



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal No.: A165/2016

In the appeal between:

MADIDI PATRICK SITHOLE

Appellant

and

THE STATE

Respondent

CORAM:

REINDERS, J *et* NICHOLSON, AJ

JUDGEMENT BY:

REINDERS, J

HEARD ON:

6 FEBRUARY 2017

DELIVERED ON:

20 FEBRUARY 2017

[1] On 19 May 2014 before the Regional Court, Kroonstad, the appellant pleaded guilty to three counts, to wit:

Count 1: Housebreaking with the intent to commit robbery.

Count 2: Rape by contravening Sec 3 of the the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of

2007 read with the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997.

Count 3: Robbery with aggravating circumstances.

- [2] On the same date appellant was convicted as charged and sentenced as follows:

Count 1: 5 years imprisonment.

Count 2: Life imprisonment.

Count 3: 15 years imprisonment.

- [3] The appellant appealed only against the sentences imposed upon him by the trial court by virtue of his automatic right to appeal in terms of Sec 10 of the Judicial Matters Amendment Act 42 of 2013. His only ground for appeal lies therein that the sentence imposed is inappropriate and out of proportion to the totality of the accepted facts in mitigation.

- [4] In sentencing, the learned magistrate conducted a thorough weighing up of all the factors to be taken into account in order to arrive at a just sentence. This included the following:

- The personal circumstances of the appellant;
- the fact that he pleaded guilty (though linked positively via DNA);
- that fact that he was not a first offender, and that the crimes to which he pleaded guilty were committed whilst he was still under correctional supervision for robbery

and assault, which is indicative of his disrespect for the law and it's not deterring appellant from committing serious crimes;

- the seriousness of the offences committed and the circumstances under which they were committed: the complainant was attacked in the safety of her home whilst her minor child was present in their home, threatened with death and penetrated vaginally and anally. Hereafter the appellant continued with his rampage and robbed the complainant of her cell phone and laptop;
- the Victim Impact Report of the complainant which indicated that she was severely traumatised by the incident, *inter alia* to the extent that she lost her employ which resulted in financial difficulties and relocated due to her fear as a result of the incident;
- the interests of the community, looking up to the courts to pass sentences that would protect the entire community.

[5] After careful consideration the trial court found no cause to deviate from the prescribed minimum sentences in respect of the convictions on rape (more than once by appellant) and robbery with aggravating circumstances.

- [6] It is trite law that the power of this court sitting on appeal, are limited when it comes to the sentence in so far as interference with same is only warranted where the sentencing court committed a material misdirection, or the sentence imposed is not proportionate, or such a court did not exercise its discretion properly or at all.

See: S v Pieters 1987(3) SA 717 (A).

- [7] Ms Kruger opined that the sentences imposed on counts 1 and 3 had to be treated as one for purposes of sentence, or alternatively be ordered to run concurrently. Counsel for the respondent, Ms Moroka, aligned herself with the first proposal of Ms Kruger.
- [8] Although the Criminal Procedure Act 51 of 1977 nowhere expressly provides that charges can be taken together for the purposes of sentence, they may indeed and often are taken together – *vide* **Hiemstra's Criminal Procedure** [Issue 6] at 28-41.
- [9] It is trite law that any determinate sentence of imprisonment runs concurrently with a sentence of life imprisonment. In S v Mashava 2014 (1) SACR 541(SCA) Saldukar JA, with reference to Sec 39 (2) of the Correctional Services Act 111 of 1998 articulated in par [7] that:

“Any determinate sentence of incarceration, imposed in addition to life imprisonment, is subsumed by the latter. This is logical and practical. A person only has one life and a sentence of life imprisonment is the ultimate penal provision.”

Following these directions there are no reasons to order on appeal that the sentences in counts 1 and 3 should run concurrently.

[10] From the judgment by the court *a quo*, it is clear that the learned magistrate appreciated his function in coming to a just and appropriate sentence and exercised it responsibly and diligently. I am not convinced that he erred or misdirected himself in imposing sentence and find no reason to interfere therewith.

[11] Ms Kruger criticised the convictions and submitted that it would have been more “appropriate for the court *a quo* to convict the appellant in respect of counts 1 and 3 on a single count of robbery with the intent to commit robbery and robbery with aggravating circumstances”. Ms Kruger referred us to *S v Zimisa* 1990 (1) SACR 22 (N) where Thirion, J (at 23 d-e) articulated as follows:

“It is settled practise to charge as one count the crime of housebreaking with intent to commit a crime and the crime itself, which was committed in consequence of the breaking in and for the purpose of the commission of which the breaking in was committed. So much so is the practise that only one sentence is imposed in respect of housebreaking with the intent to commit a crime and the further crime, to commit which the breaking was effected.”

[12] No appeal was lodged against the convictions of the appellant. I am not called upon to adjudicate upon the correctness of the conviction by the trial court and consequently do not do so. The magistrate was in any event not afforded the opportunity to respond or furnish reasons for his convictions.

[13] I would therefore make the following order:

The appeal is dismissed.

C. REINDERS, J

I concur.

C. NICHOLSON, AJ

ORDER:

The appeal is dismissed.

On behalf of the appellant: Ms S. Kruger
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of the respondent: Adv M.M.M. Moroka
Instructed by:
Director: Public Prosecutions
BLOEMFONTEIN