IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

4/12/2014 .....

DATE SIGNATURE

Case No. A176/2013

Date Heard: 02 December 2014

Date of judgment: 04 December 2014

In the matter between:

MZWAKE ISAAC MADONSELA Appellant

And

THE STATE Respondent

JUDGMENT

N.F DE JAGER, AJ:

[1] The appellant appeals, with leave to appeal granted by this division on petition, against the sentence imposed on him in the Regional Court for

the division of Mpumalanga, held at Ermelo, as one of three accused on the following counts:

[1.1] Count 1: robbery with aggravating circumstances, read together with the provisions of section 51(2) (a) of Act 105 of 1997 as amended;

[1.2] Count 2: rape;

[1.3] Count 3: unlawful possession of a firearm;

[1.4] Count 4: unlawful possession of ammunition.

[2] The count of rape was withdrawn by the prosecutor.

[3] In terms of count 1 it was alleged that on or about 29 November 2011 at Remhoogte Plaas, Davel, Mpumalanga, the appellant assaulted Pieter and Henrietta Botes, respectively 76 and 73 years of age, and there and then robbed them of a firearm, cash and jewellery, being the property of the said Botes couple.

[4] In terms of count 3 it was alleged that on or about 29 November 2011 the appellant was in unlawful possession of a firearm 0.22 Star semi-automatic pistol, in contravention of section 3 read together with section 1, 120(1) (a), 103, 117 and 121 read together with schedule 4 and section 151 of Act 60 of 2000 read together with section 250 of Act 51 of 1977.

[5] In terms of count 4 it was alleged that on or about 29 November 2011 and at Remhoogte Farm, Davel, Mpumalanga, the appellant was in unlawful possession of ammunition, to wit fourteen .22 rounds, in

contravention of section 90, read together with the legislation referred to in paragraph 4 above .

[6] The appellant prepared and submitted a plea in terms of section 112(2) of the Criminal Procedure Act, 51 of 1977, and pleaded guilty to counts 1, 3 and 4 as charged.

[7] The respondent accepted the plea.

[8] As a result the appellant was convicted as charged. The prosecution of the charges against accused 3 proceeded separately.

[9] The appellant included in his plea:

"... and I confirm that on the 20th November 2011 I did visit my co-accused 1 at his home and he was with accused 3 and accused 3 then requested us for assisting him with a revenge against his employer and further that on the 22nd of November 2011 accused 3 then took us to the complainant's farm and showed us the place and on the 29th of November 2011 we then proceeded and robbed the complainants and took their properties as mentioned in paragraph 2."

[10] The appellant in his plea also confirmed the version of his co-accused and admitted the wrongful and intentional assault of Pieter and Henrietta Botes and the robbery of the goods mentioned above.

[11] The Court a quo sentenced the appellant to 20 years imprisonment on count 1 pursuant to the provisions of section 51(2)(c) of Act 105 of 1997

and to 15 years on count 3 and warned and discharged the appellant on count 4.

[12] It was furthermore ordered that the aforesaid sentences shall not run concurrently.

[13] In addition, the Court a quo ordered that the appellant shall not be considered to be released on parole before having served two thirds of his sentence.

[14] The Court a quo also made an order under the guise of section 299A of Act 51 of 1977, apparently ordering the Commissioner of Correctional Services to contact the complainants and their children to make representations to the Parole Board if and when the appellant intends applying for parole.

[15] The appellant was also declared to be unfit to possess a firearm.

[16] The appellant had no previous convictions.

[17] A Court of appeal has limited right of interference in respect of sentences imposed by a lower Court.

[18] In this regard Holmes, JA remarked as follows in S v De Jager 1965 (2) SA 616 A at p629:

"It would not appear to be sufficiently recognized that a Court of Appeal does not have a general discretion to ameliorate the sentences of trial Courts. The matter is governed by principle. It is the trial Court which has the discretion, and a Court of Appeal cannot interfere unless the discretion was not judicially exercised, that

is to say unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable Court could have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock that is to say if there is a striking disparity between the sentence past and that which the Court of Appeal would have imposed. It should therefore be recognized that Appellate jurisdiction to interfere with punishment is not discretionary, but, on the contrary, is very limited."

[19] The approach to be followed by a Court of Appeal when considering an appeal against sentence was also stated in S v Pieters 1987 (3) SA 717 (A).[See also - S v Rabie 1975 (4) SA 855 A; and S v Pillay 1977 (4) SA 531 A at 535; and S v Kibido 1998 (2) SACR 214 SCA.]

[20] This Court therefore needs to determine whether the Court a quo exercised his discretion judicially when sentencing the appellant.

[21] Regarding sentencing in general, the Supreme Court of Appeal held as follows in S v SMM 2013 (2) SACR 292 SCA:

"It is also self-evident that sentence must always be individualized, for punishment must always fit the crime, the criminal and the circumstances of the case. It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all the relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that are involved in arriving at the appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society. Sentencing involves a very high degree of responsibility which should be carried out with equanimity."

[22] This Court has considered the Court a quo's judgment on sentence. Even though it may be argued that the Court a quo failed in considering and passing sentence in a dispassionate manner, it is clear that the Court a quo did consider the personal circumstances of the appellant, the crime and the interests of society. It would appear that the Court a quo might have over-emphasized the crime and the interests of society, to the expense of the person of the appellant, which clearly resonates in the severity of the sentence.

[23] The appellant is a young man presently 32 years of age with three young children. He was employed on a temporary basis. I accept that the children are being cared for by their mother and/or grandparents on a daily basis. If this was not the case, I have no doubt that it would have been conveyed to the Court a quo.

[24] On the appellant's own version set out in his plea, the perpetrated crimes were premeditated and planned over a period of approximately ten days. The crimes were committed on the instigation of accused 3 who persuaded the appellant and accused 1 to carry out a revenge attack and robbery on the Botes couple. The revenge-motive emanated from an incident where accused 3 was assaulted by the Botes couple's neighbour, for the reason that accused 3 allowed cattle belonging to the Botes to graze on the neighbour's farm. When accused 3 returned from hospital after the assault by the neighbour, Mr Botes dismissed accused 3.

[25] This situation prompted accused 3 to persuade the appellant and accused 1 to commit the crimes. It is relevant to note that the appellant and accused 1 had nothing to do with and had no interest in the incident of the alleged assault on accused 3, or with his subsequent dismissal.

[26] According to their pleas, the accused, including the appellant, resolved that the appellant and accused 1 would not require firearms in perpetrating the offences, seeing that the Botes couple were elderly people. I can only infer from this resolution, that the appellant and the other accused were satisfied that they would be able to immobilise the Botes by assaulting them physically. This was clearly contemplated from the start.

[27] It is disturbing to say the least, that the appellant would, on the mere request and whim of accused 3, be willing to execute an attack and rob the Botes in a manner such as the present, apparently in solidarity with accused 3, without having any personal interest in the circumstances which gave rise to accused 3's hunger for revenge. In my view the aforesaid are severely aggravating circumstances.

[28] The Court a quo also considered the fact that the appellant pleaded guilty to the charges as a mitigating factor.

[29] In S v Mashinini & Another 2012 (1) SACR 604 SCA at paragraph [24], the submission that the appellants' plea of guilty could indicate remorse, was rejected on the basis that the appellants had, on account of the evidence against them, no choice but to plead guilty. The appellants also did not verbalize any remorse.

[30] In this regard the *dictum* in S v Matyityi 2011 (1) SACR 40 SCA is relevant:

"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 simply feeling sorry for him or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in Court, that one should rather 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."

[31] I could find no facts or indication from the record, save for the bear guilty plea, that the appellant is remorseful, to the extent that it should be considered as a mitigating factor.

[32] The Court *a quo* then proceeded to receive evidence pertaining to the crime and its prevalence and from both the State and on behalf of the appellant, as contemplated in section 274 of Act 51 of 1977. The section allows the Court to receive such evidence "as it thinks fit". But the manner, in which such evidence is received, must be fair.
[See S v Mbhele 2008 (1) SACR 123 N.]

[33] Strictly speaking, facts in mitigation or aggravation of sentence should be placed before Court by way of evidence given under oath. Facts may also be placed before Court in mitigation or aggravation of sentence from the bar by the two representatives of the State and the defence. [S v Hlangothe en 'n Ander 1979 (4) SA 199 B at 200 – 201.] This right comprises only of the right to address the Court on the matter of sentence as well as the evidence received by the Court regarding sentence. It does not include the right to place facts before the Court regarding sentence,

from the bar. It also does not comprise the right to make statements from the bar or give evidence from the bar.

[34] Generally speaking the rules of evidence are applicable to evidence received pursuant to section 274. Where it is necessary in order to come to a suitable sentence, the rules of evidence may be applied more liberally. There are occasions that the hearsay rule may be relaxed during the stage of sentence. (S v Gqabi 1964 (1) SA 261 TB.) Where the other party does not object such as in the present case, the Court a quo will be in a position to apply the rules of evidence more liberally. (S v Van der Merwe & Others 2011 (2) SACR 509 FB).

[35] It is, however, so that the Court a quo erred in admitting the hearsay evidence without reservation, in weighing the seriousness of the crime as well as the interests of the community.

[36] In my view, the impression is created that that information so gathered indeed enraged the Court a quo. It tainted his judgment and was probably the reason for the order that the sentences imposed should not run concurrently.

[37] On behalf of the appellant it is contended that the Court a quo overstepped the mark by allowing the prosecution to present hearsay evidence in aggravation of sentence, with specific reference to internet publications and statistics which were handed in as exhibits. Even though it was not objected to on behalf of the appellant, I agree that it constitutes an irregularity and should not have been taken into account for purposes of considering an appropriate sentence. This Court therefore ignores the hearsay evidence presented from the bar in the Court a quo.

[38] The respondent also presented the viva voce evidence of Mr Hendry Goodwin Geldenhuys, a local farmer and member of the Transvaal Agriculture Union. He inter alia testified about the prevalence and increase of crime in the Ermelo area. Mr Geldenhuys also presented statistics in relation to the prevalence of crime with reference to a publication called "Treurgrond" which is a recording of crime statistics in the absence of proper statistics being kept by the relevant authorities. These statistics are alarming.

[39] Mr Geldenhuys emphasized the devastating consequences crime has on the farming community and the socio-economic consequences brought about by it. His evidence was wholly uncontested.

[40] The evidence of the complainant, Mr Botes, was also admitted in the form of a statement read into the record. The gist of the evidence indicates that Mr Botes has ceased his farming activities as a result of the assault and devastating injuries he sustained during the attack.

[41] In considering the nature of the crime in relation to the interest of society, it would not be a revelation to state that crime against farming communities has taken on epidemic proportions. To perpetrate violent crime against old and vulnerable people is simply despicable and ought not to be tolerated in any civilized society. No doubt, a clear message should go out to such individuals contemplating to participate in such barbaric acts in future. In the present case the crimes were planned and perpetrated with a revenge motive. There is no room or justification for such motive and conduct in a constitutional democracy such as ours. The plague of violent crime infecting our rural communities, indeed has the

potential of destabilizing our democracy for which so many reasonable minded people have fought, without the desire to revenge the past.

[42] This Court having revisited the personal circumstances of the appellant, the nature of the crime, the interests of society and the relevant mitigating and aggravating circumstances in respect of the aforesaid, the appropriateness of the sentence imposed on the appellant should be considered.

[43] In terms of section 51(2) (a) (i) of the Criminal Law Amendment Act, 105 of 1997 ("the Amendment Act"), a minimum sentence of fifteen years imprisonment on count 1 is prescribed.

[44] Section 51(2) of the Amendment Act furthermore provides that the maximum term of imprisonment in regard to the offence under count 1 may not exceed the minimum term by more than five years. As I understand the provisions of section 51 of the Amendment Act, the Court a quo has discretion to increase the minimum sentence by up to five years, without the necessity to find or proclaim substantial and compelling circumstances for doing so. Substantial and compelling circumstances are only to be considered and recorded where a lesser sentence than the prescribed minimum, is imposed.

[45] Having regard to the circumstances referred to above, and being mindful of the limited power of interference of this Court of Appeal, I do not regard a sentence of twenty years imprisonment on count 1 to be shocking or disproportionate to the particular offence. [S v M 2007 (2) SASV 539 CC; See also in general S v Malgas 2001 (1) SACR 469 (SCA).]

[46] The minimum sentence on count 3 is fifteen years imprisonment [See S v Thembalethu 2009 (1) SACR 50 SCA]. The Court a quo therefore imposed the prescribed minimum sentence. There is no merit in interfering with that sentence imposed by the Court a quo.

[47] Whether the Court a quo misdirected itself by ordering that the sentences imposed shall not run concurrently remains to be decided.

[48] Section 280(2) of Act 51 of 1977 provides as follows:
"Such punishment, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the Court may direct, unless the Court directs that such sentences of imprisonment shall run concurrently."

[49] The Court is empowered to order that the sentences on more convictions, run concurrently so as to ensure that the cumulative effect of several sentences imposed in one trial, is not too severe in the light of the aggregate sentence, but at the same time does not underestimate the seriousness of the offence. [See S v Cele 1991 (2) SACR 246 (A) at 248 J and S v Maraisana 1992 (2) SACR 507 A at 511 G.]

[50] Clearly an effective imprisonment of thirty five years as imposed by the Court a quo is too severe and induces a sense of shock under the circumstances. I am of the opinion that such a sentence would be disproportionate to the crimes for which the appellant was convicted. In my view, the sentences imposed in respect of counts 1 and 3 should run concurrently.

[51] It is submitted on behalf of the appellant that the non-parole period imposed by the Court pursuant to the provisions of section 276B of Act 51 of 1977 is unwarranted and irregular having regard to the proceedings before the Court a quo.

[52] According to Hartle, J in S v Madolwana (ECG) (Case no. 436/12 unreported):

"A non-parole period is in effect a present determination that the convicted person being sentenced will not deserve being released on parole in the future, notwithstanding that the consideration of the suitability of a prisoner to be released on parole requires the assessment of facts relevant to his conduct after the imposition of sentence."

[53] Care must therefore be taken before such a determination is made, and a proper evidential basis is required.

[54] In S v Stander 2012 (1) SACR 537 SCA at paragraph 16, the Supreme Court of Appeal concluded that an order in terms of section 276B should only be made in exceptional circumstances, when there are facts before the sentencing Court that would continue, after sentence, to result in the negative outcome for any future decision about parole. [See also S v Pauls 2011 (2) SACR 417 ECG.]

[55] A proper judicial consideration of the issue concerning a non-parole period is required. This can only be made where the sentencing Court has the opportunity to receive submissions by the defence as well as the State. [See S v Pauls supra at 421 F – G].

[56] A Court that considers a non-parole period should therefore alert the parties to this fact and give them an opportunity to address it on at least whether such a non-parole period should be ordered and furthermore what period should be attached to such an order.

[57] In the Madolwana-matter referred to above, the trial Court's fixing of a non-parole period was set aside on appeal because the absence of submissions from the parties caused prejudice. The trial Court could not have considered the matter properly in the absence of submissions by the parties.

[58] The sentencing Court should also make a specific finding as regards the presence of exceptional circumstances which would justify fixing a non-parole period, and the Court should advance such reasons why it was found desirable to impose a non-parole period. [See S v Pauls supra at 422 E – F.]

[59] In the present matter the Court a quo clearly failed to exercise his discretion judicially in making such an order. Submissions were not made on behalf of the appellant or by the prosecution. The Court a quo made no finding as to the existence of exceptional circumstances, which would warrant such an order. The Court a quo's finding in this regard is therefore irregular and stands to be set aside.

[60] Lastly, it is this Court's finding that the Court a quo does not have the authority to order the Commissioner of Correctional Services to inform the complainants or their family of parole proceedings pertaining to the appellant. The provisions of section 299A of Act 51 of 1977 do not make provision for such an order. The Court is merely obliged to inform the complainant that the complainant has a right to make representations to

the Commissioner of Correctional Services when the prisoner is to be considered for parole. If the complainant intends to exercise that right, it is the complainant who is obliged to inform the Commissioner of Correctional Services of his / her intentions as provided for by the further provisions contained in section 299A.

[61] In the premises, this order also stands to be set aside.

[62] During argument, Ms Augustyn on behalf of the appellant eluded us to the fact that accused 1, John Siphon Nkosi, similarly pleaded guilty to counts 1, 3 and 4. Accused 1 was accordingly found guilty as charged. The same sentences were imposed on accused 1 as those imposed on the appellant.

[63] It was submitted that this Court is at liberty to interfere with the sentences imposed on accused 1, pursuant to the provisions of section 304(4) of Act 51 of 1977, even though accused 1 is not on appeal before us. For the reasons referred to in respect of the appellant, we are of the view that the sentences imposed on accused 1 were also not in accordance with justice. We therefore intend to exercise our discretional powers conferred in terms of the said section and to alter the terms of the sentences imposed on John Siphon Nkosi.

[64] The appeal is therefore upheld in part. In the result I would make the following order:

Order:

1. **The appeal against sentence is upheld. The sentences imposed on the appellant and on John Siphon Nkosi (accused 1) on counts 1, 3 and 4, are confirmed.**

2. **The sentence imposed on both the appellant and on John Siphon Nkosi on count 3 is ordered to run concurrently with the sentence on count 1.**

3. **The order made by the Court a quo pursuant to the provisions of section 276B of Act 51 of 1977 is hereby set aside in respect of both the appellant and John Siphon Nkosi.**

4. **The order made by the Court a quo pursuant to the provisions of section 299A of Act 51 of 1977 is hereby set aside in respect of both the appellant and John Siphon Nkosi.**

5. **The declaration that the appellant and John Siphon Nkosi are incompetent to possess a firearm, is confirmed.**

N.F. de Jager
Acting Judge of the High Court

I agree.

A.M.L. Phatudi
Judge of the High Court

On behalf of the Appellant:	Legal Aid South Africa FNB Building Church Square Pretoria Adv. L. Augustyn
On behalf of the Respondent:	DPP Church Square Pretoria Adv. P.C.B. Luyt