IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.
26/03/2014

Case No: A622/2013
Date heard: 26 February 2014
Date of judgment: 26 March 2014

In the matter between:

JABULANI ZOMAZOMA MOGAGA Appellant

And

THE STATE Respondent

SUMMARY: **Sentence:** Imposition of sentence – Competency of a sentence of life imprisonment plus a further period of imprisonment –section 39 (2) (a) (i) of Correctional Services Act 111 of 1998 – Competency of fixing a non-parole period – Section 276B (1) (b) of Criminal Procedure Act 51 of 1977.

JUDGMENT

A.M.L. PHATUDI J:

[1] The appellant was accused 2 when convicted in the High Court of South Africa, Transvaal Provincial Division[1] (the trial court) on:

Count 1: Murder;

Count 2: Housebreaking with intent to rob and robbery with aggravating circumstances;

Count 3: Unlawful possession of a firearm and

Count 4: Unlawful possession of ammunition.

[2] The appellant was sentenced to life imprisonment, 20 years imprisonment, 5 years imprisonment and 2 years imprisonment for count 1 to 4 respectively. The trial court further stated that the appellant was thus sentenced to an effective term of life imprisonment plus a further 27 years imprisonment.[2] It was further recommended that the Department of Correctional Services should only release the appellant on parole after [the appellant] could have served at least 30 years of his sentence.[3]

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[1] The term is as referred on record.The court has since been renamed Gauteng Division: Pretoria as envisaged in terms of section 6 of the Superior Courts Act No 10 of 2013;see as well, The Directive by the Chief Justice: February 2014; Directive 3/2014.
[2] Record: page 72 line 7 – 11 – loosely translated.
[3] Record: page 72 line 12 – 14 – loosely translated

[3] The appellant petitioned the Supreme Court of Appeal (SCA) after the refusal by the trial court of his application for leave to appeal against both conviction and sentences. The SCA granted leave to appeal to the Full Court of North Gauteng High Court[4] against sentence only. The SCA further ordered:

'2. without limiting the scope of the appeal, the court of appeal is requested to consider the following in particular:

(a) The competency of a sentence of life imprisonment plus a further period of 27 years' imprisonment bearing in mind the provisions of section 39(2)(a)(i) of the Correctional Services Act 111 of 1998.

(b) The competency of fixing a non-parole period of 30 years bearing in mind the provisions of section 276B (1) (b) of the Criminal Procedure Act 51 of 1977.

3. In the event of the court interfering with the sentence on any grounds it is requested to forward a copy of its judgment to the [Legal Aid South Africa] and invite it to obtain instructions from accused 1 to apply for leave to appeal against sentence.'[5]

[4] This is thus an appeal against the sentences imposed by Els J (the trial court) on 14 October 2003.

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[4] Gauteng Division: Pretoria – see fn 1 supra
[5] Record: SCA Order: page 231 and 232

AD SENTENCE:

[5] It is trite law that in an appeal against sentence, the court of appeal is guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court. The appeal court can only interfere with the trial court's sentence if the court *a quo* misdirected itself in respect of the imposition of sentence or where the sentence imposed is either disturbingly or shockingly inappropriate.

Competency of life imprisonment plus a further period

[6] I find it prudent to consider what the SCA requested of us. First is '[t]he competency of a sentence of life imprisonment plus a further period of 27 years imprisonment *vis-à-vis* the provisions of section 39(2) (a) (i) of the Correctional Service Act 111 of 1998.

[7] Section 39 of the Correctional Service Act 111 of 1998 (CSA 1998) provides:

'(1) Subject to the provisions of subsection (2) a sentence of incarceration takes effect from the day on which that sentence is passed, unless it is suspended under the provisions of any law or unless the sentenced person is

released on bail pending a decision of a higher court, in which case the sentence takes effect from the day on which he or she submits to or is taken into custody.

(2) (a) Subject to the provisions of paragraph (b), a person who receives more than one sentence of incarceration or receives additional sentences while serving a term of incarceration, must serve each such sentence, the one after the expiration, setting aside or remission of the other, in such order as the National Commissioner may determine, unless the court specifically directs otherwise, or unless the court directs that such sentences shall run concurrently but –

(i) any determinate sentence of incarceration to be served by any person runs concurrently with a life sentence or with sentence of incarceration to be served by such person in consequence of being declared a dangerous criminal.'

[8] The CSA 1998 has been promulgated to take effect from 31 July 2004. The CSA 1998 repealed the whole Correctional Service Act 8 of 1959 (CSA 1959). Section 39 is amongst the sections that became operational with effect from 31 July 2004.[6]

[6] Proclamation R38 – Government Gazette 26626 of 30 July 2004.

[9] As indicated above[7], the trial court sentenced the appellant on 14 October 2003. The CSA 1998 was not operational as yet. Section 32 of CSA 1959 made provisions similar to those enacted under section 39 of CSA 1998. Section 32(2) of CSA 1959 provided, for ease of reference, that '[w]hen a person receives more than one sentence of imprisonment or receives additional sentences while serving a term of imprisonment, each such sentence shall be served the one after the expiration, setting aside or remission of the other in such order as the Commissioner may determine, unless the court specifically directs otherwise, or unless the court directs that such sentences shall run concurrently: Provided that any such sentence of imprisonment or additional sentence of imprisonment in which solitary confinement with or without spare diet is imposed, shall be served first: Provided further that any determinate sentence of imprisonment to be served by any person shall run concurrently with a life sentence or with an indeterminate sentence of imprisonment to be served by such person in consequence of being declared an habitual criminal; and that one or more life sentences and one or more such indeterminate sentences, or two or more such indeterminate sentences, shall also run concurrently.'

[7] Paragraph [4] above

[10] In **S v Mhlakaza and Another**,[8] the Supreme Court of Appeal set out the principle that '[t]he function of a sentencing court is to determine the term of imprisonment a convicted person may serve.' It is further principled that 'the court has no control over the maximum or actual period served or to be served.' Added thereto the court stated that 'a life sentence is thus a sentence that may, potentially, amount to imprisonment for the rest of the prisoner's natural life.'[9]

[11] The court in **S v Mahlatsi**[10] followed **Mhlakaza** decision and said that 'the sentencing court shall 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 likely interfere with.'

[12] Considering the sentence of life imprisonment plus a further period of 27 years imprisonment *vis-à-vis* the provisions of section 32(2) of the then Correctional Services Act of 1959, (which was operational at the time of imposition of the sentence), it is clear that

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[8] 1997(1) SACR 515 SCA
[9] Mhlakaza opcit
[10] 2013(2) SACR 625 (GNP) page 521

there is a misdirection on the part of the trial court in imposing the said sentence.

[13] It is further clear that the trial court ought to have ordered the sentence of 27 years' imprisonment in respect of counts 2, 3 and 4 to run concurrently with the sentence of life imprisonment in respect of count 1.

[14] It is on the basis of such misdirection that this court stands to interfere with the sentence.

Competency of fixing a non-parole period

[15] The second issue to be determined is the competence of fixing a non-parole period of 30 years bearing in mind the provisions of the Criminal Procedure Act 51 of 1977 as amended.

[16] Section 276B of the Criminal Procedure Act 51 of 1977 was inserted by section 22 of the Parole and Correctional Supervision

Amendment Act 87 of 1997.[11] The section provides for the fixing of non-parole period. It is enacted that

'(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.

(c)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.'[12]

[17] On the reading of the section, it is clear that the court has the discretion to fix a period during which a convict shall not be placed on parole.[13] However, such a "fixed non-parole period" must not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter.[14]

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[11] The section was promulgated on 1 October 2004.
[12] Section 276B (1) (a) and (b) and (2) of the Criminal Procedure Act 51 of 1977. My underline.
[13] Section 276B (1)(a)
[14] Section 276B (1)(b)

[18] It is further clear on the reading of the section that if a convict is convicted of two or more offences which are ordered to run concurrently, the court shall fix the non-parole period, subject to the provisions of subsection (1) (b), in respect of the effective period of imprisonment.

[19] Both counsel concede in their submissions that the fixing of non-parole period of 30 years imposed by the trial court was wrong and stands to be interfered with.

[20] It must, however, be borne in mind that at the time of the trial court imposing the sentences, the amendment to the Criminal Procedure Act was not as yet effected.[15] The appellant[16] submits, without reference to any authority thereto, that fixing of a non-parole period of a sentence was done as a matter of practice. The said practice created a number of challenges that prompted the insertion of section 276B. I am persuaded to accept that fixing a non-parole period in sentences developed out of practice.

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[15] The sentence was imposed on 14 October 2003 whereas section 276B was effected on 01 October 2004

[16] Adv. V.Z. Nel from Legal Aid South Africa represents the appellant

[21] In my consideration of the submissions made, I am unable to fault the trial court in fixing the non-parole period in his sentence but for the number of years so fixed. As demonstrated, [17]the provisions in section 32(2) of Correctional Services Act 8 of 1959 did not provide for the maximum number of years that could be fixed as a non-parole period in a sentence.[18] There was nothing that precluded the trial court from fixing a non-parole period other than giving sufficient recognition to the possibility of rehabilitation, even in the presence of such serious offences having been committed.

[22] Fixing a non-parole period in sentencing an offender should, in my view, be made in exceptional circumstances, such as facts before the trial court that would continue, after sentence, which may result in a negative outcome for any future decision about parole. Such circumstances should be relevant to parole and not only be aggravating factors of the crime committed.[19]In addition thereto, when the trial court considers fixing a non-parole period, the accused should be afforded the opportunity to address the court on the issue

[17] Paragraphs [17] and [18]
[18] The section only provides for any determinate sentence of imprisonment to be served by any person shall run concurrently with a life sentence.
[19] S v Stander 2012(1) SACR 537(SCA)

as to whether exceptional circumstances exist which imperatively call for such an order to be made and, if needs to be invoked, what an appropriate non-parole period would be to order in the circumstances.[20]The position was no different in the previous dispensation when the trial court had to consider making a recommendation of a non-parole period. Failure by the trial court to afford the appellant such an opportunity constitutes, in my view, misdirection that warrant interference with the sentence imposed.

[23] The position with regard to the fixing of a non-parole period changed as a result of the insertion of section 276B of Criminal Procedure Act 51 of 1977. The section prescribes a maximum number of years that a non-parole period can be fixed for. Had the fixing of a non-parole period of 30 years been done after the promulgation of section 276B of the Criminal Procedure Act, I would not have hesitated to find further misdirection on the part of the trial court.

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[20] Rabie J penned in S v Ndlovu (A621/2013) [2014] GND (26 March 2014) paragraph [20] (quorate by this Full Court) reffering to S v Mthimkhulu 2013 (2) SACR 89 (SCA)

AD SENTENCE ITSELF

[24] On my perusal of the whole record before this court, I noted that the indictment (charge sheet) is silent on the application of the provisions of the Criminal Law Amendment Act 105 of 1997(CLAA). The appellant was not even apprised of the application of the said CLAA. The application of the CLAA is mentioned for the first time when the trial judge indicated that "in terme van artikel 51(1) van Wet 105 van 1997 is die Hof verplig om in daardie geval lewenslange gevangenisstraf op te lê."[21]

[25] It has been principled by the Supreme Court of Appeal[22] that 'where the State intends to rely upon the sentencing regime created by the Act[23], a fair trial will generally demand that its intentions pertinently be brought to the attention of the accused at the outset of the trial, if not, in the charge – sheet, then in some other form, so that the accused is placed in a position to appreciate properly in good time the charge that he faces as well as its possible consequences.'[24]

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[21] Record: page 68 lines 20 – 25. In those circumstances, this court is obliged in terms of section 51(1) of the Act 105 of 1997 to impose life imprisonment. (My translation).
[22] S v Tshabalala; S v Legoa 2003(1) SACR 13 SCA; S v Ndlovu 2003(1) SACR 331 SCA; S v Makatu 2006(2) SACR 582 SCA;S v Mashinini and Another 2012(1) SACR 604 SCA; S v Kolea 2013(1) SACR 409 SCA
[23] Criminal Law Amendment Act 105 of 1997
[24] S v Ndlovu – op cit – para [12]

[26] Both the appellant's and State counsel concede that the application of CLAA is neither spelt out in the charge-sheet nor put to the appellant at any stage during trial.

[27] It has been found in cases I referred to[25] that sentencing the appellant in terms of the provisions of the CLAA while the said provisions are not spelt out in the charge-sheet, constitutes misdirection. It is thus misdirection on the part of the trial court to rely on the provisions of CLAA in imposing a prescribed sentence. It is as a result of that misdirection that this court has to interfere with the sentence imposed.

[28] Sentencing a convict was never an easy task. Having read the record, I find it necessary to consider the traditional triad factors, being the offender, the offence and the interest of the society in determining an appropriate sentence.

[29] The appellant's personal circumstances were, as placed before the trial court, that he was a first offender of 30 years of age at the

[25] Fn 22

time of the commission of the offence with 3 children to feed even though unmarried. Added thereto, I find the appellant's self-incrimination at the time of his plea explanation, [26]during cross-examination of the key witness, Mrs Engelbrecht and during his testimony when he endeavoured to reduce his moral blameworthiness. He explained how he and his co-accused went to the house. He painted a picture of an innocent follower of his co-accused, unaware that robbery was committed. He has been helpful in revealing that which the state could not have revealed in evidence.

[30] Further thereto, the appellant's counsel submits that this court should find, coupled with the above mentioned personal circumstances that the appellant is a candidate for rehabilitation.

[31] In rebuttal thereto, the State[27] submits that the offence committed, especially murder, was brutal. The sanctity of the deceased home was breached and the trust in the protection vested in the deceased by his children has, as well, been breached. Life has

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[26] Record – page
[27] Adv. A Roos

been lost in the commission of the offence. State counsel concedes that life imprisonment is not an appropriate sentence to impose.

[32] I am mindful that the commission of the offence was planned and executed by the appellant and a gang of perpetrators. Murder was committed during the robbery and in the presence of the deceased's wife and their two minor children. The goods robbed were of a substantial value and were never recovered. The court in **Director of Public Prosecution, KwaZulu Natal v Ngcobo**[28] stated, as penned by Navsa JA, that 'courts are expected to dispense justice. This kind of brutality is regrettably too regularly a part of life in South Africa.'[29]

[33] In my final analysis, considering the words of Flemming DJP (as he then was) in **S v Martin**[30] where he stated that "life sentence imposed upon a lively man of 30 years imposes a much longer and harsher sentence...,"I am of the view that a sentence of 25 years imprisonment will be a good message to the offender and other would be offenders

[28] 2009(2) SACR 361
[29] Ibid paragraph [26]
[30] 1996(1) SACR 172(W)

that such behaviour will be met with the full force and effect of the law.[31]

I in the result make the following order:

Order:

1. **The appeal against sentence is upheld.**
2. **The sentence imposed by the trial court is set aside and replaced with the following:**

   "The accused is sentenced to:

   Count 1: 25 year's imprisonment

   Count 2: 12 year's imprisonment

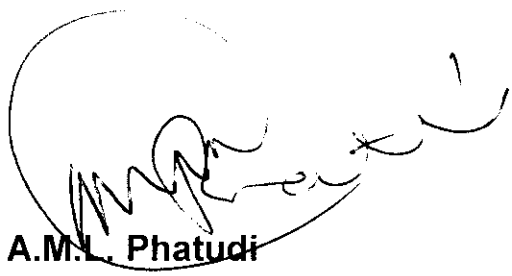
   Count 3: 3 years imprisonment

   Count 4; 1 year imprisonment

   The sentences on counts 2, 3 and 4 are ordered to run concurrently with the sentence on count 1.
3. **The sentence is antedated in terms of section 282 of the Criminal Procedure Act 51 of 1997 to 14 October 2003.**

[31] Ibid

4. It is further ordered that a copy of this judgment be forwarded to the Legal Aid South Africa and Accused 1. The Legal Aid South Africa is invited to obtain instructions from accused 1 to apply for leave to appeal against sentence.



A.M.L. Phatudi

Judge of the High Court

I agree.

C.P. Rabie

Judge of the High Court

I agree.

M.W. Msimeki

Judge of the High Court

On Behalf of the Appellant:	Legal Aid South Africa FNB Building Church Square Pretoria Adv. V.Z. Nel
On Behalf of the Respondent:	The Director of Public Prosecutions Church Square Pretoria Adv. A. Roos