



IN THE GAUTENG HIGH COURT
(LOCAL DIVISION JOHANNESBURG)

Case No: A393/2013

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

18 February 2014

EJ FRANCIS

In the matter between:

MILTON MPOFU

Appellant

and

THE STATE

Respondent

JUDGMENT

FRANCIS J

1. The appellant was charged in the Johannesburg Regional Court with housebreaking with intent to rob and robbery with aggravating circumstances and with attempted rape. He pleaded not guilty to both counts on 16 August 2006. On 3 October 2006 he was found guilty as charged on count 1 and found guilty of a lesser charge of indecent assault on count 2. He was sentenced on the same day to 20 years imprisonment on count one and one year imprisonment on count 2, which was an effective 21 years term of imprisonment.

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2. Leave to appeal was only granted against sentence by the court *a quo*.
3. The complainant was a [...] year old [...] at the time of the commission of the offences. On 12 April 2006 at 23h30 she locked her house, switched off the lights and went to sleep. At about 20 to 30 minutes later she woke up and found two males in her room who told her to tell them where the money was hiding which they would kill her. She asked them how they got into her house but they continued to threaten that they would kill her if she did not give them the money. She told them that her money was in her purse and that they could take it and leave. They swore at her and smacked her in her face and would do so whenever she answered their questions. One of the men who she later identified as the appellant grabbed her chains off her neck and asked her where the firearms were kept. He at some stage said that that “he feel like sex” and then lay on top of her but there was a duvet between the two of them. He did nothing but laid on her for about a minute before he got off her. They then tied her ankles and wrists, and she was told to lie very still or she would be killed. After a short while she heard that it was quiet, so she untied herself and telephoned 10111 and contacted the police. She inspected her house and found that her drawers had been opened and her goods were lying around and her cupboards were emptied. After 15 to 20 minutes the police arrived with the appellant who she identified as the taller of the person who had entered her house and laid on her. He was wearing her daughter’s leather jacket and her, the complainant’s wallet, was protruding from the jacket pocket. There was a R20 note in the wallet which the appellant claimed to be his. All her cards and

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other things were removed from the wallet which she did not recover. She did not recover all the things that were stolen from her house which amounted to R24 000.00. The two policemen who arrested the appellant testified that they had responded to a call of a house robbery. When they were close to the complainant's house they saw two people carrying some goods. When the two persons saw them they dropped what they were carrying and started running away. They gave chase and they arrested the appellant. The other person got away. They picked up the things that they had dropped and took the appellant to the complainant's house. She identified the things that they brought and the jacket which the appellant was wearing and the wallet that was protruding from the jacket pocket.

4. The appellant testified and said that he was alone and was never at the complainant's house. He did not wear a jacket and had no wallet. He did not run away from the police and was arrested about 600 to 700 meters away from the complainant's house and was walking towards the house and not away from it.
5. The appellant was convicted and sentenced to 20 years imprisonment for count 1 and one year imprisonment for indecent assault. In sentencing the appellant the court said that there is a minimum sentence of 15 years imprisonment which the court is obliged to impose in the case of a first offender convicted of robbery with aggravating circumstances. The court said that it could only deviate from the prescribed minimum sentence if it was

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satisfied that there were substantial and compelling circumstances which would justify a lesser sentence. The court *a quo* also said that if on the other

hand it was of the opinion that the case was too serious to warrant the imposition of a longer term of imprisonment up to a minimum of 20 years imprisonment in the case of a first offender it could do so. The court found that as far as the second count was concerned there is no minimum sentence and the normal procedure applies. The court took into account that the appellant was in his late twenties, was a first offender, is married with a [...] year old child, had a temporary work as a tiller and painter and was earning R300.00 per week. He is a family man and has not committed any offences before and had been in custody for less than six months. It took into account that the appellant and his co-perpetrator used no weapons and although the complainant had been slapped she sustained no serious injuries and some of the goods were recovered. The court found that there were many aggravating factors which it would take into account. It found that it was always serious when people entered the homes of other people while they were sleeping and then commit a robbery. The fact that the appellant and the other person entered the complainant's house was probable more of a shock for her than the fact that she lost some of her material possessions. The court found that it was a very aggravating factor that the complainant is an elderly lady who was living on her own. She was helpless against the appellant. The court relied on *State v Nkosi* 1992 (1) SACR 607 (T) where an accused was sentenced to 10 year imprisonment which was the minimum sentence at the time where the court had found that the offence was a callous vicious robbery of an elderly

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helpless woman. The offender's action were audacious, cowardly, and arrogant as they were cruel and brutal and no remorse was shown. On appeal the court found that the sentence of 10 years was justified. The court *a quo* found that although the complainant was not seriously injured she was slapped

and sworn at for no reason whatsoever. She was slapped when they had asked her questions. The court said that it was clear that the robbers not only took her possession but also humiliated her.

6. The court *a quo* said that when it looks at the totality of the factors which came out during the evidence it was of the view that the minimum sentence for count 1 would not be sufficient to appropriately punish the appellant for his misdeed. The court said that members of the public would demand that somebody such as the appellant should be removed from society as long as possible. A person such as the appellant should be removed from society for as long as possible. Other offenders must also realise that they would be treated as harshly if convicted of this type of crime. The court said that the manner that the complainant, an elderly lady was treated was further cause of concern, and a further reason why it believed that 15 years imprisonment would not suffice. It said that despite the fact that this was not the worse possible robbery one that it might imagine, it believed that it was serious enough to warrant the maximum penalty which it may impose by law. The appellant was sentenced to 20 years for count 1 and 1 year for count 2.

7. On appeal it was contended that the learned regional court magistrate erred in

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sentencing the appellant to an effective 21 years when the minimum sentence applicable to robbery with aggravating circumstances is 15 years imprisonment. The state conceded that the minimum sentence that the court *a quo* should have imposed was 15 years imprisonment for count 1.

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 improperly, 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. The armed robbery charge falls within the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997. The minimum prescribed sentence for such an offence is fifteen years 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.

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9. The court a quo judgment on sentencing is confusing and contradictory. It is clear that the court *a quo* played lip service to the mitigating factors that it found existed in this matter. It relied on *State v Nkosi* supra which however is not justification for imposing the sentence of 20 years. The court found that the complainant did not suffer any injuries and the robbery was not the worse possible robbery. Despite this finding the court decided to impose 20 years imprisonment. It found that no weapons were used in the robbery.

10. It is clear that no weapon was used during the commission of the robbery but the complainant was threatened that if she did not tell them where the money was she would be killed. There was therefore a threat to inflict grievous bodily harm which makes the robbery an aggravating one in terms of the definition section of the CPA. The minimum sentence to be imposed on robbery with aggravating circumstances is 15 years for a first offender. The appellant was sentenced to 20 years imprisonment. No cogent reasons were given by the court *a quo* why it deviated from the sentence of 15 years and increased it to 20 years. In failing to justify this, the court *a quo* materially misdirected itself and erred which allows this court to intervene on the sentence imposed by it. The court did not take into account the interest of the appellant and his prospects of rehabilitation. The factors that the appellant placed before the court *a quo* did not warrant the court to impose a harsher sentence than the minimum sentence. An appropriate sentence for count 1 is 15 years imprisonment.

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11. It is trite that a court must consider the cumulative effect of a sentence and reduce the total period of imprisonment so that it is proportionate to the total moral blameworthiness of the perpetrator. 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 there is such an overlap. Firstly there is a conjoining as to time and place of the offences. Secondly the indecent assault of the complainant flowed out of the house breaking and robbery charge.

12. In my view the court *a quo* should have ordered that the sentence imposed on count 2 should have run concurrently with the sentence imposed on count 1. It should therefore have imposed an effective sentence of 15 years imprisonment.

13. In the result the appeal against sentence is upheld to the extent that the sentence imposed by the court *a quo* is set aside and substituted with the following.

13.1 ‘The accused is sentenced as follows:

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13.1.1 On count 1, 15 years imprisonment.

13.1.2 On count 2, 1 year imprisonment.

13.1.3 The sentence imposed on count 2 is to run concurrently with the sentence imposed on count 1.

13.1.4 The effective sentence is 15 years imprisonment.

13.1.5 The sentence is backdated to 3 October 2006.”

FRANCIS J
JUDGE OF THE HIGH COURT

I agree

JULY AJ
JUDGE OF THE HIGH COURT

FOR APPELLANT : E A GUARNERI
FOR RESPONDENT : ADV M RAMPYAPEDI
DATE OF HEARING : 17 FEBRUARY 2014
DATE OF JUDGMENT : 18 FEBRUARY 2014