

SOUTH AFRICA / JUDGMENT

Sithole v S (A548/2015) [2017] ZAGPPHC 224 (26 May 2017) [2017] ZAGPPHC 224

COURT

North Gauteng High Court, Pretoria

BEFORE

L M Molopa-Sethosa, C P Rabie, P M Mabuse

CASE / FILE NUMBER

A548/2015

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)
CASE
NO: A548/2015
26/5/2017
In

the matter between: SIMON
 ANTONIO
 SITHOLE Appellant
 and
 THE
 STATE Respondent

Summary:

An appeal against an effective sentence of 78 years imprisonment imposed by the High Court of South Africa, (Gauteng Division, Pretoria) (Mavundla J).

Order

1. The appeal in respect of sentence succeeds in as far as the effective Sentence of seventy eight (78) years imprisonment induces a sense of shock.
2. The sentences imposed in respect of counts 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 37, 38, 45, 46, 47 and 48 shall run concurrently with the sentence of 15 years imprisonment imposed in count 1.
3. The sentences imposed in respect of counts 12, 13, 14, 15, 16, 17, 18, 19, 35, 36, 39, 40, 41, 42, and 43 shall run concurrently with the sentence of 15 years imprisonment imposed in count 44.
4. The sentences imposed in respect of counts 20, 21, 22, 23, 24, 25, 26, 27, 33 and 29 shall run concurrently with the sentence of 18 years imprisonment imposed in count 28.
5. The sentence of ten (10) years imprisonment imposed on count 34 is confirmed. It is ordered that eight (8) years of the sentence in count 34 shall run concurrently with the sentence in count 1.
6. The effective sentence of the appellant is therefore fifty (50) years' imprisonment.
7. The accused remains unfit to possess a firearm.
8. In terms of section 282 of the Criminal Procedure Act 51 of 1977, as amended, the sentence is antedated to 20 February 2015.

JUDGMENT

MOLOPA-SETHOSA J (RABIE and MABUSE JJ concurring)

[1] The appellant in this matter, Simon Antonio Sithole, appeared in the High Court of South Africa, Gauteng Division, Pretoria, on the following charges:

Count 1: Housebreaking with intent to rob and robbery with aggravating circumstances as intended in section 1 of Act 51 of 1977 (read with the provisions of sections 262(1) and section 260 of the Criminal Procedure Act 51 of 1977 as well as the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997);

Count 2: Contravention of Section 3 of the Criminal Law (sexual Offences and Related Matters) Amendment Act 32 of 2007 (Read with the Provisions of Section 92(2), 256, and 261 of the Criminal Procedure Act, Act 51 of 1977; and the provisions of section 51 as well as Schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997 as amended.

Count 3: Housebreaking with intent to rape and contravention of section 3 of the Criminal Law (sexual offences and related matters) Amendment Act 32 of 2007 (read with the provisions of Section 1, 55, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007; and further with sections 92(2), 256, and 261 of the Criminal Procedure Act, Act 51 of 1977; and the provisions of Section 51 as well as schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997 as amended (rape).

Count 4: Contravention of Section 120 (6)(a) read with Section 1, 103, 120 (l)(a), Section 121 read with schedule 4 and Section 151 of the Firearms Control Act, 60 of 2000 (pointing of a firearm).

Count 5: Housebreaking with intent to rape and contravention of section 3 of the Criminal Law (sexual offences and related matters) Amendment Act 32 of 2007 (read with the provisions of Section 1, 55, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007; and further with sections 92(2), 256, and 261 of the Criminal Procedure Act, Act 51 of 1977; and the provisions of Section 51 as well as schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997 as amended (rape).

Count 6: Robbery with Aggravating Circumstances as intended in Section 1 of Act 51 of 1977 (read with the provisions of Section 262(1) and Section 260 of the Criminal Procedure Act 51 of 1977 as well as the provisions of Section 51 and of the Criminal Law Amendment Act 105 of 1977).

Count 7: Housebreaking with intent to rape and contravention of section 3 of the Criminal Law (sexual offences and related matters) Amendment Act 32 of 2007 (read with the provisions of Section 1, 55, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007; and further with sections 92(2), 256, and 261 of the Criminal Procedure Act, Act 51 of 1977; and the provisions of Section 51 as well as schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997 as amended (rape).

Count 8: Robbery with Aggravating Circumstances as intended in Section 1 of Act 51 of 1977 (read with the provisions of Section 262(1) and Section 260 of the Criminal Procedure Act 51 of 1977 as well as the provisions of Section 51 and of the Criminal Law Amendment Act 105 of 1977).

Count 9: Contravention of Section 5(2) read with Sections 1, 56(1) 56A, 57, 58, 59, 60 and 61 of Act 32 of 2007. Also read with Sections 256, 261, of the Criminal Procedure Act.

Count 11: Robbery with Aggravating Circumstances as intended in Section 1 of Act 51 of 1977 (read with the provisions of Section 262(1) and Section 260 of the Criminal Procedure Act 51 of 1977 as well as the provisions of Section 51 and of the Criminal Law Amendment Act 105 of 1977).

Count 12: Housebreaking with intent to rape and contravention of section 3 of the Criminal Law (sexual offences and related matters) Amendment Act 32 of 2007 (read with the provisions of Section 1, 55, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007; and further with sections 92(2), 256, and 261 of the Criminal Procedure Act, Act 51 of 1977; and the provisions of Section 51 as well as schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997 as amended (rape).

Count 13: Robbery with Aggravating Circumstances as intended in Section 1 of Act 51 of 1977 (read with the provisions of Section 262(1) and Section 260 of the Criminal Procedure Act 51 of 1977 as well as the provisions of Section 51 and of the Criminal Law Amendment Act 105 of 1977).

Count 14: Housebreaking with intent to rape and contravention of section 3 of the Criminal Law (sexual offences and related matters) Amendment Act 32 of 2007 (read with the provisions of Section 1, 55, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007; and further with sections 92(2), 256, and 261 of the Criminal Procedure Act, Act 51 of 1977; and the provisions of Section 51 as well as schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997 as amended (rape).

Count 15: Robbery with Aggravating Circumstances as intended in Section 1 of Act 51 of 1977 (read with the provisions of Section 262(1) and Section 260 of the Criminal Procedure Act 51 of 1977 as well as the provisions of Section 51 and of the Criminal Law Amendment Act 105 of 1977).

Count 16: Housebreaking with intent to rape and contravention of section 3 of the Criminal Law (sexual offences and related matters) Amendment Act 32 of 2007 (read with the provisions of Section 1, 55, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007; and further with sections 92(2), 256, and 261 of the Criminal Procedure Act, Act 51 of 1977; and the provisions of Section 51 as well as schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997 as amended (rape).

Count 17: Robbery with Aggravating Circumstances as intended in Section 1 of Act 51 of 1977 (read with the provisions of Section 262(1) and Section 260 of the Criminal Procedure Act 51 of 1977 as well as the provisions of Section 51 and of the Criminal Law Amendment Act 105 of 1977).

Count 18: Housebreaking with intent to rape and contravention of section 3 of the Criminal Law (sexual offences and related matters) Amendment Act 32 of 2007 (read with the provisions of Section 1, 55, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007; and further with sections 92(2), 256, and 261 of the Criminal Procedure Act, Act 51 of 1977; and the provisions of Section 51 as well as schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997 as amended (rape).

Count 19: Robbery with Aggravating Circumstances as intended in Section 1 of Act 51 of 1977 (read with the provisions of Section 262(1) and Section 260 of the Criminal Procedure Act 51 of 1977 as well as the provisions of Section 51 and of the Criminal Law Amendment Act 105 of 1977).

Count 20: Housebreaking with intent to rape and contravention of section 3 of the Criminal Law (sexual offences and related matters) Amendment Act 32 of 2007 (read with the provisions of Section 1, 55, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007; and further with sections 92(2), 256, and 261 of the Criminal Procedure Act, Act 51 of 1977; and the provisions of Section 51 as well as schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997 as amended (rape).

Count 21: Robbery with Aggravating Circumstances as intended in Section 1 of Act 51 of 1977 (read with the provisions of Section 262(1) and Section 260 of the Criminal Procedure Act 51 of 1977 as well as the provisions of Section 51 and of the Criminal Law Amendment Act 105 of 1977).

Count 22: Housebreaking with intent to rape and contravention of section 3 of the Criminal Law (sexual offences and related matters) Amendment Act 32 of 2007 (read with the provisions of Section 1, 55, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007; and further with sections 92(2), 256, and 261 of the Criminal Procedure Act, Act 51 of 1977; and the provisions of Section 51 as well as schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997 as amended (rape).

Count 23: Robbery with Aggravating Circumstances as intended in Section 1 of Act 51 of 1977 (read with the provisions of Section 262(1) and Section 260 of the Criminal Procedure Act 51 of 1977 as well as the provisions of Section 51 and of the Criminal Law Amendment Act 105 of 1977).

Count 24: Housebreaking with intent to rape and contravention of section 3 of the Criminal Law (sexual offences and related matters) Amendment Act 32 of 2007 (read with the provisions of Section 1, 55, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007; and further with sections 92(2), 256, and 261 of the Criminal Procedure Act, Act 51 of 1977; and the provisions of Section 51 as well as schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997 as amended (rape).

Count 25: Robbery with Aggravating Circumstances as intended in Section 1 of Act 51 of 1977 (read with the provisions of Section 262(1) and Section 260 of the Criminal Procedure Act 51 of 1977 as well as the provisions of Section 51 and of the Criminal Law Amendment Act 105 of 1977).

Count 26: Housebreaking with intent to rape and contravention of section 3 of the Criminal Law (sexual offences and related matters) Amendment Act 32 of 2007 (read with the provisions of Section 1, 55, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007; and further with sections 92(2), 256, and 261 of the Criminal Procedure Act, Act 51 of 1977; and the provisions of Section 51 as well as schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997 as amended (rape).

Count 27: Robbery with Aggravating Circumstances as intended in Section 1 of Act 51 of 1977 (read with the provisions of Section 262(1) and Section 260 of the Criminal Procedure Act 51 of 1977 as well as the provisions of Section 51 and of the Criminal Law Amendment Act 105 of 1977).

Count 28: Housebreaking with intent to rape and contravention of section 3 of the Criminal Law (sexual offences and related matters) Amendment Act 32 of 2007 (read with the provisions of Section 1, 55, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007; and further with sections 92(2), 256, and 261 of the Criminal Procedure Act, Act 51 of 1977; and the provisions of Section 51 as well as schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997 as amended (rape).

Count 29: Robbery with Aggravating Circumstances as intended in Section 1 of Act 51 of 1977 (read with the provisions of Section 262(1) and Section 260 of the Criminal Procedure Act 51 of 1977 as well as the provisions of Section 51 and of the Criminal Law Amendment Act 105 of 1977).

Count 30: Housebreaking with intent to rape and contravention of section 3 of the Criminal Law (sexual offences and related matters) Amendment Act 32 of 2007 (read with the provisions of Section 1, 55, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007; and further with sections 92(2), 256, and 261 of the Criminal Procedure Act, Act 51 of 1977; and the provisions of Section 51 as well as schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997 as amended (rape).

Count 31: Robbery with Aggravating Circumstances as intended in Section 1 of Act 51 of 1977 (read with the provisions of Section 262(1) and Section 260 of the Criminal Procedure Act 51 of 1977 as well as the provisions of Section 51 and of the Criminal Law Amendment Act 105 of 1977).

Count 32: Contravention of Section 36 of the General Law Amendment Act 62 of 1955 (Possession of suspected stole property).

Count 33: Housebreaking with intent to rob and robbery with aggravating circumstances as intended in section 1 of Act 51 of 1977 (read with the provisions of sections 262(1) and section 260 of the Criminal Procedure At 51 of 1977 as well as the provisions of section 51 and of the Criminal Law Amendment Act 105 of 1997).

Count 34: Contravention of Section 3 read with Section 1, 103, 117, 120(1) (a) Section 121 read with schedule 4 and Section 151 of the Firearms Control Act, 60 of 2000, and further read with Section 250 of the Criminal Procedure Act, 51 of 1977 (unlawful possession of a firearm).

Count 35: Housebreaking with intent to rape and contravention of section 3 of the Criminal Law (sexual offences and related matters) Amendment Act 32 of 2007 (read with the provisions of Section 1, 55, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007; and further with sections 92(2), 256, and 261 of the Criminal Procedure Act, Act 51 of 1977; and the provisions of Section 51 as well as schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997 as amended (rape).

Count 36: Robbery with Aggravating Circumstances as intended in Section 1 of Act 51 of 1977 (read with the provisions of Section 262(1) and as well as the provisions of Section 51 and of the Criminal Law Amendment Act 105 of 1977).

Count 37: Housebreaking with intent to rape and contravention of section 3 of the Criminal Law (sexual offences and related matters) Amendment Act 32 of 2007 (read with the provisions of Section 1, 55, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007; and further with sections 92(2), 256, and 261 of the Criminal Procedure Act, Act 51 of 1977; and the provisions of Section 51 as well as schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997 as amended (rape).

Count 38: Robbery with Aggravating Circumstances as intended in Section 1 of Act 51 of 1977 (read with the provisions of Section 262(1) and Section 260 of the Criminal Procedure Act 51 of 1977 as well as the provisions of Section 51 and of the Criminal Law Amendment Act 105 of 1977).

Count 39: Housebreaking with intent to rape and contravention of section 3 of the Criminal Law (sexual offences and related matters) Amendment Act 32 of 2007 (read with the provisions of Section 1, 55, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007; and further with sections 92(2), 256, and 261 of the Criminal Procedure Act, Act 51 of 1977; and the provisions of Section 51 as well as schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997 as amended (rape).

Count 40: Robbery with Aggravating Circumstances as intended in Section 1 of Act 51 of 1977 (read with the .provisions of Section 262(1) and Section 260 of the Criminal Procedure Act 51 of 1977 as well as the provisions of Section 51 and of the Criminal Law Amendment Act 105 of 1977).

Count 41: Housebreaking with intent to rape and contravention of section 3 of the Criminal Law (sexual offences and related matters) Amendment Act 32 of 2007 (read with the provisions of Section 1, 55, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007; and further with sections 92(2), 256, and 261 of the Criminal Procedure Act, Act 51 of 1977; and the provisions of Section 51 as well as schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997 as amended (rape).

Count 42: Robbery with Aggravating Circumstances as intended in Section 1 of Act 51 of 1977 (read with the provisions of Section 262(1) and Section 260 of the Criminal Procedure Act 51 of 1977 as well as the provisions of Section 51 and of the Criminal Law Amendment Act 105 of 1977).

Count 43: Housebreaking with intent to rape and contravention of section 3 of the Criminal Law (sexual offences and related matters) Amendment Act 32 of 2007 (read with the provisions of Section 1, 55, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007; and further with sections 92(2), 256, and 261 of the Criminal Procedure Act, Act 51 of 1977; and the provisions of Section 51 as well as schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997 as amended (rape).

Count 44: Robbery with Aggravating Circumstances as intended in Section 1 of Act 51 of 1977 (read with the provisions of Section 262(1) and Section 260 of the Criminal Procedure Act 51 of 1977 as well as the provisions of Section 51 and of the Criminal Law Amendment Act 105 of 1977).

Count 45: Housebreaking with intent to rape and contravention of section 3 of the Criminal Law (sexual offences and related matters) Amendment Act 32 of 2007 (read with the provisions of Section 1, 55, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007; and further with sections 92(2), 256, and 261 of the Criminal Procedure Act, Act 51 of 1977; and the provisions of Section 51 as well as schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997 as amended (rape).

Count 46: Robbery with Aggravating Circumstances as intended in Section 1 of Act 51 of 1977 (read with the provisions of Section 262(1) and Section 260 of the Criminal Procedure Act 51 of 1977 as well as the provisions of Section 51 and of the Criminal Law Amendment Act 105 of 1977).

Count 47: Housebreaking with intent to rape and contravention of section 3 of the Criminal Law (sexual offences and related matters) Amendment Act 32 of 2007 (read with the provisions of Section 1, 55, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007; and further with sections 92(2), 256, and 261 of the Criminal Procedure Act, Act 51 of 1977; and the provisions of Section 51 as well as schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997 as amended (rape).

Count 48: Robbery with Aggravating Circumstances as intended in Section 1 of Act 51 of 1977 (read with the provisions of Section 262(1) and Section 260 of the Criminal Procedure Act 51 of 1977 as well as the provisions of Section 51 and of the Criminal Law Amendment Act 105 of 1977).

[2] On the on 18 February 2015 the appellant pleaded guilty in respect all of the counts, save for counts 30, 31 and 32, which counts were withdrawn by the prosecutor.

[3] Pursuant to the appellant's guilty plea in terms of section 112(2) of the Criminal Procedure Act 51 of 1977, as amended ("The CPA"), the appellant was convicted on 18 February 2015 as charged. Although a plea of not guilty was initially recorded in respect of counts 28, 29 and 33, the appellant made further admissions in respect of these counts in terms of Section 220 of the CPA, which satisfied the trial judge of his guilt, therefore the appellant was convicted of these counts as well.

[4] On 20 February 2015 the appellant was sentenced as follows:

[4.1] Count 1: 15 years' imprisonment

Count 2: 10 years' imprisonment

Count 3: 10 years' imprisonment

Count 4: 15 years' imprisonment

Count 5: 10 years' imprisonment

Count 6: 15 years' imprisonment

Count 7: 10 years' imprisonment

Count 8: 15 years' imprisonment

Count 9: 6 years' imprisonment

Count 10: 15 years' imprisonment

Count 11: 15 years' imprisonment

Count 12: 10 years' imprisonment

Count 13: 15 years' imprisonment

Count 14: 10 years' imprisonment

Count 15: 15 years' imprisonment

Count 16: 10 years' imprisonment

Count 17: 15 years' imprisonment

Count 18: 10 years' imprisonment

Count 19: 15 years' imprisonment

Count 20: 10 years' imprisonment

Count 21: 15 years' imprisonment

Count 22: 10 years' imprisonment

Count 23: 15 years' imprisonment

Count 24: 10 years' imprisonment

Count 25: 15 years' imprisonment

Count 26: 10 years' imprisonment

Count 27: 15 years' imprisonment

Count 28: 18 years' imprisonment

Count 29: 15 years' imprisonment

Count 33: 15 years' imprisonment

Count 34: 10 years' imprisonment

Count 35: 10 years' imprisonment

Count 36: 15 years' imprisonment

Count 37: 10 years' imprisonment

Count 38: 15 years' imprisonment

Count 39: 10 years' imprisonment

Count 40: 15 years' imprisonment

Count 41: 10 years' imprisonment

Count 42: 15 years' imprisonment

Count 43: 10 years' imprisonment

Count 44: 15 years' imprisonment

Count 45: 10 years' imprisonment

Count 46: 15 years' imprisonment

Count 47: 10 years' imprisonment

Count 48: 15 years' imprisonment

[5] The appellant was sentenced to a total of 569 years' imprisonment. In terms of section 280 of the CPA the sentences in some counts were ordered to be served concurrently. It was ordered that:

[5.1] The sentences imposed in respect of counts 2, 3, 4, 34, 37, 38, 45 and 46 shall run concurrently with the sentence of 15 years imprisonment imposed in count 1.

[5.2] The sentences imposed in respect of counts 47, 5, 6, 7, 8, 9, 10 and 11 shall run concurrently with the sentence of 15 years imprisonment

imposed in count 48.

[5.3] The sentences imposed in respect of counts 12, 35, 36, 41, 42, 14 and 15 shall run concurrently with the sentence of 15 years imprisonment

imposed in count 13.

[5.4] The sentences imposed in respect of counts 43, 16, 17, 39, 40, 18 and 19 shall run concurrently with the sentence of 15 years imprisonment

imposed in count 44.

[5.5] The sentences imposed in respect of counts 20, 21, 22, 23, 24, 25, 26, 27, 33 and 29 shall run concurrently with the sentence of 18 years imprisonment imposed in count 28.

[5.6] The effective sentence of the appellant is therefore 78 years' imprisonment.

[5.7] The accused was declared unfit to possess a firearm.

[6] The appellant was legally represented during the proceedings in the court a quo.

[7] On 20 February 2015 the appellant brought an application for leave to appeal against his sentences before the learned judge a quo (Mavundla J). The application for leave to appeal against his sentence only was granted by the learned judge a quo. The present appeal is directed against sentence only.

[8] The genesis of the convictions and the sentences arose from events which occurred in and around informal settlements in the vicinity of Mamelodi over a period of five years between 2008 and 2013, wherein the appellant went on a spree of housebreakings, robberies with aggravating circumstances, and rapes. The incidents occurred over the period of five years at shacks in Mamelodi where the appellant lived. Only one incident occurred in the adjacent Nelmapius; and one incident occurred at a brick structure. It was difficult to trace the appellant and he was eventually apprehended through the tracking of a robbed cellular telephone.

[9] All in all the appellant was convicted of 21 counts of housebreaking with the intention to rape and rape; 1 count of sexual assault; 19 counts of robbery with aggravating circumstances; 2 counts of housebreaking with the intention to rob and robbery with aggravating circumstances; and 1 count of possession of a fire arm.

[10] The appellant admitted that he broke into the houses of the complainants, where he raped them and robbed them of whatever valuables they had in their possession. The appellant was armed with a variety of weapons, including a fire arm, during these incidents.

[11] Count 28 is noteworthy since an 11 year old girl/complainant was raped.

- [12] It was submitted on behalf of the appellant, correctly so, that the appellant is unable to point out any misdirection apropos the individual sentences. The trial court quite properly considered that, although the values of the property taken during the robberies were relatively minor, the victims were the poorest of the poor and the loss to them was substantial. The trial court furthermore held, correctly so, that the fact that the appellant was invariably armed was a further aggravating feature, since it could have resulted in a fatality. This appeal is thus, basically directed at the cumulative effect of the sentences.
- [13] The rape in count 28 falls within the ambit of section 51(1) read with part I of Schedule 2 of the Criminal Law (Sentencing) Amendment Act, Act 105 of 1997 ("The Minimum Sentences Act"), as the girl/complainant was 11 years of age when she was raped. The prescribed minimum sentence for this offence would therefore be life imprisonment, unless substantial and compelling circumstances were present, justifying a deviation from the prescribed minimum sentence. The trial court ruled that life imprisonment would be unjust, considering the cumulative effect of the individual sentences, hence the determinate sentences imposed on the appellant.
- [14] All other counts, barring three, fall within the ambit of part II and part III of Schedule 2 of the Minimum Sentences Act; mandating sentences of ten and fifteen years imprisonment, respectively.
- [15] Initially the appellant contended that the trial court misdirected itself in not imposing a sentence of life imprisonment, since all determinate sentences would run concurrently with life imprisonment by operation of law. The appellant, relying on *S v Nkosi & Others* 2003 (1) SACR 91 (SCA) at par [7]-[11], contended that the correct approach to multiple sentences, where one or more counts could attract life imprisonment, would be to impose life imprisonment. That this would eliminate the invidious position a court would be in; striving to afford recognition to all of the culpable behaviour, while attempting to avoid an undue harsh cumulative sentence. That a sentence of life imprisonment would operate in appellant's favour since it would ameliorate the cumulative effect of the various sentences; that therefore the appeal should be upheld to the extent that life imprisonment should be imposed on count 28.
- [16] The respondent/state agreed with the appellant's initial contention that life imprisonment should have been imposed in respect of count 28.
- [17] However, just prior to the hearing of the appeal, counsel for the appellant filed supplementary heads of argument in which it is contended, on behalf of the appellant, that upon reflection, it became apparent that the appellant's reliance on *S v Nkosi & Others* (supra) may have been ill considered; that the appellant no longer sought life imprisonment, as this would amount to an increase in his sentence. This contention is dealt with further below.

[18] Since the judgement in Nkosi (supra) the Correctional Services Act 111 of 1998 ("the Correctional Services Act") came into operation on 1 October 2004, significantly reforming the parole policy, particularly apropos pnsoners serving sentences of life imprisonment.

[19] Counsel for the appellant submitted that no matter what cumulative sentence were to be imposed the appellant would be entitled to be considered for parole after serving 25 years of his sentence.

[20] Section 73 (6) (a) of the Correctional Services Act provides as follows:

"(6) (a) Subject to the provisions of paragraph (b), a prisoner serving a determinate sentence may not be placed on parole until such prisoner has served either the stipulated non-parole period, or if no non-parole period was stipulated, half of the sentence, but parole must be considered whenever a prisoner has served 25 years of a sentence or cumulative sentence. [My underlining].

[21] It was submitted on behalf of the appellant that the Correctional Services Act makes provision for an exceedingly more onerous procedure where persons serving life imprisonment may only be granted parole by the Minister, on the recommendation of the National Council.

[22] Section 73 (5) (a) (ii) of the Correctional Services Act provides that a sentenced prisoner may be placed under correctional supervision and on day parole and parole-

"(5) (a) (ii) in case of a prisoner sentenced to life imprisonment on day parole or on parole on a date to be determined by the court."

[23] Section 73 (6) (b) (iv) of the Correctional Services Act further provides that:

"(6) (b) A person sentenced to-

(iv) life imprisonment, may not be placed on parole until he or she has served at least 25 years of the sentence...."

[24] It was submitted on behalf of the appellant that the imposition of life imprisonment would therefore result m a more burdensome/heavy

sentence than a determinate sentence, irrespective of the potential duration, since life imprisonment could, well conceivably result in incarceration for the rest of the prisoner's life. Refer section 73 (1) (b) of the Correctional Services Act, which provides that "a prisoner sentenced to life imprisonment remains in prison for the rest of his or her life"; of course this is subject to the provisions of the Correctional Services Act set out here above.

[25] It was thus contended, on behalf of the appellant, that a sentence of life imprisonment would not be justified in the current milieu, since it would result in an increase of sentence. That life imprisonment is a more burdensome/heavy sentence than a determinate sentence.

- [26] Counsel for the appellant submitted that since a prisoner serving a determinate sentence would be required to serve half his sentence, or 25 years, any sentence in excess of 50 years would equate to an effective sentence of 50 years, and that any additional term [over and above 50 years] would essentially be of no practical consequence.
- [27] It was thus submitted on behalf of the appellant that, the effective term of 78 years imprisonment should be amended to 50 years imprisonment, in order to reflect the practical realities of the sentence.
- [28] Counsel for the respondent on the other hand submitted that the trial Judge misdirected himself by not imposing the prescribed minimum sentence in respect of count 28 [life imprisonment], and thereby did not heed the dicta of the Supreme Court of appeal in *S v Matyityi* 2011 (1) SACR 40 (SCA) at para 23, where it was stated that:

“Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from Ma/gas, it still is 'no longer business as usual'. And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons - reasons, as here, that do not survive scrutiny. As Ma/gas makes plain, courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and, like other arms of State, owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of the State here Parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as 'relative youthfulness' or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order.”

- [29] The respondent had thus, in its heads of argument, indicated that on the date of hearing of this appeal it intended requesting this appeal court to increase the sentence herein, based on the provisions of Section 51 (1) of the Minimum Sentences Act; that in line with the submissions by the appellant's initial contention, the sentence imposed in respect of count 28 must be altered to one of life imprisonment. As this would automatically mean that all the other determinate sentences would be served concurrently with the sentence of life imprisonment, it would not be necessary for this court to interfere with the sentences imposed in respect of any of the other counts.
- [30] In the alternative, the respondent submitted that the appeal court should dismiss the appeal in light of *S v Mafoho*_2013(2) SACR 179 (SCA) where Mbha JA stated the following:

“[21] The appellant is entitled to be considered for parole once he has served 25 years of his term of imprisonment. There is accordingly no need to interfere with the sentence imposed in order to ameliorate its effect. This is not to say the sentence imposed by the regional court is appropriate (it clearly being a Methuselah sentence), but to interfere with it would, in the circumstances of this case, be purely academic because, as I have already indicated, the legislature has stepped in to ameliorate the position of the person subjected to that sentence, by directing that he or she will be considered for parole once 25 years of the sentence have been served. The appeal against sentence must therefore fail.”

[31] No cross-appeal to increase the effective sentence of 78 years' imprisonment herein to life imprisonment, based on the provisions of Section 51 (1) of the Minimum Sentences Act, has been launched by the respondent. Section 310A of the CPA provides the State with the right to cross-appeal. Section 310A (3) requires the Attorney-General (now the Director of Public Prosecutions) to provide notice to the accused person, and this notice, in terms of s 310A (2) (b), must include the grounds for the cross-appeal. Therefore, the CPA has effectively formalised the practice of providing notice in cases where an increase in sentence is being sought by the state. As already mentioned above, no cross-appeal in this regard has been launched by the respondent. I suppose that is so because the appellant had previously mooted for life imprisonment in respect of count 28. However, the appellant's supplementary heads of argument were served on the respondent on 10 May 2016 and filed in court on the same day. Clearly the appellant's supplementary heads of argument indicated that the appellant has moved away from the premise of life imprisonment for reasons set out above and seeks the appeal court to reduce the determinate sentence [from 78 years to 50 years imprisonment].

[32] In our considered view it was incumbent upon the respondent to cross-appeal if it sought the appeal court to substitute the

determinate sentence of 78 years imprisonment for the sentence of life imprisonment. Consequently, it cannot be appropriate for this appeal court to entertain the respondent's contention that this court should impose a sentence of life imprisonment, because that effectively amounts to an increase in sentence. After receiving the appellant's supplementary heads of argument, the appellant should have been forewarned, by way of a cross-appeal, that the respondent would persist with the contention that life imprisonment should be imposed in respect of count 28.

[33] Section 73(6)(a) of the Correctional Services Act which falls under chapter 7, came into operation on 1 October 2004 and is applicable to prisoners sentenced after the Correctional Services Act came into operation in October 2004; and as already stated above, it provides for parole to be considered after an offender has served 25 years of his or her sentence. This Act applies to the appellant, who was sentenced on the 20 February 2015.

[34] It is trite that sentencing remains pre-eminently within the discretion of the sentencing court. In *Mokela v The State* 2012

(1) SACR 431 (SCA) para [9], Bosielo JA stated the following:

'This salutary principle implies that the appeal court does not enjoy *carte blanche* to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served. The limited circumstances under which an appeal court can interfere with the sentence imposed

by a sentencing court have been distilled and set out in many judgments of this Court. See *S v Salzwedel* 1999 (2) SACR 586 (SCA) at 591F-G; *S v Pieters* 1987 (3) SA 717 (A) at 727F-H; *S v Ma/gas* 2001

(1) SACR 469 (SCA) para [12]; *Director of Public Prosecutions v Mngoma* 2010 (1) SACR 427 (SCA) para [11]; and *S v Le Roux & others* 2010 (2) SACR 11 (SCA) at 26b-d. '

[35] It was held in *Sv Salzwedel* 1999 (2) SACR 586 (SCA) that:

"An appeal Court is entitled to interfere with a sentence imposed by a trial court in a case where the sentence is 'disturbingly inappropriate', or totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparate, or vitiated by misdirection of a nature which shows that the trial court did not exercise its discretion reasonably."

[36] The general approach to be followed by a court of appeal when considering an appeal against sentence was held to be:

"Met betrekking tot appelle teen vonnis in die algemeen is daar herhaaldelik in talle uitsprake van hierdie Hof beklemtoon dat vonnis-oplegging berus by die diskresie van die Verhoorregter. Juis omdat dit so is, kan en sal hierdie Hof nie ingryp en die vonnis van 'n Verhoorregter verander nie, tensy dit blyk dat hy die diskresie wat aan hom toevertrou is nie op 'n behoorlike of redelike wyse uitgeoefen het nie. Om dit andersom te stel: daar is ruimte vir hierdie Hof om 'n Verhoorregter se vonnis te verander alleenlik as dit blyk dat hy sy diskresie op 'n onbehoorlike of onredelike wyse uitgeoefen het. Dit is die grondbeginsel wat alle appelle teen vonnis beheers."

Vide : *S v Pieters* 1987(3) SA 717(A)

[37] Ex facie the record the trial judge took the following factors into account when he sentenced the appellant:

[37.1] That the nature and seriousness of the offences, the personal circumstances of the appellant and the interest of society had to be considered.

[37.2] That the offences that the appellant was convicted of were of an extremely serious nature and perpetrated in an extremely violent and brutal manner.

[38] The following personal circumstances of the Appellant were placed on record:

[38.1] That the appellant was a twenty six year old Mozambican who was in a steady relationship with a woman in South Africa; with whom he had a 7 year old child.

[38.2] That the appellant was forced to leave school, in what was termed level 4, as a result of the passing of his father. Due to his, apparently, low level of education the appellant herded cattle from 2003 till 2007, when he came to South Africa.

[38.3] That at the time of his arrest the appellant worked at a salon where he earned R 300-00, although it is not clear at which intervals. That the appellant used this money to support his girlfriend, who was also employed, as well as his child, who resided with the maternal grandmother.

[38.4] That the appellant received treatment for a heart condition, which is not specified in the record.

[38.5] That the appellant was incarcerated for two years, pending his trial, and pleaded guilty to the offences.

[39] In *S v Scott-Crossley* 2008 (1) SACR 223(SCA) at para [35] the following was stated with regard to the purpose of sentence:

“Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the overriding ones ... It is true that it is in the interests of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.”

[40] Evidently sentencing must attach due weight to the gravity of the crimes for which the appellant has been convicted of. It is so that the seriousness of the crimes must weigh heavily in deciding upon appropriate sentences.

[41] In sentencing the appellant, the court a quo correctly held that no substantial and compelling circumstances existed to justify a deviation from the various determinate minimum sentences.

[42] The court a quo further correctly considered the cumulative effect of the sentences and, in the interest of showing mercy to the appellant, ordered various sentences to be served concurrently. Refer: *S v Moswathupa* 2012 (1) SACR 259 (SCA) at para [8].

[43] As conceded by counsel for the appellant, and in our considered view, as stated in *S v Mahlatsi* 2013 (2) SACR 625 (GNP) at para [8]

"...it cannot be argued with any measure of conviction that the trial court misdirected itself in any way, or that the sentences imposed on each count individually could be regarded as so shockingly heavy that interference is warranted. [My emphasis]

[44] The effective gaol term, as we have seen, is seventy eight (78) years' imprisonment, which is an exceptionally long time by anyone's standard.

[45] Clearly the offences the appellant was convicted of were properly planned; the appellant terrorized the community at the informal

settlements where these offences were committed; raped and robbed the poor of the poorest [21 counts of housebreaking with the intention to rape and rape; 1 count of sexual assault; 19 counts of robbery with aggravating circumstances; 2 counts of housebreaking with the intention to rob and robbery with aggravating circumstances; and 1 count of possession of a fire arm]. These are some of the factors the court a quo took into account when sentencing the appellant. The court a quo also took into account the proximity of the offences to one another; i.e. that the robberies were committed during the rape.

[46] The only attack against the sentence imposed against the appellant, which has some merit, in our considered view, is that the cumulative effect thereof [78 years' imprisonment], could arguably be perceived to be too heavy. The length of the individual sentences "might be legally unassailable" but the effective term of imprisonment might tend to shock, justifying interference on appeal." Vide *Mahlatsi supra*.

[47] The submission by the respondent's counsel that the appeal court should dismiss this appeal in light of *S v Mafoho supra*, cannot hold. Parole issues are administrative functions of the correctional services' officials, and in our considered view it should best be left to the correctional services' officials to deal with. The release on parole is a function of the executive arm of government that courts should not lightly interfere with. Refer *S v Botha* 2006 (2) SACR 110 (SCA) at paras [25]-[26].

[48] The power of this Court of Appeal to interfere with the imposed sentence is derived from Section 322(2) of the CPA, which states

that:

"Upon an appeal under section 316 or 316B against any sentence, the court of appeal may confirm the sentence or may delete or amend the sentence and impose such punishment as ought to have been imposed at the trial."

[49] It is so that the appellant meticulously planned to commit the offences he has been convicted of and that these were pre-mediated and were committed over a period of five (5) years, between 2008 and March 2013.

[50] The only question here is whether the cumulative sentence is shockingly inappropriate. As already stated, the effective gaol term, seventy eight (78) years' imprisonment is an exceptionally long time by anyone's standard.

[51] In *S v Scott-Crossley* 2008 (1) SACR 223(SCA) at para [35] the following was stated with regard to the purpose of sentence:

“Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the overriding ones... It is true that it is in the interests of justice that crime should be punished.

However, punishment that is excessive serves neither the interests of justice nor those of society.”

[52] The courts are there to protect the society by imposing appropriate sentences and send a clear message that there is no room for criminals in our society. This also enhances the confidence of the public in the judicial system. However, as stated in Scott-Crossley

supra, punishment that is excessive serves neither the interests of justice nor those of society. The effective sentence of seventy eight years' imprisonment (78years) by any standards, induces a sense of shock, and makes it incumbent upon the appeal court to interfere with the sentence of the court a quo in so far as the cumulative effect of the sentence is concerned.

[53] Having considered both arguments before this court, and taking into consideration all factors; and in the light of what is stated above, it is proposed that an order in the following terms be made:

1. The appeal in respect of sentence succeeds in as far as the effective sentence of seventy eight (78) years imprisonment induces a sense of shock.

L M MOLOPA-SETHOSA

JUDGE OF THE HIGH COURT

I agree

C P RABIE

JUDGE OF THE HIGH COURT

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