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 **NO**

DATE: **10 August 2022**

SIGNATURE...

Case No. A20/2022

In the matter between:

SIPHO NICHOLAAS JOBELA **APPELLANT**

And

THE STATE **RESPONDENT**

Coram: Millar J & Monyemangene AJ

Heard on: 27 July 2022

Delivered: 12 August 2022 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 12 August 2022.

Summary: Criminal law – appeal against sentence – appellant found guilty on Murder -- whether a previous conviction of common robbery should be regarded as previous conviction as intended in Section 51(2) of the Criminal Law Amendment Act 105 of 1997- appeal succeeds in respect of count 1- sentence reduced- substantial and compelling circumstances-appeal in respect of count 4 dismissed.

ORDER

It is Ordered:

1. The appeal against sentence in count 1 is upheld. The sentence of the trial court is replaced with a sentence of 15 years Imprisonment.

2. The appeal against the sentence in count 4 is dismissed.

JUDGMENT

MONYAMANGENE AJ

1. The accused appeared in the Regional Court sitting in Vereeniging. He was charged with four counts :Murder read with the provisions of Section 51(1) of the Criminal Law Amendment Act 105 of 1997, kidnapping , Attempted murder and Rape in contravention Section3 of the Sexual Offences Act, ACT 32 of 2007 read with Section 51(1) of the Criminal Law Amendment Act 105 of 1997.

2. He was legally represented during the trial and pleaded guilty to count 4 and was accordingly convicted. Evidence was led in respect of count 1 to 3. He was eventually convicted on the remaining counts.

3. The following sentences were imposed:

   - Count 1: 20 years Imprisonment
   - Count 2: 10 years Imprisonment.
   - Count 3: 10 years Imprisonment.
   - Count 4: Life Imprisonment.

   In terms of Section 39(2) of the Correctional Services Act 111 of 1998 the determinate sentences were ordered to run concurrently with the sentence of Life Imprisonment.

4. The sentence of Life Imprisonment is subject to automatic right of Appeal.

5. He was found guilty against the following factual background. Only those facts that are germane to the appeal will be discussed. The complainant, (NMT) was

on 12 March 2017 on her way back from Residentia train station when, unsuspecting. was accosted by the accused who was in possession of a knife. The accused stabbed her and took her to a secluded pace in the veld where he assaulted and raped her. The accused later took her to another house, treated her wound and further raped her. The accused was linked through DNA. He pleaded Guilty to the murder charge and not guilty to the other charges. He was consequently convicted on all of them.

6. The appeal is against the sentence only.

7. Matters pertaining to sentence are pre-eminently falling squarely within the discretion of the trial court. There is a plethora of authority to the effect that:

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

8. The test is whether the sentence is vitiated by irregularity or it is disturbingly inappropriate. See S v Rabie 1975(4) SA855 (AD) at 857 D-E

> *'8. It was further stated in S v Anderson 1964(3) SA 494 (A) 495 D-E that:*
>
> *"Over the years our Courts of appeal have attempted to set out various principles by which they seek to be guided when they are asked to alter a sentence imposed by the trial court. These include the following: the sentence will not be altered unless it is held that no reasonable man ought to have imposed such a sentence, or that the sentence is out of all proportion to the gravity or magnitude of the offence. or that the sentence induces a sense of shock or outrage or that the sentence is grossly*

excessive or inadequate, or that there was an improper exercise of his discretion by the trial Judge or that the interest if justice require it."

9. See also Prinsloo v S (827/2011) [2015] ZASCA 207; [2016] 1 All SA 390 (SCA); 2016 (2) SACR 25 (SCA) (4 December 2015)

10. The appellant's main contention was that the trial court erred in imposing a sentence of 20 years' imprisonment in respect of the Murder charge. The appellant had a previous conviction of Robbery with Aggravating Circumstances. The offence of Murder falls squarely within the provisions of Section 51(2) as contained in Part II of Schedule 2 to the Criminal Law Amendment Act 105 of 1997. This section provides thus:

"51. (2): Notwithstanding any other law but subject to subsections (3) and (6). a regional court or a High Court shall— if it has convicted a person of an offence referred to in Part II of Schedule 2, sentence the person. in the case of—

(i) a first offender, to imprisonment for a period not less than 15 years

(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years."

11. Robbery with aggravating circumstances, although listed in the same schedule, is not a same offence as intended in Section 51(2) of the minimum sentences Act. It is clear from the record that the learned Magistrate relied heavily on the fact the accused previous conviction qualified him as a second offender and hence imposed a sentence of 20 years. This is clear from the record when he says.

"According to section 51(2) where a person is convicted of murder and he is a second offender, the prescribed minimum sentence is one of 20 years imprisonment "at p 120. Absent the previous conviction the normal sentence he would impose, given the fact that the accused did not have a previous conviction would be one of 15 years imprisonment."

12. The court in S v Qwabe 2012 (1) SACR 347 (WCC) considered whether a previous conviction of robbery(common) would trigger the provisions of section 51(2)(i) resulting in an escalation of the prescribed sentence for robbery with aggravating circumstances and concluded the following :

"Again, in the context, it seems to me, "any such an offence" must be an offence of the same "kind or degree" (borrowing from the Oxford dictionary) as the "kind or degree" of the offence in question. In other words, I am of the view that "any such offence" must be, in the instant case, robbery with aggravating circumstances. To hold otherwise would result in the first conviction of robbery being elevated, for the purpose of sentencing, to a conviction of robbery with aggravating circumstances. It could not, in my view, have been the contemplation of the legislature to impose the sentencing regime of section 52 on offence which would not expressly otherwise fall under its provisions." At para 38".

13. It follows from the foregoing that the offence of robbery with aggravating circumstances is not same offence with that of murder and any suggestion to equate same would me misplaced. For an increased sentence to be imposed that exceed the minimum sentence ordained by the legislature on the basis that the accused has a previous conviction, the offence must be a similar offence to the one the accused is found guilty of, in this case murder. Given the circumstances of this case it is clear that the appellant was a first offender of any such offence and a sentence of 15 years should have been imposed.

14. In imposing Life Imprisonment for the offence of rape the learned magistrate took into account the fact that the complainant was raped more than once, in this

instance three times. That she was at that time 14 years old. The appellant stabbed her with a knife albeit not before he raped her. Rape involving the infliction of serious bodily harm on its own attracts a sentence of Life Imprisonment. Whether the infliction of serious bodily harm preceded the rape or not is immaterial. The appellant threatened to stab the complainant if she resisted or called for help. She was raped while she was bleeding and injured. The appellant showed no remorse and the court rightly remarked that that this signaled the absence of any mitigating factor on the part of the appellant.

15. The remarks by the court in S v R 1996 (2) SACR 314 (T) per Nasha at 345 (I) are apposite. The court there said:

> *"Aggravating circumstances such as the appellants' lack of remorse, the use of violence during the rape and after the rape as well as the fact that the appellant left the complainant on her own in a deserted area after he violated her cannot be ignored".*

16. The appellants' main contention was further that the court failed to take into account the appellant's background and upbringing. Much reliance was placed on the pre-sentence report which revealed that the appellant's upbringing seemed to be a contributing factor to the commission of these offences, that he was exposed to domestic violence at a young age by his father and abused his mother and punished them severely as children.

17. This contention, in my view, is problematic in more than one respect. There are a lot of people who were not properly brought up and chose to distance themselves from this errant behavior in their life. There is no justification in blaming an improper upbringing by committing heinous and horrendous crimes such as the one the appellant committed. In the absence of any psychological reports to support this contention I see no justification in putting much blame in the appellant's upbringing. The trial court took into account the appellant's personal circumstances and rightly found that there were no exceptional

circumstances justifying the imposition of a lesser sentence than the prescribed minimum sentence.

18. I found no weighty justification in interfering with the sentence imposed and am of the view that the sentence imposed in respect of count 4 is not grossly proportionate to the gruesome offences the appellant committed. The court in S v Malgas 2001 (1) SA 1222 (SCA) at P1236 cautioned against deviating lightly for flimsy reasons.

> *"The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny.....at para D".*

19. I see no reason in interfering with the sentence in count 4. The learned magistrate was correct in finding that there were no exceptional circumstances.

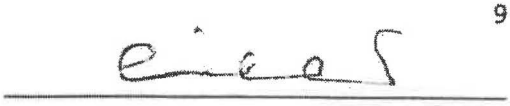
20. In the result I make the following order:

20.1 The appeal against the sentence is count 1 succeeds. The sentence in count 1 is replaced with a sentence of 15 years Imprisonment.

20.2 The appeal against the sentences in count 4 is dismissed.

T J MONYEMANGENE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE, IT IS SO ORDERED.



A MILLAR

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

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