THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 563/08

RICHARD MOKOENA Appellant

and

THE STATE Respondent

Neutral citation: Mokoena v S (563/08) [2009] ZASCA 14 (19 March 2009).

Coram: CLOETE, PONNAN et SNYDERS JJA
Heard: 2 MARCH 2009
Delivered: 19 MARCH 2009
Summary: Criminal Law: Sentence: The function of a court in imposing sentence is to determine the maximum period the convicted person may be imprisoned. It is improper for the court to attempt to determine the minimum period.

ORDER

On appeal from: Free State Provincial Division, Parys (Hattingh J as court of first instance).

1. The order of the court a quo refusing condonation for the late application for leave to appeal is set aside and condonation is granted.
2. Condonation is granted for the non-compliance with the rules of this court.

3. The appeal succeeds to the limited extent that the sentences imposed by the court a quo are set aside and the following sentences are substituted:

3.1 On the first count, murder, the appellant is sentenced to 25 years' imprisonment.

3.2 On the second count, robbery with aggravating circumstances, the appellant is sentenced to 15 years' imprisonment of which ten years is ordered to run concurrently with the sentence imposed on the first count.

3.3 The effective period of imprisonment will therefore be 30 years.

4. In terms of s 282 of the Criminal Procedure Act, the sentences are backdated to 19 September 1995.

JUDGMENT

CLOETE JA (PONNAN *et* SNYDERS JJA concurring):

[1] The appellant and his co-accused were charged with murder and robbery with aggravating circumstances before Hattingh J and assessors in the Free State Provincial Division sitting at Parys. The State alleged that on 27/28 February 1995 and at Petrus Steyn the appellant and his co-accused killed Mrs Catarina Johanna Koster ('the deceased') in her home and robbed her of inter alia her car, stove, hi-fi set, radio and personal jewellery. The appellant tendered a plea of guilty to culpable homicide on the first count, which was rejected by the State, and a plea of guilty on the second count, which the State accepted. The appellant was ultimately convicted as charged and his co-accused was convicted only of theft on the second count.

[2] The trial court sentenced the appellant to 40 years' imprisonment on the first count and 15 years' imprisonment on the second count, but ordered that half of the latter sentence should run concurrently with the former, so that the effective sentence of imprisonment was 47 and a half years.

[3] The appellant sought leave to appeal against sentence, and condonation for his failure to have done so timeously, from the trial court. The

application for condonation was refused primarily for the reason that it had no prospects of success. The appellant appeals against this order. Leave is not necessary from this court or the court a quo: *S v Gopal*,[1] *S v Moosajee*.[2] There was also an application for condonation before this court for non-compliance with certain of its rules. As the prospects of success on appeal are all important to both applications, I turn to consider the merits of the appeal.

[4] As I have said, the deceased lived in Petrus Steyn. Her house was surrounded by burglar bars. The appellant was her gardener. She was found dead in a bath half full of water with her arms and also her legs tied tightly together with wire coat hangers. There was also a wire coat hanger tied around her neck. The medical evidence showed that she had been strangled by her assailant ─ which, it was common cause, was the appellant ─ using his right hand. She had other bruises, including a black eye. A number of articles were missing from her house although there were no signs of forceable entry. The appellant said in his plea explanation (made in terms of s 112(2) of the Criminal Procedure Act) that after he had left the deceased in the bath, he locked the house and went to his dwelling. Later the same night he returned with his co-accused and loaded goods from the deceased's house into her motor vehicle, which was driven to the appellant's shack at Mamafubedu and thereafter, to the dwelling of his co-accused. Stolen goods were offloaded at both places. They subsequently rolled the vehicle. They were arrested the following day.

[5] In refusing condonation, the learned trial judge exercised a narrow discretion[3] with which this court is not entitled to interfere unless it was not exercised judicially. That is the case here because the discretion was exercised as a result of a material misdirection. The misdirection had its origin in the following passages of the record which reflect what the learned trial

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[1] 1993 (2) SACR 584 (A).
[2] 2000 (1) SACR 615 (SCA).
[3] *Naylor v Jansen* 2007 (1) SA 16 (SCA) para 14 and cases referred to in the footnotes, especially *Giddey NO v J C Barnard and Partners* 2007 (5) SA 525 (CC) para 19.

judge said to the prosecutor (Ms Bester) and counsel for the appellant (Mr Marais) during argument on sentence:

'ME. BESTER: Met betrekking tot termyne, u edele. Langtermyn gevangenisstraf ten aansien van beskuldigde 1 ten aansien van aanklag 1, ook ten aansien van aanklag 2. Ek wil my nie regtig aan 'n termyn gebonde hou nie, maar ek dink in aanklagte 1, 20-25 jaar en aanklag 2 dink ek in die omgewing van 12 tot 15 jaar, u edele.

HOF: Juffrou, het u gesien wat sê die Gevangeniswet? Hy sê waar 'n hof 'n bepaalde vonnis oplê dan kan daardie persoon, dan kom daardie persoon na die helfte daarvan verstrek is vir oorweging, vir parool in oorweging. Met ander woorde ek gee hom 20 jaar, na 10 jaar dan stap hy hier buitekant rond.

ME. BESTER: Dit is korrek.

HOF: Hoekom gee ek hom nie liewer dan 'n 100 jaar nie?

ME. BESTER: Ek het nie 'n probleem daarmee nie, u edele.

HOF: U het nie 'n probleem nie?

ME. BESTER: Ek het geen probleem daarmee nie.

HOF: Ja.

ME. BESTER: Regtig.

HOF: Dan gee ek hom lewenslank dan kom hierdie klomp burokrate weer ... (tussenbei)

ME. BESTER: Van die Nasionale Raad.

HOF: En ook hier na 20 jaar sê hulle vir hom jy kan nou 'n bietjie vir parool kwalifiseer.

ME. BESTER: Ja, u edele soos ek sê ek het glad nie 'n probleem nie.

HOF: Al die vonnisse van die howe word tot niet gemaak deur 'n klomp politici en burokrasie, adviesrade en goed.

ME. BESTER: Daarmee stem ek honderd persent saam, u edele.

HOF: Want as die doodsvonnis hier 'n gepaste vonnis was sou ek dit ernstig oorweeg het.

. . .

HOF: Dankie, juffrou. Mnr. Marais, ek wil net graag by u iets hoor. Ek het nou al gesien dat van die regters in die Transvaal veral in sulke gevalle vonnisse oplê van wat amper soos Amerikaanse vonnisse is, 110 jaar, 'n ander ene 95 jaar en so aan. Nou daardie goed is nog nie op appèl gewees nie of het nog nie voor die Appèlhof gedien nie. Wat sal die rede wees dat die regter sulke lang termyne oplê? Dit het

hulle nooit gedoen toe die doodsvonnis nog 'n gepaste vonnis was nie, 'n bevoegde vonnis was nie.

MNR. MARAIS: Ja.

HOF: Dit is eers daarna wat dit gebeur het. Nie waar nie? Is dit miskien juis om dit wat in die Wet staan, omdat dit 'n bepaalde vonnis is kom hy aanmerking vir parool na die helfte uitgedien is.

MNR. MARAIS: Met die helfte.

HOF: Gee hom lewenslank en dan is die Adviesraad, die Nasionale Adviesraad sê dit is 'n administratiewe instruksie, na 20 jaar sal jy in oorweging kom. En dan lyk dit vir my daardie regters voel wag 'n bietjie as dit dan so is gaan ek hulle wetlik verplig om, hy gaan 'n lang tyd in die tronk bly, ek gee vir hom 90 jaar dan moet hy 45 jaar daar bly. Dan kan die Nasionale Adviesraad op sy kop staan, dit help niks.'

[6] The judgment on sentence is entirely devoid of these sentiments. But I am driven to the conclusion that the learned trial judge had them at least at the back of his mind when he imposed sentence. I say this for two reasons. First, the sentence imposed for the murder and the cumulative effect of the sentence imposed for both crimes together are both unusually severe. Second, the learned trial judge did not say that he had considered imposing life imprisonment, nor does he give any reason for rejecting such a sentencing option. If he would, as he said, have considered the death penalty had this sentence not been abolished, his failure to consider the most severe penalty then available is inexplicable on any basis other than that he considered such a sentence would not be sufficient if parole were to be granted to the appellant. A court in imposing sentence cannot adopt this approach. In *S v Matlala*[4] Howie JA held:

'Unless there is a particular purpose in having regard to the pre-parole portion of an imprisonment sentence (as, for example, in *S v Bull and Another*; *S v Chavulla and Others* 2001 (2) SACR 681 (SCA)) the Court must disregard what might or might not be decided by the administrative authorities as to parole. The court has no control over that. *S v S* 1987 (2) SA 307 (A) at 313H; *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) at 521*d-h*. In the latter passage there is the important statement that the function of the sentencing court is to determine the maximum term of imprisonment the convicted person may serve. In other words, the court imposes

[4] 2003 (1) SACR 80 (SCA) para 7.

what it intends should be served and it imposes that on an assessment of all the relevant factors before it. It does not grade the duration of its sentences by reference to their conceivable pre-parole components but by reference to the fixed and finite maximum terms it considers appropriate, without any regard to possible parole.'[5]

Subsequently, in *S v Botha*,[6] Ponnan AJA said:

'One final aspect merits mention. The trial Judge recommended that the appellant serve at least two-thirds of his sentence before being considered for parole. The function of a sentencing court is to determine the term of imprisonment that a person, who has been convicted of an offence, should serve. A court has no control over the minimum period of the sentence that ought to be served by such a person. A recommendation of the kind encountered here is an undesirable incursion into the domain of another arm of State, which is bound to cause tension between the Judiciary and the executive. Courts are not entitled to prescribe to the executive branch of government how long a convicted person should be detained, thereby usurping the function of the executive. (See *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) ([1997] 2 All SA 185) at 521*f-i* (SACR).)'

In short: the function of a court in imposing sentence is to determine the maximum period a convicted person may be imprisoned. It may not attempt to fix the minimum period.

[7] In the circumstances, I am satisfied that the learned judge misdirected himself in regard to the prospects of success on appeal, and that this court is at large to grant the application for condonation refused by the trial court and also to impose the sentences it considers appropriate. I turn to address that latter question.

[8] The appellant's personal circumstances are these. He was 23 years old when he committed the offences. He had two relatively minor previous convictions for theft for which he was in each case sentenced to imprisonment with the option of a fine, but he had no previous conviction for a crime involving violence. It may be accepted that he is a relatively unsophisticated person: he grew up on a farm as the oldest of four children. His father died when he was ten years old and his mother took him out of school (he was

[5] See also *S v Botha* 2006 (2) SACR 110 (SCA) para 25.
[6] 2006 (2) SACR 110 (SCA) para 25.

then in standard three) as she put it: 'Om my te kom help pap in die huis te bring'.

[9] I have difficulty in finding that the appellant had any remorse. He did co-operate immediately with the police after he was arrested: he made various pointings out and he made a statement to a magistrate, although he attempted to shift the blame from himself to his co-accused. But he never gave evidence. His plea to culpable homicide on the murder charge was correctly rejected by the State and he had little option but to plead guilty on the robbery charge. The appellant might well regret what he did, but it cannot in my view be found that he has genuine remorse.

[10] The murder was horrific. The deceased was a defenceless elderly woman in her late sixties and the appellant, as her gardener, was in a position of trust. She was attacked in the sanctity of her own home. The appellant must have gained entry using a key or by some strategy. He strangled the deceased with his bare hand. As this court said in *R v Lewis*:[7]

'The application of pressure manually, as in the case before us, is an aggravating circumstance because the assailant is throughout not only fully alive to the degree of force exerted by him but he is, by reason of his manual contact with the throat, warned of the victim's reaction to the pressure applied.'

The other injuries sustained by the deceased, in particular the black eye, bear mute testimony to the struggle she put up. Not surprisingly, the court a quo found that the appellant had acted with *dolus directus*. The appellant then wound wire coat hangers around the deceased's feet and hands so tightly that they required a pair of pliers to remove them, and also wound a wire coat hanger around her neck. According to the uncontradicted medical evidence led by the State, this was done after the deceased had been strangled to death; but it shows a callous persistence by the appellant in his course of conduct. So too does the fact that he returned that night with an associate to complete the robbery. That to my mind should properly be reflected in an order directing that part only of the sentence on the second count should run concurrently with the sentence on the first. The obvious inference to be drawn

[7] 1958 (3) SA 107 (A) at 109E-F.

from the facts I have mentioned, in the absence of any explanation from the appellant, is that the crimes were committed purely for personal gain.

[11] It is hardly necessary to emphasise that South Africa has for a number of years been plagued by crimes of violence of the nature committed by the appellant, to such an extent that Parliament has considered it necessary to enact[8] minimum sentences for such crimes. Society is clamant for retribution and deterrence must also play a major role in the sentences imposed. The personal circumstances of the appellant must recede into the background. It must nevertheless be borne in mind that this court is obliged to impose the sentence which it considers the trial court should have imposed in 1995 and the effect that the minimum sentencing legislation has had on sentences must be left out of account.

[12] Bearing all these factors in mind, I am of the view that a sentence of 25 years' imprisonment for the murder and 15 years' imprisonment for the robbery with aggravating circumstances, ten years of the latter to run concurrently with the former, would have been appropriate before the minimum sentencing legislation came into operation. The effective period of imprisonment will therefore be 30 years. The difference between that sentence and the sentence imposed by the trial court is sufficient to warrant interference; and in the circumstances, the application for condonation for non-compliance with the rules of this court should be granted. Before making the appropriate order, I should mention that the appellant has been in jail since he was sentenced on 19 September 1995. His imprisonment should therefore be backdated in terms of s 282 of the Criminal Procedure Act.

[13] The following order is made:

1. The order of the court a quo refusing condonation for the late application for leave to appeal is set aside and condonation is granted.
2. Condonation is granted for the non-compliance with the rules of this court.

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[8] In the Criminal Law Amendment Act 105 of 1997.

3. The appeal succeeds to the limited extent that the sentences imposed by the court a quo are set aside and the following sentences are substituted:

3.1 On the first count, murder, the appellant is sentenced to 25 years' imprisonment.

3.2 On the second count, robbery with aggravating circumstances, the appellant is sentenced to 15 years' imprisonment of which ten years is ordered to run concurrently with the sentence imposed on the first count.

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T D CLOETE
JUDGE OF APPEAL

Appearances:

Counsel for Appellant:	N L Skibi Instructed by Legal Aid Board, Bloemfontein
Counsel for Respondent:	C Steyn Instructed by Director of Public Prosecutions, Bloemfontein