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

CASE NO.: A958/2009

DELETE WHICHEVER IS NOT APPLICABLE

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

28/11/2014
DATE

SIGNATURE

In the matter between:

JOSEPH KHOZA — APPELLANT

AND

THE STATE — RESPONDENT

JUDGMENT

MAKHAFOLA J

INTRODUCTION

[1] The appellant Joseph Khoza was cited as accused 3, who resided at 2114 Phase 4 Mandela Village in Mamelodi and was 26 years old. He was tried and convicted on 4 counts: namely murder, robbery with aggravating circumstances, unlawful possession of a firearm and unlawful possession of ammunition. He was finally sentenced on counts 1, 2, 3 and 4 as follows: 40 years' imprisonment, 14 years' imprisonment, 2 years' imprisonment and 6 years' imprisonment.

[2] The court ordered further that sentences imposed in counts 3 and 4 together with 4

years in count 2 should run concurrently with the sentence in count 1. The appellant was sentenced to an effective 50 years imprisonment. A further rider was added that he should not be considered for parole before serving 33 years imprisonment.

LEAVE TO APPEAL

[3] Leave to appeal the convictions and sentences having been refused by the trial court, the appellant petitioned the Supreme Court of Appeal which granted him leave to appeal only the sentences to the full court of this division.

DISCOURSE

[4] Whilst it is trite that the sentencing powers are pre-eminently within the judicial discretion of the court that tries and convicts the accused, the appeal court will interfere where a sentence is based on incorrect facts or it is shockingly inappropriate or where there is an irregularity or misdirection.

Vide: R V MAPUMULO & OTHERS 1920 AD 56 AT 57
R V HOLDER 1979(2) SA 70 (A) AT 77 TO 78
S V RABIE 1975(4) SA 855 (A) AT 857 D-E

In S V PILLAY 1977 (4) SA 531(A) at 535 E-F the court had the following to say regarding an appeal against sentence: "as the essential inquiry in an appeal against sentence, however, is not whether the sentence is right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence. That is obviously the kind of misdirection predicated in the last quoted *dictum* above: one that "the dictates of justice" clearly entitle the Appeal Court "to consider the sentence afresh" (CF. Nel's and Hockley's cases, *supra*).

The *dictum* in S V JUTA 1988 (4) SA 962 (TK) at 927 D-F is precisely pertinent to the sentencing court. The court expressed itself as follows: "it is true that the sentence is pre-eminently a matter for the trial court, and it is, within the limits of statutory provisions, in the discretion of the presiding officer. But that discretion is not an ordinary discretion, it is a judicial discretion which means that the discretion cannot be exercised arbitrarily or whimsically. It is a discretion which is bound by judicial precedent and judicial authority. As an English judge has put it – judicial officers are like the centurion of Capernaum: he is one with authority but he is himself under authority. The authority of precedent and decision of Superior Courts; whether the presiding officer likes it or not or whether he agrees with such superior precedents or not is irrelevant. He stands under that authority and must bow to it".

[5] Having laid the basis upon which the principles of sentencing are founded from authorities and bolstered by the imperative *dictum* in S V JUTA (*supra*) I cannot agree better than I do and, I unreservedly salute it.

[6] I now turn to consider the personal circumstances of the appellant placed on the trial record and arguments advanced on his behalf. At the sentencing stage the appellant was 37 years old; he had passed standard 4; he is married and has 3 children. His wife and children have left him. And he had not seen them again. He resides in an informal settlement called Mandela Village where he had one kind or the other shop which brought him an income of R2000 per month. He has lost his house on account of his arrest where he had been in custody for a period of 1 year and 9 months awaiting trial. He has a previous conviction which has been disregarded for the purpose of sentencing. He was consequently regarded as a first offender.

[7] Arguments advanced were an attack on the 40 years imprisonment on count 1 supporting arguments of the harshness of the sentence. His age, children, rehabilitation and reformation are the basis of the argument.

[8] On behalf of the respondent the core arguments are aggravating circumstances the court had to consider, and these are:

(1) Meticulous planning of the robbery, its prevalence, and the concomitant scourge the crime issues;

(2) The cold-bloodedness of murdering a police officer;

(3) The appellant acting in common purpose with other members of a gang;

(4) The appellant having been a provider of firearms and ammunition; and

(5) The appellant having given instructions that firearms must be used during the commission of the offences to overcome resistance.

[9] The appellant is a repeat-offender but his previous conviction was disregarded for the purpose of sentencing. When the learned trial judge considered both the mitigating factors and aggravating circumstances the aggravating factors do indeed need a court to attach weight to them. This the court has done.

The court lacked more personal circumstances of the appellant namely:

(a) His upbringing;

(b) Whether he was brought up by both parents or not;

(c) Whether he was exposed to bad company or not and if so, at what age did he get bad influence;

(d) The area where he grew up, is it the one where a particular crime is prevalent or not;

(e) Whether the appellant was an independent person or a person who is easily influenced by other people or not;

(f) His remorse appears not to have been fully tested, which if tested would have been a pointer as to whether reformation, deterrence and rehabilitation would change him or not; and

(g) Whether or not the appellant was raised in a dysfunctional household or not, or where violence in the household was an order of the day or not.

[10] As tabulated above I do not intent to find that the personal circumstances are limited to those stated. These and those already on record could have assisted to tilt

the scales in favour of a shorter sentence.

[11] From the record it appears that the court did not give much weight to the personal circumstances of the appellant that the sentence needs to be individualized. In S V SCHEEPTERS 1977 (2) SA 154 (A), it was expressed that individualization of sentence is part of our law.

[12] There is no doubt that murder is a horrendous offence especially aggravated by cold-bloodedness as is the position *in casu*. Robbery with aggravating circumstances is equally serious because more often than not, victims of armed robbers end up being murdered when they resist protecting their properties. I cannot fault the trial court for regarding the offence of which the appellant was convicted, to be on an aggravating pedestal.

[13] The trial court gave insufficient weight to the fact that 50 years imprisonment imposed upon an appellant who was already 37 years old at the time of sentencing, was excessive in the circumstances and that a rider of "no parole" until 33 years is served, was stifling to the flexibility of the judicial discretion the court possesses.

[14] In the circumstances, I am of the view that the sentence of 50 years is excessive and that it induces a sense of shock in that the appellant's hope of rehabilitation is shut down and for one reason or another his lifespan is unknown, and cannot be determined by the court or mankind.

[15] I find that the principles guiding the sentencing court dictate that the effective sentence of 50 years imprisonment is disproportionate to the offences committed. Consequently, the trial court did not exercise its discretion properly and judicially. The sentence is inordinately a long term of imprisonment which entitles this court to interfere with it.

[16] I now turn to deal with the "no parole" clause in the sentence. It is trite that a court of law is expected to give reasons for its findings. No reasons appear to justify the

"no parole period".

Section 276B provides:

(1) (a) If a court sentences a person convicted of an offence to imprisonment 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 sentence of imprisonment shall run concurrently, the court shall, subject to subsection (1) (b) fix a non-parole period in respect of the effective period of imprisonment.

[17] The Act is clear and lucid and the section needs to be read in conjunction with its subsections. The subsections are couched in "shall" which connotes the imperative.

[18] I am not competent to deviate from the findings of the Supreme Court of Appeal in S V STANDER 2012 (1) SACR 537 (SCA) at paragraph [16] where the court held that "an order in terms of section 276B ... should only be made in exceptional circumstances, after sentence, to result in a negative outcome for any future decision about parole"

[19] Similar sentiments expressed in S V BOTHA 2006 (2) SACR 110 (SCA) are apposite. In S V MAKENA 2001 (2) SACR 294 (GNP), a judgment of this court, has rejected the insertion of a "non-parole period" in a sentence of the trial court.

[20] I have perused the sentence to find out if the trial court had invited the appellant to place special circumstances before court and address it as to why a "non-parole period" should not be invoked. That invitation is wanting.

[21] This "non-parole period" is to be rejected as not being fair and just to the appellant, and that it is contrary to the spirit and the letter of section 276 B and the

interpretations given to it by decided cases. In the circumstances, I do not find its justification in terms of the Act and any other law. The fixing of a "non-parole period" in the sentence of the appellant obstructs the parole board from exercising its duties in terms of the Correctional Services Act 111 of 1998. The "period" needs to be sparingly exercised in terms of section 276 B when a deserving case is before court.

[22] In the circumstances of this case, the trial court misdirected itself by imposing a "non-parole period" of 33 years in the effective sentence of 50 years.

In the result, I am of the view that the appeal should succeed, and I give the following order:

ORDER

(1) The appeal against the sentence in count 1 is upheld;
(2) The "non-parole period" of 33 years is set aside;
(3) The sentences in counts 2, 3 and 4 are confirmed;
(4) The sentence in count 1 is substituted by the following:

    The appellant is sentenced to 30 years' imprisonment;

(5) The sentences in counts 2, 3 and 4 are to run concurrently with the sentence of 30 years in count 1; and
(6) The fresh sentences are ante-dated in terms of section 282 of the Act to 16 October 1997.

K MAKHAFOLA
JUDGE OF THE HIGH COURT

D S FOURIE
JUDGE OF THE HIGH COURT

C JANSE VAN NIEUWENHUIZEN
ACTING JUDGE OF THE HIGH COURT

On behalf of the Appellant:	**Adv Voster**
On behalf of the Respondent:	**Adv Pretorius**
DATE OF HEARING:	**24/07/2013**