THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 983/2022 and 056/2024

In the matter between:

LOYISO LUDIDI	**FIRST APPELLANT**
THANDO CHWAYI	**SECOND APPELLANT**
SIVUYILE SHASHA	**THIRD APPELLANT**
and	
THE STATE	**RESPONDENT**

Neutral citation: *Loyiso Ludidi & Others v The State* (983/2022 and 056/2024) [2024] ZASCA 162 (29 November 2024)

Coram: NICHOLLS, HUGHES and MOLEFE JJA and DOLAMO and BLOEM AJJA

Heard: Matter disposed of without oral hearing in terms of s 19(*a*) of the Superior Courts Act 10 of 2013.

Delivered: 29 November 2024

Summary: Sentence of life imprisonment – whether a lengthy period of incarceration as an awaiting trial prisoner can amount to a substantial and compelling circumstance justifying a deviation from the prescribed minimum sentence – section 51(3) of the Criminal Law Amendment Act 105 of 1997.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Gamble J, sitting as court of first instance):

The appeal is dismissed.

JUDGMENT

Nicholls JA (Hughes, Molefe JJA and Dolamo and Bloem AJJA concurring):

[1] Does the time an accused person has spent as an 'awaiting trial prisoner' constitute substantial and compelling circumstances when a statutorily ordained sentence of life imprisonment has been imposed? That is the question to be answered in this appeal. The Western Cape Division of the High Court (the high court) found that it did not, but granted leave to appeal to this Court.

[2] The facts, as detailed in the judgment on conviction, are briefly as follows. Mr Loyiso Ludidi (Mr Ludidi), Mr Thando Chwayi (Mr Chwayi) and Mr Sivuyile Shasha (Mr Shasha), the appellants herein, were convicted of robbery with aggravating circumstances, and murder on 19 May 2022. On the evening of 23 June 2016, the appellants entered the home of Mr Pasika Kwaza (the deceased) whom they shot and killed while he was lying on the bed with Ms Patience Kwaza (Ms Kwaza), his wife. Ms Kwaza was subsequently also charged with the murder of her husband.

[3] The marriage between Ms Kwaza and the deceased had been an unhappy one. The deceased had physically abused her over an extended period which resulted in her taking out a domestic violence interdict against him. She had also filed a complaint for non-payment of maintenance which was due to be heard by the maintenance court later that year. During 2016, Ms Kwaza entered into a romantic relationship with a local councillor which was apparently widely known in the community.

[4] As the high court stated, instead of dissolving the marriage through divorce, 'the deceased chose death'. He took out a hit on his wife and procured the services of Mr Shasha to put this into effect. The high court found that it was likely that the decision to kill Ms Kwaza was taken once the deceased found out that his wife was having an extra-marital affair. Mr Shasha then enlisted the help of the other appellants, Mr Chwayi and Mr Ludidi.

[5] When Mr Chwayi found out that the subject of the hit was his friend and relative, Ms Kwaza, he informed her of what her husband had asked them to do. The target then changed from Ms Kwaza to her husband, the deceased. The appellants were happy with this arrangement provided Ms Kwaza paid them for their services. On the night of 23 June 2016, Mr Shasha and Mr Ludidi entered the house and delivered two fatal gunshots to the head of the deceased. During the course of the attack, items such as cell phones were taken at gunpoint. Mr Chwayi, because he was known in the Kwaza household, did not participate in the attack but was the man behind the scenes.

[6] Mr Ludidi, the first appellant and Mr Shasha, the third appellant, were found guilty of robbery with aggravating circumstances, murder, unlawful possession of a firearm and unlawful possession of ammunition. Mr Chwayi, the second appellant, and Ms Kwaza were found guilty of murder only.

[7] When sentencing finally took place, the accused had been in custody for a period of five years and eight months. Although Ms Kwaza was found guilty of murder, she was not sentenced to life imprisonment. The high court found that the hit ordered on her husband was a pre-emptive strike to remove a potential threat as it was likely that he would have killed her had she gone to the police. Her reduced moral blameworthiness and lengthy pre-sentencing detention were considered to be substantial and compelling circumstances warranting a lesser sentence than the prescribed minimum sentence. Ms Kwaza was given a finite sentence of 12 years' imprisonment. She is not an appellant in this matter.

[8] In granting leave to appeal against sentence, the high court found that the sentences were appropriate in the circumstances of a contract killing and would

otherwise not warrant consideration on appeal. However, said the high court, in view of the fact that this Court has not finally determined the impact of lengthy pre-sentencing incarceration where the sentence ultimately imposed is one of life imprisonment, leave to appeal was granted. Thus, the appellants appeal against their sentences on the basis of whether their lengthy pre-sentencing incarceration amounts to substantial and compelling circumstances where the sentence is one of life imprisonment.

[9] The context in which the offence occurred is always germane to sentence. In *S v Malgas*,[1] which is the *locus classicus* of what constitutes substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence, the court said:

'If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.'[2]

[10] That proportionality is central to whether a sentence is cruel, inhumane or degrading was confirmed by the Constitutional Court in *S v Dodo*.[3] It is not just proportionality between the mandatory sentence legislated upon, and the sentence which the offence merits, that would lead to an infringement of the right not to be deprived of freedom arbitrarily without just cause in terms of s 12(1)*(a)* of the Constitution, but rather whether it is grossly disproportionate.

[11] Courts have considered whether the length of time spent in custody as an 'awaiting trial' prisoner is a substantial and compelling circumstance warranting the imposition of a lesser sentence. In 2007 the full court of the Gauteng Division of the High Court, Johannesburg in *S v Brophy and Another*,[4] reduced finite sentences on the basis that the time spent in custody while awaiting trial was a substantial and compelling circumstance. Following a Canadian decision of *Gravino* (70/71) 13 Crim LQ 434 (Quebec Court of Appeal), the full court held that the period spent in custody

[1] *S v Malgas* [2001] 3 All SA 220 (A).
[2] Ibid para 25.
[3] *S v Dodo* [2001] ZACC 16; 2001 (3) SA 382 CC; 2001 (5) BCLR 423 (CC) paras 37-39.
[4] *S v Brophy and Another* 2007 (2) SACR 56 (W) paras 16-19.

pre-sentencing was equivalent to a sentence twice that length. This was because of the harsh conditions that awaiting trial prisoners were subjected to, in comparison to convicted prisoners. The court then reduced the sentences by subtracting the time spent in prison awaiting trial by each appellant and multiplying it by two.

[12] This approach was rejected by this Court in *Radebe and Another v S*,[5] which criticised the application of any mechanical formula. Rather, the time spent in custody awaiting trial is one of the factors to consider when determining whether there is justification for a lesser sentence than the prescribed minimum sentence. The circumstances of each case should be assessed on its own merits. Similarly in *Director of Public Prosecutions North Gauteng: Pretoria v Gcwala and Others*,[6] this Court held that the trial court misdirected itself by applying the formulas and increased the sentences of imprisonment accordingly.

[13] It is now trite law that in respect of finite sentences there is no hard and fast rule as to the weight to be afforded to pre-sentencing incarceration. It is but one of the factors to take into consideration when determining the existence of substantial and compelling circumstances.[7] In addition, a sentencing court should take into account the reasons for the prolonged period of detention prior to sentencing.[8]

[14] In *S v Solomon and Others*,[9] commenting on the effect of lengthy pre-sentencing incarcerations on life imprisonment, Rogers J endorsed the view of Goosen J, as he was then, in *S v Kammies*.[10] The conceptual difficulty with a sentence that has no determinate maximum period was acknowledged. A court cannot approach a life sentence as anything other than a sentence which is imposed for the rest of that person's life. It cannot be 'reduced' by the period spent in custody awaiting trial and it would be improper for a court to take into the account the possibility of parole.[11] Goosen J suggested that the most appropriate course of conduct would be to ante

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[5] *Radebe and Another v S* [2013] ZASCA 31; 2013 (2) SACR 165 (SCA) paras 13-14.
[6] *Director of Public Prosecutions North Gauteng: Pretoria v Gcwala and Others* [2014] ZASCA 44; 2014 (2) SACR 337 (SCA) paras 26-30.
[7] *Radebe* paras 13-14; *Gcwala* para 16.
[8] *Radebe* para 14.
[9] *S v Solomon and Others* [2020] ZAWCHC 118; 2021 (1) SACR 533 (WCC) para 24.
[10] *S v Kammies* 2019 JDR 2600 (ECP) para 38.
[11] *S v Matala* 2003(1) SACR 80 (SCA) para 7; *Mvubu v S* [2016] ZASCA para 25.

date the sentence. In *Solomon*, the court held that life imprisonment means a sentence which extends for as long as that person is alive.[12] Absent the prospect of parole, a person 'would not have been released sooner on the hypothesis of no interval between arrest and sentencing'.

[15] This Court, in dealing with a sentence of life imprisonment in *Ncgobo v S*,[13] confirmed that the period spent in custody before conviction and sentencing is not, on its own, a substantial and compelling circumstance. It is merely a factor in determining whether the sentence imposed is disproportionate and unjust. It was held that the two years spent in custody would make a minimal impact on a sentence of life imprisonment and did not render the sentence shockingly disproportionate.[14]

[16] Here, the period spent in custody of five years and eight months was indeed a long one. There were inordinate delays. The high court requested the parties to address the reason for the delay at the commencement of the sentencing procedures. The high court concluded that the delays were largely attributable to the appellants and their legal representatives. Initially the appellants launched a protracted and unsuccessful bail appeal with a result that the first pre-trial conference in the high court was more than two years after their arrest. The pre-trial procedures were unduly delayed due to 'serial non-attendances' by the legal representative who represented Mr Ludidi and Mr Chwayi. When the matter had been in pre-trial management for two years in the high court, the judge case-managing the trial refused to certify it ready for trial until the legal representative made an appearance at court. It was then set down for trial six months later on 3 August 2021. Thereafter, it seemed that apart from the disruptions due to COVID, the trial ran relatively smoothly until completion on 22 February 2022. A lengthy and comprehensive judgment was delivered on 18-19 May 2022. It appears that had they wished to do so, the appellants and their legal representatives could have considerably shortened the period they spent awaiting trial.

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[12] *Solomon* para 27.
[13] *Ncgobo v S* [2018] ZASCA 6; 2018 (1) SACR 479 (SCA) para 7.
[14] Ibid para 21.

[17] If one turns to the offences for which the appellants were convicted, these were heinous. They were hired assassins willing to murder whoever was identified if they were paid for the deed. There is nothing disproportionate about their sentences of life imprisonment. Regarding the period in custody as awaiting trial prisoners, unless this is an exceptionally long period of time to which the conduct of the accused persons has not materially contributed, this in my view, can never in and of itself, be a substantial and compelling circumstance where life imprisonment is imposed. The role of courts is to ensure that any sentence passed is a fair one having regard to the crime committed and the individual circumstances of the accused.

[18] The high court did not misdirect itself when it found that the lengthy pre-sentencing incarceration period did not amount to substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence of life imprisonment.

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

The appeal is dismissed.

C E HEATON NICHOLLS
JUDGE OF APPEAL

Heads of Arguments prepared by:

For the appellants:	I B M G Levendall
Instructed by:	Legal Aid, Cape Town
	Legal Aid, Bloemfontein
For the respondent:	L Snyman
Instructed by:	Director of Public Prosecutions, Western Cape
	Director of Public Prosecutions, Bloemfontein.