THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 182/15

In the matter between:

THE STATE **APPELLANT**

And

OUPA MOTLOUNG **RESPONDENT**

Neutral Citation: *S v Motloung* (182/15) [2016] ZASCA 96 (2 June 2016)

Coram: Cachalia, Majiedt JJA and Victor AJA

Heard: 9 May 2016

Delivered: 2 June 2016

Summary: Murder – second offender committing murder whilst on parole – sentenced to 14 years of imprisonment of which six years suspended for five years – sentence startlingly inappropriate having regard to the degree of violence involved in the current and previous offences.

Sentence – s 280(2) Criminal Procedure Act 51 of 1977 (CPA) - court cannot order the Parole Board to take into account the overall impact of the re-imposition of unexpired portion of an earlier sentence when deciding the current sentence

Firearms Control Act 60 of 2000 – has not impliedly repealed s 51(2) of the Criminal Law Amendment Act 105 of 1997 − National Director of Public Prosecutions can elect whether to prosecute under the Firearms Control Act or the Criminal Law Amendment Act 105 of 1997, or both.

Costs – s 316B(3) of CPA − such an order requires both parties to argue the issue − no costs incurred where respondent represented by Legal Aid Board

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ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Spilg J sitting as court of first instance).

1. The appeal against the sentence on the murder conviction on count 1 is upheld.

2. The sentence in respect of the murder charge on count 1 is set aside and a sentence of 15 years is imposed, backdated to 9 February 2012.

3. The order in respect of the concurrent running of the sentence on count 1 and in respect of the implementation of parole or any other reduction in sentence is set aside.

JUDGMENT

Victor AJA (Cachalia and Majiedt JJA concurring)

[1] The State appeals against a sentence imposed on the respondent, Mr Oupa Motloung (Motloung), by the Gauteng Local Division, Johannesburg (Spilg J). The issues for determination are the sentence imposed for murder, the order directing the parole board how to deal with the unexpired portion of a sentence in respect of a previous conviction, the implied repeal of the sentencing portion for unlawful possession of firearms of the Criminal Law Amendment Act 105 of 1997 by the Firearms Control Act 60 of 2000, and the costs order made in criminal proceedings. The appeal is with the leave of this court.

[2] Motloung was convicted of murder in terms of s 51 (2) of the Criminal Law Amendment Act and for the unlawful possession of a semi-automatic firearm and ammunition. He was sentenced to 14 years' imprisonment for the

murder, six years of which was suspended for a period of 5 years. In respect of the unlawful possession of a firearm and ammunition, taken together for the purpose of a sentence of 6 years' imprisonment, half of which was suspended for a period of 5 years, was imposed. These sentences were ordered to run concurrently. He was thus sentenced to an effective period of 8 years. In addition, the court a quo ordered that in respect of the sentence on the murder charge '8 years… are to run concurrently with the existing sentence you are serving in relation to your conviction which has already been mentioned and that any parole that may be implemented or any other reduction in relation to the period to be served in relation to that conviction is to apply to this as well'. As at date of this appeal Motloung was out on parole for both the current and previous convictions.

[3] The convictions arose in the following circumstances. An argument and physical altercation had ensued between Motloung and the deceased, Mr Sandile Caleb Madalane, at a tavern in Thokoza township. The disagreement concerned in the main the deceased's romantic advances towards a companion of Motloung, Ms Alinah Mokoena. It was not in dispute that the deceased was the aggressor in both the verbal and physical altercations. Afterwards Motloung went home and returned with a firearm. When the deceased appeared to be attempting to run Motloung over in the street outside the tavern with his motor vehicle, Motloung fired a shot at the deceased causing him to fall out of the vehicle. Motloung fired several further shots into the deceased as the latter lay on the ground, wounding him fatally.

[4] At the time of the murder Motloung was on parole in respect of an armed robbery conviction for which he had been sentenced to 10 years' imprisonment, as well as several other convictions in terms of the Arms and Ammunition Act

75 of 1969 for the unauthorized possession of firearms and ammunition, including an AK 47, for which he was sentenced to 10 and two years respectively and which were to run concurrently with a sentence on armed robbery. He was also declared unfit to possess a firearm in accordance with s 12(2) of that Act. He was sentenced on 2 November 1998, when he was 21 years of age. He was released on parole on 2 February 2008, under parole conditions which, inter alia, prohibited him from being outside his home except for work, which at that time was to manage a tuck shop owned by his brother.

Interference with a sentence on appeal

[5] The State submitted that the sentence of eight years for murder was so inappropriate that it induced a sense of shock.

[6] The law is settled on when an appellate court may interfere with a sentence imposed by a lower court. It can only do so when there is a material misdirection by the sentencing court. In *S v Malgas* [2001] ZASCA 30; 2001 (1) SACR 469 (SCA) Marais JA, dealing with the minimum sentence legislation, stated that when considering sentence, the emphasis must shift to the objective seriousness of the type of crime and the public's need for effective sanction against it.

[7] In *Malgas* para 12, Marais JA provided guidance as to when an appellate court can interfere with a sentence as follows:

‘A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court.' But an appellate court may interfere with the

exercise by the sentencing court of its discretion, even in the absence of a material misdirection, when the disparity between the sentence imposed by the trial court and the sentence which the appellate court would have imposed, had it been the trial court, is 'so marked that it can properly be described as shocking, startling or disturbingly inappropriate'.

[8] An appellate court can also interfere when there is no misdirection but the sentence is disproportionate to the crime. Marais JA stated the test in *S v Sadler* [2000] ZASCA 13; 2000 (1) SACR 331 (SCA) para 10:

'[I]mportant to emphasise that for interference to be justified, it is not enough to conclude that one's own choice of penalty would have been an appropriate penalty. Something more is required; one must conclude that one's own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Sentencing appropriately is one of the more difficult tasks which faces courts and it is not surprising that honest differences of opinion will frequently exist. However, the hierarchical structure of our courts is such that where such differences exist it is the view of the appellate Court which must prevail.'

See also S v C*wele & another* [2012] ZASCA 155; *2*013 (1) SACR 478 (SCA) para 33, where Mpati P stated:

‘It is in my view unnecessary to consider the question whether the trial court misdirected itself when it considered the existence or otherwise of substantial and compelling circumstances. This is because I consider the disparity between the sentence imposed by the trial court and that which this court would have imposed, had it been the trial court, to be so marked that it can properly be described as disturbingly inappropriate.’

[9] The court a quo took into account the traditional factors in weighing up the sentence; the crime, the offender and society and also included the purpose of sentencing. It weighed these with Motloung’s moral blameworthiness. The court a quo also found that the purpose of Motloung fetching the firearm was to protect himself from the deceased. In finding substantial and compelling circumstances it found that the deceased persistently humiliated, degraded and

provoked Motloung and this reduced his moral blameworthiness and thus justified not imposing the minimum sentence.

Misdirections of the court a quo

[10] There are several misdirections in the judgment of the court a quo. First, the court drew an adverse conclusion from the fact that the deceased was not at home with his family, but at a tavern in the early hours of the morning.
Secondly, the learned Judge incorrectly found that Motloung had 'snapped' when the deceased appeared to be trying to run him down in the street.

[11] The sentence is startlingly inappropriate, regard being had to the following serious aggravating circumstances: Motloung went to fetch a firearm when the fight was over. He asked a friend to hold it. A short while later he demanded the firearm back despite his friend trying to dissuade him. And he eventually used the firearm in shooting the deceased. In addition, a considerable period of time had elapsed between the earlier altercations and the incident in the street, during which time Motloung could have toned down his justified anger at the humiliating treatment afforded him by the deceased.

[12] As stated, Motloung was still on parole arising out of a previous conviction for robbery involving the unlawful possession of pistols and an AK 47 and ammunition. Motloung served his parole under house arrest except when at work. He breached his parole conditions by going to the tavern and committed the murder within the precinct of the tavern where he was not supposed to be. The undisputed limited provocation by the deceased could never have justified Motloung brutally executing the deceased who was defenseless on the ground. He acted with a callous and cruel indifference to

what he had done. The sentence reflects an overemphasis of Motloung's mitigating personal circumstances at the expense of taking into account the seriousness of the murder and the manner in which the offence was committed. Motloung's age at the time of his previous conviction was correctly considered as a factor, but the court a quo placed too great an emphasis on this when it was clear from the report of Mrs Wolmarans, the social worker, that Motloung did not serve sufficient time in prison as he had not reached the requisite level of rehabilitation for his first crime at the time of his release.

[13] The sentence does not strike the correct balance between the relevant factors. Interference on appeal is therefore warranted. A proper balancing of the relevant aggravating and mitigating circumstances would justify a sentence of 15 years' imprisonment.

Is the direction to the parole board permissible?

[14] The court a quo's direction to the parole board suggested that any parole provision for imprisonment for the previous conviction should coincide with parole for the current offence. This was an interference with the parole board's powers.

[15] The court a quo furthermore considered it appropriate to deal with the effect of the re-imposition of the unexpired portion of the previous sentence. The court a quo, in explaining its instruction to the Parole Board, postulated that absent the murder conviction the incomplete period of imprisonment would not have had to be served. The court a quo found that, because of certain common intrinsic features and since the previous and current offences are causally

connected to each other, this should result in parole being granted simultaneously for the two offences.

[16] The court a quo relied for its direction on s 280(1) of the CPA which provides that ‘when a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose’. Section 280(2) empowers the court to order sentences to run concurrently. Based on these provisions the court a quo found that if a parole board failed to recognize that the present sentences run concurrently with the existing one this would amount to an interference with the exercise of the court's powers. The converse is true: imposing a duty on the parole board to implement the court’s direction on concurrency of parole would effectively be an intrusion on the parole board’s realm of functioning. A court imposing a sentence for one set of crimes cannot impose directions on the parole board where the complexities of the concurrence of sentences and cumulative effect of the other multiple sets of crimes are not before the sentencing court. The difficulties that arise are self-evident. The problem becomes even more stark when a court seeks to assess the complex features arising from a breach of the parole conditions of the previous offence and postulates how the unexpired portion of the sentence must be dealt with by the court to which Motloung must return regarding the first offence.

[17] In *S v Mhlakaza & another* [1997] ZASCA 7; 1997 (1) SACR 515 (SCA) Harms JA cautioned as follows:

‘The lack of control of courts over the minimum sentence to be served can lead to tension between the Judiciary and the Executive because the executive action may be interpreted as an infringement of the independence of the Judiciary (cf Blom-Cooper & Morris The Penalty for Murder: A Myth Exploded [1996] Crim LR at 707, 716). There are also other tensions, such as between sentencing objectives and public resources (see Walker & Padfield op cit at 378). This question relating to the judiciary's true function in this regard is probably as old as civilisation (Windlesham 'Life Sentences: Law, Practice and Release Decisions, 1989-93' [1993] Crim LR at 644). Our country is not unique. Nevertheless, sentencing jurisdiction is statutory and courts are bound to limit themselves to performing their duties within the scope of that jurisdiction. Apart from the fact that courts are not entitled to prescribe to the executive branch of government as to how and how long convicted persons should be detained (see the clear exposition by Kriegler J in S v Nkosi (1), S v Nkosi (2), S v Mchunu 1984 (4) SA 94 (T)) courts should also refrain from attempts, overtly or covertly, to usurp the functions of the executive by imposing sentences that would otherwise have been inappropriate.’

[18] These aspects were again emphasized in *S v Stander* [2011] ZASCA 211; 2012 (1) SACR 537 (SCA). In *S v Matlala* 2003 (1) SACR 80 (SCA) Howie JA stated:

‘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 & 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 521d - 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 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.’

Did the Firearms Control Act of 2000 implicitly amend the Criminal Law Amendment Act 105 of 1997?

[19] The court a quo correctly did not utilize the Criminal Law Amendment Act's sentencing provisions. Motloung was not informed in the charge sheet of the minimum sentence provision for the possession of a semi-automatic firearm and ammunition, nor was he warned about them at the commencement of the trial. Motloung was charged with the unlawful possession of a semi-automatic Norinco pistol in terms of the Firearms Control Act which determines a maximum sentence in accordance with the relevant schedule 4 as 15 years, whereas s 51(2) of the Criminal Law Amendment Act provides for various minimum sentences. In this case it would mean that Motloung as a second offender would in terms of the minimum sentencing regime qualify for a higher sentence on the charge of the unlawful possession of a semi-automatic weapon.

[20] Notwithstanding the above the court went on to analyze the distinctions between the Firearms Control Act and s 51(2) of the Criminal Law Amendment Act and found that the former Act impliedly repealed the latter Act. The Criminal Law Amendment Act provides:

'(2*) Notwithstanding any other law* but subject to subsections (3) and (6), a regional court or a Court a quo shall sentence a person who has been convicted of an offence referred to in − . . .' (own emphasis.)

The words 'Notwithstanding any other law' preserves other existing laws and includes other laws that may be promulgated into the future provided there is no clear conflict or express repeal. It follows that 'any other law' must be given their plain meaning which is this case must include the Firearms Control Act.

[21] The two statutes must also be read in the context of Parliament's wish to increase sentences. The words 'notwithstanding any other law' has remained in

place despite the amendment of the Criminal Law Amendment Act on 13 November 2008. The Firearms Control Act, which came into effect on 1 July 2004, introduced a distinction between fully automatic semi-automatic firearms and the contraventions relating to these weapons. It is apparent that, in passing this legislation, Parliament considered any offence relating to the possession of an automatic or semi-automatic firearm, explosives or armament as being a serious offence. In providing for enhanced penal jurisdiction for particular forms of an already existing offence, the legislature does not create a new type of offence; see *S v Legoa* [2002] ZASCA 112 ;2003 (1) SACR 13 (SCA) para 18.

[22] Upon a proper construction of the two statutes there is no conflict between the two sentencing regimes and they therefore do not fall into the exceptions where a later statute repeals an earlier one; see: *Khumalo v Director-General of Co-Operation & Development & others* [1990] ZASCA 118; 1991 (1) SA 158 (A) where Van Heerden JA stated at 165 that:

‘The true import of the exception therefore appears to be that, in the absence of an express repeal, there is a presumption that a later general enactment was not intended to effect a repeal of a conflicting earlier and special enactment. This presumption falls away, however, if there are clear indications that the legislature nonetheless intended to repeal the earlier enactment. This is the case when it is evidence that the later enactment was meant to cover, without exception, the whole field or subject to which it relates.’

[23] In relation to these two statutes there is no indication that the Firearms Control Act intended to repeal the earlier Act. Accordingly the court a quo erred in its finding that the Firearms Control Act repealed s 51 of Criminal Law Amendment Act, as is also the case with the conclusion of the Full Bench of the Western Cape Division, Cape Town, in *S v Baartman* 2011 (2) SACR 79

(WCC). Baartman was correctly overruled in the unreported decision of the Full Court of that Division in *Bernard Swartz v The State* (A430/130 [2014] ZAWCHC 113 (4 August 2014).

Costs

[24] The court a quo found that it was unaware if Motloung had been obliged to incur costs, but ordered that if costs had been incurred the State was to pay same in terms of s 316B(3) of the CPA. The issue of costs was not argued. This section provides that a court may order the State to pay the whole or any part of the costs incurred by an accused person in opposing an appeal or an application. Costs orders are generally not made in criminal cases; see *Sanderson v Attorney General, Eastern Cape* [1997] ZACC 18; 1998 (2) SA 38 (CC) para 14. Clearly such an order at the very least required both the State and Motloung to have argued the issue, which was not done. In this case Motloung was represented by the Legal Aid Board and no costs were incurred. The costs order must accordingly be set aside.

[25] In the result, the following order is made:

1. The appeal against the sentence on the murder conviction on count 1 is upheld.

2. The sentence in respect of the murder charge on count 1 is set aside and a sentence of 15 years is imposed backdated to 13 June 2014.

3. The order in respect of the concurrent running of the sentence on count 1 and in respect of the implementation of parole or any other reduction in sentence is set aside.

M Victor
Acting Judge of Appeal

Appearances:

For the Appellant:	J M Serepo
	Instructed by:
	Director of Public Prosecutions, Johannesburg
	Director of Public Prosecutions, Bloemfontein
For the Respondent:	W A Karam
	Instructed by:
	Justice Centre, Johannesburg
	Justice Centre, Bloemfontein