THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.01 OF 2014.

[CORAM: TUMWESIGYE, KISAAKYE, MWANGUSYA, MWONDHA, TIBATEMWA-EKIRIKUBINZA, JJSC.]

BETWEEN

MAGALA RAMATHAN ..... APPELLANT

AND

UGANDA ..... RESPONDENT

[Appeal from the decision of the Court of Appeal at Kampala by Opio-Aweri, Balungi Bossa and Kakuru, JJA) Criminal Appeal No. 0416 *of 2009 dated 22nd January) 2014.J*

JUDGMENT OF THE COURT

This is a second appeal against the sentence of the High Court delivered by J. W. Kwesiga J on 24th June 2009 at Kampala. The particulars of the case are that the appellant was convicted of manslaughter on 2 counts. The appellant was sentenced on each count to a term of 7 years imprisonment to be served consecutively.

He appealed to the Court of Appeal against both the conviction and sentences. Regarding the sentences, the appellant contended that the trial judge erred in imposing consecutive sentences. Both grounds of

appeal were dismissed and the Court of Appeal upheld the conviction and the trial Judge's decision that the sentences be served consecutively.

Dissatisfied with the Court of Appeal decision, the appellant appealed to this Court on one ground as follows:

1. **The learned Justices of the Court of Appeal erred in law and fact in upholding the aggregate sentence of 14 years imprisonment which was manifestly excessive and illegal in the circumstances, and occasioned a failure of justice.**

Representation

At the hearing of this appeal, the appellant opted to represent himself. The respondent was represented by Jane Okuo Kajuga, Senior Principal State Attorney in the Directorate of Public Prosecutions.

Appellant's submissions

The appellant submitted that the learned Justices of Appeal failed to direct their mind to the learned trial judge's failure to follow procedural law during the sentencing process. He submitted that in Uganda, it is a rule of law that a trial court must during sentencing consider the remand period. That in arriving at the sentence, the period he spent on remand (10 months) as well as that spent on bail (4years) had to be considered because his freedom was limited. That

the failure to consider both periods as part of the remand rendered the sentences imposed illegal.

In support of the above argument, he relied on **Article 23 (8)** of the **Constitution** which provides that:

> **When a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment.**

The appellant also relied on the authorities of **Bashir Ssali vs. Uganda SCCA No. 40 of 2004 and Bukenya vs. Uganda SCCA No. 3 of 2013** to emphasize the argument that failure to consider the remand period renders a sentence illegal.

Furthermore, the appellant faulted the finding of the learned Justices of Appeal that the trial judge had the discretion to direct the sentences to run either concurrently or consecutively and that the aggregate sentence of 14 years imprisonment was neither harsh nor excessive. The learned Justices of Appeal had relied on **Section 2 (2) of the Trial on Indictments Act** and held as follows: *"Our understanding of Section 2 of the Trial on Indictment Act is that the general rule is for the High Court to impose consecutive sentences and directing sentences to run concurrently is the exception. "*

It was also argued that the sentence imposed was excessive because the trial judge did not consider the mitigating factors presented in

court. The mitigating factors were that he committed the crime as a result of provocation by the crowd of people who broke his car windscreen and was therefore not in full control of his mind; was a first time offender and that at the age of 51 years, he had the capacity to reform and contribute to society. He also submitted that he was a family man with 11 dependents who looked up to him for emotional and financial support.

The appellant relied on the South African authority of **State vs. Makwanyane [1995] (3) S.A 391** to support the argument that a court is obliged to consider the mitigating factors presented.

In support of the fact that he was a first time offender, the appellant relied on Benjamin Odoki's **Guide to Criminal Procedure, 3rd Edition (2006) at page 173** wherein he stated that, *"the fact that an accused person is a first offender or has had previous good record is a valid mitigating factor ...* "

In regard to the appellant's age as a mitigating factor, there was reliance on the authority of the Court of Appeal of Uganda - **Kabatera Stephen vs. Uganda Criminal Appeal No. 123 of 2001-** where the court stated that, *"we are of the opinion that the age of an accused person is always a material factor that ought to be taken into account before sentence is imposed ... failure to consider the age of the appellant caused a failure of justice.* "

Respondent's submissions

Counsel for the respondent conceded that the honourable Justices of the Court of Appeal erred by confirming the sentences and yet the learned trial judge did not take into consideration the period that the appellant had spent on remand. She submitted that this court can invoke **Section 7 of the Judicature Act** to set aside the sentence, take into account the remand period and arrive at an appropriate sentence.

The respondent however disagreed about the period of 4 years and 4 months as the period spent on remand. Counsel submitted that part of the said period was spent on bail and only 10 months were spent in custody. Counsel therefore argued that the Court should consider only the 10 months the appellant spent in lawful custody as the remand period.

In regard to the appellant's submission that his being provoked ought to have been considered as a factor to mitigate the sentence, the respondent submitted that provocation could not be considered as a mitigating factor because the legal effect of this is to reduce the offence of murder to the lesser offence of manslaughter.

Further, counsel for the respondent submitted that whereas the mitigating circumstances had been raised before the trial judge, the judge did not specifically refer to them in his sentence because the court considered the aggravating factors to have outweighed the mitigating factors.

Analysis of Court

Although the appeal was based on only 1 ground, the submissions bring out 3 legal issues for our determination:

(i) Whether a judicial officer is obliged to consider mitigating factors while sentencing.

(ii) Whether the trial judge's order that the sentences run consecutively was an error in law.

(iii) Whether the failure to take into consideration the remand period rendered the entire sentence illegal.

Issue 1

We will first determine the aspect of the mitigating factors.

The appellant submitted that the mitigating factors were not considered. On the other hand, the respondent contended that the mitigating factors were considered but the aggravating factors superseded the mitigating factors.

During sentencing, the trial judge stated as follows:

I do give a sentence that both punishes the convict and warns people who hold guns not to abuse them and use them against the people who are defenseless and innocent. I hereby sentence the accused person as follows: imprisonment for (7) *seven years in Count* 1, *imprisonment for* (7) *seven years in Count* 2. *The sentences should be served consecutively.*

The Court of Appeal in confirming the sentence given by the trial Judge stated as follows:

((We find that the appellant having acted in the manner that he did and his actions having resulted in death of two people, the Judge correctly convicted him of manslaughter. "

We note that in sentencing, both the trial court and the Court of Appeal did not make any reference to what was presented by the accused! appellant as mitigating factors.

Judicial discretion is a vital part of imposing sentence and it is trite law that this lies with the trial court. **[See: Kyalimpa Edward vs. Uganda SCCA No.10 of 1995].** However, the discretion is not absolute. Judicial discretion is an issue of accountability and should be exercised judicially. A judicial officer is accountable to explain the reasons for exercising the discretion in a particular way.

Our justice system requires that an accused person be given an opportunity to say something in mitigation of the sentence. **It** follows that in arriving at a sentence, a judicial officer is obliged to balance the mitigating factors against the aggravating factors.

However, after identifying the mitigating and aggravating factors, a judge may come to the conclusion that in the circumstances of the particular case, the aggravating factors outweigh what would have been mitigating factors. This principle was well laid out in the persuasive authority of **S vs. Vilakazi 2009 1 SACR 552 (SCA),** where the Supreme Court of South Africa held that:

> **In cases of serious crime, the personal circumstances of the offender, by themselves, will necessarily recede**

into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment, the questions whether the accused is married or single, whether he has 2 children or 3 ... are largely immaterial to what that period should be.

Nevertheless the fact that the judicial officer was alive to what the accused submitted in mitigation must be evident on record. It must therefore be stated by the judicial officer that the sentence was arrived at with both the mitigating and aggravating factors in mind. It is only then that the accused will be sure that the judge addressed his or her mind to the cited mitigating factors but nevertheless came to the conclusion that the aggravating factors outweighed the mitigating ones.

We therefore find that the courts below erred in only referring to the aggravating factors while making no mention of the mitigating factors.

It was also the appellant's submission that his being provoked should have been considered in mitigation. That by neglecting this factor, the trial court meted out an excessive sentence. The respondent on the other hand argued that provocation cannot be considered as a mitigating factor in sentencing since the reduction of the offence from murder to manslaughter was based on the court's acceptance that the accused had killed his victim as a result of provocation.

The essence of the argument was that the appellant had already benefited from the "plea".

In our view, whereas the Penal Code Act creates the statutory defence of provocation in **Sections 192 and 193,** with the result that a murder is reduced to manslaughter, this does not mean that the law does not recognize the ordinary meaning of provocation as a possible mitigating factor in regard to sentencing. In ordinary parlance, provocation refers to wrongful conduct that makes someone angry and prompts them to physically retaliate against the wrong doer.

There is no doubt that the circumstances covered by the statutory defence of provocation are not uniform. Within the statutory provision (of **Section 193 (supra))** for example, the law recognizes assaults as well as insults. It must also be noted that case law interpretation of what constitutes provocation varies widely. Thus abusive words have in some cases been recognized as provocation **(Rex vs. Hussein** *el o* **Mohamed 9 EACA 52),** finding a spouse in an act of adultery has in some cases been recognized as provocation[R ***V AZayina*** **[1957]** ***R*** **&** ***N*** **536** ***(Ny)]*** engaging in actions of witchcraft in the presence of another person has in some cases been interpreted as provocation and so has been physical assault **(Eria Galikuwa vs. R (1951) 18 EACA 175, Republic vs. Juma [1974]).** We are therefore of the view that the nature of provocation varies from case to case.

The nature of provocation can be described in terms of gravity of provocation and must therefore have a bearing on sentences given to

convicts whose manslaughter was by reason of provocation. We also note that whereas a successful plea of provocation leads to a reduction of the crime of murder to manslaughter, the law does not provide a mandatory sentence to those convicted under the section but rather provides only a maximum sentence of life imprisonment.

In light of the above analysis, we are unable to accept the respondent's submission that once provocation has been considered to reduce a murder charge to manslaughter, it cannot be considered as a mitigating factor in sentencing.

However, despite the fact that the courts below erred in not pronouncing themselves on the mitigating factors and only considered the aggravating factors which surrounded the offences committed, we are satisfied that the failure did not cause any injustice. Having weighed the aggravating factors against what would be considered mitigating factors surrounding the offences committed, we are satisfied that the crime is deserving of a substantial period of imprisonment and 7 years for each offence was appropriate punishment.

Issue 2

In answering the question whether the order that the sentences run consecutively was an error in law, we must again emphasize that sentencing is a matter in which a judge exercises discretion and furthermore that judicial discretion should be exercised judicially. More specifically, Judicial Officers have the discretion to decide the

manner In which the sentences given will be served - whether concurrently or consecutively. **Section 2 (2) of the Trial on Indictments Act** provides:

> **When a person is convicted at one trial of two or more distinct offences, the High Court <u>may</u> sentence him or her for those offences to the several punishments prescribed for them which the court is competent to impose, those punishments, when consisting of imprisonment, to commence the one after the expiration** of the **other, in such order as the court may direct, unless the court directs that the punishments shall run concurrently.** (Emphasis of Court)

We agree with the Court of Appeal's interpretation of Section 2 (supra) that the general rule is for the High court to impose a consecutive sentence and a convict will only concurrently serve sentences arising out of distinct offences if the court so directs.

We however must underscore the need for an accused to know why a judge arrived at a particular decision. In the persuasive authority of **Ndwandwe vs. Rex [2012] SZSC 39,** the Supreme Court of Swaziland considered what judicious exercise of the sentencing discretion entails as follows:

> **The exercise of sentencing discretion must be a rational process in the sense that it must be based on the facts before the court and must show the purpose**

> **the sentence is meant to achieve. The Court must be conscious and deliberate in its choice of punishment and <u>the records of the court must show the legal reasoning behind the sentence</u>. The legal reasoning will reflect the application of particular principles and**
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> **the result it is expected to achieve. The choice of applicable principles and the sentence will depend on the peculiar facts and needs of each case. The choice will involve a consideration of the nature and circumstances of the crime, the interest of the society and the personal circumstances of the accused other mitigating factors and often times a selection between or application of conflicting objectives or principles of**
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> **punishment.** (Our emphasis)

It is therefore expected that whether a judge opts for a consecutive or a concurrent running of sentences, her reasoning should be on record.

Be that as it may, it is a trite principle of law that in ordering a consecutive sentence, the total sentence must be proportionate to the offence and the circumstances surrounding each case.

The above principle is reflected in **Section 8** of the **Sentencing guidelines** which provide that:

(2) The total sum of the cumulative sentence shall be proportionate to the culpability of the offender.

In pronouncing the number of prison years for each count and that the sentences would run consecutively, the trial judge mentioned the justification for the sentence - punitive on the one hand and deterrent on the other.

We therefore find that the trial judge judicially exercised his judicial discretion.

Issue 3

We now turn to address the aspect of consideration of remand In sentencing.

It was the appellant's submission that the learned trial judge failed to consider the period of 4 years and 4 months that he had spent on remand. It is however on record that the appellant spent only 10 months in prison custody and the 4 years he was on bail.

This Court has recently held in **Rwabugande vs. Uganda (supra)** that a sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision. Further that, consideration of

(1) Where the court imposes consecutive sentences, the court shall first identify the material part of the conduct giving or the commission of the offence and determine the total sentence to be imposed.

the time spent in lawful custody means deducting that period from the final sentence.

It is however clear in our minds that where an individual is convicted but released on bail pending appeal, the time he is out on bail cannot be deducted because the individual would not be suffering any curtailment of freedom. It is therefore the 10 months which will be deducted.

In conclusion, we find that the appeal partly succeeds to the extent that in imposing the term of imprisonment, the 10 months period spent on remand ought to have been taken into account.

Consequently, the sentence of 14 years imprisonment imposed by the High Court judge and confirmed by the Court of Appeal is here by set aside.

We have addressed our mind to the mitigating factors presented by the convict and weighed them against the fact that he fired bullets into a crowd of unarmed people, a factor we consider aggravating. In the circumstances, a sentence of 7 years imprisonment would still be appropriate for count 1. We also consider that a sentence of 7 years imprisonment would be appropriate for Count 2. We maintain that because two (2) lives were lost as a result of the actions of the appellant, the sentences will be served consecutively.

In light of Article 23 (8) of the Constitution, the 10 months the appellant spent on remand is hereby deducted from the sentence. The appellant will therefore serve a total sentence of 13 years and 2 months.

We so order.

at Kampala Dated at K .....Dated this .. 20th. day of September .....2017.

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JOTHAMTUMWESIGYE
JUSTICE OF THE SUPREME COURT .

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DR. ESTHER KISAAKYE
JUSTICE OF THE SUPREME COURT.

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JUSTICE OF THE SUPREME COURT .

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FAITH MWONDHA
JUSTICE OF THE SUPREME COURT.

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PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA
JUSTICE OF THE SUPREME COURT.