Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

Case number: A245/2010

In the matter between:

CHRISTIAN HENRY LOTTERING Appellant

versus

THE STATE Respondent

JUDGMENT delivered this 14th day of February 2011

NDITA, J:

[1] The appellant was convicted in this Court on four charges: murder, robbery with aggravating circumstances, and unlawful possession of a firearm and ammunition. He pleaded guilty on all four counts and was sentenced to a life term of imprisonment on the first count. On the robbery count the appellant was sentenced to undergo a term of imprisonment for 15 years whilst on the two remaining counts a sentence of two years imprisonment on each count

was imposed. The appeal, which lies with the requisite leave of the trial court, is against sentence alone.

[2] The facts as they emerge from the appellant's plea of guilt are that on 15 December 1998 the appellant proceeded to the premises of Dairymaid at Abbatoir Road, in the district of Worcester with the intention of committing robbery. He was armed with a Z88 9 mm Parabellum pistol loaded with six rounds of ammunition. At the premises, the appellant saw the deceased, Mr Lawrence James Schippers, a security guard. He diverted the deceased's attention by summoning him from an outside toilet. The appellant had previously worked at Dairymaid and was aware that the security personnel possessed the keys to the safe kept on the premises. When the deceased came to him, the appellant threatened him with a firearm and instructed him to open the safe and remove the cash therein. The appellant took the money and a gold watch that was on the table. After taking the property, the appellant told the deceased to get into the cold storage room. The reason for this instruction according to the appellant, was that he wanted to flee the scene with the possessions unhindered. At the cold storage room, a struggle ensued when the deceased tried to grab the appellant's hand that held the firearm. During the struggle the deceased fell down and a single shot from the pistol was fired. The deceased died as a result of a gunshot wound.

[3] The court *a quo* in sentencing the appellant invoked the provisions of Criminal Law Amendment Act, No.105 of 1997 ("the Act"). Section 51(1) read with Part 1 of Schedule 2 of the Act provides that, unless substantial and

compelling circumstances exist that justify the imposition of a lesser sentence, a court shall sentence to life imprisonment a person convicted of the crime of murder when it was planned or premeditated. It came to the conclusion that there were no substantial and compelling circumstances justifying a departure from the ordained minimum sentence. The basis for the murder conviction was *dolus eventualis*. With regard to the sentence imposed in respect of the robbery count, the court applied section 51 (2) read with Part 2 of Schedule 2 of the Act which provides for a minimum sentence of fifteen years.

[4] The appellant argues that the imposition of a sentence in terms of s 51(1) is misdirection as he was not advised of the applicability of the Act at the outset and only became aware of such after conviction. The record reveals that it is indeed so that reference to the Act appears only at the sentencing stage. There is no indication that the appellant was apprised of the sentence likely to be imposed pursuant to the provisions of the Act.

[5] Since the enactment of the Act, there is judicial harmony that it is incumbent on the State to specify the case to be met such that an accused appreciates not only the charges but also the consequences. In **S v Legoa** 2003 (1) SACR 13 (SCA) at 24 D-C the Court held that:

"To ensure a fair trial it is advisable and desirable, highly desirable in the case of an undefended accused that the charge sheet should refer to the penalty provision. In this way it is ensured that the accused is informed at the outset of the trial, not only of the charge against him, but also of the State's intention at conviction and after compliance with specified requirements to ask that the minimum sentence in question at least be imposed."

The Court further held that the essential question to be asked is whether the accused's right to a substantive fair trial, including his ability to answer to the charge, has been impaired. Similarly in **S v Ndlovu 2003** (1) SACR 331 (SCA) at 337 A-C, the court re-affirmed the principles laid down in **Legoa** *supra* and stressed that the relevant sentence provisions of the Act must be brought to the attention of the accused in such a way that the charge can be properly met before conviction. Mpati JA said:

"The enquiry, therefore, is whether, on a vigilant examination of the relevant circumstances, it can be said that an accused 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 accused at the outset of the trial, if not on the charge sheet then in some other form, so that the accused is placed in a 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."

The court set aside the minimum sentence imposed since the appellant had not been pertinently warned that the minimum sentence might be imposed, rendering the trial, in that respect substantially unfair.

[6] I have indicated that earlier on in this judgment that the record does not reveal that the appellant in this matter had any knowledge of the sentencing regime the State sought to apply. The State placed reliance on the fact that the appellant was legally represented. Whilst this is so, I do not think that such

an assumption can be safely drawn in the circumstances of this case. There may well be instances, for example, where a court can make such a finding of fact by drawing inferences from the conduct of the accused or the legal practitioner, but this still requires an assessment of whether the accused had the requisite knowledge regardless of the question of representation. The **Ndlovu** decision after all requires that the accused be given sufficient notice of the State's reliance on the sentencing regime.

[7] The State's submission is in my view flawed in that the representation by a legal practitioner does not exonerate a court from satisfying itself that the accused is aware of the intended reliance on the provisions of the Act. In the present case no inference can be drawn that the appellant and his legal representative had such knowledge prior to sentencing. It is accepted practice that an accused faced with life imprisonment, the heaviest sentence that can be imposed, must, from the outset know what the implications and consequences of the charges are. Such knowledge dictates decisions to be made by an accused, such as whether to testify or what witnesses to call and any other factor that may affect his or her fair trial.

[8] There is nothing in the record, whether by way of the indictment, the summary of substantial facts, the evidence led, or the conduct of the appellant or his legal representative which satisfies me that he was aware of the State's intention to invoke the provisions of the Act. The application of the provisions of the Act at sentencing stage by the trial court, in my view, therefore

constitutes a misdirection warranting the setting aside of the sentence and requiring the appeal court to begin the sentencing process *de novo*.

[9] I turn now to the evidence led by the appellant in mitigation of sentence, and which prompted Comrie J to decide that he was obliged to impose a sentence of life imprisonment in terms of section 51(1) of the Act. The appellant pleaded guilty to all the four charges. No evidence was adduced to gainsay the appellant's version that the deceased was killed by a single gunshot.

[10] The appellant testified that at the time of sentence he was 34 years old, was married and had two children, a 13 year old girl and 11 year old boy. He had not been staying with his wife for three years. Although he did not hold down permanent employment, he worked part time as a painter, and in the week prior to the incident, had worked at Dairymaid assisting in packing the cold storage room. That is how he came to know about the facts regarding the safe keys. The appellant's level of education is standard 9. After leaving school he was employed in various companies.

[11] Regarding the conviction, the appellant testified that the reason for the offending behaviour was that he was desperate to obtain money for hiring a scaffolding he needed in order to secure a painting contract. Through this contract, he hoped to earn some money in order to provide for his son's upcoming birthday. It transpired from the examination by the court that before executing the robbery and subsequent murder, the appellant had partaken of

alcohol, dagga and mandrax. According to his evidence he was not so drunk that he could not remember committing the offence. A substantial amount of money and the watch were recovered. The appellant is not a first offender. In 1996 he was convicted of theft and sentenced to pay a fine of R1000 or in default undergo 3 months imprisonment, which was wholly suspended.

[12] In determining an appropriate sentence factors that aggravate the crime must also be taken into account. The offences for which the appellant has been convicted are serious offences. The murder of the deceased is unfortunate and uncalled for. Violent offences of this nature are all too common and the sentence imposed must send a deterrent message to other criminals.

[13] Taking all these factors into account, I am satisfied that the appellant should be given a lengthy term of imprisonment. In my view, a sentence of 22 years imprisonment on the murder conviction would be appropriate. On the robbery count I am of the view that a sentence of 12 years imprisonment is balanced.

[14] For all these reasons I propose that the appeal be upheld and the sentence imposed by the court *a quo* be replaced with the following:

'On count 1 (murder), the accused is sentenced to 22 years imprisonment. On count 2 (robbery,) the accused is sentenced to 12 years imprisonment. On count 3 and 4 (unlawful possession of a firearm and ammunition), the

accused is sentenced to two years imprisonment on each count. The three sentences in counts 2 to 4 are to run concurrently with sentence in count 1.'

NDITA; J

I agree;

GAMBLE, J

I agree, and it is so ordered;

LOUW, J