

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

APPEAL NO: AR24/11

In the matter between:

VAMILE MICHAEL MCHUNU
CECIL MAGIDA

First Appellant
Second Appellant

and

THE STATE

The State

J U D G M E N T

Delivered on 10 February 2012

PATEL JP

INTRODUCTION

[1] The appellants, Mr Vamile Michael Mchunu (First Appellant) and Mr Cecil Magida (Second Appellant) were convicted on two counts of murder and one count of attempted robbery with aggravating circumstances as defined in Section 1 (1) (b) of Act 51 of 1977. Mchunu was indicted as Accused 2 and Magida was indicted as Accused 4 in the Court *a quo*. I shall refer to the appellants as Accused 2 and Accused 4, respectively. Accused 2 was sentenced to 20 years' imprisonment on Count 1, 20 years' imprisonment on Count 2 and 15 years' imprisonment on Count 3 whilst Accused 4 was also similarly sentenced on the two counts of murder but was sentenced to 10 years' imprisonment on the third count. Accordingly, Accused 2 was sentenced to an effective sentence of 55 years' imprisonment and Accused 4 to 35 years' imprisonment. The murder and robbery took place on 08 August 1997 and judgment and sentence was finalized on 25 May 1999. An application for leave to appeal against sentence was refused by the trial court. This appeal serves before us as a result of the grant of a petition by the Supreme Court of Appeal (SCA) and referred back to the Full Court of the KwaZulu-Natal High Court (Pietermaritzburg) for a reconsideration of the sentence.

[2] It cannot be gainsaid that both the accused committed what can only be described as heinous

crimes. The murder of the deceased occurred in the course of a well planned robbery. Both the accused were found to be unrepentant liars by the trial court, a finding with which I am in agreement. The learned judge *a quo* was not wrong in describing the offences for which both accused were convicted as being heinous in the extreme when he sentenced them. The only question which needs to be asked was whether despite the heinousness of the crimes, the sentences were manifestly just. This question must today be answered in the light of the extant jurisprudence at the time of the hearing of this appeal. The learned judge did not have the benefit of this jurisprudence when he sentenced both the accused.

[3] The Criminal Law Amendment Act 105 of 1997 re-introduced comprehensive minimum sentencing in South Africa. The Constitutional Court confirmed, as late as December 2005, that the minimum sentencing provisions were not retrospective.¹ They apply only to crimes committed on or after 1 May 1998.² [Section 51](#) introduced minimum sentences for certain offences, unless there are ‘substantial and compelling circumstances’ for the imposition of a lesser sentence. To that extent the Court *a quo* did not misdirect itself when it did not apply the provisions of the Act which although promulgated had not come into force.

[4] It is trite law that the issue of sentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be. The purpose behind a sentence was set out in *S v Scott-Crossley* 2008 (1) SACR 223 (SCA) at para 35:

‘Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the over-riding ones.’

The judgment continues:

‘. . . [i]t is true that it is in the interests of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.’

[5] The circumstances entitling a court of appeal to interfere in a sentence imposed by a trial court were revisited in *S v Malgas* 2001 (1) SACR 469 (SCA) at para 12, where Marais JA held:

‘A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. . . . However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”.’

[6] With regard to life imprisonment, the Supreme Court of Appeal in *S v Bull and Another; S v Chavulla and Others* 2002 (1) SA 535 (SCA) at para 23 held that ‘it is the possibility of parole which

[1 Veldman v Director of Public Prosecutions: \(Witwatersrand Local Division\) Veldman v Director of Public Prosecutions: \(Witwatersrand Local Division\) 2007 \(9\) BCLR 929 \(CC\) 2007 \(9\) BCLR 929 \(CC\)](#).

²See also *S v Willemse* 1999 (1) SACR 450 (C).

saves a sentence of life imprisonment from being cruel, inhuman and degrading punishment’.

[7] In terms of [s 276B](#) of the Criminal Procedure Act, 51 of 1977 the court has the power, when sentencing an accused, to direct that the accused not qualify for parole for a certain period. The non-parole period may not exceed two thirds of the period of imprisonment imposed or 25 years, whichever period is shorter ([s 276B\(1\)\(b\)](#)). If the accused has been sentenced on two or more counts, the effective period of imprisonment is used for this calculation. In the case of a sentence imposed under the minimum-sentence legislation the prisoner may not be placed on parole until he or she has served at least four fifths of the term of imprisonment imposed or 25 years, whichever period is the shorter; however, the court may, when imposing imprisonment, order that the prisoner be considered for placement on parole after he or she has served two thirds of such term ([s73\(6\)\(b\)\(v\)](#) of the Correctional Services Act).³

[8] The parole of a prisoner, who was sentenced before the coming into operation of Act [111 of 1998](#) is regulated by the provisions that applied when he or she was sentenced. Therefore the Correctional Services Act 8 of 1959 would apply.

[9] In *S v Makena* 2011 (2) SACR 294 (GNP) the appellant and his co-accused were convicted of murder, robbery and housebreaking with intent to steal and theft. **The offences giving rise to the trial against the appellant occurred in 1996, i.e. prior to the enactment of Act 105 of 1997.** The cumulative effect of the sentences imposed was 50 years’ imprisonment with the trial court further recommending to Correctional Services that the appellant only be considered for parole after having served 30 years of his sentence. On appeal, the court held that the recommendation that the accused should be considered for parole only after serving a specified part of his sentence should have been avoided and left uninfluenced in the hands of the appropriate department.

[10] It was further held that, based on the sentences emanating from the Supreme Court of Appeal for murder, it could be said that effective sentences exceeding 25 years’ imprisonment were not confirmed lightly. The basis for this may have been the emphasis on reformation and rehabilitation, based, *inter alia*, on the constitutional precepts that punishment should not be cruel or be deemed to be such. In making this statement, the court had full knowledge and appreciation of the gravity and devastating effects that the loss of the victim's life had inevitably inflicted on his family, society and the country. The need for having regard to a convicted person's personal circumstances served precisely to balance the principles that must be considered when sentencing, namely that “general punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances’. The appeal against sentence succeeded and the effective sentence was reduced to 25 years’ imprisonment.

[11] In *S v Siluale & 'n ander* 1999 (2) SACR 102 (SCA) the court held that if the circumstances of a case require that an offender should receive a sentence which removes him permanently from society, life imprisonment is the only appropriate sentence. A sentence of imprisonment which is so unusually long that it denies the offender all possible hope of ever being released, is alien to a civilised legal system. And thus exceptionally long terms of imprisonment, which are calculated to exceed the

³ *Hiemstra’s Criminal Procedure*, pg 28–37.

accused's life expectancy (in casu 155 years, 115 years and 105 years), were not appropriate.

[12] In *S v Nkosi & others* 2003 (1) SACR 91 (SCA) **the crimes were committed between the years 1995-1996**. Judgment was given in 2002. The trial Court had sentenced the appellants to terms of imprisonment of 120 years, 65 years, 65 years and 45 years respectively. At para 9 the SCA stated:

‘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.’

[13] The SCA held that the sentences imposed by the trial Judge had been calculated to circumvent the relevant parole provisions. In the circumstances it was clear that the sentences imposed could not stand. The sentence was substituted with one of life imprisonment.

[14] *S v Mhlakaza & another* 1997 (1) SACR 515 (SCA) dealt with an attack on a police officer involving a machine gun (and the shooting and wounding of members of the public). The two appellants who had been convicted on charges of murder, attempted robbery, possession of firearms, and possession of a machine gun were effectively sentenced to 47 and 38 years' imprisonment, respectively. The court considered whether, in the circumstances of the case, the cumulative effect of the sentences imposed was so inappropriate that the court was permitted to substitute its discretion for that of the trial court.

[15] The Court held that sentences of imprisonment ought to be realistic and should not be open to the interpretation that they have been designed for public consumption or for controlling the Executive. But whether or not sentences would fall within the bounds of what would be considered proper or appropriate would inevitably depend on the facts of each case. Both the appellants were sentenced to an effective 38 years' imprisonment.

[16] *S v Sidyno* 2001 (2) SACR 613 (T) the accused was convicted of seven counts of murder. The Court considered the question whether it was desirable for a Court imposing a sentence such as life imprisonment to make a recommendation that parole ought not to be considered before the lapse of a certain period longer than 25 years and whether this made any practical sense and had any effect. The Court held that it had the right to make such recommendation but that this should however only be done occasionally and only in exceptional cases, *inter alia* because of the principle of the separation of powers.

[17] The Court held that life imprisonment was appropriate and that it was a case where a recommendation was justified in the light of the number and seriousness of the murders, the accused's strong image of cold-bloodedness, his lying and the total absence of any remorse and his unlikely rehabilitation. The accused was sentenced to life imprisonment on each of the counts and it was recommended that he not be released before he had served 40 years imprisonment.

[18] It is a trite proposition that the rod of punishment is to be applied differentially and according to the law. Yet one is painfully aware of how difficult it is to achieve proportionality in practice. There are often wide variations in prison sentences handed out for murder. Perhaps it is this thinking which led the Legislature to make all sentences imposed together with a life sentence run concurrently. If I were therefore to impose life sentence on each count of murder the sentence imposed on Count 3, that of attempted robbery, will run concurrently with the sentence of life imprisonment.

[19] On the face of it and having regard to the *Makena* and *Siluale* judgments it would appear that a sentence of 55 years is 'manifestly unjust'. This takes into account the fact that the minimum-sentence legislation was in operation when the learned judge sentenced the accused to 55 years' imprisonment. Even though the Act does not apply retrospectively the learned judge ought to have taken some guidance from the Act before sentencing the accused.

[20] I am of the view that considering the jurisprudence adverted to above, the interests of both the accused and society will be best served if I impose life sentences on each count of murder and direct that both the accused are not to be considered for parole until they have served a period of 20 years' imprisonment. As far as the sentence imposed on the third count is concerned I am of the view that the learned judge's reasoning for a lighter sentence imposed on Accused 4 on the third count is justified and I do not propose interfering with that sentence.

[21] Accordingly I make the following order in respect of both appellants :

(a) The appeal against the sentences imposed on the two counts of murder is upheld and those sentences are set aside.

(b) Both the appellants are sentenced to life imprisonment on each of counts 1 and 2.

(c) The appeal against the sentence on count three is dismissed and that sentence is confirmed.

(c) The sentences are to run from 25 May 1999.

(d) I further direct that both the appellants serve a minimum of 20 years' imprisonment before they are considered for parole.

Concur:

GORVEN J

VAHED J

Date of Hearing : Friday, 03 February 2012

Date of Judgment : Wednesday, 08 February 2012

For Both Appellants : Mr. T. P. Pillay

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