REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED. ✓

29.1.2016
DATE

SIGNATURE

CASE NO: A446/2015

29/1/16

In the matter between:

SIMON BANDA Appellant

and

THE STATE Respondent

.....

JUDGEMENT

.....

SEMENYA AJ

[1] The appellant was tried and convicted in this Court in 1996 on two counts of murder and one of robbery with aggravating

circumstances as intended in section 1 of the Criminal Procedure Act 51 of 1977 (the CPA) with two co-accused.

[2] He was sentenced to thirty (30) years imprisonment on each of the murder counts and twenty (20) years on robbery with aggravating circumstances charge. It was ordered that the fifteen (15) years' imprisonment sentence on the second murder count should, in terms of section 280 (2) of the CPA, run concurrently with the sentence on count one of murder. His effective sentence was sixty five (65) years imprisonment.

[3] All three accused immediately brought an application for leave to appeal against conviction. The application was refused. On the 9 September 2014 the appellant successfully applied for leave to appeal to this court against sentence only.

[4] Counsel for the appellant submitted, based on the decision in ***S v Mahlatsi 2013 (2) SACR 311 (SCA)*** that the effective sentence imposed on the appellant by the trial court is cruel, inhuman, degrading and warrant intervention by the appeal court. He

further argued that the sentence imposed can be described as a Methuselah sentence (a beyond life sentence).

[5] Counsel for the Respondent conceded that the cumulative effect of the sentences imposed by the trial court is indeed inappropriate and calls for interference by an appeal court. She however argued that the gravity of the offences and the circumstances under which they were committed justify imposition of a heavy sentence.

[6] The approach to be adopted by an appeal court faced with an appeal against sentence has been enunciated in ***S v Pillay 1977 (4) SA 531 (A) at 535 E-G as follows:***

> "The essential inquiry in an appeal against sentence, however, is not whether the sentence was 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."

[7] It appears from the record of the proceedings that the trial court took into consideration the personal circumstances of the Appellant, the interest of the community and the nature of the offences he was convicted of in an endeavour to determine what a proper sentence would be in the circumstances of this case.

[8] The evidence presented in mitigation of sentence was that the appellant was a 33 year old married father of three children aged 3, 7 and 11 years. He was employed with an income of R4800.00 per month. He also owned immovable property. His wife was employed as a Primary School principal. From the above factors it can be deduced that the appellant committed the offences out of greed. He earned enough to cater for the needs of his family.

[9] An additional factor found by the trial court in aggravation of sentence was that the appellant was not a first offender of same such offence. He has previous conviction of robbery and assault. It is this fact that persuaded the trial court to impose a heavier sentence on the appellant than the ones imposed on his co -

accused. This again influenced trial court in arriving at a conclusion that a proper sentence would be the one that would remove the appellant from society for a long period. I am unable to find any misdirection in the reasoning of the trial court in this regard.

[10] The argument that a court should guard against imposing a sentence which is cruel and inhuman as in this case, originates from section ***12(1) (e) of the Constitution of the Republic of South Africa 1996*** (the Constitution) which provides as follows:

> "Everyone has the right to freedom and security of person, which includes the right –
>
> (e) not to be treated or punished in a cruel, inhuman or degrading way."

[11] Whilst this right is entrenched, it follows that what amounts to a cruel, inhuman and degrading sentence will depend on the facts of each particular case. The two deceased persons in this matter were killed and robbed of an amount of R23000 00 which they had just collected from their business. I am unable to imagine anything more cruel and inhuman than a senseless and gruesome killing of a

father and a son in one incident, more so for the sole purpose of taking what was rightfully and legally theirs. This, in any event, has the effect of robbing innocent, law abiding citizens of their loved ones and breadwinners. It also deprives children of their right in terms section 28 of the Constitution to parental care.

[12] I have already stated that I concur with the trial court that the appellant and his co–accused deserved to be removed from the society. However, having said so, it is also necessary to determine whether the trial court exercised its discretion properly by ordering that only a fifteen year term of imprisonment on the second murder charge should run concurrently with the thirty year term imposed on first of the murder count. It appears from the record that the trial court was alive to the need to take into consideration the cumulative effect of the sentence it was about to impose. I nonetheless concur with the argument raised on behalf of the appellant that the effective .sentence imposed is still inappropriately long.

[13] ***S v Brophy and Another 2007 (2) SACR 56 (W); S v Mokela 2012 (1) SACR431 (SCA); S v Nemutandani [2014] ZASCA 128 (unreported, Supreme Court case no. 944/13 22 September 2014*** and numerous other cases, are authority to the effect that where the accused is charged with numerous counts which emanate out of same incident, the court should , in appropriate cases, apply the provisions of section 280 (2) of the CPA and order the sentences to run concurrently. I am of the view that the cumulative effect of the sentence imposed on the appellant is, despite the fact that part of it was ordered to run concurrently, still excessive to warrant interference by an appeal court. The trial court, in my view, should have ordered that all three sentences are to run concurrently.

[14] I, in the result make the following order:

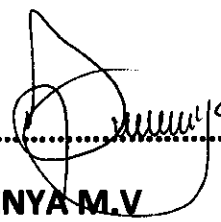
14.1 The appeal against sentence is upheld.

14.2 The sentences of 30 years imprisonment on count 1, 30 years on count 2 and 20 years on count 3 are confirmed;

14.3 The order of the court ***a quo*** in respect of the concurrent running of 15 years imprisonment on count 2 with the 30 years imprisonment on count 1 is set aside;

14.4 In terms of section 280 (2) of the CPA it is ordered that the sentences in count 1, 2 and 3 will run concurrently. Effectively the appellant will serve 30 years imprisonment.

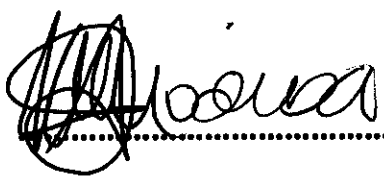
14.5 In terms of section 282 of the CPA, the sentence is antedated to the 19.2.1996.



SEMENYA M.V

Acting Judge of the High Court of South Africa, North Gauteng Division, Pretoria.

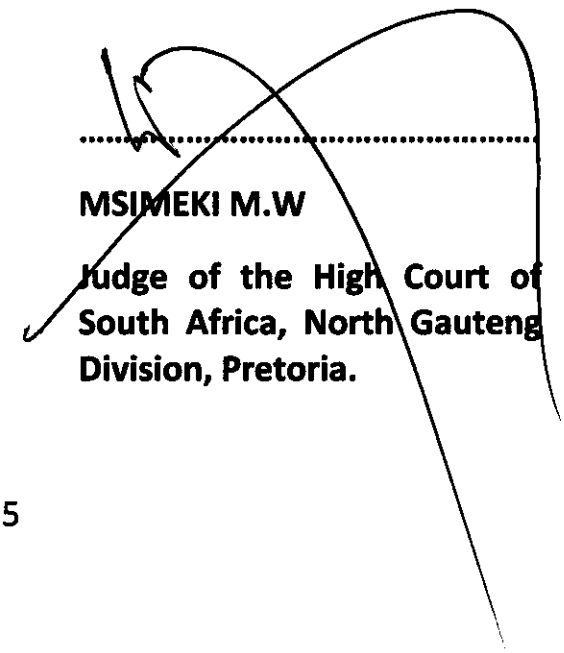
I concur.



MODIBA L.T

Acting Judge of the High Court of South Africa, North Gauteng Division, Pretoria.

I concur and it is so ordered.



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MSIMEKI M.W

Judge of the High Court of South Africa, North Gauteng Division, Pretoria.

DATE OF HEARING: 20 November 2015

DATE OF JUDGMENT: