



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case No: 53/2021

In the matter between:

SIBONGILE LUPUMLO MPUQE

APPELLANT

and

THE STATE

RESPONDENT

Neutral Citation: *Sibongile Lupumlo Mpuqe v The State* (53/2021) [2022]
ZASCA 37 (4 April 2022)

Coram: MOLEMELA, MBATHA and CARELSE JJA and SMITH
and WEINER AJJA

Heard: 15 February 2022

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the website of the Supreme Court of Appeal and release to SAFLII. The date and time for hand-down are deemed to be 11h00 on 4 April 2022.

Summary: Criminal Law and Procedure – appellant indicted for murder under s 51(2) of the Criminal Law Amendment Act 105 of 1997 – convicted and sentenced under s 51(1) of the Criminal Law Amendment Act – sentence of life imprisonment confirmed; sentence relating to possession of firearms and ammunition under s 51(2) of the Criminal Law Amendment Act confirmed; appellant convicted for attempted murder under common law – sentence of 15 years’ imprisonment set aside – reduced to 10 years – to run concurrently with other sentences.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Davis, Goliath and Henney JJ, sitting as court of appeal):

1 The appeal against the sentences imposed in respect of counts two, four and five is dismissed.

2 The appeal against the sentence of 15 years’ imprisonment, imposed in respect of count three, is upheld. The sentence is set aside and substituted with the following:

‘The accused is sentenced to ten (10) years’ imprisonment on count 3 for attempted murder.’

3 The sentence set out in para 2 above is antedated to 15 December 2010 and is to run concurrently with the sentences imposed in respect of counts one, two, four and five.

JUDGMENT

Mbatha JA (Molemela and Carelse JJA and Smith and Weiner AJJA concurring)

[1] The appellant, Mr Sibongile Lupumlo Mpuqe and his erstwhile co-accused were arraigned in the Western Cape Division of the High Court, Cape Town, on a charge of robbery with aggravating circumstances (count one), murder (count two), attempted murder (count three), possession of unlicensed firearms (count four) and illegal possession of ammunition (count five). The provisions of the Criminal Law Amendment Act 105 of 1997 (the CLAA) applied to counts one, two and four.

[2] Despite the appellant's plea of not guilty, he was convicted as charged. The trial court found no substantial and compelling circumstances that warranted a deviation from the minimum sentences than the ones prescribed in terms of the CLAA, in respect of counts one, two and four. The appellant was accordingly sentenced to 15 years' imprisonment in respect of count one, life imprisonment in respect of count two, 15 years' imprisonment in respect of count three, and 15 years' imprisonment on counts four and five, which were taken together for purposes of sentence. In respect of the attempted murder conviction in count three, which did not fall under the purview of the CLAA, a sentence of 15 years' imprisonment was imposed. All the sentences were ordered to run concurrently.

[3] Aggrieved by this result, the appellant applied for leave to appeal against both convictions and sentences to the full court. The trial court granted him leave

to appeal against the sentences, but denied him leave against the convictions. His appeal on sentences to the full court failed. Subsequently, the appellant was granted special leave to appeal to this Court only in respect of sentence, hence the present appeal. Both parties agreed that the matter may be disposed of in terms of s 19(a) of the Superior Courts Act 10 of 2013, without hearing any oral argument.

[4] The appellant also applied in terms of rule 12 of the Rules of the Supreme Court of Appeal (the Rules) for condonation for failure to comply with rule 7(b) of the Rules, by not filing the notice of appeal within the prescribed one month period from the date of granting leave to appeal. The application was unopposed. This Court having satisfied itself that a proper case for condonation was made out, granted condonation.

[5] A summary of the relevant evidence adduced at the trial is as follows. On 18 December 2007, two unsuspecting security officers, deployed to collect cash from a Pick n Pay Supermarket to an Absa Bank in Hermanus, came under fire from a group of robbers. The robbers ordered them to drop the money bags on the floor. Eventhough they complied with the orders, the robbers shot at them at close range. One of the security officers, Mr Norawuzana (the deceased), succumbed to his injuries and died on the scene, and the other, Mr Mabhikwana, was saved by the metal lining of his bulletproof vest. This enabled him to run away and seek cover in one of the shops.

[6] Having committed these brazen acts, the robbers took the money bags and drove off in a getaway motor vehicle. As they sped off at high speed, their motor vehicle collided with a kerb a few kilometres from the crime scene. The motor

vehicle was abandoned by the robbers, who fled on foot in different directions. As they fled from the crashed motor vehicle, they were spotted and pursued by civilians who kept them in sight at all times. Upon the arrival of the police, the robbers were arrested in the immediate vicinity of the abandoned motor vehicle. The bags containing the money were recovered as well as the firearms. The appellant was amongst those arrested by the police in close proximity to the getaway motor vehicle and the firearms, which were recovered by police officers.

[7] It is apparent to this Court that on the day of the incident the appellant and his co-accused were on a mission to commit a crime in Hermanus, a very busy holiday town in the Western Cape. Such an inference can be drawn from the following objective facts: they had organised a getaway motor vehicle; they were armed with semi-automatic firearms; the robbery was executed after a long weekend during a very busy period of the year and they shot at the security officers several times to further their intention of committing a robbery. The aforementioned objective facts constituted sufficient evidence to conclude that the offences committed were premeditated and committed by a group of persons in furtherance of a common purpose.

[8] I now turn to the question of law raised by the appellant, which impacts on the sentences imposed by the trial court and confirmed by the court a quo. It is trite that an appeal court will interfere with sentencing only if there is a misdirection with regard to the sentence. However, a misdirection alone does not suffice for a court of appeal to interfere, save where it is material.¹

¹ *S v Sadler* [2000] ZASCA 13; [2000] 2 All SA 121 (A) para 8.

[9] In respect of the murder conviction, the appellant was sentenced to life imprisonment in terms of s 51(1) of the CLAA. The indictment only referred to s 51(2) of the CLAA. In dismissing the appeal against the appellant, the court a quo found that he was correctly sentenced in terms of s 51(1) of CLAA and that there was no infringement of his right to a fair trial. The court a quo stated that the trial court had enquired from counsel for the appellant's erstwhile co-accused number one, if he had apprised his client of the minimum sentence legislation and its application to the counts that were relevant thereto. The response was that counsel for the then-accused number one had not done so, as he had focused on the merits of the case. The trial court afforded him an opportunity to explain the CLAA provisions and their implications to his client. On that basis, the court a quo found that it was implausible that the rest of the legal team, including counsel for the appellant, would not have taken advantage of that opportunity to explain to their clients, including the appellant, what the CLAA entailed and its consequences. This was in line with the principle that the trial court was enjoined to satisfy itself on this aspect before the commencement of the proceedings.

[10] The indictment, in this case, referred to the applicability of the CLAA, but wrongly referred to s 51(2), which attracts a sentence of 15 years' imprisonment for the first offender. Notably, the prosecutor, defence counsel and the court made reference to the sentence of life imprisonment throughout the hearing. Had it been a misdirection on the part of the court, objections would have been raised by any of the defence counsel representing the accused.

[11] This Court held in *S v Legoa*² (*Legoa*) that sentencing in lieu of a conviction must encompass all the elements of the offence set out in the Schedule.

² *S v Legoa* [2002] ZASCA 122; [2002] 4 All SA 373 para 14.

Schedule 2 to the CLAA reflects those specific serious offences where the legislature has ordained the prescribed minimum sentences. The murder count faced by the appellant involved multiple accused, which was premeditated and planned. This occurred during the robbery and was committed by persons acting in furtherance of a common purpose. Therefore, such a murder falls under the provision of s 51(1) and attracts a sentence of life imprisonment. The fate of this appeal hinges in considerable measure on whether the sentence of life imprisonment was correctly imposed. Therefore, it is appropriate for this court to consider the record in its entirety, particularly before conviction, to determine if such a material defect occurred and if it led to an unfair trial.

[12] This appeal is distinguishable from *Ndlovu v S*³ (*Ndlovu*), where the appellant had been erroneously sentenced to life imprisonment instead of 15 years in line with the charges against him in terms of s 51(2) of CLAA. When the regional court found *Ndlovu* guilty as charged, it was aware that he was charged in terms of s 51(2) and not s 51(1) of CLAA. Accordingly, when the regional court imposed a sentence of life imprisonment, it exceeded its jurisdiction. Hence, the Constitutional Court had to decide whether the imposition of a harsher sentence than that envisaged in the indictment infringed *Ndlovu*'s right to a fair trial.

[13] In *Ndlovu*, the Constitutional Court affirmed that s 35(3) of the Constitution guarantees the right to a fair trial, which includes the right to be informed of the charge with sufficient detail to answer it.⁴ An accused person's

³ *Ndlovu v S* [2017] ZACC 19; 2017 (10) BCLR 1286 (CC).

⁴ *Ibid* para 2 at fn 1.

right to a fair trial has been the subject of various decisions of this Court.⁵ For example, in the case of *S v Makatu*⁶ (*Makatu*) the court held that:

‘Following *Legoa* this Court in *Ndlovu* held that the relevant sentence provisions of the Act must be brought to the attention of an accused in such a way that the charge can be properly met before conviction.’ (Footnotes omitted.)

[14] In *Mashinini and Another v S*,⁷ the appellants were erroneously charged with rape, read with the provisions of s 51(2) instead of s 51(1) of the CLAA. The sentence was set aside by this Court. In *casu*, the court held that:

‘[17] In this matter, the State decided to restrict itself to s 51(2), where Part III of Schedule 2 prescribes a sentence of ten years’ imprisonment. This is what was put to the appellants and to which they pleaded guilty. It was not thereafter open to the court to invoke a completely different section which provides for a more severe sentence unless the State had sought and been granted an amendment of the charge sheet in terms of s 86 of the Criminal Procedure Act prior to conviction. The State did not launch such an application. The magistrate was therefore bound to impose a sentence in terms of s 51(2) read with Part III of Schedule 2. (Footnote omitted.)

[18] In my view, the fact that the proceedings had been stopped and referred to the high court for sentencing cannot be regarded as a ground to deprive the accused of his constitutional right to fair trial. This is akin to allowing the State to benefit from its own mistakes. In the result, I find there was a misdirection which vitiates the sentence. The misdirection lies in the fact that the appellants were sentenced for an offence different to the one for which they were convicted. There was therefore no need for this matter to be referred to the high court as the regional magistrate had the competence to sentence the appellants. Undoubtedly, the judge below erred in sentencing the appellants in terms of s 51(1) instead of s 51(2) read with Part III of Schedule 2 of the Act. The appeal against sentence has to succeed.’

⁵ See *Mashinini and Another v S* [2012] ZASCA 1; 2012 (1) SACR 604 (SCA); *Machongo v S* [2014] ZASCA 179; *Tshoga v S* [2016] ZASCA 205; 2017 (1) SACR 420 (SCA); *Kolea v S* [2012] ZASCA 199; 2013 (1) SACR 409 (SCA) (*Kolea*); *S v Makatu* [2006] ZASCA 72 (SCA); [2007] 1 All SA 470 (SCA) (*Makatu*).

⁶ *Makatu* para 5.

⁷ Footnote 5.

[15] The question that arises in this case is whether there was a failure to apprise the appellant of the provisions of the CLAA, which vitiated his right to a fair trial. This Court settled this issue in *Kolea v S*,⁸ where the court emphatically stated that the CLAA does not create new offences. The fact that the charge sheet is not amended does not translate to invalid proceedings. A formal application to amend the charge is not always required. The test is whether the accused suffered any prejudice. In this case, it is clear that it was always uppermost in the mind of the trial court that it was dealing with the murder in terms of s 51(1) of the CLAA. As a matter of fact, the pertinent issues relating to the elements of the conviction in terms of s 51(1) were conclusively proved by evidence.

[16] In this case, the odds are heavily stacked against the appellant. As a result, I agree with the conclusion of this Court in *Makatu* where the court confirmed the dictum in *Legoa* and held that:

‘there is no general rule that the indictment must “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”.’⁹

The overriding factor will always be whether there has been unfairness or prejudice. I, therefore, conclude that the appellant’s right to a fair trial was not vitiated by any irregularity, as the trial court afforded him the appropriate protection.

[17] I endorse the findings by the court a quo that there were no substantial and compelling circumstances that could have persuaded the trial court to depart from imposing the prescribed minimum sentences. The trial court aptly summarised the conduct of the appellant and his erstwhile co-accused as follows: ‘The success

⁸ *Kolea* para 17.

⁹ *Makatu* para 4.

of the plan depended upon the killing of the guards because the accused knew they were armed. This conclusion is drawn from the fact that the robbers armed themselves with firearms and shots were fired at the deceased and his colleague in the parts of the body where death would be instant.’

[18] The convictions on possession of illegal firearms and ammunition were treated as one for purposes of sentencing. The provisions of Part II of Schedule 2 of the CLAA were applicable to the firearm charges and provided a minimum sentence of 15 years’ imprisonment. A sentencing court is obliged to apply the prescribed minimum sentence unless there are substantial and compelling circumstances that would persuade it from imposing the prescribed sentences. As a final string on the bow, it was contended on behalf of the appellant that the 15 years imposed by the trial court should have been regarded as a maximum sentence instead of the minimum sentence. This was attributed to the alleged conflict between the Firearms Control Act 60 of 2000 (the FCA) and the CLAA, which have different sentencing regimes.

[19] In terms of s 3 of the FCA, possession of a firearm, including a semi-automatic firearm, attracts a maximum sentence of 15 years. This is distinct from the provisions of s 51(2)(a) of the CLAA which imposes a minimum sentence of 15 years’ imprisonment to a first offender, 20 years to a second offender and 25 years to a third offender. The indictment pertinently referred to s 51(2), hence the appellant was sentenced in terms of the CLAA. This was difficult for the appellant to reconcile, and various conflicting decisions on the subject at hand were referred to. The court in *Swartz v S*¹⁰ (*Swartz*) held that when s 51 of the CLAA was substituted in terms of s 1 of the Criminal Law (Sentencing) Amendment Act 38

¹⁰ *Swartz v S* [2014] ZAWCHC 113; 2016 (2) SACR 268 (WCC) at 273.

of 2007, the legislature's use of the phrase 'notwithstanding any other law' meant that the minimum sentences were intended to supersede the general penalty provisions of the FCA. The finding in *Swartz*, is in line with the decision of this Court in *S v Thembaletu*,¹¹ where this Court held that the opening words in s 51(2) namely, 'notwithstanding any other law' meant that the sentencing regime in the CLAA took precedence over that laid down in the Arms and Ammunition Act 75 of 1969.

[20] In *S v Baartman*¹² the court held a different view. It held that the phrase 'notwithstanding any other law' in s 51(2) of the CLAA could not have been intended to override a future law which introduced its own regulatory and sentencing regime.¹³ The same view was held by the WCC in *S v Mentoer*¹⁴ in that it did not refer to the FCA.

[21] Section 3(1) of the FCA provides that:

'No person may possess a firearm unless he or she holds for that firearm –

- (a) a licence, permit or authorisation issued in terms of this Act; or
- (b) a licence, permit authorisation or registration certificate contemplated in item 1, 2, 3, 4, 4A or 5 of Schedule 1.'

Similarly, s 90 of the FCA prohibits possession of ammunition without a licence. Within the prescripts of the FCA, where the accused person was found in possession of a firearm or ammunition without a licence, the court must impose an appropriate sentence. This court in *Nkabinde and Others v S*¹⁵ held that 'sentencing lies in the discretion of the trial court'.¹⁶

¹¹ *S v Thembaletu* 2009 (1) SACR 50 (SCA).

¹² *S v Baartman* 2011 (2) SACR 79 (WCC).

¹³ *Ibid* para 34.

¹⁴ *S v Mentoer* case A395/2013.

¹⁵ *Nkabinde and Others v S* [2017] ZASCA 75; 2017 (2) SACR 431 (SCA).

¹⁶ *Ibid* para 51.

[22] On the other hand, s 51 of the CLAA provides for minimum discretionary sentences for certain serious offences. Important in this case is s 51(2)(a) of Part 2 of Schedule 2, which provides as follows:

‘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.’¹⁷

According to *Netshivhodza v S*¹⁸ (*Netshivhodza*), ‘[t]he minimum sentence has been set as a benchmark prescribing the sentence to be ordinarily imposed for specific crimes and should not be departed from for superficial reasons.’¹⁹ *Netshivhodza*’s finding was in line with the principle set out in *Centre for Child Law v Minister for Justice and Constitutional Development*.²⁰ Relying on various cases,²¹ the Constitutional Court in *Centre for Child Law v Minister for Justice and Constitutional Development* held that:

‘... the starting point for a sentencing court is the minimum sentence, the next question being whether substantial and compelling circumstances can be found to exist. This is answered by considering whether the minimum sentence is clearly disproportionate to the crime.’²²

¹⁷ Although this is not the only offence covered there, part II of Schedule 2 of the CLAA refers to any offence relating to possession of an automatic or semi-automatic firearms which is dealt with in this case.

¹⁸ *Netshivhodza v S* [2014] ZASCA 145.

¹⁹ *Ibid* para 8.

²⁰ *Centre for Child Law v Minister for Justice and Constitutional Development and Others* [2009] ZACC 18; 2009 (2) SACR 477 (CC).

²¹ *S v Malgas* 2001 (1) SACR 469 (SCA) (*Malgas*); *S v Dodo* [2001] ZACC 16; 2001 (3) SA 382 (CC); *Vilakazi v S* [2008] ZASCA 87; [2008] 4 All SA 396 (SCA).

²² Footnote 20 para 39.

[23] According to *S v Malgas*, s 51 of the CLAA ‘has limited but not eliminated the courts’ discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2)’.²³

[24] On the other hand, s 121 of the FCA provides for penalties in respect of any person convicted of a contravention of or a failure to comply with various sections mentioned there. In the case of any contravention of sections 3 and 90 of the FCA, the Act provides that the maximum period of the conviction is 15 years. This clearly shows that there are two different regimes in respect of the latter section and to s 51 of the CLAA .

[25] In the absence of a material misdirection by the trial court, an appellate court cannot approach the question of sentence as if it were the trial court and then substitute the trial court’s sentence simply because it prefers to.²⁴ The same would apply to an accused who cannot choose the sentencing regime that he prefers. In addition, this Court in *Nkabinde and Others v S*²⁵ (*Nkabinde*) held that where the Court a quo had:

‘imposed the minimum sentences prescribed in the Criminal Law Amendment Act 105 of 1997 in respect of the charges of murder, robbery with aggravating circumstances, possession of semi-automatic and automatic firearms . . . After considering the factors required to be taken into account in the imposition of sentence, including the appellants’ personal circumstances, the Court a quo came to the conclusion that there *were no substantial and compelling circumstances to deviate from the prescribed minimum sentences.*’²⁶ (Emphasis added.)

²³ *Malgas* para 25.

²⁴ *Ibid* para 12.

²⁵ *Nkabinde and Others v S* [2017] ZASCA 75; 2017 (2) SACR 431 (SCA).

²⁶ *Ibid* para 52.

This clearly sets out the intention of the legislature to give severe punishment to those who commit crimes with semi-automatic firearms or possess them for criminal purposes. The FCA caters only for possession of any firearm or ammunition without a licence.

This was endorsed in *Nkabinde* as follows:

‘. . . the prescribed minimum sentences should not be departed from lightly and for flimsy reasons. The legislature has ruled that these are the sentences that ordinarily, and in the absence of weighty justification, should be imposed for the specified crimes, unless there are truly convincing reasons for a different response.’²⁷

[26] The sentence imposed was in line with the prescripts of s 51(2)(a) of the CLAA. There was no error or misdirection on the part of the trial court in sentencing the appellant as indicated. There is no reason for this Court to interfere with the sentence in counts four and five.

[27] It is now convenient to deal with the charge of attempted murder. The appellant’s challenge to the attempted murder charge is that it was inappropriate for the court a quo to confirm the sentence of 15 years’ imprisonment for this conviction as if it was akin to the sentence for murder in terms of s 51(2) of CLAA. It bears mentioning that the attempted murder conviction was in terms of the common law and not the CLAA. I re-iterate that sentencing is pre-eminently within the discretion of the trial court. A correct synopsis of the law with regard to the limited point of interference was set out in *Hewitt v S*²⁸ as follows:

‘It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required; it must

²⁷ Ibid para 54.

²⁸ *Hewitt v S* [2016] ZASCA 100; 2017 (1) SACR 309 (SCA).

conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a 'striking' or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised.'²⁹ (Footnotes omitted.)

[28] It was contended on behalf of the appellant that the sentence imposed for attempted murder was more severe than what the high courts had in the past held to be appropriate in cases of this kind. Courts must be cautious of such comparisons with other cases as each case must be decided on its merits. I have taken into account that the security guard did not sustain any injuries. I am of the view that there exists a striking disparity between the sentence imposed by the trial court in respect of the charge of attempted murder and the sentence that another court would impose on appeal. This leads me to conclude that the trial court's sentencing discretion was not reasonably exercised. This court is therefore at large to consider sentence in respect of the attempted murder charge afresh.

[29] I have considered the sentence in line with the principles set out in *S v Zinn*.³⁰ The offence committed by the appellant remains a serious offence. These kind of violent crimes should be visited with sentences that should deter not only the appellant, but others from committing them. These factors need to be considered together with the nature and seriousness of the offence, interests of society and interests of the accused persons. In this regard, I am of the view that the sentence of 15 years' imprisonment is disproportionate under the

²⁹ Ibid para 8.

³⁰ *S v Zinn* 1969 (2) SA 537 (A).

circumstances and ought to be set aside and be replaced with the sentence of 10 years' imprisonment.

[30] Accordingly, I make the following order:

1 The appeal against the sentences imposed in respect of counts two, four and five is dismissed.

2 The appeal against the sentence of 15 years' imprisonment, imposed in respect of count three, is upheld. The sentence is set aside and substituted with the following:

‘The accused is sentenced to ten (10) years' imprisonment on count 3 for attempted murder.’

3 The sentence set out in para 2 above is antedated to 15 December 2010 and is to run concurrently with the sentences imposed in respect of counts one, two, four and five.

Y T MBATHA
JUDGE OF APPEAL

APPEARANCES:

For Appellant: J Van Der Berg

Instructed by: Mathewson Gess Inc., Cape Town
Symington & De Kok, Bloemfontein

For Respondent: G D Wolmarans

Instructed by: Director of Public Prosecutions, Cape Town
Director of Public Prosecutions, Bloemfontein