REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION, PRETORIA

14/4/2016

CASE NO: A634/15

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

.....
SIGNATURE

19/04/2016
.....
DATE

In the matter between:

SOLOMON FELANI MASILELA **Appellant**

and

STATE **Respondent**

JUDGMENT

MPHAHLELE J

[1] The appellant was arraigned in the Regional Court, Pretoria on 3 counts, namely:

1. robbery with aggravating circumstances as intended in section 1 of Act 51 of 1977 read with section 51 (2) of Act 105 of 1997;

2. attempted rape in contravention of section 55(a) read with sections 1, 3, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2000; and

3. Kidnapping.

The appellant pleaded not guilty to all the charges.

[2] At the end of the testimony of the complainant, the appellant tendered admissions in terms of section 220 of Act 51 of 1977. He admitted that he assaulted and robbed the complainant of R50-00 cash, a laptop and a bag. He had a knife in his possession during the robbery. He also admitted that he attempted to rape the complainant.

[3] In respect of counts 1 and 3, the trial court found that there was a duplication of charges and therefore acquitted the appellant of count 3, the kidnapping charge. The appellant was accordingly convicted of armed robbery with aggravating circumstances and attempted rape.

[4] According to the SAP 69 record, the appellant was on 02 December 1999 convicted of rape, robbery and attempted murder and was sentenced to 29 years imprisonment. He was released on parole in 2012 after serving 12 years of the 29 years' term. He is currently serving the remaining 17 years of his term.

[5] The appellant was sentenced to 20 years' imprisonment on the count of robbery with aggravating circumstances and 15 years on the count of attempted rape. The sentences in respect of both counts were ordered to run concurrently. He was effectively sentenced to 20 years' imprisonment.

[6] The trial court granted the appellant leave to appeal to this court against sentence only.

[7] The issue that arise in this appeal is that the sentence imposed was shockingly inappropriate.

[8] It is trite law that sentencing falls within the discretion of the trial court and that the court of appeal's right to interfere with a sentence is limited to instances where the court *a quo* materially misdirects itself or commits a serious irregularity in evaluating all the relevant factors with regard to sentence.

[9] The trial court is silent on the reasons for the imposition of the 20 years' imprisonment for the robbery with aggravating circumstances conviction. The term of twenty years' imprisonment on this conviction could have been imposed in one of these two instances:

[1] the discretion afforded the regional magistrate on the maximum term in terms of section 51(2) of the Act 105 of 1997; or

[2] the jurisdictional fact or requirement that the appellant was a second offender of any such offence in terms of section 51(2) of the Act 105 of 1997.

[10] Whilst it is appreciated that there were no constraints on its discretion to impose a sentence far in excess of the ordained minimum, the trial court was supposed to properly motivate the sentence imposed, which was not done.

[11] The State correctly conceded that under the circumstances of this case, the appellant could not have been regarded as a second offender for the purposes

of sentencing in relation to the robbery with aggravating circumstances conviction. Due to the nature of the previous convictions, the appellant is to be regarded as a first offender for the purposes of section 51(2) of Act 105 of 1997.

[12] Under the circumstances this court is at large to interfere with the sentence imposed by the trial court. Therefore the appropriate sentence to be imposed herein is the minimum sentence of 15 years as stipulated in section 51(2) of Act 105 of 1997 in the absence of any substantial and compelling circumstances.

[13] The judgment on sentence is likewise silent on the reason for imposing the 15 years' imprisonment in respect of the conviction for attempted rape. The provisions of section 55(a) of Act 32 of 2007 provides that:

> *"Any person who-*
>
> *(a) attempts;*
>
> *... to commit a sexual offence in terms of this Act, is guilty of an offence and may be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable."*

Therefore the provisions of section 51(2) of Act 105 of 1997 finds application in this matter. As mentioned, the appellant has a previous conviction of rape. On this basis the appellant, as a second offender, is subject to be sentenced to 15 years' imprisonment as stipulated in section 51(2)(b)(ii) of Act 105 of 1997 in the absence of any substantial and compelling circumstances.

[14] The trial court, in determining the sentence to be imposed herein, took into account the personal circumstances of the appellant, the nature of the offence

and the interest of the society into consideration. However the trial court failed to make a determination on whether there were compelling and substantial circumstances justifying a lesser sentences than the ones stipulated in section 51 of Act 105 of 1997.

[15] In considering whether or not there are substantial and compelling circumstances in this matter justifying a lesser sentence than the prescribed minimum sentences, I take queue from S v Nkomo 2007 (2) SACR 198. The court mentioned at paragraph 3:

> *"..... it is for the court imposing sentence to decide whether the particular circumstances call for the imposition of a lesser sentence. Such circumstances may include those factors traditionally taken into account in sentencing – mitigating factors – that lessen the accused moral guilt. These might include the age of the accused or whether he or she has previous convictions. Of these must be weighed together with aggravating factors."*

[16] The appellant was born on 02 July 1972, thus he was 43 years old as at the date of sentencing. He is single. He is a father of three children. The ages of these children born of different mothers are 22 years, 18 years and 5 months respectively. He derived a weekly income of R500-00 from his job as a taxi driver.

[17] The two offences the appellant has been convicted of are serious in nature. During the attack, the complainant sustained the following injuries: bruises on her neck, a scratch on her arm and a swollen lip. The appellant elected to remain silent and did not call any witnesses during the proceedings.

Nevertheless during the cross-examination of the complainant, the appellant put a version to the complainant denying the commission of the offences. The admissions tendered by the appellant in terms of section 220 of Act 51 of 1977 were only made after the testimony of the complainant. Nonetheless the admissions were mere repetition of the contents of the charge sheet.

[18] Even though the appellant is said to have apologized to the complainant during the ordeal, he pleaded not guilty during the hearing and maintained his innocence. It must be appreciated that the actual rape did not take place due to the pleas of the complainant. She had to demonstrate to the appellant that she was indeed menstruating. She further indicated to the appellant that the rape would cause her to fall sick. This was indeed not due to the change of heart on the part of the appellant.

[19] The appellant is well known to the complainant, used to be employed by complainant's grandmother as a taxi driver. The attack took place at the complainant's home.

[20] The appellant was released on parole in 2012 after serving 12 years of the 29 years' term. He committed the crimes on 13 March 2013, shortly after his release on parole. The appellant having been given a "second chance" at life, has violated not only his parole conditions but the rights of the complainant and the interest of society in the re-integration process.

[21] It is my considered view that there are no substantial and compelling circumstances justifying lesser sentences than the prescribed minimum sentences. The circumstances of this matter are such that the aggravating factors far outweigh the mitigating factors.

[22] I am therefore not persuaded that the prescribed minimum sentences in respect of both counts are disproportionate to the appellant, the crimes and the interest of society.

[23] In the result, I hereby propose the following order:

1. the appeal against sentence in respect of count 1 is hereby upheld;

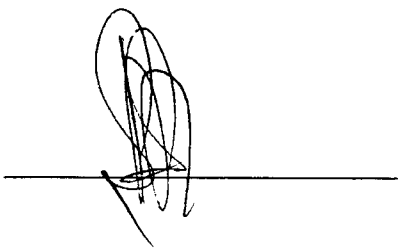
2. the appeal against sentence in respect of count 2 is hereby dismissed;

3. the order of the trial order is hereby replaced with the following:

   3.1 on count 1 the appellant is sentenced to 15 years' imprisonment;

   3.2 on count 2 the appellant is sentenced to 15 years' imprisonment

   3.3 the sentences in respect of counts 1 and 2 will run concurrently.



S S MPHAHLELE

JUDGE OF THE HIGH COURT

GAUTENG DIVISION HIGH COURT, PRETORIA

I agree

AH PETERSEN

ACTING JUDGE OF THE HIGH COURT,

GAUTENG DIVISION HIGH, PRETORIA

APPEARANCES:

Counsel for the appellant	:	Masete MMP (Miss)
Instructing attorneys	:	Legal Aid Board of South Africa
Counsel for the respondent	:	L Williams
Instructing attorneys	:	The Director of Public Prosecutions
Date of the Hearing	:	18 April 2016
Date of Judgment	:	19 April 2016