THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case No: 295/13

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS
NORTH GAUTENG: PRETORIA **APPELLANT**

and

SKHOSIPHI GCWALA **FIRST RESPONDENT**
ERIC THEMBA NTHOMBELA **SECOND RESPONDENT**
JOSIA NEO MOLOI **THIRD REPONDENT**

Neutral citation: *DPP v Gcwala* (295/13) [2014] ZASCA 44 (31 March 2014)

Coram: **Lewis, Shongwe and Saldulker JJA**

Heard: **19 March 2014**

Delivered: **31 March 2014**

Summary: The period spent in custody by a prisoner awaiting trial is a factor to be taken into account in determining whether substantial and compelling circumstances exist such that a prescribed minimum sentence may be departed from. There is no rule as to how to determine what weight is to be given to that period. Each case must be decided having regard to all circumstances that justify a lesser sentence.

ORDER

On appeal from: North Gauteng High Court (Circuit Local Division for the Eastern Circuit District, Middelburg, Phatudi J sitting as court of first instance):

1 The appeal against sentence is upheld.

2 The order of the high court in respect of sentence is set aside and is replaced by the following:

'1 The accused are sentenced to 20 years of imprisonment with effect from 30 June 2011.

2 The sentence currently being served by accused 2 is to run concurrently with the sentence now imposed.'

JUDGMENT

Lewis JA (**Shongwe and Saldulker JJA concurring**):

[1] This is an appeal by the Director of Public Prosecutions, North Gauteng, against sentences imposed by the North Gauteng High Court (Eastern Circuit District, Middleburg) on the three respondents. All three were charged with the murder of a Mrs Thandi Mtsweni. The State alleged that they had unlawfully and intentionally killed her on 27 June 2007 in the district of Leslie. In the alternative, the respondents were charged with conspiring to murder the deceased. They were convicted on the charge of murder and the high court (Phatudi J) imposed an effective sentence of 12 years' imprisonment. I shall deal with the full sentence in due course since it is central to the appeal. The appeal lies at the instance of the

State, with the leave of this court, and is against sentence only. In giving leave to appeal this court required the State and the respondents to address a number of questions which I shall set out later.

[2] The context in which the murder occurred is, of course, germane to the sentence. The deceased was the deputy mayor of the Govan Mbeki Municipality. The municipality had awarded a number of tenders to Ms Sibongile Florence Lukhele. The deceased cancelled some of these tenders. Ms Lukhele decided to arrange for her to be killed. To this end she enlisted the help of a number of people, including one Mr Madoda Nkambule, who was referred to throughout the trial as Madoda, and who gave evidence in terms of s 204 of the Criminal Procedure Act 51 of 1977, on the basis that if he answered questions frankly and honestly he might be discharged from prosecution. Madoda agreed to execute Ms Lukhele's mandate for a fee of R60 000 and he in turn enlisted the aid of the three respondents. (In fact the high court did not discharge Madoda because he failed to answer questions frankly and honestly, but this is not an issue that arises in the appeal.)

[3] The deceased, her husband and her son arrived at their home on 27 June 2007, and they alighted from their vehicle. As she went to open her front door she was shot several times, and died at the scene. Ms Lukhele was charged with murder together with the respondents. However, she pleaded guilty to the charge and was thus tried separately. She was sentenced to 20 years' imprisonment. She agreed to give evidence at the respondents' trial and testified that she had conspired to murder the deceased, who had been her friend, with the mayor of the municipality, an officer of the South African Police Service and others. She explained the financial arrangements that she had made with Madoda.

[4] Madoda in turn testified that he had approached the three respondents to kill the deceased. All three had attended a meeting at his house, and all three knew that they were mandated to kill the deceased for a fee. After the deceased had been shot they had informed Madoda that the mandate was accomplished. The fee was paid. The evidence that the three respondents were responsible for the killing of the deceased was corroborated by a number of other witnesses. I shall not traverse it since the first two respondents did not appeal against conviction and the third respondent's application for leave to appeal against conviction was refused. Suffice it

to say that it was not clear which respondent actually shot the deceased. The third respondent claimed only to have driven the others to the deceased's house. The high court found that the evidence of Madoda, in so far as it was corroborated by police witnesses and circumstantial evidence, proved beyond reasonable doubt that the three respondents had a common purpose to murder the deceased. And as I have said, there is no leave to appeal against their convictions. It should be noted, however, that the high court found all three respondents 'guilty of conspiracy to murder and murder as charged'. It did not take into account that the charge of conspiracy was an alternative to the charge of murder. But in sentencing the respondents the court made it clear that there was only one sentence on one charge.

[5] I turn then to the sentence. It read as follows:

'1 I sentence you to 12 years of direct imprisonment. Two years of the period spent in custody while awaiting trial be deducted when calculating the date upon which the sentence is to expire for purposes of considering parole.

2 I further sentence you to 10 years of direct imprisonment, which sentence is wholly suspended for a period of 5 years on condition you are not found guilty of murder, attempted murder or conspiracy to murder during the period of suspension.

3 This applies only to accused 2:

This sentence is to run concurrently with the sentence you are currently serving. [The second respondent was, at the time of the trial, serving a period of five years' imprisonment for a previous conviction.]

You are all to serve an effective 12 years.'

[6] In determining the sentence the trial court took a number of factors into account: the murder was planned, and the respondents willingly agreed to kill a woman who was a dedicated member of the community in which she lived and worked. They spent time and travelled some distance (twice) to plan and commit the offence. They received VAT (sic) on the fee. The murder was politically motivated. Communities 'have been riddled with these offences of killing officers holding decisive positions in government especially those who refuse to subscribe to "corruption"'.

[7] But, said the court, the witness who testified on behalf of the community in which the deceased worked, Mrs Mtshweni, and who asked on behalf of the community that a sentence of life imprisonment be imposed, did not convince him: sentencing is aimed, said the court, at punishing the offender and not at vengeance. Her evidence as to the ways in which the deceased's death had affected the community and the family was not considered any further.

[8] The high court found that the following circumstances justified deviation from the prescribed period of life imprisonment for the murder of the deceased:

'1 All three accused have been in custody for 4 years awaiting trial.

2 There is no evidence before me as to who shot the deceased.

3 Accused 1 and 3 are first offenders.

4 All three are candidates for rehabilitation.'

[9] The high court referred to *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 15 which dealt with the proper approach to determining whether there are substantial and compelling circumstances that warrant a deviation from the minimum sentence prescribed by the Criminal Law Amendment Act 105 of 1997: there this court said that 'it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence'. But for that, said the high court, it would have imposed life imprisonment. Nonetheless, it took the factors listed above as being sufficient to impose an effective sentence of 12 years' imprisonment instead of the sentence prescribed.

[10] In refusing leave to appeal against sentence, the trial judge explained that he had taken the four years spent in custody by the respondents awaiting trial into account, and had, on the submission of defence counsel, doubled that number so that he deducted eight years from the sentence he would otherwise have imposed. The submission probably has its origin in *S v Brophy & another* 2007 (2) SACR 56 (W), where the court held that as a rule of thumb, 'imprisonment while awaiting trial is the equivalent of a sentence of twice that length' – a quotation from a Canadian case, *Gravino* (70/71) 13 Crim LQ 434 (Quebec Court of Appeal), cited also in *S v Stephen & another* 1994 (2) SACR 163 (W) at 168*e-g*. The rule of thumb was not

approved in *S v Vilikazi & others* 2000 (1) SACR 140 (W) at 148*a-e* and this court has recently doubted its application and, in *S v Radebe & another* 2013 (2) SACR 165 (SCA), ruled it to be inappropriate. I shall return to the issue shortly.

[11] On appeal, the State argues that this court should interfere with the sentence of 22 years imprisonment, ten of which are to be suspended, since the trial judge materially misdirected himself in several respects, and that the disparity between the sentences imposed on the respondents and the sentences that this court would have imposed are shocking, startling and disturbingly inappropriate.

[12] The first misdirection the State relies on is the determination that the period of four years' imprisonment spent in custody while awaiting trial was calculated by the trial court as constituting eight years, and that that period was deducted from the 20 year period that the court considered appropriate. The second misdirection is that the court effectively fixed a non-parole period of ten years (presumably in terms of s 276B of the Criminal Procedure Act 51). The State argues that a non-parole period should be set only in exceptional circumstances. Thirdly, the State argues that there was no evidence before the court that the respondents were candidates for rehabilitation. And finally, the State argues that the trial court, in failing to have regard to the evidence of the witness who testified about the consequences of the murder of the deceased, misdirected itself.

[13] As I have said, this court, when granting leave to appeal against sentence, requested that the parties address certain issues. Some of them fall away in view of the findings to which I shall come. The remaining two have already been settled by this court. But I shall set out the directions, in so far as relevant, before turning to the way in which this court has resolved them.

[14] The order of this court reads:

'(2) On the assumption that a life sentence was the appropriate sentence that the high court should have imposed upon each accused, and bearing in mind that this court has sanctioned the deduction of time spent in custody as a substantial and compelling circumstance for offences contemplated in ss 51 and 52 of the Criminal Law Amendment Act 105 of 1997 (*S v Vilakazi* . . . para 60; *Dlamini v S* (362/11) [2012] ZASCA 27 March 2012), the parties are requested, in addition to any other matter they consider relevant, to address the following questions:

(a) How should the period in custody be dealt with generally in cases where a life sentence is appropriate, and in this case?

. . .

(d) How must a court generally and in this case deal with and give credit to the accused for the time spent in custody before conviction and sentence? (*Dlamini* . . . . para 41.)'

[15] In *S v Dlamini*, now reported in 2012 (2) SACR 1 (SCA), Cachalia JA questioned the appropriateness of the rule of thumb (applied by the high court in *S v Brophy* above) that the time spent in custody awaiting trial is equivalent to twice that length because of the harsher conditions to which awaiting-trial prisoners are subjected in comparison with convicted prisoners. He said, however, that the matter had not been argued before the court and that he would refrain from saying anything further about the matter. He added that the courts have not spoken clearly on the matter.

[16] Subsequently, in *S v Radebe* (above, handed down on 27 March, some three weeks after leave to appeal was given in this matter) this court held that there should be no rule of thumb in respect of the calculation of the weight to be given to the period spent in detention awaiting trial. In that case I said (paras 13 and 14):

'In my view there should be no rule of thumb in respect of the calculation of the weight to be given to the period spent by an accused awaiting trial. (See also *S v Seboko* 2009 (2) SACR 573 (NCK) para 22.) A mechanical formula to determine the extent to which the proposed sentence should be reduced, by reason of the period of detention prior to conviction, is unhelpful. The circumstances of an individual accused must be assessed in each case in determining the extent to which the sentence proposed should be reduced. (It should be noted that this court left open the question of how to approach the matter in *S v Dlamini* 2012 (2) SACR 1 (SCA) para 41.)

A better approach, in my view, is that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. And accordingly, in determining, in respect of the charge of robbery with aggravating circumstances, whether substantial and

compelling circumstances warrant a lesser sentence than that prescribed by the Criminal Law Amendment Act 105 of 1997 (15 years' imprisonment for robbery), the test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one.'

[17] I referred (in para 15) in this regard to the decision in *Vilakazi* (above) and to *S v Malgas* 2001 (1) SACR 469 (SCA) para 25 where Marais JA said:

'If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.'

[18] The questions have thus already been answered, not only in relation to cases where minimum sentences have been prescribed by the legislature, but in all cases where a court is considering the justness of the sentence to be imposed: the sentencing court should consider in all cases whether the period of imprisonment proposed is proportionate to the crime committed, taking into account, for that purpose, the period spent in custody awaiting trial.

[19] The trial court in this matter should have determined whether, in all the circumstances, the substantial and compelling circumstances shown to have existed, *including the period spent in custody awaiting trial*, justified imposing a sentence less than that prescribed by the legislature. The four years spent in custody prior to the trial by each of the respondents should have been taken into account as a factor warranting deviation from the prescribed sentence. But the doubling of that period, especially given the length of the period spent in custody, cannot be justified. The deduction of eight years of imprisonment from the number of years the trial court thought was warranted (apparently 20 years) amounted to a misdirection warranting interference with the sentences imposed.

[20] The other questions that this court, in giving leave to appeal against sentence, raised were based on the assumption that the period spent in custody awaiting trial did not amount to substantial and compelling circumstances, and were raised with reference to the parole provisions of the Correctional Services Act 111 of 1998.

There is no need to address these questions given my conclusion that the period in custody must be taken into account in determining whether the prescribed sentence is justified.

[21] The second misdirection that the State alleges occurred was that the trial judge imposed a non-parole period. First, it argues, the effect of the order (that two years of the period spent in custody while awaiting trial be deducted when calculating the date on which the sentence is to expire for purposes of considering parole) is that the effective sentence is then ten years' imprisonment, whereas life imprisonment is prescribed. Apart from the effect of the order, the State argues that such an order should be made only in exceptional circumstances: see *S v Stander* 2012 (1) SACR 537 (SCA) paras 12 and 13 where Snyders JA explained why it is not desirable for courts to make decisions on the release of prisoners on parole. Non-parole orders should be made only in exceptional circumstances and none existed in this case. I accept the State's submission that this amounted to another misdirection.

[22] The third misdirection complained of is that the trial court assumed that the respondents were all candidates for rehabilitation. Yet they proffered no evidence to that effect. They chose not to explain to the court why they were remorseful, if they were, and why they were likely to be rehabilitated such that life imprisonment was not justified. The trial court considered it as a compelling factor despite the absence of evidence in that regard. Taken on its own, however, I do not think that the finding constitutes a misdirection. It is but one of the factors that call into question the weight given to mitigating factors in determining whether substantial and compelling circumstances existed.

[23] Finally, the State argues that the trial court failed properly to take into account the evidence of Mrs Mtshweni who testified as to the after-effects of the murder of the deceased. The court referred to this evidence in explaining that a court cannot exact vengeance for the murder. Mrs Mtshweni did testify that people in the community in which the deceased had worked were badly affected by her death and wanted a sentence of life imprisonment imposed. The trial court correctly said that it should not impose a sentence to satisfy the public. But it did no more than mention the evidence about the suffering of the deceased's family after her death and the

important social work that was no longer being done in the Govan Mbeki Municipality because of her death.

[24] The failure to consider this evidence properly, and the trial court's further failure to look at the entire context in which the murder was committed, indicate, said the State, that the court did not consider what was justified in the circumstances. The context included the fact that the murder was politically motivated and that Ms Lukhele was sentenced to 20 years' imprisonment despite her show of remorse and guilty plea. There was, argued the State, an unjustifiable imbalance between her sentence and that of the respondents. This is not decisive of the matter, for all cases and all accused must be treated on their own merits. But it was not a factor even mentioned by the trial court in sentencing.

[25] The State fairly conceded that sentences of life imprisonment should not be imposed on the respondents and that there were substantial and compelling circumstances that justified a deviation from the prescribed sentence. But, as I have said, it argued that the trial court had misdirected itself in several respects and that this court should interfere with the sentences imposed and itself impose appropriate sentences.

[26] I accept that the trial court failed to consider all the factors that had to be weighed in the balance to determine whether the sentence that it imposed was appropriate in all the circumstances. And it is clear that it misdirected itself in relation to the computation of the period spent in custody awaiting trial to be taken into account when determining that the prescribed minimum sentence should not be imposed. It imposed sentences that were far too lenient in all the circumstances.

[27] The very factors that the trial court referred to in sentencing the respondents as aggravating – that the respondents were motivated by financial greed, that violence in the community is politically motivated and endemic, that the deceased was murdered precisely because she was fighting against corruption, and that they showed no remorse – indicate that the sentences imposed are inappropriate. In the circumstances, this court is at large to interfere.

[28] I have already indicated that the four-year period spent by the respondents in custody awaiting trial must be regarded as a factor that requires this court to deviate

from the prescribed sentence: life imprisonment is not proportionate to the crime in the circumstances. That requires this court to consider an appropriate sentence. In my view, a lengthy term of imprisonment is warranted. The factors that the trial court regarded as aggravating, and which I have described above, show that a prison sentence of many more years than that imposed is required. People who take another's life for financial gain must be severely punished. I consider that a sentence of 20 years of imprisonment in respect of each of the respondents is justified.

[29]

1 The appeal against sentence is upheld.

2 The order of the high court in respect of sentence is set aside and is replaced by the following:

'1 The accused are sentenced to 20 years of imprisonment with effect from 31 June 2011.

2 The sentence currently being served by accused 2 is to run concurrently with the sentence now imposed.'

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C H Lewis

Judge of Appeal

APPEARANCES:

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