Reportable:	NO
Circulate to Judges:	NO
Circulate to Magistrates:	NO
Circulate to Regional Magistrates	NO

[redacted]

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: CA68/2019

CASE NUMBER *A QUO:* RC2/282/2015

In the matter between:-

THAPELO SAMUEL BULWANE Appellant

and

THE STATE Respondent

CORUM: REID J *et* LAUBSCHER AJ

FMM REID J

[1] This matter is heard in terms of section 19(a) of the **Superior Court Act** 10 of 2013, by agreement between the parties on the documents filed in the court file without the presentation of oral argument. The State filed heads of argument and the appellant did not.

[2] The appeal is against the sentences imposed by Magistrate Nzimande on 25 January 2019 in the Regional Court, Provincial Division of North West held at Klerksdorp. The appellant was charged, pleaded guilty and was subsequently found guilty on 10 charges which included rape, robbery and kidnapping. The appellant was sentenced to 3 x life imprisonments, 2 x 15 years' imprisonment, 4 x 6 years' imprisonment and 1 x 4 years' imprisonment. The sentences in charges 8, 10, 11, 13, 14, 16 and 17 were to run concurrently with the sentence in charge 9 and the sentences in charges 12 and 15 are to run consecutively. I set out the details of these charges and sentences hereunder.

[3] At the onset of the trial, the State withdrew charges 1 – 7 against the appellant. The presiding magistrate confirmed with the appellant and the appellant's legal representative that the prescribed minimum legislative sentences were explained to the appellant, and the appellant confirmed that he was informed and understood these provisions.

[4] The appellant pleaded guilty, and was found guilty on the following charges:

4.1. Charge 8: KIDNAPPING

IN THAT the appellant, on 16 November 2013 at Ellaton in the Regional Division of North West, unlawfully and intentionally deprived T[redacted] S[redacted] (17) of her freedom of movement by means of forcing her into a vehicle, and upon her attempt to escape, stabbing her with a sharp object and consequently covering her head / face with a pillowcase, driving her to Ysterspruit.

4.2. Charge 9: RAPE

THAT the appellant is guilty of the crime of contravening the provisions of Section 3 read with sections 1, 2, 50, 56(1), 56A, 57, 58, 59, 60 and 61 of the **Criminal Law (Sexual Offences and Related Matters) Amendment Act** 32 of 2007 as amended. Further read with sections 94, 256, and 261 of the **Criminal Procedure Act** 51 of 1977 as amended. Further read with Section 120 of the

Children's Act 38 of 2005.

IN THAT on or about 16 November 2013 and at or near Ysterspruit Klerskdorp Regional Division of North West the appellant did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit, T[redacted] S[redacted] (17) by penetrating her vaginally with his penis acting in the execution or furtherance of a common purpose or conspiracy with a co-perpetrator or accomplice without the consent of the complainant.

4.3. Charge 10: KIDNAPPING

That the appellant is guilty of the crime of Kidnapping.

IN THAT upon 13 December 2013 and at or near Extention 12, Jouberton in the Regional Division North West, the appellant did unlawfully and intentionally deprive V[redacted] T[redacted] (19) of her freedom of movement by means of forcing her into a vehicle, and driving with her to Ext 14 in Jouberton.

4.4. Charge 11: ROBBERY

THAT the appellant is guilty of the crime of Robbery.

IN THAT upon or about 13 December 2013 and at or near Ext 14 Jouberton in the Regional Division North West, the appellant unlawfully and intentionally assaulted V[redacted] T[redacted] (19) and did then and with force take the following items from her, to wit 1 x Nokia cellphone to the value of R1,000, R13.15 in cash, chocolate bars, being her property or property in her lawful possession.

4.5. Charge 12: RAPE

THAT the appellant is guilty of the crime of contravening the provisions of section 3 read with sections 1, 2, 50, 56(1), 56A, 57, 58, 59, 60 and 61 of the **Criminal Law (Sexual Offences and Related Matters) Amendment Act** 32 of 2007 as amended. Further read with sections 94, 256 and 261 of the **Criminal Procedure Act** 51 of 1977. Further read with section 51(1) and Schedule 2 of the **Criminal Law Amendment Act** 105 of 1997 as amended. Further read with Section 120 of the

Children's Act 38 of 2005.

IN THAT on or about the 13 December 2013 and at or near Ext 14 Jouberton in the Regional Division of North West the appellant did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit, V[redacted] T[redacted] (19) by penetrating her vaginally with his penis acting in the execution or furtherance of a common purpose or conspiracy with a co-perpetrator or accomplice without the consent of the said complainant.

4.6. Charge 13: KIDNAPPING

THAT the appellant is guilty of the crime of Kidnapping.

IN THAT upon 24 January 2014 and at or near Ext 16, Jouberton in the Regional Division North West, the appellant unlawfully and intentionally deprived Z[redacted] S[redacted] (22) of her freedom of movement by means of forcing her into a vehicle, by driving with her to Ysterspruit.

4.7. Charge 14: KIDNAPPING

THAT the appellant is guilty of the crime of Kidnapping.

IN THAT upon 24 January 2014 at or near Ext 16, Jouberton in the Regional Division North West, the accused did unlawfully and intentionally deprive K[redacted] S[redacted] (40) of his freedom of movement by means of forcing him into a vehicle and driving him to Ysterspruit.

4.8. Charge 15: RAPE

THAT the appellant is guilty of the crime of contravening the provisions of Section 3 read with sections 1, 2, 50, 56(1), 56A, 57, 58, 59, 60 and 61 of the **Criminal Law (Sexual Offences and Related Matters) Amendment Act** 32 of 2007 as amended. Further read with sections 94, 256, and 261 of the **Criminal Procedure Act** 51 of 1977. Further read with section 51(1) and Schedule 2 of the **Criminal Law Amendment Act** 105 of 1997 as amended. Further read with Section 120 of the **Children's Act** 38 of 2005.

IN THAT on or about 24 January 2014 and at or near

Ysterspruit in the Regional Division of North West the appellant unlawfully and intentionally committed an act of sexual penetration with the complainant to wit, Z[redacted] S[redacted] (22) by penetrating her vaginally with his penis acting in the execution or furtherance of a common purpose or conspiracy with a co-perpetrator or accomplice without the consent of the said complainant.

4.9. Charge 16: ROBBERY

THAT the appellant is guilty of the crime of Robbery with aggravating circumstances (read with the provisions of Section 51(2) of the **Criminal Law Amendment Act** 105 of 1997).

IN THAT upon or about 24 January 2014 and at or near Ysterspruit Jouberton in the Regional Division of North West, the appellant unlawfully and intentionally assaulted K[redacted] S[redacted] and did then and with force take the following items from him, to with 1 x Blackberry Cellphone to the value of R3,200, 1 x wallet containing R300 his property or property in his lawful possession, aggravating circumstances being that the

wielding of a dangerous weapon to wit a stone (hitting him on the forehead) and a knife (stabbing him on the left shoulder) on the occasion when the offence was committed.

4.10. Charge 17: ROBBERY

THAT the appellant is guilty of the crime of robbery with aggravating circumstances (read with the provisions of section 51(2) of **Criminal Law Amendment Act** 105 of 1997).

IN THAT upon or about 24 January 2014 and at or near Ysterspruit Jouberton in the Regional Division North West, the appellant did unlawfully and intentionally assault Z[redacted] S[redacted] (22) and did then and with force take the following items from him, to wit 1 x Caevela shoes to the value of R1,800, 1 x Nokia Cellphone to the value of R800, 1 x Nokia Cellphone to value R800 her property or property in her lawful possession, aggravating circumstances being he wielding of a dangerous weapon to wit a knife, on the occasion when the offence was committed.

[5] The appellant pleaded guilty and provided formal admissions in terms of section 220 of the **Criminal Procedure Act** 51 of 1977 (CPA). The admissions read as follows:

> *"I the undersigned Tapelo Samuel Bulwane do hereby state as follows.*
> *I am the accused in this matter and would like to make the following admissions without any undue influence.*
> *I admit that upon 16 November 2013 and at or near Ellaton in the Regional Division of North West I did unlawfully and intentionally deprive one T[redacted] S[redacted] of her freedom of movement continuing kidnapping.*
> *On the said date I met the complainant near a tuck shop at Bate and Beateman Suite in Ellaton. One of my friends called her and upon her refusal one of my friends grabbed her into the car and we sped off. The complainant wanted to escape through the back window but was prevented from getting out and as she was stabbed in her back.*
> *Her head was then covered with a pillow case and we drove to Ysterspruit she dragged, she was dragged out of the car and me and two of my friends had sexual intercourse with her without her consent. We then left her in the veld. I admit that neither myself nor my friends had consent to have sexual intercourse with the complainant.*
> *I admit that upon 13 December 2013 and at or near Ex 12 in Jouberton within the Regional Division of North West I did unlawfully and intentionally deprive B[redacted] T[redacted] from her freedom of movement constituting kidnapping.*

On the said date my friends and I approached the complainant on the street and forced her into the, a motor vehicle. We drove off to a veld in Ext 14 in Jouberton. As we arrived in the veld the complainant was searched by us and we took her belongings consisting of Nokia cellphone, cash and sweets by force. The complainant was taken to a vacant room nearby. I then had sexual intercourse with the complainant by penetrating her with my penis without her consent. My friend also penetrated her without her consent. My friend also penetrated her with his penis without her consent. We then left her.

I admit that upon 24 January 2014 and at or near Ext 16, Jouberton within the Regional Division of North West I did unlawfully and intentionally deprive Z[redacted] T[redacted] and K[redacted] S[redacted] from their freedom of movement constituting kidnapping.

We approached them where they were parked. We climbed into her vehicle squashing them in the middle. We then drove with their vehicle to Ysterspruit. At Ysterspruit we demanded cell phones and threatened both with knifes.

We then took the female's shoes, cell phone and the male's Blackberry cell phone.

I admit that both myself and my friend wielded dangerous weapons on the occasion when he offence was committed whether before, during or after the commission of the offence.

The male was then ordered to lay on his stomach while my friend and I took turns in having sexual intercourse with the complainant without her consent.

I admit that the rape of the female occurred in the presence of K[redacted] S[redacted]. I admit that at all relevant times of the said different dates that my actions constituted criminal behaviour and that if I am

found guilty by a Court of Law I would be punished for my deeds.
Regarding charges 11, 16 and 17 I admit to the value as indicated in the charge sheet.
Regarding charges 9, 12 and 15 I admit that the complainants was examined by a medical doctor and I have no objection if the completed medical forms J88's be handed in as exhibits.
I confirm that the exhibits were handed in, in the correct manner and correctly sealed, handled and dispatched to the forensic Science Laboratory in Pretoria.
Therefore the chain regarding the exhibits is not in dispute.
I confirm that the analysis of the exhibits were conducted in the correct manner and have no objection if the statement deposed of in terms of Section 212(4)(a) and (6)(b) of the ***Criminal Procedure Act*** *51 of 1977 be handed in as an exhibit.*
I therefore admit guilt on all charges put.
I confirm these admissions are sufficient and the state does not have to prove such."

[6] The court *a quo* accepted the appellant's plea of guilt and the section 220 admission and the appellant was found guilty on charges 8 – 17. The appellant was found not guilty on charge 18.

[7] After being found guilty, the appellant elected to not testify in mitigation of his sentence. It was placed before the court *a*

quo that the appellant has the following previous convictions:

7.1. On 12 June 2009 the appellant was convicted on a charge of robbery committed on 7 May 2009 at the Orkney District Court. The appellant was sentenced to 18 month's imprisonment of which 9 months was suspended for a period of 4 years.

7.2. On 31 October 2009 the appellant was convicted on a charge of robbery committed on 16 September 2013 and the appellant was sentenced to 8 year's imprisonment which was wholly suspended for a period of 5 years.

[8] The following were placed on record as mitigation circumstances by the legal representative of the appellant:

8.1. At the time of the commissioning of the offences, the accused was 22 years old.

8.2. He is married and has one child who is 8 years old, but

he is not residing with the mother.

8.3. The accused has been in custody since 2014, after being arrested on a different matter, and on his arrest in this matter his detention continued.

8.4. He was self-employed prior to his arrest.

8.5. The fact that the appellant pleaded guilty is a sign of remorse.

8.6. The appellant attended school up to grade 5.

[9] The records reflect the following judgment of the court *a quo* in consideration of determining the appropriate sentences for the convictions of the appellant:

> *"... All these offences are indeed serious. With regard to robbery which is read with the provisions of section 51(2) that is robbery with aggravating circumstances there is prescribed minimum sentence of 15 years for the first offender.*
>
> *With regard to the counts of rape all these counts*

you are charged with they are read with the provisions of Section 51 Subsection 1 of the Criminal Law Amendment Act 105 of 1997.

In terms of that section those types of rapes attract life imprisonment.

Therefore the court must impose the prescribed minimum sentence where applicable unless the court finds that there are substantial and compelling circumstances which justify the court has to take into account your personal circumstances, the seriousness of the offence and the interest of the society in order to determine whether substantial and compelling circumstances do exist.

And the court has to take into account the purposes of sentencing in these circumstances.

...

As a result, I do not find any substantial and compelling circumstances in all counts where there are or is prescribed minimum sentences.

Therefore, in count 8 you recall that seven counts, count 1 to 7 were withdrawn. We start from count 8 to count 18. Because count 18 you were found not guilty and discharged.

Count 8 YOU ARE SENTENCED TO UNDERGO SIX YEARS IMPRISONMENT. That is kidnapping.

Count 9 in terms of section 51(1) of Act 105/1997 THE ACCUSED IS SENTENCED TO LIFE IMPRISONMENT.

Count 10 which is kidnapping YOU ARE SENTENCED TO SIX YEARS IMPRISONMENT.

Count 11 which is robbery, common robbery YOU ARE SENTENCED TO FOUR IMPRISONMENT.

Count 12 which is rape. In terms of section 51(1) of Act 105 of 1997 YOU ARE ALSO SENTENCED TO LIFE IMPRISONMENT.

Count 13 which is kidnapping YOU ARE SENTENCED TO SIX YEARS IMPRISONMENT.

Count 14 which is kidnapping YOU ARE ALSO SENTENCED TO SIX YEARS IMPRISONMENT.

Count 15 which is rape YOU ARE SENTENCED IN TERMS OF SECTION 51(1) OF ACT 105 OF 1997 YOU ARE SENTENCED TO LIFE IMPRISONMENT.

Count 16 which is robbery with aggravating circumstances in terms of section 51(2) of Act 105 of 1997 YOU ARE SENTENCED TO 15 YEARS IMPRISONMENT.

The last count 17 which is also robbery with aggravating circumstances in terms of section 51(1) (Schedule) 2 of Act 105 of 1997 YOU ARE SENTENCED TO UNDERGO 15 YEARS IMPRISONMENT.

In terms, it is ordered in terms of section 280(2) of the Criminal Procedure Act 51 of 1997 THAT THE SENTENCES IN THE FOLLOWING COUNTS: COUNT 8, 10, 11, 13, 14, 16 AND 17 WILL RUN CONCURRENTLY WITH THE SENTENCE IN COUNT 9. And that means you ARE SENTENCED TO THREE TERMS OF LIFE IMPRISONMENT. They will run consecutively, one after the other."

[10] The most prominent issue in the above quoted judgment, is that the court *a quo* effectively ordered the appellant to 3 life sentences, one to be served after the other.

The legal principles

[11] The provisions of section 51(1) of the Criminal Law

Amendment Act are applicable in this matter and prescribe the following minimum sentence in a peremptory manner:

> *"Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person— (a) if it has convicted [a person] of an offence referred to in Part 1 of Schedule 2 … to imprisonment for life."*

[12] Section 51(3)(a) of the Criminal Law Amendment Act contains a redeeming provision and provides as follows:

> *"If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and [may] must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years."*

[13] Section 51(3)(aA) of the Criminal Law Amendment Act aids the interpretation of the phrase "substantial and compelling circumstances" by stating which facts shall not constitute "substantial and compelling circumstances". This provision reads as follows:

"When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

(i) The complainant's previous sexual history;

(ii) an apparent lack of physical injury to the complainant;

(iii) an accused person's cultural or religious beliefs about rape; or

(iv) any relationship between the accused."

[14] The provisions of section 51(1) refer to Schedule 2, Part 1. In respect of this matter the applicable provisions of this Part of Schedule 2 is the part which deals with "rape". This part reads as follows:

"Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 —

(a) *when committed—*

(i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;

(ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;

(iii) by a person who has been convicted of two or more offences of rape or

compelled rape, but has not yet been sentenced in respect of such convictions; or

(iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;

(b) *where the victim—*

(i) is a person under the age of 16 years;

(iA) is an older person as defined in section 1 of the Older Persons Act, 2006 (Act No. 13 of 2006);

(ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or

(iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or

(c) *involving the infliction of grievous bodily harm."*

[15] In **S v Bogaards** 2013 (1) SACR 1 (CC) at para [41], Khampepe J in the Constitutional Court held the following:

> *"It can only do so [i.e. interfere with the sentence imposed] where there has been an irregularity that results in the failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it."*

[16] In the matter of **S v Malgas** 2001 (1) SACR 469 (SCA) at paragraph [7] to [9], the following was stated by Marais JA in the SCA regarding sentencing and the implementation of the provisions of section 51 of the Criminal Law Amendment Act and the concomitant imposing of prescribed minimum sentences:

> *"...The very fact that this amending legislation has been enacted indicates that Parliament was not content with that and that it was no longer to be "business as usual" when sentencing for the commission of the specified crimes.*
>
> *In what respects was it no longer business as usual? First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should ordinarily be imposed for the commission of the listed crimes in the specified circumstances. In short, the legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence, the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But*

that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may.

Secondly, a court was required to spell out and enter on the record the circumstances which it considered justified a refusal to impose the specified sentence. As was observed in Flannery v Halifax Estate Agencies Ltd by the Court of Appeal, 'a requirement to give reasons concentrates the mind, if it is fulfilled the resulting decision is much more likely to be soundly based- than if it is not'. Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, ante omnia as it were, any or all of the many factors

traditionally and rightly taken into account by courts when sentencing offenders…"

[17] It is thus very limited powers entrusted to this Court to interfere with the judgment on sentence that was imposed by the court *a quo.*

Analysis

[18] In summation, the appellant was sentenced as follows:

18.1.	Count 8:	Kidnapping:	6 years' imprisonment;
18.2.	Count 9:	Rape:	Life imprisonment;
18.3.	Count 10:	Kidnapping:	6 years' imprisonment;
18.4.	Count 11:	Robbery:	4 years' imprisonment;
18.5.	Count 12:	Rape:	Life imprisonment;
18.6.	Count 13:	Kidnapping:	6 years' imprisonment;
18.7.	Count 14:	Kidnapping:	6 years' imprisonment;
18.8.	Count 15:	Rape:	Life imprisonment;
18.9.	Count 16:	Robbery:	15 years' imprisonment;
	and		
18.10.	Count 17:	Robbery:	15 years' imprisonment.

[19] The sentences imposed, is effectively that the time periods (of 6 years, 6 years, 4 years, 6 years, 6 years, 15 years and 15 years) to be executed together with count 9 being that of lifelong imprisonment. The remainder of the two counts, count 12 and count 15, being that of lifelong imprisonment were ordered to be executed consecutively *"They will run consecutively, one after the other."*

[20] The court *a quo* thus sentenced the appellant to three (3) consecutive life sentences, the one to be executed after the other. This, for obvious reasons, cannot be correct.

[21] In the heads of argument filed on behalf of the respondent, Adv MD Moeketsi submits that the sentences are too severe and shockingly inappropriate, for the circumstances of the case. Adv Moeketsi submitted that the sentences are unjust and unfair and should be changed by this Court of appeal and submits that all the sentences should run concurrently.

[22] I hold the view that the court *a quo* erred grossly in imposing the sentences as it has in the manner that it did. This is

deserving of the interference of this Court.

[23] The sentences should be changed to have the sentences of the time periods of 6 years, 6 years, 4 years, 6 years, 6 years, 15 years and 15 years executed together with counts 9, 12 and 15 which are that of lifelong imprisonment.

[24] It is logical that life sentences cannot be imposed to be consecutive, served one after the other. The court *a quo* grossly erred in giving this sentence.

[25] For the reasons set out above, the appeal against the sentence of the appellant is successful.

Order:

[26] In the premises I make the following order:

i) The appeal is upheld.

ii) The sentence of the court *a quo* is set aside and replaced with the following sentence:

"The sentences on count 8 (of 6 year's

imprisonment), count 10 (of 6 year's imprisonment), count 11 (of 4 year's imprisonment) count 13 (of 6 year's imprisonment), count 14 (of 6 year's imprisonment), count 16 (of 15 year's imprisonment) and count 17 (of 15 year's imprisonment) should run concurrently with the life sentences as imposed on count numbers 9, 12 and 15."

[redacted]

FMM REID
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG

I agree

[redacted]

NG LAUBSCHER
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG

DATE OF HEARING : **27 NOVEMBER 2023**

DATE OF JUDGMENT : **16 APRIL 2024**

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