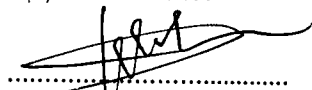


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

11/2/15
CASE NO: A549/14

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
	
SIGNATURE	11.02.2015
	DATE

In the matter between:

ABSALOM BOSS LOKHOTSHWAYO

Appellant

And

THE STATE

Respondent

JUDGMENT

MATOJANE J

[1] This is an appeal against sentence. On 6th February 1996 appellant was convicted and sentenced in the then Transvaal Division sitting in Pretoria as follows:

- Count 1, murder, 45 years imprisonment.
- Count 2, robbery, 5 years imprisonment.
- Count 3, rape, 15 years.
- Count 4, pointing of a firearm, 12 months imprisonment.
- Count 5, unlawful possession of a firearm, 12 months imprisonment
- Count 6, unlawful possession of ammunition, 6 months imprisonment.

[2] The sentences in respect of counts 4, 5 and 6 were ordered to run concurrently. The appellant was thus sentenced to an effective period of 66 years of imprisonment. The provisions of the Criminal law Amendment Act were not applicable at the time of the commission of the offence.

[3] The appellant applied to the court *a quo* for leave to appeal to this court against his conviction and sentence. The application for leave to appeal against conviction was refused and the court gave leave to appeal against sentence only.

[4] Appellant contends that this court must set aside the sentence imposed because of misdirection by the court *a quo* and accordingly that this court is at liberty to reconsider sentence and impose a shorter term of imprisonment. Appellant's counsel relies on the following alleged misdirection by the court *a quo*:

(1) It failed to exercise its discretion judicially, properly, and in a balanced manner in sentencing the appellants by not allowing enough evidence in mitigation of sentence to be placed on record.

(2) It imposed a sentence totally out of proportion to the gravity of the offence committed and the sentence is shockingly harsh and induces a sense of shock, therefore startlingly disproportionate.

(3) In sentencing the appellant to an effective term of 66 years imprisonment, the Court *a quo* over-emphasized the

seriousness of the offences and the interest of the society whilst the personal circumstances of the appellant were not considered and or under-emphasized.

(4) The trial court misdirected itself by failing to take into account that appellant was in custody awaiting trial for a period of 3 years and 8 months.

[5] In its judgment the court *a quo* accepted the state's evidence that appellant, who was accompanied by Absalom Mahlangu, a section 204 witness, went to the deceased house. The appellant assaulted the deceased, shot and wounded her and dragged her to the vehicle they were traveling in. The deceased was carrying a baby on her back, the witness tried to intervene but appellant pointed him with a firearm and ordered him into the vehicle. Appellant drove the vehicle to some nearby bushes where he dragged the deceased out of the vehicle and raped her. Thereafter, appellant ordered Absalom Mahlangu to help him carry the deceased into the vehicle, as she could not walk on her own. They both put the deceased in the vehicle and appellant ordered Absalom Mahlangu to drive the vehicle. The deceased died in the vehicle and her corpse was dumped on the side of the road. The deceased died of a gunshot wound in the abdomen.

[6] It is settled law that the infliction of punishment is pre-eminently a matter for the discretion of the trial court. In determining an appropriate sentence regard must be had to the well-known triad factors, namely the seriousness of the crime, the offender's personal circumstances, as well as the interests of society. Equally important is the aspect of mercy, which is a concomitant of justice. Each sentence must be individualized. Each case must be dealt with on its own peculiar facts. A Court of appeal does not have an unfettered discretion to interfere with the sentence imposed by a trial court. It is only where it is clear that the discretion of the trial court was not exercised judicially or reasonably that a court of appeal will be entitled to interfere. Where there is no clear misdirection the remaining question is whether there exists such a striking disparity between the sentences imposed by the trial court and the sentences the appeal court would have imposed, as to warrant interference.

[7] It is necessary to deal briefly with the argument that the court *a quo* misdirected itself by failing to take into account that appellant was in custody awaiting trial for a period of 3 years and 8 months. Lewis JA in **S v Radebe and another**¹ differed with **S v Brophy and Another**²

¹ 2013(2)SACR 165 (SCA)

² 2007(2)SACR 56 (W)

where the court held that the rule of thumb in determining an appropriate sentence should be to take into account the period in detention awaiting the completion of the trial and double it. That double period should be deducted from the period of imprisonment proposed when sentencing. Lewis JA held that there should be no rule of thumb in respect of the calculation of the weight to be given to the period spent by an accused awaiting trial. The court stated that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed.

[8] It is trite that whatever the gravity of offence is and the interest of society, the most important factors in determining sentence are the person, the character and circumstances of the crime. Holmes JA in the often-quoted statement from the case of **S v Sparks** 1972(3) SA 396 (A) at page 410H held that:

"Punishment should fit the criminal as well as the crime, be fair to the state and to the accused and be blended with a measure of mercy."

[9] It follows that in determining the appropriate sentence the needs of the convict and the interest of society should be balanced with care and understanding. In order to achieve these ideals the sentencing court should have sufficient and meaningful pre-sentencing information in order to come up with suitable punishment. See **State v Maxaku**³. *In casu*, the only information in mitigation of sentence considered by the court was that appellant was 42 years old when he was sentenced and was married with two minor children to maintain. The court did not know who appellant was, why he committed the offences, his level of education, his upbringing and whether he was a victim of substance abuse. This scant information in my view leaves the assessment of penalty to a hazardous guess based on no or inadequate information.

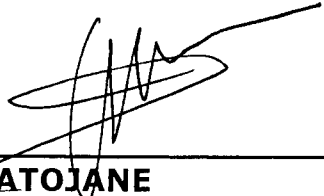
[10] In the circumstances, the court *a quo* should have called for such evidence as was necessary to enable it to exercise a proper judicial sentencing discretion. This enquiry was not carried out. This is a misdirection on the part of the trial court in that the basic elements of sentencing were not followed to the prejudice of the accused.

³ *State v Maxaku*, Williams 1973(4) SA 248

[11] In my view, the cumulative effect of the sentences imposed, is excessive and induces a sense of shock which warrants our interference.

[12] In the result, I would confirm the conviction and set aside the sentence imposed by the court *a quo* and substitute it with the following:

1.
 - a. Count 1, Murder, 30 years of imprisonment.
 - b. Count 2, Robbery, 5 years imprisonment.
 - c. Count 3, Rape, 15 years imprisonment.
 - d. Count 4, pointing of a firearm, 6 months imprisonment.
 - e. Count 5, unlawful possession of a firearm, 12 months imprisonment.
 - f. Count 6, unlawful possession of ammunition, 6 months imprisonment.
2. All sentences are ordered to run concurrently.
3. In terms of section 282 of the Criminal Procedure Act the sentence is antedated to 6 February 1996.



K E MATOJANE
JUDGE OF THE HIGH COURT

I agree, and it is so ordered



W R C PRINSLOO
JUDGE OF THE HIGH COURT

I agree



N M MAVUNDLA
JUDGE OF THE HIGH COURT