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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION JOHANNESBURG)
Case No: A384/2013

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

20 February 2014 **EJ FRANCIS**

In the matter between:

PUKANE, KGABI Appellant

and

THE STATE Respondent

JUDGMENT

FRANCIS J

1. On 28 July 2009 the appellant was sentenced to 15 years imprisonment by the Protea Regional Court for rape. The court also ordered that the sentence should not run concurrently with any other sentence that he was serving. At the time of sentencing, the appellant was serving a 26 year sentence for murder and being in possession of an unlicensed firearm. The appellant's attorney when he addressed the court on sentencing did not request that the

sentence imposed for the rape should run concurrently with any other sentence that he was serving.

2. The appellant duly applied for leave to appeal against sentence and was granted leave to appeal on the basis that the court *a quo* was of the view that as far as the running of the sentence that was imposed by the court was concerned, another court could come to a different conclusion.

3. A succinct factual background of the facts of this case will serve to elucidate this judgement. On 29 October 2005, the appellant came to the complainant's place of residence in the morning. He was the complainant's boyfriend's friend and had been there before and was known to her. She opened for him and he requested if he could sleep there. She told him that he could not sleep at her place as she only had one room. He then opened the cupboard, took out a knife and threatened her and ordered that she undress. She did so and he raped her. After he had raped her he left. She sent an SMS to her sister who arrived with her aunt. She told them what had happened and they went to the police station to report the rape. This led to the appellant's arrest. The appellant's version was that the sexual encounter was consensual and that the complainant had initiated it.

4. The appellant was charged with rape and was informed that the charge of rape would attract a minimum sentence of 10 years imprisonment if he was found guilty and that if he was a second offender it would be 15 years and if a third offender it would be 20 years. He was represented at the criminal proceedings

and was duly convicted. During closing arguments on sentencing the state contended that the court should impose the minimum sentence since there

were no substantial or prevailing circumstances to deviate from the minimum sentence. His counsel had contended that as far as the rape charge was concerned, he was a first offender and since the complainant did not suffer any injuries as a result of the rape that the court should be lenient towards him.

5. In sentencing the appellant, the court *a quo* found that the aggravating factors were that when he committed the offence of rape, the five year robbery sentence was still pending. Whilst he was out on bail for rape he committed the crime of murder and being in possession of unlicensed firearm in 2006. The court found that all three offences were serious in nature beside the violence part of it. The court found that rape is prevalent in the regional district of Gauteng and that the appellant had used a knife to threaten the complainant to succumb to his actions but did not use it. The court said that the fact that she did not sustain physical injuries was not a factor that the court would consider in his favour. Rape involves the invasion of a person's privacy and dignity. The most aggravating factor on the nature and the seriousness of the offence was that he attacked the complainant at the place where she was supposed to feel protected and safe at her own place of residence. He also knew her quite well and she trusted him as a friend of her boyfriend. She had opened the door for him without hesitation since she had expected him to protect her. The court said that section 51(2)(b) of the Criminal Law Amendment Act Act 105 of 1997 (the CLA) provides for a

minimum sentence of ten years imprisonment in the case of a first offender, unless the court found compelling or substantial factor then the court is to

deviate from the prescribe sentence and give a lesser sentence. The court said that the state had placed on record that there are no factors that compels the court from deviating from the prescribed sentence and that it agreed with the state. The court said that the defence did not place factors to be considered by the court to reduce the prescribed sentence. The court said that ten years was the least that the courts are expected to give in a case of this kind of an offence. The court said that when weighing the appellant's pattern of committing those violent crimes, it was persuaded to go beyond a term of ten years as he had shown that he was someone who did not respect the law and could not be rehabilitated. The court said that it was placed on record by the appellant's his legal representative that starting from 2008, he was serving a term of 26 years imprisonment. Further that he was [….] years old and was [….] years at the time of the commission of the offence. The court said that he was quite mature enough to face the consequences of his wrongful deeds and was sentenced to 15 years imprisonment and that the sentence would not run concurrently with any other sentence that he was serving.

6. When the appellant's counsel sought leave to appeal against sentence, it was contended that the sentence imposed was shockingly inappropriate in that the court had erred in finding that the attorney did not mention any factors that could be considered by the court to reduce the prescribed sentence. It was further contended that the court erred by not deviating from the prescribed

minimum sentence and thereby exercising its discretion and adding five years to the prescribed minimum sentence of ten years without considering that the

appellant had not previous conviction of rape. The appellant's representative was asked whether the court should have made any order that the 15 year sentence should run concurrently with any other sentence that was imposed. The legal representative stated that it would be difficult to find that the court had erred by not making such an order since the offences were not committed at the same time and place but he left it in the court's discretion and that is why no submissions were made about it. That was not one of the grounds for leave to appeal.

7. The grounds of appeal are that the trial court misdirected itself by taking into account the appellant's previous conviction for murder volunteered by the appellant's legal representative and by over-emphasising the seriousness of the offence at the expense of the appellant's personal circumstances.

8. Sentencing is inherently within the discretion of a trial court. This court's powers to interfere with the trial's court's discretion in imposing sentence are limited unless the trial court's discretion was exercised wrongly. The essential enquiry in an appeal against sentence is not whether the sentence was right or wrong, but whether the court exercised its discretion properly and judicially. If the discretion was exercised wrongly, this court will interfere with the sentence imposed. There must be either a material misdirection by the trial court or a gross disparity between the sentence which the appeal court would

have imposed had it been the trial court. This Court can interfere with a sentence of a trial court in a case where the sentence imposed was disturbingly

inappropriate. In this regard see *S v Salzwedel and others* 1999 (2) SACR 586 at 588 A – B.

9. The rape charge falls within the provisions of section 51(2)(b) of the CLA. The minimum prescribed sentence for such an offence is life imprisonment unless the court found substantial and compelling circumstances. It is trite that when a court considers an appropriate sentence the seriousness of the offence, the interest of the accused, as well as the interest of the society ought to be taken into account.

10. The issue that arises in this appeal is whether the court a quo misdirected itself when it sentenced the appellant to 15 years imprisonment instead of 10 years imprisonment. The appellant was informed in the charge sheet that the offence that he was charged with carries a minimum sentence as prescribed by section 51(2)(b) of the CLA, to the effect of ten years in the case of a first offender, 15 years imprisonment in the case of a second offender and 20 years imprisonment in the case of a third or subsequent offender. The appellant's counsel submitted that the appellant was 31 years old, single with three children aged 10, 9 and 4 years respectively. He passed standard 10 in 1994 and was before his arrest employed as a driver's assistance and was earning a salary of R800.00 per week. The complainant did not suffer any injuries. He had a previous conviction for armed robbery and was sentenced to 22 years

imprisonment for murder and four year imprisonment for being in possession of an unlicensed firearm.

11. The learned magistrate clearly failed to appreciate that he could only deviate from the minimum sentence provided in the CLA if it was found that there were no substantial and compelling circumstances to do so. The appellant was a first offender in the rape conviction and should have been sentenced to ten year imprisonment. It would appear that the five year imprisonment that was imposed on the appellant was because of his previous conviction for robbery and murder. This is clearly impermissible to do so and in doing so the court committed a serious misdirection. It was not clear whether the rape was committed before the murder or the murder before the rape. The trial court was required to provide cogent reasons for imposing a 15 year imprisonment sentence and failed to do so. The reasons advanced by the appellant as mitigating factors were not sufficient to allow the trial court to impose a lesser sentence than what is prescribed in the CLA. The appeal against sentence is granted.

12. During arguments before this court, the appellant's counsel argued that the trial court should have ordered that part of the sentence imposed for the rape should run concurrently with the sentence imposed for murder. This was not a ground for leave to appeal nor was this raised by the appellant in his heads of arguments. As stated previously when the appellant was afforded an opportunity to deal with this issue in the application for leave to appeal, it was made clear that this was not a ground for leave to appeal. Since this was not

part of the ground for leave to appeal, there is no need for this court to consider it. However the trial court appeared to have granted leave to appeal

on whether the sentence it imposed should have run concurrently with the other sentences. Even if this court could consider it, it should fail since the principles applicable in considering whether sentences should run concurrently finds no application here. In *S v Motswathupa* 2012 (1) SACR 259 (SCA) at paragraph 8 at page 263, it was held that a court must not lose sight of the fact that the aggregate penalty must not be unduly severe, when dealing with multiple offences. It is trite that sentencing courts in all the divisions of our courts have been enjoined to have regard to the nature of the offences and where there is a close connection or similarity between the offences involved or where there is a close connection in time and place and in intention with regard to the offences involved, then usually the counts are taken as one for purpose of sentence or the sentences are ordered to run concurrently. In the present case the appellant was charged with rape. There was as such no overlap between the murder charge and being in possession of an unlicensed firearm. There was also no conjoining as to time and place of the offences. The incidents did not flow from the same incident and the appellant was sentenced by different courts. It is also unclear what factors were taken into account when the appellant was sentenced by those courts. This ground of appeal should fail.

13. For the above reasons the following order is made:

13.1 The appeal is upheld.

13.2 The sentence imposed by the trial court are set aside and replaced with the following:

"(a) The accused is sentenced to 10 years imprisonment on count 1.

(b) The sentence is not to run concurrently with any other sentence that the accused is serving."

_____
FRANCIS J
JUDGE OF THE HIGH COURT

I agree

_____
JULY AJ
JUDGE OF THE HIGH COURT

FOR APPELLANT	:	ADV E TLAKE
FOR RESPONDENT	:	ADV VT MUSHWANA
DATE OF HEARING	:	18 FEBRUARY 2014
DATE OF JUDGMENT	:	20 FEBRUARY 2014