IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

10 - 1 - 2018
DATE

SIGNATURE

CASE NUMBER: A550/16
DATE: 10 January 2018

NKOSINATHI MELVIN NKULULEKO MTHIMKULU Appellant

V

THE STATE Respondent

JUDGMENT

MABUSE J: (Prinsloo and Molopa-Sethosa JJ concurring)

[1] This is an appeal against sentence. The appellant, Nkosinathi Melvin Nkululeko Mthimkulu, was granted leave to appeal by the Supreme Court of Appeal on 20 October 2015 against the sentence imposed on him by the court *a quo* on 9 April 2015.

[2] The appellant and a certain Clifford Junior Motileng, accused 2, appeared before this Court (Coetzee J), charged with a number of offences. Accused 2 is not involved in this appeal. Accordingly, this appeal is strictly confined to the appellant. Therefore no further reference to accused 2 will be made in this judgment. Because the number of offences he was convicted of had bearing on his ultimate sentence, it is only proper if I set them out herein:

2.1 in counts 1, 2 and 3 he was charged with robbery with aggravating circumstances as intended in section 1 of Act 51 of 1977 and read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997;

2.2 in count 4, he was charged with housebreaking with intent to steal and theft;

2.3 in counts 5 and 6 he was charged with attempted murder;

2.4 in count 7, he was charged with housebreaking with intent to rob and robbery with aggravating circumstances as intended in section 1 of Act 51 of 1977 read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997;

2.5 in counts 8, 9, 10 and 11 he was charged with robbery with aggravating circumstances as intended in section 1 of Act 51 of 1977 read with section 51(2) of the Criminal Law Amendment Act 105 of 1997;

2.6 in count 12 he was charged with contravention of section 120 (C)(a) read with sections 1, 103, 120(1)(a), 121 read with schedule 4 and section 151 of Act 60 of 2000 (pointing of a firearm);

2.7 in count 13 he was charged with contravention of section 66(2) read with section 89 of the National Road Traffic Act 93 of 1996 (using a motor vehicle without the owner's consent);

2.8 in count 14 the charge against him was housebreaking with intent to rob and robbery with aggravating circumstances as intended in section 1 of Act 51 of 1977 read with section 51(2) of the Criminal Law Amendment Act 105 of 1997;

2.9 in count 15 he was charged with robbery with aggravating circumstances as intended in section 1 of Act 51 of 1977 read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997;

2.10 in count 16, he was charged with attempted murder;

2.11 in count 17 his charge was assault with intent to do grievous bodily harm;

2.12 in count 18 he was charged with malicious damage to property;

2.13 in count 19 he was charged with contravention of section 3 read with sections 1, 103, 117, 120(1)(a), 121 read with schedule 4 of section 151 of Act 60 of 2000 (illegal possession of a firearm); and

2.14 in count 20 he was charged with contravention of section 90 read with sections 1, 103, 117, 120(1)(a), 121 read with schedule 4 of section 151 of Act 60 of 2000 (illegal possession of a firearm).

[3] At the plea stage the appellant had no legal representation. After the charges were read to him, he refused to tender any plea. He told the court that he needed a legal representative. The court refused to grant him an opportunity to look for another legal representative because a certain Mr Mmusi, who had been instructed by the Pretoria Justice Centre to appear for him, had to withdraw on the instructions of the Pretoria Justice Centre. This was after the appellant had failed to appear at court on 3 November 2014 in the morning when instead he went to write examinations. So the court entered a plea of not guilty on his behalf and the trial commenced.

[4] The facts of the matter were aptly captured by the court *a quo* in its judgment. Having listened to the whole evidence and considered it, the court *a quo* was satisfied that the respondent, the State in the court *a quo*, had proved its case beyond reasonable doubt against the appellant in respect of counts 1, 2, 4, 7, 8, 10, 11, 14, 19 and 20. For various reasons set out in the record of the court *a quo*, he was found not guilty and acquitted on the rest of the counts.

[5] Upon conviction the court *a quo* sentenced the appellant as follows:

5.1 Count 1: 15 years' imprisonment;

5.2 Count 2: 15 years' imprisonment;

5.3 Count 4: 5 years' imprisonment;

5.4 Count 7: 15 years' imprisonment;

5.5 Count 8: 15 years' imprisonment;

5.6 Count 10: 15 years' imprisonment;

5.7 Count 11: 15 years' imprisonment;

5.8 Count 14: 15 years' imprisonment;

5.9 Count 19: 3 years' imprisonment;

5.10 Count 20: 1 year imprisonment.

In addition the court *a quo* ordered that:

5.11 the sentences imposed on the appellant in respect of counts 1, 2, 19 and 20 should run concurrently;

5.12 in respect of counts 4, 7, 8, 10 and 11 "the sentences imposed on the appellant in respect of those 4 counts shall run concurrently."

The appellant was accordingly sentenced to an effective term of imprisonment of 50 years.

[6] It is this term of 50 years imprisonment that constitutes the subject matter of this appeal. Leave to appeal against the sentence, as pointed out earlier, was granted by the Supreme Court of Appeal on 20 October 2015. The appellant's dissatisfaction with the sentence imposed on him by the court *a quo* was fully set out in his application for leave to appeal and fully argued at a subsequent hearing. In a written judgment dated 31 August 2015, the application was refused by the court *a quo*. That sole ground of appeal that the appellant set out in his application for leave to appeal was that the sentence imposed on him by the court *a quo* was harsh as to induce a

sense of shock. Though that ground appeared in the application for leave to be the sole ground of appeal, there was another ground raised for the first time in the appellant's counsel's heads of argument. That ground was set out as follows in paragraph 9 of the heads of argument:

"The trial court then mentioned 5 counts (counts 4, 7,8,10 and 11) and ruled that "these 4 counts" shall run concurrently. It does not appear which 4 counts the trial court referred to – or whether the trial court made a mistake and actually referred to the 5 counts mentioned in this group."

[7] At the hearing of this appeal, the appellant was represented by Adv. JG Cilliers (SC), while the respondent was represented by Adv. Van Deventer, of the office of the Director of Public Prosecutions in Pretoria. As required by the practice directive both of them had filed their heads of argument.

[8] In his heads of argument, Adv. Cilliers (SC), made it clear, at the hearing of this appeal that essentially the issue for determination by the Appeal Tribunal was centred on the cumulative effect of the sentences imposed on the appellant by the court *a quo* which sentences would, practically ordinarily exceed the life expectancy of such a sentenced person. Such long sentences are, in the words of the Courts, called "Methuselah sentences". The name is derived from the old adage that: *"As old as Methuselah"*. This has its origin in Genesis 5:27 which states that: *"In all Methuselah lived 969 years, and he died."*

[9] Referring to sections 1, 7 and 10 of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution"), he argued that in view of the current constitutional dispensation questions arise as to whether such Methuselah sentences are in line with the values and ethos of our Constitution. Before setting out the provisions of sections 1, 7 and 10 of the Constitution, it is only proper to point out that already in **S v Nkosi 2003(1) SACR 91 (SCA)**, the court had complained about the Methuselah sentences when it stated that:

"(9) Thus, under the law as it presently stands, when what one may call a Methuselah sentence is imposed (i.e. a sentence in respect of which the prisoner would require something approximating to the longevity of Methuselah if it is to be served in full) the prisoner will have no chance of being released on the expiry of the sentence and also no chance of being released on parole after serving one half of the sentence. Such a sentence will amount to cruel, inhuman and degrading punishment which is proscribed by section 12(1)(e) of the Constitution of South Africa Act 108 of 1996. See Bulls, case supra at 695 C where it is pointed out that it is the possibility of parole which saves a sentence of life imprisonment from being cruel, inhuman and degrading punishment."

[10] Section 1 of the Constitution provides that:

"(1) THE REPUBLIC OF SOUTH AFRICA

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the Constitution and the rule of law."

This section clearly recognises the inherent dignity of all persons, nationals and foreigners, in the Republic of South Africa. In the same breath, section 7 of the Constitution provides as follows:

"(7) RIGHTS

(1) This Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

Section 10 of the Constitution states as follows:

"(10) HUMAN DIGNITY

Everyone has the inherent dignity and the right to have their dignity respected and protected."

And finally section 35(2)(e) provides as follows:

"(35) ARRESTED, DETAINED AND ACCUSED PERSONS

(1) ...

(2) Everyone who is detained, including every sentenced prisoner, has the right

(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment."

There is no doubt in my mind that the Constitution puts the highest premium on the human dignity and that respect for human dignity and equality are the fundamental values very close to our hearts. These are the values that have guided us and have continued to do so since the coming into operation of the Constitution.

[11] With regard to the appellant's complaint that the sentence imposed on him by the court a quo is so harsh that it induces a sense of shock the starting point is the case of **R v Maphumulo and Others 1920 AD 56, 57** where the Court had the following to say:

"The infliction of punishment is pre-eminently a matter for the discretion of the trial court. It can better appreciate the atmosphere of the case and can better estimate the circumstances of the locality and the need for a heavy or light sentence than an appellate tribunal and we should be slow to interfere with its discretion."

This paragraph does not mean that the trial court has unfettered powers to impose a sentence nor does it mean that an appeal court may not interfere with the sentence imposed by the trial court. There are recognised grounds on the basis of which an appeal court may interfere with the sentence or sentences imposed by the trial court. For instance, in **S v Salzwdel and Others 1999(2) SACR 586 (SCA), 588 A-B**, it was held that:

"A court of appeal was entitled to interfere with a sentence imposed by the trial court in a case where the sentence was disturbingly inappropriate, or totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparate, or vitiated by misdirections of a nature which showed that the trial court had not exercised its discretion reasonably. Over-emphasis of the personal circumstances of an accused and an underestimation of the gravity of the offence constituted a misdirection which might result in a sentence being set aside."

See also R v S 1958(3) SA 103 AD, 104B-C; S v Malgas 2001(1) SACR 469 (SCA), 478 par 12 and S v Anderson 1964(3) SA 494 (A), 495D-E.

[12] In the imposition of sentence it is expected of the court imposing sentence to consider the "Zinn triad" which derives its name from S v Zinn 1969(2) SA 537 A, in other words the offence, the personal circumstances of the person convicted and, thirdly, the interest of the society. The duty lies on such a court to put all these three factors in an imaginary weighing scale, to weigh them, according each one of them equal weight, avoiding any over- or under emphasis of any one of them at the expense of the others, and distilling from them what in its view is an appropriate sentence.

[13] Mr Cilliers (SC) complained that the court *a quo* did not motivate its judgment on sentence. This failure, according to him, constituted a misdirection. The court *a quo* correctly pointed out, in determining whether substantial and compelling circumstances existed, that it must take into account the appellant's personal circumstances, the seriousness of the crimes committed by the appellant and the interest of the society.

[14] The following personal circumstances of the appellant were placed before the Court. The appellant was 28 years old. At the time of the commission of the offences he was 22 years old. He had no dependents. He was a second year Bachelor of Commerce Investment student at the

University of South Africa. It was placed on record furthermore that when he was not studying he assisted his uncle at his spaza shop and cattle farm. For his services to his uncle he earned R4000.00 per month. The appellant was a first offender. The court also mentioned that the appellant did not show any penitence and furthermore that he did not take responsibility for his conduct. The court, quite correctly so, in my view, found no substantial and compelling circumstances in the facts that at the time he committed the offences the appellant was fairly young and had no previous convictions. When it comes to serious offences the fact that the offender has a clean record must recede into the background. This is demonstrated by **S v Matyityi 2011(1) SACR 40 (SCA)**.

THE CRIME

[15] With regard to the crimes that the appellant had committed, the court *a quo* observed that armed robbery was a very serious offence. It took into account the prevalence of the offence in the area and in fact in the whole country. The court *a quo* was therefore entitled to have regard to this factor. The prevalence of a particular kind of crime or a noticeably increased occurrence of such a crime is an aggravating factor that may lead to an increased severity in sentences. See in this regard **S v Mohase 1998(1) SASV 185 OPA, 193d** where the court, in taking into account the prevalence of robbery, had the following to say:

"Gewapende rooftogte neem huidiglik ernstige afmetings aan in die gebied van hierdie hof en is dit belangrik dat 'n duidelike boodskap aan die voornemende misdadiger gestuur word dat hierdie optrede nie deur die howe geduld sal word nie. Die element van vergelding en veral afskrikking kom hier sterk na vore."

See also **S v Seoela 1996(2) SACR 616 O, 620h; S v Qamata 1997(1) SACR 479 (E), 482C.**

[16] In emphasising the seriousness of the offence the court *a quo* took into account the huge loss that a number of the appellant's victims had suffered; that the appellant acted with disrespect

for the dignity of the persons and the property of his victims; the brutal assault that was inflicted on some of the victims and the disrespect that he and his cohorts showed when they shot at the members of the South African Police Services.

[17] In **S v Banda and Others 1991(2) SA 352 GBD, 355** the court had the following to say about crime:

"In passing sentence, the trial court must take into account the moral and ethical nature of the crime, and the gravity of the offence. It is accepted and is indeed logical that a more serious crime will carry with it a greater moral blameworthiness than a minor or less serious offence. This involves a moral and value judgment. A process of arid intellectualism is insufficient. Mere theorising is not sufficient. What matters finally is how the court views the crime on its own merits and all the relevant proven facts and circumstances must be carefully considered and assessed.

Merely to find that a crime is in itself serious without regard to its setting and its factual context and thereby concluding that the crime committed by the offender is therefore also serious, is not appropriate and may result in a misdirection."

The court continued at 356 B-C and stated that:

"Conjoined to the nature of the crime are also the consequences of the crime. If the consequences are serious or indeed incalculable, the aggravating circumstances will be viewed more seriously by the court. On the other hand if there were no serious consequences or results flowing from the crime, the aggravating circumstances recede."

According to Du Toit "Straf in Suid-Afrika" at pages 89 to 91, and **S v Haasbroek 1969(1) SA 356**, the sentence that a court imposes on the offender must be commensurate with the gravity or otherwise of the crime.

[18] The court *a quo* observed furthermore that the appellant's motive for committing these offences was sheer greed. The motive with which an accused person commits an offence should be

considered as an aggravating factor especially where such motive is greed. See **S v Moyo 1979(4) SA 61 ZRA, 63D-E**, where the court had the following to say:

"One of the most important considerations in sentencing an offender is his moral guilt, and logically his motive in committing the offence bears strongly upon such moral guilt."

See also **S v Banda and Others** *supra*.

[19] The argument by Mr Cilliers (SC) that the court *a quo* failed to motivate its judgment on sentence is, in my view, not correct. The record of the proceedings in the court *a quo* shows that the court *a quo* did not only take into account the relevant factors for the assessment of an appropriate sentence but also analysed them before imposing sentence.

[20] That the appellant had to be sentenced was not in dispute, for he had indeed committed serious offences. What is at stake, however, is the cumulative effect of the sentences imposed on him. I have pointed out that these are sentences which ordinarily would exceed the life expectancy of a sentenced person. The sentences imposed by a court should not be designed to confine an offender to a penitentiary for the rest of his life. As shown in S v Nkosi *supra* the problems associated with the Methuselah sentences are that:

(a) the prisoner will have no chance of being released on expiry of the long sentence imposed on him or her;

(b) the prisoner will have no chance of being released on parole after serving one half of the long sentence; and

(c) such sentence will amount to cruel, inhuman and degrading punishment contrary to the provisions of section 12(1)(e) of the Constitution which provides that:

"Everyone has the right to freedom and security of the person, which includes the right –

(a) ...

(b) ...

(c) ...

(d) ...

(e) *Not to be treated or punished in a cruel, inhuman or degrading way."*

(d) Such sentences deprive the offender of any chance of being rehabilitated, which is one of the purposes of sentence, especially in a case such as the instant one where the offender was 22 years at the time of the commission of the offences and had no previous convictions at the time of his conviction and sentence.

[21] Sending the appellant to 50 years' imprisonment is, without doubt, to set him up for ruin; to deny him the opportunity to be rehabilitated. In **S v Siluale en Ander 1999(2) SACR 102 at 103 (SCA)** the court had the following to say:

"If circumstances of a case require that an offender should receive a sentence which for all practical purposes removes him permanently from society, life imprisonment is the only appropriate sentence. It is intended to be the most severe sentence that can be imposed, although there are acknowledged procedures which make parole possible in appropriate circumstances, e.g. where the offender (contrary to all expectation) genuinely reforms. On the other hand a sentence of imprisonment which is so unusually long that it denies the offender all possible hope of ever being released, whatever happens, is alien to a civilised legal system. Accordingly, exceptionally long terms of imprisonment, which are calculated to exceed the accused's life expectancy (in casu 155 years,115 years and 105 years) are not appropriate."

[22] When it comes to the imposition of sentence, a huge responsibility rested on the shoulders of the trial judge. In this regard in **S v Dzukuda and Others; S v Tshilo 2000(2) SACR 443 CC, 462 para [30]** the court had the following to say:

"As far as the fundamental considerations and procedures regarding sentence are concerned, our law does not distinguish between heavy and lesser sentences. The responsibility resting on a

judicial officer may well be more onerous, in human terms, when considering the choice between a sentence of life imprisonment and a lesser sentence on the other hand, than when considering the choice between sentences of three or five years imprisonment or the choice between a custodial and a non-custodial sentence, on the other. Yet the broad principles are the same and in all these cases the judicial officer must, among other things, be put in possession of all the information relevant to the imposition of a sentence and in particular information relevant to mitigating circumstances, in the broadest sense of the expression, which might ameliorate the severity of the ultimate punishment."

There is always a high expectation placed on the trial court to consider all the relevant factors, which include guidance from previous judgments such as S v Nkosi *supra* and S v Seoelo en Andere *supra*. The high expectations placed on the presiding judge are mirrored in the following *dicta* in **S v Rabie 1975(4) SA 855 A, 866A-C** where the court had the following to say:

"A judicial officer should not approach punishment, in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity, nor, on the other hand, surrender himself to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with humane and compassionate understanding of human frailties and pressures of society which contribute to criminality."

[23] With regard to the interests of the society, the court *a quo* merely stated that the members of the community expect from a court to impose heavy sentences on a person such as the appellant who wields firearms and did not hesitate to use it whenever the need arose. The court fulfils an important role in the application of the law in the community. It must be recalled that the court acts as an instrument through which the society exerts punishment on offenders. The court has a duty to enforce the law; to maintain the law and order, as it operates in a society, its decisions,

without doubt, have an impact on individuals in the ordinary circumstances in their daily hours. By its decisions and imposition of sentences, the court promotes or must promote the respect for the law. Therefore, a weighty consideration must be accorded to the interests of society in imposing sentences. It must forever be reminded that the purposes of sentences is not so much to please the interests of society as it is to protect and serve the community. The interests of the community should not be overstated at the expense of the personal circumstances of an offender. Accordingly, it was not correct, in my view, for the trial court to remark that the members of society expect a court to impose a heavy sentence on the offender.

[24] In my view, the court *a quo* should have steered its course away from the Methuselah sentences; should have stuck to the values and purpose of the Constitution as pointed out in the aforegoing paragraphs.

[25] Finally, I accept the appellant's complaint as contained in paragraph 9 of Mr Cilliers's heads of argument. That part of the sentence only requires clarification. It is my considered view that the court *a quo* had intended referring to 5 instead of 4 counts.

[26] Mr Van Deventer conceded at the hearing of this appeal that a sentence of 50 years' imprisonment is severe. The appeal against sentence should therefore succeed.

[27] Accordingly, the following order is made:

1. The appeal against sentence is hereby upheld.
2. The sentences imposed by the court *a quo* on the appellant are hereby amended to the following extent:

"2.1 the sentences imposed on the accused in respect of counts 2, 19 and 20 shall run concurrently with the sentence imposed on him in respect of count 1. The effect

hereof is that the accused is sentenced in respect of counts 1, 2, 19 and 20 to an effective term of imprisonment of 15 years.

2.2 the sentence imposed on the accused in respect of counts 4, 7, 8, 10, and 11 shall run concurrently with the sentence of 15 years imposed on the accused in respect of count 14. Accordingly in respect of counts 4, 7, 8, 10, 11 and 14, the accused is sentenced to an effective term of 15 years' imprisonment."

Therefore the accused is sentenced to an effective term of imprisonment of 30 years antedated to 9 April 2015.

PM MABUSE
JUDGE OF THE HIGH COURT

I agree

WRC PRINSLOO
JUDGE OF THE HIGH COURT

I agree

LM MOLOPA-SETHOSA
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the appellant:	*Adv JG Cilliers (SC)*
Instructed by:	*Madungandaba Attorneys*
Counsel for the respondent:	*Adv A van Deventer*
Instructed by:	*Director of Public Prosecutions*
Date heard:	*5 May 2017*
Date of Judgment:	*10 ~~December~~ 2018*