CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 170/18

In the matter between:

KHATHUTSHELO OUPA MAKHOKHA Applicant

and

STATE Respondent

Neutral citation: *Makhokha v State* [2019] ZACC 19

Coram: Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ, Theron J.

Judgments: Madlanga J (unanimous)

Decided on: 3 May 2019

ORDER

On appeal from the High Court of South Africa, Venda Provincial Division (hearing an appeal from the Regional Court, Sibasa):

1. Leave to appeal against the sentence of 15 years' imprisonment is refused.
2. Leave to appeal against the orders referred to in paragraphs 4 and 5 of this order is granted.
3. The appeal is upheld.

4. The order by the Sibasa Regional Magistrates' Court (Regional Court) that for the duration of the term of 15 years' imprisonment Mr Khathutshelo Oupa Makhokha will not be eligible for parole is set aside.
5. The order by the Regional Court that the 15-year term of imprisonment will not run concurrently with the term of life imprisonment is set aside.
6. The commencement of the term of 15 years' imprisonment is antedated to the date of sentence.

JUDGMENT

MADLANGA J (Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Ledwaba AJ, Mhlantla J, Nicholls AJ, Theron J concurring)

Introduction

[1] At issue here is a 15-year term of imprisonment in respect of the whole of which the sentencing Regional Magistrate ruled that the applicant would not be eligible for parole. The 15-year term was to start running on completion of a term of life imprisonment that the accused was serving at the time of its imposition. The questions that arise are: whether a sentence in respect of the whole of which there is no parole is constitutionally valid; and whether it is lawful for a court to impose a determinate term of imprisonment that is to commence running on completion of a term of life imprisonment.

[2] In 2008 the applicant, Mr Khathutshelo Oupa Makhokha, was convicted by the Sibasa Regional Magistrates' Court of possession of a motor vehicle that was reasonably suspected to have been stolen and in respect of which he was unable to give

a reasonable explanation of his possession.[1] He was sentenced to 15 years' imprisonment, the maximum term of imprisonment that may be imposed by a Regional Court under section 92(1)(a) of the Magistrates Court Act.[2] The Regional Magistrate ordered that the applicant "must never be released on parole". At the time of sentence the applicant was serving a sentence of life imprisonment. The Regional Magistrate also directed that the two sentences were to run consecutively; that is, the 15-year sentence would only start to run after the life sentence.[3]

[3] The High Court of South Africa, Venda Provincial Division (High Court) dismissed the appeal. An approach to the Supreme Court of Appeal did not bear fruit. Now the applicant applies to this Court for leave to appeal his sentence and seeks condonation of the late lodgement of this application.

[4] We are deciding this matter without oral argument.[4] Ms Estelle Kilian SC, Mr Cliff McKelvey and Ms Palesa Mafisa were appointed by the Johannesburg Bar at this Court's request to assist the applicant. This Court is indebted to them for their written submissions.

Condonation

[5] The applicant, a layperson who was not legally represented when he lodged this application, says that after his appeal had been struck from the roll by the Supreme Court of Appeal, he believed that it would still be re-enrolled without him lifting a finger and then determined on the merits. It was only recently that he got to understand the real import of the order. He then began to prepare an application for lodgement in this Court. In doing so, he encountered difficulties in getting all the documents he required. Although the period of the delay is very long, in the circumstances of this case it is

[1] This is an offence in terms of section 36 of the General Law Amendment Act 62 of 1955.

[2] 32 of 1944.

[3] That, of course, must have been premised on the reality that life imprisonment does not always mean that the sentenced person will be incarcerated for life.

[4] We may do this in terms of rule 11(4) of the Rules of this Court.

proper to grant condonation. Circumstances that singularly dictate that condonation be granted are what egregiously went wrong with the sentencing. I demonstrate this shortly. Condonation is granted.

Jurisdiction and leave to appeal

[6] At the outset, let me dispel any notion that we have jurisdiction to entertain an appeal that is *purely* against the magnitude of sentence. This Court has held that it "will not ordinarily entertain an appeal on sentence merely because there was an irregularity; there must also be a failure of justice".[5] It must follow more strongly that, where there is no claim of an irregularity and the challenge is purely against the magnitude of sentence, this Court does not have jurisdiction to interfere. Indeed, in *Bogaards* Khampepe J held:

> "[T]his Court does not ordinarily hear appeals against sentence based on a trial court's alleged incorrect evaluation of facts. For instance, this Court will not, in the ordinary course, hear matters in relation to sentence merely because the sentence was disproportionate in the circumstances. Something more is required."[6]

[7] Thus leave to appeal against the 15-year term of imprisonment is refused.

[8] Here as I will soon show, there is not just a contention that the period of imprisonment was disproportionately lengthy in the circumstances but that there was also a failure of justice and more. The applicant's constitutional right not to be detained arbitrarily or without just cause[7] is implicated.[8] Needless to say, this is a constitutional matter. Thus we have jurisdiction.

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[5] *S v Bogaards* [2012] ZACC 23; 2013 (1) SACR 1 (CC); 2012 (12) BCLR 1261 (CC) (*Bogaards*) at para 42.

[6] Id.

[7] Section 12(1)(a) of the Constitution.

[8] See *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) (*Boesak*) at paras 37-8; *De Lange v Smuts N.O.* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) (*Smuts)* at paras 22-5.

[9] The issues raised by the applicant are of some import. A combination of this and the fact that the 15-year term of imprisonment is to commence running only on completion of the term of life imprisonment compellingly make it to be in the interests of justice to grant leave to appeal.

The appeal

[10] The questions we must determine are: first, whether the order that the applicant must not be released on parole (non-parole period) ought to stand; and second, whether the determination that the 15-year term of imprisonment and life imprisonment are to run consecutively is legally competent.

The non-parole period

[11] Sentencing sometimes raises separation of powers concerns. In *Mhlakaza* Harms JA considered this in a context that did not involve a non-parole period, but concerned a disturbingly high cumulative effect of several sentences. He cautioned against the possible temptation of courts to impose sentences that seek to counteract the ameliorative effects of decisions by the Executive on the actual length of terms to be served in prison. He said:

> "The function of a sentencing court is to determine the maximum term of imprisonment a convicted person may serve. The court has no control over the minimum or actual period served or to be served.
>
> . . .
>
> 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. There are also other tensions, such as between sentencing objectives and public resources. This question relating to the Judiciary's true function in this regard is probably as old as civilisation. 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 long convicted persons should be

> detained . . . 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."[9] (References omitted.)

Nkabinde J quoted these words of caution with approval in *Jimmale*.[10]

[12] An important innovation for present purposes is the 1997 amendment[11] to the Criminal Procedure Act.[12] In section 276B of this Act the amendment curbs the power of courts to impose non-parole periods. Section 276B(1) provides:

> "(a) If a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may as part of the sentence, fix a period during which the person shall not be placed on parole.
>
> (b) Such period shall be referred to as the non-parole period, and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter."

[13] In terms of section 276B(1)(b) at worst the applicant could not be eligible for parole before serving 10 years' imprisonment.[13] That means the Regional Court simply did not have the power to fix a 100 percent non-parole period in respect of the 15-year term of imprisonment.

[14] That portion of the non-parole period that is proscribed by section 276B(1)(b), namely the portion in excess of two thirds of 15 years' imprisonment, constitutes an infringement of the applicant's right under section 12(1)(a) of the Constitution: the right not to be deprived of freedom arbitrarily or without just cause.[14] It is so that it is not a

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[9] *S v Mhlakaza* [1997] ZASCA 7; 1997 (1) SACR 515 (SCA) (*Mhlakaza*) at 521D-I

[10] *S v Jimmale* [2016] ZACC 27; 2016 (2) SACR 691 (CC); 2016 (11) BCLR 1389 (CC) (*Jimmale*) at para 11.

[11] This amendment took effect on 1 October 2004 in terms of Proc R45 GG 26808 of 1 October 2004.

[12] 51 of 1977.

[13] Obviously, 10 years is two-thirds of 15 years.

[14] See *Boesak* above n 8 at paras 37-8; *Smuts* above n 8 at paras 22-5.

foregone conclusion that a sentenced prisoner will be released on parole. But then a sentenced prisoner who would have been entitled to be released on parole may end up serving the entire term of imprisonment purely because of a 100 percent non-parole period. That will happen contrary to the express provisions of section 276B(1)(b) which outlaw a 100 percent non-parole period. That is antithetical to the rule of law, a founding value of our Constitution,[15] and thus at odds with the provisions of section 12(1)(a) of the Constitution. In *Boesak* Langa DP held that "[a]s far as the substantive aspect of [the section 12(1)(a)] right is concerned, 'just cause' must be grounded upon and consonant with the values expressed in section 1 of the Constitution and gathered from the provisions of the Constitution as a whole".[16]

[15] For these reasons, the non-parole period is not only in conflict with the statute but constitutionally invalid and falls to be set aside.

Sentences to be consecutive

[16] Turning to the direction that the applicant's sentences run consecutively, this is contrary to the provisions of section 39 of the Correctional Services Act.[17] Section 39(2)(a) provides:

> "Subject to the provisions of paragraph (b), a person who receives more than one sentence of incarceration or receives additional sentences while serving a term of incarceration, must serve each such sentence, the one after the expiration, setting aside or remission of the other, in such order as the National Commissioner may determine, unless the court specifically directs otherwise, or unless the court directs that such sentences shall run concurrently but—

[15] In this regard, section 1 of the Constitution provides that the Republic of South Africa is one sovereign, democratic state founded on, amongst others, the value of the supremacy of the Constitution and the rule of law.

[16] *Boesak* above n 9 at para 38. To explain the reference to the substantive aspect of the section 12(1)(a) right, in paragraph 37 the Court held that the section "entrenches two different aspects of the right to freedom, the substantive and the procedural. The substantive aspect is the right not to be deprived of freedom arbitrarily or without just cause . . . The procedural aspect is implicit in section 12(1) and guarantees a fair trial."

[17] 111 of 1998.

> (i) any determinate sentence of incarceration to be served by any person runs concurrently with a life sentence or with a sentence of incarceration to be served by such person in consequence of being declared a dangerous criminal . . ."

[17] In *Mashava* here is what the Supreme Court of Appeal said of paragraph (a)(i) of the section:

> "The provision is clear. Any determinate sentence of incarceration, imposed in addition to life imprisonment, is subsumed by the latter. This is logical and practical. A person has one life and a sentence of life imprisonment is the ultimate penal provision."[18]

[18] Thus the Regional Magistrate lacked the legal competence to direct that the 15-year term of imprisonment should commence to run after completion of the sentence of life imprisonment. To that extent, the Regional Magistrate's direction exposes the applicant to the possibility of only starting to serve the 15-year term of imprisonment upon release – possibly on parole – from life imprisonment. This, in circumstances where – because of the lack of competence to make the direction – the 15-year term of imprisonment would have commenced to run on the date of sentence and concurrently with the term of life imprisonment. For reasons expressed earlier, the Regional Magistrate's direction constitutes a deprivation of freedom arbitrarily or without just cause in contravention of section 12(1)(a) of the Constitution.

Remedy

[19] As indicated, we will not interfere with the 15-year term of imprisonment. But the order must put it beyond question that this term started running from the date of sentence. The order that, for this entire term of imprisonment, the applicant will not be eligible for parole and the direction that this term of imprisonment will commence to run on completion of the life term of imprisonment must be set aside.

[18] *S v Mashava* [2013] ZASCA 200; 2014 (1) SACR 541 (SCA) (*Mashava*) at para 7.

[20] Do the provisions of section 39(2)(a)(i) of the Correctional Services Act render it inconsequential to remit the matter to the Regional Magistrate to consider whether to still impose a non-parole period? At face value they appear to. But the answer is not all that easy. The issue is complicated by the provisions of section 39(2)(b) of the Correctional Services Act. This section provides that in the case of the imposition of more than one period of imprisonment, the non-parole period or periods fixed by the court must be served consecutively before a prisoner becomes eligible for parole. To reach a conclusion of inconsequentiality, I would have to interpret "more than one period of imprisonment" to exclude life imprisonment, with the result that there would be no question of the non-parole period being served after life imprisonment. I am uncomfortable to adopt that interpretation in a judgment where we have not had the benefit of argument on that question.

[21] That said, I still do not think it necessary to remit the matter to the Regional Court. That is because of what we held in *Jimmale*[19] about circumstances in which it is appropriate to impose a non-parole period. We held that a sentence with a non-parole period should be imposed—

> "only in exceptional circumstances, which can be established by investigation of salient facts, legal argument and sometimes further evidence upon which a decision for non-parole rests. In determining a non-parole period following punishment, a court in effect makes a prediction on what may well be inadequate information as regards the probable behaviour of the accused. Therefore, a need for caution arises because a proper evidential basis is required."[20]

[19] *Jimmale* above n 10.

[20] Id at para 13.

[22] *Jimmale* further quoted with approval[21] what the Supreme Court of Appeal said in *Stander*[22] about section 276B:

> "[I]ts enactment does not put the court in any better position to make decisions about parole than it was in prior to its enactment. Therefore the remarks by this court prior to section 276B still hold good. An order in terms of section 276B should therefore only be made in exceptional circumstances, when there are facts before the sentencing court that would continue, after sentence, to result in a negative outcome for any future decision about parole. *Mshumpa* offers a good example of such facts, namely, undisputed evidence that the accused had very little chance of being rehabilitated."

[23] The Regional Magistrate dealt at length with the factors relevant to sentence. None of them constituted exceptional circumstances warranting the imposition of a non-parole period.[23] In the circumstances of this case, I cannot conceive of exceptional circumstances suddenly popping up upon remittal. Thus remittal will be an exercise in futility. This matter has been outstanding for a long time. Interests of justice dictate that it be brought to finality now.

Order

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

1. Leave to appeal against the sentence of 15 years' imprisonment is refused.
2. Leave to appeal against the orders referred to in paragraphs 4 and 5 of this order is granted.
3. The appeal is upheld.
4. The order by the Sibasa Regional Magistrates' Court that for the duration of the term of 15 years' imprisonment Mr Khathutshelo Oupa Makhokha will not be eligible for parole is set aside.

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[21] Id at para 15.

[22] *S v Stander* [2011] ZASCA 211; 2012 (1) SACR 537 (SCA) at para 16, referring to *S v Mshumpa* [2007] ZAECHC 23.

[23] Compare *Jimmale* above n 10 at para 13.

5. The order by the Regional Court that the 15-year term of imprisonment will not run concurrently with the term of life imprisonment is set aside.

6. The commencement of the term of 15 years' imprisonment is antedated to the date of sentence.

For the Applicant	E Kilian SC, C McKelvey and P Mafisa