THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 518/2016

In the matter between:

BONGOKWAKHE BONGINKOSI MVUBU **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Bongokwakhe Bonginkosi Mvubu v the State* (518/2016) 2016 ZASCA 184 (29 November 2016)

Coram: Leach, Tshiqi and Zondi JJA and Schoeman and Schippers AJJA

Heard: 11 November 2016

Delivered: 29 November 2016

Summary: Section 276B(2) of the Criminal Procedure Act 51 of 1977 does not have retrospective application: 30 years' imprisonment for attempted murder and cumulative effect of sentence of 45 years' imprisonment excessive: appeal court entitled to interfere with sentence where it is shocking, startling and disturbingly inappropriate: appellate court able to arrive at a definite view as to what sentence it would have imposed.

ORDER

On appeal from: Natal Provincial Division of the High Court (Theron, Kruger and Van Zyl JJ sitting as court of appeal):

1 The appeal against the sentences in respect of counts 1, 2, 3, 4, 5, 9 and 10 is successful, and these sentences are set aside and substituted with the following.

(a) In respect of counts 1, 2 and 4 the appellant is sentenced to undergo ten years' imprisonment on each count;

(b) In respect of count 3 the appellant is sentenced to undergo 15 years' imprisonment;

(c) In respect of count 5 the appellant is sentenced to undergo 5 years' imprisonment;

(d) In respect of count 9 the appellant is sentenced to undergo 20 years' imprisonment; and

(e) In respect of count 10 the appellant is sentenced to undergo 12 years' imprisonment.

2 All the sentences in respect of counts 1, 2, 4 and 10 are to run concurrently with the sentence of 20 years' imprisonment imposed on count 9;

3 All the sentences in respect of counts 5, 6, and 8 are to run concurrently with the sentence of 15 years' imprisonment imposed in count 3;

4 It is further ordered that five years of the sentence imposed in respect of count 3 is to run concurrently with the sentence imposed in respect of count 9.

5 The effect of the above is that the appellant is to serve a total of 30 years' imprisonment.

6 The sentences are ante-dated to 25 September 2003, being the date sentence was imposed by the trial court.

JUDGMENT

Schoeman AJA (Leach, Tshiqi and Zondi JJA and Schippers AJA Concurring):

[1] After a trial in the Natal Provincial Division of the High Court the appellant, together with five co-accused, were convicted of five counts of attempted murder and four counts of robbery with aggravating circumstances, flowing from what is commonly known as a 'cash-in-transit heist'. On 25 September 2003 the appellant was sentenced to a cumulative period of 205 years' imprisonment with an order that the effective term of imprisonment imposed would be 95 years' imprisonment.

[2] With leave of the trial court, the appellant was granted leave to appeal to the full court solely in respect of the cumulative effect of the sentences.

[3] On 1 February 2008 the full court reduced the effective term of imprisonment of the appellant and two of his convicted co-accused who had proceeded with the appeal, to 45 years' imprisonment. It further ordered, in terms of the provisions of s 276B(2) of the Criminal Procedure Act 51 of 1977

(the Act), that there would a non-parole period of 25 years.[1] Special leave was then granted to the appellant to appeal further to this court.

Background

[4] The charges all relate to a single incident. On 17 September 2001 the appellant was one of a group of people that attacked a Fidelity Guards motor vehicle, carrying an undisclosed amount of money, but said to be about R2,5 million. As a result of the attack, the motor vehicle veered off the road and capsized. Some of the assailants, armed with AK 47 rifles, approached the vehicle and fired shots at the security guards who were trapped in the motor vehicle. Bulletproof windows protected the guards, but eventually they were forced to leave the vehicle and thereafter the perpetrators robbed them of their firearms at gunpoint. The removal of the money from the vault of the motor vehicle proved to be impossible due to damage it sustained when it capsized. While some of the attackers attempted to get into the vehicle others erected a roadblock. When members of the public attempted to intervene, they were shot at. At the roadblock the assailants robbed three members of the public of two 303 rifles, keys to a motor vehicle and an Isuzu motor vehicle at gunpoint. When a police motor vehicle approached the roadblock, the perpetrators fired shots at it. One of the occupants, Sergeant Thomas, was seriously injured when a bullet struck him in the neck, rendering him a paraplegic. The other policeman, Inspector Ncwane's life was probably saved by the fact that the bullets struck his bulletproof vest twice, preventing injuries to his chest.

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[1] Section 276B(2) of the Act reads:
'**276B Fixing of non-parole-period**
(1) *(a)* If a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may as part of the sentence, fix a period during which the person shall not be placed on parole.
(b) Such period shall be referred to as the non-parole-period, and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter.
(2) If a person who is convicted of two or more offences is sentenced to imprisonment and the court directs that the sentences of imprisonment shall run concurrently, the court shall, subject to subsection (1) (b), fix the non-parole-period in respect of the effective period of imprisonment.'

[5] These events had the effect that the appellant and his co-accused in the trial were charged and convicted of: (a) two counts of attempted murder of the two Fidelity Guards, Messrs Pillay and Krishna (counts 1 and 2); (b) robbery with aggravating circumstances of their firearms (count 3); (c) attempted murder of Mr Pienaar (count 4), one of the members of the public that attempted to assist the security guards; and (d) three further counts of robbery with aggravating circumstances in respect of the keys of one of the motor vehicles that were stopped at the roadblock, the Isuzu motor vehicle and the two rifles from members of the public who had attempted to assist the security guards (counts 5, 6 and 8). The shots fired at the police vehicle, striking Sergeant Thomas and Inspector Ncwane, resulted in two further counts of attempted murder (counts 9 and 10).

[6] Subsequently, the trial court imposed the following sentences on the accused and ordered that certain of those sentences run concurrently. In respect of counts 1, 2, 9 and 10, four of the attempted murder convictions, the appellant was sentenced to undergo 30 years' imprisonment on each count. On the other attempted murder conviction, of Mr Pienaar, count 4, he was sentenced to undergo 20 years' imprisonment. The robbery of the security guards' firearms (count 3) exacted a sentence of 20 years' imprisonment. In respect of the other three convictions of robbery with aggravating circumstances (counts 5, 6 and 8) the trial court imposed sentences of 15 years' imprisonment on each count. As mentioned, the full court did not interfere with the sentences, but the effective prison sentence of the appellant was reduced to 45 years' imprisonment.

Issues

[7] The issues in the appeal are threefold, namely: whether (a) the imposition of the periods of imprisonment for the convictions were justified; (b) the effective term of imprisonment being a very long term of imprisonment (often referred to as a Methuselah sentence), which will in all probability exceed the lifespan of an accused, can be justified; and (c) the full bench was correct in making a determination in terms of s 276B(2).

The determination in terms of s 276B(2) of the Act

[8] Dealing with the last-mentioned issue, as already mentioned, the full court determined that there should be a non-parole period of 25 years' imprisonment in terms of the provisions of s 276B(2) of the Criminal Procedure Act. There are two fatal irregularities attendant upon this.

[9] First, the section was inserted by s 22 of the Parole and Correctional Supervision Amendment Act 87 of 1997 which came into operation on 1 October 2004. The crimes in this instance were committed in 2001, before the relevant section came into operation. It has been held in *S v Mchunu & another*[2] that this section does not operate retrospectively. In *Mchunu* this court reasoned that the well established principle of our common law, namely, that a penalty arises when a crime is committed and not when the person is convicted or sentenced, was applicable to the fixing of a non-parole period.

[2] *S v Mchunu & another* [2013] ZASCA 126; 2013 JDR 2013 (SCA) para 5.

[10] Second, the possibility of the imposition of a non-parole period was not debated before it was imposed as it ought to have been, which also was a fatal misdirection.[3]

[11] Accordingly, the full court's determination in terms of s 276B(2) of the Act falls to be set aside.

[12] Furthermore, even if an accused is sentenced to life imprisonment, after serving 25 years imprisonment he or she will be considered for parole.[4] Therefore, imposing a non-parole period of 25 years was akin to life imprisonment, a sentence which is not appropriate as appears from what follows.

The sentences imposed

[13] Turning to the individual sentences the appellant was around 28 years old at the time of the incident. He was a first offender and had been in custody for a period of approximately two years as an awaiting trial prisoner before he was sentenced.

[14] We were not referred to any misdirection of the trial judge regarding the sentences imposed. It is trite that the imposition of an appropriate sentence is a function which lies within the discretion of the trial court.[5] A court of appeal's power to interfere with sentence is circumscribed.[6] It is only entitled to

[3] *S v Stander* 2012 (1) SACR 89 (SCA) para 22; *Mhlongo v The State* (140/16) [2016] ZASCA 152 (3 October 2016) paras 9-13.
[4] *Van Vuren v Minister of Correctional Services & others* 2012 (1) SACR 103 (CC) para 59. This is also provided for in s 73(6)*(b)*(iv) of the Correctional Services Act 111 of 1998.
[5] *S v Rabie* 1975 (4) SA 855 (A) at 857D-F.
[6] *S v Bogaards* [2012] ZACC 23; 2013 (1) SACR 1 (CC) para 41.

interfere if the imposition of a sentence is affected by material misdirection or, in the absence of any specific misdirection, 'when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate".'[7] If there were such a disparity the crucial issue is whether the appellate court is able to arrive at a definite view as to what sentence it would have imposed.[8]

[15] In the instant matter it is possible to arrive at a definite view as to what appropriate sentences should have been imposed in respect of the different counts the appellant had been convicted of and to impose sentence afresh.

Attempted murder

[16] This was a violent attack, carried out by a ruthless group of people who could have killed any number of civilians and police officers. However, I am of the view that the sentences imposed for attempted murder in the circumstances of this case, are disturbingly inappropriate. In respect of the first two counts, shots were fired at the complainants while they were protected by bulletproof glass in an armoured vehicle. There was no direct intent to kill them, but the accused were convicted on the basis of dolus eventualis. The intention was clearly to force the complainants out of the motor vehicle. When Messrs Pillay and Krishna left the safety of the motor vehicle they were vulnerable, but were not attacked. A sentence of 30 years' imprisonment, a sentence usually reserved for murder under special circumstances, is excessive in this instance.

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[7] *S v Malgas* 2001 (1) SACR 469 (SCA) para 12. See also *S v Abrahams* 2002 (1) SACR 116 (SCA) para 15.
[8] *S v Matlala* 2003 (1) SACR 80 (SCA) para 10. See also *S v Monyane & others* 2008 (1) SACR 543 (SCA) para 23.

[17] The conviction on the charge of the attempted murder of Mr Pienaar is premised on shots that were fired at him when he came to the assistance of the security guards. However, Mr Pienaar was not wounded and he did not testify as to his condition at the time or the consequences of the attempt on his life. A sentence of 20 years' imprisonment cannot be justified under those circumstances.

[18] Furthermore, the consequences of the shots fired at Inspector Ncwane were not serious, but it cannot be ignored that they were aimed at police officers and struck him in a vulnerable part of his body. It was solely due to the bulletproof vest that he was not wounded in his chest area. The consequences of the shots fired at Sergeant Thomas were devastating and changed his life completely.

[19] I am of the view that a sentence of ten years' imprisonment would be appropriate in respect of the first three attempted murder charges. The counts of attempted murder of the two policemen are in a different category. The shots were directed at the cabin of the police vehicle where both policemen were seated. The attempted murder of a police officer performing his or her duties is a very serious offence. Life imprisonment is the prescribed sentence for the completed offence.[9] Sergeant Thomas has been rendered a paraplegic, while the bulletproof vest probably saved the life of Inspector Ncwane. An appropriate sentence for the attempted murder of Inspector Ncwane is 12 years' imprisonment, while the attempted murder of sergeant Thomas

[9] The provisions of s 51(1) of the provisions of the Criminal Law Amendment Act 105 of 1997 read with Schedule 2 Part I*(b)*(i) determine that life imprisonment is the prescribed sentence in instances when a law performance officer is murdered while he was performing his functions. See also S *v Mahlamuza & another* [2014] ZASCA 213; 2015 (2) SACR 385 (SCA) para 18.

warrants a sentence of 20 years' imprisonment.

Robbery with aggravating circumstances

[20] The provisions of s 51(2)*(a)*(i) of the Criminal Law Amendment Act 105 of 1997 were applicable as the appellant was convicted of robbery with aggravating circumstances and he was a first offender. Therefore, it was incumbent on the trial court to impose a minimum sentence of 15 years' imprisonment in respect of each of the robbery with aggravating circumstances charges, unless there were substantial and compelling circumstances to impose a lesser sentence. There were no substantial and compelling circumstances present in respect of three of the counts of robbery. However, count 5 can be differentiated as only the keys of a motor vehicle were taken. I am of the view that the value of the items robbed in count 5, in the circumstances of this case where all the charges relate to a single incident, amount to substantial and compelling circumstances and a sentence deviating from the prescribed sentence of 15 years' imprisonment is justified and a sentence of five years' imprisonment is appropriate.

[21] The trial judge imposed a sentence of 20 years' imprisonment in respect of the robbery of the two firearms of the two security guards. No reasons were given why the sentence in that instance should be so severe. As stated previously the charges all related to a single incident and there is no justification for imposing a harsher sentence in that instance. I am of the view that 15 years' imprisonment would also be the appropriate sentence is this instance. The disparity between the sentence of 20 years' imprisonment and 15 years is so marked that interference is warranted.

The cumulative effect of the sentences

[22] It was pointed out in *S v Muller*[10] when considering the cumulative effect of sentences:

> 'When dealing with multiple offences, a sentencing court must have regard to the totality of the offender's criminal conduct and moral blameworthiness in determining what effective sentence should be imposed, in order to ensure that the aggregate penalty is not too severe.'

The view was expressed that a cumulative sentence of 30 years' imprisonment should be reserved for 'particularly heinous offences'.[11]

[23] One of the other accused in this matter Nkosinathi Erick Gamede, appealed to the full court against his effective sentence of 60 years' imprisonment, after the appeal of the appellant had been disposed of by the full court.[12] The appellant in that instance was 26 years old and was the youngest of the accused at the time of the commission of the offences. His sentence was reduced from 60 years to 30 years' effective imprisonment.

[24] In my opinion this is also a case of considerable gravity and the offences are particularly heinous. These were violent acts, perpetrated with the precision of a military armed attack. The victims in the armed motor vehicle were repeatedly shot at with automatic firearms. The roadblocks were set up and manned by some of the perpetrators wearing police paraphernalia. The two policemen were fortuitously not killed, but only because one was wearing a bulletproof vest, and the other officer's quality of life has inexorably deteriorated. The perpetrators' actions were brazen and they

[10] *S v Muller & another* [2012] ZASCA 151; 2012 (2) SACR 545 (SCA) para 9.
[11] Ibid para 10.
[12] Reported as *S v Gamede* 2016 JDR 0196 (KZP).

showed no restraint in executing their objectives with maximum violence, directed not only at the aforementioned persons, but also at members of the public.

[25] It has been accepted that life imprisonment is the most severe sentence that can be imposed,[13] and it is the sentence that has to be imposed if an offender needs to be removed from society.[14] The sentence of 45 years' imprisonment that was imposed on appeal would have the effect that the appellant, who was around 28 years old at the time of the incident, would be some 80 years of age at the time of his release. It is improper to take into consideration any possibility of parole in determining a suitable and proper sentence.[15] Thus, despite the aggravating circumstances I have mentioned, the sentence imposed by the full court is effectively one of life imprisonment and that is shockingly inappropriate. I am of the view that the effective term of imprisonment in this instance should be 30 years. I am reinforced in that view by counsel for both the appellant and the State agreeing that such a sentence is appropriate.

Order

[26] The following order is made:

1 The appeal against the sentences in respect of counts 1, 2, 3, 4, 5, 9 and 10 are successful, and those sentences are set aside and substituted with the following.

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[13] *S v SMM* [2013] ZASCA 56; 2013 (2) SACR 292 (SCA) para 19.
[14] *S v Bull & another; S v Chavulla & others* 2001 (2) SACR 681 (SCA) para 21.
[15] *S v S* 1987 (2) SA 307 (A) at 313H – J. It has however been said that the possibility of parole saves a life sentence from being cruel, inhuman and degrading punishment See *S v Bull* ibid para 23.

‘(a) In respect of counts 1, 2 and 4 the appellant is sentenced to undergo 10 years imprisonment on each count;

(b) In respect of count 5 the appellant is sentenced to undergo five years’ imprisonment;

(c) In respect of count 9 the appellant is sentenced to undergo 20 years’ imprisonment; and

(d) In respect of count 10 the appellant is sentenced to undergo 12 years’ imprisonment.

2 All the sentences in respect of counts 1, 2, 4 and 10 are to run concurrently with the sentence of 20 years’ imprisonment imposed on count 9,

3 All the sentences in respect of counts 5, 6, and 8 are to run concurrently with the sentence imposed in count 3 namely 15 years’ imprisonment.

4 It is further ordered that five years of the sentence imposed in respect of count 3 is to run concurrently with the sentence imposed in respect of count 9.

5 The effect of the above is that the appellant is to serve a total of 30 years’ imprisonment.

6 The sentences are ante-dated to 25 September 2003, being the date sentence was imposed by the trial court.

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I Schoeman

Acting Judge of Appeal

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