

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: A396/2012

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED. ✓
26/7/2013.	
DATE	SIGNATURE

Coram: De Vos J; Lamprecht *et* Phatudi AJJ

In the matter between:

MZOLISI ZOLLA MAHLATSI

APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

LAMPRECHT. AJ

[1] At approximately 21h00 on the 15th of July 2001, Ms Nompunelelo Nyakale returned home to 12 Adolf Scheil street, Thaba Tshwane, in her motor

vehicle (a green Citi Golf) - her child sleeping in the back of the vehicle. When she stopped at the gate and alighted to open it, another vehicle arrived. Appellant¹ (in a military uniform) and another, taller one, alighted from that vehicle and forced Ms Nyakale at gunpoint to surrender her vehicle and the contents thereof, including her cellular phone. She barely managed to pull her son out of the back seat before appellant and his fellow robbers waiting in the other vehicle then sped off with both cars.

[2] The very next day, at about 13h15, the vehicle that appellant took from Ms Nyakale was used in another robbery, this time in the Carletonville area. Appellant and Ms Florence Grootboom² carefully waited and watched as Ms SA De Beer and Mr KJ Viljoen left their Caltex filling station at Welverdiend near Carletonville on their way to the First National Bank, Carletonville, to deposit the income that they have generated that day. Appellant and Grootboom then phoned their fellow robbers and informed them of the vehicle and the route it traveled. The fellow robbers in the green Citi Golf belonging to Ms Nyakale, with a blue light on its roof, used their police appearance to pull over the vehicle that Ms De Beer and Viljoen were travelling in. One of them,³ approached Ms De Beer and, after she refused to alight anywhere but at a police station, he put a gun to her head, and forced her and Viljoen to hand over R25, 400.00 in cash, a revolver and a number of other items, including her purse containing a further R2, 000.00 in cash, motor keys, a cellular phone and two cheques to the value of

¹ Accused no 5 in the court *a quo* - Van der Byl AJ presiding.

² Accused no 6 in the Court *a quo*.

³ Accused no 1 in the Court *a quo*.

approximately R92, 000.00. When all was over, he told her to close her eyes, the gun still aimed at her head. She looked away, fearing that at any moment he might pull the trigger, but he walked backwards, they got into the Golf and, eventually, they drove off. It is only then that Ms De Beer could ask for help from other vehicles passing.

[3] On the 18th of August 2001 at approximately 19h15, Mr and Mrs De Sousa were traveling home from their shop, Black Ace Cafe in Carletonville. They were with Ms De Ponte (an employee), whom they gave a lift home as usual. They had approximately R20, 000.00 cash in their possession. When they stopped at Ms De Ponte's house to drop her off at about 19h20, they were approached by a number of gun-wielding men, including appellant.⁴ Appellant and his fellow gun-bearing robbers then robbed the occupants of the vehicle of the vehicle, the money, a cellular phone and a 9mm pistol before driving off with the vehicle, with Mrs De Sousa still in it. After a while they stopped, forced Mrs De Sousa into the boot of the car and drove a further distance before abandoning the car with her still locked inside the boot. Fortunately she managed to free herself and summoned help.

[4] For his role in the aforementioned incidents, appellant, was convicted of three counts of robbery with aggravating circumstances⁵ and one count of

⁴ And accused no 1 in the Court *a quo*.

⁵ Counts 13, 14 and 17 in the Court *a quo*.

kidnapping (of Mrs De Sousa).⁶ On 28 September 2004, he was sentenced to the minimum sentence of fifteen (15) years imprisonment⁷ on each of the robbery counts and five (5) years imprisonment on the count of kidnapping. None of the sentences were ordered to run concurrently - the effective sentence therefore being fifty (50) years imprisonment.

[5] After an unsuccessful application to the trial court for leave to appeal his convictions and sentences, appellant successfully petitioned the Supreme Court of Appeal⁸, leave was granted to appeal only his sentences to the Full Court of this Division. He has however remained inside of prison pending the outcome of his appeal ever since he was sentenced - he has thus already served almost nine (9) years of his gaol term to date. In the heads of argument for the appellant, Adv Henzen-Du Toit,⁹ also drew our attention to the fact that he had also spent two (2) years and two (2) months in prison awaiting trial before he and his co-accused were eventually convicted and sentenced.

[6] Sentencing, famously,¹⁰ is a matter pre-eminently falling squarely within the purview of the trial court's discretion, which should not lightly be interfered with. A sentence should only be interfered with on appeal where, (i) an

⁶ Count no 19 in the Court *a quo*.

⁷ Imposed in terms of s 51(2)(a)(i) of the Criminal Law Amendment Act 105 of 1997 as amended, the so-called 'Minimum Sentencing Act', Van der Byl AJ having found that no substantial and compelling circumstances existed justifying a lesser sentence..

⁸ Heher JA and Bertelsmann AJA on 18 August 2010.

⁹ The matter was however argued by Adv E Tlake from the Legal Aid Board since Henzen-Du Toit could not make it to court for some or other undisclosed reason.

¹⁰ *S v De Jager and Another* 1965 (2) SA 616 (A); *S v Rabie* 1975 (4) SA 855 (A); *S v Petkar* 1988 (3) SA 571 (A) at 574C.

irregularity occurred; (ii) the trial court materially misdirected itself on the question of sentence; or, (iii) the sentence could be described as so disturbing that it induces a sense of shock. The mere fact that any or all the judges sitting on an appeal would have imposed another sentence, be it heavier or more lenient, if he presided in first instance, is not enough reason for a court of appeal to interfere with the sentence imposed.¹¹ This much is trite.

[7] On the three counts of robbery with aggravating circumstances, the trial court reportedly had no choice but to impose fifteen (15) years imprisonment per count, simply because the court found that no substantial and compelling circumstances existed justifying the imposition of a lesser sentence than the one called for in terms of section 51(2)(a)(i) of the Criminal Law Amendment Act 105 of 1997 as amended (the Minimum Sentencing Act).¹² In respect of the kidnapping count, no minimum sentence is prescribed. The presiding judge correctly had regard to existing jurisprudence and guidelines as regards the determination of whether substantial and compelling circumstances justified a deviation from the prescribed minimum sentences,¹³ and further considered, as was required, the personal circumstances of the appellant, the seriousness of the offences of which he was convicted and the interests of society before imposing the sentences, effectively resulting in a gaol term of fifty (50) years.

¹¹ *S v Pillay* 1977 (4) SA 531 (A) at 535E-G; *S v Holder* 1979 (2) SA 70 (A). See also *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA).

¹² See s 51(3)(a) of the Minimum Sentencing Act.

¹³ *S v Malgas* 2001 (2) SA 1222 (SCA) at 1235F-1236E; *S v Riekert* 2002 (1) SACR 566 (T) at 570b-571a.

[8] In our opinion, it cannot be argued with any measure of conviction that the trial court misdirected itself in any way, or that the sentences imposed on each count individually could be regarded as so shockingly heavy that interference is warranted. Robbery, especially where aggravating circumstances are present as in this case and robbery of motor vehicles appear to have become an industry country-wide, akin to a disease that has spread and gotten out of hand. This is emphasized by the fact that no less than seven (7) accused persons stood trial in this matter, for gang activities involving nineteen (19) counts of robberies, murders, attempted murders, kidnapping and the unlawful possession of fire arms and ammunition that played off during the period September 2000 to August 2001 in the region of Pretoria, Carletonville and Oberholzer. It appeared that all the accused persons operated in a gang, but due to lack of identifying evidence, not all the accused were convicted on all counts. Most of them however were convicted on most counts, as I will set out in more detail below. In some instances some of the accused persons pretended to be members of the armed forces and did not hesitate to use military uniforms and blue lights (normally only used by the police) and fire arms to commit their dastardly deeds and, during this time, two people were killed, one nearly killed and one kidnapped.

[9] Ordinary citizens cannot be blamed for constantly living in fear for their lives, never mind only for the safety of their possessions, so much so that they either spend thousands of Rands to, try and create safe havens to live in and

vehicles to travel in; emigrate; take the law into their own hands; or, simply cringe at the thought of venturing the streets or even to stay at home because it would appear that there is nowhere to hide and no way in which one can properly defend oneself. According to many psychiatrists and psychologists, the psychiatric condition or illness known as post traumatic stress disorder (PTSD) has become the order of the day, not only as a result of people having served in the armed forces or the police, but also for having fallen victim to robberies and murders, rapes and other rapacious violence that they witness or are forced to witness. Quite often PTSD leads to sufferers thereof committing crimes themselves, which goes to show how sick society that we live in has become. I can only imagine what fears must go through someone's mind when a gun is pressed against his head before he is killed, before someone else is killed in front of him, or just knowing that there is a possibility of him or someone else being killed. How must it feel to be bundled into the boot of one's own car by a bunch of armed thugs, not knowing whether further torture or the ultimate price of death is merely being delayed?

[10] It is therefore not surprising that Parliament has decided to call for consistent heavy sentences (called 'minimum sentences') to be imposed by courts whenever people are convicted of crimes like these. It is also not surprising that courts tend to up sentences for such crimes and that, sometimes, courts are tempted to make sure that convicted criminals are never again allowed to roam the streets, still being able to commit crimes. One must remember that

before the death penalty¹⁴ was held to be unconstitutional,¹⁵ robbery with aggravating circumstances was still regarded as a capital crime for which the ultimate penalty could be (and sometimes was) imposed, failing which, life imprisonment or, at least, lengthy periods of imprisonment in excess of the minimum sentences that are currently called for by law were often imposed. These considerations, and the constant increase in South Africa of these kinds of brutal crimes, have at occasion led to the Supreme Court of Appeal increasing sentences on appeal.¹⁶

[11] The only attack against the sentence imposed on appellant that has, at least, some merit, is that the cumulative effect thereof could arguably be perceived to be too heavy. The effective gaol term, as we have seen, is fifty (50) years imprisonment, which is an exceptionally long time by anyone's standard. This concerns the debate on what, ideally, the maximum term of imprisonment should be that can be imposed if life imprisonment is not imposed, or where a convicted person has not been declared an habitual criminal or a dangerous criminal in terms of sections 286, 286A and 286B of the Criminal Procedure Act¹⁷ (the Criminal Procedure Act). (The effect of the latter orders will however not be considered since they were neither considered nor imposed *a quo* - since the need did not arise.) It must however be said here that a distinction is to be drawn

¹⁴ This judgment has nothing to do with the debate on whether the death penalty should be reintroduced and this argument is employed solely to emphasise the seriousness of the crime of robbery where aggravating circumstances are involved.

¹⁵ *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

¹⁶ E.g., *DPP, KwaZulu-Natal v Ngcobo* 2009 (2) SACR 361 (SAC) 361 - a sentence of 18 years imprisonment for murder and 12 years for robbery with aggravating circumstances substituted with sentences of life and 15 years imprisonment respectively.

¹⁷ Act 51 of 1977 as amended.

between the 'sum total' of various sentences imposed and the 'effective' sentence imposed taking into account the cumulative effect of the sentences. In some instances, like here, the length of the individual sentences individual sentences might be legally unassailable, but, the effective term of imprisonment might tend to shock, justifying interference on appeal.

[12] Before the death penalty was abolished, life imprisonment was seldom imposed and almost never served to the end of a person's natural life. Originally, such a sentence was regarded as a sentence equal to twenty (20) years imprisonment, simply because someone sentenced to life imprisonment (lifer) could be considered for parole after having served twenty (20) years imprisonment. Notably after the abolition of the death penalty, this perception led to some judicial officers resorting to the imposition of what may be called 'Methuselah sentences. These are single sentences¹⁸ or effective sentences¹⁹ running, for example, to periods in excess of twenty five (25) or even a hundred (100) or a thousand (1,000) years - just to make sure, where he is considered a danger to society, that a convicted person is not released on parole after having served only twenty (20) years. This constitutes a practice which, at more than one occasion, the Supreme Court of Appeals has warned against and intervened with.²⁰

¹⁸ E.g., a Judge may have decided to impose, say 100 years imprisonment for murder instead of life.

¹⁹ E.g., Judges, Regional Magistrates (and even District Court Magistrates) deciding to impose effective sentences on various individual counts of up to or even exceeding 100 years imprisonment without ordering concurrent running.

²⁰ E.g., see *S v Nkosi and Others* 2003 (1) SACR 91 (SCA) effective sentences of 120 years, 65 years and 45 years imposed on various appellants set aside and replaced with sentences of life imprisonment.

[13] This stance of the Supreme Court of Appeals has now changed somewhat come the judgment of *S v Mafoho*,²¹ a judgment which has been handed down in March this year and only recently reported. It would appear that the Supreme Court of Appeals is now prepared to uphold so-called 'Methuselah sentences' just because Parliament has now determined that all persons serving extremely lengthy sentences must now, like people who have been sentenced to life imprisonment (lifers), be considered for release on parole at a much earlier date.²² I will deal with this judgment, its impact and binding or non-binding nature, and criticism that can be leveled against that judgment in more detail below.

[14] Theoretically a High Court can impose any term of imprisonment besides life imprisonment; but, in practice,²³ and based on the perception that existed before the new legislation that entrenches policies of parole saw the light of

²¹ *S v Mafoho* 2013 (2) SACR 179 (SCA) - a decision of which we were unaware and our attention has been drawn to it for the first time during argument by Adv Scheepers arguing the matter for the Respondent.

²² In the latter matter, the SCA (after an unsuccessful appeal to two Judges of this Division (Makgoba J and Davis AJ) upheld a Methuselah effective sentence emanating from the Regional Court, Polokwane, of 275 years! The SCA rejected appellant's submission that he, like the appellants in *Nkosi and Others supra* footnote 17, qualified for substitution of his effective sentence of 275 years with life imprisonment so that he could qualify for parole after 25 years, mainly because the Regional Court did not have the jurisdiction, even under the Minimum Sentencing Act to impose life imprisonment on any of the counts of which appellant was convicted (60 counts of robbery with aggravating circumstances, attempted murder, rape, attempted rape, kidnapping and pointing of a fire arm). After considering that the appellant would in any event under the new parole legislation qualify for release on parole after 25 years have been served, just like someone sentenced to life imprisonment, the Court (Mbha AJA - Mthiyane DP, Shongwe JJA, et Schoeman, Swain AJJA concurring) further remarked at para [21] of the judgment: "The appellant is entitled to be considered for parole once he has served 25 years of his term of imprisonment. There is accordingly no need to interfere with the sentence imposed in order to ameliorate its effect. This is not to say the sentence imposed by the regional court is appropriate (it clearly being a Methuselah sentence) but to interfere with it would, in the circumstances of this case, be purely academic because, as I have already indicated, the legislature has stepped in to ameliorate the position of the person subjected to that sentence, by directing that he or she will be considered for parole once 25 years of the sentence has been served. The appeal against sentence must therefore fail."

²³ Based thereon that, earlier, life imprisonment was regarded as the equivalent of 20 years.

day,²⁴ that a life sentence can be equated to twenty (20) years imprisonment, a sentence of twenty five (25) years has been regarded as so long that it was rarely imposed, almost never exceeded, and only in the most exceptional cases.²⁵ Obviously, therefore, if an effective sentence of imprisonment imposed on one or on more than one count exceeds twenty five (25) years, eyebrows in the Appeal Court would normally rise; and, more often than not, courts of appeal would intervene if that was the case and if the exceptionally long period of imprisonment cannot be justified.²⁶ I will deal with the current non-parole period for lifers below and the concomitant adjustment of the 'outer bound' of prison sentences other than life.

[15] Professor Bekker expresses the view that life imprisonment is not the most severe sentence that a High Court, or even a Regional Court nowadays

²⁴ To be dealt with *infra*.

²⁵ *R v Mzwakalala* 1957 (4) SA 273 (A) at 278E; *S v Whitehead* 1970(4) SA 424 (A) at 438F-H; *S v Sibiyi* 1973 (2) SA 51 (A); *S v Skenyana* 1985 (3) SA 51 (A) at 55H-I; *S v M* 1993 (1) SACR 126 (A) at 134a-i; and *S v Nkosi* 1993 (1) SACR 709 (A) at 717b-c. See also the American Bar Association Standards Relating to Sentencing, Alternatives and Procedures (1968) 56, 59: "A term of 25 years should be the 'outside limit for extreme cases'."

²⁶ *S v Nkosi and Others supra* footnote 20. There are various other examples where the SCA or High Courts intervened in cases where the effective sentences were regarded as too high. E.g., *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) - determinate sentence of one appellant reduced from 47 years to the same sentence than that the other appellant received, namely 38 years imprisonment. Notably the SCA held that life imprisonment would have been a more appropriate sentence that could have been imposed before holding: "In any event, had I not considered a life sentence to be justified I would have regarded an effective sentence of 47 years as exceeding acceptable limits." See also *S v Maseola* 2010 (2) SACR 311 (SCA) where the SCA, referring to *Mhlakaza*, reduced an effective sentence of 43 years imprisonment to 30 years. In *S v Johaar* 2010 (1) SACR 23 (SCA), the SCA commended the regional magistrate for utilizing s 280 of the Criminal Procedure Act to ameliorate the effect of long sentences by ordering concurrent running so that a total sentence of 58 years was reduced to an effective term of 30 years, and one of 26 years was reduced to 16 years, which resulted in the appeal being dismissed and the sentences upheld. In *S v Schrich* 2004 (1) SACR 360 (C), a total effective sentence of 33 years for six counts of attempted murder and fire arm offences was considered as too heavy and reduced to 20 years.

under the Minimum Sentencing Act, can impose.²⁷ In the light of the current legislation regulating the parole system for sentenced prisoners, which I will elaborate on in more detail below, I do not think that his proposition is still correct in every sense, except in the case where someone is declared to be a dangerous criminal, which might result in someone actually being detained until the end of his or her natural life where the courts refuse to set him or her free.²⁸ But, assuming that he is, the question however remains what the maximum period of effective imprisonment is that a court can (or rather should) impose today for the sentence to remain a balanced, sensible and proper one in terms of judicial policy - which is of course aimed at protecting society at large and to instill confidence in the criminal legal system of this country, but also at the humane treatment of sentenced prisoners.

[16] In post-Methuselah Biblical terms, no person can usually live beyond the age of one hundred and twenty (120) years,²⁹ but the Biblical norm is that an age of only in the region of seventy (70) to eighty (80) years is generally reached.³⁰ We all know that for someone today to reach an age of, say, ninety five (95) or a hundred (100) years would be regarded as an extreme blessing,³¹ and an age beyond that, a wonder of some sorts. In South Africa today, generally speaking,

²⁷ Peet M Bekker "The maximum length of imprisonment by South African Courts: Life, dangerous criminal or 60 years?" 2002 (15) *SACJ* 207 at 222. See also in general Peet M Bekker "The maximum length of imprisonment imposed by South African courts after the constitutional abolition of the death penalty: a comparative note in the position in the United States of America" 2000 *CILSA* 136.

²⁸ S 286B of the Criminal Procedure Act.

²⁹ Gen 6:3

³⁰ Ps 90:9-10.

³¹ That is if one can regard reaching such an age a blessing, especially where one lacks the means for proper medical care and sustenance.

life expectancy of individuals is in the region of 59.6 years.³² So what, might one ask, is the purpose of sentencing a forty (40) year old individual like the appellant to an effective term of fifty (50) years imprisonment if one is not going to sentence him to life imprisonment? And, if that is too much, what would a more appropriate term of effective imprisonment be? If he serves the full sentence, he would be ninety (90) years old when he is released.

[17] These questions are not easy to answer, but, in the light of the current trend by some courts to impose unreasonably long prison sentences, perhaps the time has come for courts of appeal to determine where the outer bounds of appropriateness lie or should lie; and, to provide guidance to sentencing courts in this regard without being too prescriptive and binding. Besides determining the outcome of the appeal, this is what this judgment further aims at.

[18] Before attempting to make this determination, one perhaps has to muse at the fact that, in addition to life imprisonment for murder, some of appellant's co-accused received astronomical sentences of imprisonment in addition to life - accused no 1, one hundred and seventy (170) years;³³ accused no 2, one hundred and five (105) years;³⁴ accused no 3, one hundred and forty eight (148)

³² <http://www.health24.com/Medical/HIV-AIDS/News/One-in-10-in-SA-HIV-positive-20130514>.

³³ He was convicted of 15 counts altogether: 2 counts of murder for which he received two terms of life imprisonment and 9 counts of robbery with aggravating circumstances (including the same three counts on which appellant was convicted and sentenced as above) for which he received 15 years imprisonment on each count, 1 count of attempted robbery with aggravating circumstances for which he received 10 years, 1 count of unlawful possession of fire arms - 5 years imprisonment and 1 count of kidnapping (as was appellant) - 5 years imprisonment.

³⁴ He was convicted of 10 counts altogether: 1 count of murder - life imprisonment, 6 counts of robbery with aggravating circumstances - 15 years imprisonment on each count, 1 count of attempted murder - 15

years;³⁵ accused no 4, one hundred and ten (110) years imprisonment;³⁶ and, accused no 7, one hundred and five (105) years imprisonment.³⁷ Accused no 6, Grootboom, was, like the appellant, not convicted of any of the counts of murder and, therefore, she did not receive a sentence of life imprisonment. She was however convicted on two of the same counts of robbery with aggravating circumstances as was appellant, for which she received fifteen (15) years imprisonment on each count; and, on the same count of kidnapping, for which she received five (5) years imprisonment. As in the case of appellant, her sentences were not ordered to run concurrently, meaning that her effective sentence is one of thirty five (35) years imprisonment. Although most of them, including Grootboom, petitioned the Supreme Court of Appeal, none of the mentioned accused persons received leave to appeal their sentences, only the appellant did.

[19] Mr Tlake argued on strength of the heads of argument drawn up by his colleague that appellant's effective sentence should be reduced to no more than

years imprisonment, 1 count of attempted robbery with aggravating circumstances - 10 years imprisonment and 1 count of unlawful possession of fire arms - 5 years imprisonment.

³⁵ That is for 2 counts of murder - life imprisonment on each count, 8 counts of robbery with aggravating circumstances - 15 years on each count, 2 counts of unlawful possession of fire arms - 5 and 3 years respectively, 1 count of attempted murder - 15 years imprisonment and 1 count of attempted robbery with aggravating circumstances - 10 years imprisonment. Two of the counts of robbery with aggravating circumstances were the same as two of the counts on which appellant was convicted and sentenced as above.

³⁶ I.e., 2 counts of murder - life imprisonment on each count, 5 counts of robbery with aggravating circumstances - 15 years on each count and 1 count of attempted murder - 15 years imprisonment. One of the counts of robbery with aggravating circumstances coincides with one of the counts on which appellant was convicted and sentenced as above.

³⁷ I.e., 1 count of murder - life imprisonment, 5 counts of robbery with aggravating circumstances - 15 years on each count, 1 count of robbery with aggravating circumstances - 10 years imprisonment (it is not certain why he received only 10 years on count 7, whereas the others convicted of the same count received 15 years), 1 count of attempted murder - 15 years imprisonment and 1 count of unlawful possession of fire arms - 5 years imprisonment.

twenty (20) years imprisonment; but, after he has reconsidered the seriousness of the offences and the effective sentences imposed on the co-accused persons who did not receive leave to appeal, he conceded that it should be reduced to a more reasonable period. Ms Scheepers (for the state)³⁸ argued that the imposed sentence is an appropriate one, but, if the Court does reduce the effective sentence of appellant, it should not be reduced to less than the sentence that accused no 6, Grootboom, received and that his effective sentence should then be in the region of between thirty five (35) and fifty (50) years imprisonment. In the light of what was said above, and, in the light of the fact that courts should always strive to obtain parity of sentences as far as co-perpetrators convicted of the same offence are concerned,³⁹ Ms Scheepers' argument appears to be the more acceptable of the two.

[20] This still leaves one with the question as to what the correct sentence in appellant's case should be and what guidance, if any, should be given to sentencing courts as to what, ideally, should the longest (effective)⁴⁰ term of imprisonment be that is usually to be imposed besides life imprisonment or the indeterminate sentences of habitual criminals and dangerous criminals.

³⁸ Adv S Scheepers stood in for Adv FC Roberts who is seriously indisposed.

³⁹ *S v Giannoulis* 1975 (4) SA 867 (A); *S v Marx* 1989 (1) SA 222 (A) - referred to in Mr Roberts' heads of argument for the state at para 9.3 thereof. See also *S v Vermeulen* 2004 (2) SACR 174 (SCA).

⁴⁰ Remember that, when one has to do with the cumulative effect of sentences, one has to do with the ultimately effective sentence, and not with the appropriateness of a sentence on individual counts - see section 280 of the Criminal Procedure Act and the discussion of A Kruger *Hiemstra's Criminal Procedure* - loose leaf edition at 28-38(1) to 28-42.

[21] In our opinion, the answer should partially lie in what the current effect and/or perception of life imprisonment is. No sentence of imprisonment should, logically, be longer than what life imprisonment is, otherwise one can just as well coin another phrase to refer to what is known as 'life imprisonment' today and discard the idea that it is to be regarded as the heaviest sentence that can be imposed in the Republic of South Africa.⁴¹ The other accused persons that were mentioned above, who received sentences of life imprisonment besides the astronomical sentences of imprisonment imposed on other counts, will have to serve no more than life imprisonment since all other sentences of imprisonment imposed together with a sentence of life imprisonment, are automatically absorbed by the sentence of life imprisonment; or, in other words, are being served concurrently with any sentence of life, simply because life imprisonment is the ultimate sentence that can be imposed.⁴² It also matters not whether a convicted person receives one or more terms of life imprisonment in any one case - he will serve only one period of life imprisonment. In practice, whether one has received one or twenty terms of life imprisonment, effectively, it will be regarded by the relevant authorities as only one sentence of life imprisonment.

⁴¹ The Supreme Court of Appeal held *S v Silulatlle en 'n Ander* 1999 (2) SACR 102 (SCA) that life imprisonment is the longest term of imprisonment that a court can impose. See also in general *S v Makwanyane supra* footnote 14; JJ Naser "Mandatory minimum sentences in the South African context" available at <http://www.crisa.org.za/downloads/vvs.pdf> under the heading: "Relation between life imprisonment and long term imprisonment". Incidentally, his perception is also that a very long sentence in South Africa today, where lifers are entitled to parole after 25 years - see *infra* - is 30 years imprisonment, 5 years more than the non-parole period for lifers. See also para [14] *supra* for the position before the current parole policies and legislation saw the light of day.

⁴² *S v Mhlakaza supra* footnote 26 at 523j: "Determinate sentences, in any event, run concurrently with a life term."

[22] This begs the question as to what life imprisonment really is. In terms of section 73(1)(b) of the Correctional Services Act,⁴³ a person sentenced to life imprisonment remains in prison for the rest of his or her natural life. Now that sounds rather unambiguous. But, as most of the time where punishment is concerned, things are not always as they seem. If a prisoner sentenced to life imprisonment remains alive for quite some time and, if he or she is not already an old person when he or she is sentenced to life imprisonment, the possibility of parole before one dies was always almost omnipresent. As was stated above, life imprisonment in the past was for this very reason in practice regarded as a sentence of twenty (20) years imprisonment,⁴⁴ and, if something longer was imposed, it would only be twenty five (25) years imprisonment, the outer limit reserved for exceptional cases.⁴⁵ The Nett effect of this approach is that criminal jurisprudence in this country would dictate that sentences of non-life imprisonment should usually not be in excess of approximately five (5) years more than what life imprisonment effectively in practice boils down to taking parole policies and practice into account..

[23] Today, life imprisonment still holds the promise of early release on parole,⁴⁶ although the law has changed somewhat, most probably because the Constitutional Court in *Makwanyane* and the Supreme Court of Appeal in *Silulatlle*, alluded to above, held that life imprisonment could be regarded as an

⁴³ Act 111 of 1998.

⁴⁴ *Supra* para [12].

⁴⁵ *Supra* para [14].

⁴⁶ *S v De Kock* 1997 (2) SACR 171 (T) at 211f-g. See also *S v Tcoeb* 1996 (7) BCLR 996 (NmS), 1996 (1) SACR 390 (NmS) at 402d-e and 403c-d.

effective alternative for the death penalty as the ultimate punishment that can be imposed; and, that it should therefore, ideally, mean that a person should remain in prison for the rest of his natural life as the term implies. This is, however, where the problem is exasperated. Although section 73(1) of the Correctional Services Act⁴⁷ creates the impression at first read that a person sentenced to life imprisonment remains in prison for the rest of his or her life and, in addition, that other sentenced prisoners remain in prison for the full period of the sentence, a proviso in that section makes the provision subject to other portions of the Act. It reads:

"(1) ***Subject to the provisions of this Act-***

(a) a sentenced prisoner remains in prison for the full period of sentence;

and

(b) a prisoner sentenced to life imprisonment remains in prison for the rest of his or her life." (Own italics.)

[24] The other provisions of the Act that this provision is made subject to, of course relate to the current parole release policies incorporated into legislation, of which the ones relating to parole where life imprisonment was imposed were clearly inserted into law to still the fears of the public (and the courts) that prisoners serving life sentences would be released at a too early stage - in other words, before they have been rehabilitated or rendered more or less harmless as far as the commission of serious crimes are concerned. As we have seen, in the past, life sentences were for this very reason regarded as equivalent to a

⁴⁷ Act no 111 of 1998.

sentence of twenty (20) years imprisonment, and, therefore, today it should be regarded as the equivalent of twenty five (25) years imprisonment. The parole provisions in the Correctional Services Act that are relevant for this judgment can be summarized as follows:

- (1) A person sentenced to life imprisonment may not be placed on parole until he or she has served at least **twenty five (25) years** of the sentence; but such a prisoner may, on reaching the age of sixty five (65) years, be placed on parole after he has served at least fifteen (15) years of the sentence.⁴⁸ Most importantly, however, a lifer is not released on parole by the Parole Board as in other cases, the Minister may on application release him or her on parole after considering the Board's recommendation.⁴⁹ It must be noted here already that this option has not been statutorily entrenched for other sentences of imprisonment as is the case of life sentences. In such cases, sentenced prisoners are released by the Parole Board itself, without the Minister intervening.

- (2) In other cases (imprisonment other than life imprisonment), the following apply:

⁴⁸ S 73(6)(b)(iv) of the Act.

⁴⁹ S 73(5)(a)(ii), 75(1)(c), 78 of the Correctional Services Act. Before amendment these provisions gave the courts the power to release or not release lifers on parole. "In broad terms it provides that the court, having considered the record of proceedings of the Board and its recommendations in the case of a lifer, may grant parole to such prisoner subject to the provisions of section 73(6)(b)(iv) which provides that a lifer may not be placed on parole until he or she has served at least twenty five years of the sentence but that the prisoner, on reaching the age of 65 years, may be placed on parole if he or she has served at least fifteen years of such sentence." - Per Van Der Merwe J in *Derby-Lewis v Minister of Correctional Services and Others* 2009 (2) SACR 522 (GNP).

(a) When the sentencing court makes no order regarding parole, the non-parole period is usually **half of the sentence**; but, **parole must in all cases** (regardless of whether the relevant prisoner is serving individual sentences or cumulative sentences) **be considered** after the expiry of **twenty five (25) years**,⁵⁰ and may be considered in cases where the prisoner reaches the age of sixty five (65) years, provided that he or she has already served at least fifteen (15) years of the sentence.⁵¹ When the court has however ordered a non-parole period to be applicable in terms of section 276B of the Criminal Procedure Act, parole may generally not be considered at all before the expiry of that period, but section 276B(1)(b) of the latter Act again contains similar limitations than the Correctional Services Act, namely, the maximum non-parole period that can be fixed is either **two thirds** of the sentence or **twenty five (25) years**, whichever is the shorter.⁵² Section 276B(1)(c) of the same Act further makes it clear that, where sentences on more than one count are ordered to run concurrently, the non-parole period, if ordered,⁵³ shall make the non-parole period applicable to the *effective* period of imprisonment, not to individual sentences. The latter proviso

⁵⁰ S 73(6)(a) of the Act.

⁵¹ S 73(6)(b)(vi) of the Act.

⁵² S 276B(1)(b) of the Criminal Procedure Act.

⁵³ Note that, despite the word 'shall' used in this subsection, it is not compulsory for the court to order a non-parole period in terms of this section once it has ordered concurrent running of sentences - it still has a discretion whether to order same, and then only after hearing both parties on the issue. See *S v Mthimkulu* 2013 (2) SACR 89 (SCA).

appears to be of no assistance in this matter since the presiding judge did not order appellant's sentences to run concurrently, which is exactly the question that we should decide, namely whether concurrent running should be ordered.⁵⁴

(b) In the case of offences contemplated in section 51 of the Minimum Sentencing Act (as is the position with the three counts of robbery with aggravating circumstances that the appellant had been convicted of) the offender may not be placed on parole before at least **four fifths** of the sentence has been served or **twenty five (25) years**, whichever is the shorter period; but the court may order that he or she be considered for parole after he or she has served **two thirds** of such term.⁵⁵

[25] From the emphasis added to the above observations it is abundantly clear that, at least as far as the parole policies of the Department of Correctional Services (an extension of the executive arm of government); and, also as far as the leeway afforded sentencing courts to interfere with parole policies by ordering non-parole periods in terms of section 276B of the Criminal Procedure Act are concerned, the maximum effective term of imprisonment that must be served before a convict **must** be considered for release on parole, is twenty five

⁵⁴ S 276B(1)(c) of the Criminal Procedure Act is however subject to some controversy. Why should a non-parole period be determined according to what the effective sentence is, only when the sentences have been ordered to run concurrently? Why should the injunction not be applicable where a court considers fixing non-parole periods for each individual sentence that it imposed? This, however, is a debate for another day and another forum, since the issues of neither concurrent running nor the fixing of a non-parole period have arisen in this case.

⁵⁵ S 73(6)(b)(v) of the Act.

(25) years. In other words, it does not matter what the effective length of the sentence is, whether life imprisonment, thirty one and a quarter (31,25) years in the case of minimum sentences under the Minimum Sentencing Act, fifty (50) or more years under normal circumstances (where section 51 of the Minimum Sentencing Act is not applicable) or where a sentencing court has ordered a non-parole period, the intention of the Executive arm of government is clear, all prisoners that have served at least 25 years behind bars, ***must be considered for release on parole.***

[26] This is what influenced the Supreme Court of Appeal in *Mafoho* not to interfere with an effective sentence of two hundred and seventy five (275) years imprisonment.⁵⁶ With the greatest of respect, and with all due deference to the stature of the Supreme Court of Appeals, however, it appears from the *Mafoho* judgment that the Court did not have regard to two very important things:

(1) Although all prisoners serving determinate sentences of imprisonment (not life imprisonment or declaration as habitual criminal or dangerous criminal) must now in terms of current legislation be ***considered*** for release on parole after the expiry of twenty five (25) years, no guarantee exists that such prisoners will necessarily be released on parole when their cases are considered by the Parole Board. In the discretion of the Parole Board, for example, where such prisoners have not been rehabilitated or where the complainants / victims request their non-release, the Board may refuse parole and order that the prisoner serve the

⁵⁶ *S v Mafoho supra* footnotes 21 and 22.

entire sentence. The Board's decision is usually regarded as final, except if the Minister or Commissioner refers the matter to the Parole Review Board.⁵⁷

(2) The Minister and all the high officials in the Department of Correctional Services are involved in deciding whether lifers should be granted parole, and one would expect that everyone involved will see to it that the legislative prescripts in this regard are observed. This is not the case where other sentences of imprisonment are concerned. What would now happen if the Parole Board or employees of the Department of Correctional Services omits to consider someone's release (perhaps by miscalculating the non-parole period where different sentences by different courts have been imposed); or, for flimsy reasons, decide not to release someone on parole? This would mean that, unless a High Court exercises its inherent power to review a decision of the Parole Board not to release a specific prisoner, such a prisoner might find himself in a spot of trouble if the Parole Board refuses to order his release. If this happens in *Mafoho's* instance, where would he be able to obtain redress for being treated worse than a lifer?

The Court's opinion that the issue has become academic so that interference is not necessarily required in the case of Methuselah sentences can therefore not be supported. This, coupled with the fact that the Court has not expressly overturned *Nkosi*,⁵⁸ but, instead, hinted that the Regional Court's effective

⁵⁷ S 75(8) of the Correctional Services Act.

⁵⁸ *S v Nkosi and Others supra* footnote 20.

sentence cannot necessarily be regarded as 'appropriate', to our mind brings about a situation where the *Mafoho* judgment does not provide for binding precedent. Furthermore, the Supreme Court of Appeal's jurisprudence thus far have always been that a sentencing court should not consider the possibility of release on parole when determining an appropriate sentence, but that the sentence imposed must be one which the court intends as the ultimate punishment that should be served, and that release on parole is a function of the Executive arm of government that courts should not lightly interfere with.⁵⁹ These earlier decisions of the Supreme Court of Appeal have also not been overturned, and remain binding - which in itself questions the binding nature of *Mafoho*. Moreover, the facts in the current matter differ from the facts in *Mafoho*, and the latter case might be in need for reconsideration.

[27] As was already hinted above, the Department of Correctional Services, the Parole Board or their employees are empowered to consider such things as recommendations for parole, might not interpret the parole legislation correctly or refuse parole for flimsy reasons, which means that a person, although legally entitled to be considered for release on parole, might not be released when he should. This is not a far-fetched speculative hypothesis as the premature release of some of the so-called 'Waterkloof Four' due to a miscalculation of the legislative requirements bears testimony. The same mistake can just as easily be made regarding an omission to consider or refusal to release on parole. Once

⁵⁹ *S v Botha* 2006 (2) SACR 110 (SCA) at paras [25]-[26]. See also *S v Matlala* 2003 (1) SACR 80 (SCA). See also *S v Mthimkulu supra* footnote 53.

again, therefore, sentencing and appeal courts should not rely on the current parole provisions and policies when determining an appropriate sentence. While the date for consideration to be released on parole is now the same for everyone, lifers or people sentenced to otherwise unreasonably long periods of imprisonment such as one hundred (100) years, the fact remains that some of them might not be so considered or released, and their remedies might be limited to obtain redress. No one can lose sight hereof, especially not sentencing courts or courts of appeal. Parole is the function of the Executive arm of government, and the courts should steer well clear of interfering unless authorized by law to do so.

[28] Nevertheless, the aforementioned measures pertaining to parole for lifers and other sentenced prisoners clearly convey the impression that Parliament has intended to decree that, just like a sentence of life imprisonment has been regarded as equivalent to twenty (20) years imprisonment under the dispensation before the new Correctional Services Act became effective, so that a heavier punishment than twenty five (25) years were almost unthinkable at the time;⁶⁰ life imprisonment today should be regarded as equivalent to twenty five (25) years imprisonment, so that a heavier punishment than thirty (30) years should not be lightly considered.⁶¹

⁶⁰ Para [14] *supra*.

⁶¹ Compare Naser *loc cit* footnote 44. Compare also the *rationes* of the SCA in *Mhlakaza, Maseola and Johaar supra* footnote 26.

[29] We are fortified in this conclusion because of the fact that, where a Regional Court (concededly not a High Court) acts under section 51(1) of the Minimum Sentencing Act,⁶² and it finds that substantial and compelling circumstances exist justifying the imposition of a lesser sentence than life imprisonment, the jurisdiction of a Regional Court is not extended to an unlimited period of imprisonment such as the High Court theoretically may impose, but to a maximum of thirty (30) years imprisonment.⁶³ This, effectively means that, taking into account that where minimum sentences are concerned, at least four fifths of the sentence must be served, the effective non-parole period would be twenty four (24) years if the maximum of thirty (30) years is imposed by a Regional Court - one (1) year less than what would have entitled someone sentenced to life imprisonment to be considered for parole. It is also interesting to muse at the fact that the maximum term of imprisonment that can be imposed by a Regional Court under section 51(2) of the Minimum Sentencing Act, which does not require life imprisonment, is thirty (30) years imprisonment in the case of a third or subsequent offender convicted of an offence mentioned in Part II of Schedule 2 of the Minimum Sentencing Act.⁶⁴

⁶² Where it holds concurrent jurisdiction with the High Courts to impose life imprisonment, albeit as a minimum sentence and not really a 'discretionary' one as the title of the provision s51 suggests:

"Discretionary minimum sentences for certain serious offences" - own italics.

⁶³ See the proviso in s 51(3)(a) of the Minimum Sentencing Act: "... Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to in Part I of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years."

⁶⁴ Although s 51(2)(a)(iii) decrees a minimum of 25 years to be imposed, the proviso extends the jurisdiction of a Regional Court (not a High Court) to 30 years imprisonment max: "Provided that the maximum term of imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than five years."

[30] I find it instructive that Parliament has decided to limit the maximum penal jurisdiction of the regional courts, otherwise entrusted with the power to impose life imprisonment in certain circumstances, to thirty (30) years imprisonment in cases where life imprisonment is not imposed. Is Parliament not trying to tell us something? That, where minimum sentences are concerned, one should ideally not impose more than thirty (30) years imprisonment, even where a High Court imposes such sentence, unless, of course, a High Court utilizes its discretion to impose life imprisonment? There is by the way no prohibition for a High Court to impose the maximum penalty for any crime, which should be life imprisonment now that the death penalty has been abolished, especially in the case of robbery with aggravating circumstances that, pre-*Makwanyane*,⁶⁵ was still regarded as a capital crime for which the death penalty could be imposed.⁶⁶ In this regard it is important to note that in the case of *Nkosi and Others* alluded to above,⁶⁷ even where one of the appellants in a 'taxi violence' matter was not convicted of murder like the other appellants that received 'Methuselah sentences' of one hundred and twenty (120) and sixty five (65) years imprisonment,⁶⁸ and who was sentenced to an effective term of forty five (45) years for having committed two offences under the Riotous Assemblies Act,⁶⁹ his sentence was, like that of his co-appellants set aside and replaced with the ultimate penalty, life imprisonment. In our view, this judgment pronounced a basic principle - the Supreme Court of

⁶⁵ *Supra* footnote 15.

⁶⁶ The now repealed s 277 of the Criminal Procedure Act.

⁶⁷ *Supra* footnote 20.

⁶⁸ Another thing that the SCA overlooked in *Mafoho supra* footnote 21 when stating the facts of *Nkosi* in order to distinguish the two cases to escape the effect of the rule of *stare decisis*.

⁶⁹ Act 17 of 1956.

Appeal is (or was) of the opinion that no sentence of imprisonment should perceivably exceed what life imprisonment would effectively mean for a person to be released on parole.

[31] It is also instructive to note that, while the provisions referred to above, besides perhaps section 276B(1)(c) of the Criminal Procedure Act alluded to above,⁷⁰ do not refer to 'effective' terms of imprisonment, meaning that the cumulative effect of sentences have to be taken into account. It is quite clear from the intention of the legislature, the Constitutional Court in *Makwanyane* and the Supreme Court of Appeal in *Nkosi and Others* alluded to above, that no sentence of imprisonment should perceivably be higher than what life imprisonment effectively entails. Life imprisonment should remain the ultimate sentence that a South African court can impose today.⁷¹ Furthermore, in our view, the Supreme Court of Appeal has also already expressed itself in *Mhlakaza*, in *Maseola* and in *Johaar* that, normally effective sentences on cumulative counts of between forty (40) and fifty (50) years would exceed 'acceptable limits' of imprisonment other than life imprisonment; and, therefore effective sentences of thirty (30) years in *Maseola*; thirty eight (38) years in *Mhlakaza*; and thirty (30) years in *Johaar* were held to be within the 'norm' that should be imposed (either *a quo* or on appeal) where life imprisonment is not imposed.⁷²

⁷⁰ *Supra* at para [25] (2)(a).

⁷¹ *S v Silulatlle en 'n Ander supra* footnote 41.

⁷² *Mhlakaza, Maseola and Johaar supra* footnote 26.

[32] In the light of the above, I am of the opinion that, when a court, be it a High Court, a Regional Court or even a District Magistrate's Court in the case of multiple counts where the maximum of three (3) years imprisonment can sometimes be imposed per count, sentencing courts should be wary of taking into account the parole legislation and policies expounded on above. This is so, particularly because, even when considered, a prisoner might not necessarily qualify for release on parole. Sentencing courts should further not impose effective sentences (as opposed to individual sentences on each count) of imprisonment that exceed the above guidelines. In other words, effective sentences (as opposed to individual sentences on each count) imposed under section 51(1) or (2) of the Minimum Sentencing Act should not perceivably exceed life imprisonment.⁷³ (In other words thirty one (31) years and three (3) months imprisonment.)⁷⁴ Effective sentences (as opposed to individual sentences on each count) imposed in any other circumstance should not exceed a period of fifty (50) years imprisonment, because after half has been served - twenty five (25) years - the prisoner will in any event become entitled to parole, just like someone sentenced to life imprisonment. The Supreme Court of Appeal has however already indicated that sentences of between forty (40) and fifty years (50) would usually be regarded as inappropriate,⁷⁵ meaning that effective

⁷³ Where the prisoner will be considered for release on parole after a minimum of 25 years have been served (the exception applicable to prisoners who reach the age of 65 excluded).

⁷⁴ Which would mean that a person who receives such an effective sentence would have to serve four fifths of his sentence (i.e., 25 years) before becoming eligible for release on parole - the same as a person sentenced to life imprisonment.

⁷⁵ *Mhlakaza and Maseola supra* footnotes 26, 72; and in the main text of this judgment at para [31].

sentences of between thirty (30) and forty (40) years should rather be considered.

[33] A further consideration is of importance, namely the general life expectancy of people in South Africa today, namely almost sixty (60) years; as well as the fact that a lifer or other sentenced prisoner that has reached the age of sixty five (65) years⁷⁶ during his imprisonment is entitled to be considered for release on parole much earlier than others.⁷⁷ Would it make sense, therefore, that a sentencing court should impose an effective sentence of fifty (50) years imprisonment on a person that is already forty (40) years old. If he is not released on parole, and examples like these exist, for example the *Derby-Lewis* matter,⁷⁸ such a person might be ninety (90) years old before he is released - that is if he does not die before. On an optimistic assumption that someone in the position of the appellant might reach an age of eighty (80) years, his effective sentence should in the light of what has been said above not have been more than forty (40) years imprisonment, just in case he is not released on parole when considered after twenty five (25) years as the law requires he should be considered. After twenty five (25) years he would already be sixty five (65) years old. As a general guideline, therefore, we would venture that, where a sentencing court imposes sentences that do not include life imprisonment, the cumulative effect of which would be above thirty (30) years, the court should

⁷⁶ The so-called pensionable age.

⁷⁷ As indicated *supra* they are entitled to be considered for parole after 15 years, whereas other lifers are only entitled to be so considered after 25 years.

⁷⁸ *Supra* footnote 49.

ideally not impose an effective sentence that, added to the convict's age at the time of sentencing, would exceed eighty (80) years so that, if he is not released on parole after having been considered for such release, he or she will only be released at the age of eighty (80), should he be so fortunate.

[34] The public yearning for retribution, prevention and deterrence of crimes will still be satisfied where it learns via the media that a person has, for example, been sentenced to a total of one hundred (100) years, but, that his or her effective sentence will be that, if he is not released on parole, he will only leave prison at the age of sixty (60), seventy (70) or eighty (80). It however becomes ludicrous if a person (even a teenager) is sentenced to one hundred (100) years imprisonment.

[35] Thus, it does not matter whether the sum total of the sentences imposed on individual counts, as in this matter, exceeds the effective sentences that have been expressed above to be desirable, a sentencing court should always be mindful to bring the effective sentences to a period within these guidelines. This is exactly why section 280 of the Criminal Procedure Act has been placed on the statute book.⁷⁹ Even though the language in section 280 has been couched in a way providing for a discretion to order concurrent running, if legislative, judicial and juridical policy dictates, as I think it does, that no effective sentence (as opposed to sentences imposed on individual counts) should be above what the

⁷⁹ E.g., see the *ratio* in *Johaar supra* footnote 26 where the regional magistrate was commended for having ordered sentences to run concurrently to bring down the effective sentences to within judicially acceptable norms.

perceived effect of life imprisonment is, I am of the opinion that courts are enjoined to utilize section 280 of the Criminal Procedure Act to bring the total effective sentence in line with these guidelines.

[36] In the light of what was said above, especially taking into account the legislative and policies surrounding release on parole, we are of the opinion that the trial court *in casu* could just as well have imposed sentences of life imprisonment on both the appellant and Grootboom, who was sentenced to an effective term of thirty five (35) years imprisonment, but did not receive leave to appeal the sentences as did the appellant. But then again, would it be fair if he is also sentenced to life imprisonment like his co-accused who have been convicted of many more counts, including murder? Grootboom's case is much closer to the ideal effective sentence advocated above should have been the maximum that the trial court should have considered than what appellant's is. Applying normal principles applicable to parole, she would have to serve four fifths of the thirty (30) years imprisonment imposed on the two counts of robbery with aggravating circumstances - i.e., twenty four (24) years - and half of the five (5) year sentence imposed on the kidnapping count - i.e., two and a half (2,5) years. This amounts to a total non-parole period of twenty six and a half (26,5) years, which is close enough to the maximum non-parole period of twenty five (25) years, as is the case with life imprisonment, and will not really raise eyebrows in a court of appeal. Applying normal parole principles to appellant's matter, however, boils

down to the following. He will have to serve four fifths of the forty five (45) years imposed on the three robbery with aggravating circumstances count - i.e., thirty six (36) years - and half of the five (5) year sentence for kidnapping - i.e., two and a half (2,5) years. The total non-parole period would therefore in his case amount to thirty eight and a half (38,5) years, which is more than twelve (12) years above the threshold compared to what his co-accused, that have been sentenced to life imprisonment, would have to serve. As it is said in Afrikaans: 'Dit skree tog ten hemele.'

[37] Fortunately, in the cases of Grootboom and appellant, the legislative framework surrounding parole release policy discussed above, would in the end mean that the two of them will also be considered for parole after twenty (25) years, just like their co-accused that have been sentenced to life imprisonment. The persuasive force on the Department of Correctional Services that the imposition of extremely lengthy sentences, or the fixing of non-parole periods, whether impliedly or in terms of section 276B of the Criminal Procedure Act, or even a recommendation of a non-parole period before section 276B became operative, should not be underestimated and is a practice that should be applied with caution.⁸⁰ In any event, a non-parole period, with a maximum of twenty five (25) years, should not be considered and ordered by a sentencing court in terms of section 276B before allowing Counsel for the state and the accused to address

⁸⁰ *S v Botha supra* footnote 59. See also *S v Matlala supra* footnote 59 where, for this same reason, an effective sentence of 40 years imprisonment with a recommendation that the accused should not be released on parole before 30 years have expired, was set aside and substituted with an effective sentence of 30 years imprisonment without any recommendation of a non-parole period.

the court on that issue, and after having properly considered the fact that the trial court's purpose is pre-eminently to determine a proper sentence of what the trial court thinks should be served, and not to prescribe to the Executive arm of government how the execution of sentences should be done.⁸¹

[38] In the light of the above it is proposed that an order in the following terms be made:

(1) The appeal in respect of sentence succeeds in as far as the effective sentence of fifty (50) years imprisonment is inappropriate and induces a sense of shock.

(2) The sentence of fifteen (15) years imprisonment imposed on each of counts 13, 14 and 17 is confirmed. It is, however, ordered that five (5) years of the sentence on count 14 and five (5) years of the sentence on count 17 should run concurrently with the sentence on count 13. An effective term of thirty five (35) years imprisonment is therefore imposed in terms of section 51(2)(a)(i) of the Criminal Law Amendment Act 105 of 1997.

(3) The sentence of five (5) years imprisonment imposed on count 19 is confirmed. It is ordered that three (3) years of the sentence on this count run concurrently with the sentence on count 17. An effective term of two (2) years imprisonment is therefore imposed in terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1997.

⁸¹*S v Mthimkulu supra* footnote 53; *S v Botha* and *S v Matlala supra* footnote 59; and main text of judgment at para [26].

(4) The total effective sentence is therefore thirty seven (37) years imprisonment. Appellant shall be considered for parole after a period of twenty five (25) years has been served, subject to the Correctional Services Act, 111 of 1998.

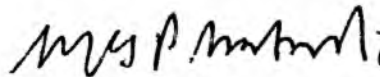
(5) The sentences mentioned above are, in terms of section 282 of the Criminal Procedure Act 51 of 1977, antedated to the date of the original sentence, namely 28 September 2004.

(6) A copy of this whole judgment be supplied to the Department of Correctional Services.



**AA LAMPRECHT
ACTING JUDGE OF THE NORTH
GAUTENG HIGH COURT**

I agree



**MG PHATUDI
ACTING JUDGE OF THE NORTH
GAUTENG HIGH COURT**

I agree and it is so ordered



**HJ DE VOS
JUDGE OF THE NORTH
GAUTENG HIGH COURT**

Representation for the applicant:

Counsel:

Adv E Tlake

Instructed by:

Legal Aid South Africa
Pretoria Justice Centre
2nd Floor FNB Building
206 Church Street
Pretoria

Representation for respondent

Counsel:

Adv S Scheepers

Instructed by:

Director of Public Prosecutions
High Court
Pretoria