be few and far between because judges who deal with the original application will readily identify cases of that ilk. But the power under s 17(2)*(f)* is one that can be exercised even when special leave has been refused, so 'exceptional circumstances' must involve more than satisfying the requirements for special leave to appeal. The power is likely to be exercised only when the President believes that some matter of importance has possibly been overlooked or *grave injustice* will otherwise result.' (My emphasis.)

[9] In his application to the President of this Court, the applicant drew attention to Moagi's success on appeal resulting in the reduction of the latter's sentence.

[10] Moagi's appeal was heard by a Full Bench of the Gauteng Division of the High Court, Pretoria (Molahlehi AJ, Senyatsi AJ concurring) (the full bench). The full bench found that:

'The silence of the charge sheet concerning minimum sentence and the failure by the trial court to forewarn the appellant about reliance on the provisions of s 51 (2) of the CPA at the beginning of the trial constitutes substantial and compelling circumstances.'

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[1] *Avnit v First Rand Bank Ltd* [2014] ZASCA 132 para 7.

On the strength of that finding it concluded:

'i. For count 1, relating to robbery with aggravating circumstances, the appellant is sentenced to 14 years imprisonment.

ii. For count 2, relating to kidnapping of the complainant, the appellant is sentenced to 5 years imprisonment.

iii. For count 3, relating to possession of a firearm, the appellant is sentenced to 3 years imprisonment.

iv. The appellant will effectively serve 12 years imprisonment.'

[11] It proceeded to reduce Moagi's sentence to 14 years on the robbery with aggravating circumstances. The sentences imposed on the other two charges remained unchanged. Whilst the correctness of the full bench's judgment in the Moagi matter, is strictly speaking, not before us, certain observations need to be made. In the first place, the court did not specifically direct that the sentences imposed in respect of counts 2 and 3 were to run concurrently with the sentence on count 1, in which event the effective sentence would have been 22 years' imprisonment, not 12 years as is reflected in the paragraph 2(iv) of the order. I pause to record that what is stated in the judgment appears to be at odds with the order that issued in the matter, which reads:

'1. The appeal against the sentence imposed on the appellant by the court a quo is upheld;

2. The order of the trial court is set aside and the following order relating to the sentence of the appellant, Mr Mzwakhe Moagi, is made:

I. For court 1, relating to robbery with aggravating circumstances, the appellant is sentenced to 14 years imprisonment;

II. For count 2, relating to kidnapping of the complainant, the appellant is sentenced to 5 years imprisonment;

III. For count 3, relating to possession of a firearm, the appellant is sentenced to 3 years imprisonment;

IV. Counts 2 and 3 will run concurrently with count 1;

V. The appellant will effectively serve 14 years imprisonment;

3. The sentence is antedated to 14 October 2014, the date on which the trial court imposed its sentence;

4. The appellant is in terms of S 103(1) of the Firearm Control Act 60 of 2000, declared to be unfit to possess a firearm.'

[12] In the second place, the finding that the accused were not forewarned about the applicability of the minimum sentencing regime is not supported by the record.

[13] The charge sheet reads: 'THAT the accused are guilty of the crime of Robbery with aggravating circumstances (read with the provisions of Section 51(2) of the Criminal Law Amendment, Act 105 of 1997 and Act 38 of 2007). IN THAT upon or about 14/01/2014 and that or near **KWA-THEMA** in the Regional Division of **NORTH GAUTENG** the accused did unlawfully and intentionally assault **HAJOON KHAN** and did then and with force take the following items from him, to wit **1 x MOTOR VEHICLE FORD FIESTA WITH REG NO CS96FBGP, 2 CELLPHONES** his property or property in his lawful possession, aggravating circumstances being **THAT THE ACCUSED MADE USE OF FIREARM(S).**'

[14] It is thus clear that the charge sheet made specific reference to the minimum sentence legislation. Further, both accused pleaded not guilty. Each was represented. Each had been convicted previously for the same offence, namely robbery with aggravating circumstances and sentenced in terms of the minimum sentencing legislation to the prescribed minimum sentence. At the commencement of the sentencing phase of the trial, the regional magistrate made it clear that there was 'a minimum sentence for a second offender as well'. Neither accused, nor their legal representatives were under any misapprehension that a minimum sentence applied. In fact, when the

application for leave to appeal was being argued on behalf of the applicant before the regional court magistrate, the following was said:

'With regards to sentence Your Worship, it is my submission that another Court could quite easily come to a different decision and decrease the sentence. It is my submission there is a reasonable prospect of success with regards sentence and it is my submission that another Court could find substantial and compelling circumstances in the circumstances.'

The regional magistrate dealt with that submission in these terms:

'In the light of the recent previous conviction of accused 2, the court cannot see that another Court would find substantial and compelling circumstances and impose a sentence less or in terms of Section 280(2) make the sentences run concurrently.'

[15] Thus, the basis on which leave to appeal was initially sought was that another court could find that substantial and compelling circumstances existed, not that the applicant had not been forewarned about the minimum sentence. That was also the only point sought to be advanced in support of his petition to this Court for special leave to appeal. He stated in support of that application:

'7.1 The effective sentence of 25 years is shocking inappropriate as it did not take into consideration the fact that the said counts were committed as part of the same event and should therefore have been ordered to run concurrently and the sentence should therefore have been at least 20 years.

7.1.1 The magistrate further misdirected in imprison [sic] a sentence of 20 years even when then compelling and exceptional circumstances to deviate from the minimum sentence.'

[16] It was only in the application to the President of this Court under s 17(2)(*f*) of the Act that the applicant for the first time stated that:

'11. It is applicant's submission that the honourable judges of the Gauteng Local Division, Pretoria viz. Mr Justice Msimeki and Mr. Justice Baqwa did not apply their minds judiciously and in proper and reasonable manner when they dismissed his petition case

no:P369/2014 on the 5th February 2015 in the process subjected him to an unfair appeal process which is not in the interest of justice because his co-accused's petition who is in the same legal condition like applicant was granted leave to appeal and the appeal succeeded before the honourable Mr Justice Molahleli and the honourable Mr Justice Senyatsi AJ on the 26th October 2016.

11.1 In dealing with applicant's co-accused Mr Mzwakhe Moagi's matter case no: A448/2015 the Appeal Court's finding was that there was failure by the trial court to forewarn the applicant about the application of the minimum sentencing regime viz. section 51(2)(a)(ii) of the Criminal Procedure Act 51 of 1977 at the beginning of the hearing constituted an irregularity warranting an interference on appeal.'

[17] Until then it had never been his case that there had been a failure of justice of any kind. In any event, as I have shown the applicant had indeed been forewarned in the charge sheet of the applicable minimum sentence provisions and reference was also subsequently made to those provisions both by the court and his counsel.

[18] It follows that the application is without merit.

[19] The following order is made:

The application is dismissed.

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CARELSE JA

JUDGE OF APPEAL

APPEARANCES

For appellant:	H L Alberts Legal Aid South Africa, Pretoria Legal Aid South Africa, Bloemfontein
For respondent:	L A More Director of Public Prosecutions, Pretoria Director of Public Prosecutions, Bloemfontein.