IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

24/3/17

Case Number: A91/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: **NO**.

(2) OF INTEREST TO OTHER JUDGES: **NO**.

(3) REVISED.

24/3/17
DATE

SIGNATURE

In the matter between:

THABISO MTAMBO APPELLANT

and

THE STATE RESPONDENT

Coram: HUGHES J *et* MANYATHI AJ

JUDGMENT

HUGHES J

[1] The appellant was convicted on 24 January 2013 at the Brakpan Regional Court on three counts:

Count 2: Robbery;

Count 3: Robbery; and

Count 4: Rape

He was sentenced to five years imprisonment in respect of count 2 and 3 as they were taken as one court for purpose of sentencing and fifteen years in respect of count 4. In total he was to serve an effective twenty years imprisonment. In addition a non-parole period was affixed to the total of the sentence administered and the appellant could not be released until at least two-thirds of his sentence was served.

[2] At the trial the appellant was legally represented and pleaded not guilty. After being found guilty the appellant filed for leave to appeal against his conviction and sentence. He was granted leave to appeal by the court a quo on sentence only.

[3] Briefly the facts are that the appellant was one of four people who robbed the two female complainant's in count 2 and 3. In addition, the appellant decided to take the complaint in count 3 to a nearby field and raped her after the robbery.

[4] The crux of the appellant argument with regards the sentence imposed lies with the sentence he attained for the rape of fifteen years, the fixed term of two-thirds for non-parole period and the omission to take into account the two years nine months that he had served in awaiting trial for finalisation of the trial.

[5] The argument advanced that deals with the sentence impose for the rape count 4 was that the prescribed minimums sentence of ten years was not for a first offender but rather the maximum sentence of fifteen years was imposed without providing substantial and compelling factor for the imposition of a high sentence than that prescribed.

[6] In *S v Mathebula and Another* 2012 (1) SACR 374 (SCA) at para [10] the court held :

"A regional magistrate has the discretion to impose a sentence exceeding the minimum sentence prescribed by the Act with an additional five years as provided for in the proviso of s51(2). Such a discretion must, however, be exercised judicially and on reasonable grounds. Where the regional magistrate intends to depart from the prescribed minimum sentence, it is proper and fair that the regional magistrate gives reasons for such a departure. Absent any such reasons, the conclusion

becomes inescapable that such a decision is arbitrary or that the sentencing discretion was not exercised judicially. It is not proper for an appeal court to have to speculate about the reasons which motivated the regional magistrate to impose a sentence higher than the minimum sentence prescribed. Such an approach cannot be countenanced as it is subversive to the principles of openness, transparency, accountability and fairness. It is trite that judicial officers can only account for their decisions in court through their judgments. It is through judgments which contain reasons that judicial officers speak to the public. Their reasons are therefore the substance of their judicial actions."

[7] In the matter at hand the court a quo acknowledged that there was a prescribed minimum sentence to adhere to and deviate from same if there are substantial and compelling circumstances to do so. The court a quo went further to make the pronouncement that there were no substantial and compelling factors to justify a lesser sentences than the prescribed minimum sentence. But instead of imposing the minimum it instead imposed the maximum with providing reason therefore.

[8] The state in in agreement that the court a quo erred when it imposed the maximum prescribed sentence when it sentenced the appellant on the rape count to fifteen years. The state concurred with the appellant that the prescribed sentence in these circumstance, the appellant being a first offender, was ten years.

[9] In the circumstances the sentence imposed for count 4 falls to be set aside and replaced with sentence of ten years.

[10] The second matter is that the court a quo did not take into account the appellant's time served when sentencing took place. This cannot be accepted a correct as the court a quo states the following before sentencing:

'I am also alive to the cumulative effect of the sentence and that you have already served some time, close to two years, you are also a first offender with a child to fend for and still relatively young.'

[11] In the case before me it is not evident form the record that the proceedings were delayed in anyway by the state. The proceedings were such that all four accused in the court a quo were brought to account in accordance with the principles of a fair trial and all accused were duly represented. This being the case I find that

the circumstances in this case differ from that in *S v Vilakazi* 2009 (1) SACR 552 (SCA) where the accuse in that case was not brought to trial promptly and as such the period in awaiting trial was taken into account as it was not the actions of the accused that delayed the trial proceedings, but rather the actions of the state.

[12] Lastly, the non-parole period imposed by the court a quo. As argued on behalf of the appellant and conceded, rightly so I might add by the respondent, the appellant was not warned by the court a quo of its intention to impose a non- parole period to his sentence. Nether was he give an opportunity to make representations in this regard. It was stated in *S v Mhlongo* 2016 (2) SACR 611 (SCA) at para [9]:

"The fixing of a non-parole period is part of a criminal trial and it must thus accord with the dictates of a 'fair trial' that an accused person be given notice of the court's intention to invoke s276B of the Act and to be heard before a non-parole period is fixed. Failure to do so amounts to a misdirection by the sentencing court."

[13] In the circumstances mentioned above it is evident to me that the court a quo misdirected itself when it imposed the fixed non-parole period to the sentence of the appellant.

[14] With regards to count 2 and 3 the appellant contend that the court a quo did not consider the cumulative effect of sentencing and erred when it failed to order that the sentence imposed in count 2 and 3 run concurrently with the sentence imposed in court 4. I must state that counsel for the appellant did not argue this point vigorously.

[15] Going back to the sentencing judgment the court a quo stated clearly that count 2 and 3 for sentencing purposes would be taken together. In my view, count 4 is an offence on its own and apart from the robberies which I regard as on continuing offence. Thus the court a quo was correct in sentencing this specific count that is count 4, separately from the two robberies. There is no basis to have the sentence in count 4 run concurrent with count 2 and 3 sentence. Thus the court a quo did not misdirect itself in these circumstances.

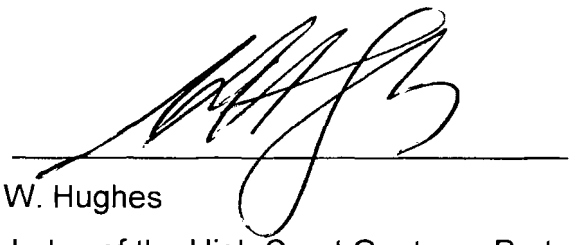
[16] Consequently the following order is made:

[a] The appeal is upheld and the sentence in respect of count 4 is set aside and substituted with a sentence of ten (10) years imprisonment

[b] The order fixing a non- parole period to the sentence of the appellant is set aside.

[c] The appeal against count 2 and 3 is dismissed.

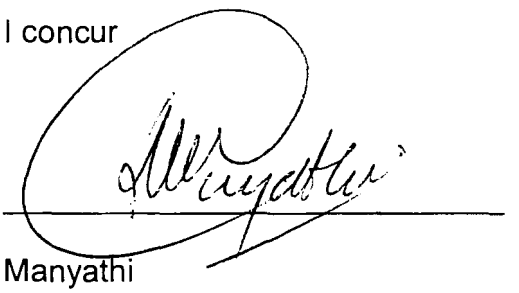
It is so ordered



W. Hughes

Judge of the High Court Gauteng, Pretoria

I concur



B. P Manyathi

Acting Judge of the High Court Gauteng, Pretoria

Appearances:

For the Appellant : M van Steynberg

Instructed by : Legal Aid

For the Defendant : Adv Wilsenach

Instructed by : The State Attorney

Date heard : 13 March 2017

Date delivered : 17 March 2017