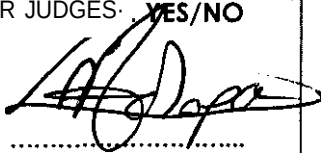


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<u>25 June 2015</u>	
DATE	SIGNATURE

APPEAL NO: A830/2014

In the matter between:

26/6/2015

THABO PETROS MPHITHI

APPELLANT

and

THE STATE

RESPONDENT

J U D G M E N T

MOLOPA-SETHOSA J:

[1] The appellant was arraigned in the Circuit Local Division of the High Court, held at Delmas on the following charges:

[1.1] Count 1: Murder, read with the provisions of s 51 (1) of Act 105 of 1997 (the Act);

[1.2] Count 2: Robbery with aggravating circumstances;

[1.3] Count 3: Robbery with aggravating circumstances; and

[1.4] Count 4: Rape in contravention of s 3 of Act 32 of 2007.

[2] The charges arose from an incident which occurred on the night of 28 April 2008, in an open field, at Riverside, Kwa-Thema, and during which the deceased was accosted by the appellant and his friends, robbed of her takkies and stabbed to death in an attempt to rape her.

[3] The appellant appeared in the court *a quo* as accused 4. On 12 February 2009 the appellant pleaded guilty on counts 1 and 2 and on count 4 he pleaded guilty to abetting as an accomplice to an attempt to rape (a lesser offence to count 4). The State withdrew count 3 and accepted the plea of the appellant. The appellant was convicted as pleaded. The trial of the other accused, who had all pleaded not guilty on all counts, was separated from that of the appellant, and postponed *sine die*.

[4] In his plea statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 which was handed in, the appellant describes his role and participation in the offences he was convicted of, as follows:

Count]

9.1 On 28 April 2008 at Kwathema(sic) I killed E. I. S.(the deceased) by stabbing her several times with a knife.

9.3 *I admit that she died as of stab wounds to the abdomen.*

9.4 *I admit that I knew what I did was wrong and when I stabbed the deceased she could die as a result thereof*

Count 2

9.5 *I admit that I was threatening the deceased with a knife and holding her while she was searched and her takkies were taken by accused 3 Themba Mvubu.*

9.6 *I admit that I had no right to threaten the deceased while her takkies were taken from her.*

9.7 *I admit that the deceased was the rightful owner of the takkies that were taken from her by Themba Mvubu.*

9.8 *I admit that I wanted to rob the deceased together with my co-accused and that is the reason why I threatened her with the knife.*

Count 4

9.9 *I admit that on 28 April 2008 accused 2 Johannes Mahlangu tried to insert his penis in the vagina of the deceased without her consent.*

9.10 *I admit that while Johannes Mahlangu was trying to insert his penis into the vagina of the deceased I was holding her legs.*

9.11 *I admit that at the time when Johannes Mahlangu tried to insert his penis in the vagina of the deceased, I knew that it was wrong to help someone while he is trying to insert his penis into the vagina of a woman without her consent.*

10

10.1 *I was drinking at Noge Tavern during the evening of 27 April 2008 when Khumbulani Magagula, Johannes Mahlangu and Themba Mvubu (accused 1, 2 and 3) arrived. I had already had 4 beers when they arrived at about 22:00 and I continued to drink with them until about 01:00 the next morning of 28 April 2008 when I left the tavern in the company of my co-accused.*

10.2 *I was drinking Black Label quarts and although I was under the influence of alcohol, I was aware of what was happening around me, aware of my own actions and I can still remember what happened.*

10.3 I was friends with Themba Mvubu but not with accused 1 and 2 and I got to know them through Themba Mvubu.

10.4 I did not know the deceased before her death.

10.5 We came across the deceased and her friends on our way home and our intention was to rob.

10.6 Khumbulani Magagula suggested that the deceased must be raped because we did not find any money in her possession. Everybody else agreed and she was pulled to the grass.

10.7 While Johannes Mahlangu was trying to insert his penis in the vagina of the deceased, Themba Mvubu and Khumbulani were holding her arms.

10.8 After Johannes Mahlangu tried to rape the deceased, she recognised Themba Mvubu.

10.9 Themba Mvubu gave me the knife when we started searching the deceased and I still had it when the deceased recognised Themba Mvubu.

10.10 Themba Mvubu confirmed that the deceased knew him and that we are all going to be arrested and that I must do something. I panicked because I did not want to be arrested and I stabbed the deceased.

10.11 Khumbulani Magagula kicked the deceased into a nearby stream after I stabbed her and we left.

11

11.1 I reported at the police station later on 28 April 2008 after I heard that the police were looking for me and I gave them the knife that I still had.

11.2 I decided to plead guilty because I am ashamed about what I did and my conscience is bothering me. I want to take responsibility for my actions.

11.3 I have already through my legal representative informed the prosecution that I am prepared to give my co-operation and to testify; in any further proceedings that they intend instituting in connection with the death and the surrounding circumstances after my conviction and sentence. "

[7] From the above it appears that the appellant threatened the deceased with a knife while she was robbed of her takkies by a co-accused. He was also

holding the legs of the deceased while a co-accused tried to insert his penis into the private part of the deceased. He stabbed the deceased several times with a knife and caused her death.

[8] On the 13th of February 2009 the appellant was sentenced as follows:

[10.1] Count 1: 18 years' imprisonment;

[10.2] Count 2: 15 years' imprisonment;

[10.3] Count 4: 9 years' imprisonment;

[10.4] the court *a quo* further ordered that 10 years of the sentence in respect of count 2 shall run concurrently with the sentence in respect of count 1; and

[10.5] the court *a quo* further ordered that:

"in respect of the sentence of 9 years, relating to count 4, the period the accused has been in custody from 28th April up to 13th February 2009, shall be deducted toward the determination of the period he must serve, after taking into consideration the credits and remission granted to him. "The effective sentence is thus 32 years imprisonment.

[11] On the 9 April 2014 the appellant applied for and was granted leave to appeal against sentence to this court.

[12] The appellant admitted the following previous convictions:

[12.1] 26 March 2003- assault with the intent to do grievous bodily harm; he was sentenced to 12 months imprisonment, wholly suspended for a period of 5 years on condition that he is not found guilty of assault where direct imprisonment is

imposed without a fine or assault with intent to do grievous bodily harm committed during the period of suspension;

[12.2] 26 March 2003-Theft; he sentenced to 6 months imprisonment, wholly suspended for a period of 5 years on condition that he is not found guilty of theft or attempted theft committed during the period of suspension.

[13] The appellant testified in mitigation of sentence. The personal circumstances of the appellant were:

- 1) He was born on the [...] and [...] years old when the offences were committed;
- 2) He attended school up to standard 9;
- 3) At the time of his arrest he was self-employed selling fruit and vegetables at a stall earning an income of approximately R400 to R500 per week;
- 4) He further earned an income of R250 a fortnight from temporary employment at World Market in Springs, where he weighed fruits and vegetables sold at the market.
- 5) He is single;
- 6) He has one child aged [.....];
- 7) His child resided with the child's mother;

8) He contributed to his household and also maintained his child;

9) His mother has passed away, his father is still alive;

10) He a brother and 4 sisters;

11) He testified that he was remorseful for his actions;

12) He asked the family of the deceased for forgiveness.

[14] By agreement between the parties, the State handed in the following exhibits in aggravation of sentence:

14.1 A photo album of the scene of the crime (Exhibit "B")

14.2 A copy of the photo album of the *post mortem* (Exhibit "C")

14.3 The *post mortem* report of the deceased (Exhibit "D"). The cause of death is indicated as "stab wounds abdomen (transected aorta)"

[15] The state also called the following witnesses in aggravation of sentence:

[15.1] Dr G.J. Du Preez:

He testified that he was a medical practitioner and that he conducted the *post mortem* examination on the body of the deceased. He found eight (8) stab wounds in total on the deceased's body, including two (2) fatal wounds on the abdomen. That one of the abdominal wounds penetrated the intestines as well as the abdominal aorta, cutting the main blood vessel that took blood from the heart to the abdomen and the legs. He further testified that the deceased was a *virgo intata*, i.e. that she had never had intercourse before and was also not

sexually penetrated on the day of the incident; there was no tear to her hymen and no remains of semen. She had an injury on the genitalia that was an indication of blunt trauma to the skin on the genitalia. He testified that the cause of death was severe intra-abdominal haemorrhage. Under cross examination he stated that the stabbing of the deceased was a frenzied attack.

[15.2] Mally Elizabeth Simelane:

She testified that she was the deceased's mother. She further testified that the deceased was a former soccer player for Banyana Banyana, the South African national women's soccer team; and she was an internationally qualified soccer referee. She testified that the deceased helped HIV positive people, was the coordinator of an HIV positive group and sponsored some children who were coming from disadvantaged backgrounds. The deceased was taking care of her family. She and the deceased's father were both pensioners. She/deceased liked getting involved in sporting activities and was loved by her community.

[16] Counsel for the appellant in the court *a quo* argued that the following factors, cumulatively considered, amounted to substantial and compelling circumstances justifying the imposition of a sentence less than the prescribed minimum of life imprisonment:

- 1) The appellant was still relatively young;
- 2) The appellant showed good prospects of rehabilitation;
- 3) The appellant showed remorse by pleading guilty;
- 4) The appellant was prepared to assist the State with any further prosecution of the other accused involved in the matter;
- 5) In the appellant's plea explanation he did not shift the blame;
- 6) The appellant is taking responsibility of his actions;

- 7) The incident was not planned;
- 8) He was drinking prior to the incident;
- 9) The appellant stabbed the deceased in a fit of panic.

- [17] The Court *a quo* found substantial and compelling circumstances mainly in the appellant's age, his intoxication during the commission of the offences, his level of education and that he committed the murder when he panicked, and thus deviated from the minimum sentence of life imprisonment in respect of count 1.
- [18] The appellant in essence appeals against the severity of the sentence and contends that the court *a quo* failed to properly take the factors set out in para [17] above into account and that the cumulative effect of the sentences is too harsh.
- [19] The appellant contends that the failure by the court *a quo* to properly take the above factors into account resulted in a cumulative sentence of inappropriate length. Counsel for the appellant submitted that the court *a quo* ought to have ordered a portion of the sentence in respect of count 4 to run concurrently with the sentences in respect of counts 1 and 2.
- [20] The appellant further raised a point *in limine* in respect of the reduction ordered as part of count 4 the wording of which is confusing as it is impossible on a reading thereof to determine exactly what period of to be deducted.
- [21] The appellant had been in custody awaiting trial for almost 10 months. Counsel correctly submitted that when taking into account the wording of the order, the period of almost 10 months must be deducted which could

have been achieved by the imposition of 8 years' instead of 9 years' imprisonment.

[22] I agree that the second part of the court order in respect of the sentence in count 4 indeed creates confusion, and that the simplest way is to just impose a determinate sentence, deducting the period the appellant spent in custody awaiting trial, which is almost one (1) year.

[23] Counsel for the respondent, on the other hand, submitted that the sentence was in order; that the court *a quo* considered sentence in a balanced manner and that it cannot be said that the court *a quo* committed any irregularity or misdirection.

[24] Counsel however conceded that a correction should be made by this court to the reduction portion to count 4.

[25] The imposition of a sentence is pre-eminently within the discretion of the sentencing court. It is trite that a court of appeal does not lightly interfere with a sentence imposed by the court of first instance (see *R v Lindley* 1957 (2) SA 235 (N)). A court of appeal will interfere with the sentence only if there is a material misdirection or if the court could not, in the circumstances of the case, reasonably have imposed the particular sentence. In *S v Salzwedel* 1999 (2) SACR 586 (SCA) 591F-G it was held:

"A court of appeal was entitled to interfere with a sentence imposed by a trial court in a case where the sentence is 'disturbingly inappropriate', or totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparate, or vitiated by misdirections of a nature which shows that the trial court did not exercise its discretion reasonably."

[26] The general approach to be followed by a court of appeal with regards to sentence, is set out as follows in *Sv Pieters* 1987 (3) SA 717 (A) 727:

"Met betrekking tot appelle teen vonnis in die algemeen is daar herhaaldelik in talle uitsprake van hierdie Hof beklemtoon dat vonnis-oplegging berus by die diskresie van die Verhoorregter. Juis omdat dit so is, kan en sal hierdie Hof nie ingryp en die vonnis van 'n Verhoorregter verander nie, tensy dit blyk dat hy die diskresie wat aan hom toevertrou is nie op 'n behoorlike of redelike wyse uitgeoefen het nie. Om dit andersom te stel: daar is ruimte vir hierdie Hof om 'n Verhoorregter se vonnis te verander alleenlik as dit blyk dat hy sy diskresie op 'n onbehoorlike of onredelike wyse uitgeoefen het. Dit is die grondbeginsel wat alle appelle teen vonnis beheers. "

[27] In the *Sv Pillay* 1977 (4) SA 531 (A) 535 E-G, the court held:

"....the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably. "

[28] In terms of section 51(I) read with Part I of Schedule 2 of Act 105 of 1997, the applicable minimum sentence for the murder (count 1) was life imprisonment, because the death of the deceased was caused during a robbery with aggravating circumstances. A minimum sentence of 15 years' imprisonment was also applicable to count 2 (robbery with aggravating circumstances).

[29] As I have already mentioned, the court *a quo* found substantial and compelling circumstances mainly in the appellant's age, his intoxication during the commission of the offences, his level of education and that he committed the murder when he panicked.

[30] In *S v Matyityi* 2011 (1) SACR 40 (SCA), approximately nine years after *S v Malgas*, the Court noted that criminality is still on the rise in our country, despite the imposition of minimum sentences, and has again stressed the relevance of the legislation (para [23].

[31] In *Sv Makatu* 2014 (2) SACR 539 (SCA) para [30] the Court remarked:

"For some time now this country has witnessed an ever increasing wave of crimes and violence, notably murder and sexual offences. Undoubtedly, these crimes seriously threaten the social and moral fabric of our society. As a result our society is seriously fractured. The majority of our people, particularly the vulnerable and the defenceless, which include women, children, the elderly and infirm, live in constant fear. It is no exaggeration to say that every woman or girl in this country is a potential victim of either murder or rape..... "

and also (para [31]):

"....., despite all these valiant efforts by government, we are not winning the war against these crimes. "

[32] Taking into consideration all the circumstances of this case, it cannot in my view, be said that the effective sentence is shockingly inappropriate.

[33] Evidently sentencing in this matter must attach due weight to the gravity of the crimes for which the appellant was been convicted. The seriousness of the crimes must weigh heavily in deciding upon appropriate sentences. The trial court was fully aware thereof and imposed a sentence of appropriate severity, but in favour of the appellant, found substantial and compelling circumstances to exist and did not impose life imprisonment in respect of count 1. 10 years of the sentence in count 2 was ordered to run concurrently with the sentence in count 1.

[34] The question is whether the court *a quo* properly considered the concurrency of the sentences and whether the cumulative sentence is shockingly inappropriate. I cannot find on the facts before this court that the cumulative sentence is shockingly inappropriate or that the learned judge committed any misdirection.

[35] The effective sentence is tempered by the fact that a sentence of life imprisonment was not imposed as prescribed minimum sentence on the charge of murder (count 1); a substantial period of imprisonment [10 years] on the charge of robbery with aggravating circumstances (count 2) was ordered to run concurrently with the sentence on count 1; the appellant will in addition serve a shorter term of imprisonment as the term he was in prison awaiting trial will be deducted in the sentence this court proposes to impose on count 4. No doubt the offence perpetrated on the deceased was a fortuitous, brutal, senseless attack on a defenceless woman that shocked the deceased's family, the sporting fraternity and the community at large. Violence against women remains rife and prevalent and has become pervasive and endemic, and sentencing in such matters must reflect the gravity of the crime, for society not to lose confidence in the criminal justice system. In *The Director of Public Prosecutions v*

Mngoma 2010 (1) SACR 427 (SCA) 432, para [14], the following is stated:

"a failure by our courts to impose appropriate sentences, in particular for violent crimes by men against women, would lead to society losing its confidence in the criminal justice system. "

[36] Having considered the arguments advanced in this court I am satisfied that the sentences imposed duly reflect the gravity of the crimes and that the sentences are appropriate and proportionate taking into account the prevalence of violence on women and the vulnerable in South Africa (cf *S v Roberts* 2000 (2) SACR 522 (SCA)).

[37] Society cries out for protection against all types of criminals who should not be sent to prison today to return tomorrow showing bold and daring faces as heroes of crime in a community that shuns crime. The convicted offenders must do their stint in prison for all serious crimes (as the ones here) so that when they return they must respect the right to life, property and dignity and all other rights of the citizens of this country, including the rights of women and children.

[38] In my view, interference with the sentence and a further reduction of the effective term of imprisonment will disregard the seriousness of the offence, the interests of the society and the other objectives of sentence and will over-emphasize the personal interests of the appellant.

[39] The courts are there to protect the society by imposing appropriate sentences and send a clear message that there is no room for criminals in

our society. This also enhances the confidence of the public in the judicial system.

[40] Taking into consideration all factors, the effective sentence is appropriate. The appeal against sentence accordingly falls to be dismissed, save that the period of 9 years' imprisonment on count 4 will be substituted with a period of 8 years' of imprisonment. The effective sentence is thus 31 years' imprisonment.

[41] In the result the following order is made:

1. The appeal against the sentence on count 4 is upheld only insofar as the period of 9 years' imprisonment is replaced with a period of 8 years' imprisonment.
2. The appeal against the sentences on counts 1 and 2 is dismissed.

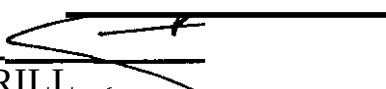
The effective sentence is thus 31 years' imprisonment.


L.M. MOLOPA SETHOSA
JUDGE OF THE HIGH COURT

I agree and it is so ordered.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.


SPOTTERILL
JUDGE OF THE HIGH COURT

COUNSEL FOR APPELLANT
COUNSEL FOR RESPONDENT

LA VAN WYK
GCJMARITZ

DATE OF HEARING
DATE OF JUDGMENT

12 JUNE 2015
26 JUNE 2015