**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

Reportable

Case No: 1267/2017

In the matter between:

**NICO MANUEL KHOZA** **FIRST APPELLANT**

**SIMON BENNET MHLONGO** **SECOND APPELLANT**

and

**THE** **STATE**

**RESPONDENT**

**Neutral citation:** *Khoza & another v The State* (1267/2017) [2018] ZASCA 133 (28 September 2018)

**Coram:** Maya P and Van der Merwe JA and Nicholls AJA

**Heard:** 4 September 2018

**Delivered:** 28 September 2018

**Summary:** Criminal Procedure – sentence – appellants not informed of the applicable provisions of the Criminal Law Amendment Act 105 of 1997 at the outset of the trial – right to a fair trial – test for prejudice – reasonable possibility that appellants may have conducted their cases differently had they been so informed –

sentence to be imposed afresh without consideration of minimum prescribed sentences.

---

**ORDER**

---

**On appeal from:** North West Division of the High Court, Mahikeng (Leeuw JP and Gura and Gutta JJ sitting as court of appeal):

1 The appeal against sentence is upheld.
2 The order of the full court is set aside and replaced with the following:
   ‘a The appeal is upheld.
   b The sentences of the appellants are set aside and the matter is remitted to the trial court to impose sentence afresh.’
3 The registrar of the North West Division of the High Court, Mahikeng is directed to prioritise the enrolment of the matter.

---

**JUDGMENT**

---

**Van der Merwe JA (Maya P and Nicholls AJA concurring)**

[1] This is yet another appeal that raises the question whether an appellant’s right to a fair trial was infringed by the failure to alert them at the outset of the trial to the applicable provisions of the Criminal Law Amendment Act 105 of 1997 (Minimum Sentences Act). It is appropriate, at the outset, to draw attention to the duties of courts and prosecutors in this regard set out in *Ndlovu v The State* [2017] ZACC 19; 2017 (2) SACR 305 (CC) paras 53-58.

[2] The appeal against sentence arose in the following manner. The first appellant and the second appellant were charged together with four others in the North West Division of the High Court, Mahikeng with murder (count 1), robbery with

aggravating circumstances (count 2) and unlawful possession of firearms and ammunition (counts 3 and 4), respectively. The indictment did not refer to the Minimum Sentences Act. Neither did it contain factual allegations that rendered the Minimum Sentences Act applicable.

[3] The trial took place before Hendricks J. The prosecution led the evidence of several witnesses. The appellants did not testify, an aspect to which I shall return. At the conclusion of the trial Hendricks J found that the appellants had participated in a planned armed robbery at the residence of a shopkeeper. During the robbery the shopkeeper was shot and killed by one of the other accused. The trial court found that cash in the amount of R5 400, cellphones and a Toyota Hilux vehicle were taken during the robbery and that the appellants shared in the spoils. The trial court accordingly convicted the appellants on counts 1 and 2 but acquitted them on counts 3 and 4.

[4] At the commencement of the trial the appellants were represented by separate legal representatives. During the state case, the legal representative of the second appellant indicated that he held instructions to apply for the recusal of the trial judge. However, he argued that the application for recusal should be heard by another judge. When Hendricks J unsurprisingly ruled that the application for recusal should be determined by him, the second appellant terminated the mandate of his legal representative and indicated that he would take no further part in the trial. Hendricks J urged the second appellant to reconsider and to participate in the trial as well as to make use of the available legal representation, but the second appellant persisted with this stance for the remainder of the trial.

[5] After the second appellant took this position, the legal representative of the first appellant in fact applied that Hendricks J recuse himself. This application was refused, whereafter the legal representative of the first appellant placed on record that she withdrew from the matter on the ground that the first appellant too, would take no further part in the trial. The legal representative was then excused. The trial judge enquired from the first appellant whether he wished to conduct his own defence or to obtain legal representation at his own expense. The first appellant did

not respond and the next witness for the state was called. The first appellant also steadfastly remained unresponsive for the remainder of the trial.

[6] After the appellants were convicted, the trial court informed them as follows:

'They are convicted of murder and the circumstances under which this murder was committed is that of robbery where aggravating circumstances are present and also the fact that they acted in a group when they committed the murder and the robbery. The sentence prescribed for murder under such circumstances is that of life imprisonment and unless they place before this Court substantial and compelling circumstance which may persuade the Court to deviate from the sentence of life imprisonment, this Court will impose life imprisonment for murder.'

This statement was in accordance with s 51(1) of the Minimum Sentences Act, read with Part I of Schedule 2 thereto. In continuation of the stance taken previously, the appellants did not respond to this statement.

[7] Hendricks J proceeded to find that there were no substantial and compelling circumstances that justified a departure from the prescribed minimum sentence of life imprisonment in respect of the count of murder. He therefore sentenced each of the appellants to life imprisonment on that count. In terms of s 51(2)*(a)* of the Minimum Sentences Act read with Part II of Schedule 2 thereto, the minimum prescribed sentence applicable to count 2 (the appellants being first offenders) was 15 years imprisonment. Despite this and the submission of counsel for the prosecution that 'the only appropriate sentence' on count 2 was 15 years imprisonment, Hendricks J sentenced each of the appellants to 20 years imprisonment on that count. These sentences were imposed on 11 November 2005.

[8] The appellants' application for leave to appeal came before Hendricks J nearly 11 years later, on 19 August 2016. He granted them leave to appeal to the full court of that division only against their sentences. Before the full court, counsel for the appellants pertinently argued that they were not afforded a fair trial in that they had only been informed about the applicability of the Minimum Sentences Act when sentence was considered. Counsel for the respondent, who did not appear at the trial, conceded that the sentences were affected by an irregularity and that the

appellants should be sentenced afresh. Nevertheless the full court (Leeuw JP, Gura and Gutta JJ concurring) held that the appellants had been afforded a fair trial and dismissed the appeal. This court granted special leave to appeal to the appellants in respect of their sentences.

[9] As I have said, the issue in this appeal has been considered by this court on a number of occasions.[1] The same applies to the closely related issue of the effect of an incorrect reference to the Minimum Sentences Act in the indictment on fair trial rights.[2]

[10] The following principles can be distilled from these judgments. As a general rule, fair trial rights[3] require that an accused person should be informed at the outset of the trial of the provisions of the Minimum Sentences Act (or other provisions relating to an increased sentencing regime) that the state intends to rely upon or are applicable. The accused person should generally be so informed in the indictment or charge sheet; by notification by the presiding officer or in any other manner that effectively conveys the applicable provisions to the accused person before or at the commencement of the trial. This is of particular importance when the accused person has no legal representation. This, however, is not an absolute rule. Each case must be determined on its own particular facts and circumstances, bearing in mind the oft-quoted dictum in *S v Jaipal* 2005 (4) SA 581 (CC); 2005 (1) SACR 215 (CC) para 29. There it was stated that the right to a fair trial also requires fairness to the public as represented by the state and has to instill public confidence in the criminal justice system. Substance must prevail over form. In the final analysis, the determination of whether fair trial rights were infringed in these circumstances, turns on the question of prejudice to the accused.

---

[1] See *S v Legoa* 2003 (1) SACR 13 (SCA); *S v Ndlovu* 2003 (1) SACR 331 (SCA); *Tshoga v S* [2016] ZASCA 205; 2017 (1) SACR 420 (SCA). The latter was one of the matters that the Constitutional Court, in *M T v The State*; *A S B v The State*; *Johannes September v The State* [2018] ZACC 27 (3 September 2018), declined to determine as it was not in the interests of justice to do so.

[2] See *S v Makatu* 2006 (2) SACR 583 (SCA); *S v Kolea* [2012] ZASCA 199; 2013 (1) SACR 409 (SCA); *Thakeli & another v S* [2018] ZASCA 47; 2018 (1) SACR 621 (SCA). In *Ndlovu v The State* [2017] ZACC 19; 2017 (2) SACR 305 (CC) the Constitutional Court determined a matter of this type on the basis that the regional court in that matter did not have jurisdiction to impose sentence in terms of s 51(1) of the Minimum Sentences Act and thus considered it unnecessary to consider the fair trial question.

[3] Especially ss 35(3)*(a)* and *(b)* of the Constitution which provide: 'Every accused has a right to a fair trial, which includes the right – *(a)* to be informed of the charge with sufficient detail to answer it; *(b)* to have adequate time and facilities to prepare a defence.'

[11] The question of prejudice is determined by an objective facts-based inquiry. In my view the test should be similar to that applicable to the question whether an accused person has been prejudiced by a defective charge, which also directly implicates s 35(3)*(a)* of the Constitution. In *Moloi & others v Minister for Justice & Constitutional Development & others* [2010] ZACC 2; 2010 (2) SACR 78 (CC) at para 88a the pre-constitutional position was summarized as follows:

'Whether the accused may be so prejudiced is dependent upon the facts of each case. What is cardinal, however, is that prejudice, actual or potential, will always exist, unless it can be established that the defence or response of the accused person would have remained exactly the same had the state amended the charge.'

In my judgement the same applies to the determination of this question under the Constitution. This signifies that prejudice will exist if there is a reasonable possibility that the defence or response of the accused person may not have been the same had there been an amendment.

[12] It follows, in my view, that there will be prejudice to an accused if he or she could reasonably have conducted his or her defence differently, had the accused been informed at the outset of the trial of the applicable provisions of the Minimum Sentences Act. Thus, if there is a reasonable possibility that the accused may have conducted his or her case differently, there would in these circumstances be an infringement of the right to a fair trial.

[13] On an application of these principles to the facts of this case, it has to be accepted that the appellants were only informed of the applicability of the Minimum Sentences Act and that they were therefore exposed to a sentence of life imprisonment, after they had been convicted. It follows that they were unaware of this critical factor when they resolved to take no further part in the trial. Importantly, they were informed thereof at a time when they were not legally represented and they subjectively believed that the trial judge was biased against them. Had the appellants known from the outset that they were exposed to life imprisonment, they may well have responded differently or conducted their cases differently. I find that in the peculiar circumstances of this case, the sentencing proceedings in respect of the appellants were vitiated by an infringement of their fair trial rights. Counsel for the

respondent's reiteration in this court of his concession before the full court, was therefore fair and proper.

[14] It follows that the sentences must be set aside and that the appellants must be sentenced afresh without the application of the Minimum Sentences Act. Both counsel requested that the matter be referred back to the trial court for this purpose, with the direction from this court that it be afforded priority. Despite the lengthy lapse of time, I am, in the particular circumstances of this case, prepared to accede to this request. As I have pointed out, the appellants did not participate in the sentencing proceedings in the trial court. There is good reason to believe that they will do so now, with the assistance of counsel. The periods of imprisonment already served by the appellants will no doubt be taken into account when they are sentenced afresh.

[15] In the result the following order is issued:

1 The appeal against sentence is upheld.

2 The order of the full court is set aside and replaced with the following:

'a The appeal is upheld.

b The sentences of the appellants are set aside and the matter is remitted to the trial court to impose sentence afresh.'

3 The registrar of the North West Division of the High Court, Mahikeng is directed to prioritise the enrolment of the matter.

_____

C H G van der Merwe

Judge of Appeal

APPEARANCES

| | |
|---|---|
| For Appellants: | N L Skibi |
| | Instructed by: |
| | Mafikeng Justice Centre, Mmabatho |
| | Bloemfontein Justice Centre, Bloemfontein |
| For Respondent: | T D Muneri |
| | Instructed by: |
| | Director of Public Prosecutions, Mmabatho |
| | Director of Public Prosecutions, Bloemfontein |