REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A374/14

Court *a quo* Court No. SS253/00

DPP Ref: JPV2000/0216

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED:
[Date]

.....

In the matter between:

DINZE, JOSEPH STUURMAN First Appellant

NONDWANGU, LUWANDA SIMON Second Appellant

MHLONGACALA, MXOLISI FLOID Third Appellant

and

THE STATE Respondent

Coram: Mabesele, Mudau JJ and Kolbe AJ

Judgments: Kolbe AJ with Mudau J concurring [1-38]

Mabesele J dissenting [39-53]

Date of Hearing: 18 March 2016

Judgment Delivered: 02 JUNE 2016

ORDER

On appeal from this Division of the High Court, against sentence imposed by the Honourable Du Toit (J):

> The appellants' appeal against their sentences are upheld. The sentences are set aside and replaced with the following:
>
> 1. Appellant No.1 is sentenced as follows:
>
> 1.1 Count 1: Life Imprisonment ;
>
> 1.2 Count 2: 10 years imprisonment ;
>
> 1.3 Count 3: 3 years imprisonment;
>
> 1.4 Count 4: 2 years imprisonment.
>
> 2. Appellant No's 2 and 3 are sentenced as follows:

2.1 Count 1: 20 years imprisonment;

2.2 Count 2: 10 years imprisonment;

2.3 The sentences imposed in respect of Counts 1 and 2 are ordered to be served concurrently.

3. All of the above sentences are antedated to 5 June 2005 in terms of the provisions of S 282 of the CPA;

JUDGMENT

KOLBE AJ (MUDAU J Concurring)

[1] This matter came before us as part of the delayed appeals project.

[2] The Appellants were as long ago as 5 June 2005 convicted and sentenced by Du Toit AJ sitting with assessors ("the Court *a quo*") and on 26 November 2010 granted leave to appeal against the sentences imposed by Claassen J

[3] We have been informed from the Bar that there are a number of pending appeals in respect of which the records are defective and cannot be reconstructed. This is such a matter.

[4] We are indebted to Mr Karam who appeared on behalf of the Appellants for his assistance and helpful approach. As the appeal is against the sentences imposed only, we were requested to dispose of the matter on the record as it stands.

[5] The record is incomplete in that all evidence relating to the merits as well as all exhibits are missing. The record placed before us consists of the indictment, the judgment of the Court *a quo* on the merits and the record of the proceedings relating to sentence. We accept that the remainder of the record is lost or destroyed and cannot be reconstructed.

[6] It is trite that where a record has been lost, an accused is not *ipso facto* entitled to an acquittal. See *S v Whitney and Another* 1975 (3) SA 453 (N). We are however, mindful of the following remarks in *S v Marais* 1966 (2) SA 514 (T) on page 517 A-B:

> *"If during a trial anything happens which results in prejudice to an accused of such a nature that there has been a failure of justice, the conviction cannot stand. It seems to me that if something happens, affecting the appeal, as happened in this case, which makes a just hearing of the appeal impossible, through no fault on the part of the Appellant, then likewise the Appellant is prejudiced, and there may be a failure of justice. If this failure cannot be rectified, as in this case, it seems to me that the conviction cannot stand, because it cannot be said that there has not been a failure of justice."*

[7] In this matter, as already mentioned, leave was granted to appeal against the sentences imposed only. The Court *a quo*'s judgment on the merits is comprehensive, contains a detailed summary of the evidence and fully reflects the Court's reasoning in convicting the appellants. We agree with Mr Karam, that the matter can and ought to, in the interests of justice, be disposed of on the existing record, provided of course that the appellants

are not prejudiced in any manner whatsoever by reason of the incompleteness of the record.

[8] The appellants were convicted on one count of murder, as well as one count of robbery with aggravating circumstances as defined in Section 1 of the Criminal Procedure Act 51 of 1977 ("the CPA").

[9] Appellant No. 1 was in addition convicted of unlicensed possession of a firearm in contravention of Section 2 of Act 75 of 1969 as well as the unlawful possession of ammunition in contravention of Section 36 of the same Act.

[10] Appellant No. 1 was in addition convicted of unlicensed possession of a firearm in contravention of Section 2 of Act 75 of 1969 as well as the unlawful possession of ammunition in contravention of Section 36 of the same Act.

[11] As far as Appellant No. 1 is concerned, there was an additional order that as far as may be relevant, the sentences imposed should run concurrently. In view of the imposition of the sentence life imprisonment, such an order was of course superfluous in view of the provisions of S 39(2)(a)(i) of the Correctional Services Act, Act No. 111 0f 1998.

[12] This brings us to the grounds of appeal which can be summarised as follows:

[12.1] In imposing sentence, the Court *a quo* invoked the mandatory minimum sentences provided for in s. 51 of the Criminal Law

Amendment Act, Act No. 105 of 1997 ("the minimum sentence legislation") in terms of which the Court was obliged, in respect of Count 1 to impose life imprisonment and in respect of Count 2, 15 years' imprisonment unless satisfied that substantial and compelling circumstances existed which justified the imposition of lesser sentences.

[13] Mr Karam referred us to the judgments in *S v Legoa* 2003 (1) SACR 13 (SCA), *S v Ndlovu* 2003 (1) SACR 331 (SCA), *S v Makatu* 2006 (2) SACR 582 (SCA), *S v Mashinini and Another* 2012 (1) SACR 604 (SCA) and *S v Kolea* 2013 (1) SACR 409 (SCA), in which judgments the principle was laid down that a fair trial to which every accused is entitled, will generally demand that the State's intention to eventually request the Court to invoke the provisions of the minimum sentence legislation, should be brought to the attention of the accused either by referring to the legislation in the indictment or in some other way.

[14] This principle was confirmed in the recent judgment of the Supreme Court of Appeal *Zwane v The State* (700/15) [2016] ZASCA 19 delivered on 17 March 2016.

[15] On a perusal of the record as it stands, it is clear that there is no reference to the minimum sentence legislation either in the indictment or the judgment by the Court *a quo*.

[16] As the record of the proceedings on the merits is lost it cannot be determined whether or not the appellants had been made aware thereof

that the State would ask the Court to invoke those provisions. In any event, had this happened, one would have expected a reference thereto in the judgment.

[17] Be this as it may, as already mentioned, the appellants cannot be prejudiced by the fact that the record is defective and we therefore, for purposes of this appeal, accept that the appellants had not been forewarned of the possibility that they may be sentenced in terms of the minimum sentence legislation.

[18] Consequently, the Court *a quo*'s sentencing of the appellants in terms of the minimum sentence legislation, constitutes a misdirection entitling this Court to set aside the sentences imposed by the Court *a quo* and to consider the imposition of appropriate sentences afresh.

[19] The personal circumstances of the Appellants are on record. All three Appellants were first offenders and incarcerated for a period of 2½ years pending finalisation of the matter.

[20] Appellant No.1 has reached a standard 6 (grade 8) level of education and engaged in temporary work at the time of the commission of the offences. Appellant No.2 had no fixed employment and engaged in doing temporary manual work. Appellant No.3 has a matric and was gainfully employed manufacturing power lines at the time of the commission of the offences.

[21] The offences were committed under the following circumstances: On Monday morning, 31 January 2000 at 06:00, the appellants together with a fourth person, surrounded the deceased in the street and robbed him of his

cellphone whereafter Accused No. 1 shot the deceased from behind and killed him.

[22] Not only was the robbery of a cell phone with the use of a fire arm by a group of persons, an horrendous crime, and a cancer in our society, but the gratuitous killing of the deceased shocking to say the least.

[23] In our view the nature of the offences and the interests of society call for sentences that would constitute punishment commensurate with the nature of the crimes and would serve as a deterrent for other would be offenders. This requirement should of course be balanced with the appellants' personal circumstances and blended with a measure of mercy.

[24] In our view, the appellants, as far as the murder charge is concerned, ought to be treated differently. Although all three appellants, by reason of having acted in furtherance of common purpose, were correctly convicted of murder, appellant No. 1, the actual shooter, was convicted on the basis of having had *dolus directus* in respect of the death of the deceased and appellants Nos 2 and 3 on the basis of having had *dolus eventualis* in respect of his death.

[25] In our view, the only appropriate sentence that can be imposed in respect of appellant No1's gruesome and gratuitous killing of the deceased is one of life imprisonment.

[26] The question now arises whether it would be permissible to impose a sentence of life imprisonment, having found that the Court a quo's

imposition of that sentence by invoking the provisions of the minimum sentence legislation constituted a misdirection.

[27] In our view, the fact that the provisions of the minimum legislation cannot be invoked, does not detract from the general discretion conferred upon a Court by the CPA with regards to the imposition of appropriate punishment.

[28] The nature of punishments that may be imposed by a Court are set out in s 276(1) of the CPA, the relevant portion of which reads as follows:

> *"(b) Imprisonment, including imprisonment for life ….."*

[29] Ito s 283 of the CPA, a Court, in sentencing an accused, retains a discretion to impose a lesser sentence than the sentence for which the accused may be liable save insofar as the minimum sentence legislation may be applicable.

[30] There is a clear a difference in a Court's approach when imposing life imprisonment in the exercise of its discretion and imposing life imprisonment by invoking the provisions of s 51 of the minimum sentence legislation.

[31] S 51(1) of the minimum sentence legislation reads as follows:

> *"Notwithstanding any other law but subject to sections (3) and (4) a regional court or a high court <u>shall</u> sentence a person it has convicted …* (emphasis added) *to the prescribed sentences"*.

[32] The correct approach to be adopted by a Court in the event of the minimum sentence legislation being applicable is summarised as follows in the judgment of *S v Malgas* 2001 (1) SACR 469 (SCA) on 480, paragraph [20]:

> *"The best one can do is to acknowledge that one is obliged to keep in the forefront of one's mind that the specified sentence has been prescribed by law as the sentence which must be regarded as ordinarily appropriate and that personal distaste for such legislative generalisation cannot justify an indulgent approach to the characterisation of circumstances as substantial and compelling."*

[33] And on page 482 G that:

> *"The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ("substantial and compelling") and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained."*

[34] When the provisions of the minimum sentence legislation are invoked, there is an onus on an accused to show substantial and compelling circumstances which would justify the imposition of a lesser sentence than the relevant prescribed minimum sentence which a Court is obliged to impose should an accused fail to show such circumstances.

[35] In the event of a Court considering an appropriate sentence in the exercise of its discretion in the manner provided for in sections 276(1)(b) and 283(1)

of the CPA, no such onus rests on an accused and the ordinary factors relevant to the imposition of sentence are considered.

[36] We therefore find that the fact that the provisions of the minimum sentence legislation may not be invoked, does not detract from a Court's general discretion, conferred upon it by the CPA, to impose an appropriate sentence.

[37] Having carefully considered the personal circumstances of the appellants, their roles in the commission of the crimes, the nature of the crimes committed, the prevalence thereof, the interests of the community, where applicable the period spent in custody awaiting finalisation of the trial and the cumulative effect of the sentences and showing a measure of mercy the following order is made:

[38] The appellants' appeal against their sentences are upheld. The sentences are set aside and replaced with the following:

3. Appellant No.1 is sentenced as follows:

    1.5 Count 1: Life Imprisonment ;

    1.6 Count 2: 10 years imprisonment ;

    1.7 Count 3: 3 years imprisonment;

    1.8 Count 4: 2 years imprisonment.

4. Appellant No's 2 and 3 are sentenced as follows:

    2.1 Count 1: 20 years imprisonment;

    2.2 Count 2: 10 years imprisonment;

2.3 The sentences imposed in respect of Counts 1 and 2 are ordered to be served concurrently.

3. All of the above sentences are antedated to 5 June 2005 in terms of the provisions of s 282 of the CPA;

MABESELE J

[39] This appeal forms part of the Delayed Criminal Appeals Project

[40] I had the opportunity to read the judgment and order made by Kolbe AJ with Mudau J concurring. I respectfully disagree with their judgement and order.

[41] The appellants appeal against the sentence of life imprisonment for murder (count1) and fifteen years for robbery with aggravating circumstances (count 2) imposed on each of them.

[42] Each appellant raised the following issues:

(i) They were not charged in terms of the minimum sentences legislation and further that the learned acting judge did not advise them of the fact that they faced minimum sentences, if convicted, or enquired from their respective counsel as to whether counsel were aware of same and had explained same to them.

(ii) In the alternative, the appellants argue that the personal circumstances of each of them, cumulatively considered, constitute substantial and compelling factors, warranting a departure from the prescribed minimum sentences on counts 1 and 2.

[43] On 31 January 2000 the appellants, acting in furtherance of a common purpose, shot and killed the deceased and robbed him of his cell phone.

[44] The indictment reads as follows:

"*Die Direkteur van Openbare Vervolgings van die Witwatersandse Plaaslike Afdeling van die Hoogeregshof van Suid Afrika, wat vir en namens die Staat vervolg stel die Agbare Hof hiermee in kennis dat:*

1. ***DINZE, JOSEPH STUURMAN***

   'n 22-jarige man, woonagtig te D….. t….. V…. T…..

2. ***NONDWANGU, LUWANDA SIMON***

   'n 26-jarige man, woonagtig te A 5…. T…… V……, T…..

3. ***MHLONGACALA, MXOLISI FLOID***

   'n 28-jarigte man, woonagtig te D….. T….. V…… T…….

skuldig is aan die volgende misdrywe:

1. *Moord*
2. *Roof met verswarende omstandighede soos bedoel in artikel 1 van Wet 41 van 1977.*
3. *Oortreding van artikel 2 gelees met artikel 1 en 39 van Wet 75 van 1969 (slegs beskuldigde 1)*
4. *Oortreding van artikel 36 gelees met artikels 1 and 39 van Wet 75 van 1969 (slegs beskuldigde1)*

AANKLAG 1

Deurdat op of omtrent 31 Januarie 2000 en te of naby Brackendowns in die distrik van Alberton die beskuldiges wederregtelik en opsetlik vir Stephanus Francis Smit gedood het.

AANKLAG 2

Deurdat op of omtrent die datum en te of naby die plek in aanklag 1 genoem, die beskuldiges wederregtelik en opsetlik ver Stephanus Francois Smit aangerand het en toe daar met geweld 'n sellulere foon, sy eiedom of in sy regmatige besit van hom geneem het.

AANKLAG 3 (SLEG BESKULDIGDE 1)

DEURDAT op of omtrent die datum en te of naby die plek in Aanklag 1 genoem, die beskuldigde wederregtelik in besit was van 'n 7.62 mm pistol sonder dat hy die houer was van 'n geldige lisensie om genoemde wapen te besit

AANKLAG 4 (SLEGS BESKULDIGDE 1)

DEURDAT op of omtrent die datum en te of naby die plek in Aanklag 1 genoem die beskuldigde in besit was van 'n onbekende aantal rondtes 7.62 mm ammunsie sonder dat hy die wettige houer was van "n vuurwapen waaruit genoemde ammunisie afgevuur kon word.

Ingeval van skuldig bevinding versoek genoemde Direkteur van Openbare Vervolgings vonnis teen die beskuldigdes ooreenkomstig die reg."

[45] It is apparent from the indictment that the appellants were not charged in terms of the minimum sentences legislation is respect of counts 1 and 2. Secondly, there is no indication in the record that the appellants were advised of the fact that they faced minimum sentences, if convicted of counts 1 and 2.

[46] Each appellant has a clean record. The appellants were incarcerated for a period of two and a half years pending finalisation of the matter.

[47] The essential issue to be determined is whether it can be said that the appellants had a fair trial as provided for in the Constitution despite the fact that minimum sentence legislation was not explained to them.

[48] Section 35(3) (a) of the Constitution provides that every accused person has a right to a fair trial.

[49] According to Mbha AJA, in S V Kolea 2013(1) SACR 409 (SCA) at 411, the objective (behind the accused person's right to a fair trial) is not only to avoid a trial by ambush, but also to enable the accused to prepare adequately for the trial and to decide, *inter alia,* whether or not to engage legal representation, how to plead to the charge and which witnesses to call. The learned judge stated further 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.

[50] This approach had already been endorsed in SV Ndlovu 2003(1) SACR 331(SCA) wherein it was held that where the state intends to rely upon the

sentencing regime created by the Act a fair trial will generally demand that its intention be pertinently brought to the attention of the accused at the outset of the trial. Mpati JA, (on page 337, par. 14) said the following:

> "*In the circumstances of this case it cannot be said that the appellant suffered no prejudice from the magistrate's failure to warn him of the consequences of his findings, should he make such as a finding…… By invoking the provisions of the Act without it having been brought pertinently to the appellant's attention that this would be done rendered the trial in that respect substantial and compelling reason why the prescribed sentence ought not to have been imposed….."*

[51] It was for that reason that the sentence of 15 years imprisonment that was imposed on the appellant for possession of semi-automatic firearm was set aside and replaced with a sentence of 3 years imprisonment.

[52] In the present case the appellants were not warned of the consequences of the charges they were facing in counts 1 and 2. That, in my view, rendered their trial unfair, thereby justifying a departure from the prescribed sentences in the said counts. The result is that I would alter sentences in counts 1 and 2 and take into account, also, the record of each appellant and the period they spent in prison, awaiting trial.

[53] For these reasons, I would make the following order:

1. Each appellant is sentenced to a period of 20 years imprisonment on count1, 12 years imprisonment on count 2; 5 years of 12 years

imprisonment on count 2 in respect of each appellant should run concurrently with the sentence of 20 years imprisonment.

2. The sentences in paragraph (1) above should be backdated to 5 June 2005.

MABESELE J

MUDAU J

KOLBE AJ

APPEARANCES

On Behalf of the Appellants: W.A Karam

Instructed By: Legal Aid South Africa, Johannesburg

On Behalf of the Respondent: L.R Surendra

Instructed By: Director of Public Prosecutions,

Gauteng Local Division, Johannesburg