THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 255/13

NOT REPORTABLE

In the matter between:

ALEX DIKELEDI MAHLASE **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Mahlase v The State* (255/1211) [2011] ZASCA 191 (29 May 2011)

Coram: Lewis, Tshiqi and Theron JJA

Heard: **25 November 2013**

Delivered: **29 November 2013**

Summary: Appeal against sentence – two misdirections – convictions for offences committed after offences in issue not previous convictions – Part I Schedule II of the Criminal Law Amendment Act 105 of 1997 not applicable – other rape incidents not proven – court on appeal required to interfere with the sentence.

ORDER

On appeal from: Limpopo High Court, Thohoyandou (Makgoba J sitting as a court of first instance):

The appeal against sentence is upheld to the limited extent reflected herein below.

(a) The individual sentences of five years' imprisonment each imposed by the trial court in counts 3, 4, 5 and 6 – kidnapping - are confirmed. All four sentences are ordered to run concurrently.

(b) The sentences imposed by the trial court in counts 1 and 2 are set aside and substituted as follows:

'(i) Count 1– Robbery – The accused is sentenced to 12 years' imprisonment.

(ii) Count 2 – Rape – The accused is sentenced to 15 years' imprisonment.

(iii) The sentences in counts 1 and 2 are ordered to run concurrently.'

JUDGMENT

Tshiqi JA (Lewis and Theron JJA concurring):

[1] The appellant, was convicted and sentenced in the Limpopo High Court, Thohoyandou (Makgoba AJ) as follows:

(i) Count 1 – Robbery with aggravating circumstances – sentenced to 20 years' imprisonment;

(ii) Count 2 – Rape – sentenced to life imprisonment;

(iii) Counts 3, 4, 5 and 6 – Kidnapping – sentenced to five years' imprisonment on each of the individual counts.

[2] None of those sentences was ordered to run concurrently. This appeal is with the leave of the high court (per Shaik AJ) against sentence only.

[3] The charges arose from an incident that occurred on 6 June 1998. Mr Bhudeli, the complainant in counts 1 and 3, had just closed his bottle store and had, together with his employee, Ms D M, the complainant in counts 2 and 4, and two other male employees, the complainants in counts 5 and 6, entered his motor vehicle, a Caravelle combi, when the appellant and four co-assailants, some of whom were in possession of fire-arms, approached them and entered the vehicle. The appellant and his co-assailants pointed fire-arms at them and robbed Mr Bhudeli of cash in the amount of R4 000, his watch, fire-arm and a cellular phone. They ordered him and the male employees to lie at the back and Ms D M to go to the front of the vehicle.

[4] One of the assailants drove the vehicle away from the premises of the bottle store. Whilst the motor vehicle was moving, Ms D M was raped, apparently more than once, and allegedly by more than one of the assailants. She could not identify the perpetrators. According to Mr Thami Mahlangu, one of the assailants who later testified in terms of s 204 of the Criminal Procedure Act 51 of 1977, she was raped by three men, one of whom was the appellant. However, as at the date of the trial only the appellant appeared, as his co-assailants had fled. At some stage the vehicle stopped and Mr Bhudeli and his male employees were stripped naked. All of them and Ms DM were ordered to alight from the vehicle. They complied and ran into the bushes. They were offered a lift by a school bus driver conveying children along a certain route noticed them, gave them a lift and took them to the police station. None of them was able to identify their assailants.

[5] The appellant and his co-assailants were arrested approximately three years later, as a result of a confession made by Mr Mahlangu to the police and afterwards to a magistrate implicating himself, the appellant and the other co-assailants as the

perpetrators of the crimes. Mr Mahlangu testified at the trial as a s 204 witness. His evidence was found to be admissible by the trial court and the appellant was convicted. As I have said, leave to appeal was granted only in respect of the sentences.

[6] During sentencing the trial court committed two material misdirections that justify interference by this court.

[7] The first misdirection by the court a quo was that it treated offences which were committed by the appellant after the offences for which he was on trial as previous convictions. He was convicted for those offences – rape, robbery and kidnapping – before being tried on the charges that are the subject of this appeal.

[8] In spite of the acknowledgement by the court that those offences could not be taken as previous convictions, it nonetheless stated that the appellant 'has three to four *relevant previous convictions*, assault, robbery, abduction and rape'. In that regard it erred. This is not to say it should have ignored that evidence all together. That evidence is just one of the many factors that should be taken into account by a trial court when it makes a decision on an appropriate sentence. As this court stated in *R v Zonele & others* 1959 (3) SA 319A at 330:

> 'A previous conviction may be described as one which occurred before the offence under trial. Generally speaking, previous convictions aggravate an offence because they tend to show that the accused has not been deterred, by his previous punishments, from committing the crime under consideration in a given case. One knows, from practice and from thousands of review cases, that judicial officers usually confine their attention, as far as convictions are concerned, to previous convictions. But I can see no reason why a judicial officer, in deciding what particular form of punishment will fit the criminal as well as the crime, should not be informed of subsequent convictions, because of the light they may throw on the form of sentence which will be the most appropriate. There is nothing in ss 301 to 303 of Act 56 of 1955 which ousts such a view. On the contrary, s 186 (2) seems to me to sanction it. It provides that the court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the

proper sentence to be passed. I do not consider that the word "evidence" in the above section, was intended to have its strict meaning as would be the case in respect of evidence prior to conviction. I agree with respect with the following remarks by Selke J concurred in by Hathorn J in *Mbuyase & others v Rex*, 1939 NPD 228 at p 231:

"Now to enable a magistrate, or for that matter, anyone exercising judicial functions, to decide upon what is an appropriate sentence in the case of an individual accused, he is entitled to avail himself of many sources of information, and of many circumstances affecting that individual, some of which it would not be proper for him to regard in coming to a conclusion as to whether the accused were guilty or not guilty."

The foregoing remarks were described by Roper J, (with whom Clayden J as he then was, concurred) as "very apt"; see *R v Swart* 1950 (1) SA 818 (T) at p 824. Furthermore in *R v Liebenberg* 1924 TPD 579, a Bench consisting of Mason J, De Waal and Tindall JJ, agreed that a magistrate was entitled to take into account, in considering whether to give the accused a suspended sentence, the fact that he had just previously been convicted and sentenced on a charge of theft, although the latter crime was committed after the one for which he was then being tried.

All this is consistent with what was said in this court by Schreiner JA in *R v Owen* 1957 (1) SA 458 (AD) at p 462 F - G, namely:

"When it comes to the imposition of sentence the judicial officer is no doubt entitled to take a wide range of factors into account, including the accused's bad or good character, his apparent reformability and the like."'

Thus, while those convictions were pertinent to sentence they did not bring the offences committed by the appellant within the purview of s 51(2)*(a)*(ii) of the Criminal Law Amendment Act 105 of 1997. A minimum sentence of 20 years' imprisonment was not required, as found by the trial court. That sentence must accordingly be set aside.

[9] The second misdirection pertained to the sentence imposed for the rape conviction. The court correctly bemoaned the fact that Ms D M was apparently raped more than once and in front of her colleagues. The learned judge however overlooked the fact that because accused 2 and 6, who were implicated by Mr Mahlangu, were not before the trial court and had not yet been convicted of the rape, it cannot be held that the rape fell within the provisions of Part 1 Schedule 2 of the Criminal Law Amendment

Act (where the victim is raped more than once) as the high court found that it did. It follows that the minimum sentence for rape was not applicable to the rape conviction and the sentence of life imprisonment must be set aside.

[10] In light of those misdirections, the sentences for robbery and rape imposed by the court below stand to be set aside and this court is at large to impose what it considers to be appropriate sentences. The rape was aggravated by the fact that it took place in the presence of Ms D M's fellow employees. The appellant and his co-assailants did not only rob Mr Bhudeli of his vehicle: they stripped him and his employees of all their clothes and abandoned them in the open veld. They behaved in a cruel and humiliating fashion. Lengthy periods of imprisonment are warranted in respect of both offences. I consider that an appropriate sentence in respect of the robbery is 12 years' imprisonment and in respect of the rape 15 years' imprisonment. Those offences were committed in the course of one continuous attack on the complainants and should thus run concurrently. Together with the sentences for kidnapping (an effective period of five years' imprisonment) the appellant should then serve an effective period of 20 years' imprisonment.

[11] I therefore make the following order:

The appeal against sentence is upheld to the limited extent reflected herein below.

(a) The individual sentences of five years' imprisonment each imposed by the trial court in counts 3, 4, 5 and 6 – kidnapping - are confirmed. All four sentences are ordered to run concurrently.

(b) The sentences imposed by the trial court in counts 1 and 2 are set aside and substituted as follows:

'(i) Count 1– Robbery – The accused is sentenced to 12 years' imprisonment.

(ii) Count 2 – Rape – The accused is sentenced to 15 years' imprisonment.

(iii) The sentences in counts 1 and 2 are ordered to run concurrently.'

Z L L TSHIQI

JUDGE OF APPEAL

APPEARANCES:

For Appellant:	M C Mogashoa Instructed by: Justice Centre, Bloemfontein
For Respondent:	R J Makhera Instructed by: The Director of Public Prosecutions, Thohoyandou The Director of Public Prosecutions, Bloemfontein