HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: A83/2022

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.
DATE: 24 NOVEMBER 2022

SIGNATURE

In the matter between:

KENNETH WALTERS	First Appellant
DAVID MIDDELKOP	Second Appellant

and

THE STATE	Respondent

Summary: *Criminal law – sentencing – application of the minimum sentencing regime envisaged in section 51(1) of the Criminal Law Amendment Act 105 of 1997 in circumstances where the prosecutor and the charge sheet referred to section 51(2) of that Act – conviction pursuant to a plea of guilty after the appellants have duly been informed of their rights and sentencing with reliance on the sentencing regime applicable to murder committed in the furtherance of a common purpose confirmed and appeal dismissed*

ORDER

The appeals against convictions and sentences are dismissed.

J U D G M E N T

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

MOGALE AJ

Introduction

[1] This appeal concerns the question of whether it was competent for a court to apply the minimum sentencing regime envisaged in section 51(1) of the Criminal

Law Amendment Act 105 of 1997 ("*the CLAA*") in circumstances where the charge sheet only referred to section 51(2) of the CLAA but where the subsequent plea of guilty to the charge of murder disclosed that the appellants had been acting in the furtherance of common purpose with each other and other perpetrators.

The crime

[2] On 31 December 2019 and at a shopping center near Tsakane, Gauteng, a gang of perpetrators committed a robbery. The robbers were armed with firearms, and one of them shot and fatally wounded a security guard who attempted to foil the robbery. The two appellants were part of the well-planned robbery. Their duty was to pose as Eskom workers while accessing the main electricity supply to the shopping centre. They used Eskom uniforms and identity cards for this purpose, given to them by the mastermind of the robbery. The appellants then switched off the electricity supply and thereafter sealed the electricity box with Eskom seals so that no one else could gain access thereto, thereby enabling the rest of the gang to continue with the robbery without being hindered by alarms and response units and with the shopping centre in semi-darkness. During the course of the robbery, a security guard who attempted to stop the robbers was wounded in the upper left leg, severing his femoral artery. He passed away as a result of this.

The charge

[3] The appellants were charged with robbery with aggravating circumstances as well as murder. It is the second charge that forms the crux of this appeal, and for purposes thereof, it is quoted in full:

> *"The accused are guilty of the crime of murder read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997 in that upon or about 31 December 2019 and at or near Tsakane in the regional division of Gauteng, the accused did unlawfully and intentionally kill Dumi Zulu Mosai Nqwasho, a male person. The State alleges that both accused acted with co-perpetrators in their furtherance and pursuance of a common purpose".*

The pleading process

[4] The Appellants were legally represented and, at the outset, indicated their intention to plead guilty.

[5] Before receiving their plea of guilty, the learned magistrate interrupted the plea process and, clearly being cognizant of the sentencing regimes prescribed by the CLAA, informed the appellants as follows:

> *"I just verified this since I heard from the charge that the State alleges common purpose. I also need to make you aware. The risk is that I do not even have it at this stage about sentencing but the court can admit by what the State indicated here. The fact remains that the State had shown that the murder the charged you with, they allege common purpose. And the murder of common purpose attracts a minimum sentence of life imprisonment not 15 years. So should the court find you guilty of murder where the common purpose is found in the evidence that will come before the court, a minimum sentence will be life.*

> *But if it is an ordinary murder that does not include common purpose, the minimum sentence will be 15 years. Do you understand accused 1. Yes Worship. Accused you too Ja, I did Ja"*

[6] Hereafter the appellants pleaded guilty and tendered a statement in terms of section 112 (2) of the Criminal Procedure Act 51 of 1977 ("*the CPA*"). In their plea, they detailed their involvement in the pre-planned robbery, which they called a "mission". They confirmed that they were part of the "crew" who pulled off the robbery and that their contribution facilitated access to the shopping center, knowing that this would enable the rest of the perpetrators to continue with the robbery, which they did with the use of firearms. They admitted that the deceased had been killed during the course of this robbery in which they had partaken in the furtherance of a common purpose.

[7] Having considered and accepted their plea, the appellants were found guilty as charged.

[8] Prior to the conviction, however, the magistrate asked the prosecutor and the appellant's legal representative to address him on whether "*the court should convict them in terms of section 51 in respect of the charge of murder read with the provisions of section 51(1) or 51(2)*". The prosecutor argued that it would be improper to invoke the sentencing regime envisaged in section 51(1) of the CLAA because the Appellants "*were charged with the provisions of section 51(2)*". For

purposes of this argument, the prosecutor relied on *S v Van Wyk*[1], a decision by a full court of this Division.

[9] The magistrate considered the sections and the arguments presented and thereafter convicted the appellants and sentenced them to 12 years imprisonment each in respect of the charges of robbery with aggravating circumstances and 20 years imprisonment each in respect of the charges of murder perpetrated in the furtherance of a common purpose. The respective sentences were ordered to run concurrently.

The appeal

[10] The entreaties made by the prosecutor to the court ***a quo*** regarding the charges of murder having been "only" in respect of section 51(2), were not only echoed by their legal representative at the time but formed the basis of the appellant's appeal. They argued that the appellants "*were charged*" in terms of section 51(2) in respect of the charges of murder and that they had pleaded guilty to those charges, which carry prescribed minimum sentences of 15 years each and not life imprisonment and as a result, they argued that the magistrate did not have the jurisdiction to consider the prescribed minimum sentence regime provided for in section 51(1) of the CLAA. Adv. Alberts, who appeared for the appellants in the appeal, further argued that the Appellants had been prejudiced in their defense in having been "*exposed*" to a substantially increased sentencing regime whilst having pleaded to a specific sub-section of the CLAA. As a result, so the argument went, the trial court has misdirected itself in convicting and sentencing the appellants as set out above.

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[1] *S v Van Wyk* 2017 JDR 1352 (GP) (*Van Wyk*).

The law

[11] Murder is a common law crime. The elements thereof are (a) an unlawful act; (b) which is intentional; and (c) which leads to the death of a person.[2] If all these elements are proven, an accused must be convicted of murder.

[12] Murder can, as in this instance where it was coupled with *dolus eventualis*, be committed by multiple perpetrators, acting in the furtherance of a common purpose. The most recent pronouncement of what constitutes common purpose in criminal law is to be found in *Tshabalala v State*[3] wherein the Court also referred to the sentencing regime introduced by the CLAA. This was labelled "*a bold step in response to the public outcry about serious offences, like rape*".[4]

[13] Sections 51 to 53 of the CLAA came into operation on 1 May 1998. These sections introduced a range of minimum sentences in respect of certain serious offences. The minimum sentences may only be deviated from when substantial and compelling circumstances have been found to exist justifying the imposition of a lesser sentence.

[14] Section 51(2) of the CLAA provides that a High Court or Regional 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 or a period of not less than 15 years (ii) a second offender ... to for a period of not less than 20*

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[2] *See:* Snyman, *Criminal Law*, 5th Edition at *447*

[3] *Tshabalala v S; Ntuli v S* 2020 (2) SACR 38 (CC).

[4] At para [61].

years and (iii) a third or subsequent offender of such offence, to imprisonment for a period of not less than 25 years".

[15] Section 51(1) of the CLAA contemplates higher sentences. It provides that a Court *"... shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life".*

[16] Part I of Schedule 2 provides as follows:

> *"Murder, when (a) it was planned or premeditated or ... (d) the offence was committed by a person, group of persons or syndicate acting in the furtherance of a common purpose or conspiracy".*

[17] Section 35(3)(a) of the Constitution provides that an accused has a right to be informed of the charge against him with sufficient details to answer it. Should this not be done, an accused's Constitutional right to a fair trial would be breached. The accused should also be informed of the sentencing consequences of the charge against him, should he be found guilty thereof. [5]

[18] Whether an accused's aforementioned Constitutional rights to a fair trial have been breached at either the conviction or sentencing stage can only be answered after a *"vigilant examination of the relevant circumstances."* [6]

Evaluation

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[5] See: Du Toit et al, *Commentary on the Criminal Procedure Act* at 28 – 2G, commencing on section 274 of the CPA and *S v Kolea* 2013 (1) SACR 409 (SCA) at [7]

[6] See: *S v Legoa* 2003(1) SACR 13 SCA, par. 21

[19] It is clear that the accused had been properly informed of the particulars of the crime with which they had been charged. Section 35(3)(a) of the Constitution has therefore been complied with in this regard. From the detailed plea explanation tendered by the appellants whilst being legally represented, it is clear that they also understood the charge and that they were in a position to properly respond thereto. Their Constitutional rights have therefore not been breached regarding the charge.

[20] Having regard to the explanation given to the appellants by the learned magistrate before they pleaded, as to what the possible sentencing consequences could be which could follow upon a finding of guilty of a charge of murder committed in the furtherance of a common purpose, the appellants' rights to a fair trial in that respect had also not been breached.

[21] One finds often that a reference is made in a charge sheet to the sentencing regime which conviction of the offence mentioned in the charge sheet may attract or where a particular sentencing risk might follow (such as a declaration of being a habitual criminal)[7], but this is not an absolute rule.[8]

[22] The appellants' argument is that the sentencing risk was not merely mentioned, but that they had been "*charged*" in terms of section 51(2). The argument is further that as this section had explicitly been mentioned in the charge sheet, this limited the Regional Court's sentencing jurisdiction and it was in respect

[7] *S v Brand* 2019 (1) SACR 264 (GP).

[8] *S v MT* 2018 (2) SACR 592 (CC) at [40].

of that limited jurisdiction that the appellants had pleaded guilty. The prosecutor in the court ***a quo*** was apparently of the same view.

[23] The argument put forward by the appellants is untenable. An accused is not "*charged*" with a sentencing regime but he or she is charged with having committed a particular offence. That offence and the elements thereof must be set out in the charge sheet. Once the elements of such a crime fall within the ambit of Part I of Schedule 2 of the CLAA, then, upon conviction, the crime will attract a particular sentencing regime.

[24] This much was expressly dealt with and set out in *S v Kekana*[9]

> *"It was for the appellant to lay a factual foundation for a conclusion that murders were premeditated and the issue was one for the trial court to decide. In coming to a decision the court would have had regard to all the circumstances of the murder, including the appellant's actions during the relevant period. Anything short of this could not bind the court to the sentence of section 51(2) of the CLAA. There is no reason why the suggestion that the court's power to consider the prescribed minimum sentence in terms of section 51(1) can be ousted simply by mere reference to section 51(2) in a plea explanation is untenable. The provisions of the CLAA do not create a different or new offence but are relevant to the sentence. Thus, murder remains murder as a substantive charge, irrespective of whether section 51(1) or section 51(2) applies. Simply put there is no*

[9] 2019 (1) SACR 1 (SCA) para. 21 – 22.

such as murder in terms of section 51(1) or 51(2). It follows there can never be a plea to such a non-existent charge".

[25] Despite the fact that the above pronouncement has been made prior to the appellants' trial, it is of concern to this court that prosecutors, such as the one in question, are still of the view that an accused can be "*charged with*" a sentencing regime as opposed to being charged with having committed a particular offence. This concern extends to the attitude adopted on behalf of the appellants, even in this court. For this reason and, at the risk of being repetitive, it should be clarified that the inclusion of references to the sentencing regimes contemplated in sections 51(1) and 51(2) in a charge sheet is merely to inform the accused of the consequences of the crime or crimes with which they are charged. This is done to ensure that an accused has a fair trial and that, when a plea is tendered, it is done with full knowledge of possible consequences thereof. The inclusion of references to the CLAA, however, does not mean that an accused is "*charged*" therewith. An accused cannot be charged with a sentencing regime but only with having committed an offence. *Kekana*, which post-dates *Van Wyk* on which the prosecutor relied, had clarified this as well as the debate about whether a conviction "guilty as charged" which featured in *Ndlovu v S*[10] (and which was quoted in *Van Wyk*) limited the jurisdiction of a court to a particular sentencing regime.

[26] In considering the sentences to be imposed, the learned magistrate found compelling and substantial circumstances warranting a deviation from the prescribed minimum sentence of life imprisonment on the conviction of murder in

[10] *Ndlovu v S* 2017 (2) SACR 305 (CC).

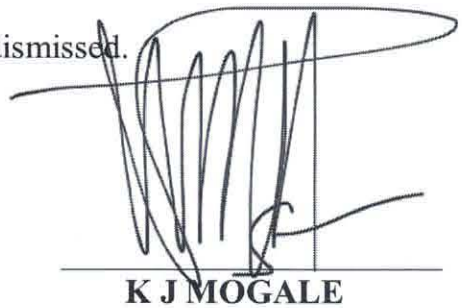
the furtherance of a common purpose. This finding was not attacked by the State, and on the facts before us, it cannot be faulted. [11]

[27] The legal representatives for the appellants conceded that the offenses that the appellants had pleaded guilty to were serious and that long-term imprisonment was unavoidable. After having accepted the magistrate's deviation from the prescribed minimum sentences, they conceded that the sentences imposed were not shocking and inappropriate. Having regard to the facts of the matter, the pre-sentencing reports and the appellant's lesser roles in the robbery, we agree.

[28] In the circumstances of the case the trial court had not misdirected itself and the sentences of 20 years imprisonment on account of murder, even with the invocation of the provisions of section 51(1) of the CLAA, did not amount to a travesty of justice.

Order

The appeals against convictions and sentences are dismissed.



K J MOGALE
Acting Judge of the High Court
Gauteng Division, Pretoria

[11] See: *S v Malgas* 2001 (1) SACR 469 SCA and S *v Matyityi* 2011 (1) SACR 40 SCA.

I agree, and it is so ordered.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 13 October 2022

Judgment delivered: 24 November 2022

Appearances for the Appellants:

Adv. H L Alberts

Instructed by the Legal Aid Board, Pretoria

Appearances for the State:

Adv. L A More

Instructed by the Director of Public Prosecutions, Pretoria