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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

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

Case No: A272/2019

In the matter between:

MICHAEL MASITENG

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

Retief AJ,

Hearing on written argument, by agreement.

1.

- 1.1. This appeal lies against sentence only. The appellant has exercised his automatic right of appeal.
- 1.2. On the 21st June 2019, in the Regional Court, Tsakane (*“the Trial Court”*),

the appellant was sentenced to life imprisonment and determinate sentences on all the other counts.

- 1.3. The appellant, who was legally represented at the time, pleaded guilty to all the counts put to him. The individual counts and the sentences imposed by the Trial Court can be summarized as follows:

- 1.3.1. count 1 - housebreaking with intent to rob, was sentenced to 10 years imprisonment ;

- 1.3.2. count 2 - robbery with aggravating circumstances, was sentenced to 15 years imprisonment;

- 1.3.3. count 3 - a contravention of Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007 ("CLSA"), was sentenced to life imprisonment:

- 1.3.4. count 4 - housebreaking with intend to steal, was sentenced to 7 years imprisonment;

- 1.3.5. count 5 - theft, was sentenced to 5 years imprisonment;

- 1.3.6. count 6 - contravention of the CLSA, was sentenced to 10 years imprisonment.

- 1.4. The implications and consequences of pleading guilty to crimes which attracted the provisions of Section 51(1) of the Criminal Law Amendment Act, Act 105 of 1997 ("CLAA") was explained to the appellant by the Trial Court prior to his plea and again on the 21st June 2019.

- 1.5. At the time of the appellant's sentencing he was serving a sentence of life imprisonment for robbery and contravening Section 3 of the CLSA. This sentence was duly imposed on the 21st April 2015 ("*2015 sentence*").

- 1.6. No evidence was tendered during the Trial Court proceedings of a pending automatic appeal as against the conviction and/or sentence of the 2015 sentence.

THE GROUNDS OF APPEAL:

- 2.1. The nub of the grounds of appeal before this Court, as are set out in the filed Notice of Appeal ("*notice*"), centers around the contention that the Trial Court erred in not deviating from the prescribed minimum sentence, referred to in Section 51(1) of the CLAA. In consequence, that the sentence of life imprisonment imposed by the Trial Court was shockingly inappropriate, in that it was out of proportion to the totality of the accepted facts in mitigation.
- 2.2. In written argument the appellant's counsel amplified the grounds relied on *supra*, by contending that the Trial Court had misdirected itself in dismissing the prospect of the appellant's ability to become rehabilitated and stating that mercy would play a very limited role and by further contending that the Trial Court should have considered the following facts below, to constitute substantial and compelling reasons as referred to in Section 51(3)(a) of the CLAA to justify a lesser sentence, namely:
 - 2.2.1. the cumulative effect of imposing a further life sentence *vis-a-vis* the 2015 sentence was unjust in that, the appellant's eligibility of parole, in terms of the Correctional Services Act, 111 of 1998, would be extended, shifting the goal posts as it were;
 - 2.2.2. affording appropriate weight of the appellant's upbringing, especially the effect of his drug abuse.

3.

FACTUAL BACKGROUND:

The consideration of the grounds of appeal warrant a reconsideration of the admitted facts considered by the Trial Court and the timeline in which these offenses were committed in relation to the appellant's previous convictions.

The admitted facts which the Trial Court considered in respect of the crimes committed in this case, can be set out as follows:

3.1. Count 1. 2 and 3:

- 3.1.1. On the 14th June 2013, the appellant together with two other unknown persons, entered the complainant's place of residence, at [...], Gauteng, forcibly opening her shack door with a screwdriver.
- 3.1.2. The appellant entered the complainant's residence with the intention to rob her, approached the complainant and started to strangle her by putting his hands around her throat with force. The appellant's intention was to injure her further should she desist from complying with his instructions including to surrender her property to him.
- 3.1.3. The complainant was then gang-raped by the appellant together with another.
- 3.1.4. After raping the complainant, the appellant intentionally stole certain movable property from her.

3.2. Count 4 and 5:

- 3.2.1. On the 3rd October 2012, the appellant then broke into the complainant's house at [...], Gauteng Province *via* her bathroom window.
- 3.2.2. The appellant entered the house without the complainant's permission and without the complaint's consent stole her school bag.

3.3. Count 6:

- 3.3.1. On the 13th March 2012, the appellant approached the complainant in a residential street being [...] Gauteng Province with the intention to rape her.
- 3.3.2. He hit her to the ground, raped her in the open street and fled the scene.

4.

TIMELINE:

The timeline in which these crimes, *supra*, were committed in relation to the appellant's previous convictions are as follows:

4.1. 2013 crimes:

4.1.1. The 2015 sentence: On the 8 June 2013 the appellant committed serious crimes involving the rape and robbery of a complainant.

4.1.2. These serious crimes, *supra*, were committed approximately 1(one) week before the appellant broke into the home of the complainant (counts 1-3 in this matter), together with others, gang raped her then robbed her of her property.

4.2. 2012 crimes:

Before the 2013 crimes and in 2012 the appellant committed crimes of housebreaking, theft and the rape of a complainant in an open street in 2012 (counts 4-6 in this matter).

4.3. 2003 crimes:

Before the 2012 crimes and in 2003, the appellant committed theft and was sentenced to and served 4 (four) years imprisonment.

4.4 The Trial Court considered the timeline during sentencing and having regard thereto, stated that the appellant:

4.4.1 was making a habit of committing crimes and was subsequently warned of the risk of being declared a habitual criminal should he be convicted again in the future;

4.4.2 displayed a disinclination to be rehabilitated and therefore, the

chances of the success of rehabilitating the appellant in the future were slim, if not impossible;

- 4.4.3 committed perpetual acts of rape during the timeline which weighed heavily against mercy being shown.

CONSIDERATION OF THE GROUNDS OF APPEAL:

- 5.1 At the outset this is an appeal in which the interference with the sentence will only be justified if the Trial Court is shown to have misdirected itself in some respect or if the sentence imposed was so disturbingly inappropriate or disproportionate that no reasonable court would have imposed it. The test is not whether the Trial Court was wrong, but whether it exercised its discretion properly.¹

- 5.2 As to the grounds in the notice and as amplified in written argument:

- 5.2.1 The appellant pleaded guilty to certain charges which, in terms of Part 1 of Schedule 2 to the CLAA, attracted a sentence of imprisonment for life in terms of Section 51(1) thereof .

- 5.2.2 In term of Section 51(1) of the CLAA:

"51 Discretionary minimum sentences for certain serious offences

(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a high court shall sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life."

- 5.2.3 In consequence, a Trial Court when applying the provisions of Section 51 is faced with:

*"A generalized statutory injunction to impose a particular sentence which injunction rests, not upon all circumstances of the case including the personal circumstances of the offender, but simply upon whether or not the crime falls within the specific categories spelt out in Schedule 2."*²

5.2.4 Concomitantly with such a generalized statutory injunction to oppose a particular sentence, the Trial Court is empowered and more importantly is obliged to consider whether particular circumstances of that case before them require a difference sentence to be imposed.

5.2.5 Such vested power and obligation are set out in Section 51(3)(a) of the CLAA and the Trial Court is entitled to deviate from the minimum sentence of life imprisonment provided that the composite yardstick of substantial and compelling circumstances seen cumulatively justify a departure.

5.2.6 If the ultimate impact of all the circumstances relevant to the sentencing are measured against the composite yardstick of substantial and compelling reasons and seen cumulatively, justify a departure failure to do so and depart from the prescribed sentence would be unjust. Unjust in that it would be disproportionate to the crime, the criminal and the needs of society.³

5.3 According to the record of the proceedings, the Trial Court applied the composite yard stick of substantial and compelling reasons, by having regard to:

5.3.1 **Exhibit D**, being a pre-sentencing report. The following salient facts pertaining to his personal circumstances and substance abuse , relevant to the grounds of appeal are that, the appellant:

¹ **S v Romer** 2011 (2) **SACR** 153 (**SCA**), par 22 to 23.

² See **S v Malgas**, 2001 (1) **SACR** 469 (**SCA**) at par 14.

- 5.3.1.1 substance abuse started with the use of dagga at age 9, was introduced to mandrax at the age of 14 years old and prior his arrest for the 2013 crimes he was selling coke and dagga;
- 5.3.1.2 grew up under unfavorable circumstances, which were unstable, he was rejected by his father , abandoned by his mother at age 10 and subjected to various forms of emotional and physical abuse by people with whom he lived including his stepfather;
- 5.3.1.3 at the age of 13 he absconded from home and went to look for his mother and her boyfriend in Tsakane;
- 5.3.1.4 mother's boyfriend emotionally and physically abused him and his mother and later sexually abused his younger sister;
- 5.3.1.5 does not take responsibility for his crimes and shifts the reasons for his criminal behaviour on his upbringing and the forms of abuse he experienced while he was a child.

5.3.2 Counsel's argument in mitigation during the trial court proceedings:

- 5.3.2.1 Confirmed that the appellant's substance abuse problem was not used as a form of excuse and/or as a defense and that he could understand the difference between right and wrong. That his substance abuse was a means of escape from his abusive childhood. Conversely no reason to justify the appellant's history of drug abuse as a substantial and compelling circumstance was proffered nor was the reason for his perpetual life of crime blamed on his abuse of substances.

³ S v Malgas (*supra* footnote 2) at par 251.

5.3.2.2 No willingness in mitigation was provided to indicate that the appellant wished to rehabilitate from his life of perpetual crime save for his willingness to stop his substance abuse.

5.3.2.3 Was silent on the effect a sentence to a further life of imprisonment would have on the appellant's eligibility for parole.

5.3.3 The Trial Court appeared to have cumulatively considered all the circumstances placed before it, at the time, and thereafter found that no substantial and compelling reasons existed to justify a deviation from the statutory imposed minimum sentence.

5.4 Now turning to the written argument before this Court, the appellant's Counsel conceded that the offences the appellant pleaded to were exceedingly serious. especially considering the number of separate incidents and that, he accepted that life imprisonment imposed by the Trial Court could very well have been appropriate.

5.5 However, he contended that the misdirection of the Trial Court lay in its failure to consider the unjust consequence of the further life sentence imposed in that the appellant's eligibility for parole would put back. This Court was referred to Section 39(2)(a)(i) of the Correctional Services Act, Act 11 of 1998 as well as **S v Mashava 2014 (1) SACR 541 (SCA)** at paragraph 7-8. Reference hereto did not advance the contention and furthermore:

5.5.1 This contention, *supra*, was not put before the Trial Court to consider as a substantial and exceptional circumstance.

5.5.2 However, when considering it, regard must be had to:

5.5.2.1 the fact that the absence of a pending appeal against the 2015 sentence, implies that the appellant's 2015 sentence as a fact, was just, and proportionate to the

crime or crimes committed for which he was charged at that time;

5.5.2.2 that, eligibility of parole is the prerogative of the Parole Board and regard too must be had to the independence of the judiciary. This aspect was emphasized in **S v Stander 2011 ZASCA 211; 2012 (1) SACR 537 (SCA)** and in **S v Matlala 2003 (1) SACR 80 (SCA)** when Howie J stated: *"Unless there is a particular purpose in having regard to the pre-parole portion of an imprisonment sentence as, for example in S V Bull and Another; S v Chavulla and others 2001 (2) SACR 681 (SCA)), the Court must disregard what might or might not be decided by the administrative authorities as to parole. The court has no control over that";*

5.5.2.3 that an example of a particular purpose referred to, *supra*, **was a** constitutional validity of Sections 286A and 2688 of the Criminal Procedure Act 51 of 1977 prior to the enactment of the Correctional Services Act 111 of 1998 and that no such particular purpose has been raised in this matter as a ground of appeal;

5.5.2.4 that the provisions of Section 39(2)(a)(ii) of the Correctional Services Act 111 of 1998 apply and the Trial Court was aware and took cognizance of it at the time of sentencing.

5.6 Having regard to all the grounds raised by the appellant in the notice and as amplified in written argument, including the appellant's concession, no misdirection by the Trial Court can be found to justify interfering with the sentence imposed by the Trial Court and the appeal should fail.

Having regard to the above I propose the following order:

1. The Appeal is dismissed.

LA Retief AJ
(12/8/2020)

I agree and it is so ordered

MMP Mdalana-Mayisela J

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