THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 825/2012

Not Reportable

In the matter between:

VAMILE MICHAEL MCHUNU First Appellant

CECILMAGIDA Second Appellant

and

THE STATE Respondent

Neutral citation: *Mchunu v the State (*825/2012) ZASCA 126 (25 September 2013)

Coram: ***Maya, Shongwe, Pillay and Willis JJA and Zondi AJA***

Heard: 5 September 2013

Delivered: 25 September 2013

Summary: Sentence – appeal by the appellants against an order fixing a non-parole period of 20 years' imprisonment for each of the appellants – crimes committed before the promulgation of s276B of the Criminal Procedure Act 51 of 1977 – appeal upheld – order was incorrectly made and set aside.

ORDER

On appeal from: KwaZulu-Natal High Court, Durban (Patel JP, Gorven and Vahed JJ concurring, sitting as a court of appeal):

(1) The appeal is upheld;

(2) The order of the court below fixing a period of time to be served before the appellants may be released on parole is set aside.

JUDGMENT

WILLIS JA (MAYA, SHONGWE, PILLAY JJA and ZONDI AJA concurring):

[1] The appellants were both arraigned before the KwaZulu-Natal High Court in Durban (Levinsohn J), each on two counts of murder and one count of attempted robbery with aggravating circumstances, as defined in s 1(1)(*b*) of the Criminal Procedure Act 51 of 1977, as amended (the Act). The offences were committed on Friday 8 August 1997 at a factory known as Sanjon Chemicals, at 4 Martin Drive, Queensmead Industrial Area (Malvern), in the district of Pinetown. The trial commenced on 7 May 1999. On 25 May 1999 the High Court found the two appellants, together with their co-accused, MduduziMkhize, guilty on all three counts. The trial judge sentenced the first appellant to 20 years' imprisonment on count 1, 20 years' imprisonment on count 2 and 15 years' imprisonment on count 3. The second appellant was sentenced to 20 years' imprisonment on count 1, 20 years' imprisonment on count 2 and 10 years' imprisonment on count 3. The trial judge made no order as to the concurrent serving of any portion of the sentences in question. The first appellant was thus

given an effective sentence of 55 years' imprisonment and the second appellant 50 years' imprisonment. The trial judge dismissed the appellants' application for leave to appeal on both conviction and sentence.

[2] For reasons that are not apparent from the record it took several years before the appellants petitioned this court for leave to appeal. The petition was directed against sentence only. On 28 September 2007 this court granted the first appellant leave to appeal to the full court of what was then known as the Natal Provincial Division. On 29 November 2011 this court granted similar leave to the second appellant.

[3] On appeal, the full court, on 10 February 2012, increased the sentence to life imprisonment on both the murder counts in respect of each of the appellants and dismissed the appeal on the count of attempted robbery. That court further directed that the appellants were to serve a minimum of 20 years' imprisonment before they might be considered for parole. In fixing the non-parole period, the court relied on the provisions of s 276B of the Act. This section was inserted by s 22 of the Parole and Correctional Supervision Amendment Act 87 of 1997 which, although assented to on 26 November 1997, came into operation only on 1 October 2004.[1] The appellants then successfully petitioned this court yet again for special leave to appeal against the sentence of the full court. In this court the argument on sentence was confined solely to the fixing of a non-parole period.

[4] The murder victims, Mr and Mrs Hayes, operated a small family business for the manufacture and sale of household detergents. In doing so they provided employment to several other people. The staff was paid weekly in cash every Friday. The purpose of the attack on the business premises where the victims were killed was to effect a heist of the cash that was to be paid to the staff later that day. The victims were shot dead in the presence of their two young daughters, one of whom, Misty, testified in court as to the incident when she was 13 years of age. The full court clearly endeavoured, in fixing the non-parole period, to take into account the heinous nature of the crimes and to respond to

[1] *Government Gazette* No. 26808 of 1 October 2004.

the acute sense of outrage which the facts and circumstances of this case arouse.

[5] As has been emphasised in *R v Mazibuko*,[2] it is an ancient, well-established principle of our common law that the liability for a penalty arises when the crime is committed and not when a person is either convicted or sentenced. An increase in penalty (which the fixing of a non-parole period is) will, therefore, ordinarily not operate retrospectively in circumstances where that additional burden did not apply at the time when the offence was committed. This principle was reaffirmed in *R v Sillas*[3]and *S v Mpetha*.[4] The crimes in question were committed before the coming into operation of s 276B of the Act. There are no special circumstances, recognised in our law, which would permit a departure from the general principle that sets its face against the retrospective operation of a penalty. The order of the court below fixing a period of time before the appellants may be released on parole was therefore incorrectly made.

[7] The following is the order of the court:

1. The appeal is upheld.
2. The order of the court below fixing a period of time to be served before the appellants may be released on parole is set aside.

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NP WILLIS

JUDGE OF APPEAL

APPEARANCES:

[2]*R v Mazibuko* 1958 (4) SA 353 (A) at 357E.
[3]*R v Sillas*1959 (4) SA 305 (A) at 311E-G.
[4]*S v Mpetha* 1985 (3) SA 702 (A) at 707H-708A and 717I-718B.

For the Appellant: T.P.Pillay

Instructed by:

Durban Justice Centre

For the Respondent: S.Mcanyana

Instructedby:

Director of Public Prosecutions,

Durban,

and

The Director of Public Prosecutions,

Bloemfontein