THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No 506/09

In the matter between:

KERSTON MOKGOAKAE MASEOLA **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Maseola v The State* (506/09) [2010] ZASCA 37 (30 March 2010)

Coram: Navsa JA and Griesel and Saldulker AJJA

Heard: 16 March 2010

Delivered: 30 March 2010

Summary: Sentence: Cumulative effect of sentences on several counts. Unduly harsh and disproportionate – Effective sentence set aside and substituted.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Els J sitting as a court of first instance):

1. The appeal against the sentences imposed by the court below is upheld to the extent set out in para 2.

2. The order of the trial court, is amended to read as follows:

'The sentences I impose on accused 3 are the following:

Count 1, the murder charge, 25 years' imprisonment.

Count 2, the second charge of murder, 25 years' imprisonment.

Count 3, possession of the automatic firearm, 15 years' imprisonment.

Count 4, dealing in the firearm, 7 years' imprisonment.

Count 6, unlawful possession of a firearm - 6 years' imprisonment

The sentence on count 1 is to run concurrently with the sentence on count 2. Ten years of the sentence on count 3 is to run concurrently with the sentences imposed in respect of counts 1 and 2. The sentences imposed in respect of counts 4 and 6 are to run concurrently with the sentences imposed in respect of counts 1 and 2. The accused is thus sentenced to an effective 30 years' imprisonment.'

3. The sentence is antedated in terms of s 282 of the Criminal Procedure Act 51 of 1977 to 8 August 2005.

JUDGMENT

SALDULKER (NAVSA JA and GRIESEL AJA concurring)

[1] This is an appeal against sentence with the leave of this court. The appellant, Kerston Mokgoakae Maseola, stood trial in the North Gauteng High Court (Pretoria) (Els J) as accused 3 together with two co-accused, Tshuledi Blessing Moloi (accused

1) and David Serame Melato (accused 2) for the murder of two policemen, Inspector Hechter and Mr Greyling, a police reservist. They were also charged with dealing in an automatic firearm, the unlawful possession thereof and the unlawful possession of ammunition. On 8 August 2005 the appellant was convicted together with his co-accused, on all five counts.

[2] On the same date, the trial court sentenced the appellant to 25 years' imprisonment on each of the murder charges, 18 years' imprisonment in respect of the unlawful possession of the automatic firearm, 6 years' imprisonment on the unlawful dealing in the firearm and 7 years' imprisonment in respect of the unlawful possession of ammunition. Els J ordered that the sentences imposed on the two murder counts be served concurrently. Furthermore, he ordered that the 6 and 7 year sentences run concurrently with the sentence of 18 years in respect of the unlawful possession of the firearm. Thus the appellant was sentenced to an effective 43 years' imprisonment.

[3] The appellant was a police informer. Regrettably, he turned rogue and himself engaged in gun-running, an activity he was tasked to monitor and report on. The automatic weapon he procured was used by accused 1 in a fierce shoot-out on 17 January 2004, with two policemen on the old Fochville Road, outside Sebokeng, who had been informed of the latter's intention to participate in an in-transit heist, and who were requested to assist in his arrest.

[4] In the ensuing gun-battle, the two policemen died a gruesome death. They were fired upon unremittingly with an automatic R4 rifle as they attempted to effect the arrest. Inspector Hechter armed with a 9mm pistol, was no match for accused 1. Seriously wounded, with parts of his face literally shot off, he collapsed and died at the scene. Mr Greyling, accompanying Inspector Hechter, had not been armed. He died at the scene seated in the police vehicle in which they had travelled.

[5] Although the appellant did not testify, it was put to state witnesses on his behalf that he was innocent and that he had informed his handler about the acquisition by

accused 1 of the R4 automatic rifle. It is common cause that the appellant had communicated this fact only after the shoot-out had already occurred. The appellant was rightly convicted on all charges. The court below correctly held that the appellant must have forseen that the R4 automatic rifle would be used by accused 1 in the commission of offences, including murder.

[6] In sentencing the appellant on the murder counts, the court recorded that he was being held liable on the basis of *dolus eventualis*, and that there were substantial and compelling circumstances, justifying a departure from the prescribed minimum sentence of life imprisonment. However, in respect of the possession of the R4 automatic rifle, the court found that there were no substantial and compelling factors justifying such a departure, and sentenced the appellant to 18 years' imprisonment, which the court stated to be the minimum sentence.

[7] In terms of s 51(2) of the Criminal Law Amendment Act 105 of 1997, the minimum prescribed period for sentences in respect of offences falling under the ambit of Part II of Schedule 2 is as follows:

'Nothwithstanding any other law but subject to subsections (3) and (6), a regional court or a High court shall sentence a person who has been convicted of an offence referred to in-

(a) Part II of Schedule 2, in the case of-

(i) a first offender, to imprisonment for a period not less than 15 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;'

The relevant portion of Part II of Schedule 2 reads as follows:

'Any offence relating to-

(a) the dealing in or smuggling of ammunition, firearms, explosives or armament;

or

(b) the possession of an automatic or semi-automatic firearm, explosives or armament.'

Thus it is clear that the trial court erred in imposing the sentence of 18 years on the appellant. The appellant was a first offender, whom the court intended to sentence to the applicable minimum prescribed period. That period as is shown above is 15 years' imprisonment.

[8] The appellant is 43 years old and married with four children. He had been a member of the South African Police Services until his discharge on medical grounds. Thereafter he started his own business, as a Funeral Undertaker and became registered as a police informer. He was a first offender and had been incarcerated for more than a year awaiting the finalisation of his trial. The trial court found that the only mitigating factor in respect of his personal circumstances was his clean record.

[9] It is true that the trial court was dealing with a police informer who had committed offences he was tasked to prevent. Unlawful firearms have become the scourge of our society and sentences imposed should send out a clear message that offences of the kind in question will be met with the full force of the law.

[10] It should also be borne in mind that in this matter, policemen were shot and killed. This is an aggravating factor. The appellant knew when he was approached to procure the firearm that fatal consequences might ensue.

[11] Counsel for the state was rightly constrained to concede that the effective sentence was excessive. The cumulative effect of the sentences is so harsh and disproportionate that this court is entitled to interfere and substitute its discretion for that of the trial court.

[12] In *S v Mhlakaza & another,*[1] there was an attack on a police office involving a machine gun (and the shooting and wounding of members of the public). The two appellants who had been convicted on charges of murder, attempted robbery, possession of firearms, and possession of a machine gun were effectively sentenced

[1] 1997 (1) SACR 515 (SCA).

to 47 and 38 years' imprisonment respectively. This court considered, whether in the circumstances of the case, the cumulative effect of the sentences imposed was so inappropriate that the court was permitted to substitute its discretion for that of the trial court. This court determined that each appellant should be sentenced to an effective 38 years' imprisonment, because both were equal partners in the same criminal activity. The court stated as follows at (523g-j):

'The several convictions resulted from more or less the same event. It is therefore appropriate to assess what sentence I would have imposed for the murderous armed attack on a police office involving a machine gun and the shooting and wounding of members of the public (cf *S v M* 1994 (2) SACR 24 (A) 30h-31e; *S v Coales* 1995 (1) SACR 33 (A) 37a-b). I believe that a sentence of life imprisonment would have been fully justified not only in relation to the combined crimes, but also on the murder count alone (cf *S v Tcoeib* 1991 (2) SACR 627 (Nm); *S v Mhlongo* 1994 (1) SACR 584 (A) at 589-90). And, as was pointed out by Hefer JA in *S v Nkosi* 1993 (1) SACR 709 (A) 717g-i, such a sentence is more realistic and subject to more safeguards than extraordinarily long sentences of imprisonment. Determinate sentences, in any event, run concurrently with a life term (s 32(2)(a)).'

And at 524e:

'In any event, had I not considered a life sentence to be justified I would have regarded an effective sentence of 47 years as exceeding acceptable limits.'

[13] In *Mhlakaza* this court sounded a note of caution at 518e-f:

'The object of sentencing is not to satisfy public opinion but to serve the public interest . . . A sentencing policy that caters predominantly or exclusively for public opinion is inherently flawed. It remains the court's duty to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public.'

[14] For the reasons set out above the appeal against the sentences succeeds. In my view, in the circumstances of this case, a sentence that strikes a proper balance is an effective sentence of 30 years' imprisonment constituted as set out in the ensuing order:

[15] The following order is made:

1. The appeal against the sentences imposed by the court below is upheld to the extent set out in para 2.

2. The order of the trial court is amended to read as follows:

'The sentences I impose on accused 3 are the following:

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3. The sentence is antedated in terms of s 282 of the Criminal Procedure Act 51 of 1977 to 8 August 2005.

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H K Saldulker

Acting Judge of Appeal

APPEARANCES:

APPELLANT:	D de Kock Instructed by: Zwelakhe Radebe Attorneys, Booysens. Matsepes Attorneys, Bloemfontein
RESPONDENT:	E Leonard SC Director of Public Prosecutions, Pretoria. Director of Public Prosecutions, Bloemfontein