IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: A12/2016

Date: 7/9/16

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED

7/9/2016 .....
DATE SIGNATURE

In the matter between:

MASHACK MAKOTUMA MAKGOBA

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

PRETORIUS J,

(1) In this appeal against sentence the appellant is appealing against the

recommendation by the sentencing court that the appellant should not be released on parole by the Department of Correctional Services before he had served at least 45 years.

(2) Leave to appeal in respect of sentence was granted on petition by the Supreme Court of Appeal and is restricted to the legality of the recommendation in respect of parole.

BACKGROUND:

(3) The appellant, as accused 2 in the court *a quo*, were convicted of the crimes of murder, robbery with aggravating circumstances, unlawful possession of a firearm and unlawful possession of ammunition. The appellant was sentenced to life imprisonment on the charge of murder, 20 years' imprisonment on the charge of robbery, 5 years' imprisonment on the charge of unlawful possession of ammunition. It was also recommended by Els J that the appellant and his co-accused should not be released from prison before they have served 45 years of their sentence.

(4) The appellant was legally represented during the trial in the court *a quo*.

(5) The facts of the crime are that the deceased in count 1 was with his

wife, having breakfast in their home, at 8h00, when the appellant and his co-accused arrived, shot the deceased and robbed his wife. At the time the deceased was 82 years old and his wife was 78 years old, both elderly people.

SENTENCE:

(6) At the time of sentencing the appellant was 22 years old. He was married with two children, aged 5 and 1 years respectively, he had passed matric and was earning R460 per fortnight, he spent 10 months awaiting trial and was a first offender. It is important to mention that the appellant had been sentenced on 31 October 2000 and leave to appeal was only granted on petition on 6 August 2014.

(7) This case has to be dealt with according to the law as it was at the time of sentencing. The **Criminal Procedure Act**[1] was changed significantly on 1 October 2004, when section 276B of the **Criminal Procedure Act**[2] became law. Section 276B does accordingly not apply in the present circumstances.

(8) In **State v Botha**[3] there was a recommendation from the trial judge that the appellant had to serve at least two thirds of his sentence,

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[1] Act 51 of 1977
[2] *Supra*
[3] 2006(2) SACR 110 (SCA) at paragraph 25

before being released on parole. Ponnan AJA, held:

> *"One final aspect merits mention. The trial Judge recommended that the appellant serve at least two-thirds of his sentence before being considered for parole. The function of a sentencing court is to determine the term of imprisonment that a person, who has been convicted of an offence, should serve. A court has no control over the minimum period of the sentence that ought to be served by such a person.* ***A recommendation of the kind encountered here is an undesirable incursion into the domain of another arm of State, which is bound to cause tension between the Judiciary and the executive****. Courts are not entitled to prescribe to the executive branch of government how long a convicted person should be detained, thereby usurping the function of the executive. (See S v Mhlakaza and Another 1997(1) SACR 515 (SCA); [1997] 2 All SA 185) at 521 f–I (SACR))"* (Court emphasis)

(9) This was confirmation for the finding in **S v Mhlakaza and Others**[4] where Harms JA held:

> *"The lack of control of courts over the minimum sentence to be served can lead to tension between the judiciary and the executive because the executive action may be interpreted as an infringement of the independence of the judiciary (cf Blom-Cooper & Morris The Penalty for Murder: A myth exploded*

[4] 1997(1) SACR 515 (SCA) at 521 f - i

[1996] Crim LR 707 716). There are also other tensions, such as between sentencing objectives and public resources (see Walker & Padfield op cit p 378). This question relating to the judiciary's true function in this regard is probably as old as civilization (windlesham Life Sentences; law, practice and release decisions, 1969-93 [1993] Crim LR 644. Our country is not unique. Nevertheless, sentencing jurisdiction is statutory and courts are bound to limit themselves to performing their duties within the scope of that jurisdiction. Apart from the fact that courts are not entitled to prescribe to the executive branch of government as to how and how long convicted persons should be detained (see the clear exposition by Kriegler J in S v Nkosi (1), S v Nkosi (2), S v Mchunu 1984 (4) SA 94 (T)) ***courts should also refrain from attempts, overtly or covertly, to usurp the functions of the executive by imposing sentences that would otherwise have been inappropriate****. In this regard I regard as commendable and correct the approach of Erasmus J in S v Smith supra 254-259."* (Court emphasis)

(10) The State has argued that there was no order that the appellant had to serve at least 45 years, but that it was a mere recommendation. The **Botha case**[5] also dealt with a recommendation and at paragraph 26 Ponnan AJA found:

"Albeit, just a recommendation, its persuasive force is not to be

[5] *Supra*

underestimated. It, no doubt, was intended to be acted upon. In making the recommendation which he did, ***the trial court may have imposed, by a different route, a punishment which in truth and in fact was more severe than originally intended****. Such a practice is not only undesirable but also unfair to both an accused person as well as the correctional services authorities."* (Court emphasis)

(11) In **Strydom v The State**[6], Pillay JA held:

"With regard to the second issue, the circumstances under which such an order could be imposed, Snyders JA, in Stander, recognising the provisions of the Correctional Services Act 111 of 1998 (CSA) as amended, articulated the history and the development of the courts' approach to this aspect of the imposition of a non-parole order. In referring to a number of decisions, she concluded that while the legislation empowers the courts to impose such an order when sentencing, it should only do so when the circumstances specifically relevant to parole in addition to any aggravating factors pertaining to the commission of the crime, and where a proper, evidential basis had been laid for a finding that such circumstances exist so as to justify the imposition of such an order. ***This court held that a court should not resort to s 276B of the CPA lightly and rather, as this court has often indicated, allow the officials***

[6] (20215/14) [2014] ZASCA 29 (23 March 2015) paragraph 15

of the Department of Correctional Services, who are guided by the CSA and the attendant regulations, to make such assessments and decisions as well as the parole board." (Court emphasis)

This recent judgment confirms that a court will only impose such an order in exceptional circumstances after a proper basis for such an order has been established, even in the event that section 276B applies.

(12) It is thus clear that even with the insertion of section 276B of the **Criminal Procedure Act**[7], that such a recommendation may only take place under exceptional circumstances which are fully motivated by the court. In **S v Botha**[8] and **S v Mhlakaza**[9] it was decided, before section 276B was promulgated, that sentencing is the court's duty, but the fixing of a term before parole may be considered as intruding on the executive arm of the government's sphere and prerogative to establish when a sentenced prisoner should qualify for parole. The Department of Correctional Services is guided in this regard by the **Correctional Services Act**[10], read with the regulations, to decide when to make assessments and to release a prisoner on parole.

(13) It must also be mentioned that section 276B has no retrospective

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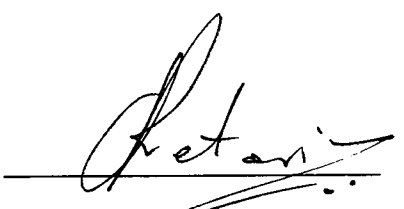
[7] *Supra*
[8] *Supra*
[9] *Supra*
[10] Act 111 of 1998

operation. The present appeal has to be decided according to the law as it was on 31 October 2000, when the appellant was sentenced. The State did not refer to the abovementioned decisions, but this court has considered all the facts, decisions and arguments relating to the appeal. It is quite clear that the recommendation by the court *a quo* has to be set aside, notwithstanding the State opposing the appeal.

(14) Due to our finding that the appeal has to succeed and that the recommendation has to be removed from the sentence, this court invokes its inherent powers of review in the case of the appellant's co-accused. The order will be applicable to the sentence imposed on William Phetole Mamabolo, being accused 1 in the court *a quo*, and who is not before this court.

(15) In the result we make the following order:

1. The appeal succeeds;
2. The recommendation to the Department of Correctional Services that neither the appellant nor William Phetole Mamabolo should be released on parole or otherwise before they have served at least 45 years' imprisonment, is removed.



Judge C Pretorius

I agree,

Judge P M Mabuse

I agree,

Judge M J Teffo

Case number	: A12/2016
Matter heard on	: 12 August 2016
For the Applicant	: Adv R S Matlapeng
Instructed by	: Pretoria Justice Centre
For the Respondent	: Adv A J Rossouw
Instructed by	: Director of Public Prosecutions
Date of Judgment	: