



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

11/5/15

CASE NO. A758/2014

(1)	REPORTABLE: YES ☒ NO
(2)	OF INTEREST TO OTHER JUDGES: YES ☒ NO
(3)	REVISED: YES ☒ NO
<u>11 May 2015</u>	
DATE	<u><i>Fourday o.b.</i></u> SIGNATURE

In the matter between:

PHILLIP TIVANE

Appellant

and

THE STATE

Respondent

JUDGEMENT

DE VOS J:

[1] On the 29th August 2013 the Appellant was convicted at Sebokeng Regional Court by the Learned Magistrate Mrs T E Simpson on the following charges:

- 1.1 Count 1, Robbery;
- 1.2 Count 2, Rape;
- 1.3 Count 3, Robbery with aggravating circumstances; and
- 1.4 Count 4, Rape.

The Act on Minimum Sentences is applicable on Counts 2, 3 and 4 as set out in the charge sheet. The Sexual Offences Act is applicable on Counts 2 and 4.

[2] On the 2nd October 2013 the Appellant was sentenced as follows:

- 2.1 On Count 1: 8 (eight) years imprisonment;
- 2.2 On Count 2: 10 (ten) years imprisonment;
- 2.3 On Count 3: 15 (fifteen) years imprisonment; and
- 2.4 On Count 4: 20 (twenty) years imprisonment.

The sentence on Count 1 was ordered to run concurrently with the sentence on Count 3, and the sentence on Count 2 was ordered to run concurrently with the sentence imposed on Count 4. The effective sentence is 35 (thirty five) years imprisonment. The Appellant was also declared unfit to possess a firearm.

[3] On the 15th October 2013 the Appellant applied for leave to appeal against both his conviction and the sentence imposed. Leave to appeal against the conviction was refused, but leave was granted to appeal against the sentence.

[4] The Appellant was legally represented throughout the trial and before us a legal representative employed by Legal Aid South Africa appears on his behalf.

[5] The Appellant's personal and mitigating circumstances were placed on record as follows:

- 5.1 He was 33 years old;
- 5.2 He is married;
- 5.3 He has three minor children;
- 5.4 He never went to school;
- 5.5 He owned a hair salon;
- 5.6 The cell phone on Count 1 has been recovered;
- 5.7 He has spent about two years and four months in custody awaiting trial;

5.8 He was supporting his family in South Africa and Mozambique; and

5.9 He is a first offender.

[6] Before dealing with the merits of the appeal, I keep in mind that the decision as to what an appropriate punishment would be is pre-eminently a matter for the discretion of the trial court. The court hearing the appeal should therefore be careful not to erode that discretion and would be justified to interfere if the trial court's discretion was not judicially and properly exercised, which will be the case "*if the sentence that was imposed is vitiated by irregularity or misdirection or is disturbingly inappropriate*". See **S v Rabie, 1975(4) SA 855 (A)** at p857 d – f.

[7] The court a quo found that there are substantial and compelling circumstances to deviate from the prescribed minimum sentences. Counsel on behalf of the Appellant contends that the court a quo has misdirected itself in not deviating from the prescribed minimum sentences on Counts 2 and 3. The minimum sentence on Count 2 is 10 (ten) years imprisonment and on Count 3 is 15 (fifteen) years imprisonment. The court a quo has imposed the minimum sentences on both counts. It is further contended on behalf of the Appellant that the sentences imposed evokes a sense of shock and is despairingly disproportionate. It is submitted that the sentence should be set aside and be replaced with a suitable sentence.

[8] On behalf of the Appellant it is argued that the trial court misdirected itself in imposing an effective sentence of 35 years imprisonment. It is contended that the trial court erred in over-emphasising the seriousness of the offences which the Appellant has committed and the interest of the society, whilst the personal

circumstances of the Appellant were under-emphasised. By imposing such a lengthy period of imprisonment the trial court erred as the sentence is harsh and induces as sense of shock. See in this regard **S v Khumalo, 1973(3) SA 697 (A)** where the Appeal court held that the punishment must fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances. In the present case the court a quo ordered the sentence imposed on Count 1 to run concurrently with the sentence imposed on Count 3, and the sentence on Count 2 to run concurrently with the sentence on Count 4. It is contended that the court a quo failed to seek an appropriate sentence for all offences taken together. See in this regard **S v Moswathupa, 2012(1) SACR 259 (SCA)** where it was held that "*when dealing with multiple offences a court must not lose sight of the fact that the aggregate penalty must not be unduly severe*". It is submitted that the court a quo further disregarded the fact that the Appellant has already spent some time in jail whilst awaiting the finalisation of the matter against him.

[9] The State contends that the trial Magistrate took all the relevant aspects into consideration when considering an appropriate sentence, as the offences are serious. It is further contended that the Magistrate also took into consideration the cumulative effect of the sentences and therefore ordered the sentences imposed on Counts 1 and 3 and also Counts 2 and 4 to run concurrently.

[10] The court a quo found in its judgement that substantial and compelling circumstances do exist in the present matter. The court also took into account that the Appellant was awaiting trial for two years and four months before finalisation of the case. It is the Appellant's contention that once a finding of the existence of

substantial and compelling circumstances is made, a court should impose a lesser sentence than the prescribed minimum sentence. I do not agree with this submission. A court is entitled to impose a higher sentence than the prescribed minimum sentence even if there exists compelling and substantial circumstances, depending on the facts of each matter. The Magistrate gave a well-reasoned judgement on sentence. He carefully weighed up the mitigating circumstances as referred to above, as well as the aggravating circumstances against each other. For record purposes, the aggravating circumstances are:

- 10.1 All four charges involve violent and serious crimes;
- 10.2 On the rape charge referred to in Count 2, the complainant was only 17 years old at the time and she was also a virgin. The Appellant took away something that was supposed to be lovely and precious and she was supposed to have loving memories of her first sexual experience. The Appellant changed it into something very ugly and severely traumatised the victim;
- 10.3 On the second rape charge referred to in Count 4, the complainant was 22 years old at the time and she was 4 months pregnant. She was gang-raped by the Appellant and his two friends;
- 10.4 The complainant on Count 4 was taken away by force and at gunpoint and even after she told her assailants that she was pregnant, they decided to proceed with their terrible deeds. The Appellant and his co-assailants did not care and were cruel;
- 10.5 Both of the complainants were mentally and emotionally traumatised;
- 10.6 Both complainants in the rape charges suffered vaginal injuries.

10.7 The Appellant was the gang leader when the complainant on Count 4 was raped, and he threatened the complainant with a gun which was in his possession.

To this may be added that the Appellant showed no remorse, deliberately lied to the court, is a Mozambiquan citizen who was allowed to make a living in South Africa, ignoring the basic rights and dignity of South African women living a clean and healthy life. In my view the Magistrate did not misdirect himself and the sentences imposed, cumulatively spoken, do not induce a sense of shock. In the case of **S v Mafoho, 2013(2) SACR 179 (SCA)** the Supreme Court of Appeal upheld a Methuselah effective sentence, emanating from the Regional Court, Polokwane, of 275 years. The SCA held in paragraph 21:

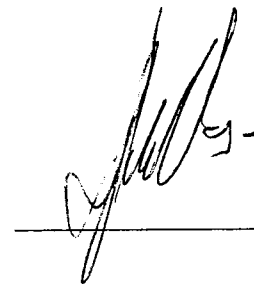
"The Appellant is entitled to be considered for parole once he has served 25 (twenty five) years of his term of imprisonment. There is accordingly no need to interfere with the sentence imposed in order to ameliorate its effect... To interfere with it would, in the circumstances of this case, be purely academic because, as I have already indicated, the legislature has stepped in to ameliorate the position of the person subjected to that sentence by directing that he or she will be considered for parole once 25 years of the sentence has been served".

In practice, whether one has received one or twenty terms of life imprisonment, effectively, it will be regarded by the relevant authorities as only one sentence of life imprisonment. This is more specifically set out in section 73(6)(a) of the Correctional Services Act, Act 111 of 1998, which provides that when the sentencing court makes no order regarding parole, the non-parole period is usually half of the sentence; but, parole must in all cases (regardless of whether the relevant prisoner is serving individual sentences or cumulative sentences) be considered after the expiry of 25 years. The Mafoho decision overturned earlier decisions of the SCA where it was held that a sentencing court should not consider

the possibility of release on parole when determining an appropriate sentence. Before the Mafoho decision, parole was considered to be a function of the executive arm of government and it was held that courts should not likely interfere with a sentence based on when a prisoner will qualify for parole. It appears from the Mafoho decision that this principle is no longer applicable. See in this regard **S v Botha, 2006(2) SACR 110 (SCA)** at paragraphs 25(/26), see also **S v Madlala, 2003(1) SACR 80 (SCA)**.

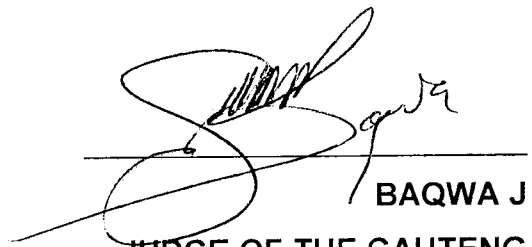
[11] The Magistrate, in my view, properly exercised his discretion when considering a proper sentence to be imposed, did not misdirect himself and imposed a sentence which is appropriate to the facts of the case and does not induce a sense of shock.

[12] I therefore propose that the appeal against the sentence be dismissed.



DE VOS J
JUDGE OF THE GAUTENG
DIVISION OF THE HIGH COURT

I agree.



BAQWA J
JUDGE OF THE GAUTENG
DIVISION OF THE HIGH COURT

It is so ordered.