REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) NOT REPORTABLE
(2) NOT OF INTEREST TO OTHER JUDGES
(3) NOT REVISED

CASE NO: A61/2017

In the matter between:

MMUSE MAHLO Appellant

and

THE STATE Respondent

JUDGMENT

MOKOSE J

[1] The appellant had been tried in the Regional Court sitting at Sebokeng of the following charges:

(i) Count 1 - Housebreaking with intent to commit theft;

(ii) Count 2 - robbery with aggravating circumstances read with the provisions of Section 51 and 53 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended by Act 38 of 2007;

(iii) Count 3 - rape in contravention of Section 3 read with Section 1, 56(1), 57,58 , 59 , 60 and 61 of the Sexual Offences Act 32 of 2007 read with Section 92(2), 94, 256, 257 and 281 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997.

[2] The appellant, who was legally represented, was convicted and sentenced as follows :

(i) Count 1 - three (3) years imprisonment;
(ii) Count 2 - fifteen (15) years imprisonment;
(iii) Count 3 - ten (10) imprisonment. The Magistrate ordered that the sentence in respect of Count 1 run concurrently with the other sentences making the appellant serve an effective twenty-five (25) years imprisonment.

[3] Leave to appeal on sentence in respect of Counts 2 and 3 was granted by the Regional Court.

[4] The charges arise from an incident which occurred on 20 November 2014 when the complainant, Ms M M testified that she and her two children were sleeping at their home when she was woken by people who invaded her home having gained entry through the bedroom window. She was pointed with a firearm and robbed of several items from her tuckshop. She was also raped by the appellant who was wielding a firearm.

[5] After the complainant had given her evidence, the appellant's legal representative opted not to challenge the complainant's version and indicated that the appellant wished to make formal admissions in terms of Sections 220 of Act 51 of 1977 pertaining to the elements of all the charges as alleged in the charge sheet.

[6] The appellant appeals the sentence on the ground that the court misdirected itself in finding that there are no substantial and compelling circumstances to deviate from the minimum sentences. The appellant submitted further that the effective sentence of twenty-five (25) years is shockingly inappropriate and induces a sense of shock.

[7] It is trite law that sentence is pre-eminently at the discretion of the trial court. The court of appeal may interfere with the sentencing discretion of the trial court if such discretion had not been judicially exercised. The test which has been enunciated in numerous cases is whether the sentence imposed by the trial court is shockingly inappropriate or was violated by

misdirection. The trial court considers for the purposes of sentence, the following:

(i) The seriousness of the case;
(ii) The personal circumstances of the Appellant;
(iii) The interests of society.

[8] The provisions of Section 51(1) of Act 105 read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 51 of 1977 were explained to the Appellant prior to him pleading to the charges. The section states that an offender shall be sentenced to imprisonment as per the minimum sentence unless there are compelling and substantial reasons to deviate from the prescribed minimum sentence. The specified sentences are not to be departed from for flimsy reasons and must be respected at all times.
S v Matyityi 2011 (1) SACR 40 (SCA) at 53 E-F

[9] There is no definition of what constitutes compelling and substantial reasons. The court must consider all the facts of the case in determining whether compelling and substantial circumstances exist. The overall guiding principle is that the sentence must befit the crime. The approach was followed by the court in the matter of **S v Rabie 1975 (4) SA 855 at 862 G - H** where Holmes JA said:

"Punishment should fit the criminal as well as the crime, and be fair to society, and be blended with a measure of mercy according to the circumstances."

[10] In mitigation of sentence, the Magistrate considered the following circumstances of the appellant:

(i) that the appellant was a thirty-two (32) year old unmarried man with two children aged eight (8) and five (5) years;

(ii) the appellant who had attended school until Grade 6 was unemployed at the time of the commission of the crime;

(iii) he had been in custody for two (2) years and was a first offender.

[11] In aggravation of sentence, the following circumstances were considered:

(i) the appellant had broken into the complainant's house in violation of her right to privacy;

(ii) the complainant had to endure the humiliation of having to ask her children to go to another room to allow the appellant to rape her out of sight of her children;

(iii) rape by its nature is an invasion of the complainant's right to sexuality and dignity.

[12] In argument, Counsel for the appellant argued that the court a quo failed to take into account the fact that the appellant had owned up to the crimes and as such, took responsibility for the crimes he had committed. She argues further that this in itself prevented the cross-examination of the complainant and showed remorse for crime committed. She argued that this shows that he is a person who can be rehabilitated.

[13] Counsel for the respondent was of the view that the court had shown leniency in sentencing the appellant. She brought it to the court's attention that the appellant had been refused bail on the ground, *inter alia,* that he was a Lesotho national who was illegally in the country. He had also been charged on other counts which had been withdrawn and even cautioned and discharged in respect of another robbery charge. She argued that the court had a duty to take a holistic view of the charges and sentences imposed.

[14] Poonan JA in the matter of **S v Matyityi 2011 (1) SA 40 (SCA) at para 19** said:

"There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct but that does not without more translate to genuine remorse. Remorse is a *gnawing pain of conscience for the plight of another. Thus, genuine contrition can only* come *from an appreciation and acknowledgement of the extent of one's error. Whether*

the offender is sincerely remorseful and not merely feeling sorry *for himself at having been caught is a factual question. It* is *the surrounding actions of the accused rather than what he* says *in court that one should look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens the genuineness of the contrition alleged to exist cannot be determined."*

[15] Given the seriousness of the crime as well as the mitigating and aggravating circumstances which were taken Into consideration by the Magistrate in the court a quo, I am of the opinion that the Magistrate did not err in sentencing the Appellant. There were no substantial and compelling reasons to sentence the Appellant to a lesser sentence than that prescribed by the provisions of Section 51(1) of Act 105 read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 51 of 1977 nor is there any evidence of the discretion of the Magistrate having been incorrectly exercised.

ORDER

[17] In the premise . the following order is made:

The appeal against sentence is accordingly dismissed.

MOKOSE J

Judge of the High Court
of South Africa

Gauteng Division,
Pretoria

I agree and is so ordered

MABUSE J

Judge of the High Court

of South Africa

Gauteng Division,

Pretoria

For the Appellant:

Adv Me Moloi instructed by

Legal Aid South Africa
Pretoria

For the State:

Adv MM Maponya instructed by

The Office of the Director of Public Prosecutions
Pretoria

Date of hearing: 28 January 2019

Date of judgement: 31 January 2019