

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: A738/2014
Date: 26/5/2015

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED

...26/5/2015

DATE

.....

SIGNATURE

In the matter between:

MOSES CHRISTOPHER ZULU

1st APPELLANT

ANDRIES LEKGAU

2ND APPELLANT

JOSEPH MATHE

3RD APPELLANT

And

THE STATE

JUDGMENT

PRETORIUS J ,

[1] The appellants are appealing only against sentence with the leave of the court *a quo*.

[2] The appellants were convicted in the Regional Court, Benoni, on 1 April 2014. They were sentenced as follows:

Count 1, 2 and 3: Rape – Fifteen (15) years' imprisonment on each count. The sentences on counts 2 and 3 were ordered to run concurrently with count 1 – Effective period of imprisonment of fifteen (15) years, with an order that the appellants have to serve a non-parole period of fifteen (15) years.

Count 4 and 5: Rape – Twenty (20) years' imprisonment on each count to run concurrently and an order that the appellants were to serve a non-parole period of twenty (20) years' imprisonment, thus an effective sentence of twenty (20) years.

Counts 6 and 7: Rape – Fifteen (15) years' imprisonment on each count.

Count 8: Housebreaking with the intent to rape – Ten (10) years' imprisonment.

The sentences on counts 7 and 8 were ordered to run concurrently with the sentence on count 6. A non-parole period of fifteen (15) years was ordered on these counts as well.

[3] In effect the period of imprisonment is fifty (50) years and the magistrate had ordered that the appellants had to serve the full 50

years without being considered for parole at all. The third appellant was convicted on conspiracy to commit the offences in counts 1 to 7 and found guilty as charged on count 8.

- [4] The appellants are appealing against sentence on the grounds that the magistrate erred in fixing a non-parole period of fifty (50) years' and that the cumulative effect of fifty (50) years' imprisonment on the individual sentences imposed is shockingly harsh and inappropriate.
- [5] The appellants were legally represented throughout their trial. The applicability of the minimum sentence of imprisonment was explained to the appellants at the beginning of the trial.
- [6] The evidence was that on 24 November 2012 the first complainant, was at her home at [.....] with her husband and children. They were asleep but the lights were on as she had attended to the baby crying during the night and thereafter left the lights on. She woke up from the sound of a breaking window and three men entered the house through the window. She was scared and covered herself with a blanket when the first appellant dragged her from the bed to the kitchen which was separated from the room by a curtain. The first appellant raped her on the kitchen table. Thereafter he raped her daughter, the second complainant, who was twelve (...) years at the time. He raped her on the kitchen floor. Then the second appellant raped the complainant and thereafter he raped the second complainant. The first appellant once more raped the first complainant on the floor whilst she was lying next to the second complainant. Then the second appellant raped the first complainant once again. The first

complainant had to perform oral sex on the first and second appellants, whereafter the second appellant raped her once more.

[7] As the two appellants were raping her and her daughter the third appellant was guarding her husband. He threatened him with a knife, whilst watching the rape by his two co-perpetrators. He prevented her husband from coming to his wife's and daughter's assistance. As he shouted for help the appellants fled.

[8] Order: Non-parole period:

The appellants were all sentenced to fifty (50) years' imprisonment with no parole to be considered and granted at all.

[9] Section 2768 of the Criminal Procedure Act, provides:

"Fixing of non-parole-period

(1) (a) If a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may as part of the sentence, fix a period during which the person shall not be placed on parole.

(b) Such period shall be referred to as the non-parole-period, and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter.

(2) If a person who is convicted of two or more offences is sentenced to imprisonment and the court directs that the sentences of imprisonment shall run concurrently, the court shall, subject to subsection (1) (b), fix the non-parole-period in respect of the effective period of imprisonment."

[10] In the present instance it is patently clear that the trial court did not

take the provisions of section 2768 into consideration.

- [11] In **S v Stander 2012(1) SACR 537 (SCA)** at para 12 Snyders JA explained that although section 2768 grants the courts the power to intrude on the executive's terrain, courts should be loath to exercise such power. Snyders JA concluded at para 13:

"This short summary of the statutory procedure prescribed for the consideration of a prisoner's release on parole illustrates why the Department, and not a sentencing court, is far better suited to make decisions about the release of a prisoner on parole and why it remains desirable to respect the principle of the separation of powers in this regard."

- [12] In **S v Siluale en Ander 1999(2) SACR 102 SCA**, Grosskopf JA held at p107 b-c:

"Die Verhoorregter wou verder klaarblyklik verhoed dat die verlening van parool en moontlike begenadiging deur die uitvoerende gesag enige werklike effek op die appellante se vonnis sou he. Daardie oorweging kan egter nooit die oplegging van 'n onrealistiese swaar vonnis regverdig nie. 'n Hof is immers nie bevoeg om deur middel van 'n ontoepaslike vonnis die toekenning van parool te probeer neutraliseer nie."(Court's emphasis)

- [13] An order in terms of section 276B should only be made in exceptional circumstances. There is no undisputed evidence that the accused have no chance of rehabilitation. It is clear from the record that the magistrate did not inform the appellants that he was contemplating to

impose a sentence with an order denying them parole on their effective sentences.

- [14] The magistrate did not indicate that counsel for the appellants should address him in regards to the non-parole order. There was not sufficient evidence before the magistrate to indicate that all three appellants could not be rehabilitated. The court did not set out that there were exceptional circumstances which would justify the imposition of such a harsh, non-parole order.
- [15] The sentences did not exceed twenty-five (25) years and therefor the magistrate did not comply with the provisions of section 276B(1)(b) of the Criminal Procedure Act.
- [16] Due to this error this court is entitled to interfere with the sentence and to set the non-parole period aside.
- [17] The second ground of appeal is that the effective period of fifty (50) years' imprisonment is shockingly harsh and inappropriate.
- [18] It is clear from the evidence that all eight counts of which the appellants were convicted relate to the same incident. The court takes notice of the dictum in **S v Young 1977(1)(SA 602 (A)** at 610 E-H where Trollip JA held:

"Where multiple counts are closely connected or similar in point of time, nature, seriousness or otherwise, it is sometimes a useful, practical way of ensuring that the punishment imposed is not unnecessarily duplicated or its cumulative effect is not too harsh on the accused."

- [19] In **S v Nkosi and Others 2003(1) SACR 91 (SCA)** at para 9, Farlam

JA found:

"Thus, under the law as it presently stands, when what one may call a Methuselah sentence is imposed (ie a sentence in respect of which the prisoner would require something approximating to the longevity of Methuselah if it is to be served in full) the prisoner will have no chance of being released on the expiry of the sentence and also no chance of being released on parole after serving one half of the sentence. Such a sentence will amount to cruel, inhuman and degrading punishment which is proscribed by s 12(1)(e) of the Constitution of the Republic of South Africa Act 108 of 1996" (Court's emphasis)

[20] It seems as if the appellants in this instance are sacrificed on the altar of deterrence, thereby receiving a sentence which is unjustifiably cruel and harsh.

[21] In **S v Dodo 2001(1) SACR 594** (CC) at para 38, Ackerman J found:

"To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the

gravity of the offence (in the sense defined in para 37 above) the offender is being used essentially as a means to another end and the offender's dignity assailed. So too where the reformatory effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity." (Court's emphasis)

[22] These principles, as set out in the authorities, should be considered and applied when sentencing.

[23] The personal circumstances of the appellants are that the first appellant is [....] years old, unmarried, has a child aged [...] years, was a car-washer earning R300 per week and he obtained grade 5. He has a previous conviction for robbery in 2002 and was sentenced to fifteen (15) years' imprisonment. He was on parole when he committed these crimes.

[24] The second appellant is [.....] years old, unmarried, has a child and is unemployed with no formal schooling. His career in crime started in 1987 with previous convictions for rape and robbery in 1989, and assault in 2000.

[25] The third appellant is [...] years old, divorced, the father of two children

and was employed earning R350 per week. He has previous convictions dating back to 1987 when he was sentenced to a fine and six cuts with a light cane. In 1990 he received 4 years' imprisonment for housebreaking with intent to steal and theft and five years' imprisonment for four counts of rape in 1993. All his previous convictions are older than twenty years.

[26] It is so that women and children are the most vulnerable members of our violent society. Rape is prevalent in South Africa and a scourge which should be combatted in the interest of society. In this instance the victims were asleep in their own beds, in their own homes, when they were violently attacked and raped by the first and second appellants, whilst the third appellant was watching and guarding the helpless husband and father of the victims.

[27] The seriousness of the appellants' deeds is exacerbated by them raping both the mother and daughter more than once. The court is aware that society and the women in our society are clamouring for the harsh treatment of these perpetrators.

[28] However, the court must balance the crime, the perpetrator's interest, society's interest and the victims' interest when determining a balanced sentence.

[29] I have to agree that an effective sentence of fifty (50) years' imprisonment is shockingly harsh and inappropriate when all the circumstances are taken into account.

[30] The court has considered all the mitigating and aggravating circumstances. However, a long period of imprisonment is called for if

all the circumstances are considered.

[31] I propose the following order:

1. All the sentences imposed on the appellants are set aside;
2. Counts 1, 2 and 3 are taken as one and the appellants are sentenced to fifteen (15) years' imprisonment;
3. Counts 4 and 5 are taken as one and the appellants are sentenced to twenty (20) years' imprisonment;
4. Counts 6 and 7 are taken as one and the appellants are sentenced to twenty (20) years' imprisonment;
5. Count 8: the appellants are sentenced to five (5) years' imprisonment.
6. It is ordered that ten (10) years' imprisonment on counts 1, 2 and 3 will run concurrently with the sentence on counts 4 and 5.
7. It is ordered that the sentences on counts 6, 7 and 8 will run concurrently with the sentences imposed on counts 4 and 5.
8. An effective sentence thus of twenty-five (25) years' imprisonment.
9. The date of sentence is ante-dated to 1 April 2014.

I agree.

A handwritten signature in black ink, appearing to read 'M M Jansen', is written over a horizontal line.

Judge M M Jansen

Case number : A738/2014

Appeal heard on : 18 May 2015

For the Applicant : Adv. Van AS

Instructed by : LEGAL AID BOARD

For the Respondent : Adv. Van der Westhuizen

Instructed by : NATIONAL PROSECUTING AUTHORITY

Date of Judgment : 26 May 2015