IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
25/04/2014

A701
Case No: ~~AG06~~/2013
Date heard: 26 March 2014
Date of judgment: 25 April 2014

In the matter between:

KOOS MALIBE Appellant

And

THE STATE Respondent

JUDGMENT

PHATUDI J:

[1] The appellant enjoyed legal representation on *pro deo* basis when convicted by the High Court of South Africa (Circuit Local Division of the Eastern Circuit District) held at Graskop, Transvaal

Provincial Division (as it then was).[1] The appellant was convicted on Counts 1,5,6,7 and 8 on his plea of guilty.

[2] The appellant was then sentenced to[2]

Count 1: 15 years' imprisonment

Count 2: 30 years' imprisonment

Count 3: 30 years' imprisonment

Count 4: 10 years' imprisonment

Count 5: 5 years' imprisonment

Count 6: 2 years' imprisonment

Count 7: 3 years' imprisonment

Count 8: 2 years' imprisonment

[3] The appellant was thus sentenced to an effective period of 97 years imprisonment. The trial court further ordered that 'no parole is to be considered until [the appellant] served at least 50 years in prison'[3]

---

[1] The name has since changed to: Gauteng Division: Pretoria
[2] Sentence page 99 record
[3] Ibid

[4] Leave to appeal was granted by Van Der Merwe DJP (as he then was) to appeal to the Full Court of this division against sentence only. This appeal is thus only against the sentence imposed by Curlewis J sitting with assessors on 20 March 1996(the trial court). At the commencement of the hearing of this appeal, the appellant's counsel submits that the crux of this appeal is basically in respect of the sentences in respect of counts 2 and 3 and the fixing of a non-parole period of 50 years.

[5] It is trite law that the imposition of sentence is pre-eminently within the discretion of the trial court. The appeal court may only interfere with the trial court's sentences if the sentence is, among other factors, disturbingly inappropriate or the sentence is so totally out of proportion to the magnitude of the offence that induces a sense of shock.

[6] I find it necessary to set out a synopsis of what happened on the night of 18 June 1994 that led to the appellant's conviction. The appellant hid the whole day in the veld nearby the house occupied by the victims. He patiently waited for the sun to set. At about 19h50,

while the father and the son were enjoyably playing "wrestling,"[4]the appellant shot through the window from the outside. The father was hit. He died as a result thereof. The offence is set out in count 2. The father is hereinafter referred to as deceased 1. The 16 year old son to deceased 1 was also shot at close range. He was shot while on his way out of the house towards the motor vehicle in order to take deceased 1 to the hospital. The wife to deceased 1 and their daughter were then robbed off R15, 00 in cash and the "bakkie". The wife and daughter realised later that the 16 year old had also been shot (deceased 2 on count 3).

Cumulative effect of 97 years imprisonment

[7] Immediately after the appellant's personal circumstances were placed on record and without giving the state either an opportunity to address the court or to submit aggravating circumstances, the trial court said:

[4] Worded : stoei – page 19 of record line 3

'Let me say at once in a crime of such a nature as this certainly I would have imposed a death sentence, these personal circumstances play little part in the assessment of my sentence.'[5]

[8] The trial court then sentenced the appellant to an effective 97 years' imprisonment with a rider of fixing a non-parole period of 50 years. The question to be determined is whether the sentence imposed is shockingly disproportionate to the offence and whether the fixing of a non-parole period of 50 years is in accordance with the law.

[9] Mr Nel, for the appellant, correctly submits with reference to **S v Makwanyane**[6] that after the abolishment of the death penalty, a sentence of life imprisonment became the ultimate sentence that can be imposed upon a deserved offender.

[10] It is trite law that an offender sentenced to life imprisonment remains in a correctional centre for the rest of his or her life.[7]

---

[5] Record – page 98 line 20 - 25
[6] S v Makwanyane and Another 1995(2) SACR 1 (CC)
[7] Section 73 of Correctional Service Act 111 of 1998

[11] This Supreme Court of Appeal[8] had held that '[t]hus, under the law as it presently stands, when what one may call a Methuselah sentence is imposed (i.e. 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 prescribed by s 12(1) *(e)* of Constitution of the Republic of South Africa Act 108 of 1996: see *Bull's* case *supra* at 695*c* where it is pointed out that it is the possibility of parole which saves a sentence of life imprisonment from being cruel, inhuman and degrading punishment.'[9]

[12] The sentence of 97 years is not only shockingly disproportionate to the offence but unconstitutional as it amounts to cruel, inhuman and degrading punishment which is proscribed by section 12(1)(e) of the Constitution of the Republic of South Africa Act 108 of 1996.[10]The sentence is indeed a *Methuselah* sentence.

---

[8] S v Nkosi and others 2003(1) SACR 91 SCA
[9] S v Nkosi para [9]
[10] Ibid

[13] Section 32(2)(a) of the Correctional Services Act 8 of 1959[11] made provision that the sentences of life imprisonment and all other determinate sentences imposed must be served concurrently. The Act was in operation at the time when the appellant was sentenced. The trial court failed to consider ordering all sentences imposed to run concurrently with each other. This in my view, constituted misdirection that warrants this court to uphold the appeal against the sentences imposed.

---

[11] 'When 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.' The Act has since been repealed. Emphasis added

Fixing a non-parole period of 50 years

[14] Section 276B of the Criminal Procedure Act 51 of 1977 as inserted by section 22 of the Parole and Correctional Supervision Amendment Act 87 of 1997 stipulates that:

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

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

(2) If a person who is convicted of two or more offences is sentenced to imprisonment and the court directs that the sentences of imprisonment shall run concurrently, the court shall, subject to subsection (1) *(b)*, fix the non-parole-period in respect of the effective period of imprisonment.' The amendment became operational on 01 October 2004.

[15] The question that needs consideration is whether the rider in the order that 'no parole is to be considered until [the appellant] served at least 50 years in prison' constituted misdirection on the part of the trial court

bearing in mind that at the time of the imposition of the sentences, the amendment to the Criminal Procedure Act was not as yet effected.[12] 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. The provisions enacted 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.[13] There was nothing that precluded the trial court from fixing such 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.

[16] 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

[12] The sentence was imposed on 20 March 1996 whereas section 276B was effected on 01 October 2004

[13] The section only provides for any determinate sentence of imprisonment to be served by any person shall run concurrently with a life sentence.

aggravating factors of the crime committed.[14]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 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.[15]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 warrants interference with the non-parole period sentence imposed.

[17] The appellant, 33 years of age at the time of the commission of the offence, was married with no children. These are the only personal circumstances placed on record. The appellant pleaded guilty to counts 1,5,6,7 and 8. The appellant was not a first offender. It is apparent from the reading of the record that he had escaped from prison at the time of the commission of this offence.

---

[14] S v Stander 2012(1) SACR 537(SCA)
[15] S v Ndlovu (A621/2013) [2014] GND (26 March 2014) paragraph [20] ; S v Mthimkhulu 2013 (2) SACR 89 (SCA)

[18] He had planned to commit the offence. He hid in the veld nearby the victim's home. He patiently waited there for the night to come. He, unprovoked and mercilessly, shot at deceased 1 and deceased 2. This kind of murder was described in **DPP Kwazulu-Natal v Ngcobo** as brutal and savage.[16] The court further stated that 'this kind of brutality is regrettably too regularly a part of life in South Africa.'[17]

[19] Considering the personal circumstances, the personality of the appellant and the justifiable expectations of the community on the sentence to be imposed, I have no doubt that it is this kind of brutality that prompted the legislature to enact the Criminal Law Amendment Act 105 of 1997(CLAA). Had the appellant been charged with the provisions of the CLAA, the substantial and compelling circumstances that warrant deviation from the prescribed minimum sentences would undoubtedly not have been found to exist.

[20] In these circumstances, the sentences I am about to impose, are to be backdated in accordance with the law. Section 282 of

[16] 2009(2) SACR 361 (SCA) at paragraph [25]
[17] DPP Kwazulu-Natal v Ngcobo paragraph [26]

Criminal Procedure Act 51 of 1977 (CPA) as substituted by section 36 of the CLAA provides:

'Whenever any sentence of imprisonment imposed on any person on conviction for an offence is set aside on appeal or review and any sentence of imprisonment or other sentence of imprisonment is thereafter imposed on such person in respect of such offence in place of the sentence of imprisonment imposed on conviction, or any other offence which is substituted for that offence on appeal or review, the sentence which was later imposed may, if the court imposing it is satisfied that the person concerned has served any part of the sentence of imprisonment imposed on conviction, be antedated by the court to a specified date, which shall not be earlier than the date on which the sentence of imprisonment imposed on conviction was imposed shall be deemed to have been imposed on the date so specified.'

[21] I indicated earlier that the Correctional Services Act 8 of 1959, which has since been repealed, was operational at the time of imposition of the sentence. The credits and benefits that accrued as provided for in terms of the provisions of the repealed Acts are succinctly spelt out in **Van Vuren v Minister of Correctional Services.**[18] Of importance is the interpretation of section 136[19] of the Correctional Services Act 111 of 1998 dealing specifically with the

[18] 2012 (1) SACR 103 (CC)
[19] See Van Vuren v Minister of Correctional Services (op cit) paragraphs [47] to [61]

transitional provisions. Seeing that the appellant was sentenced prior to the promulgation of section 276B of the CPA as amended, I would recommend consideration of the policy and guidelines in existence as at 20 March 1996 when considering placement of the appellant on parole. I in the result I would make the following order:

Order:

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

   "The accused is sentenced to:

   Count1: 15 years imprisonment;

   Count 2: Life imprisonment;

   Count 3: Life imprisonment;

   Count 4: 10 year's imprisonment;

   Count 5: 5 years imprisonment;

   Count 6: 2 years imprisonment;

   Count 7: 3 years imprisonment;

   Count 8: 2 years imprisonment;

The sentences in count 1, 3, 4, 5, 6, 7 and 8 are to run concurrently with the sentence in respect of count 2.'

3. The sentences are antedated in terms of section 282 of Criminal Procedure Act, 51 of 1977 as amended, to 20 March 1996.

4. The appellant shall be considered for placement on parole in terms of the policy of the Department of Correctional Services that applied as at the 20 March 1996.

A.M.L. Phatudi

Judge of the High Court

I agree.

C.P. Rabie

Judge of the High Court

I agree.

P.L.C. Maseti

Acting Judge of the High Court

On Behalf of the Appellant:	Pretoria Justice Centre 206 Church Street 2nd Floor FNB Building Pretoria Adv. V.Z. Nel
On Behalf of the Respondent:	Director of Public Prosecutions Church Square Pretoria Adv. S. Scheepers