

REPUBLIC OF SOUTH AFRICA

**IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)**

CASE NO: SS63/11

In the matter between

STATE

versus

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**RICHARD TSHIFHIWA LURULI
MICHAEL KHOROMBI**

**Accused 1
Accused 2**

SENTENCE

WEINER J:

[1] In this case, the accused have been found guilty of:

30 1.1. eight counts of rape;

1.2. one count of robbery with aggravating circumstances as defined in
Section 1(1) of Act 51 of 1977 read with Section 51(2) of Act 105 of
1997;

1.3. four counts of compelled sexual assault and;

1.4. one count of being in possession of an unlicensed firearm.

[2] As Plaskett J in *S v Mako*¹ held, various elements are considered in imposing sentence namely; the interests of the community²; the personal circumstances of the accused³ and; the nature of the offence⁴. These considerations have become trite when courts are imposing sentence.

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[3] The accused have been found guilty of serious and prevalent offences. I have taken into account the remarks of Plaskett J in *Mako* (*supra*) at [12] where it is said that one cannot in an “endeavour to deal with violent crime” forget that a

“proper balance has to be struck between the objective gravity of the offence, the interests of society and the interests of the offender, even where a particular crime is prevalent and an element of general deterrence may be warranted.”

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[4] The personal circumstances of the accused are the following: In respect of accused 1: he is 30 years old; he passed grade 10 in Venda. Since 2002, he has been in Johannesburg and has worked. He earned between R900.00 and R3 200.00 per month. He is married by Venda custom and has one child, a boy, aged 11 years

¹ 2005 (2) SACR 223 (E).

² *Ibid* at 232A.

³ *Ibid*.

⁴ *Ibid*.

old.

[5] In respect of accused 2:- he is 28 years old; born in Venda and reached grade 9. He has been in Johannesburg since 2003 where he worked until 2009 and earned between R900.00 and R1 800.00 per month. He was married according to Venda custom and is now divorced and the child, aged 7 years old, is staying with relatives. He has a second child, a girl, who is with his family in Venda and who is aged 12.

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[6] Counsel for the accused argued that there are exceptional and substantial circumstances to deviate from the minimum sentences applicable in this case. According to him, an exceptional and substantial circumstance is that the complainants suffered no physical injuries. He has also argued that all of the sentences should run concurrently with the main sentence.

[7] The state has argued that these are serious and violent crimes and that the community's interests need to be served.

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[8] In my view, there are no compelling and substantial circumstances which would allow the court to deviate from the minimum sentences prescribed in respect of those offences governed by the minimum sentences legislation.

[9] The victims may not have suffered physical injuries, but this court can only imagine the psychological trauma suffered. According to family

members of Ms T, which statements were not disputed or objected to by the accused's counsel, they do not know whether she will ever be able to come to terms with what has happened to her. She has become detached and has had a personality change. Her marriage has broken down. According to the words used by the prosecutor, both of these complainants were vandalised by the two accused.

10 [10] The second complainant, Ms R, is still suffering the trauma and is continuing to see counsellors to save her marriage and in order to assist her in coming to terms with what has happened to her.

[11] The state argued that due to the prevalence and seriousness of rape in our society it is time to send a clear message that South-Africa is fighting to eradicate this and put the perpetrators of these crimes away as women are not safe on our streets.

20 [12] This case also involved the compelled sexual assault which was imposed on Mr P. These offences crossed the boundary of humanity. The psychological trauma and the loss of dignity which the complainants and Mr P suffered have left deep wounds and are seen as aggravating circumstances in this case.

[13] Other aggravating circumstances are the following: Firstly, a firearm was used and placed against the heads of the two female victims who, together with Mr P, were beaten and assaulted throughout their ordeal. Secondly, they had no regard for the innocent child who had been burnt and was seeking help from the paramedics whom they

violently abducted from their ambulance.

[14] Thirdly, the comments and utterances and humiliation which the three victims had to endure will not easily be erased from their minds, if at all.

[15] Fourthly, the community has been adversely affected by this crime. Not only the direct community in Durban Deep, but the entire country has been affected. Now paramedics are not safe to go into
10 communities on their own to treat people who need their help. They are obliged to call for a police escort, which affects not only the time within which the paramedics can get to those injured but affects the ability of the police to do their own work.

[16] These accused have shown no remorse. They have denied their involvement and despite the wealth of evidence against them, they chose not to ask for forgiveness or show any remorse or take any responsibility for what they had done.

20 [17] In regard to the commission of these offences, many fall under the Sexual Offences and Related Matters Amendment Act 32 of 2007 ("The 2007 Act"). In this regard, reference should be made to the judgement of the Supreme Court of Appeal in the matter of *Director of Public Prosecutions, Western Cape vs Prins and Others*⁵. Wallis JA (Mpati P and Navsa, Brand and Malan JJA concurring), said the following:

⁵ 2012 (2) SAKR 183 (SCA)

No judicial officer sitting in South-Africa today is unaware of the extent of sexual violence in this country and the way in which it deprives so many women of their right to dignity and bodily integrity...

10 *...The rights to dignity and bodily integrity are fundamental to our humanity and should be respected for that reason alone. It is a sad reflection on our world, and societies such as our own, that women and children have been abused and that such abuse continues so that their rights require legal protection by way of international conventions and domestic laws, as South-Africa has done in various provisions of our Constitution and in our Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (The Act). It was rightly stressed in argument, in the light of evidence tendered and admitted in this appeal, that the Act is a vitally important tool in the ongoing fight against this scourge in our society...*

20 *... [2] There are many judgments in which our courts have emphasised the need for the rights of vulnerable people, in particular women and children, to be respected and protected. One of the ways in which that needs to be done is by the effective prosecution of those who infringe those rights"*

[18] Wallis JA also made mention of specific offences that are referred to in Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ("the CLA"), the Minimum Sentences Legislation. This has affected both the High Courts and the Magistrates Courts in the sentences which they impose.

30 [19] Until the coming into force of the 2007 Act, these crimes were prosecuted as common law crimes. They are now dealt with under the Act. They include the crimes of indecent assault, compelled sexual

assault and sexual violation, of which the accused in this case have been found guilty. There was no statutory prescribed sentence for these particular offences. Wallis JA dealt with this in the *Prins matter*:

*"In the case of common law crimes the position is different, because it has never been the practice for parliament, as the only legislative body having power to deal with this question, to prescribe the sentences that courts may impose for such crimes. In such cases courts imposed sentence in the exercise of a judicial discretion within the limits of their jurisdiction."*⁶

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[20] The CLA, in express terms, created criminal offences in Sections 2 to Section 26 thereof and the offence of sexual assault is one of those that was created by the Act. It has been referred to as either sexual violation or sexual assault and in the indictment is referred to as compelled sexual assault. This related to counts 8 and 14 in respect of which the accused have been found guilty.

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[21] The other counts, which are also regarded as criminal offences under the CLA are those in respect of which the accused were found guilty of aiding and abetting and inciting each other to commit sexual offences. These were dealt with under counts 9 and 15.

[22] Wallis JA held that

*"The long title to the Act also makes its purpose clear. It is first a consolidating measure directed at bringing together in one piece of legislation all criminal offences of a sexual nature. Second, it replaces and in some respects broadens the scope of existing common law crimes of a sexual nature"*⁷

⁶ *Prins*, fn 5 at [10].

⁷ *Ibid* at [19].

[23] It also creates a number of new offences⁸, one of which is the new statutory offence of sexual assault and the new statutory offence relating to certain compelled acts of violation. These new statutory offences are criminalised in the Act. Similarly, the incitement to commit a sexual offence is dealt with as one of the new statutory offences. The act expressly renders criminal, the conduct described in the various sections and contemplates the imposition of sentences on offenders. Its aim is the prosecution and sentencing of persons
10 who commit these offences.

[24] The charges were correctly and fully set out in the indictment. It is not necessary for those charges to include the sentence that may be imposed. It is only necessary to specify the penal consequences of conviction where the prosecution proposes to rely on specific provisions such as those in the Minimum Sentencing Legislation and that has been done in this case.

[25] Reference was also made, in the *Prins* case, to Section 276(1) of the
20 Criminal Procedure Act which provides that, "*subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence...*"
Subsection (2) provides that the power to sentence a person convicted of an offence is to be construed
" (a) as authorising any court to impose any sentence other than

⁸ *Ibid.*

or any sentence in excess of the sentence which that court may impose in respect of any offence; or

(b) as derogating from any authority specially conferred upon any court by any law to impose any other punishment or to impose any forfeiture in addition to any other punishment.”

[26] Section 276 is read in conjunction with the Minimum Sentencing Legislation and the permissible penalties for other offences are found within Section 276. There is nothing obscure or unclear about the language of Section 276, as Wallis JA held, and that section empowers the courts to impose sentences upon persons convicted of crimes and limits the punishments that courts may impose in certain other sections.⁹

[27] In the *Prins* case, it was argued that Section 276(1) was affected by the fact that there was an omission in the Sexual Offences Act to specify penalties for the offences in chapters 2, 3 and 4.¹⁰ The Supreme Court of Appeal held that it cannot affect the construction of Section 276(1) and, in addition, Wallis JA referred to the fact that parliament has since the judgment in the court *a quo* met and passed an amending bill that expressly provides that the powers of the courts in regard to sentence for the offences in chapters 2, 3 and 4 of the Act are those specified in Section 276 of the Criminal Procedure Act.

[28] For those reasons, *inter alia*, the argument was that Section 276(1) is

⁹ *Prins* fn 5 at [38]

¹⁰ *Prins* fn 5 at [24]

construed as being a provision empowering courts to impose sentences in relation to the offences contained in the Sexual Offences Act.

[29] Accordingly, the accused are sentenced as follows;

[30] In respect of count 1, robbery with aggravating circumstances, the accused are sentenced to 15 years' imprisonment.

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[31] In respect of count 2, unlawful possession of a firearm, the accused are sentenced to 15 years' imprisonment.

[32] In respect of count 4, rape, the accused are sentenced to life imprisonment.

[33] In respect of count 5, rape, the accused are sentenced to life imprisonment.

20 [34] In respect of count 6, rape, the accused are sentenced to life imprisonment.

[35] In respect of count 7, rape, the accused are sentenced to life imprisonment.

[36] In respect of count 10, rape, the accused are sentenced to life imprisonment.

30 [37] In respect of count 11, rape, the accused are sentenced to life imprisonment.

[38] In respect of count 12, rape, the accused are sentenced to life imprisonment.

[39] In respect of count 13, rape, the accused are sentenced to life imprisonment.

[40] In respect of count 8, compelled sexual assault, the accused are sentenced to 10 years' imprisonment.

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[41] In respect of count 14, compelled sexual assault, the accused are sentenced to 10 years' imprisonment.

[42] In respect of count 9, aiding, abetting and inducing others to commit sexual offences, the accused are sentenced to 10 years' imprisonment.

[43] In respect of count 15, aiding, abetting and inducing others to commit sexual offences the accused are sentenced to 10 years' imprisonment.

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[44] The sentences in respect of counts 1 and 2 of 15 years each will run concurrently. The eight life sentences will run concurrently. The sentences on counts 8 and 14 of 10 years each will run concurrently. The sentences on counts 9 and 15 will run concurrently. The effect of this is that the sentences, other than on the rape charges, amount to 35 years which will not run concurrently with the life imprisonment. Accordingly the accused are sentenced to 8 life sentences plus 35

years.

Weiner J

Date of hearing: 20 July 2012

Date of judgment: 20 July 2012

10 *Counsel for the State: Adv Futshane*

Attorneys for the State: National Prosecuting Authority

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Attorneys for Accused: Legal Aid South Africa