IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) NOT REPORTABLE

(2) NOT OF INTEREST TO OTHER JUDGES

(3) REVISED.

CASE NO: A634/2016

29/3/2018

In the matter between:

GIVEN MALULEKE **Appellant**

and

THE STATE **Respondent**

JUDGMENT

Mdalana-Mayisela AJ

1. The appellant (cited as accused 2 in the trial Court) was charged and convicted on 8 April 2014 in the Regional Court, Pretoria on charges of robbery with aggravating circumstances (count 1 and 4) read with section 51(2){a) and Part II of schedule 2 of Criminal Law Amendment Act 105 of 1997 ('the Act'), and rape (count 3 and 6). He was sentenced on 9 April 2014 as follows:

1.1 Counts 1 and 4 to 15 years imprisonment on each count;

1.2 Counts 3 and 6 to life imprisonment on each count; and

1.3 It was ordered that all other sentences should run concurrently with the sentence on count 3. He was sentenced to an effective period of one life imprisonment.

2. The appellant was charged with one, Collen Baloyi (accused 1), who was also charged with and convicted on counts 1 and 4. Accused 1 was similarly sentenced to the appellant on these counts. Accused 1 was moreover charged with and convicted on further charges of robbery with aggravating circumstances and rape (counts 2, 5, 7 and 8) and duly sentenced on such charges.

3. The appellant was legally represented throughout the proceedings in the Regional Court. This an appeal directed against sentence only, by way of an automatic right of appeal noted in terms of section 309{1Ha) of Criminal Procedures Act 51 of 1977. The appeal is brought on the grounds that the trial Court misdirected itself in not imposing a sentence less than the prescribed life imprisonment on counts 3 and 6, after having found that there were substantial and compelling circumstances.

4. The facts which the appellant was convicted on are briefly as follows. In respect of counts 1 and 3, the complainant J.B was walking home with her boyfriend when they were accosted by accused 1 and the appellant. One of the accused wielded and pointed a firearm at them. A shot was fired to induce fear in them. Accused 1 and the appellant robbed Ms J.B of a pair of Nike shoes and a cellular phone. Accused 1 and the appellant then chased the boyfriend away, where after they both raped her, without using a condom. Ms B sustained vaginal injuries. In respect of counts 4 and 6, which crimes were committed on the same date as those, mentioned in counts 1 and 3, a similar modus operandi was employed by accused 1 and the appellant as in the case of the crimes referred in counts 1 to 3. The complainant , S.R was walking home with her boyfriend when they were accosted by accused 1 and the appellant. One of the accused wielded and

pointed a firearm at them. A shot was fired to induce fear in them. The accused then robbed the complainant and her boyfriend of the items mentioned in count 4. Accused 1 and the appellant chased the boyfriend away, whereupon they proceeded to take the complainant to a maize field at gunpoint where they both raped her, without using a condom. The complainant sustained vaginal and anal injuries.

5. Both accused 1 and the appellant pleaded guilty. The State proved no previous convictions. The appellant did not testify in mitigation of sentence. His legal representative conveyed his personal circumstances from the bar. He was 19 years old at the time of the commission of the offences; he is not married; he has no children; he passed Grade 8; and he was employed as a gardener. It was disclosed by his legal representative that he was sentenced on 11July 2012 on two counts of rape to 20 years per count, ordered to run concurrently, and therefore he was serving an effective sentence of 20 years imprisonment .

6. In aggravation of sentence the State submitted that the appellant raped the complainants without using a condom. A firearm was used to induce fear. The appellant raped the complaints on more than one interval. The complainants sustained vaginal and anal injuries as a result of rape.

7. The Court took into account that for this type of rape where there is more than one perpetrator, the minimum sentencing regime prescribed in terms of s 51(1) of the Act is life imprisonment. In sentencing the appellant the trial Court remarked as follows: *' Mr Baloyi and Mr Maluleke, it is clear that there are no substantial and compelling reasons not* to *impose the minimum sentence, you surely know it yourself. It is not all about raping these women, you also robbed them of their items ' .* The trial Court further remarked that *'I must tell you that if you pleaded guilty and you were not serving life sentence or 20 years, the mere fact that you pleaded guilty, I would have imposed a lesser sentence, but a lesser term of sentence will not make any difference because you are serving heavier sentences in any case.'*

8. The above remarks by the trial Court are contradictory. The former one, the trial Court found that there were no substantial and compelling circumstances warranting an imposition of a lesser sentence. The latter one, the trial Court found that a plea of guilty amounted to substantial and compelling circumstances but imposed a prescribed minimum sentence of life imprisonment because of 'heavier sentences' that the appellant and his co-accused were already serving.

9. Accused 1 was serving a life sentence and the appellant was serving 20 years. The trial Court imposed an effective sentence of life imprisonment which is longer or heavier than the 20 years the appellant was serving. In this matter, the trial Court exercised its discretion improperly or unreasonably. It is trite that sentencing is pre-eminently a matter for the discretion of the trial Court. In S *v* Pillay[1] the Appellate Division Court held that: '... *a mere misdirection is not by itself sufficient to entitled the appeal Court to interfere with the sentence, it must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably.'* The earlier sentence of life imprisonment imposed on accused 1 blinded the trial Court to all other considerations in passing sentence in respect of the appellant. This Court is therefore entitled to interfere with the sentence of life imprisonment imposed on counts 3 and 6 and to consider a sentence afresh.

10. I have alluded to the circumstances under which the rape offences were committed , the aggravating factors and the personal circumstances of the appellant. The appellant was 19 years old at the time of the commission of the offence he was not yet 20 years old and therefore he was not mature. He pleaded guilty to the counts of rape and he did not subject the complainants to a secondary further trauma of having to testify incident in Court. I take into account that at the time of sentencing he was serving an effective sentence of 20 years imprisonment for other rape offences,

[1] 1977 (4) SA 531 A at 535 E-H

however, the State proved no previous convictions and he is therefore regarded as a first offender for the purpose of this matter. Whilst I take into account the retributive, deterrent and preventative aspects of punishment, I also have regard to the reformative aspect. Having considered all the relevant factors in this matter, I am of the view, that there were prospects of rehabilitation deserving of consideration which and would have justified a substantially lesser sentence than the exceptionally long one imposed. I find that there were substantial and compelling circumstances which warranted the imposition of a lesser sentence than life imprisonment imposed on counts 3 and 6.

11. The appellant committed serious crime s. A lengthy period of imprisonment is called for. In my view one of 25 years imprisonment on each count of rape is an appropriate sentence. It is one which, I consider, will satisfy the purposes of punishment and achieve a fair balance between the nature of the crimes, the interests of society and the victims, and the mitigating factors of the appellant. In taking into account the cumulative effect of the sentences imposed in respect of the multiple offences committed by the appellant, I propose to order that all other periods of imprisonment Imposed in this matter run concurrently with the sentence of 25 years imprisonment imposed by this Court on count 3. In terms of section 280(1) of the Act, sentencing Court has a discretion whether to direct sentences to run concurrently or not. In cases where the sentencing Court directs that certain sentences run concurrently, it also has a wide discretion to determine the periods which must run concurrently. In S v Moswathupa[2] the Supreme Court of Appeal stated that *' when dealing with multiple offences a Court must not lose sight of the fact that the aggregate penalty must not be unduly severe'.* In S v Motloung[3] Spilg J pointed out that the provisions of section 280(1) and (2) *'allow a sentencing court to impose a custodial sentence that will run concurrently with another sentence which the offender is already serving*

[2] 2012(1) SACR 259 SCA

fora previous conviction imposed by a different court. It applies whether the offender is still serving time for the earlier conviction, has been released on parole or where the suspended portion of the earlier sentence has become operative.' I take into consideration also consider that the appellant is serving an effective sentence of 20 years imprisonment for the offences not related to this matter. I propose that the sentence of 25 years imprisonment run concurrently with the earlier sentence of 20 years imprisonment.

12. In the result, the following order is proposed:

(a) The appellant's appeal against sentence succeeds to the extent set out below.

(i) The appeal against the sentences imposed by the trial court in respect of counts 3 and 6 is upheld. These sentences are set aside and substituted with:

13. *"On each of counts 3 and* 6 *the appellant is sentenced to imprisonment for a term of 25 years. Sentences imposed on counts 1, 4 and* 6 *are ordered to run concurrently with the sentence imposed on count 3.* The Sentence of 25 years imprisonment imposed by this court is ordered to run concurrently with an earlier sentence of 20 years imprisonment imposed on 11 July 2012.

M P MDALANA-MAYISELA

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

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[3] 2015 (1) SACR 310 (GJ) at (27)

I agree and it is so ordered

JW LOUW
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 13 March 2018

Judgment delivered: 29 March 2018

Appearances

For the Appellant: Adv F Van As

Attorney for Appellant: Pretoria Justice Centre

For Respondent: Adv DWM Broughton

Attorney for Respondent: Director Public Prosecutions , Pretoria