REPUBLIC OF SOUTH AFRICA

GAUTENG LOCAL DIVISION OF THE HIGH COURT, JOHANNESBURG

CASE NO: A375/2014

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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In the matter between:

NKOSI, ROBERT MAFIKA Appellant

And

THE STATE Respondent

J U D G M E N T

KATHREE-SETILOANE, J:

[1] This is an appeal with leave of the High Court on sentence only.

[2] On 17 May 2000 the appellant, a 25 year old male, was convicted by Shongwe J (as he then was) on the following charges:

2.1 count 1 − robbery with aggravating circumstances;

2.2 count 2 – murder;

2.3 count 3 – intimidation;

2.4 count 4 – unlawful pointing of a firearm;

2.5 count 5 − unlawful possession of a firearm; and

2.6 count 6 – unlawful possession of ammunition.

[3] The court *a quo* sentenced the appellant, on 23 May 2000 as follows:

3.1 count 1 − 15 years imprisonment;

3.2 count 2 − 18 years imprisonment;

3.3 count 3 − 4 years imprisonment;

3.4 count 4 − 2 years imprisonment;

3.5 count 5 − 3 years imprisonment;

3.6 count 6 − 1 year imprisonment;

The court *a quo* ordered the sentence imposed on count 4 to run concurrently with the sentence imposed on count 3, and the sentence imposed on count 6 to run concurrently with the sentence imposed on count 5. As a result, the effective sentence imposed by the court *a quo* was 40 year's imprisonment.

The court *a quo* made an order that the appellant must serve at least 25 years of the sentence imposed prior to being placed on parole.

[4] The offences for which the appellant was convicted and sentenced arise from the armed robbery and murder of the deceased, on 22 August 1998 on Kakatu Street, Thokoza, by the appellant and his accomplice known only as "Dingaan"[1]. The appellant and Dingaan held the deceased, who was known to them, at gun point and robbed him of his cell phone, wallet and neck chain. Dingaan provided the appellant with a firearm and instructed him to shoot the deceased in the stomach. The appellant responded by saying to Dingaan that he would rather shoot the deceased in the ear, as this will cause him to die quickly. The appellant then shot the deceased in the ear and the deceased fell to the ground. Ms Nokuthula Mashinini ("Ms Mashinini"), the sister-in-law of the deceased, witnessed the entire incident from behind a wall in close proximity to where the appellant had robbed and shot the deceased. Since both the appellant and Dingaan were known to her, Ms Mashini confronted them after they robbed and shot the deceased. The appellant pointed his firearm at Ms Mashinini and threatened to shoot her if she informed members of her family that they robbed and shot the deceased. Both the appellant and Dingaan then ran away. Ms Mashinini rushed home and informed her aunt of the shooting. The deceased was rushed to hospital and died in hospital two days later.

[5] Sentencing is pre-eminently a matter for the discretion of the trial court. A court of appeal is only entitled to interfere with the sentence where there has been a material misdirection by the trial court or when the sentence imposed by the trial court is shocking or startlingly inappropriate[2]. During argument, it was contended on behalf of the appellant that the sentence of 40 years imprisonment is shockingly inappropriate, and that the trial court erred in failing to attach sufficient weight to the following personal circumstances of the appellant: (a) he was only 23 years of age at the time of the commission of the offences; (b) he was employed earning R200,00 per month; (c) he

[1] The appellant described Dingaan as his brother in evidence in chief.
[2] *S v Malgas* 2001(2) SA 1222 (SCA).

assisted his parents; (d) he is a first offender; (e) he was drunk during the commission of the offences and was possibly influenced by his accomplice; and (f) the murder of the deceased was not premeditated.

[6] Prior to dealing with this contention, it is necessary to point out that although the appellant was sentenced in relation to counts 2 (murder) in terms of s 51(1) read with s 51(3) of the Criminal Law Amendment Act 105 of 1997 ("the Act") which enjoins a court to impose a mandatory sentence of life imprisonment unless it is satisfied that substantial and compelling circumstances exist which justify imposition of a lesser sentence than prescribed, the charge sheet makes no mention of this. Nor was he informed of this at the outset of the trial by either the court *a quo* or his legal representative. What is apparent from the record, however, is that after conviction and prior to the commencement of the sentencing hearing the Judge (*a quo*), in chambers, requested the legal representatives for the State and the appellant to address him at the sentencing hearing on the applicability of the Act to the appellant's convictions on counts 1 (robbery with aggravating circumstances) and 2 (murder).

[7] During the sentencing hearing, the State contended that s 51(1) and (2) read with 51(3) of the Act were applicable to the sentences to be imposed upon the appellant in respect of his convictions on counts 1 and 2, as these offences were committed after the commencement of the Act. Counsel for the appellant did not object, but rather remarkably endorsed the State's reliance on these provisions of the Act as enjoining the court *a quo,* subject to the provisions of s 51(3) of the Act, to impose the minimum sentence of 15 years imprisonment in respect of the appellant's conviction on count 1, and life imprisonment in respect of his conviction on count 2, despite the fact that the appellant was not pertinently warned at the outset of the trial that he faced the prospect of the minimum sentencing regime of the Act being applied against him on conviction.

[8] The appellant has not raised the State's reliance on the minimum sentencing regime of the Act, as a ground of appeal, in its application for

leave to appeal before the court *a quo* or before this Court on appeal. To the contrary, both the State and the appellant were in agreement, at the appeal hearing, that because the Judge in the court in the court *a quo* had invited the legal representatives for both the State and the appellant to address him during the sentencing hearing on the application of s 51(1) and (2) of the Act to the conviction of the appellant on counts 1 and 2, the omission by the State to set this out in the charge sheet or raise it at the commencement of the proceedings, would not vitiate the proceedings in the court *a quo*. I disagree for the reasons set out below.

[9] In *S v Kolea,*[3] the Supreme Court of Appeal emphasised the importance for an accused person to be informed in sufficient detail of the charge/s against him or her as follows:

'The accused's right to be informed of the charge he is facing, and which must contain sufficient detail to enable him or her to answer it, is underpinned by s 35(3)(a) of the Constitution, which provides that every accused person has a right to a fair trial. The objective is not only to avoid a trial by ambush, but also to enable the accused to prepare adequately for trial and to decide, inter alia, whether or not to engage legal representation, how to plead to the charge and which witnesses to call. It follows that, if the State intends to rely on the minimum-sentencing regime created in the Act, this should be brought to the attention of the accused at the outset of the trial…'

Then citing *S v Seleka en Andere*[4] in which the Court held that although it was desirable for a charge to contain a reference to a penalty, this was not essential as the ultimate test was whether the accused suffered prejudice as a result of the charge omitting to mention the penalty, the SCA in *S v Kolea* stated thus:

'[T]he question that should be posed should be the following: Did the appellant have a fair trial and, more specifically, was the appellant sufficiently apprised of the charge he or she was facing, and was he or she informed, in good time, of any likelihood of

[3] 2013 (1) SACR 409 (SCA).
[4] 1976 (1) SA 675 (T).

his or her being subjected to any enhanced punishment in terms of the applicable legislation. This, of necessity, entails a fact based enquiry into the entire proceedings of the trial.'

[10] Mpati JA in *S v Ndlovu*[5] endorsed this approach stating:

'The enquiry, therefore, is whether, on a vigilant examination of the relevant circumstances, it can be said that an accused had had a fair trial. And I think it is implicit in these observations that where the State intends to rely upon the sentencing regime created by the Act, a fair trial will generally demand that its intention pertinently be brought to the attention of the accused at the outset of the trial, if not in the charge-sheet then in some other form, so that the accused is placed in a position to appreciate properly in good time the charge that he faces as well as the possible consequences.'

More recently in *S v Makatu,*[6] the SCA re-affirmed the principle that where no mention is made in the indictment of the State's reliance on s 51(1) of the Act and no mention is made of this during the trial except at the sentencing stage then the imposition of a sentence of life imprisonment would constitute a misdirection.

[11] In the current matter the appellant was neither informed in the charge-sheet nor at the outset of the trial that the State was intending to rely on the minimum-sentencing regime created by the Act. Moreover, the court *a quo* did not warn the accused that the State was relying on the minimum sentencing regime created by the Act in relation to the charge of murder in count 2, and what the consequences of being charged of that offence were. It would seem to me that the court *a quo* was also not aware of the State's reliance on the minimum sentencing regime created by the Act, and for that reason asked counsel for both the State and the appellant to address him on its applicability. It also seems to me that the State had not applied its mind to the applicability of the Act to the charges of robbery with aggravating circumstances and

[5] 2003 (1) SACR 331 (SCA) ([2003] 1 All SA 66 para 12.
[6] 2014 (2) SACR 539 (SCA) at para 24

murder in counts 1 and 2 respectively, until asked by the court *a quo* to address it on its applicability.

[12] This begs the question: Was the appellant given a fair trial? This question necessitates an assessment of the facts with reference to, in particular, the prejudice, if any, that the appellant may have suffered as a result of the State's omission to inform him in the charge-sheet or at the outset of the trial that it would be relying on the minimum-sentencing regime created by the Act. As alluded to, the appellant's legal representative did not object to the State's reliance on the minimum sentencing regime created by the Act during the sentencing proceedings. The implications of his failure to object should not, in my view, be visited upon to the appellant because on scrutiny of the record of the sentencing proceedings, it is quite clear that the appellant's legal representative did not appreciate the impact that the provisions of the Act, more specifically s 51(1) and (2) could have on the appellant's fair trial rights. Frankly, I do not believe that he appreciated the likelihood of the appellant being sentenced to an enhanced punishment of life imprisonment for his conviction on count 2, and a minimum sentence of 15 years imprisonment for his conviction on count 1.

[13] The appellant was, in my view, quite clearly ignorant of his fair trial rights to be informed, in good time, of the charge he was facing and "of any likelihood" of him "being subjected to an enhanced punishment"[7] in terms of the minimum-sentencing regime created by the Act. As it happens, the appeal record reveals that neither the Judge nor the State fully understood the operation of the minimum sentencing regime created by the Act, and its implications for an accused convicted of murder as contemplated in the Act. Quite simply, the court *a quo* failed to recognise that the appellant could spend the rest of life in prison, without being informed from the outset what the consequences of being charged under the minimum-sentencing regime created by the Act were. It cannot, in the circumstances, be said that the appellant was not prejudiced by the proceedings in the court *a quo.*

[7] *S v Kolea* at para 9.

Accordingly, the court *a quo* clearly committed a misdirection by invoking the provisions of s 51(1) read with s 51(3) the Act, when the appellant's attention was not drawn to it in the charge sheet and at the outset of the trial. This constitutes a ground for this Court to interfere with the sentence imposed by the court *a quo* on appeal.

[14] As indicated, the court *a quo* only applied the minimum sentencing regime of the Act to the appellant's conviction on count 2 (murder). On applying s 51(1) read with s 51(3) of the Act to the appellant's conviction on count 2, the court *a quo* found substantial and compelling circumstances to be present which warranted a deviation from the minimum sentence of life imprisonment and consequently sentenced the appellant to a lesser sentence of 18 years imprisonment. On consideration of the sentence which the court a quo ultimately imposed upon the appellant in respect of his conviction on count 2 (murder), I find that it is not out of kilter with what a court would consider appropriate, for a conviction of murder, outside the minimum sentencing regime created by the Act.

[15] Murder is a serious offence which is prevalent in the jurisdiction of the Court. The appellant murdered the deceased, who was unarmed and posed no threat, because he wanted to avoid identification by him. Significantly, in this regard, the deceased was known to the appellant as they resided in the same area, and the deceased had assisted him with food and money from time to time in the past. Although Dingaan had handed the appellant the unlicensed firearm, and had instructed him to shoot the deceased in the stomach, the appellant elected instead to shoot the deceased in the ear in order to ensure that he died quickly. It was a cold, callous and senseless armed robbery and murder that was motivated by sheer greed and purely to avoid detection. Then, to silence the only witness to the robbery and shooting of the deceased, the appellant intimidated Ms Mashinini by pointing a gun at her and threatening to shoot her if she informed on him.

[16] The appellant pleaded not guilty and elected not to testify in mitigation of sentence. In the absence of testimony from the appellant as to what

motivated him to commit the crimes; what has since caused a change of heart; and whether he has a true appreciation of the consequences of his actions, I am unable to conclude that he was remorseful for his actions[8].

[17] In addition, the aggravating circumstances far outweigh the contentions that the appellant was only 23 years of age at the time of the commission of the offences and may have been influenced by Dingaan who was older than him, and that he was under the influence of alcohol when he committed the offences. Quite apart from the fact that the commission of an offence whilst under the influence of alcohol is not considered to be a mitigating factor, the appellant has simply failed to provide any evidential basis for these contentions. As stated by the SCA in *S v Matyity*[9]

'It is trite that a teenager is *prima facie* to be regarded as immature and that youthfulness of an offender will invariably be a mitigating factor unless it appears that the viciousness of his or her deeds rules out immaturity. Although the exact extent of mitigation will depend on all the circumstances of the case, in general a court will not punish an immature young person as severely as it would an adult. It is well established that, the younger the offender, the clearer the evidence needs to be about his or her background, education, level of intelligence and mental capacity, in order to enable a court to determine the level of maturity and therefore moral blameworthiness. The question in the final analysis, is whether the offender's immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduce his blameworthiness. Thus, whilst someone under the age of 18 years is to be regarded as naturally immature, the same does not hold true for an adult. In my view, a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor.'

Accordingly, I find that the sentence of 18 years imprisonment, which the court *a quo* imposed upon the appellant for his conviction on count 2 (murder) to be appropriate and justified. I, likewise, find that the sentences imposed by

[8] *S v Matyity* 2011 (1) SACR 40 (SACR) at para 13.
[9] (above) at para 14.

the court *a quo* in respect to the appellant's convictions on count 1 and counts 3 to 6 to also be appropriate, and justified.

[18] However, since the commission of offences of robbery with aggravating circumstances and murder where concurrent and closely connected to each other, I find the imposition of an effective sentence of 40 years imprisonment to be shockingly inappropriate. Significantly, in this regard, although the court *a quo* caused the sentences imposed on count 4 to run concurrently with the sentence imposed on count 3, and the sentence imposed on count 6 to run concurrently with the sentence imposed on count 5, it failed to take into consideration that the offences of robbery with aggravating circumstances and murder were closely connected to each other as contemplated in s 280(1) of the Criminal Procedure Act 51 of 1977 ("the Criminal Procedure Act"). Thus, by failing to give consideration to the cumulative effect of the sentences imposed, the court *a quo* overlooked the impact which a sentence of 40 years imprisonment would have on the well-being of the appellant. Accordingly, the court a quo committed a misdirection by failing to consider, the cumulative effect that a sentence of 40 years imprisonment will have upon the appellant who was only 25 years old at the time of sentencing and, the possibility that he may be integrated into society upon his or her release from jail in the future. In the circumstances, I find the effective sentence of 40 years imprisonment to be shockingly inappropriate.

[19] Furthermore, I am of the view that the court *a quo* committed a misdirection by ordering, in terms of s 276B of the Criminal Procedure Act, that the appellant must serve 25 years of the 40 year sentence imposed before he is placed on parole. This, as contended on behalf of the appellant impacts unduly harshly upon him and is tantamount to a sentence of life imprisonment. The court a quo, in my view, committed a misdirection first, by imposing a non-parole period of 25 years without providing an evidential basis and reasons for doing so[10] and second, by not inviting the appellant to make

[10] *S v Stander* 2012 (1) SACR 537 (SCA) paras 12-13 and 20.

submissions on the appropriateness of imposing such a period[11]. Significantly in this regard, our courts have consistently held that a non-parole period may only be set in exceptional circumstances[12]. No such circumstances were, however, found to be present in the current matter. Accordingly, I find that the court *a quo* committed a misdirection by imposing a non-parole period of 25 years.

[20] In the result, I make the following order:

(1) The appeal against sentence is upheld.

(2) The sentence of 15 years imprisonment imposed for the conviction on count 1 (robbery with aggravating circumstances) is confirmed.

(3) The sentence of 18 years imprisonment imposed for the conviction on count 2 (murder) is confirmed.

(4) The sentence of 4 years imprisonment imposed for the conviction on count 3 (intimidation) is confirmed.

(5) The sentence of 3 years imprisonment imposed for the conviction on count 4 (unlawful pointing of a firearm) is confirmed.

(6) The sentence of 2 years imprisonment imposed for the conviction on count 5 (unlawful possession of a firearm) is confirmed.

(7) The sentence of 1 year imprisonment imposed for the conviction of count 6 (unlawful possession of ammunition) is confirmed.

(8) The sentence of 15 years imprisonment imposed for the conviction on count 1 (robbery with aggravating circumstances) is to run concurrently with the sentence of 18 years imprisonment for the conviction on count 2 (murder).

(9) The order causing the sentence of 4 years imprisonment for the conviction on count 3 (intimidation) to run concurrently with the sentence of 3 years imprisonment for the conviction on count 4 (unlawful pointing of a firearm) is confirmed.

(10) The order causing the sentence of 2 years imprisonment for the conviction on count 3 (unlawful possession of a firearm) to run concurrently

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[11] *Strydom v The State* (2015/14) [2014] ZASCA 29 (23 March 2015) para 16

[12] *Director of Public Prosecutions, North Gauteng: Pretoria v Gcwala* 2014 (2) SACR 337 (SCA) para 20; *S v Stander* (above) paras 12 -13; *Strydom v The State* (above) para 16.

with the sentence of 1 year imprisonment for the conviction on count 4 (unlawful possession of ammunition) is confirmed.

(11) The effective sentence of 40 years is set aside and replaced with an effective sentence of 25 years imprisonment.

(12)The non-parole period of 25 years is set aside.

(13)The effective sentence is, in terms of s 282 of the Criminal Procedure Act 51 of 1977, antedated to 23 May 2000 being the date upon which the sentence was imposed by the court *a quo.*

F KATHREE-SETILOANE
JUDGE OF THE GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree:

AML PATHUDI
JUDGE OF THE GAUTENG LOCAL DIVISON, JOHANNESBURG

I agree:

P COPPIN
JUDGE OF THE GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for the Appellant:	Advocate WA Karam
Instructed by:	The Johannesburg Justice Centre
Counsel for the Respondent:	Advocate J Steyn
Instructed by:	The Director of Public Prosecutions
Date of Hearing:	30 May 2015
Date of Judgment:	28 July 2015