IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A615/2007

DATE: 23 MAY 2008

In the matter between:

ASHLEY MKANGASHE 1ST Appellant

ALFRED MZAZI 2ND Appellant

and

THE STATE

J U D G M E N T

H J ERASMUS, J:

[1] The appellants were arraigned before the Regional Court in Wynberg on the following charges:

1. Murder
2. Robbery with aggravating circumstances
3. Attempted murder
4. Unlawful possession of a firearm
5. Unlawful possession of ammunition

The appellants pleaded not guilty to all the charges. On 5 December 2001 they were convicted on all the charges except in respect of count 2 they were convicted of attempted robbery.

[2] On 7 December 2001 they were sentenced as follows:

The first appellant on count 1, 20 years' imprisonment

On count 2, 10 year's imprisonment

On count 3, 10 years' imprisonment

On counts 4 and 5 taken together for purposes of sentence, three years' imprisonment

It was ordered that the sentence of 10 years' imprisonment in respect of count 2 be served concurrently with the sentence imposed in respect of count 1. The effective term of imprisonment was therefore 33 years.

The second appellant, on count 1 he was sentenced to 15 years' imprisonment

Count 2, 10 years' imprisonment

Count 3, seven years' imprisonment

Counts 4 and 5, two years' imprisonment

It was ordered that five years of the sentence in respect of count 2 be served concurrently with the sentence imposed in respect of count 1.

The effective term of imprisonment was therefore 29 years.

[3] The appeal of the appellants is against sentence only. In granting the second appellant leave to appeal against sentence, the magistrate stated that he had erred in sentencing the second appellant and that after conviction he should, in terms of section 52 of the Criminal Law Amendment Act 105 of 1997 have referred the matter to the High Court for imposition of sentence. The first appellant was granted leave to appeal against sentence by a magistrate other than the magistrate who had imposed the sentence on the ground that another Court may come to a different conclusion in regard to sentence. In granting leave he also referred to the view expressed by the trial magistrate that the matter should have been referred to the High Court for imposition of sentence.

[4] Counsel for the appellants and the State are agreed that the appellants had been convicted of offences which fall within Part I of Schedule 2 of the Criminal Law Amendment Act and that after conviction the magistrate should, in terms of section 52 thereof, have referred the matter to the High Court for sentence. Mr Stamper on behalf of the appellants submitted in his heads that the sentences imposed on the appellants are invalid. He further submitted that the sentences imposed must be set aside, the appeals must be struck from the roll and the

matters be referred to a single judge to be dealt with in terms of section 52 of the Criminal Law Amendment Act.

[5] This was the approach adopted in S v Sekgobela & Four Other Cases 2006(2) SACR 309 (W). Ms van der Merwe, who appeared on behalf of the State, submitted that this approach is no longer possible in view of the provisions of the Criminal Law (Sentencing) Amendment Act 38 of 2007 which came into operation on 31 December 2007. This Act repeals sections 52, 52A and 52B of the Criminal Law Amendment Act and inserts a new section 53A as a transitional provision. The section provides as follows:

> "If a Regional Court has, prior to the date of the commencement of the Criminal Law (Sentencing) Amendment Act 2007:
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> (a) committed an accused for sentence by a High Court under this Act, the High Court must dispose of the matter as if the Criminal Law (Sentencing) Amendment Act 2007 had not been passed; or
>
> (b) not committed an accused for sentence by a High Court under this Act then the Regional Court must dispose of the matter in terms of

this Act as amended by the Criminal Law (Sentencing) Amendment Act 2007".

[6] Ms van der Merwe further submitted that although this Court is entitled to set the sentences aside and refer the matter back to the Court *a quo* to impose sentence anew, that would in the circumstances of the case not be the appropriate course to adopt. She rightly points out that the appellants were sentenced more than six years ago and that all the information necessary for a reconsideration of the sentences is before this Court. Moreover, referring the matter back to the Regional Court for imposition of new sentences will further delay the final disposal of the matter.

[7] Ms van der Merwe accordingly submitted that this Court should set the sentences imposed by the magistrate aside and impose appropriate sentences. In this regard she referred to the powers of the Court under section 22 of the Supreme Court Act 59 of 1959 and sections 304(2) and 309(3) of the Criminal Procedure Act 51 of 1977. Thus section 22(b) of the Supreme Court Act provides that a division of a High Court hearing an appeal shall have the power "to confirm, amend or set aside the judgment or order which is the subject of the appeal and

to give any judgment or to make any order which the circumstances may require".

[8] In my view, the interests of justice require this Court to set the sentences imposed by the magistrate aside and impose appropriate sentences. It would be a senseless exercise in futility to remit the matter to the magistrate who imposed sentences that will almost inevitably again come before this Court on appeal. (See S v Shamatla 2004(2) SACR 507 (E) at 573a-h; Erskine v S 2007(3) All SA at 241 (C). The interests of the two appellants would be best served by dealing now and here with the substance of their appeals against the sentences imposed upon them.

[9] The appellants have been convicted of offences which fall within Part I of Schedule 2 of the Criminal Law Amendment Act in respect whereof imprisonment for life is prescribed in terms of section 51(1)(b) of the Act. In the charge sheet the appellants were warned that "section 51 of Act 105 of 1997 is applicable" to the charges of murder and robbery with aggravating circumstances. The appellants were legally represented at the trial. From the record it is clear that the magistrate and the legal representatives were under the

impression that the minimum sentences prescribed in Part II of Schedule 2 in which lesser sentences than imprisonment for life are prescribed, were applicable. In the result the appellants were not pertinently alerted to the fact that conviction would bring the provisions of Part I of Schedule 2 of the Criminal Law Amendment Act into play. In the circumstances I am satisfied that it would not be fair at this stage to subject the appellants to the provisions of Part I of Schedule 2.

[10] Ms van der Merwe submitted that leaving aside the question of lack of jurisdiction, the sentences imposed were proper given the nature of the offences and that this Court should impose similar sentences. Mr Stamper submitted that the sentences are excessive. He submitted that both appellants were convicted of attempted robbery and that no injury was caused in the attempted murder. He further stressed that the role of the second appellant was less than that of the first appellant. In his judgment on sentence the magistrate has taken into consideration every relevant consideration, including the lesser role of the second appellant. The sentences imposed in respect of the different offences cannot be faulted. The magistrate clearly had the cumulative effect of the sentences in

mind when he took some of the sentences together for purposes of sentence and ordered other sentences to be served concurrently.

[11] My concern is whether, despite the gravity of the offences, the cumulative effect of the sentence nevertheless remains too harsh. The underlying idea is that the total sentence imposed should be in proportion to the total blameworthiness of the offender (S v Mpofu 1985(4) SA 322 (ZHC) at 324G-J; Terblanche: A Guide to Sentencing in South Africa 204-205). This is achieved arbitrarily reducing the total sentence to or produce a reasonable result (R v Abdullah 1956(2) SA 295 AD at 300A).

[12] In my view, in the case of the first appellant, 30 years' imprisonment would be appropriate. This can be achieved by ordering the sentence of 10 years' imprisonment on count 1 and the sentence of three years' imprisonment on counts 4 and 5 to be served concurrently with the sentence imposed in respect of count 1.

[13] In the case of second appellant, a total sentence of 22 years would be appropriate. This can be achieved by

1 and the sentence of two years' imprisonment on counts 4 and 5 to be served concurrently with the sentence in respect of count 1.

[14] In the result, the following orders are made:

1. The sentences imposed by the magistrate on the first and second appellants are set aside and replaced by the following sentences:

2. First appellant (Ashley Mkangashe)

Count 1: 20 years' imprisonment

Count 2: 10 years' imprisonment

Count 3: 10 years' imprisonment

Counts 4 and 5: Three years' imprisonment

It is ordered that the sentence of 10 years' imprisonment in respect of count 2 and the sentence of three years' imprisonment in respect of counts 4 and 5 be served concurrently with the sentence imposed in respect of count1.

The effective term of imprisonment is therefore 30 years'.

3. The second appellant (Alfred Mzazi)

Count 1: 15 years' imprisonment

Count 1: 15 years' imprisonment

Count 2: 10 years' imprisonment

Count 3: seven years' imprisonment

Counts 4 and 5: two years' imprisonment

It is ordered that the sentence of 10 years' imprisonment in respect of count 2 and the sentence of two years' imprisonment in respect of counts 4 and 5 be served concurrently with the sentence imposed in respect of count 1.

The effective term of imprisonment is therefore 22 years.

4. The sentences imposed by this Court are in terms of section 282 of the Criminal Procedure Act 51 of 177, antedated to 7 December 2001.

H J ERASMUS, J

BRUSSER, AJ: I agree.

BRUSSER, AJ

SP

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