THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 419/12
Not Reportable

In the matter between:

ITANI THOMAS MUDAU **Appellant**

and

THE STATE
Respondent

Neutral citation: *Itani Thomas Mudau v The State* (419/12) [2011] ZASCA 191 (30 November 2012)

Coram: PONNAN, TSHIQI JJA and MBHA AJA

Heard: 01 November 2012

Delivered: 30 November 2012

Summary: Criminal law – sentence - effective sentence of 49 years' imprisonment for housebreaking with intent to murder and attempted murder – trial court misdirecting itself – sentence set aside.

ORDER

On appeal from: Limpopo High Court, Thohoyandou (Hetisani J), sitting as court of first instance):

1 The appeal against sentence is upheld.

2 The sentences imposed by the court a quo are set aside and substituted with the following:

Count 1 – 18 years' imprisonment

Count 2 – 18 years' imprisonment

Count 3 – 15 years' imprisonment

Count 4 – 15 years' imprisonment

3 It is ordered that the sentences imposed on counts 2, 3 and 4 shall run concurrently with the sentence imposed in respect of count 1. The appellant is sentenced to an effective term of imprisonment for 18 years

JUDGMENT

MBHA AJA (Ponnan et Tshiqi JJA concurring):

[1] This is an appeal against sentence only. The appellant was convicted, pursuant to his plea of guilty, by the Limpopo High Court, Thohoyandou (Hetisani J) on four charges, namely two counts of housebreaking with intent to murder and attempted murder (being counts 1 and 2) and two counts of attempted murder (being counts 3 and 4). The appellant was sentenced to imprisonment for terms of 25 and 49 years respectively in respect of the first two counts and 18 and 15 respectively in respect of counts 3 and 4. The sentences imposed in respect of

counts 1, 3 and 4 were ordered to run concurrently with the sentence imposed in respect of count 2. He was thus sentenced to imprisonment for an effective term of 49 years. The appeal is with the leave of the court a quo (per Makhafola J).

[2] The facts relating to the commission of the offences can be gleaned from the appellant's statement in terms of section 112(b) of the Criminal Procedure Act 51 of 1977, the relevant parts of which read:

'3. I admit that upon or about the 4th day of March 2002, and at or near Tshimbupfe Dindela, Mianzwi residential area in the district of Thohoyandou, I did wrongfully and intentionally break in and enter the house of Livhuwani Elizabeth Murundwa with intent to murder and did then and there wrongfully and intentionally attempt to cause the death of Livhuwani Elizabeth Murundwa, a female person by setting her on fire after pouring petrol on her body.

4. I admit that upon or about the 4th day of March 2002, and at or near Tshimbupfe Dindela, Mianzwi residential area in the district of Vuwani, I did wrongfully and intentionally break in and enter the house of Livhuwani Elizabeth Murundwa with intent to murder and did then and there wrongfully and intentionally attempt to cause the death of Andani Mphaphuli, a young male person by setting him on fire, after pouring petrol on him.

5. I admit that upon or about the 4th day of March 2002, and at or near Tshimbupfe Dindela, Mianzwi residential area in the district of Vuwani, I did unlawfully and intentionally attempt to cause the death of Tshinahalo Mbau, a female person by chopping her with a butcher knife.

6. I further admit that upon or about the 4th day of March 2002, and at or near Tshimbupfe Dindela, Mianzwi residential area in the district of Vuwani, I did unlawfully and intentionally attempt to cause the death of Thivhileli Eunice Mbau, a female person by chopping her with a butcher knife.'

[3] There is no doubt that all the offences were committed in the most barbaric, cruel and inhumane manner. After he had broken into the home of Ms Livhuwani Elizabeth Murundwa (Murundwa), where the latter had been sleeping with her children, the appellant ordered her and her son Andani Mphaphuli (Mphaphuli) to stand whereafter he doused them with petrol and set them alight. Thereafter he

attacked Murundwa with a butcher knife and struck her several times over the head and body. Mphaphuli, whilst alight, managed to escape through a window and summon his maternal grandmother and aunt - the complainants in the third and fourth counts respectively. Upon their arrival at the scene and without any provocation from them, the appellant also attacked them with the butcher knife. The medico-legal reports (J88 forms) in respect of all four complainants, which was admitted by consent show each of them to have sustained multiple bodily injuries including fractures, cuts lacerations and bruises. Over and above that, Murundwa and her son Mphaphuli, then 12 years old at the time, sustained serious burns causing the latter's hands to be paralysed.

[4] In assessing an appropriate sentence regard must be had to the main purposes of punishment, namely deterrent, preventive, reformative and retributive. In considering sentence, the court a quo found the following factors to be seriously aggravating: the barbaric and cruel manner in which the offences were committed; the fact that Murundwa and Mphaphuli were attacked in the sanctity of their home; and importantly the fact that all the victims, three of whom were women were vulnerable and defenceless individuals. Undoubtedly these offences evoke a great measure of moral outrage among right thinking members of society. The court had a duty to impose a sentence that properly takes account of such outrage. That these offences called for a severe sentence is beyond doubt. However, in my view the learned Judge plainly over-emphasized the retributive aspects of punishment at the expense of the other considerations and thus failed to strike an appropriate balance. Moreover, he imposed very disparate sentences in respect of similar offences without furnishing any reasons for the difference. Absent any explanation for the disparity, the sentences appear to be ill-considered and arbitrary.

[5] What is even more worrisome is that the trial Judge appeared to lose from sight the practical effect of a sentence of 49 years' imprisonment imposed on the appellant. The appellant was 35 years old when sentenced on 5 March 2003. If he serves the full sentence this means that he will be 84 years old by the time he completes serving his sentence. It is generally accepted that inordinately long terms of imprisonment do not contribute to the reform of an accused person. On the contrary they have the negative effect of denuding the accused of all hope of rehabilitation. I consider Nicholson JA's dicta in *S v Skenjana* 1985 (3) SA 51 (A) at 55C-D, appropriate. He said the following:

'Nor is it in the public interest that potentially valuable human material should be seriously damaged by long incarceration. As I observed in *S v Khumalo and Another* 1984 (3) SA 327 (A) at 331, it is the experience of prison administrators that unduly prolonged imprisonment brings about the complete mental and physical deterioration of the prisoner. Wrongdoers "must not be visited with punishments to the point of being broken." (per Holmes JA in *S v Sparks and Another* 1972 (3) SA 396 (A) at 410G).'

[6] All of the above amounted to misdirections. The result is that the sentence should be set aside. It then becomes the task of this court to impose sentences which it thinks suitable in the circumstances of this case.

[7] In this case, the appellant, other than his age of 35 years at the time of sentencing, is married with 4 four children; he was the sole breadwinner in the family as his wife is unemployed; there is evidence of him having consumed alcohol at the time of the commission of the offences; he has a standard 7 level of education and he was a first offender which suggests that he has no propensity to criminal conduct. All of these factors, cumulatively taken, weigh in his favour. None however were taken into consideration in determining an appropriate

sentence.

[8] It remains to substitute what this court considers appropriate for those sentences imposed by the court below. For each of counts 1 and 2 the appellant is sentenced to 18 years' imprisonment and in respect of each of counts 3 and 4 the appellant is sentenced to 15 years' imprisonment. The sentences imposed on counts 2, 3 and 4 are ordered to run concurrently with the sentence imposed on count 1. The appellant is thus sentenced to an effectice term of 18 years' imprisonment.

[9] In the result:

1 The appeal against sentence is upheld.

2 The sentences imposed by the court a quo are set aside and substituted with the following:

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Count 2 – 18 years' imprisonment

Count 3 – 15 years' imprisonment

Count 4 – 15 years' imprisonment

3 It is ordered that the sentences imposed on counts 2, 3 and 4 shall run concurrently with the sentence imposed in respect of count 1. The appellant is sentenced to an effective term of imprisonment for 18 years.

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BH Mbha

Acting Judge of Appeal

APPEARANCES

For Appellant:	M J Mahwadu
	Instructed by:
	Justice Centre, Bloemfontein
For Respondent:	R J Makhera
	Instructed by:
	Director of Public Prosecutions, Thohoyandou
	Director of Public Prosecutions, Bloemfontein