**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

**CASE NUMBER: A651/13**

**DATE: 26 AUGUST 2016**

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

26/8/16

In the matter between:

**AARON MORGAN MAHLANGU** Appellant

and

**THE STATE** Respondent

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**JUDGEMENT**

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**NKOSI: AJ SITTING WITH: MOLAHLEHI J**

**INTRODUCTION**

[1] The Appellant is an adult male person who was 37 years old at the time of his arrest. He was arrested on the 23 April 2003 and charged with the following offences:-

[a] Count 1: Housebreaking with intent to commit robbery and robbery with aggravating circumstances.

[b] Count 2: Rape

[c] Count 3: Theft of a motor vehicle.

[2] He pleaded not guilty to all three charges. The date when the trial commenced is not clear from the record. However there is a note made by them Magistrate on the 9 December 2004 which reads:-

*"Uitgestel 14 Maart 2005 hof 6 vir pleit en verhoor".*

On the 14 March 2005, the Magistrate made a note which reads as follows:-

*"Uitgestel 2 en 3 Junie 2005 Hof 3 verder verhoor".*

I can safely assume that the trial commenced on the 14 March 2005.

[3] At the end of the trial, the Appellant was found guilty of all the charges and on the 19 July 2007 he was sentenced as follows:-

[a] Count 1: 15 years imprisonment

[b] Count 2: 15 years imprisonment

[c] Count 3: 5 years imprisonment

The sentence in respect of count 3 was to run concurrently with the sentence in respect of counts 1 and 2. Effectively the Appellant was sentenced to 30 years imprisonment.

[4] The Appellant applied for leave to appeal on the 16 August 2007. The Application was refused. However upon petitioning the High Court, leave to appeal was granted only in respect of the sentence.

**MERITS IN BRIEF**

[5] The complainant testified in detail what happened on the night of the 9 December 2002. She arrived at home driving her motor vehicle, parked it and got into her house. She locked the doors behind her. She went into the kitchen to unlock the door in order to allow her dog into the house. At that stage the Appellant and his co-perpetrator were already in the house having gained forceful entry through one of the doors at the back. Holding knives, they ordered her not to make noise and escorted her into a spare room. One of the assailants left to ransack the house and the other remained with her. She was tied up. The one remaining with her, raped her and left together with the other taking with them the complainant's goods and the motor vehicle.

**PERSONAL CIRCUMSTANCES OF APPELLANT**

[6] The Appellant's personal circumstances were placed on record and they are the following:-

6.1 He was 41 years old at the time of his conviction and sentence.

6.2 He is married with 3 children aged 19, 12, and 8 years.

6.3 All the children reside with their mother and grandmother.

6.4 He was employed earning R2 400,00 per month.

6.5 He passed grade 10 in school.

**APPELLANT'S GROUNDS OF APPEAL**

[7] The Appellant's grounds of appeal are:-

7.1 The trial court erred in not finding that there were substantial and compelling reasons to justify the imposition of a sentence less than the prescribed minimum sentences. This argument is advanced in respect of the first charge (housebreaking with intent to commit robbery and robbery with aggravating circumstances) as well as the second charge of rape.

7.2 Further, that the trial court misdirected itself in not attaching sufficient weight to the following factors:-

7.2.1 The Appellant spent 4 years and 3 months awaiting trial whilst in custody.

7.2.2 No evidence was presented in respect of the complainant's injuries. The J88 only reflects bruising to the Fossa Navicularis.

7.2.3 No evidence was presented to establish the extent of the trauma suffered by the complainant.

7.2.4 The rape was not one of the worst.

7.2.5 The trial court failed to consider the accumulative effect of the sentence.

**RESPONDENT'S SUBMISSIONS REGARDING GROUNDS OF APPEAL**

[8] On the other hand, the Respondent argued that the sentence was appropriate for the following reasons: -

8.1 The Appellant has previous convictions relevant to the first charge. He therefore has no respect for the norms of the society, the rights and property of other individuals and the justice system. He has poor prospects of being rehabilitated.

8.2 The trial court was correct in imposing the minimum sentence in respect of count 1.

8.3 The impositions of the maximum sentence of 15 years in respect of rape was warranted given the facts and circumstances of the case in that:-

8.3.1 The rape did not occur in the spur of the moment. It was planned.

8.3.2 The complainant was at her home when attacked.

8.3.3 She suffered anguish in particular when the Appellant had to rub his penis against her body to induce an erection.

8.3.4 The DNA evidence linked the Appellant to the rape but he still pleaded not guilty and continued to deny raping the complainant.

8.3.5 The fact that the trial court ordered sentence in respect of count 3 to run concurrently with count 1 and 2 clearly indicates that the trial court did apply its mind.

[9] The complainant's version is to a very large extent corroborated by that of the Appellant except that the Appellant denies raping the complainant. He alleged that it was his co-perpetrator who raped the complainant. This explains why leave to appeal against conviction and sentence was refused by the trial magistrate. Further, why the High Court considering the petition granted leave to appeal only in respect of the sentence.

**ISSUES TO BE DECIDED**

[10] The Appeal is against the sentence and is opposed. The court is called upon to decide if there were substantial and compelling reasons to persuade the trial court not to impose the minimum sentence. The court is further called upon to order that the sentences in respect of count 1 and count 2 should also run concurrently. He argues further that the trial court misdirected itself by failing to consider the accumulative effect of the sentence.

**CONSIDERATION OF ISSUES**

[11] Section 5(2) (a) of the Criminal Law Amendment Act 105 of 1997 prescribes a minimum sentence of 15 years imprisonment for a first offender convicted of robbery with aggravating circumstances.

The undisputed evidence on record is that, the Appellant had a knife with him, ordered the Complainant not to make any noise, raped her threatened her to a state of submission and robbed her of her belongings. There can be no doubt that all of these factors constitute aggravating circumstances which would normally persuade the trial court to consider imposing the minimum sentence.

[12] I agree with the Respondent's submission that the learned Magistrate's decision to impose the minimum sentence of 15 years imprisonment in respect of count 1 cannot be faulted. I have considered the Appellant's personal circumstances. It is true that he has had previous encounters with the law as indicated in his criminal record. There are a number of previous convictions which are similar in nature with the present conviction of house breaking with intent to rob and robbery.

It was argued on his behalf that the fact that he spent 4 years and approximately 3 months in custody awaiting trial should have been given sufficient weight and regarded as a substantial and compelling reason persuading the learned Magistrate not to impose the minimum sentence. I do not agree with this submissions for reasons I shall give later herein.

[13] **In S v Rabie 1975(4) SA 855(A) at p 857D-E**, it was stated that:-

> *"In every appeal against sentence, whether imposed by the magistrate or a Judge, the court hearing the appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court; and should be careful not to erode such discretion: hence the further principle that sentence should only be altered if the discretion has not been judicially and properly exercised. The test under (b) is whether the sentence is vitiated by irregularity or by misdirection or is disturbingly inappropriate."*

In this case, housebreaking with intent to rob and robbery was proved beyond a reasonable doubt. In fact the commission of the said offence is corroborated by the Appellant's own evidence. The aggravating circumstances are apparent from the evidence on record. I can therefore not falter the learned magistrate in passing a minimum sentence in light of the evidence before him. I am therefore satisfied that he exercised his discretion judicially and did not misdirect himself.

[14] I now turn to deal with the submission by the Appellant regarding the period of 4 years and 3 months spent in custody awaiting trial.

**In S v Radebe 2013 (2) SACR 165 at 170 (B)** it was stated by Lewis J.A that:-

> *"A better approach, in my view, is that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention".*

The pre-sentence period spent in custody should be considered together with all the evidence in mitigation and in aggravation of the sentence in order to decide whether there are substantial and compelling reasons to deviate from the minimum sentence.

[15] The reasons for the prolonged period of detention pre-sentencing appear from bundle of documents which form part of the appeal record as well as the record itself *viz:*-

15.1 A trial date was set. The Appellant decided to terminate the service of his Legal Aid Attorney.

15.2 There was a further postponement at his request because he was unable to raise funds to appoint a private attorney. In the meantime state witnesses were excused from attending court purely to afford the Appellant an opportunity to sort out his issue of legal representation.

15.3 The Appellant re-applied to legal aid and was provided with a legal representative.

15.4 His first attorney withdrew from the record on the 12 October 2014. Finally the subsequent Legal Aid Attorney appeared on his behalf on the 25 November 2004. The trial commenced on the 14 March 2005.

15.5 The matter was postponed at the request of the state on the 2 June 2005, on the 3rd October 2005 and on the 6th December 2016 because the Public Prosecutor was ill on those days. It was also postponed on the 14 June 2006 because the investigating officer was on leave.

15.6 The matter was also postponed on the 8th August 2007 because the Appellant's attorney was ill.

15.7 On all other occasions, the trial proceeded and the matter was postponed partly heard.

I have perused the record and studied the reasons for postponement. I did not get an impression that there was a deliberate and concerted effort to delay the trial. The state called six witnesses whose evidence was material to the case. I have further taken into account the fact that the Appellant was not arrested at the scene but there had to be a lot of investigation done by the police. It is such evidence about the investigation and eventually the arrest which had to be placed on record before the court.

[16] I have considered the pre-sentencing period in custody together with the Appellant's mitigating factors and the circumstances of the case, I am persuaded that the evidence in aggravation has more weight. Further the prolonged period of trial cannot be attributed to the prosecution authority. I therefore do not find that the learned magistrate misdirected himself in not finding that there were substantial and compelling reasons to impose a lesser sentence.

[17] It was further argued that the presiding magistrate misdirected himself by imposing the maximum sentence in respect of the rape charge without giving reasons.

[18] A maximum sentence by its nature presupposes that there must be extra ordinary circumstances which go beyond what would have persuaded the trial court to impose a minimum sentence. Such extra ordinary circumstances must be justified by evidence on record. The discretion to impose the maximum sentence must and still be exercised judicially and reasons given for such conclusion.

[19] **In S v Matvitvi 2011 (2) SACR 40 (SCA) at 53F**, the court held that:-

> *"Courts are not free to subvert the will of the legislature by resort to vague, ill-founded hypothesis that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcome not outcomes based on the whelm of an individual judicial officer, are foundational to the rule of law which lies at the heart of our constitutional order."*

The only reason given by the learned magistrate for opting for the maximum sentence is that he felt that the minimum sentence of 10 years imprisonment was "too light". The learned magistrate may be pardoned for not recalling whether there were other reasons which influenced his decision. This is so because the trial record had to be reconstructed 9 years after the sentence was imposed.

[20] The reconstructed record does justify the imposition of the minimum sentence of 10 years in respect of the rape charge. However it does not go further to justify the imposition of the maximum sentence. One would have expected all the role players involved in the reconstruction of the record to have canvassed the reasons why the maximum sentence was imposed. In the alternative, they should have atleast indicated on record whether the reasons for imposing the maximum sentence were given or not although same could not be remembered. I have doubt in my mind whether the reasons for imposing the maximum sentence were given. I therefore give the Appellant the benefit of the doubt.

[21] The presiding magistrate ordered that the 5 year term of imprisonment in respect of the third count should run concurrently with the sentences in respect of counts 1 and 2. This fact alone convinces me that the learned magistrate did consider the

accumulative effect of the sentence. I will therefore not interfere with the discretion of the trial court.

**[22] I therefore propose the following order:-**

**[a] The sentence in respect of count one is confirmed.**

**[b] The sentence in respect of count two is set aside and the following sentence is imposed, 10 years imprisonment.**

**[c] The sentence in respect of count 3 is confirmed.**

**[d] The sentence in respect of count three is to run concurrently with the sentence in respect of count 1 and 2.**

**[e] The sentence is *ante* dated to the 19th July 2007.**

**N NKOSI**
**Acting Judge of the High Court, Pretoria**

22 August 2016

**I AGREE.**

**E MOLAHLEHI**
**Judge of the High Court, Pretoria**

22 August 2016