THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 679/2011
Not Reportable

In the matter between:

THULANE DZUDZU THWALA **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Thulane Dzudzu Thwala v The State* (679/11) [2012] ZASCA 46 (29 March 2012)

Coram: CLOETE, MHLANTLA, BOSIELO, TSHIQI JJA AND PETSE AJA

Heard: 23 February 2012

Delivered: 29 March 2012

Summary: Sentence – imposition of – factors to be taken into account – appellant convicted of robbery with aggravating circumstances involving use of a knife – minimum sentencing provisions of the Criminal Law Amendment Act 105 of 1997 not applicable – complainant robbed of a sum of R320 and wrist watch valued at R780 – no bodily harm caused to complainant – whilst brandishing a knife accused's action limited to threats only.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Raath and Da Silva AJJ sitting as court of appeal):
The appeal is upheld and the order of the court below is set aside and replaced with the following:

'1 The appeal is upheld.

2 The sentence imposed by the court below is set aside and replaced with a sentence of eight years' imprisonment which is ante-dated to 23 August 2004.'

JUDGMENT

PETSE AJA (CLOETE, MHLANTLA, BOSIELO, TSHIQI JJA concurring):

[1] On 11 August 2004 the appellant was charged in the regional court, Daveyton, with robbery with aggravating circumstances (count 1) and with contravening s 36 read with ss 39(2) and 40 of the Arms and Ammunition Act 75 of 1969 (count 2). Despite his plea of not guilty to both counts he was subsequently convicted on count 1 and found not guilty and discharged on count 2. He was sentenced to twenty-five years' imprisonment.

[2] His appeal against conviction to the North Gauteng High Court was dismissed in a judgment of Raath AJ (in which Da Silva AJ concurred). But the appeal against sentence was partially successful. The sentence of 25 years' imprisonment imposed by the trial court was set aside and substituted with a sentence of 15 years' imprisonment.

[3] Disenchanted with the outcome of his appeal the appellant applied for leave to appeal to this court against his conviction on count 1 and the resultant sentence. On 12 August 2008 the court below refused the appellant leave to appeal against conviction but

granted it in respect of sentence.

[4] The evidence adduced at the trail was briefly as follows:
The complainant John Thwala, a resident of Daveyton, went to a shebeen in his area at approximately 11h20 where he found the appellant present. He elected to sit alone outside. The appellant was also sitting outside with his friend Busiso. The appellant approached the complainant who soon realised that the appellant was intent on taking his cellular telephone which he held in his hand. Disgusted at the appellant's menacing behaviour the complainant left and returned home to sleep. He later returned to the shebeen and there met the appellant at the gate of the premises as he (the complainant) arrived. The appellant drew an okapi knife and robbed him of his wristwatch and a sum of R320. The complainant did not offer any resistance nor did he sustain any injuries.

[5] The next morning the complainant reported the incident to the appellant's grandmother and uncles. Thereafter he laid a charge of robbery against the appellant. Nothing was recovered from the appellant.

[6] In imposing sentence on the appellant the trial court said the following:
'The court considers your personal [circumstances] as your attorney has outlined. You [are] still young [at] 25 years, . . . But the court finds that there are no compelling circumstances to deviate from the minimum sentences. Furthermore you have two directly relevant previous convictions of assault which involve violence and malicious injury to property which involves violence and destroying another person's property which is very relevant to robbery.'
It then proceeded to impose a sentence of twenty-five years' imprisonment.

[7] In imposing the sentence it did, the trial court evidently had regard to the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997 (the Act).

Section 51(2) of the Act provides:

'(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.'

Robbery, when there are aggravating circumstances as defined in s 1(1)*(b)* of the Criminal Procedure Act 51 of 1977, is one of the offences referred to in Part II of Schedule 2 of the Act.

[8] The court below, as mentioned earlier in this judgment, dismissed the appeal against conviction. As to the sentence it held that the trial court's view that the appellant was a third offender for purposes of Part II of Schedule 2 as contemplated in s 51(2) of the Act, was erroneous. It held that the appellant's two previous convictions – being assault with intent to do grievous bodily harm and malicious damage to property – were not previous convictions as contemplated in s 51(2) of the Act. But for this erroneous view of the trial court, the court below held that the trial court ought to have imposed a sentence of fifteen years' imprisonment. It consequently set aside the sentence of twenty-five years' imprisonment and substituted it with a sentence of fifteen years' imprisonment, this being the prescribed minimum sentence for robbery in terms of the Act.

[9] In granting leave to appeal against sentence in an extempore judgment by Hartzenberg J in which Potteril AJ concurred, the court below reasoned that '. . . there is some room for an argument that substantial and compelling circumstances exist for imposing a lesser sentence' and that 'the sentence of 15 years' imprisonment seems . . . looking at the whole matter that [it] is excessive for the act that has been committed.'

[10] In this court counsel for the appellant argued, as a preliminary point, that both the trial court and the court below were oblivious to the fact that the appellant was not apprised, either in the charge sheet or otherwise, that the provisions of s 51(2) of the Act would be invoked. It was contended that it was during sentencing that mention was made for the first time that the so-called minimum sentencing legislation was applicable. The implication of this submission is that the appellant's fair trial rights were infringed. Counsel for the appellant pinned his hopes on *S v Chowe* 2010 (1) SACR 141 (GNP) in which the

following dictum appears at para 22-23:

'. . . it is clear that the appellant had not been warned at the beginning of the case that the minimum sentence was applicable. The fact that the accused was legally represented, in my view, does not take away the need to inform the accused that such minimum sentencing dispensation of the Act would be relied upon for sentencing. Section 35(3)*(a)* of the Constitution requires that the accused be informed of the charge with sufficient detail to answer to it. This entails, in my view, inter alia, the applicability of the minimum sentencing provisions of the Act.

I am of the view that a perfunctory approach by the lower courts with regard to the minimum sentence regime is not to be countenanced. The record must speak for itself, that, right at the pleading stage, irrespective of whether such an accused person is legally represented or not, he has been informed of the applicability of the Minimum Sentence Act. By so insisting we shall be ensuring that the right to a fair trial is ingrained in our criminal jurisprudence, ensuring that at all times accused persons make an informed decision in the preparation and the conducting of their defences.' (Footnotes omitted.)

I shall return to what is said in para 23 of *Chowe* in a moment.

[11] In *S v Legoa* 2003 (1) SACR 13 (SCA) this court, in considering the question whether the failure by the State to alert an accused person in the charge sheet that it would be relying on the provisions of the minimum sentencing legislation, concluded that under the common law it was a salutary practice that the charge sheet should set out all the facts the State intended to rely on to bring the accused within an enhanced sentencing jurisdiction. It went on to say the following at para 20-21:

'But under the constitutional dispensation it can certainly be no less desirable than under the

common law that the facts the State intends to prove to increase sentencing jurisdiction under the 1997 statute should be clearly set out in the charge-sheet.

The matter is, however, one of substance and not form, and I would be reluctant to lay down a general rule that the charge must in every case recite either the specific form of the scheduled offence with which the accused is charged, or the facts the State intends to prove to establish it. A general requirement to this effect, if applied with undue formalism, may create intolerable complexities in the administration of justice and may be insufficiently heedful of the practical realities under which charge-sheets are frequently drawn up. The accused might in any event acquire the requisite knowledge from particulars furnished to the charge or, in a Superior Court,

from the summary of substantial facts the State is obliged to furnish. Whether the accused's substantive fair trial right, including his ability to answer the charge, has been impaired, will therefore depend on a vigilant examination of the relevant circumstances.'

It is not without significance that this court is *Legoa* refrained from laying down a general proposition that failure to do so would vitiate the proceedings.

[12] Hot on the heels of *Legoa* was *S v Ndlovu* 2003 (1) SACR 331 (SCA) in which this court stated (para 12):

'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 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 its possible consequences. Whether, or in what circumstances, it might suffice if it is brought to the attention of the accused only during the course of the trial is not necessary to decide in the present case. It is sufficient to say that what will at least be required is that the accused be given sufficient notice of the State's intention to enable him to conduct his defence properly.'

It should be emphasised that both *Legoa* and *Ndlovu* make it plain that the fairness or otherwise of the trial in the context of the provisions of the minimum sentencing legislation ought not to be determined in the vacuum but within the context of the circumstances of each case.

[13] I now revert to the passage quoted from *Chowe* in para 10 above. The point I

seek to highlight in relation thereto is that to the extent that the last two sentences of that passage suggest that if the accused has not been pertinently informed of the applicability of the minimum sentencing legislation 'right at the pleading stage' that in itself, regardless of all else, would vitiate the proceedings, I do not, with respect, consider it to accurately reflect the state of the law on this subject. It is, in my view, at odds with what this court said both in *Legoa* and *Ndlovu* above.

[14] I turn now to consider the question whether on the peculiar facts of this case the invocation of the provisions of the minimum sentencing legislation at so late a stage during

the trial infringed the appellant's rights to a fair trial. The trial court in its judgment on sentence made only a passing reference to the minimum sentencing legislation. Even then it did so in a most perfunctory fashion. In *S v Malgas* 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222; [2001] 3 All SA 220) para 25 this court made it plain that 'all factors . . . traditionally taken into account in sentencing (whether or not they diminish moral guilt) continue to play a role' when considering the question whether substantial and compelling circumstances as contemplated in s 51(3) exist.

[15] The appellant was at no time, either before or during his trial, warned that the minimum sentencing legislation would be invoked. Thus he did not have even the slightest inkling that this might occur until he was confronted with that reality when the trial court made a passing reference to such legislation when imposing sentence. To my mind it was therefore unfair and highly prejudicial to the appellant for the trial court to have done so.

[16] It therefore follows that when it came to sentence the trial court 'had a clean slate on which to inscribe whatever sentence it thought fit,' (*Malgas* para 8) untrammelled by s 51(2) of the Act.

[17] The appellant contended that the sentence imposed on him is disturbingly inappropriate and that the court below misdirected itself in its approach to sentence.

[18] At the outset it bears mention that the principle that applies with respect to an appeal against sentence is well-established. It is trite that sentencing is a matter pre-eminently within the discretion of the trial court and that a court of appeal will interfere with the exercise of such discretion only on limited grounds.

[19] In *Malgas* this court restated the test in these terms at para *12:*

'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, and appellate Court is of course entitled to consider the question of sentence afresh. In

doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate".'

In this case this court is at large to interfere given the material misdirection committed by the trial court when it applied the minimum sentencing legislation.

[20] When imposing sentence a court must ordinarily have regard to the fact that the imposition of sentence is principally a matter of judicial discretion save where the legislature has decreed otherwise. This then requires that the sentencing court should have regard to, inter alia, the peculiar facts of each case, the crime and the personal circumstances of the offender. (See eg *S v Zinn* 1969 (2) SA 537 (A) at 540G).

[21] It is plain from the judgments of the courts that crimes involving violence, as robbery does, are always viewed in a serious light. Their gravity is, for example, reflected in a passage from the judgment of the Constitutional Court in *S v Makwanyane & another* 1995 (2) SACR 1 (CC) para 117:

'The need for a strong deterrent to violent crime is an end the validity of which is not open to question. The State is clearly entitled, indeed obliged, to take action to protect human life against violation by others. In all societies there are laws which regulate the behaviour of people and which authorize the imposition of civil or criminal sanctions on those who act unlawfully. This is necessary for the preservation and protection of society. Without law, society cannot exist. Without law, individuals in society have no rights. The level of violent crime in our country has reached alarming proportions. It poses a threat to the transition to democracy, and the creation of development opportunities for all, which are primary goals of the Constitution. The high level of violent crime is a matter of common knowledge and is amply borne out by the statistics provided by the Commissioner of Police in his *amicus curiae* brief. The power of the State to impose sanctions on those who break the law cannot be doubted. It is of fundamental importance to the future of our country that respect for the law should be restored, and that dangerous criminals should be

apprehended and dealt with firmly. Nothing in this judgment should be understood as detracting in any way from that proposition. But the question is not whether criminals should go free and be allowed to escape the consequences of their anti-social behaviour. Clearly they should not; and equally clearly those who engage in violent crime should be met with the full rigour of the law.'

[22] The crime committed by the appellant is, apart from its seriousness, also prevalent. Moreover the appellant's ill-gotten loot was not recovered. These factors dictate that the elements of retribution and deterrence must come to the fore when assessing an appropriate sentence. But there are strong mitigating factors weighing heavily in favour of the appellant. Although not a youthful offender the appellant is a relatively young man; the complainant was not injured; although he drew a knife he did not use it; no violence or force was used to perpetrate the crime. And although the loss suffered by the complainant is not insignificant it was not substantial.

[23] I have given consideration to the cases cited in the appellant's heads of argument in support of the proposition that the trial court ought to have found that substantial and compelling circumstances exist and thus sentence the appellant accordingly. However, I do not consider it appropriate to have regard to those cases given the conclusion reached in this case that it was not competent for the trial court on

the facts of this case to invoke the minimum sentencing legislation. As Olivier JA made it plain in *S v Jimenez 2003* (1) SACR 507 (SCA) para 12 that:

'In general, it is not permissible to have regard, without the necessary caveats, qualifications and distinctions, to sentences imposed on the strength of minimum sentence provisions in a case where the minimum provisions are not applicable. The point of departure in prescribing maximum and minimum sentences differs substantially from that applicable to cases where no such provisions are prescribed; and equating without the necessary caveats, qualifications and distinctions the reasoning of the one with the other will often not be valid.'

Thus, having regard to those cases would be ill-advised.

[24] On a conspectus of all the relevant considerations it is my view that a sentence of eight years' imprisonment would have satisfied the dictates of justice in the circumstances of this case.

[25] Before concluding it is unfortunately necessary to make some adverse comments on what transpired in the trial court. First, upon the conclusion of the adduction of evidence the following exchange took place between the appellant and the trial court:

'Court: Okay. Accused do you have anything to say? Regarding the merits. Or whether you should be found guilty or not and the reasons.

Accused: I will ask the court to find me not guilty because I did not do it your worship. That is all your worship it is just that I am not guilty.'

As the appellant was represented at the trial it was procedurally impermissible of the trial court to invite him to address it on the merits of the case when his attorney had in fact already done so.

[26] Moreover the manner in which the trial court addressed the appellant as 'accused' was demeaning. In *S v Gwebu* 1988 (4) SA 155 (W) it was held that the habit of addressing accused persons by the appellation 'accused' or its Afrikaans equivalent 'beskuldige' was both disrespectful and degrading. At *158G-H* the court held that:

'It is no cause for difficulty for people to be called by their proper names. I can find no reason for the appellant, in this case, when addressed directly by the magistrate, not being called "Mr

Gwebu". Members of the public who appear in our courts, whether as accused or as witnesses, are entitled to be treated courteously and in a manner in keeping with the dignity of the court.'

I wholeheartedly align myself with these sentiments bearing in mind that s 10 of the Constitution provides, in the Bill of Rights, that:

'Everyone has inherent dignity and the right to have their dignity respected and protected.'

[27] Second, in the course of its judgment the trial court said the following:

'However the other thing that the court looks at is that the accused went and robbed a person who he knew was very sickly and the reason he robbed him was because he knew that this person is very weak. Also the way he committed his robbery, he flicked a knife and threatened him and he is a person who he knew for five years. They used to sit and drink together.'

Other than that the complainant had testified that he had known the appellant for five years there was simply no evidence that the appellant robbed the complainant because he knew that he was very weak. Nor was there any evidence that the appellant and the

complainant 'used to sit and drink together'.

[28] With respect to the inquiry in terms of s 12 of the Arms and Ammunition Act 75 of 1969 (since repealed by the Firearms Control Act 60 of 2000) the trial court said that:

'if [the appellant] had a firearm [he] would in all probability have killed the complainant, which shows clearly that [he] is a dangerous person with a firearm.'

Again there was no basis for this conclusion whatsoever.

[29] With respect to the appellant's application for leave to appeal his conviction and sentence – which the trial court refused – it stated that the test for leave to appeal is whether 'another court will come to a different conclusion on the same evidence.' This is, however, not the test. The proper test, which is trite, is whether there is a reasonable prospect of success on appeal. See eg *Rex v Baloi* 1949 (3) SA 523 (A) at 524; *S v Mabena & another* 2007 (1) SACR 482 (SCA) at 494e-f.

[30] In the result the appeal succeeds. The sentence imposed by the court below is set aside and in its place the following sentence is substituted:

‘1 The appeal is upheld.

2 The sentence imposed by the court below is set aside and replaced with a sentence of eight years’ imprisonment which is ante-dated to 23 August 2004.’

X M Petse
Acting Judge of Appeal

APPEARANCES

APPELLANT:	L A Van Wyk (Ms)
	(with her J M Mojuto)
Instructed by :	Legal Aid South Africa, Pretoria
	Legal Aid South Africa, Bloemfontein
RESPONDENT:	M J Makgwatha
Instructed by:	The Director of Public Prosecutions, Pretoria;
	The Director of Public Prosecutions, Bloemfontein