IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

Case Number: A689/2016

Date: 18 November 2020

REPORTABLE:YES/NO

OF INTEREST TO OTHER JUDGES:YES/NO

REVISED

DATE:01 APRIL 2021

KOBOPHIRI SMODEN LETSIRI **FIRST APPELLANT**

CEDRICK NKADIMENG **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the Parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or his/her Secretary. The date of this judgment is deemed to be 01 April 2021.

JUDGMENT

LUKHAIMANE AJ:

[1] The First Appellant (Accused 1 in the trial court) stood trial in the

regional court, Pretoria, along with two others, on the following charges:

(a) Count 1: Murder read with Section 51(2) of the Criminal Law Amendment Act, Act 105 of 1997;

(a) Count 2: Kidnapping;
(b) Count 3: Murder read with section 51(2) of Act 105 of 1997;
(c) Count 4: Kidnapping;
(d) Count 5: Murder read with section 51(2) of Act 105 of 1997;
(e) Count 6: Kidnapping;
(f) Count 7: Assault with the intent to cause grievous bodily harm;
(g) Count 8: Kidnapping

[2] The First Appellant was legally represented at the time of his trial, had pleaded not guilty and was convicted on all counts. The presiding magistrate had found that the deceased were all killed during the same incident, together with the assault on the complainant.

[3] The matter came before this court on petition directed to the Judge President for leave to appeal the Appellants' conviction and sentence. The trial court had refused such leave to appeal on 21 April 2016. On petition, leave to appeal was refused on conviction, however granted on sentence. Although leave to appeal was granted to both Appellants, only the First Appellant has persisted with the appeal. Therefor-e, this judgment is only in respect of the First Appellant.

[4] Applications for leave to appeal a conviction and/or sentence imposed by a Magistrate Court are governed by section 3098 of the Criminal Procedure Act 51 of 1977 and upon such leave being refused, on petition to the Judge President in terms of section 309C of the same Act.

[5] On 23 March 2015, the First Appellant was convicted by the presiding magistrate. The trial court held as follows:

> *"You have been convicted on all counts but regarding murder, it will be a condition under section 51(2). I will elaborate myself on section 51(2) and (1) during the sentencing status."* [1]

[6] On 14 July 2015, the 1st Appellant was sentenced to an effective sentence of52 years of imprisonment as follows:

(a)	Count 1: Murder	-15 years of imprisonment
(b)	Count 2: Kidnapping	-1 year imprisonment
(c)	Count 3: Murder	-15 years of imprisonment
(d)	Count 4: Kidnapping	-1 year imprisonment
(e)	Count 5: Murder	-15 years imprisonment
(f)	Count 6: Kidnapping	-1 year imprisonment
(g)	Count 7: Assault with the intent to cause grievous bodily harm	-3 years imprisonment
(h)	Count 8: Kidnapping	-1 year imprisonment

[7] Although the effective sentence is 52 years of imprisonment, the trial court noted that the effective sentence was 51 years of imprisonment. [2]

[8] The origins of the conviction and the sentence arose from events which occurred on 29 November 2009. The First Appellant, together with two others, were part of a community mob that hunted down the deceased, assaulted them with sticks, stones and a variety of tools, killing them on a hill as they suspected the deceased of stealing the First Appellant's vehicle whilst parked outside Chamberlains Store in Watloo, Pretoria.

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[1] Record p 691lines 21- 23

[9] In sentencing the First Appellant, the trial court found that the three deceased were killed in a cold and calculated manner; a grossly barbaric manner that does not belong in a civilised society grounded in the rule of law. The trial court also found that the Appellants hunted down the deceased thereby establishing premeditation. The trial court also found that the murder was premeditated.

[10] For purposes of mitigation of sentence, the following personal circumstances of the First Appellant were placed on record by his legal representative:

- First Appellant was […]years old at the time of imposition of sentence;
- He was unemployed, but earned an income doing casual work;
- He is married;
- He has 5 children born between 1994 and 2000;
- The family relied on social grants for the younger children;
- He was a first offender;
- He had no history of violent behaviour;
- The older 3 children no longer receive social grants and are unmarried;
- His parents passed away when he was very young;
- He did not attend school.

[11] The only mitigating factors placed before the trial court were his personal circumstances, his age and the fact that he had no previous convictions.

[12] The legal representative of the First Appellant did not argue any substantial and compelling circumstances present which would justify

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[2] Record p 803 lines 17-19

a deviataion from the prescribed minimum sentences. His argument instead was that the trial court ought to impose the prescribed minimum sentence in terms of section 51(2) of Act 105 of 1997, being 15 years imprisonment. The trial court found no substantial and compelling circumstances; therefore, there was no justification to deviate from the prescribed minimum sentences to impose a lesser sentence.

[13] Counsel for the Respondent on the other hand submitted that the First Appellant was part of a group, which formed a premeditated action, that there were no substantial and compelling circumstances to deviate from the prescribed sentence, nor were any argued during the sentencing process. Therefore, the Respondent argues that in the absence of any misdirection on the part of the trial court, that the appeal court must not interfere with the sentences imposed by the court a quo.

[14] Section 51(2) of Act 105 of 1997 on which the First Appellant was convicted, provides as follows:

> *"(2) Notwithstanding any other law, but subject to subsections (3) and (6),* a
>
> *regional court of* a *High Court shall* -
>
> *(i) If it has convicted* a *person of an offence referred to in Part II ofSchedule 2 sentence the person, in the case of* -
>
> *(i) A first offender, to imprisonment for* a *period not less than 15 years*
>
> …
>
> *Provided that the maximum sentence that* a *regional court may impose in terms of this subsection shall not be more than five years longer than the minimum sentence that it may impose in terms of this subsection."*

[15] It is well established in our law that sentencing is within the discretion

of the sentencing court. The appeal court would normally not interfere with such discretion unless the discretion is found to have been improperly exercised. Therefore, such inquiry is not on whether the sentence was right or wrong but whether the discretion was exercised properly and judicially". [3]

[16] Section 51(2) of Act 105 of 1997 provides for a prescribed minimum sentence of 15 years imprisonment for a first offender accused of murder. In addition, section 51(3) of Act 105 of 1997 provides that the trial court must impose a sentence that is less than the prescribed minimum sentence were the court to find substantial and compelling circumstances justifying that a lesser sentence be imposed.

[17] In respect of the First Appellant, no substantial and compelling circumstances were placed before the court and the trial court on its own could not establish any substantial and compelling circumstances. Only his personal circumstances as indicated in paragraph 10 above, were placed before the trialcourt.

[18] On behalf of the First Appellant, it was submitted that the trial court did not properly consider the cumulative effect of the imposed sentences, taking into account the First Appellant's personal circumstances. Counsel for the First Appellant relied on *S v Mahlatsi* [4], where the court held that the effective sentences under section 51(1) or (2) of the Criminal Law Amendment Act should not exceed life imprisonment:

> *"The appellant was convicted in the high court on three counts of armed robbery and one count of kidnapping arising out of* a *series of armed robberies in which the appellant, together with* a *number of associates, set out on* a *spree of robberies and car hijackings. He was sentenced to the minimum sentence of 15*

[3] S v Rabie 1975 (4) SA 855 (A)
[4] 2013 (2) SACR 625 (GNP)

> *years' imprisonment on each of the robbery counts and five years' imprisonment on the count of kidnapping. None of the sentences were ordered to run concurrently - the effective sentence therefore being 50 years' imprisonment."* [5]

The court held as follows:

> *"that the only attack against the sentence imposed on the appellant that had, at least, some merit was that the cumulative effect thereof could arguably be perceived to be too heavy. The effective gaol term of 50 years' imprisonment was an exceptionally long time by anyone's standard, ad this raised the question of the maximum term of imprisonment that should be imposed if life imprisonment were not imposed, or where* a *convicted person had not been declared* a *habitual criminal or* a *dangerous criminal in terms of ss 286, 286A and 2868 of the Criminal Procedure Act 51 of 1977."* [6]

[19] Courts have several avenues available to them to ensure that the cumulative effect of sentences is mitigated, the most prevalent being to order that parts ofsentences run concurrent. [7]

[20] It is therefore the First Appellant's submission that to curb the cumulative effect of the sentences, the trial court should have made the kidnapping charges run concurrent with the murder charges as well as the assault charge - resulting in an effective sentence of 48 years imprisonment. The Respondent on the other hand submits that in the absence of any misdirection on the part of the trial court, this Honourable court must not interfere with the trial court's sentence and the appeal should therefore fail.

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[5] 2013 (2) SACR 625 (GNP) at par 4
[6] 2013 (2) SACR 625 (GNP) at par 4
[7] Section 280 (2) of the Criminal Procedure Act 51 of 1977

[21] This court is being asked to consider whether the cumulative effect of the sentences was too severe, thereby resulting in a misdirection that would justify interference. In terms of the cumulative effect of the sentence, none of the charges individually warranted a life imprisonment sentence. However, the effective sentence is equal to imposing a sentence which has the effect of permanently removing the Appellant from society. This effective sentence is 52 years imprisonment, even though the trial court noted it as 51 years of imprisonment [8] and therefore more onerous than a life sentence because for a person sentenced to life imprisonment, consideration for release on parole may be after 25 years imprisonment. [9]

[22] In Zimila v S[10], Shongwe ADP at paragraph 10 states as follows:

> *"The regional court,* as *well* as *the court* a *quo, considered all the purposes of punishment, the personal circumstances of the appellant, the seriousness of the offences and the interests of society. There is no need to repeat same. The area of interference will be in respect of making certain sentences to run concurrently with count 1 and the sentences in counts 13 and 15 to run concurrently. The logic is that when considering an appropriate sentence, the regional court considered all the necessary factors, therefore, since the offences are similar in nature, it would serve the interests of justice to mitigate the length of the sentence by ordering some of the counts to run concurrently."*

[23] As the offences that were committed were closely connected to each other in time and space, it is so that the learned magistrate should have ordered the sentences to run concurrently. In granting

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[8] Record p 803 lines 17-19
[9] S *v* Mahlakaza & Another 1997 (1) 1997 SACR 515 (SCA) at 521 G-1); ands 73(6) of the Correctional Services Act 111 of 1998

the sentences, the learned magistrate neglected to do this. The appeal on sentence must therefore succeed. Having regard to that, I therefore "propose what is stated in the order below to be an appropriate effective sentence, taking into account the cumulative effect of the individual sentences.

[24] The following order is made:

1. The appeal is upheld.

2. The order of the court a quo is set aside and replaced with the following:

(a) Count 1: Murder - 15 years of imprisonment
(b) Count 2: Kidnapping - 1 year of imprisonment
(c) Count 3: Murder - 15 years of imprisonment
(d) Count 4: Kidnapping - 1 year of imprisonment
(e) Count 5: Murder - 15 years of imprisonment
(f) Count 6: Kidnapping - 1 year of imprisonment
(g) Count 7: Assault with the intent to cause grievous bodily harm - 3 years of imprisonment
(h) Count 8: Kidnapping - 1 year of imprisonment
(i) The sentences imposed in respect of Counts 2,4 and 6 are ordered to run concurrently with the sentences in Counts 1,3 and 5, respectively, in terms of section 280(2) of the Criminal Procedure Act 51 of 1977.
(j) The sentence imposed in terms of Count 8 is ordered to run concurrently with the sentence in count 7, in terms of section 280(2) of the Criminal Procedure Act 51 of 1977.
(k) Effectively, the Appellant is sentenced to 48 years' imprisonment.

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[10] 2017 ZASCA 55 (18 May 2017)

(l) The sentences are antedated to 14 July 2015 in terms of section 282 of the Criminal Procedure Act 51 of 1977.

MA LUKHAIMANE
ACTING JUDGE OF THE HIGH COURT

I agree

CJ COLLIS
JUDGE OF THE HIGH COURT

For the First Appellant	:	Adv. L.A van Wyk
Instructed by	:	Legal Aid SA
For the Respondent	:	Adv. L Williams
Instructed by	:	Director of Public Prosecutions
Date of Hearing	:	18 November 2020
Date of Judgment	:	01 April 2021