IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No.: AR 262/13

In the matter between:

EMMANUEL NKOSINATHI NYAWUZA Appellant

and

THE STATE Respondent

J U D G M E N T

KOEN J:

[1] On 31 July 1997 the Appellant[1] was convicted by Vahed AJ of murder and robbery with aggravating circumstances. In respect of the murder he was sentenced to 25 years imprisonment. In respect of the robbery with aggravating circumstances he was sentenced to 15 years imprisonment. It was ordered that 5 years of the sentence on the robbery count run concurrently with the sentence of 25 years, thus resulting in an effective term of 35 years imprisonment. Both of these crimes arose from the same incident on 25 January 1995 when the Appellant murdered a 29 year old policeman, Reginald Thandanani Masango, who was dressed in his police uniform and was on his way home. The Appellant robbed him of his service pistol.

[2] At the time the aforesaid sentences were imposed, the appellant was already serving an effective term of 15 years imprisonment. On 19 March 1997 the appellant was convicted by Niles-Dunér J of murder and attempted robbery. In respect of the murder he was sentenced to 15 years imprisonment and in respect of the attempted

[1] The appellant was accused 1 in the court a quo.

murder he was sentenced to 5 years imprisonment. It was directed that these sentences be served concurrently. Both these crimes arose from the same incident on 21 June 1991.

[3] Leave to appeal was refused by the trial court. On 23 January 2013, the Supreme Court of Appeal[2] however granted the following order:

> 'The application for condonation is granted.[3]
> Leave to appeal is granted against sentence imposed by a single Judge.
> Leave to appeal is granted to the Full Court of KwaZulu-Natal High Court'.

[4] According to the Appellant's affidavit filed in the Supreme Court of Appeal, the Appellant appeals on the following grounds:

> (a) 'On 31 July 1997 when I was sentenced the court misdirected itself in failing to take into account that on 19 March 1997 I had just been sentenced to fifteen (15) years imprisonment which I was obliged to serve and on completion thereof to commence serving the term of thirty five (35) years imprisonment it had just imposed on me'.

and

> (b) 'I have reasonable prospect of successes in that the sentence of thirty five (35) years imprisonment on the circumstances of the incident and my personal circumstances is to serve in that it induces a sense of shock. Taking into account that I shall commence serving the sentence of thirty five (35) years after completing the sentence of fifteen (15) years it results in a sentence which is so severe that it induces a sense of shock'.

[5] This judgment is concerned only with the sentence imposed by Vahed AJ and what is stated in the aforesaid paragraph as grounds for appeal.

[6] The Appellant's heads of argument had however also hinted at a possible further basis for the appeal, couched as follows:

> 'The court found that the appropriate sentence was a sentence less than the ultimate sentence but erred in imposing a sentence which was in fact far more severe than the ultimate sentence since Appellant would have qualified for release on parole after serving thirteen (13) years three (3) months if he was sentenced to life imprisonment'.

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[2] Per Brand et Pillay JJA.

[3] The papers in the Supreme Court of Appeal were not available to me. All the indications however are that the condonation related to the late petition for leave to appeal.

It is necessary to deal briefly with this argument and a further case authority to which the Respondent referred.

[7] A sentencing court does not concern itself with parole provisions and when an accused might be released on parole, in determining an appropriate sentence.[4] If the Appellant's complaint is the alleged unequal operation of parole conditions between prisoners serving an indeterminate sentence of life imprisonment and prisoners serving determinate sentences, then the appropriate remedy is for these conditions to be challenged in a separate review. In *Houston v The State*[5] the Constitutional Court held with regards to facts similar to the present that:

> '[7] But if the applicant is right about that, and we express no opinion on it, his possible remedy lies in seeking a review of the Department's parole policies in the High Court. It is not a ground for an appeal against sentence to this Court, because this result does not flow from any unfairness in the trial. This Court should also not ordinarily deal with a review application of that kind as a Court of first instance'.

Similarly in *casu,* any such complaint, if it legitimately arises, does not flow from any unfairness in the trial.

[8] At the outset of his argument, Mr Cooke, on behalf of the Respondent, also drew our attention to the decision of the Supreme Court of Appeal in *S v Mafoho*,[6] which he had come across after preparing the Respondent's heads of argument and in preparing for the appeal hearing. In that matter the Appellant, who had been convicted on 60 counts involving robbery with aggravating circumstances, attempted murder, kidnapping, rape, attempted rape and pointing a firearm, was sentenced to an effective 275 years imprisonment. The Supreme Court of Appeal concluded at paragraph 17:

> 'The right to parole,[7] whether the prisoner is sentenced to a determinate sentence, or to life imprisonment, is the same, regardless of the date the prisoner was sentenced'.

Specifically with regard to prisoners serving a determinate sentence it was concluded that the position is governed in terms of s 73(6)(a) of the Correctional Services Act[8] as amended by the Parole and Correctional Supervision Amendment

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[4] *S v Mtalala* 2003 (1) SACR 80 (SCA) para 7.
[5] 2013 (5) BCLR 527 (CC).
[6] 2013 (2) SACR 179 (SCA).
[7] More correctly perhaps the right to apply for parole.
[8] Act no 111 of 1998.

Act[9]. Such a prisoner shall not be considered for placement on parole unless he has served half of his term of imprisonment, provided that no such prisoner shall serve more than 25 years before being considered for parole. Section 9(d)(iv) of the Parole and Correctional Supervision Amendment Act provides that in respect of imprisonment contemplated in s 52(2) of the Criminal Law Amendment Act,[10] a prisoner would not be placed on parole unless he has served at least four fifths of the term of imprisonment imposed, or 25 years, whichever is the shorter. In paragraph 21, the Supreme Court of Appeal concluded as follows:

> 'The appellant is entitled to be considered for parole once he has served 25 years of his term of imprisonment. There is accordingly no need to interfere with the sentence imposed in order to ameliorate its effect. This is not to say the sentence imposed by the regional court is appropriate (it clearly being a Methuselah sentence), but to interfere with it would, in the circumstances of this case, be purely academic because, as I have already indicated, the legislature has stepped in to ameliorate the position of the person subjected to that sentence, by directing that he or she will be considered for parole once 25 years of the sentence have been served. The appeal against sentence must therefore fail'.

[9] I do not understand the judgment in *Mafoho* supra to mean that because any prisoner serving a determinate effective sentence of 50 or more[11] years is subject to these parole provisions, that would render every appeal in excess of such a sentence academic because the prisoner would in any event be considered for parole once he has served 25 years of his term of imprisonment. In each instance, the issue on appeal is still whether the sentences imposed were appropriate, regard being had to the relevant legal principles. It seems, although this is not expressly stated, that the Supreme Court of Appeal in *Mafoho* supra was of the view that the nature of the offences committed were such that an effective term of imprisonment which was appropriate would be such that four fifth's thereof would in any event exceed 25 years. Accordingly, although the sentence of 275 years was a Methuselah sentence, it was academic to consider interfering with the sentence. My concern however remains that the 25 year period is one determined by the legislature, in response to policy formulated by the executive. It simply affords a time limit by when the right to apply for parole may be exercised. But whether a particular prisoner will in fact be released on parole, is another issue, and his detention could therefore

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[9] Act no 87 of 1997 which came into operation on 1 October 2004.
[10] Act No 105 of 1997.
[11] After half of which, i.e. 25 years he would be entitled to be considered for parole.

exceed the 25 year period, in which case the actual effective term of imprisonment would assume significant relevance.

[10] The judgment in *Mafoho* supra, does not on my reading thereof preclude interfering with the sentence imposed by a trial court, and determining an appropriate sentence.

[11] In imposing the sentences it did, the trial court with regard to the established triad of factors referred to in *S v Zinn*[12]:

(a) referred to the despicable nature of the murder, involving the killing of a policeman, where the only motive was to relieve him of his firearm;

(b) commented that in regard to the demands of society, people convicted of such crimes be dealt with severely;

(c) with regard to the Appellant's personal circumstances said that 'we take into account what has been said on both your behalf, accused 1, and your behalf accused 2 …'.

[12] What had 'been said' on behalf of the Appellant, included:

(a) He was 27 years of age on 31 July 1997;

(b) He had three children respectively 2, 3 and 3½ years old by three different women;

(c) He was employed prior to his arrest and maintained these children and an additional six family members;

(d) He had a standard nine education;

(e) No evidence was led that he wielded the murder weapon. He was found guilty based on a common purpose to rob and murder. Accordingly it had been submitted that he was at most an accomplice and not the person who actually killed the deceased;

(f) It was asked that the court direct that whatever sentence the Court imposes, run concurrently with the sentences he was serving at that time;

[12] 1969 (2) SA 537 (A).

(g) He had prospects of rehabilitation and that he could still serve a useful purpose to the community upon his release.

[13] Vahed AJ did not comment specifically in his judgment on the submission that the sentences imposed run concurrently with those previously imposed by Niles-Dunér J. The failure to do so seems to suggest that the submission had not found favour with the trial court.

[14] In the absence of a direction that the sentences run concurrently, the sentences imposed will, in terms of s 280(2) of the Criminal Procedure Act[13] run consecutively, that is the one after the other. The effect thereof is that the Appellant has to serve an effective 50 years imprisonment.

[15] It is settled law that the infliction of punishment is pre-eminently a matter for the discretion of the trial court.[14] In determining an appropriate sentence regard must be had to the well-known triad factors, namely the seriousness of the crime, the offender's personal circumstances, as well as the interests of society. Equally important is the aspect of mercy which is a concomitant of justice. Each sentence must be individualised. Each case must be dealt with on its own peculiar facts.[15] A Court of appeal does not have an unfettered discretion to interfere with the sentence imposed by a trial court.[16] It is only where it is clear that the discretion of the trial court was not exercised judicially or reasonably that a court of appeal will be entitled to interfere. Where there is no clear misdirection the remaining question is whether there exists such a striking disparity between the sentences imposed by the trial court and the sentences the appeal court would have imposed, as to warrant interference.[17] Where there are convictions on multiple offences, the question is whether the cumulative effect of the sentences imposed, is excessive or unduly harsh.[18] This would be so irrespective of whether one is dealing with separate crimes in the same proceedings or crimes also arising in the context of the previous

[13] No. 51 of 1977.
[14] *R v Ramanka* 1949 (1) SA 417 (A) at 420.
[15] *S v Samuels* 2011 (1) SACR 9 (SCA) para 9.
[16] *S v Rabie* 1975 (4) SA 855 (A).
[17] *S v Whitehead* 1970 (4) SA 424 (A).
[18] *S v Moswathupa* 2012 (1) SACR 259 (SCA); *S v Dube* 2012 (2) SACR 579 (ECJ) para 11.

conviction. In *S v Mtshali and another*,[19] the Court remarked that 'when an accused is simultaneously convicted of several offences, the official imposing the punishment should see that the total period of imprisonment is not unreasonably large'.

[16] Incarceration for a period of 50 years is a cruel, inhuman and degrading punishment, rightly and justifiably labelled as a Methuselah sentence.[20]

[17] On what is an appropriate period of incarceration, in *S v Whitehead*,[21] it was held that a sentence of 25 years is a very long sentence to be imposed in exceptional circumstance. In *Mabunda v S*[22] it was held that a sentence of 30 years imprisonment is an extremely severe sentence. Similarly in *Basson v S*,[23] the Supreme Court of Appeal agreed that the cumulative effect of the sentences passed by two different courts, 40 and 36 years respectively, was too severe. The court did not interfere with the individual sentences imposed but ordered portions of the two sentences to run concurrently, making the effective sentence one of 25 years imprisonment, seemingly on the basis that had the Appellants been charged with all the offences in one trial, an effective sentence of 25 years would likely have been imposed.

[18] In all instances, the discretion a court has to direct that sentences run concurrently, is an important and essential tool to introduce an element of mercy and to ameliorate the unduly lengthy cumulative effect of imprisonment which would otherwise follow if sentences on separate counts and in separate proceedings, were all to run consecutively.

[19] The Appellant should be in no different a position to that he would have been in had all the counts i.e. those before Niles-Dunér J and those before Vahed AJ, been preferred in a single trial. Where appropriate, sentences on different counts but arising from the same facts or occasion, may appropriately be directed to run

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[19] 1967 (2) SA 509 (N) at 510A.
[20] *S v Nkosi and others* 2003 (1) SACR 91 (SCA) para 9.
[21] 1970 (4) SA 424 A at 438F – 440.
[22] 2013 (2) SACR 161 (SCA) para 7.
[23] [2012] ZASCA 204 para 14.

concurrently, either wholly, as Niles-Dunér J directed in relation to the sentences imposed by her, or in part, as Vahed AJ directed.

[20] *Viz-a-viz* crimes committed on separate occasions, the overall length of incarceration should be tempered appropriately to avoid unduly lengthy and hence cruel sentences. This can always be achieved as no relationship between the various crimes needs to exist before the concurrent running of sentences is ordered.[24]

[21] In adjusting sentences to ameliorate the cumulative effect thereof, it is however important to keep in mind the cautionary words of Mbha AJA in *Zondo v S*:[25]

> 'I am also weary of being seen to be creating an unacceptable precedent that an accused person could go on a criminal spree committing separating instances of serious crimes, but effectively being punished for only one of them. For this reason, I am of the view that ordering the two sentences to run concurrently in their entirety would not only send out a wrong message. It would in effect defeat the purpose of adequately punishing the Appellant for his conduct'.[26]

[22] The murder of the deceased was a heinous crime. The Appellant and his co-accused had sat with others and when the deceased came into their view, the Appellant had drawn attention to the fact that deceased had a firearm on his person which could be used by the erstwhile accused 2. The Appellant and accused 2 then left the group and pursued the deceased. A short while later, gunshots were heard. The body of the deceased was subsequently found.

[23] The robbery and the killing of the deceased are inextricably interwoven. The murder was perpetrated in the course of a plan, even if only devised on the spur of the moment, when the Appellant saw the deceased walk past and decided to relieve him of his firearm. I do not consider the sentences of 25 years and 15 years to be so disparate to what I would have imposed, as to justify interfering in those sentences.

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[24] *S v Pase* 1986 (2) SA 303 E at 306 I - J.

[25] [2013] ZASCA 51.

[26] In that matter the court of appeal ordered that the sentence of 7 years imprisonment run after the sentence of 25 years imprisonment, where initially the cumulative effect of the sentence would have been 39 years imprisonment in respect of two separate offences of robbery.

[24] I do however consider the direction that only 5 years of the sentence on the robbery run concurrently with that on the murder, to be insufficient to ameliorate the cumulative effect of the sentences, which was in my view unduly harsh. In my view, an effective sentence of 25 years was appropriate. I would accordingly have directed that the whole of the sentence of 15 years in respect of the robbery run concurrently with the sentence of 25 years of the murder.

[25] That would in the ordinary course still result in an overall cumulative period of imprisonment for the Appellant of 40 years (15 years imposed by Niles-Dunér J and 25 years in respect of the present appeal), which is still unduly long. The effect thereof should also be adjusted by directing that 10 years of the effective sentence of 25 years be served concurrently with the effective sentence of 15 years imposed by Niles-Dunér J, thus giving an overall effective sentence of 30 years imprisonment.

[26] The appeal against the sentences imposed accordingly succeeds, but only to the limited extent set out in paragraphs (b) and (c) below:

(a) The sentences of 25 years on count 1, murder, and 15 years on count 2, robbery with aggravating circumstances, imposed on 31 July 1997 are confirmed;

(b) It is directed that the sentence of 15 years on count 2 shall run concurrently with the sentence of 25 years on count 1, thus giving an effective term of imprisonment of 25 years;

(c) It is further directed that 10 years of this effective 25 year period of imprisonment be served concurrently with the effective sentence of 15 years imposed by Niles-Dunér J under Durban and Coast Local Division case No. CC 10 /97 on 17 March 1997.

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OLSEN J

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CHILI J

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