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IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NUMBER: A85/2008

DATE: 20 FEBRUARY 2009

In the matter between:

MLAMLI JONI APPLICANT

and

THE STATE RESPONDENT

JUDGMENT

MOTALA, J:

The appellant was charged in the regional court with 11 counts. At the conclusion of the trial he was acquitted on counts 4, 9, 10 and 11. On count 1 the appellant was charged with housebreaking with the intent to commit an unknown offence. On count 2 he was charged with robbery with aggravating circumstances. On count 3 he was charged with rape. On counts 5 and 7 he was charged with being in possession of a pistol and a revolver respectively, in contravention for Act 75/1969. On counts 6 and 8 he was charged with possession of ammunition in contravention of that Act.

The appellant was found guilty on count 1 of housebreaking with the intent to rob. He was found guilty as charged on counts 2, 3, 5 and 6. There are certain difficulties as to the verdicts on counts 7 and 8. According to the J15 form, which was filled in by the trial magistrate, the appellant was acquitted on count 7. No sentence was passed on that count. However it is clear from the judgment of the magistrate that the appellant was found guilty on count 7. In that regard I refer to page 176, lines 11 to 14 of the record. Accordingly the J15 was clearly filled in incorrectly. In the judgment itself no verdict is recorded on count 8. However according to the J15 form, the appellant was found guilty on that charge. That is confirmed in the "Vonnis-Aanhangsel".

There is a further difficulty as regards the effective sentence imposed on the appellant. In the judgment on sentence, the magistrate ordered, *inter alia*, that the sentence on count 3 be served concurrently with the sentence of ten years imprisonment imposed on count 1. In the "Vonnis-Aanhangsel" he first accurately recorded that ruling. However at some stage the figure 3 was deleted and substituted by the figure 2. On count 2 he was sentenced to six years imprisonment. On count 3 he was sentenced to five years imprisonment.

It is accordingly not clear if the appellant was sentenced to effective sentence of 15 years or 16 years imprisonment, although both in the judgment and in the vonnis-aanhangsel the magistrate concluded by saying the effective sentence was one of 15 years imprisonment. In my view the benefit of any doubt should be given to the appellant and we must conclude that the effective sentence passed on him was 15 years imprisonment.

I turn now to the appeal against the convictions. Ms Christelene Rossouw testified that she had been asleep at her home. In the early hours of the morning she was awakened by the sound of her sliding door being opened. As she was getting out of bed, two men appeared in the doorway, one of whom was the appellant. The two men were armed with an axe, a knife, a hammer and a rope. Appellant's colleague demanded guns, money and gold.

Thereafter Ms Rossouw was repeatedly and brutally assaulted by appellant and his colleague. She was smacked and repeatedly punched. She was struck with the back of the axe and the side of the knife. She was hit on her chest with the hammer. She was gagged and tied up with the rope. Appellant's colleague spat in her face. She was threatened repeatedly with death and subjected to racist insults. Her

watch was taken. She was forced to disclose where the keys to her safe were kept. Appellant went downstairs and returned with ammunition, firearms and a bank bag, which Ms Rossouw said contained R15 000 or R20 000.

While appellant was out of the room, his colleague forced Ms Rossouw on to her bed, stabbed her several times with a pair of scissors and raped her. While he was raping her, appellant returned to the room. He handed a revolver to his colleague and he himself fired a shot in the passage. The two then left the house after locking Ms Rossouw in her bedroom. She testified that the firearms, a sum of money and various other items were taken from her home.

Members of the South African Police who had been summoned by the wife of Mr Verkuil, a neighbour, arrived shortly afterwards. After obtaining a description of Ms Rossouw's assailants, the police patrolled the area. Inspector Roux and Inspector Hawkins, who were in one vehicle, received a report that a shot had been fired at a truck on the R300. They drove there and saw the appellant, who, according to Roux, fitted the description they had been given. Appellant ran when he saw them. They chased him and Inspector Hawkins eventually caught him, immediately after he had jumped over a wall.

Both Inspector Roux and Inspector Hawkins testified that appellant threw a 9 mm and a .22 bullet on the ground. In his back pocket they found R1 000,00. Under a brick, about a metre away, they found R14 500,00. Appellant was wearing a woman's watch. While taking appellant back along the route he had taken, Inspector Caswell, who had joined Roux and Hawkins, found two firearms, a revolver and a pistol.

Ms Rossouw testified that later that day the South African Police brought two firearms and a pair of white gloves to her at the hospital. She identified the gloves as belonging to her, which appellant had previously put on. She said she also identified the two firearms as belonging to her or her son. Inspector Caswell's evidence in that regard was inconsistent. At first he said that Ms Rossouw identified only the revolver as being hers. Later when recalled by the trial magistrate, he claimed she had identified both firearms. I do not think the discrepancy is of much importance as the appellant was charged merely with possession of those weapons. Inspector Caswell's evidence as to where he obtained Ms Rossouw's glove, was also inconsistent. At first he said he could not recall whether he had found them in Ms Rossouw's house. Later he said he found them in the appellant's possession and had put the firearms in the gloves. In my view the latter version is more probable and confirmed by Ms Rossouw.

The only issue before us is whether the appellant was one of the two persons who were in the complainant's house. Ms Rossouw positively identified him. Although only her bedside lamp was on in her bedroom, there was more light in the passage where she was taken in order to point out where the keys to the safe had been hidden. She saw appellant many times during her ordeal. He was frequently very near to her. In any event any doubt as to the reliability of her evidence in that regard, is in my view eliminated by the evidence of the policemen which I have outlined.

It has long been established, as Advocate Van Wyk, who appears for the State, has submitted, that when a house has been broken into with the intent to commit a crime and that crime is committed, those two offences are chargeable in one count and should not be prosecuted separately. In that regard I refer to S A Criminal Law & Procedure, Volume 2, page 814, paragraph 6. Accordingly the conviction on counts 1 and 2 should be substituted by a conviction of housebreaking with the intent to commit robbery and robbery with aggravating circumstances.

Advocate Van Wyk has also conceded, correctly, that the conviction of rape was not justified. Accordingly the conviction

appropriate sentence for the remaining convictions. I would make the following order:

1. (a) The convictions on count 1 and 2 are set aside and substituted by the following to be numbered count 1. Count 1 – "Accused is convicted of housebreaking with the intent to rob and robbery with aggravating circumstances."

(b) The conviction and sentence on count 3 are set aside.

(c) The convictions on counts 5, 6, 7 and 8 are confirmed.

2. (a) The sentences on counts 1 and 2 are set aside and substituted by the following. "The accused is sentenced to 15 (FIFTEEN) YEARS IMPRISONMENT."

(b) The sentence of three years imprisonment on counts 5, 6 and 8 is amended to read as follows. On counts 5, 6, 7 and 8, which are taken together for the purposes of sentence, the accused is sentenced to 3 (THREE) YEARS IMPRISONMENT.

(c) It is ordered that a sentence of three years imprisonment on counts 5, 6, 7 and 8 be served concurrently with the sentence on count 1. Accordingly the accused is sentenced to an effective sentence of 15 years imprisonment.

MOTALA, J

I agree

BINNS-WARD, A J