THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 231/2017

In the matter between:

SENTE JOSEPH THAKELI **FIRST APPELLANT**

SAMUEL ZAMBUK MARUMO **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Thakeli v S* (231/2017) [2018] ZASCA 47 (28 March 2018)

Coram: Lewis, Seriti, Saldulker and Van der Merwe JJA and Makgoka AJA

Heard: 15 February 2018

Delivered: 28 March 2018

Summary: Criminal Law: appellants indicted for murder – charge sheet referred to s 51(2) of the Criminal Law Amendment Act 105 of 1997 (the Act) – trial court amended charge sheet, after appellants testified in their defence, by deleting subsection (2), in terms of s 86 of the Criminal Procedure Act 51 of 1977 – no opportunity afforded to appellants to address the court in respect of amendment – appellants convicted and sentenced by the trial court in terms of s 51(1) of the Act – sentence set aside – appellants ultimately sentenced to 15 years' imprisonment in terms of s 51(2) of the Act.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Mocumie J and Chesiwe AJ sitting as court of appeal):

1 The appeal against the sentence imposed on both appellants is upheld.

2 The sentence imposed by the trial court on the appellants is set aside and substituted as follows:

'Accused 1 and accused 4 are each sentenced to 15 years' imprisonment.'

JUDGMENT

Saldulker JA (Lewis, Seriti and Van der Merwe JJA and Makgoka AJA concurring):

[1] The appellants, Mr Sente Joseph Thakeli (first appellant) and Mr Samuel Zambuk Marumo (second appellant), were indicted in the regional court, Welkom, on a charge of murder, subject to the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997. Both appellants were convicted on 23 August 2011 on the murder count and sentenced to 28 years' imprisonment in terms of s 51(1) of the Act, and declared unfit to possess a firearm. Their application for leave to appeal against conviction and sentence in the regional court was unsuccessful. However, leave to appeal was granted on petition against their conviction and sentence to the full bench of the Free State High Court. On 23 March 2016, their appeal against both conviction and entence was dismissed by the court a quo (Chesiwe AJ, Mocumie J (concurring)). This appeal, against sentence only, is with special leave of this court.

[2] The crisp issue is whether the trial court misdirected itself by amending the charge sheet after the appellants had pleaded and testified to a charge of

murder read with the provisions of s 51(2) of the Act, and then convicted them in terms s 51(1), thereby increasing the sentence faced by the appellants.

[3] Section 51(1) of the Act, read with Part 1 of Schedule 2, requires the imposition of a minimum sentence of life imprisonment for murder when it is planned or premeditated, unless there are substantial and compelling factors that justify the imposition of a lesser sentence. In terms of s 51(2) of the Act, read with Part II of Schedule 2, the minimum sentence to be imposed for murder on a first offender following a conviction is 15 years' imprisonment unless there are substantial and compelling circumstances. I turn to consider briefly the facts giving rise to the appeal.

[4] At the commencement of the trial in the regional court, the appellants pleaded not guilty and tendered no plea explanation. Several witnesses testified for the State and identified the appellants as the attackers who confronted the unarmed deceased at his home, brutally stabbing him with a pitchfork and knives. As a result of this attack the deceased succumbed to his injuries. The appellants denied being involved in the deceased's murder. At the close of the defences' case an application to re-open the State's case was allowed. Thereafter two witnesses called by the trial court testified. At the end of their testimony the trial court amended the charge sheet in terms of s 86(4) of the Criminal Procedure Act 51 of 1977, by deleting subsection (2) of s 51 of the Act, stating that the amendment would not prejudice the appellants. The charge was then vague – reference must be made to one of the two subsections so that there is clarity as to which sentence is to be imposed.

[5] Thereafter the trial court convicted the appellants of murder in terms of s 51(1) read with Part 1 of Schedule 2, on the basis of the amended charge sheet, carrying with it the sentence of life imprisonment. However, the trial court found that there were substantial and compelling circumstances justifying a departure from the prescribed minimum sentence of life imprisonment and sentenced the appellants to 28 years' imprisonment each. On appeal the court a quo held that the amendment effected by the trial court was akin to curing a

'typing error' which did not go to the substance of the charge nor the sentencing regime.

[6] This court has held in numerous decisions that an accused person must be apprised from the outset what charge he or she has to meet, so that he or she not only appreciates properly and in good time what the charges are that he or she is facing but also the consequences. In *S v Makatu*,[1] Lewis JA put it succinctly:[2]

'. . . [A]n accused faced with life imprisonment – the most serious sentence that can be imposed – must from the outset know what the implications and consequences of the charge are. Such knowledge inevitably dictates decisions made by an accused, such as whether to conduct his or her own defence; whether to apply for legal aid; whether to testify; what witnesses to call and any other factor that may affect his or her right to a fair trial. If during the course of a trial the State wishes to amend the indictment it may apply to do so, subject to the usual rules in relation to prejudice.'

See also *S v Ndlovu* 2003 (1) SACR 331 (SCA).[3]

[7] The effect of the amendment of the charge sheet brought about by the magistrate was to expose the appellants to the prescribed minimum sentence of life imprisonment as opposed to a prescribed minimum sentence of 15 years' imprisonment. This was done after all the evidence had been led and without affording the appellants any opportunity to address the court on the question of prejudice, and whether the amendment should be effected. The failure to afford the appellants a full and proper opportunity to address this question, in my view constituted a fundamental irregularity that infringed the fair trial rights of the appellants, and destroyed the validity of the amendment. It follows that it is not possible to say with certainty that the appellants suffered

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[1] *S v Makatu* 2006 (2) SACR 582 (SCA); [2007] All SA 470 (SCA).
[2] Paragraph 7.
[3] Mpati JA in *S v Ndlovu* 2003 (1) SACR 331 (SCA), stated at para 12 that '… 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 be pertinently bought 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 properly appreciate 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'.

no prejudice as a result of the amendment and that they should have been sentenced in terms of s 51(2) of the Act. Had the appellants known that they were being charged with murder that was premeditated, or that they had a common purpose in killing the deceased, they may well have conducted their defence differently.

[8] This matter is thus to be distinguished from those in which it was held that an irregularity did not vitiate the proceedings, such as *S v Kolea,*[4] where it was found that the accused had known at the outset what charges they faced. For these reasons the court a quo erred in dismissing the appeal.

[9] Accordingly, the appeal against sentence must succeed. Consequently the appellants ought to have been sentenced to 15 years' imprisonment in terms of s 51(2) unless there were substantial and compelling factors justifying a deviation. I turn to consider whether there are any. The personal circumstances of both appellants are similar. Both are young, first offenders and have spent at least two and half years incarcerated. These factors are to be taken into account in determining whether a sentence of 15 years is appropriate. The court must also take into account the aggravating factors which are significant. The deceased died of eight stab wounds, four of which penetrated the heart and the chest. This was a vicious and cruel attack perpetrated with knives and a garden fork on an unarmed man: that it was a heinous attack is apparent from the nature of the injuries and wounds. Cumulatively the aggravating factors far outweigh the mitigating factors. There is nothing exceptional about the personal circumstances of either of the appellants. In *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 58, Nugent JA stated as follows: '[i]n cases of serious crime the personal circumstances of the offender, by themselves will necessarily recede into the background'. In my view, taking into account all of these factors, there are no substantial and compelling circumstances present justifying a deviation from the prescribed sentence of 15 years' imprisonment. It is a salutary sentence in the circumstances of this case for both appellants.

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[4] *S v Kolea* [2012] ZASCA 199; 2013 (1) SACR 409 (SCA).

[9] Accordingly, the appeal is upheld. The following order is made:

1 The appeal against the sentence imposed on both appellants is upheld.

2 The sentence imposed by the trial court on the appellants is set aside and substituted as follows:

‘Accused 1 and accused 4 are each sentenced to 15 years' imprisonment.'

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H K Saldulker

Judge of Appeal

APPEARANCES:

For the Appellant:	S Kruger
	Instructed by:
	Bloemfontein Justice Centre
For the Respondent:	E Liebenberg
	Instructed by:
	Director of Public Prosecutions, Bloemfontein