IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / ~~NO~~ only SA & R
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / ~~NO~~
(3) REVISED ✓

DATE 12/12/16 SIGNATURE

CASE NO: A436/2014

DATE: 14/12/2016

IN THE MATTER BETWEEN

MPHO ABRAM SETSHEDI — APPELLANT

AND

THE STATE — RESPONDENT

JUDGMENT

PRINSLOO, J

[1] On 30 November 2005, the appellant, then 23 years old, was convicted in this court on the following six charges:

1. murder;
2. contravention of section 3 of Act 60 of 2000 (unlawful possession of a firearm);

3. contravention of section 90 read with section 120(1) of Act 60 of 2000 (unlawful possession of ammunition);
4. murder;
5. contravention of section 3 of Act 60 of 2000 (unlawful possession of a firearm);
6. contravention of section 90 read with section 120(1) of Act 60 of 2000 (unlawful possession of ammunition).

[2] There were three other charges, namely attempted murder and the two contraventions of Act 60 of 2000, but no evidence was offered with regard to those charges and the appellant was correctly discharged in connection therewith.

[3] On 1 December 2005, the appellant, as accused, was sentenced as follows by the learned trial Judge with regard to the six charges:

1. on count 1, murder, eighteen years' imprisonment;
2. on count 2, the illegal possession of a firearm, four years' imprisonment;
3. on count 3, the illegal possession of ammunition, one year imprisonment;
4. on count 4, the second murder, eighteen years' imprisonment;
5. on count 5, the illegal possession of a firearm, four years' imprisonment;
6. on count 6, the illegal possession of ammunition, one year imprisonment.

The learned trial Judge, after stating that he took the cumulative effect of the sentences into account, ordered that six years of the eighteen years imposed on count 4 would run concurrently with the eighteen years imposed on count 1. The learned Judge further ordered that the four years and one year imposed on counts 5 and 6

respectively would run concurrently with the four years and one year imposed in respect of counts 2 and 3 (I add, simply for the sake of detail, that, according to the record, the learned Judge only mentioned that the four years and one year imposed on counts 5 and 6 respectively would run concurrently with the four years imposed on count 2, evidently overlooking the one year imposed in respect of count 3 This was obviously an oversight because the learned Judge, in conclusion, pointed out that the effective sentence would be one of 35 years' imprisonment, meaning that the one year sentence on count 3 was taken into account).

[4] On 22 March 2013, almost eight years after the sentence was imposed, and after the learned trial Judge had also, sadly, passed away, leave was granted to the appellant, by the Deputy Judge-President of this Court, to appeal against the convictions as well as the sentences.

[5] The appeal came before us on 11 November 2016. Before us, Mr Kgagare appeared for the appellant and Ms Mahomed appeared for the State.

Brief summary of the underlying facts and the evidence which led to the convictions

(i) Counts 1, 2 and 3

[6] These three charges relate to the murder of Mr Niko Mashabana in Mamelodi East, district Pretoria, on 1 December 2004 (the first murder).

[7] Count 1 deals with the murder, and counts 2 and 3 with the unlawful possession of a firearm and ammunition respectively.

[8] Patrick Thabo Mothabela testified that he is a cousin of the appellant. On 1 December 2004 the witness was at his home in Mamelodi East.

The deceased arrived at the home of the witness in the company of another person, one Abram. They said they were looking for the appellant. They said they wanted a firearm from the appellant.

At about 12:30, when the two visitors were still there, the appellant arrived. The witness was standing at the door of the sitting room, and when the accused went in to meet the visitors, he heard the deceased saying "I want my firearm". The witness heard a firearm being cocked and a shot was fired. The shot was fired by the appellant. The appellant shot the deceased. The appellant went outside and there he fired another shot. The shot was not fired at anyone in particular, but perhaps "to prevent us from going out of the house". The deceased was not fighting, neither was he armed.

[9] The version put to the witness in cross-examination is that the appellant found the deceased pointing a firearm at the witness. This the witness denied. He had no quarrel with the deceased and did not even know him.

It was put that the accused and the deceased then struggled for possession of the firearm. This the witness also denied. It was put that, during the struggle, a shot went off which hit the deceased. This was also denied. If this had happened, the witness would have seen it.

The witness insisted that the appellant was carrying the firearm. He added that on the 30th (presumably of November, the previous day, although he did not say so) the appellant also arrived with a firearm, showed it to the witness and said he needed some bullets for the firearm. The witness has neither a licence to possess a firearm nor does he have a firearm. This evidence of the witness was denied on behalf of the appellant in cross-examination. The witness insisted that the appellant came to see him on the 30th.

[10] When he gave evidence in his own defence, the appellant testified that when he arrived at the house he saw that the deceased was pointing a firearm at the witness and at one Percy Mothabela (this was not put in cross-examination of Patrick, neither was Percy called as a witness). The appellant decided to disarm the deceased, grabbed him and they started wrestling for the firearm. In the process the deceased tried to point the firearm at the appellant and then he shot himself (presumably by accident). The appellant then left the house.

[11] In cross-examination, the appellant confirmed that he did not have a licence to own a firearm or ammunition. He said he did not have a firearm. He confirmed that the witness Patrick was his cousin.

The appellant confirmed that he was in the process of helping Patrick by grabbing the firearm. When asked why Patrick would then lie to implicate him of the killing when the appellant had probably saved his life, the appellant was equally surprised.

The appellant said, in cross-examination, that the deceased had fallen down whilst holding onto the firearm. He did not take the firearm with him. He denied the evidence about his visit to Patrick on 30 November.

(ii) <u>Accounts 4, 5 and 6, and also the evidence of the investigating officer, dealing with both the occurrences</u>

[12] Counts 4, 5 and 6 relate to the murder of Fanyana Daniel Selepe, also in Mamelodi East, on 4 December 2004. Count 4 deals with the murder, and counts 5 and 6 with the unlawful possession of the firearm and ammunition respectively.

[13] Maria Selepe testified that she was the grandmother of the deceased, Fanyana Daniel Selepe.

[14] On 4 December 2004 she was at home when the deceased also came home.

[15] Thereafter the deceased left her home, after they had spoken to each other.

[16] When the deceased went out, she heard three gunshots. She had been sitting outside. She got up and looked in the direction that the deceased had walked and saw him lying on the ground. She went back into the house, informed "the people who were sleeping in the house" that the deceased had been shot and went to where the deceased was lying. When she asked him what happened he said "it is Mpho" (this is a reference to the appellant). It was clear, at that stage, whilst she was holding onto the deceased, that he was busy dying. People started gathering around.

[17] The witness also pointed out the appellant in court as the person Mpho to whom the deceased had referred.

[18] She knew the appellant before the incident. He had previously tried to shoot at the deceased but he shot at the wrong person, and missed. She observed that the deceased had been shot on the side of his body, on the abdomen. He was bleeding. His breath was getting "lower and lower" and it was obvious that he was busy dying. In cross-examination she said that the incident happened at about 22:00. The area was well lit with Apollo lights.

When the deceased left, he was in the company of a "certain boy" which the witness did not know.

[19] Significantly, the witness said that as she was leaving the yard the appellant walked past her house. He went to sit with her next-door neighbours. This was after the shots had been fired. It was shortly thereafter.

[20] In cross-examination, it was put to the witness that the accused would deny that he shot the deceased on that occasion. She answered:

> "It is him. You missed twice and you did this on purpose. You said that you wanted to cause him some harm. Everything that he did to the accused, the accused informed me about it."

The learned Judge asked the witness what the accused said to her and she answered, somewhat confusingly, that a younger brother of the accused (obviously the appellant)

had been shot in the leg by the appellant and thereafter the latter shot the deceased. He wanted to kill both of them. She later said that the appellant did not tell her this. She insisted that the appellant and the deceased had been involved in a fight. The deceased came to her home to sort the matter out and to discuss it.

Perhaps significantly, the witness said that the accused (appellant), on the day when he came to her house, said to the witness 'because I was defending my children, he was going to show me".

[21] She insisted that she saw the appellant near the scene shortly after the shooting. She told bystanders that it was the appellant who had shot the deceased.

[22] Ratumela Moufhe was the investigating officer. He testified about certain exhibits, cartridges that were used as part of the evidence.

[23] The "first batch" of cartridges he collected at the house of Patrick, on 1 December 2004, and opened a docket under a specific case number. He later said it was only one cartridge that he collected.

[24] On 5 December 2004 he went to the scene where the second murder occurred in Batili Street Mamelodi. He confirmed that that is where the deceased Selepe was killed. He found two empty cartridges. He opened a case docket under another CAS number.

[25] When he got to the scene (presumably of the second murder) he was informed that the appellant was the suspect and he arrested him where he found him in prison. He did not know the appellant before arresting him.

[26] The first cartridge he sent to the Forensic Department for analysis and the other two cartridges which he found on 5 December, he handed over to Inspector Visser, the expert photographer. It was common cause between the parties that the exhibits had been properly submitted to the Forensic Department for analysis. It was common cause that the two shells that Visser refers to in exhibit "L" are the two shells which he received from the investigating officer. This was a formal admission that was recorded.

[27] When the investigating officer arrived at the scene on 1 December, the deceased, Niko, was no longer there. It is undisputed that he was rushed to hospital where he passed away. He found the shell in the yard. It was the yard where the deceased had been killed.

[28] The shell that he found on 5 December 2004 was found where that deceased (Fanyana) had been killed. The body of Fanyana was still there, and the shells were lying about three metres away.

[29] The cross-examination of the investigating officer was short and sweet: at the scene of the first murder he did not find any cartridges inside the house.

The cartridge was outside the house next to the door.

As to the second murder, after he received information about the suspected perpetrator, he searched for him but could not find him at the scene.

[30] When the appellant testified in his own defence about the second murder, he said that he knew the deceased who was not staying far from his aunt's house. He had never had a problem with the deceased. On the day of the alleged murder he was at his aunt's place. The aunt stayed about 70 metres from where the deceased had stayed. He left the aunt's house at about 20:00. He never went back there but went straight home.

[31] He denied that he killed the deceased Fanyana.

[32] In his judgment, the learned trial Judge, significantly, recorded that it was common cause between the parties that the cartridges found at the first murder scene and the cartridges found at the second murder scene had been fired, according to the Forensic and Ballistic reports, exhibits "H", "M" and "T", by the same gun. In other words, the same gun had been used to kill both the first deceased Niko and the second deceased Fanyana.

[33] The learned Judge pointed out that the firearm was not found at the scene where the first deceased, Niko, had been shot. The learned Judge, correctly, pointed out that this is understandable, because the same firearm was used a few days later to shoot Fanyana.

[34] As to the first killing, the learned Judge found that Patrick was an impressive witness. He rejected the version of the appellant before convicting him on the first three counts.

[35] As to the grandmother of Fanyana, the learned Judge found that she was a satisfactory witness. The visibility was good. The learned Judge found corroboration for her evidence in the "dying declaration" of the deceased Fanyana who stated that the appellant was the perpetrator who shot him.

[36] In Schmidt, *Bewysreg*, 4th edition, the learned author under the heading "Sterwensverklarings" says the following on page 491:

> "Daar is 'n gemeenregtelike hoorsê-uitsondering met die strekking dat 'n verklaring deur die slagoffer van doodslag omtrent die oorsaak daarvan, in strafregtelike verrigtinge toelaatbaar is. Hierdie uitsondering was om die een of ander rede spesifiek in artikel 223 van die Strafproseswet opgeneem, maar is deur Wet 45 van 1988 herroep toe die diskresie om hoorsê toe te laat ingevoer is.
>
> Die rede vir toelaatbaarheid is die onwaarskynlikheid dat 'n persoon wat sy naderende dood besef, 'n valse verklaring sal doen.
>
> Die verklaarder moes bevoeg gewees het om getuienis af te lê. Hy moes bewus gewees het dat hy sou sterf.
>
> Die verklaring was slegs toelaatbaar in 'n geding waarin 'n persoon van moord of manslag aangekla was en die verklaarder die slagoffer was. Die verklaring

> is gewoonlik deur die staat teen 'n beskuldigde wat die doodslag sou veroorsaak het, aangebied, maar dit was ook toelaatbaar as dit die beskuldigde begunstig het, in welke geval die vereistes dieselfde was."

See also the discussion in Hiemstra's *Criminal Procedure*, loose-leaf edition, at 24-84. It appears that such evidence is still admissible and "useful regarding consideration of the discretionary admission of hearsay evidence and the evaluation of the evidential value thereof".

[37] The learned Judge, more particularly, found corroboration for the evidence of the grandmother in the undisputed fact that the same weapon was used to kill both Niko and Fanyana. Patrick said that the appellant was the person in possession of the firearm when he shot Niko. This points to the reasonable inference that the appellant shot Fanyana with the same firearm.

[38] Against this background, the appellant was convicted of both the murders.

[39] This finding was not contested before us by the counsel for the appellant.

[40] The only attack offered on the convictions on behalf of the appellant was that the convictions on counts 2 and 3 (unlawful possession of a firearm and ammunition respectively) and counts 5 and 6 (the same offences) amounted to a splitting of charges. The learned trial Judge had found that the appellant had possessed the same firearm over the period which elapsed between the two murders.

[41] The subject of splitting of charges is discussed by the learned author in *Hiemstra's*, *supra*, at 14-4 to 14-5. The "test" for splitting is twofold. The one is the "same evidence test": if the evidence which is necessary to establish the one charge also establishes the other charge, there is only one offence. The other is the "single intent test". I need not dwell on the details.

The argument about splitting of charges advanced on behalf of the appellant was conceded by Ms Mahomed on behalf of the State and, it seems to me with respect, correctly so.

[42] Consequently, the appeal against the convictions falls to be dismissed, with the exception that the convictions in respect of counts 5 and 6 ought to be set aside.

[43] I turn to the sentences imposed.

The sentences imposed

(i) The provisions of section 51 of the Criminal Law Amendment Act, Act 105 of 1997, were applied for sentence purposes, but not mentioned in the charge-sheet, neither was the appellant timeously apprised of the applicability thereof

[44] The possible application of the provisions of section 51 of Act 105 of 1997 ("the Act"), for sentence purposes, was not mentioned in the charge-sheet.

[45] The involvement of the Act, for purposes of these proceedings during the trial, was not mentioned at the commencement of the hearing. There was only an exchange between the learned trial Judge and the prosecutor, with the learned Judge asking the

prosecutor whether he had explained the charge to the accused, and when this was answered in the affirmative, he was asked whether the accused understood the charges and, again, this was confirmed.

[46] The appellant pleaded not guilty, without offering any plea-explanation.

[47] The first time the Act was mentioned, was when counsel for the appellant addressed the learned Judge before sentence was passed in the following terms:

> "It means that it should just be tempered with some mercy and that when the court assesses a sentence, the court should at all costs avoid anger otherwise the sentence will break down the accused as a human being. And for that reason M'Lord, I understand what my learned colleague say (*sic*) they will press for the provisions of Act 105 of 1977 (*sic*). If that is the case M'Lord ... [intervenes]
>
> COURT: I listened to him, but as far as I am concerned they are not applicable.
>
> MR MOKOBI: I was under the same impression M'Lord. But if all in all M'Lord, beside these factors I have alighted to the court, there are no substantial and compelling circumstances in this matter. That is all."

And, at the end of the debate before sentence was passed, the prosecutor said the following:

> "Otherwise as my colleague has put it very clearly there is no substantial and compelling circumstances. Thanks M'Lord."

[48] In passing sentence, the learned Judge, in concluding that the murders had not been proved to have been pre-planned, said the following:

> "They might have run into each other by chance and therefore section 51(1) Act 105 of 1977 (*sic*) is not applicable. Section 51(2) is in fact applicable which states that for murder under any circumstances except as mentioned in part I of schedule 2, fifteen years is the minimum sentence."

[49] As I mentioned earlier, the learned Judge went on to sentence the appellant to eighteen years' imprisonment for each of the two murders, ordering six years of the second murder sentence to run concurrently with the eighteen years sentence in respect of the first murder.

[50] The argument offered by Mr Kgagare, if I understood it correctly, was that where the appellant was not timeously warned that the Act would be applied for sentence purposes, such failure, as a matter of course, amounts to substantial and compelling circumstances, as intended by the provisions of section 51(3)(a) of the Act, so that the learned Judge, for that reason, should have imposed a sentence less than the prescribed minimum sentence of fifteen years' imprisonment in respect of both the murder convictions.

[51] In *S v Ndlovu* 2003(1) SACR 331 (SCA), one of the leading cases on this subject, the following is said at 337a-c:

> "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 in some other form, so that the accused is placed in the 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."

[52] At 337g-i, the following is said:

"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 finding, should he make such a finding, that the weapon found on him was a semi-automatic firearm. 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 substantially unfair. That, in my view, constituted a substantial and compelling reason why the prescribed sentence ought not to have been imposed."

[53] It should be added, with some emphasis, that the circumstances in *Ndlovu* were markedly different from those in the present matter: the appellant in that matter was charged with contravening two sections of the Arms and Ammunition Act 75 of 1969, namely section 2 (unlawful possession of a firearm) and section 36 (unlawful possession of ammunition). In the charge-sheet his attention was only drawn to the

provisions of section 39(2) of the said Act stipulating the penalties for contravening that Act. The penalty for contravening section 2 was a fine of R12 000.00 or imprisonment of three years or both. The very reference to that section was calculated to convey the impression that the State would seek the penalty provided for in that Act – *Ndlovu* at 335d-g.

[54] In *Ndlovu*, the appellant was also legally represented during the trial – at 335a.

[55] During the course of the trial, the learned magistrate raised the question whether the firearm in question was a semi-automatic weapon. When this was confirmed, it was concluded by the lower court that the case resorted within the ambit of section 51(2)(a)(i) of the Act prescribing a minimum sentence of fifteen years' imprisonment absent substantial and compelling circumstances.

[56] In these circumstances, it is clear, as concluded by the learned Judge of Appeal, that the appellant was prejudiced because he was not forewarned that the minimum sentence regime would be applied instead of the provisions of the Arms and Ammunition Act which were mentioned in the charge-sheet.

[57] In *S v Chowe* 2010(1) SACR 141 (GNP) the provisions of the Act were only mentioned during sentencing by the learned magistrate.

At 149d-e, the learned Judge says the following:

> "From the above-mentioned magistrate's statement 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."

[58] In *Chowe*, the learned Judge went on to find that the magistrate had erred in coming to the conclusion that there were no substantial and compelling circumstances. The accused had been convicted of robbery with aggravating circumstances and unlawful possession of a firearm. In terms of the minimum sentence regime, he was sentenced to fifteen years' imprisonment for the robbery and three years' imprisonment for the unlawful possession of the firearm, the sentences to run concurrently. The learned Judge, after coming to the conclusion which he did, reduced the sentence for the robbery to ten years' imprisonment.

[59] As I read the judgment, there was no specific finding to the effect that failure to warn an accused that the minimum sentence regime would come into play, *per se*, or as a matter of course, constitutes substantial and compelling circumstances requiring a reduction of the prescribed minimum sentence. In *Chowe*, the learned Judge, as I said, reduced the sentence after considering whether or not there were such circumstances.

[60] As I read *Ndlovu*, there is also no rule, cast in stone, that failure to forewarn the appellant automatically constitutes substantial and compelling circumstances. It depends on the particular case, and the enquiry is whether or not there had been an

unfair trial because of the failure to bring the relevant minimum sentence regime, and the intention to apply same, to the attention of the appellant.

[61] I turn to some judgments dealing with aspects related to the application of the minimum sentence regime.

- In *S v Mtembu* 2011(1) SACR 272 (KZP), the Full Court of that Division held that the failure of the trial Judge to apprise the defence that a higher sentence than the minimum was contemplated, was not a defect in the proceedings – at 279i.

  In the present case, the learned Judge also did not indicate in advance that he was contemplating sentences higher than the prescribed minimum of fifteen years.

- In *S v Mathebula* 2012(1) SACR 374 (SCA) it was held, at 378e-h, that the proper approach to be adopted by a sentencing court which contemplates imposing a sentence higher that the prescribed minimum sentence is for it, in its judgment on sentence, to identify on the record the aggravating circumstances that take the case out of the ordinary.

  In that regard, the learned Judge of Appeal quoted, with approval, what was said in *S v Mbatha* 2009(2) SACR 623 (KZP) at 631f-j:

  > "On that approach there is as much a necessity for the court in its judgment on sentence to identify on the record the aggravating circumstances that take the case out of the ordinary, as there is for it in

> the converse situation to identify those substantial and compelling circumstances that warrant the imposition of a lesser sentence than the prescribed minimum. The trial Judge should identify the circumstances that impel her or him to impose a sentence greater than the prescribed minimum and explain why they render the particular case one where a departure from the prescribed sentence is justified. The factors that render the accused more morally blameworthy must be clearly articulated. In doing so the court must also weigh in the balance of any factors, such as youth, provocation or past ill-treatment by the deceased that point in the opposite direction. It is only where the balance is clearly in favour of the imposition of a sentence greater than the prescribed minimum that such a sentence should be imposed. Otherwise the whole purpose of a reasonably consistent and standardised approach to sentence in the case of the most serious crimes will be defeated, as it will be open to those judges who have particularly stern views on sentence, and regard Parliament's response to serious crime as inadequate, to impose those views in disregard of the purpose of the legislation."

In the present case, the learned trial Judge did not mention the factors which inspired him to impose sentences of eighteen years instead of the prescribed minimum of fifteen years' imprisonment for the two murders.

In *Mathebula*, the learned Judge of Appeal, in adopting the reasoning of the learned Judge in *Mbatha*, upheld an appeal against a judgment by a Full Bench

of this court, dismissing an appeal against sentence, and reduced a sentence of twenty years' imprisonment for robbery, to one of fifteen years.

- The most recent word on this subject, to which we were referred, is contained in the judgment of *Machongo v S* (20344/14) [2014] ZASCA 179 (21 November 2014).

The appellant was convicted of robbery with aggravating circumstances and murder. The facts before the court were that the appellant, and two accomplices, attacked the deceased in an effort to deprive him of his motor vehicle. When the deceased produced a firearm to defend himself, the appellant deprived the deceased of the firearm and shot and killed him.

The appellant was sentenced to life imprisonment on the murder charge and twenty years' imprisonment on the charge of robbery with aggravating circumstances.

The main ground of appeal to the Full Court was that the trial court erred in relying on the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 ("the Act" *supra*) because no mention was made in the indictment to inform the appellant of the applicability of the Act. The trial Judge also failed to warn the appellant of its applicability. In granting leave to the Full Court, the trial Judge acknowledged that he erred in applying the provisions of the Act. The appellant contended that failure to mention and to

warn him of these provisions *ipso facto* resulted in the miscarriage of justice (*Ndlovu, supra*, was relied on).

The Full Court agreed that the omission to mention the applicability of the minimum sentence regime was irregular and constituted a misdirection entitling it to interfere with the sentence. However, it concluded that "the normal inherent penal jurisdiction of the High Court is applicable and the court will have to consider the sentence afresh". It then embarked on an exercise to consider the aggravating as well as the mitigating factors. It concluded that from the facts of this case and evidence on record, the sentences of life imprisonment on the murder charge and twenty years' imprisonment on the charge of robbery with aggravating circumstances are neither shockingly inappropriate nor induce a sense of shock. Lastly it said that the sentences imposed by the trial court were fair and justified in the circumstances – *Machongo* at paragraph [5].

Before the Supreme Court of Appeal, the appellant contended that the trial court misdirected itself by relying on the provisions of the minimum sentence regime where no mention was made at all of its applicability in the indictment. It was also argued that the Full Court did not consider the sentence afresh but simply "regurgitated" the sentence imposed by the trial court without more.

The respondent conceded that the failure to mention or forewarn the appellant of the applicability of the provisions of section 51(1) and 51(2) of the Act, indeed, resulted in an unfair trial.

It appears that the Full Court also said the following in its judgment dismissing the appeal:

> "[21] It is trite that a Court of Appeal will only interfere when the sentence imposed by the trial court is vitiated by an irregularity or misdirection or when the sentence is shockingly severe, disturbingly inappropriate and totally out of proportion to the offence committed."

- *Machongo* at paragraph [7].

The learned Judge of Appeal then said the following:

> "[10] It is settled law that failure to forewarn or to mention the applicability of the minimum sentence is a fatal irregularity resulting in an unfair trial in respect of sentence. The question is, having come to the conclusion that a misdirection has been committed, what next should the Appeal Court do? The answer is and has always been that the Appeal Court must consider the sentence afresh. What then does considering the sentence afresh mean?
>
> [11] Certainly it does not mean what the Full Court said in paragraph [21] of its judgment referred to in paragraph [7] above. I therefore agree with counsel for the respondent that the test applied was incorrect. Considering a sentence afresh must

> ineluctably mean, setting aside of the sentence of the trial court, *inter alia*, and conducting an enquiry on sentence as if it had not been considered before. In other words, the Appeal Court must disabuse itself of what the trial court said in respect of sentence – it must interrogate and adjudicate afresh the triad in respect of sentence ... Its task would be to impose a sentence which it thinks is suitable in the circumstances, without comparing it with the one imposed by the trial court. The Full Court erred in my view by stating that an Appeal Court 'will only interfere when the sentence is totally out of proportion ...' What the Full Court did was not considering the sentence afresh ..."

(The text of the computer print-out obtained from the court library is incomplete in various respects.)

The learned Judge of Appeal also said the following:

> "[13] Counsel for the respondent also raised the question that the High Court does not possess inherent penal jurisdiction. He submitted that a trend is developing in their Division to refer to an inherent jurisdiction when an argument where the phrase 'inherent jurisdiction' is mentioned. I have already said that the power of an Appeal Court in respect of sentencing resides in the provisions of section 276 of the CPA and nowhere else. It is not only salutary practice but advisable too that practitioners

need to be careful not to loosely use some of the expressions or phrases when preparing their arguments ...

[14] It is not in dispute that the trial court erred and misdirected itself in respect of sentence as the appellant had not been forewarned of the applicability of the Minimum Sentence Act. It is also not in dispute that the Full Court erred in its approach by using an incorrect test when sentencing the appellant afresh. These series of misdirections placed this Court at large to consider the sentence as if it had not been considered before."

[62] From the aforegoing, it appears that this court, which is bound by the judgment of the Supreme Court of Appeal, must accept that the proper approach, in considering this appeal, is the following:

1. It is settled law that failure to forewarn of, or to mention the applicability of the minimum sentence regime is a fatal irregularity resulting in an unfair trial in respect of sentence (it is not stated, neither does it appear to be so, for reasons mentioned, that such failure also, *ipso facto*, constitutes substantial and compelling circumstances which have to lead to a reduction of the sentence).

2. Having come to the conclusion that a misdirection has been committed, the Appeal Court must consider the sentence afresh.

3. Considering a sentence afresh must ineluctably mean setting aside the sentence of the trial court, and conducting an enquiry on sentence as if it had not been considered before. In other words, the Appeal Court must disabuse itself of

what the trial court said in respect of sentence – it must interrogate and adjudicate afresh the triad in respect of sentence. Its task is to impose a sentence which it thinks is suitable in the circumstances, without comparing it with the one imposed by the trial court.

4. Under these circumstances, it is inappropriate to apply the approach that the Appeal Court must be slow to interfere with the sentence unless it is "shockingly inappropriate or induces a sense of shock." - *Machongo* at paragraph [5].

It is also put as follows by the learned author S S Terblanche *Guide to Sentencing in South Africa* 2nd edition at pages 410-411:

> "The discretion to impose sentence belongs to the trial court. Owing to this fact the Appeal Court may not and shall not interfere with the imposed sentence unless it is convinced that the sentence discretion has been exercised improperly or unreasonably."

For the sake of brevity, I do not repeat the trite authorities quoted by the learned author.

5. The trial Judge should identify the circumstances that impel her or him to impose a sentence greater than the prescribed minimum and explain why they render the particular case one where a departure from the prescribed sentence is justified – *Mbatha supra* and *Mathebula supra*.

(ii) **Considering the sentence afresh, as per *Machongo, supra*, at paragraphs [5] to [14]**

[63] As per *Machongo*, paragraph [11], it appears that the task of this court is "to impose a sentence which it thinks is suitable in the circumstances, without comparing it with the one imposed by the trial court". Despite this instruction from the Higher Court, I assume, that in the course of conducting this exercise, this Court of Appeal is not prevented from pointing out perceived misdirections on the part of the learned Judge *a quo*, if any, when the sentence now being challenged was passed. It seems to me necessary that this may have to be done in the course of motivating a fresh sentence, if any, which this Court of Appeal may arrive at.

[64] I turn to the personal circumstances of the appellant at the time when sentence was imposed.

He was 23 years old, unmarried, but the father of a child who was then 14 months old. He only passed Standard 6 (it would be Grade 8 in modern terms) at school.

He worked until August of the previous year as a labourer, earning R560,00 per week.

He was a first offender.

He had been in custody for eleven months by the time he was sentenced.

[65] As to the first murder, it seems to me, on the weight of the evidence, that there was some friction between the appellant and the deceased Niko before the shooting. The

witness Patrick said that the deceased and his friend, when they visited the witness, said they wanted a firearm from the deceased. To the contrary, Patrick also said in cross-examination that he heard Niko saying "I want my firearm". That is when the firearm was cocked and a shot was fired.

Consequently, it appears as if, on the inherent probabilities, the shooting of Niko was inspired by some pre-existing disagreement between the appellant and the deceased.

In the result, I am not in sympathy with the conclusion of the learned Judge that he had to draw the inference that the shooting, in respect of both murders, was perpetrated "just purely out of the pleasure of shooting". This, in my view, would have been an aggravating factor.

[66] The same observations apply as far as the second shooting is concerned. Grandmother Selepe made it quite clear that there had been bad blood between the deceased Fanyana and the appellant. The latter had threatened to cause harm to the deceased on an earlier occasion and even shot his younger brother, presumably by accident, in the process of an altercation with the deceased. They had been involved in a fight before. On the weight of the evidence, this, also, inspired the appellant, on the probabilities, to shoot the deceased Fanyana. This is different from a situation where Fanyana was shot "out of the pleasure of shooting".

[67] No reasons were given by the learned Judge for increasing the prescribed sentence of fifteen years by three years in each instance. This failure flies in the face of the authorities quoted.

[68] Taking all the factors into account, including the personal circumstances of the appellant, and the fact that he had been in custody for eleven months prior to being sentenced, which is a factor which has to go into the scale for purposes of considering a proper sentence, I find no basis for imposing a sentence in excess of the prescribed minimum of fifteen years.

[69] Given the cumulative effect of the two sentences, it would seem to me to be appropriate to order, as the learned Judge did, that a portion of the one murder sentence should run concurrently with the other murder sentence.

[70] As to the five years sentence imposed in respect of count 2 (illegal possession of a firearm) and count 3 (illegal possession of ammunition) I consider that to be an appropriate sentence.

[71] If six years of the second fifteen years sentence were to run concurrently with the first fifteen years sentence, the total sentence in respect of the two murders would come to twenty four years and, if the sentence in respect of counts 2 and 3 is added, the result would be a total sentence of twenty nine years' imprisonment.

[72] In all the circumstances, the sentence ought to be antedated to 1 December 2005, the date when the sentence was first imposed, in terms of the provisions of section 282 of the Criminal Procedure Act, 51 of 1977 ("the CPA").

The order

[73] I make the following order:

1. The appeal against the convictions in respect of counts 1, 2, 3 and 4 is dismissed.

2. The appeal against the convictions in respect of counts 5 and 6 is upheld and those convictions and sentences are set aside.

3. The appeal against the sentences in respect of counts 1, 2, 3 and 4 is upheld in part and dismissed in part.

4. The order made by the learned Judge *a quo* in respect of sentence is set aside and replaced with the following:

   "(i) in respect of count 1, the accused is sentenced to fifteen years' imprisonment;

   (ii) in respect of count 2, the accused is sentenced to four years' imprisonment;

   (iii) in respect of count 3, the accused is sentenced to one year imprisonment;

   (iv) in respect of count 4, the accused is sentenced to fifteen years' imprisonment;

   (v) it is ordered that six years of the sentence in respect of count 4 will run concurrently with the sentence in respect of count 1, resulting in an effective term of imprisonment of twenty nine years."

5. The sentence now imposed is antedated, in terms of section 282 of the CPA, to 1 December 2005.

W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

A436/2014

I agree

A A LOUW
JUDGE OF THE GAUTENG DIVISION, PRETORIA

I agree

S P MOTHLE
JUDGE OF THE GAUTENG DIVISION, PRETORIA

HEARD ON: 11 NOVEMBER 2016
FOR THE APPELLANT: ADV KGAGARE
INSTRUCTED BY: THE LEGAL AID BOARD
FOR THE RESPONDENT: ADV S MAHOMED
INSTRUCTED BY: THE DIRECTOR OF PUBLIC PROSECUTIONS