

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: **A.810/2013**

In the matter between:

12/12/2014

JOMO MOLEFE SERAGE

Appellant

and

THE STATE


Respondent

Full Bench Appeal:

FOURIE J

MOLEFE J

STRIJDOM AJ

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO.	
(2) OF INTEREST TO OTHER JUDGES: YES /NO.	
(3) REVISED.	
9.12.2014	
DATE	SIGNATURE

Date of Hearing:

3/12/2014

Date of Judgment:

9 December 2014

Counsel for Appellant:

Adv. S. Moeng

Counsel for Respondent:

Adv. J.J. Kotzé

JUDGMENT

STRIJDOM A.J.

A. INTRODUCTION:

1. The appellant was convicted and sentenced in the High Court of South Africa on the 11th April 2011 by Potterill J as follows:

1.1 Count 1: rape, life imprisonment;

1.2 Count 3: assault, six months imprisonment;

1.3 Count 4: rape, life imprisonment;

1.4 Count 5: theft, twelve months imprisonment;

1.5 Count 6: malicious damage to property, three months imprisonment;

1.6 Count 8: rape, life imprisonment;

1.7 Count 9: theft, twelve months imprisonment;

1.8 Count 10: unlawful possession of a firearm, five years imprisonment;

1.9 Count 13: robbery with aggravating circumstances, fifteen years imprisonment.

2. Leave to appeal against sentence was granted by the Trial Court on the 11th April 2011.

B. AD THE SENTENCE:

3. It is trite that this Court will not interfere with the sentence imposed by the Court *a quo* unless it is satisfied that the sentence has been vitiated by a material misdirection or is disturbingly inappropriate.

4. The appellant in this matter was charged *inter alia* with three counts of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Act, No. 32 of 2007, read with sections 51(2)(b) and Schedule 2 Part III of the Criminal Law Amendment Act, 105 of 1997, as amended.

5. Part III of Schedule 2, Act 105 of 1997, reads as follows:

"Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively in

circumstances other than those referred to in Part I."

6. Section 51(2)(b) of Act 105 of 1997 reads as follows:

"Notwithstanding any other law but subject to subsections (3) and (6) a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in -

(b) Part III of Schedule 2, in the case of -

(i) a first offender, to imprisonment for a period of not less than 10 years;"

7. The perusal of the record reveals that when sentencing the appellant, the court *a quo* invoked the provisions of Part I of Schedule 2, Act 105 of 1997 and imposed life imprisonment on counts 1, 4 and 8.

8. There is no indication why the court *a quo* invoked the provisions of Part I of Schedule 2, Act 105 of 1997.

9. An accused person's right to a fair trial includes the right to be

informed of the charge with sufficient detail to answer it. This right is set forth at section 35(3)(a) of the Constitution and is described therein as an absolute right.

10. It is only fair that the charge should in no uncertain terms let the accused know what to expect.
11. The appellant was informed of the charges with sufficient detail and expect that the State rely on the provisions of Part III of Schedule 2, Act 105 of 1997 and not Part I of Schedule 2, of which the latter makes provision for life imprisonment.
12. The court *a quo* relies on the confirmation by appellant's legal representative that the appellant was informed of the provisions of the Criminal Law Amendment Act, 105 of 1997 and what penalties can be imposed for rape. However, there is no indication whether the appellant was informed of the provisions of Part III of Schedule 2 or Part I of Schedule 2, Act 105 of 1997.
13. By invoking the provisions of Part I of Schedule 2 and not Part III of Schedule 2, in my view, constituted a material misdirection and life imprisonment ought not to have been imposed.

14. In my view the sentence on counts 1, 4 and 8 has been vitiated by a material misdirection and this court is at large to interfere with the sentences imposed by the court *a quo*.
15. Part III of Schedule 2, Act 105 of 1997 makes provision for a minimum sentence of ten years imprisonment on the rape charges.
16. It was not contested by the appellant that the sentences imposed on counts 3, 5, 6, 9, 10 and 13 should be interfered with by this court. However, the court will take into consideration the cumulative effect of the sentences on all the counts.
17. The pertinent question before this court is whether the trial court should have found substantial and compelling circumstances to be present, justifying a departure from the prescribed minimum sentence of ten years on counts 1, 4 and 8.
18. It was submitted on behalf of the appellant that the following personal circumstances cumulatively constituted substantial and compelling circumstances. These were that the accused was 21 years old when he committed these offences. He was single and had one minor child to maintain. The child was staying with his mother. He only passed Grade 9. He was a first offender and was

not gainfully employed. He was staying with his parents and he was awaiting trial for a period of two years.

19. The aggravating circumstances were the following: The appellant was convicted on three counts of rape, which indicated that the appellant had the propensity to rape vulnerable women. The appellant not only raped them, but also robbed or stole their property. He threatened the complainants with a firearm, a knife and a broken bottle during the execution of the rapes.
20. It was held in **S. v. PB**, 2013(2) SACR 533 (SCA) at 539 e - g that the approach to an appeal on sentence imposed in terms of Act 105 of 1997 should be different to an approach to other sentences imposed under the ordinary sentencing regime. This was so because the minimum sentences to be imposed were ordained by the Act. They could not be departed from lightly or for flimsy reasons.
21. When a court considers whether substantial and compelling circumstances justifying a lesser sentence exist, it must carefully weigh any such possible circumstances, in the context of the facts of the case, in order to establish what possible effect such circumstances may have.

22. The personal circumstances of the appellant were taken into account by the Trial Court. However, in cases of serious crime the personal circumstances of the offender by themselves will necessarily recede into the background.
23. I am not persuaded that the appellant's circumstances meet the threshold of substantial and compelling circumstances set out in section 51(3) of the Act.
24. Rape is rife and prevalent across our country. Our courts are obliged to render a service to the community in endeavouring to send a warning to any prospective criminal to refrain from harassing and terrorising women.
25. It was held in **S. v. Nkunkuma**, 2014(2) SACR 168 (SCA) at 177 c - d that:


"Rape must rank as the worst invasive and dehumanising violation of human rights. It is an intrusion of the most private rights of a human being, in particular a woman, and any such breach is a violation of a person's dignity which is one of the pillars of our Constitution."

26. I regard it as fair that some of the sentences, including one with regard to rape, be ordered to run concurrently to ameliorate the severity thereof.

27. In the result I suggest the following order:

1. The appeal against sentence on counts 1, 4 and 8 (Rape) is upheld, such sentences being set aside and replaced with a sentence of 15 years imprisonment in respect of each count with effect from 11 April 2011;
2. It is further ordered, in terms of section 280 of Act 51 of 1977, that the sentences imposed in respect of counts 3, 5, 6, 8, 9, 10 and 13 shall run concurrently with the sentences on counts 1 and 4. The effective term of imprisonment is thirty years imprisonment.

SIGNED AT PRETORIA ON THIS THE 9TH DAY OF DECEMBER 2014.



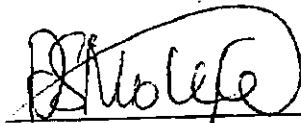
J.J. STRIJDOM
ACTING JUDGE OF THE HIGH COURT

I AGREE, AND IT IS SO ORDERED:



**FOURIE J
JUDGE OF THE HIGH COURT**

I AGREE:



**MOLEFE J
JUDGE OF THE HIGH COURT**