

**IN THE HIGH COURT NORTH GAUTENG, PRETORIA
REPUBLIC OF SOUTH AFRICA**

**REPORTABLE
OF INTEREST TO OTHER JUDGES**

CASE NUMBER: A682/09

DATE: 26 NOVEMBER 2009

**In the matter between
LETSAU MASEMOLA
and
THE STATE**

APPELLANT

RESPONDENT

JUDGMENT

Ismail AJ

[1] The Appellant was given leave to appeal to this court against sentence only. He was sentenced to an effective term of 25 years imprisonment

[2] The Appellant pleaded guilty to 9 counts of housebreaking with the intent to steal and theft; 1 count of rape; 1 count of attempted housebreaking with intent to commit an offence unknown to the State and 1 count of being in possession of housebreaking instruments.

[3] He pleaded guilty to the offences in terms of a plea bargain agreement subject to the provision of Section 105A of Act 51 of 1977(the CPA).

[4] The trial court sentenced him in respect of count 1,2,3,4,6,7,8,10 and 11 (The housebreaking with intent to steal and theft charges) to 10 years imprisonment on each count On count 5, the rape charge, he was sentenced to 15 years imprisonment. On count 9, the attempted housebreaking to commit an offence unknown to the State, to 5 years imprisonment and on count 12 to 12 months

imprisonment for being in possession of housebreaking instruments.

[5] The court ordered that all the counts with the exception of count 5 the rape charge, should run concurrently.

[6] He was represented by Mrs Ledwaba who read the plea agreement into the record. The prosecutor, Welie Ismail Motaung represented the state during the plea negotiations whilst Mrs Ledwaba represented the appellant. The sentences were agreed upon between the parties during the negotiation process between them as reflected in paragraph [4] above.

[7] The Plea agreement stated that:

“The offences were committed while the victims were asleep in their houses except for the matter of D. M. an (sic) 10 section to (sic)... and they were committed at night. The victim in count 5 was also arrested in her house whilst sleeping and raped by the accused as well as another suspect..”

[8] From the transcript it appears that the following questions were asked by the court to establish whether the appellant intended to plead guilty in terms pf the agreement.

COURT: The plea and sentence agreement reflects the instructions you gave to Mrs Ledwaba it in line of what you Know and did.

ACCUSED: Correct your worship.

COURT: You entered into this agreement freely and voluntarily in your sound and sober senses not influenced to make or enter into this plea and agreement?

ACCUSED: Correct your worship.

COURT: You are also aware of the sentences as stated in this plea and sentence agreement that is what you agreed upon?

ACCUSED: Correct

[9] After this interchange of questions and answers between the Court and the appellant the trial court rubber stamped the agreement and sentenced the appellant in terms of the agreement.

[10] In the heads of argument submitted on behalf of the appellant it was submitted that the sentence was unreasonably excessive and that it called for interference of this court.

[11] Section 105 A came into operation of 14 December 2007 and it set out in detail how the practice should operate or be concluded between the parties to the agreement Prior to this section coming into operation Uijs AJ in **North Western Dense Concrete CC and Another v Director of Public Prosecution (Western Cape)** 1999 (2) SACR 669 (C) at 683 stated

'In my view, thus, the respondent should and must be held to his part of the bargain. That the prosecutor should stand by an undertaking solemnly given during negotiations leading up to a plea agreement should be regarded as a basic rule of that procedure "

Uijs AJ held prior to the enactment of section 105A that plea bargaining was an integrated part of one law of criminal procedure see 672 h-j.

[12] In this matter it is clear that the appellant and respondent entered into a written plea bargain agreement. Both parties agreed that the appellant would plead guilty to the diverse charges and that he would be sentenced to an effective term of 25 years imprisonment.

[13] The parties accordingly entered into a contract whereby they agreed to the terms and conditions thereof. It has often been said that the parties conclude contracts between them and it is not the court which makes agreement for them.

[14] I can see no reason why the appellant having negotiated the plea bargain agreement between him and the State and particularly as a consequence of the magistrate taking the precautionary efforts at ensuring that the appellant was a willing party to the agreement that it should be deviated from. See: *Van Eeden v Director of Public Prosecution. Cape of Good Hope* 2005 (2) SACR 22 at 28b-c.

[15] I feel compelled to address the question of sentence agreed upon between the parties in respect of the rape count, namely count 5. The rape in question fell within the parameters of Part III of the second schedule of the Criminal Law Amendment Act 105 of 1997. The court may sentence a person for an offence falling within that Part II of the second schedule to a minimum term of 10 years imprisonment.

[16] Section 51 of the Act stipulates:

Discretionary minimum sentences for certain serious offences

(1) Notwithstanding any other law but subject to subsection (3) and (6), a regional court or High Court shall sentence a person it has convicted of an offence referred to in Part I of of schedule 2 to imprisonment for life.

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

(a) Part II of Schedule 2. in the case of-

(i) a first offender, to imprisonment for a period not less than 15 years;

(ii) a second offender of any such offence, to imprisonment for a period of not less than 20 years; and

(iii) a third or subsequent offender of any offence to imprisonment for a period not less than 25 years;

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

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

(ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and

(C) Part IV of Schedule 2 , in the case of-

(i) a first offender to imprisonment for a period of not less than 5 years:

(ii) a second offender of any such offence, to imprisonment for a period not less than 7 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period of not less than 10 years

Provided that the maximum term of imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of

imprisonment that it must impose in terms of this subsection by more than five years.

[17] It appears from the foregoing provisions that the sentence imposed in respect of the rape charge was not the minimum sentence but the maximum sentence which the court could impose. It would appear that this was the period which the appellants legal advisor agreed to during the plea bargaining process.

[18] The parties therefore agreed upon this term of imprisonment and the trial court was not called upon to determine whether substantial and compelling circumstances existed. The sentence was determined by the parties to the agreement themselves.

[19] There is no merit to the appeal in terms of the sentence and I would accordingly recommend that the appeal be dismissed.

ISMAIL AJ

I agree

VAN ZYL AJ

For the Appellant: Adv Tshabaiala Instructed by the Justice Centre

For the Respondent: Adv Ramakhelwan instructed by DPP

Judgment delivered: on 26 November 2009