SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 149/2012

Reportable

In the matter between:

MICHAEL MAFOHO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Mafoho v The State* (149/12) [2012] ZASCA 49 (28 March 2013).

Coram: Mthiyane DP, Shongwe JA, Schoeman, Swain et Mbha AJJA

Heard: **12 March 2013**

Delivered: **28 March 2013**

Summary: **Parole – the Parole and Correctional Supervision Amendment Act 87 of 1997 – eligibility to parole of prisoners serving determinate sentences – a prisoner serving a determinate sentence must be considered for parole after having served half of his or her sentence, provided that no such prisoner shall serve more than 25 years of imprisonment.**

ORDER

On appeal from: North Gauteng High Court, Pretoria (Makgoba J et Davis AJ sitting as court of appeal):

The appeal against sentence is dismissed.

JUDGMENT

MBHA AJA (MTHIYANE DP, SHONGWE JJA ET SCHOEMAN, SWAIN AJJA CONCURRING)

[1] This is an appeal against the judgment and order of the North Gauteng High Court (per Makgoba J et Davis AJ), in terms of which a sentence of 275 years' imprisonment that was imposed by the regional magistrate court, Pietersburg (the trial court), was upheld.

[2] The appellant was convicted by the trial court, consequent to his plea of guilty, on 60 counts involving robbery committed with aggravating circumstances, attempted murder, kidnapping, rape, attempted rape and pointing a firearm. This appeal, which is against sentence only, is with the leave of this court.

[3] The appeal raises the important issue of the appropriateness of the sentence imposed and the impact of the relevant provisions of the applicable legislation governing the eligibility to parole of prisoners serving determinate sentences, on such sentence. Ultimately, what has to be determined, is what parole period should apply to the appellant's determinate sentence.

[4] The appellant's complaint is that, as he was sentenced on 17 January 2001, his eligibility to be considered for parole is governed by the provisions of s 65(4) of the Correctional Services Act 8 of 1959 (the old Act), which means that he will only be considered for parole after serving half of his sentence, unless the date for considering parole is brought forward as a result of credits earned. He contends, further, that the long period of incarceration of 275 years' imprisonment to which he is subject, amounts to cruel, inhuman and degrading punishment and consequently, the sentence cannot stand. He accordingly submits that in view of the seriousness of the offences for which he was convicted, it would be appropriate if this court substituted his sentence with that of life imprisonment. If his sentence is substituted with life imprisonment, so he argues, then he would in terms of s 136(3)*(a)* of the Correctional Services Act 111 of 1998 (the new Act), read together with para 59 of the Constitutional Court's judgment in *Van Vuren v Minister of Correctional Services*[1], be entitled to be considered for parole after serving a period of imprisonment of 20 years, unless the date for parole is brought forward as a result of credits earned, in which case it will be earlier. The appellant relies, in this respect, on the Constitutional Court's ruling in *Van Vuren* that s 136(3)*(a)* of the new Act preserved such an entitlement of a prisoner sentenced to life imprisonment between the period 1 March 1994 or 3 April 1995, and the commencement of the new Act on 3 July 2004.[2]

[5] Before I commence to deal with the issues for determination in this appeal, it is apposite to first give a brief background on the nature and seriousness of the offences committed by the appellant, and the modus operandi used in their commission.

In his plea explanation, the appellant admitted operating as part of a gang of which he was the leader. The offences were committed along the N1 highway between Polokwane and Makhado. The modus operandi used by the gang was to target heavily laden vehicles at night whose occupants were mostly foreigners, whilst pretending to be law enforcement officers. Vehicles were brought to a standstill using a flashlight and potential resistance from the occupants was overcome by the pointing of a firearm at them. In one instance a victim was shot. The victims were robbed of various items including cash and vehicles. In certain instances the female victims were callously raped in front of their partners and family members. It is clear that the appellant and his gang committed a

[1] *Van Vuren v Minster of Correctional Services* 2012(1) SACR 103 (CC) para 59.
[2] Above para 59.

series of serious, premeditated offences on at least 20 occasions during the period between May 1998 until May 2000.

[6] The trial court, in considering an appropriate sentence, found that there were no substantial and compelling circumstances present under the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentences Act) justifying the imposition of a lesser sentence. The trial court also had regard to the cumulative effect of the sentences imposed. Conscious of this cumulative effect, the trial court attempted to ameliorate the sentences imposed on the appellant by ordering that certain of the sentences should run concurrently. The appellant, in the result, was sentenced to a determinate period of imprisonment amounting to 275 years.

[7] The appellant's submission that it is within this court's competence to substitute the sentence imposed by the trial court of 275 years' imprisonment with life imprisonment, cannot succeed. It is common cause that the trial court did not have jurisdiction to impose a sentence of life imprisonment at the time. In the circumstances, this court cannot substitute a sentence for one which the trial court did not have the competency to impose at the time. In *S v Smith*,[3] M T Steyn AJA quoted with approval Rabie JA's dicta in *S v Crawford* 1979 (2) SA 48 (A), saying (at 56B-C):

' . . . Counsel for both parties suggested that a lesser sentence than the one imposed by the magistrate would meet the justice of the present case and that consideration should be given to the question whether the amending provision is applicable to the present case. It seems to be clear, however, that the provision is not of application to the present case, and this Court cannot on appeal impose a sentence which would at the time of the respondents conviction not have been a competent sentence for the magistrate to impose.'

[8] In any event, life imprisonment is not the prescribed sentence for any of the offences for which the appellant was convicted. It follows that the appellant's reliance on *S v Nkosi*[4] is misplaced. In that case the four appellants had been convicted in the Bophuthatswana High Court on multiple charges of murder, which ordinarily, carried a prescribed minimum sentence of life imprisonment. The decision of the Constitutional Court in *Van Vuren* similarly cannot avail the appellant as that case concerned convictions by a high court for, inter alia, murder for which life imprisonment was

[3] *S v Smith* (2) 1987 (4) SA 768 (A) at 771D-G.
[4] *S v Nkosi* 2003 (1) SACR 91 (SCA).

prescribed.

[9] I now turn to consider the various parole provisions applicable to this case. Section 65(4)*(a)* of the old Act, provides that 'A prisoner serving a determinate sentence . . . *(b)* shall not be considered for placement on parole until he has served half of his term of imprisonment'. The appellant would, on the basis of this provision, be eligible to be considered for parole after he had served approximately 135 years of his sentence, because he was sentenced in 2001 before the new Act came into operation.

[10] As the Constitutional Court observed in *Van Vuren* (supra) para 24, the new Act, which commenced on 31 July 2004, was 'gradually brought into operation with the simultaneous abolition and repeal of the corresponding parts of the old Act'. Certain parts in the old Act still applied to parole. Section 137 of the new Act, read with the Schedule, makes provision for the repeal or amendment of the old Act to the extent set out in the Schedule. The Short Title in s 138 makes provision for the commencement of the new Act and that the commencement of the repeal of the old Act shall be by proclamation. Importantly, it provides that the new Act shall come into operation on different dates fixed by the President by proclamation in the Government Gazette for the repeal of the different provisions of the old Act. As a result a number of sections of the new Act were brought into operation and a number of sections in the old Act were repealed, with effect from 19 February 1999, in terms of Proclamation R20, 1999, published in GN20, *GG* 19778, 19 February 1999. The sections of the Act that came into operation include that of s 136 while those sections of the old Act which were repealed included ss 61 and 64. Significantly, s 65, relevant to this case, was not similarly repealed.

[11] Section 73(6)*(a)* of the new Act which falls under Chapter 7 came into operation on 1 October 2004 and provides that a sentenced offender serving a determinate sentence, or cumulative sentences of more than 24 months, may not be placed on parole until such sentenced prisoner has served half of his or her sentence, but parole must be considered whenever a sentenced offender has served 25 years of a sentence, or cumulative sentences. As this provision applies to sentences imposed after the commencement of the new Act, it obviously would not apply to the appellant.

[12] Section 136(1) of the new Act provides that any person serving a sentence of incarceration (that is offenders serving determinate and indeterminate sentences

immediately before the commencement of the new Act), is subject to the provisions of the old Act. Clearly, this section preserves the policy and guidelines that applied at any time before the new Act came into operation in 2004. Furthermore, s 136(2) of the new Act, provides that when considering the release of a sentenced offender, who is serving a determinate sentence of incarceration as contemplated in subsection (1), such sentenced offender must be allocated the maximum number of credits in terms of s 22A of the old Act.

[13] It is therefore clear that in terms of ss 136(1) and (2) of the new Act, the parole provisions applicable to the appellant were those set out in s 65(4)*(a)* of the old Act namely, that a prisoner serving a determinate sentence imposed prior to July 2004, is not considered for parole before having served half of the sentence, unless the date for considering parole is brought forward as a result of credits earned. The matter does not, however, simply end there.

[14] On 1 October 2004 the Parole and Correctional Supervision Amendment Act 87 of 1997 (the 1997 Act) came into operation. The 1997 Act amended s 65(4)*(a)* of the old Act[5] by providing that a prisoner serving a determinate sentence shall not be considered for placement on parole, unless he has served half of his term of imprisonment, provided that no such prisoner shall serve more than 25 years before being considered for parole. Of particular relevance to this case is that the 1997 Act also amended, in s 9(d)*(iv)* thereof, the old Act by providing that in respect of imprisonment contemplated in s 52(2) of the Minimum Sentences Act, the prisoner shall not be placed on parole unless he has served at least four fifths of the term of imprisonment imposed or 25 years, whichever is the shorter.

[15] On the same date the 1997 Act came into operation (ie 1 October 2004), by way of Proclamation R38 in *GG* 26626, 30 July 2004, s 65 of the old Act was repealed and substituted by the provisions contained in the 1997 Act.

[16] In my view, s 9 of the 1997 Act is intended to ensure legal continuity and to prevent a hiatus developing.[6] Clearly, the repeal of s 65 of the old Act and its substitution

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[5] *Van Vuren v Minister of Correctional Services* (supra) at 123 footnote 51.
[6] *G E Devenish Interpretation of Statutes* 1 ed (1992) at 252.

in terms of the 1997 Act, ensured that there was no gap in continuity between the provisions of s 65 as contained in the old Act, and as substituted in terms of the 1997 Act. In addition, because not all of the old Act was repealed, the court is entitled to examine the repealed portions to determine the meaning of what remains.[7] Clearly the repealed portion of the statute constitutes part of the context in which the unrepealed portion was enacted.

[17] The issue accordingly, is the effect of the amendment of the parole period in s 65(4) of the old Act, upon the appellant's right to parole. By virtue of the fact that s 65(4) of the old Act, was amended on the same date that the provisions of s 73(6)*(a)* of the new Act were brought into operation, it is clear that the intention of the legislature was to create equality amongst those prisoners eligible for parole, irrespective of whether they were sentenced before or after the passing of the new Act. The right to parole, whether the prisoner is sentenced to a determinate sentence, or to life imprisonment, is the same regardless of the date the prisoner was sentenced.

[18] In *Van Vuren* (supra)[8] the Constitutional Court made it clear that the retrospective operation of a change in parole policy which deprives the subject of rights, would offend against the foundational values of constitutional supremacy in the rule of law, which the Constitutional Court would not countenance.

[19] It is trite that a statute may apply retrospectively where it is expressly stated to operate as such, or where it impliedly does so.[9] Thus the provisions of the 1997 Act which substituted certain provisions of the old Act, which were simultaneously repealed, must have been intended to operate retrospectively to deal with the rights of prisoners to parole, who were sentenced before the new Act came into force.

[20] An exception to the presumption that legislation does not apply retrospectively, is where it benefits the subject. However this is only so if all persons subject to its provisions, would benefit from reliance on it.[10] In the present case the amendment is indeed beneficial to prisoners serving determinate sentences because they must be

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[7] *Devenish* supra at 253.
[8] *Van Vuuren* (supra) para 60.
[9] *The Law of South Africa* (2 ed) vol 25 para 341(a) at 342.
[10] *The Law of South Africa* (supra) at 341.

considered for parole after serving 25 years and not only after they have served half of their sentences.

[21] The appellant is entitled to be considered for parole once he has served 25 years of his term of imprisonment. There is accordingly no need to interfere with the sentence imposed in order to ameliorate its effect. This is not to say the sentence imposed by the regional court is appropriate (it clearly being a Methuselah sentence) but to interfere with it would, in the circumstances of this case, be purely academic because, as I have already indicated, the legislature has stepped in to ameliorate the position of the person subjected to that sentence, by directing that he or she will be considered for parole once 25 years of the sentence has been served. The appeal against sentence must therefore fail.

[22] The appellant also sought to introduce, in this appeal, new evidence to enable this court to reconsider the whole question of sentence afresh. This 'new' evidence consists of affidavits and testimonials about the appellant's character and conversion to Christianity which has been on-going in prison from the date of his arrest on 7 September 2007.

[23] The record shows that similar evidence was placed before the trial court when it considered an appropriate sentence. Furthermore, such evidence merely testifies to the appellant's on-going success at rehabilitation and fell outside the ambit of the trial court when it considered an appropriate sentence for the appellant.

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

The appeal against sentence is dismissed.

B H MBHA
ACTING JUDGE OF APPEAL

APEARANCES:

FOR APPELLANT:	ADV B STUDTI Instructed by: Edelstein-Bosman Attorneys, New Muckleneuk Webbers Attorneys, Bloemfontein
FOR RESPONDENT:	ADV S SCHEEPERS Instructed by: The National Director of Public Prosecutions, Pretoria The National Director of Public Prosecutions, Bloemfontein