Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: CC248/2004

In the matter between:

THABO WILLIAM TSHWARO Applicant

and

THE STATE Respondent

DATE OF HEARING : 21 OCTOBER 2016

DATE OF JUDGMENT : 27 OCTOBER 2016

COUNSEL FOR THE APPLICANT : ADV. NKHAHLE

COUNSEL FOR THE RESPONDENT : ADV. ZONDO

JUDGMENT ON LEAVE TO APPEAL

HENDRICKS J

[1] This is an application for leave to appeal against sentence. Coupled with this is also an application for condonation for the late noting and prosecution of the application for leave to appeal which is unopposed. Although the Applicant was convicted and sentenced as far back as 02 December 2004, I am inclined to grant the requisite condonation on the basis that there are reasonable prospects of success on appeal against the sentence imposed.

See: **S v Smith** 2012 (1) SACR 567 SCA

[2] The application for leave to appeal against sentence is premised on the ground of appeal that the Applicant was not forewarned in the indictment that Section 51 (1) of the Criminal Law Amendment Act 105 of 1997 ("the Minimum Sentence Act") find application and that he may be sentenced to the prescribed sentence of life imprisonment in the event that he is convicted on the charges of murder, unless substantial and compelling circumstances exist which warrant a deviation from the impositioning of the prescribed sentences. That the Applicant was indeed not forewarned is correctly conceded by the Respondent.

[3] Having studied the record of proceedings it is apparent that the Applicant was never informed that the provisions of the said Minimum Sentence Act find application. In **S v Ndlovu 2003 (1) SACR 331 (SCA)** Mpati JA (as he then was) writing for the Court in a unanimous judgment stated the following:-

> *[11] Whilst it is desirable that the charge-sheet should set out the facts the State intends to prove in order to bring an accused within an enhanced sentencing jurisdiction, to do so is not essential. R v Zonele and Others 1959 (3) SA 319 (A) at 323A - H; S v Moloi 1969 (4) SA 421 (A) at 424A - C. But in a recent judgment of this Court Cameron JA reminds us that an accused person has a constitutionally guaranteed right to a fair trial that embraces a concept of substantive fairness. He said the following:*
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> > *'The Constitutional Court has emphasised that under the new constitutional dispensation, the criterion for a just criminal trial is "a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution of the Republic of South Africa Act 108 of 1996 came into force". (S v Zuma and Others 1995 (1) SACR 568 (CC) (1995 (2) SA 642; 1995 (4) BCLR 401) in para [16], drawing a contrast with S v Rudman and Another, S v Mthwana 1992 (1) SA 343 (A) at 377; and see Sanderson v Attorney-General, Eastern Cape 1998 (1)SACR 227 (CC) (1998 (2) SA 38; 1997 (12) BCLR 1675) in para [22], per Kriegler J.) The Bill of Rights specifies that every accused has a right to a fair trial. This right, the Constitutional Court has said (in S v Zuma and Others 1995 (1) SACR 568 (CC) (1995 (2)*

SA 642; 1995 (4) BCLR 401) in para [16]), is broader than the specific rights set out in the subsections of the Bill of Rights' criminal trial provision (Constitution, s 35(3)(a) - (o)). One of those specific rights is "to be informed of the charge with sufficient detail to answer it" (Constitution, s 35(3)(a)). What the ability to "answer" a charge encompasses this case does not require us to determine. But under the constitutional dispensation it can certainly be no less desirable than under the common law that the facts the State intends to prove to increase sentencing jurisdiction under (the Act) should be clearly set out in the charge-sheet.'

(Michael Legoa v The State, case No 33/2002, judgment delivered on 26 September 2002, in para [20].) Cameron JA declined, however, to lay down a general rule that the charge-sheet must in every case recite either the specific form of the scheduled offence (in that case dealing in dagga with a value of more than R50 000) with which an accused is charged, or the facts the State intends to prove to establish it. He held, in the end, that: 'Whether the accused's substantive fair trial right, including his ability to answer the charge, has been impaired, will depend on a vigilant examination of the relevant circumstances' (in para [21]).*

[12] The following extract from the judgment of the Full Court in S v Seleke en Andere 1976 (1) SA 675 (T) at 682H was quoted with approval by Cameron JA (his translation from Afrikaans):

> *'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 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 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.

[14] 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. Hence the order that we have already made."

[4] In **S v Makatu** 2006 (2) SACR 582 (SCA) the following is stated:-

"[7] As a general rule, where the State charges an accused with an offence governed by s 51(1) of the Act, such as premeditated murder, it should state this in the indictment. This rule is clearly neither absolute nor inflexible. However, an 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 Legoa** 2003 (1) SACR13 (SCA)
Kgantsi v S (732/11) [2012] ZASCA 76 (25/5/12)
PN v S (828/13) [2014] ZASCA (27/3/14)

[5] In **S v Machongo** 2014 JDR 2472 (SCA) the following is stated:-

> *"[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?*
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> *[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."*

[6] In **S v Smith**, supra, the following is stated:-

> *"[7] What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not*

remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[7] In my view, the misdirection of not been forewarned in the indictment that the Minimum Sentence Act find application is sufficiently weighty to justify a conclusion that, if leave to appeal is granted, the Applicant's prospects of success are reasonable. In the result, the application for leave to appeal must succeed.

Order

Consequently, the following order is made:

1. Condonation is granted for the late noting and prosecution of the application for leave to appeal.

2. Leave to appeal is granted to the Full Bench of the High Court, North West Division, Mahikeng against sentence.

R D HENDRICKS

JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG