


**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

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(1)REPORTABLE: YES/NO	<input checked="" type="radio"/> NO
(2)OF INTEREST TO OTHERS JUDGES: YES/NO	<input checked="" type="radio"/> NO
(3)REVISED	<input checked="" type="checkbox"/>
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CASE NO. A1010/2013

In the appeal between:

**SIYAMKELISWE MBONANI**

**APPELLANT**

**and**

**THE STATE**

**RESPONDENT**

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**JUDGMENT**

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**BOTES AJ**

1. **INTRODUCTION**

1.1 This appeal comes before us with leave of the Court *a quo* (Ranchod J). The Court *a quo* granted leave to the Appellant to appeal against the sentence which was imposed by it on 13 September 2011. Leave to appeal against the sentence was granted by the Court *a quo* on 6 August 2013.

1.2 The Appellant was the second accused in the Court *a quo* and he only appeals against the sentence which was imposed upon him, being life imprisonment in accordance with the provisions of Section 51(1) of the Criminal Law Amendment Act, No 105 of 1997.

2. **CONVICTIONS AND SENTENCE**

The Court *a quo* convicted both accused (the Appellant and his accomplice) on the following charges:

- 2.1 Count 1 - housebreaking with the intention to steal and theft;
- 2.2 Count 2 - robbery with aggravating circumstances;
- 2.3 Count 3 - murder;
- 2.4 Count 5 - unlawful possession of firearms; and
- 2.5 Count 6 - unlawful possession of ammunition.

3. The Court *a quo* imposed the following sentence upon the Appellant:

- 3.1 Count 1 - 6 years imprisonment;
- 3.2 Count 2 - 15 years imprisonment;
- 3.3 Count 3 - life imprisonment;
- 3.4 Count 5 - 2 years imprisonment (taken together with count 6); and
- 3.5 Count 6 - 2 years imprisonment (taken together with count 5).

The sentences run concurrently with the life imprisonment imposed on count 3. The Appellant appeals these sentences.

4. We deem it prudent to canvas the convictions relating to counts 1 and 2 by the Court *a quo*. The Appellant was found guilty of housebreaking with the intent to steal and theft (count 1) as well as robbery with aggravated circumstances (count 2).

4.1 A charge of housebreaking with intent to steal and theft (count 1) together with a charge of robbery with aggravating circumstances (count 2) would in our view be technically ineffective, as the Criminal Law Amendment Act, No 105 of 1997, would apply differently to a charge of housebreaking with whatever further allegations may be made in the charge sheet.

- 4.2 It is thus highly relevant whether an accused is found guilty of robbery or murder and also of housebreaking with intent to steal and theft, when regard is had to the provisions of Section 51 of the Criminal Law Amendment Act, No 105 of 1997.
- 4.3 It would consequently be desirable that, because of the provisions of the Criminal Law Amendment Act, No 105 of 1997, charges be framed in such a manner in order to separate the allegations of housebreaking, with intent to steal and theft (or to commit an offence), from substantive charges such as robbery and all other charges where a minimum sentence is prescribed upon conviction.
- 4.4 It was therefore incompetent for the Court *a quo* to convict the Appellant on both counts 1 and 2. Once the Appellant was found guilty on robbery with aggravating circumstances, he could not have been found guilty on the charge of housebreaking with the intent to steal and theft (count 1). Wepener J pronounced on this issue as follows:

*"When the composite count of housebreaking with intent to rob and robbery is looked at objectively, the effect of such a conviction would be that an accused is effectively found guilty of both housebreaking with intent to rob, and of robbery, as the two charges were put as one, and because of a practice that developed over the years, that 'they are in practice charged and*

*punished as one offence'. I am consequently of the view that the minimum sentence prescribed for robbery would be applicable in this matter. Although charged as one offence, the sentence to be imposed on the accused is regulated by the minimum sentence prescribed for robbery, as he has been convicted of robbery.*

*I am, however, of the view that the better practice would be that an accused person should be separately charged with the offence of housebreaking with the intent to commit a crime, and the crime itself, for the reasons set out hereinabove. Should an accused be convicted of a number of offences, the cumulative effect of the sentences imposed is a factor that Courts have dealt with for many years and, no doubt, will continue to do."*

**See: S v Maswetswa 2014(1) SACR 288 GSJ at par 17 and 18 on page 294.**

- 4.5 The accumulative effect of the sentence imposed on the Appellant is of no concern insofar as the conviction on counts 1 and 2 is concerned. We agree with the approach adopted by Wepener J, *supra*, but we regarded it prudent and necessary to refer to the charges (specifically counts 1 and 2) on which the Appellant were convicted.

5. **THE FACTORS TO BE CONSIDERED AND TAKEN INTO ACCOUNT**

The Appellant was 19 years old at the time of the commission of the crimes that he was convicted of.

5.1 The Appellant was arrested on 10 July 2008 and the trial was finalized on 13 September 2011.

5.2 The Appellant was detained since 10 July 2008 and he has been in custody for longer than 3 years.

6. In our considered view the Court *a quo* should have considered the following factors:-

6.1 The Appellant was 19 years old when the crimes were committed. He was 23 years old when he was sentenced;

6.2 The Appellant was a first offender;

6.3 The Appellant was unemployed and attempted to earn an income from fixing bicycles;

6.4 The Appellant was not abusing any substances like drugs;

- 6.5 The Appellant dropped out of school in 2008 and did not complete Standard 8;
  - 6.6 The Appellant's social circumstances did not contribute to the crimes that he was convicted of;
  - 6.7 The Appellant can still be rehabilitated; and
  - 6.8 The Appellant allegedly verbalized his remorse to his mother.
7. It is trite that a Court of Appeal should not, and will not, interfere with an imposed sentence unless it is convinced that the sentence discretion has been exercised improperly or unreasonably, or where the sentence induced a sentence of shock or is startling inappropriate. See in this regard **State v Pieters 1987(3) SA 717 (A)**.
8. The sentence imposed upon the Appellant was clearly intended to "*break*" him and to leave him without any hope or the chance of being rehabilitated. He was only one year above the threshold of the age of majority when the crimes were committed.
- 8.1 The Appellant is now sharing the same stage in prison with offenders who were more matured than him when they committed the offences

which they were convicted of.

8.2 The Appellant will spent the rest of his youthful years behind bars as he may only be considered for parole at the age of 48.

9. The sentence (or punishment) imposed upon the Appellant should not have the result that he is removed from society for the rest of his life. A life term imprisonment imposed by the Court *a quo* on the Appellant will not serve the purpose of rehabilitating the Appellant. The public interest is not necessarily served by the imposing of very long sentences of imprisonment.
10. As far as deterrence is concerned, there is no reason to believe that the deterrent effect of prison sentence is always proportionate to its length.
11. The sentences imposed by the Court *a quo* in respect of counts 1, 2, 5 and 6 are in our considered view appropriate and should not be interfered with.



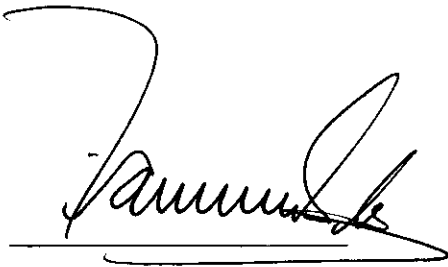
12. **ORDER**

In the premises we grant an order in the following terms:

1. The appeal pertaining to the sentence which was imposed on the Appellant (in respect of count 3, murder) is upheld and replaced with the following sentence:

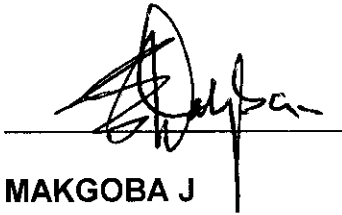
*"1.1 The accused is sentenced to imprisonment for a period of 20 years in respect of his conviction of count 3, murder. In terms of Section 282 of the Criminal Procedure Act, No 51 of 1977, this sentence is antedated to 13 September 2011.*

- 1.2 The sentences in respect of counts 1, 2, 5 and 6 are to run concurrently with the sentence of 20 years imprisonment in respect of count 3."*

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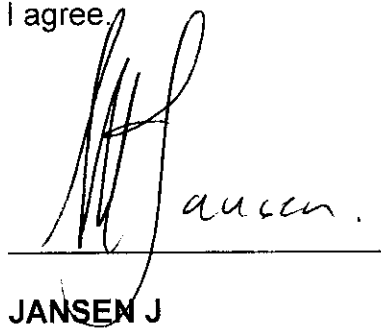
**F W BOTES AJ**

I agree.

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**MAKGOBA J**

I agree.

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**JANSEN J**