



REPORTABLE

CASE NO: SA 7/2008

CASE NO: SA 8/2008

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

**ZEDIKIAS GAINGOB
ERENSTEIN HAUFIKU
NICODEMUS URI-KHOB
SALMON KHEIBEB**

**First Appellant
Second Appellant
Third Appellant
Fourth Appellant**

and

THE STATE

Respondent

Coram: SHIVUTE CJ, SMUTS JA, HOFF JA, MOKGORO AJA and
FRANK AJA

Heard: 7 November 2017

Delivered: 6 February 2018

Summary: The appellants in this case were sentenced to long fixed terms of imprisonment of 67 and 64 years for two counts of murder, one count of housebreaking with intent to rob and robbery with aggravating circumstances, and two counts of housebreaking with intent to steal and theft.

At issue in this appeal is the question whether inordinately long fixed terms of imprisonment which could extend beyond the life expectancy of an offender, constitute cruel, inhumane or degrading treatment or punishment in conflict with Art 8 of the Namibian Constitution which entrenches the right to human dignity.

The Attorney-General was invited to intervene in the appeal by virtue of his functions under Art 87 of the Constitution and place evidence before the court concerning the application of the Correctional Services Act, 9 of 2012 ('the Act') and make submissions at the appeal hearing. The Attorney-General filed an affidavit in which he contended that while punishment by courts is aimed at deterrence, prevention and rehabilitation, any punishment or term of imprisonment which 'takes away all hope of release from an offender should be contrary to the values and aspirations of the Namibian Constitution and more specifically the inherent right to dignity afforded to such incarcerated offender' and maintained that after the abolition of the death penalty, a sentence of life imprisonment is the most severe form of punishment a court can impose on an accused.

The Act provides for a range of rehabilitation programmes to address the needs of offenders to contribute to their successful re-intergration into society and mechanisms for the release of offenders.

In terms of s 115 applicable to the appellants, they would only become eligible for consideration of parole after serving two-thirds of their respective terms. In the case of first, second and fourth appellants, this would be after 44 and a half years and in the case of the third appellant after 42 and a half years. In contrast, s 117 read with the regulations, provides that in the case of offenders sentenced to life

imprisonment, the most onerous and serious sentence, eligibility for parole would arise after 25 years. The court stressed that parole is not automatic and that the National Release Board must be satisfied that offenders meet the other requirements for parole as well before release on parole can be recommended.

The realistic hope of release after 25 years if the other requirements for parole are also met means that life imprisonment in Namibia does not infringe an offender's right to dignity protected under Art 8 as held in *S v Tcoeib* and accords with the approach in South Africa (in *S v Nkosi* and *S v Siluale en 'n ander*), Zimbabwe in *Makoni* and the European Court for Human Rights (in *Vinter and other v UK*).

Held, the phenomenon of what academic writers have termed 'informal life sentences' where the imposition of inordinately long terms of imprisonment of offenders until they die in prison, erasing all possible hope of ever being released during their life time is 'alien to a civilised legal system' and contrary to an offender's right to human dignity protected under Art 8 of the Constitution.

Held, the absence of a realist hope of release for those sentenced to inordinately long terms of imprisonment would in accordance with the approach of this court in *Tcoeib* and other precedents offend against the right to human dignity and protection from cruel, inhumane and degrading punishment.

Held, the effective sentences of 67 years in this case mean that first, second and fourth appellants would be eligible for consideration of parole after 44 and a half years and in the case of the 3rd appellant 42 and a half years, given his 64 year sentence.

Held further that, the sentences in this case amount to informal life sentences imposed upon the appellants as they have no realistic prospect of release in the sense of fully engaging in society again – if at all - during their life times. The appellants would only become eligible for consideration for parole at the ages of over 80 years in the case of the first appellant, 69 and a half years in the case of the second appellant, 77 and a half years old for the third appellant and 66 and a half years for the fourth appellant.

It is thus held that, these sentences, by effectively removing from all of the appellants the realistic hope of release in the sense referred to during their life times, amount to cruel, degrading and inhuman or degrading treatment or punishment and infringe their right to human dignity enshrined in Art 8. Those sentences were set aside and replaced by sentences of life imprisonment in respect of counts 1 and 2, to be served concurrently with each other and with the further terms of imprisonment imposed on them.

APPEAL JUDGMENT

SMUTS JA (SHIVUTE CJ, HOFF JA, MOKGORO AJA and FRANK AJA concurring):

[1] At issue in this appeal is whether inordinately long fixed terms of imprisonment which could deprive an offender of the hope of release during his or her lifetime would constitute cruel, inhumane or degrading treatment or punishment in conflict with Art 8 of the Constitution which entrenches the right to human dignity.

Factual background

[2] This question arises for decision in the following way. On 8 February 2002, the High Court convicted the four appellants on two counts of murder, one count of housebreaking with intent to rob and robbery with aggravating circumstances and two counts of housebreaking with intent to steal and theft.

[3] There were indeed aggravating features to the case. The two murder victims were a couple, Mr and Mrs Adrian, in their late seventies who were brutally murdered on their isolated farm in the district of Okahandja. Three of the appellants had attempted to break in at their farm house a few days before the fateful night. The elderly couple was alerted. Warning shots were fired and the trio retreated to Okahandja. They returned with the other appellant a few nights later when the elderly couple had already retired for the night.

[4] The appellants broke into the house but could not enter the bedroom where Mr and Mrs Adrian were asleep. The appellants provoked the dogs to bark. This stirred the couple. When Mr Adrian sought to investigate, he was overpowered, gagged tied up and badly beaten with droppers. Mrs Adrian was likewise savagely beaten and gagged, and locked in a cupboard. They both died from the assaults. The appellants made off with a money box, a firearm and clothes from the house. They also broke into the farm's store and garage. A money box and some foodstuff were stolen from the store and they made off with the couple's car from the garage. They offloaded the loot at the third appellant's home which they shared and abandoned the motor vehicle in Okahandja.

[5] The appellants were legally represented during the trial. They elected not to give evidence or call any witness to give evidence on their behalf in mitigation of sentence. Nor did the prosecution tender evidence in respect of sentence. The appellant's counsel provided the personal details of the appellants in their respective addresses concerning mitigation of sentence.

The appellants' personal circumstances

[6] At the time of sentencing, the first appellant was 36 years old and the unmarried father of three children then aged eight, five and three years old. He was said to have no formal education and was then serving a ten year prison term. He had not testified during the trial.

[7] The second appellant was then 25 years old, also single and the father of two children aged eight and five years. He had attended school up to grade 8 and was at the time serving an eighteen year prison sentence.

[8] The third appellant was then 35 years old, single and the father of three children. He was a first offender and was employed as a motor mechanic by the Namibian Defence Force.

[9] The fourth appellant was 21 years old when the crimes were committed and would have been 22 years old at the time of sentencing. He is single with two children. He had advanced as far as grade 8 at school. At the time of sentencing, he was serving a sentence of four years for housebreaking.

[10] The prosecutor sought consecutive sentences of 50 years for each murder and 18 years for the robbery.

The approach of the High Court

[11] In sentencing the appellants, the High Court stated that they 'are dangerous and deserve to be removed from society for a reasonable time period'. The court *quo* proceeded to sentence all four appellants to 30 years imprisonment in respect of each murder and directed that 10 years in respect of the sentence on the second count would run concurrently with the 30 year term on count one. The first, second and fourth appellants were sentenced to 12 years imprisonment on count 3 (housebreaking with intent to rob and robbery with aggravating circumstances) whilst the third appellant was sentenced to 10 years' imprisonment on that count. In respect of count 4, (housebreaking with intent to steal and theft), first, second and fourth appellants were sentenced to 8 years imprisonment with 4 years to run concurrently with the sentences they were serving. The third appellant received a sentence of 5 years on that count with 2 years to run concurrently with his 10 year term on count 3. All four appellants were sentenced to 4 years imprisonment on count 5 (housebreaking) with three of those to run concurrently with their sentences in count 4.

[12] The overall effect of these sentences was as follows: the first, second and fourth appellants each received an effective prison term of 67 years and the third appellant 64 years imprisonment.

[13] The appellants applied for leave to appeal against their convictions and sentences. That application was refused on 16 October 2003. The trial court informed them of their right to petition the Chief Justice for leave to appeal.

Proceedings in this court

[14] The third appellant petitioned the Chief Justice and on 21 July 2005 was granted leave to appeal against the sentences on counts 3 and 4 only. The petition was refused in respect of all of his convictions and the other sentences. There was a similar outcome in respect of the first and second appellants' subsequent petition which was granted on 24 October 2007 – in respect of the sentences imposed on counts 3 and 4 only. These appeals stalled for some years.

[15] The appeal (of first, second and third appellants) was eventually set down in March 2015 but could not then be heard owing to the late briefing of counsel by the Directorate of Legal Aid. It was postponed to 15 July 2015 before a differently constituted court which made an order vacating the earlier orders granting leave to appeal and replaced it with an order granting leave to those three appellants as well as the fourth appellant to appeal against the cumulative effect of the sentences passed by the High Court. This court on that occasion in its order invited argument on the issue as to whether it would be consistent with the Constitution to impose sentences of imprisonment which would exceed the life expectancy of an accused.

[16] The appeal was postponed to 11 April 2016. On that occasion it was again postponed and the following further orders were made:

- ‘2. The Attorney-General is invited to intervene in the appeal by virtue of his functions under Article 87 of the Constitution. If so minded, the Attorney-General is invited to place further evidence relevant to the constitutional question raised in the appeal before this Court and to make submissions at the hearing of the appeal. Such further evidence would, *inter alia*, relate to the operation of sections 107, 110, 112, 115, 117 and 118 of Part XIII of the Correctional Service Act 9 of 2012, particularly in respect of offenders sentenced for crimes listed in the Third Schedule of that Act. If the Attorney-General intends to place further evidence before this Court by way of affidavit, this should be done by not later than 31 August 2016.
3. If the appellants intend to place further evidence by way of affidavit before this Court relevant to the constitutional question, they are to apply to do so under section 19 of the Supreme Court Act 15 of 1990 by not later than 31 August 2016.
4. If the respondent intends to place further evidence by way of affidavit before this Court in response to an application of the appellants, if any, the respondents must apply to do so by not later than 30 September 2016.
5. The appellants and the respondent are afforded the opportunity to respond to any evidence placed by the Attorney-General before this Court by not later than 30 September 2016.’

Further evidence pursuant to the court order of 11 April 2016

[17] The Attorney General filed an affidavit, referring to constitutional provisions and in particular Art 8 which protects the right to human dignity, and submitted that, while punishment by courts is aimed at deterrence, prevention and rehabilitation, any punishment or term of imprisonment which ‘takes away all hope of release from an offender should be contrary to the values and aspirations of the Namibian Constitution and more specifically the inherent right to dignity afforded to such incarcerated offender’.

[18] It was further stated by the Attorney General that ‘a term of imprisonment should not be so long so as to remove all reasonable hope of release as such term would severely encroach on the offender’s constitutional right to dignity’.

[19] The Attorney-General referred in detail to the statutory mechanisms dealing with remission of sentence,¹ release on day parole² and release on full parole or probation³ embodied in the Correctional Service Act, 9 of 2012 (the Act) which had come into force on 1 January 2012.

[20] None of these regimes of early release in meritorious cases applied to offenders convicted of crimes listed in the third schedule to the Act. Those crimes include murder and robbery. Those mechanisms thus do not apply to the appellants.

[21] The Attorney-General pointed out that s 115 of the Act applied to the appellants. It deals with release on parole or probation of offenders sentenced to more than 20 years imprisonment for a third schedule offence. Before such offenders could become eligible for consideration of such release, they would need to have served two-thirds of their sentences. The Attorney General also referred to s 117 which, together with the regulations promulgated under the Act⁴, requires that offenders serving sentences of life imprisonment must serve a minimum of 25 years before being eligible for consideration for release on parole.

¹ In s 107.

² Section 110.

³ Section 112.

⁴ Regulation 281 published in Government Notice 330 of 2013 published in Government Gazette dated 18 December 2013.

[22] The Attorney General further submitted that, following the abolition of the death sentence upon independence (and the coming into operation of the Constitution) a life sentence is the harshest term of imprisonment an offender can receive. He further stated that life imprisonment would not necessarily mean incarceration for the rest of an offender's life with release on parole being a possibility after 25 years, as set by the legislature in the Act read with the regulations. He further pointed out that a term of imprisonment longer than 37 and a half years (with two-thirds of that term being 25 years) amounted to a harsher sentence than life imprisonment. He concluded:

'In the final analysis, I submit that a sentence imposed by a trial court should not be designed to confine an offender to a correctional facility. Death should not be the only hope of release that such an offender has of ever being released.'

[23] The Deputy Commissioner-General of the Namibian Correctional Services (NCS), Anna-Rosa Katjivena, also made an affidavit. After referring to life expectancy in correctional facilities, the following conclusion was made:

5.1 In conclusion I wish to state that in recent years the objective of the Correctional Service has been to rehabilitate offenders with the hope of turning them into productive and law abiding citizens despite their criminal history. One of the greatest catalysts in the rehabilitation process is hope. It is the hope of release that enables the process of rehabilitation to yield fruitful results. An offender without hope of release will not likely participate in programs that are designed to rehabilitate him/her.

5.2 In the premises long custodial sentences do not assist the Correctional Service in achieving one of its primary objectives. Furthermore long custodial sentence put an unnecessary financial burden on the resources

of the State as offenders who could contribute positively towards nation building are not able to do so because of their sentences.'

[24] A letter on behalf of the Commissioner-General of the NCS addressed to the Government Attorney was by agreement placed before court in which it was stated:

' . . . the NCS does not support the long sentences as they are a barrier to the achievement of the goals of the service. Sentences should be of such nature that a sentenced offender still has hope for life after release from the correctional facility.'

[25] Neither the appellants nor the prosecution placed any further evidence before this court following the Attorney-General's affidavit. They did however file further written argument.

The parties' submission on appeal

[26] Mr Van Wyk, SC, who together with Ms Kandovazu appeared for the Attorney-General, provided both written and oral argument in support of the contentions advanced in the Attorney-General's affidavit. Mr Van Wyk argued that a sentence which takes away all hope of release would be contrary to the values and aspirations and the right to human dignity protected in Art 8 of the Constitution, citing the approach of this court in *S v Tcoelib*.⁵ He also referred to two decisions of the South African Supreme Court of Appeal (SCA), *S v Nkosi*⁶ and *S v Siluale en 'n Ander*⁷ which set aside exceptionally long sentences of imprisonment as being in conflict with that country's Constitution (as being 'cruel,

⁵ 1999 NR 24 (SC).

⁶ 2003(1) SACR 91 (SCA).

⁷ 1999(2) SACR 102 (SCA).

inhuman and degrading in *Nkosi*) and as 'alien to a civilised legal system' in *Siluale*.

[27] Mr Van Wyk submitted that a life sentence should be the most severe for a court to impose. The legislature had ensured that offenders sentenced to life imprisonment would be eligible for consideration for parole after 25 years. That factor, according to him, rendered that form of sentence constitutional whilst sentences of imprisonment which effectively meant that offenders would not be eligible for consideration for parole would in his submission be in conflict with Art 8. He also argued that any effective sentence of imprisonment in excess of 37 and a half years would render it more severe than life sentence (by reason of offenders only becoming eligible for consideration for parole after 25 years) and thus untenable.

[28] Mr Boesak, who appeared for the appellants, associated himself with the submissions advanced on behalf of the Attorney-General. He stressed the practical effect of the sentences upon each appellant. He pointed out that the first, second and fourth appellants would only become eligible for consideration for parole after serving 44 years and 6 months. In the case of the third appellant, he would qualify for consideration after serving 42 year and a half years. He referred to the record and pointed out that the prosecution had sought sentences whose effect far exceeded the harshness of life sentences. Mr Boesak contended that the effect of these sentences rendered them unconstitutional for the reasons advanced by Mr Van Wyk and contained in the Attorney-General's affidavit.

[29] The State was represented by Mr Lisulo. He initially stated that he did not have a problem with the sentences passed by the court *a quo*. He however conceded that life imprisonment should be the most severe form of sentence. He also correctly conceded that a sentence which removes all hope of the prospect of release would not be appropriate, but declined to accept that this would be in conflict with the Constitution. He referred to the seriousness of the offences and the fact that three of the four appellants were repeat offenders but acknowledged that there was difficulty in justifying the cumulative effect of their sentences and suggested that this court should give guidance upon the vexed issue of lengthy sentences of imprisonment.

Applicable constitutional and statutory provisions

[30] The very first statement in the preamble to the Constitution expresses 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom justice and peace' as a foundational principle of the Constitution.

[31] Article 8, contained in chapter 3 which protects and enshrines fundamental rights and freedoms, states under the heading 'respect for human dignity':

- '(1) The dignity of all persons shall be inviolable.

- (2) (a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.

- (b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.'

[32] Article 18 enjoins administrative bodies and officials to act fairly and reasonably and to comply with statutory requirements imposed upon them.

[33] The Criminal Procedure Act, 51 of 1977, in s 276 empowers courts in their discretion to impose a sentence of imprisonment upon conviction without placing a limit upon the period of duration of that sentence.

[34] The Correctional Service Act, 9 of 2012, (the Act) established the Namibian Correctional Service. Its functions are to 'ensure every inmate is secured in safe and humane custody within a correctional facility',⁸ enforce sentences of the courts,⁹ apply rehabilitation programmes and activities which contribute to rehabilitation and successful re-integration of offenders into community as law abiding citizens,¹⁰ supervise offenders on conditional release¹¹ and effectively manage, administer and control correctional facilities in accordance with the principles laid down in the Act.¹²

[35] Section 94 of the Act enjoins the Correctional Service to provide 'a range of rehabilitation programmes designed to address the needs of offenders and contribute to their successful re-integration into society'.

[36] Part XIII of the Act sets out detailed mechanisms to deal with the release of offenders. These were referred to and explained in some detail in the Attorney-

⁸ S 3(a).

⁹ S 4(a).

¹⁰ S 3(a).

¹¹ S 3(d).

¹² S 3(e) read with s 4.

General's affidavit. Central to this function is the National Release Board (the Board) established in s 104. Paramount in the principles which guide it in fulfilling its functions is the protection of society.¹³ Other principles include a proper risk assessment of each offender, openness and effectiveness in exchanging information with other components of the criminal justice system and making the least restrictive determination consistent with the protection of society.¹⁴ The Board is empowered to recommend or authorise – depending upon the applicable mechanism – the release on day parole, full parole of an offender, if in its opinion the offender will not be re-offending and present an undue risk to society before expiration of the sentence being served and the release of the offender will contribute to his or her reintegration into society as a law abiding citizen.¹⁵

[37] The mechanisms for the release of offenders vary with reference to the severity of their offences and of the sentences imposed upon them. The more serious the offence and severe the sentence, the more onerous are the requirements set for parole. Meritorious conduct and industry may lead to remission in cases except for offenders declared habitual criminals, sentenced to life imprisonment and those sentenced to imprisonment for scheduled crimes or offences.¹⁶ There is also release on full parole or probation under s 112 of offenders serving terms of imprisonment when authorised by the Board after a hearing. But this does not apply to offenders sentenced to a term of imprisonment for a scheduled crime or offence.¹⁷

¹³ S 106(1)(a).

¹⁴ S 106(1)(b) to (f).

¹⁵ S 106(2).

¹⁶ In s 107.

¹⁷ S 112(10).

[38] Offenders serving terms of imprisonment of less than 20 years for scheduled crimes or offences may qualify for release on full parole or probation under s 114 if they meet the requirements of that section.

[39] Relevant for present purposes is s 115 which provides for release on full parole or probation for offenders sentenced to more than 20 years for scheduled crimes or offenders. In order to be eligible to qualify for this, offenders would need to have served two-thirds of their terms of imprisonment and the Board would need to be satisfied after a hearing that:

- (i) the offender has displayed meritorious conduct, self discipline and industry during the period served in the correctional facility;
- (ii) the offender will not be re-offending and place an undue risk to society;
- (iii) the release of the offender would contribute to his or her re-integration into society as a law abiding citizen.¹⁸

[40] It is thus clear from the Act that parole does not automatically arise after serving two-thirds of the sentence. The Board must, in addition be satisfied that the three further criteria are met.

[41] If the Board is so satisfied, it would recommend a release on parole or probation in a report to the Commissioner-General who would refer the report to the Minister responsible for Correctional Service who may then authorise the release of the offender on parole or probation.

¹⁸ S 115(1)(a).

[42] The next gradation of offenders in Part XIII concerns those declared habitual criminals who are only eligible for similar release after serving the minimum terms prescribed in the regulations, promulgated under the Act.¹⁹

[43] Finally and the most onerous gradation of offenders is s 117 which deals with the release of offenders sentenced to life imprisonment. They only become eligible for release on parole or probation after serving the minimum term prescribed in the regulations as 25 years. In their case the Board would furthermore need to be satisfied that -

- '(i) there is a reasonable probability that such offender will abstain from crime and is likely to lead a useful, responsible and industrious life;
- (ii) such offender has displayed a meritorious conduct during such minimum term of imprisonment and no longer has a tendency to engage in crime; and
- (iii) the release of the offender will contribute to reintegration of the offender into society as law abiding citizen; or
- (iv) it is desirable for any other reason to release such offender on full parole.'

[44] The Board is precluded from recommending the release on parole unless the offender has served at least 25 years and it is satisfied that an offender's release meets the further requirements specified.

[45] If so satisfied, the Board would submit a report to the Commissioner-General recommending release on parole or probation. The latter would submit the report and his or her comments to the Minister who must forward the report together with his or her comments to the President who may authorise an

¹⁹ S 116.

offender's release on parole or probation for life, unless the President determines otherwise.

[46] It is clear from the categories of offenders set out in Part XIII that the legislature treats a sentence of life imprisonment as the most severe sentence imposed upon conviction of an offender. This accords with the submission to that effect by the Attorney-General and supported by the prosecution. It also accords with the approach of the Supreme Court of Appeal (SCA) in South Africa in *S v Bull and another; S v Charvulla and others*²⁰ where it was stated that the SCA had, since the abolition of the death sentence in South Africa:

'consistently regarded that life imprisonment is the most severe and onerous sentence that can be imposed and it is the appropriate sentence to impose in those cases where the accused must effectively be removed from society.'

[47] This statement was subsequently confirmed by the SCA in *S v Nkosi and others*²¹ where it was also stated:

'In the *Bull* case it was also pointed out that this court has repeatedly warned against excessively long sentences being imposed to circumvent the premature release of prisoners by the Executive.'²²

[48] This court in *S v Tcoeib*,²³ accepted that, following the adoption of the Constitution, life imprisonment is the most severe and onerous sentence to be imposed upon offenders by referring to its application in civilised legal systems as follows:

²⁰ 2001 (2) SACR 681 (SCA) at 693j-694a.

²¹ 2003 (1) SACR 91 (SCA) at para 7.

²² At para 7.

²³ 1999 NR 24 (SC).

‘ . . . (I)t is resorted to only in extreme cases either because society legitimately needs to be protected against the risk of a repetition of such conduct by the offender in the future or because the offence committed by the offender is so monstrous in its gravity as to legitimise the extreme degree of disapprobation which the community seeks to express through such a sentence.’²⁴

This principle is also reflected in the Act, as is set out above.

Mahomad CJ, in *Tcoeib* further stated:

‘ . . . (T)here is no escape from the conclusion that an order deliberately incarcerating a citizen for the rest of his or her natural life severely impacts upon much of what is central to the enjoyment of life itself in any civilised community and can therefore only be upheld if it is demonstrably justified. In my view, it cannot be justified if it effectively amounts to a sentence which locks the gates of the prison irreversibly for the offender without any prospect whatever of any lawful escape from that condition for the rest of his or her natural life and regardless of any circumstances which might subsequently arise.’²⁵

And

‘To insist, therefore, that regardless of the circumstances, an offender should always spend the rest of his natural life in incarceration is to express despair about his future and to legitimately induce within the mind and the soul of the offender also a feeling of such despair and helplessness. Such a culture of mutually sustaining despair appears to me to be inconsistent with the deeply humane values articulated in the preamble and the text of the Namibian Constitution which so eloquently portrays the vision of a caring and compassionate democracy determined to liberate itself from the cruelty, the repression, the pain and the shame of its racist and colonial past. Those values require the organs of that society continuously and consistently to care for the condition of its prisoners, to seek to manifest concern for, to reform and rehabilitate those prisoners during

²⁴ At 32B-C.

²⁵ At 32D-E.

incarceration and concomitantly to induce in them a consciousness of their dignity, a belief in their worthiness and hope in their future.²⁶

[49] *Tcoeib* concerned a challenge upon the constitutionality of life imprisonment on the grounds of offending against Art 8. Mohamed, CJ, for a unanimous court, after a meticulous analysis of the provisions of the then applicable Prisons Act, 8 of 1959, as amended (which likewise provided for eligibility for release on parole for offenders sentenced to life imprisonment) concluded:

'It seems to me that the sentence of life imprisonment in Namibia can therefore not be constitutionally sustainable if it effectively amounts to an order throwing the prisoner into a cell for the rest of the prisoner's natural life as if he was a 'thing' instead of a person without any continuing duty to respect his dignity (which would include his right not to live in despair and helplessness and without any hope of release, regardless of the circumstances).

The crucial issue is whether this is indeed the effect of a sentence of life imprisonment in Namibia. I am not satisfied that it is'²⁷

[50] Mohamed CJ proceeded to refer to the mechanisms in the then applicable legislation²⁸ concerning the duty to make recommendations for the training and treatment of those sentenced to life imprisonment and the machinery for the functioning of a release board to make recommendations to the President for the release of offenders sentenced to life imprisonment. Mohamed CJ, concluded:

'It therefore cannot properly be said that a person sentenced to life imprisonment is effectively abandoned as a 'thing' without any residual dignity and without affording such prisoner any hope of ever escaping from a condition of helpless and

²⁶ At 32H-33A.

²⁷ At para 33E-F.

²⁸ Act 8 of 1959 which was subsequently repealed by Act 17 of 1998 which was in turn repealed by the Act which came into operation on 1 January 2014.

perpetual incarceration for the rest of his or her natural life. The hope of release is inherent in the statutory mechanisms. The realisation of that hope depends not only on the efforts of the prison authorities but also on the sentenced offender himself. He can, by his own responses to the rehabilitative efforts of the authorities, by the development and expansion of his own potential and his dignity and by the reconstruction and realisation of his own potential and personality, retain and enhance his dignity and enrich his prospects of liberation from what is undoubtedly a humiliating and punishing condition but not a condition inherently or inevitably irreversible.'

[51] After referring to the concerns voiced by the German Federal Constitutional Court in the 'life imprisonment case',²⁹ Mohamed CJ stated that the statutory mechanisms in question are to be interpreted with regard to the 'discipline of the Constitution and the common law' which require the relevant authorities to duly and properly apply their minds to each case and exercise their discretion properly in accordance with the objects of the legislation creating those mechanisms and the values and protections of the Constitution.

[52] It is clear from the lucid analysis in *Tcoeib* that it is the hope of release inherent in the statutory mechanisms and their proper application which saves life imprisonment from being in conflict with an offender's right to dignity protected under Art 8. *Tcoeib* has been followed by this court in *Kamahere v Government of the Republic of Namibia and others*.³⁰

[53] The statutory mechanisms under the 1959 Act have been expanded in the Act which places more emphasis upon rehabilitation with the NCS enjoined to provide rehabilitation programmes designed to address the needs of offenders and

²⁹ 'Lebenslange Freiheitsstrafe' 45 BverfGE 187.

³⁰ 2016(4) NR 919 (SC).

their successful integration into society. Furthermore, the Act expressly provides for hearings by the Board in assessing whether offenders qualify for release on parole, thus providing for a procedure in the Act designed to meet the demands of Art 18 as emphasis by Mohammed, CJ in *Tcoeib*.

[54] This is also at the heart of the approach of the European Court of Human Rights (ECtHR). In *Kafkaris v Cyprus*,³¹ the Grand Chamber of the ECtHR held that a life sentence which was irreducible in law or in fact would infringe Art 3 of the European Convention of Human Rights (ECHR) which protects the right to human dignity in terms similar to Art 8 of the Constitution. In that case, the sentence was found not to be irreducible by reason of the opportunities both in law and in fact for the consideration of release.

[55] In the subsequent seminal case of *Vinter and others v UK*³², the Grand Chamber of the ECtHR held that sentences of life imprisonment (whole life sentences) in England and Wales would not be regarded as irreducible for the purposes of Art 3 of the ECHR (and thus in conflict with Art 3) because the circumstances under which the executive would release those prisoners was so restricted and confined so as not to give them any hope of being released when they could engage fully in society again. (The limited power of release was on compassionate grounds – when a prisoner was terminally ill or seriously incapacitated). The Grand Chamber found that this procedure was inadequate and was inconsistent with a prospect of release articulated in *Kafkaris*.³³ There

³¹ ECtHR (app 21906/04) 12 February 2008 [GC].

³² ECtHR (apps. 66069/09, 130/10 and 3896/10) July 9, 2013 (GC).

³³ Para 127.

needed to be a mechanism of review which would determine whether the continued incarceration was justified on sufficient penological grounds.³⁴

[56] The importance of the 'right to hope' of release was thus emphasised in the short concurring opinion of Judge Power-Forde in *Vinter*.

'... what tipped the balance for me in voting with the majority was the Court's confirmation, in this judgment, that Article 3 encompasses what might be described as "the right to hope". It goes no further than that. The judgment recognises, implicitly, that hope is an important and constitutive aspect of the human person. Those who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading'.

[57] The Constitutional Court of Zimbabwe recently in *Makoni v Commissioner of Prisons and another*³⁵ unanimously struck down a system of life imprisonment without parole as violating the right to dignity and amounting to inhuman and degrading treatment in breach of that country's constitution. That court drew upon international standards, the approach of the ECtHR in *Vinter* and this court in *Tcoeib* in stating:

'The regional and European case authorities that I have cited earlier all point to the conclusion that whole life imprisonment, without rehabilitative treatment coupled with the possibility of release, is tantamount to inhuman and degrading treatment

³⁴ At para 129.

³⁵ Const application No CCZ 45/15; Judgment CCZ 8/16 on 13 July 2016.

in contravention of the relevant constitutional and conventional rights. Similarly, all the international instruments alluded to above, viz. the 1976 Covenant and the (United Nations) Standard Minimum Rules of 1957 and 2015, capture the essentially twofold purpose of penal servitude as it has developed over the years within the broad framework of societal protection: firstly, the infliction of a punishment that is condign to the nature and gravity of the crime committed; secondly, the rehabilitative reorientation of the offender to render him fit and suitable for societal reintegration as a law-abiding and self-supporting citizen. These two objectives are intrinsically interconnected, so that the unavoidable cruelty of incarceration without the correlative beneficence of rehabilitation would unnecessarily aggravate and dehumanise the delivery of corrective justice. In short, every prisoner should be able to perceive and believe in the possibility of his eventual liberation after a period of incarceration befitting his crime and his capacity for reformation.³⁶

[58] That court further held that the fact that other prisoners sentenced to fixed sentences had the right to be considered for parole meant that the deprivation of that right for prisoners serving life sentences infringed the latter's right to equal protection and benefit of the law. The offending provisions were struck down by that court as unconstitutional.

[59] The absence of a realistic hope of release for those sentenced to life imprisonment would in accordance with the approach of this court in *Tcoeib* and the ECtHR thus offend against the right to human dignity and protection from cruel, inhuman and degrading punishment.

[60] But what of inordinately long sentences of imprisonment which could or would likewise have the effect of removing the right to hope of eligibility for release on parole or probation?

³⁶ At p 13-14.

[61] In chapter 2 of their illuminating work *Life Imprisonment: A Global Study*, Dirk van Zyl Smit and Catherine Appleton³⁷ describe the different manifestations of life imprisonment encountered worldwide. They refer to two primary forms of formal life imprisonment: life with or without the possibility of parole. In Namibia the former is the case by virtue of s 117 of the Act read with the regulations. The latter (being life without the possibility of parole) would, upon the analysis in *Tcoeib*, infringe Art 8.

[62] The learned authors also describe³⁸ the phenomenon of what they term 'informal life sentences' where the State has the power to imprison offenders until they die in prison. Informal life sentences according to the learned authors, manifest themselves in two forms: a *de facto* life sentence and secondly various forms of indefinite post-conviction detention without pre-determined limit.

[63] The former – a *de facto* life sentence - has relevance to this enquiry. The learned authors describe these sentences as inordinately long, fixed terms of imprisonment. Even though the sentences have a fixed release date, the offenders will inevitably die in prison before that date is reached as the release date is beyond their life expectancy.

[64] The effect of *de facto* life sentences imposed in Namibia may be intended by a sentencing judge to exclude the possibility of offenders being considered for parole under the life imprisonment regime contemplated by the Act where offenders have the right to be considered for parole after 25 years.

³⁷ Forthcoming, Harvard University Press, 2018.

³⁸ In chapter 2.

[65] This form of informal life sentence – where a sentence is so unusually long so as to deny offenders all possible hope of ever being released during their life time – was found by the SCA in *S v Siluale en Andere* ‘to be alien to a civilised legal system’. I entirely agree with that characterisation. The SCA held that where the circumstances of a case required a sentence which for all practical purposes required the removal from society of an offender, life imprisonment is the only appropriate sentence and replaced sentences of 115 and 105 years for sentences of life imprisonment.³⁹ This approach would accord with the analysis of the purpose of life imprisonment in *Tcoeib*.

[66] The underlying approach in *Siluale* was emphatically confirmed in *Nkosi* where the SCA went further and found that a sentence imposed upon a prisoner without a chance of being released on parole would amount to cruel, inhuman and degrading punishment which is likewise proscribed by that country’s constitution. In *Nkosi*, the SCA found that the sentences imposed were calculated to circumvent the relevant parole provisions and substituted it for life imprisonment.⁴⁰ That would likewise be impermissible in Namibia.

[67] In this matter, the effective sentences of 67 and 64 years mean that 1st, 2nd and 4th appellants would be eligible for consideration of parole after 44 and a half years and the 3rd appellant after 42 and a half years.

[68] These sentences amount to informal life sentences imposed upon the appellants by having no realistic prospect of release in the sense of fully engaging

³⁹ At 106.

⁴⁰ At para 10 - 11.

in society again – if at all - during their life times, bearing in mind their respective ages. They would become eligible for consideration for parole at the ages of over 80 years in the case of the first appellant, 69 and a half years in the case of the second appellant, 77 and a half years old for the third appellant and 66 and a half years for the fourth appellant.

[69] These sentences effectively remove from all of the appellants the realistic hope of release in the sense referred to during their life times. They thus amount to cruel, degrading and inhuman or degrading punishment and infringe their right to human dignity enshrined in Art 8.

[70] These sentences are certainly in effect far more severe than life sentences as offenders are to be eligible for parole after 25 years if sentenced to life imprisonment in accordance with s 117 of the Act read with the regulations. The appellants must wait almost 20 years more than those sentenced to life imprisonment to become eligible for parole under s 115. This is untenable. It would appear that the sentences were imposed to circumvent the relevant parole provisions determined as appropriate by the legislature.

[71] It is the prospect of eligibility of parole after 25 years which renders the most severe sentence of life imprisonment compatible with Art 8. Where trial courts impose excessively long sentences to circumvent the right of that hope of release represented by their eligibility for parole (and the proper application of the criteria embodied in the applicable sections), the resultant sentences will infringe offenders' Art 8 right to dignity. By removing an offenders' realistic hope of release, the statutory purpose of rehabilitation trenchantly stressed in the Act, and further

explained in the affidavit by the Deputy Commissioner-General of NCS, is fundamentally undermined.

[72] Such an approach is not only in conflict with offenders' constitutional right to dignity but also negates an understanding of the criteria to be met for parole set out in s 115 and s 117 of the Act quoted in paras [39] and [43] above. Not only must offenders have served 25 years in order to be eligible for consideration under s 117, but they must also satisfy the Board as to the further criteria before a recommendation for their release can be made.

[73] As has been stressed in *Tcoeib*, a sentence of life imprisonment is appropriate where a court considers that a convicted offender should be removed from society.

[74] As was submitted on behalf of the Attorney-General, an effective sentence of more than 37 and a half years would mean that such offender is worse off than those sentenced to life imprisonment. Such lengthy sentences would not be appropriate and are to be discouraged. Depending upon their length and the circumstances of an offender, they may also infringe an offender's right to dignity under Art 8. This approach would accord with that outlined in *Tcoeib*.

[75] It follows that the appeal succeeds against the sentences imposed upon all appellants on counts 1 and 2 which are set aside.

[76] The crimes committed by the the appellants were however brutal and vicious in the extreme and perpetuated with premeditation, justifying that they

should be permanently removed from society as would be brought about by a sentence of life imprisonment, as found in *Tcoeib*.⁴¹ But the mechanism in s 117 means that they retain the hope of release after serving at least 25 years which renders that sentence compatible with Art 8. With respect to all the appellants, I accordingly set aside the sentences in counts 1 and 2 and replace them with sentences of life imprisonment on each of those counts. The sentences of life imprisonment in regard to each count in respect of each appellant, are to run concurrently. The sentences imposed on all the other counts will run concurrently with the life sentences.

[77] The following order is made:

- (a) The appeal against the sentences on counts 1 and 2 succeeds;
- (b) The sentences imposed on those counts are set aside and in each case replaced with a sentence of life imprisonment on each count which is to run concurrently in respect of each appellant and is backdated to the date of sentencing, namely 8 February 2002;
- (c) The sentences on counts 3, 4 and 5 are to run concurrently with the sentences on counts 1 and 2.

SMUTS JA

⁴¹ At para 35E-H.

SHIVUTE CJ

HOFF JA

MOKGORO AJA

FRANK AJA (concurring):

[78] I agree with the judgment of Smuts JA with two provisos. First it must be seen in the context of the sentences of life imprisonment only. Second it must be read to deal only with sentences that seek to circumvent the statutory mechanism entitling persons sentenced to life imprisonment to apply for release on parole after serving the statutorily prescribed period. In my view the decision of this court in *Tcoeib* must also be seen in the above context. As pointed out by Smuts JA in his introductory paragraph what lies at the heart of this appeal is 'inordinately long fixed terms of imprisonment'.

[79] In terms of its plain meaning there cannot be a longer term of imprisonment than one for life. This means that a person so sentenced must spend the rest of his life in prison. What is clear from *Tcoeib* is that this is the most severe and onerous sentence that can be imposed.

[80] How sentences must be implemented or executed is dealt with in the Correctional Services Act. This Act makes provision for prisoners to be released prior to serving their full sentences (whatever those sentences may be). This fits in with the main objectives of sentencing namely, retribution, deterrence and rehabilitation. (The emphasis in modern times being on the latter objective). The courts cannot monitor prisoners on a constant basis to assess whether they have been rehabilitated and are ready to take up their position in society despite having not yet served their full terms of imprisonment. The prison authorities who deal with them on a daily basis are in a much better position to determine this and hence there has been no objection, in principle, to this approach which seems to be a universal one.

[81] The legislature has determined that in respect of life imprisonment a prisoner will only be entitled to apply for parole after having served 25 years. In other words, this is the period deemed to satisfy the requirements of retribution and deterrence provided the prisoner has been rehabilitated. The periods stipulated in the Correctional Services Act relevant to applications for parole or early release have not been attacked on any basis. The Act must therefore be applied. As pointed out by Smuts JA in respect of serious crimes where fixed terms of imprisonment have been imposed prisoners can only apply for parole after having served two thirds of their sentences. This means that where a person is sentenced to imprisonment for a period longer than 37 and half years it would mean such sentence would in effect be a sentence that is harsher than a sentence of life imprisonment. As life imprisonment is the most severe sentence that can be imposed any sentence that seeks to circumvent this approach by imposing fixed term sentences longer than 37 years and a half years is materially misdirected and

can be rightly described as inordinately long and is thus liable to be set aside. Such sentence is imposed contrary to the principle enunciated in *Tcoeib* and the statutory scheme relating to parole ensconced in the Correctional Service Act.

[82] The references in the cases referred to by Smuts JA to the fact that imprisonment for life without the hope (prospect) of release prior to death renders such imprisonment cruel and inhuman and deprive such person of his or her dignity cannot, in my view, be read in isolation but must be seen in the context of the implementation of life imprisonment only.

[83] It follows from both *Tcoeib* and the judgment of Smuts JA that if a person sentenced to life imprisonment does not meet the relevant criteria to be granted parole such prisoner must remain in prison and live out the rest of his life in prison. It follows that the condition of being a prisoner does not, in itself, amount to a cruel, inhuman or degrading treatment or punishment. It cannot be otherwise else no one can be imprisoned for any crime committed. What is cruel, inhuman and degrading is to be given an inordinately lengthy term of imprisonment with the purpose of preventing release at all (because the term of imprisonment would obviously, even taking the parole provisions into consideration, extend beyond the life expectancy of the prisoners, eg 150 years) or to circumvent the provisions governing the right to apply for parole after having served 25 years of imprisonment. Where an elderly Namibian Clark⁴², or Madoff⁴³ is sentenced to, say, 15 years imprisonment the fact that such person will probably or may die in prison (barring a release on compassionate grounds) will not be a reason to attack such

⁴² Ralph Clark was convicted at the age of 101 in respect of 21 historic sex offences involving young children. The English court sentenced him to 13 years imprisonment.

⁴³ Bernie Madoff was convicted of defrauding the clients of his asset management firm of US\$64.8 billion at the age of 71 and sentenced to 150 years imprisonment in the USA.

sentence. This is so because different considerations will apply seeing that one is not dealing with a sentence of life imprisonment.

[84] I accordingly concurred with the order proposed by Smuts JA.

FRANK AJA

APPEARANCES

APPELLANTS: A W Boesak (assisted by T
Brockhoff)

Instructed by Directorate of Legal Aid

RESPONDENT: D M Lisulo

Instructed by the Prosecutor-General

ATTORNEY-GENERAL: A P Van Wyk, SC (assisted by N
Kandovazu)

Instructed by Government Attorney