

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION: MAKHANDA]**

CASE NO. CC51/2021

In the matter between:

THE STATE

and

ALBERTO WYNKWARDT

Accused

SENTENCE

JOLWANA J:

Introduction.

[1] The accused was arraigned in this Court on two counts of rape in contravention of section 3, read with sections 1, 56 (1), 57 (1), 58, 59 and 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 and one count of house- breaking with intent to commit rape in contravention of section 3, read with sections 1, 56 (1), 57 (1), 58, 59 and 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The State further invoked the provisions of section 51 (1), read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentences Act) thus indicating its

intention to ask the court to impose a discretionary minimum sentence of life imprisonment upon the accused in the event of a conviction on counts 1 and 3. This was on the basis that the alleged rapes involved the infliction of grievous bodily harm and the victims was raped more than once by the accused. Furthermore, the victim was particularly vulnerable by virtue of the fact that she is blind.

The plea.

[2] Before the accused pleaded to the charges, the court sought to establish from him if he understood the charges put to him and he confirmed that he understood all the charges. The court also explained to the accused the implications of the State's invocation of section 51 (1) of the Minimum Sentences Act and sought his confirmation that indeed he understood that he may be sentenced to life imprisonment in the event of a conviction in respect of counts 1 and 3. His answer was in the affirmative. His legal representative confirmed that the accused's plea on all the charges was in accordance with his instructions and that he had also discussed the implications of section 51 (1) of the Minimum Sentences Act with the accused who indicated to him that he understood them. The accused was thereupon asked to plead to the charges. He pleaded guilty to all three charges.

[3] His legal representative handed up to the court the accused's written statement in terms of section 112 (2) of the Criminal Procedure Act 51 of 1977. That statement was also read into the record and interpreted to the accused. Section 112(2) reads as follows:

"If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1) (b), convict the accused on the strength of such statement and sentence him as

provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.”

[4] The State indicated its acceptance of the plea of guilty to all the charges by the accused and his section 112 (2) statement including the facts alleged therein about how the offences were committed as being in accord with its own information and docket contents. However, counsel for the State made it clear that the State did not accept his indication therein that he was pleading guilty out of remorse for the crimes he admitted committing. The accused was consequently convicted on all three charges on the strength of his section 112 (2) statement as the court was satisfied that indeed the accused is guilty of the offences with which he was charged and to which he was pleading guilty. It now behoves of this Court to consider an appropriate sentence to be imposed upon the accused and sentence him accordingly.

The sentencing principles.

[5] Courts exercise their penal jurisdiction according to what has become known as the *Zinn*¹ triad consisting of the crime, the offender and the interests of society. The basic tenets of the Zinn triad have evolved over the decades since *Zinn* into accepted sentencing principles that a sentencing court must apply in order to properly consider and thus make a decision on what a just, balanced and fair sentence should be in light of the circumstances of a particular case. The sentencing principles in effect mean that such a sentence as a sentencing court considers to be appropriate must be individualised taking into account the crime or crimes for which the accused has been convicted, the personal circumstances of the

¹ S v Zinn 1969 (2) SA 537 A.

accused himself and what is in the best interests of the society. In *Tsotetsi*² Myburgh AJ with whom Steyn J concurred gave what can fairly be said to be an elaborate exposition of our basic sentencing principles as follows:

- “(a) The sentence must be appropriate based on the circumstances of the case. It must not be too light or too severe.
- (b) There must be an appropriate nexus between the sentence and severity of the crime, full consideration must be given to all mitigating and aggravating factors surrounding the offender. The sentence should thus reflect the blameworthiness of the offender and be proportional. These are the first two elements of the triad enunciated in *State v Zinn*.
- (c) Regard must be had to the interest of the society (the third element of the Zinn triad). This involves a consideration of the protection society so desperately needs. The interests of society are deterrence, prevention, rehabilitation and retribution.
- (d) Deterrence, the important purpose of punishment, has two components, being the deterrence of both the accused from re-offending and the deterrence of would be offenders.
- (e) Rehabilitation is a purpose of punishment only if there is a potential to achieve it.
- (f) Retribution, being a society’s expression of outrage at the crime, remains of importance. If the crime is viewed by society as an abhorrence, then the sentence should reflect that. Retribution is also expressed as the notion that the punishment must fit the crime.
- (g) Finally, mercy is a factor. As humane and balanced approach must be followed.”

It is with these sentencing principles in mind that I must consider what an appropriate sentence should be that would be a fitting and just sentence that must be imposed upon the accused person.

² S v Tsotetsi 2019 (2) SACR 594 (WCC) at page 604 para 29.

The legal position on minimum sentences.

[6] As indicated earlier in this judgment, the State, in indicting the accused, also invoked the provisions of section 51 (1) of the Minimum Sentences Act in respect of counts 1 and 3. Our authority on the application of section 51 is of course *Malgas*³ in which Marais JA gave a detailed exposition on section 51 exactly 21 years ago. He thereafter stated the legal position on the consideration and application of the minimum sentences legal framework in cases in which minimum sentences are applicable in terms of the Minimum Sentences Act. He said:

“What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect and not merely pay lip service to, the Legislature’s view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed. In summary –

- A. Section 51 has limited but not eliminated the courts’ discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).
- B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.
- C. Unless there, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consisted response from the courts.
- D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

³ S v Malgas 2001 (1) SACR 469 (SCA) at 481 f-j to 482 a-f.

- E. The Legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.
- F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.
- G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick (substantial and compelling) and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.
- H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.
- I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.
- J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided."

[7] Having set out in quite some detail the legal position regarding the sentencing process itself as well as the legal position pertaining to the approach that a sentencing court must follow where section 51 is concerned, I turn now to look at all the relevant specific facts of this case.

The crime.

[8] The first leg of the Zinn triad is the nature of the crime for which an accused has been convicted. The section 112 statement of the accused gives a chilling account of what happened on or about the 4 July 2020 at no.2[...] P[...] C[...]Street in A[...], the home of the then 59 year old blind rape victim. The complainant, on that fateful

night, went through a horrifying ordeal of being assaulted and raped by a person who was born and grew up in front of her. Her home and that of the accused are in the same street separated by a number of houses in between. He raped her on two separate occasions that night. When the victim screamed during the first rape incident he closed her mouth with his hands and raped her. He also not only assaulted her with his hands, he, on his account of the events of that incident, also kneed her with his knees in her stomach while raping her because “she was making noise.” The rape ordeal continued until the accused was interrupted by the complainant’s then 12 year old son, S[...] who arrived at his home to a disturbingly disgusting sight when he caught the accused raping his mother. S[....], presumably to try and bring to an end the harrowing ordeal he saw his own mother going through at the hands of a person he himself knew very well, he told the accused that his father and his sister were on their way home. Indeed the accused stopped. He got dressed up quickly and left.

[9] As if what the accused did to the helpless and vulnerable complainant was not horrible enough, he came back after realizing that S[...] had lied to him in saying that his father and sister were on their way home. On this second occasion in order to commit the second rape incident, the accused found a broken window at the complainant’s homestead. He opened that window and entered the house. He raped the complainant again. The complainant tried to fight him off by hitting him with a mug on his face. He then stopped, got dressed and left. At some point he was arrested.

[10] This case represents some of the most odious crimes in our country. The victim was both old and blind both of which made her particularly vulnerable. Her attacker, the accused was the last person she could have thought could be dangerous to her

as they knew each other very well and lived in the same street. His presence at her own home would have given her a false sense of safety and security. Her son also clearly operated under the same false sense of trusting someone very dangerous to them. He was also lulled into a false sense of security which is why he left his frail and blind mother with the accused. The complainant and Siyabulela were both obviously oblivious to the ominous danger that was lurking in their midst which the accused represented. While the accused knew that the first time he raped her he got caught by S[...], he ignored all of that and decided to come back and abuse his victim for the second time taking advantage of her blindness and frailty both of which made her particularly vulnerable. He came back again after he had already raped her and left after the first incident when S[...] walked into a disturbing scene as I said before to rape her again.

[11] Some exhibits were handed up to court to be part of the court record by the prosecutor by agreement with the accused's legal representative. Briefly, those exhibits include an affidavit in terms of section 212 (4) of the Criminal Procedure Act deposed to by Dr Fandi Jamal. Attached to that affidavit is a medico-legal examination report completed on 4 July 2020. According to the said report, the clinical findings were that the complainant had multiple bruises on her body. The doctor's conclusion was that the complainant had been physically assaulted. The conclusions under gynaecological examination are that the complainant had multiple bruises on her private parts and that she had been raped. Another one of the exhibits was a section 212 affidavit deposed to by warrant officer Mquteni who is a forensic analyst and a reporting officer working at the biology section of the Forensic Science Laboratory in Gqeberha. That evidence of the DNA analysis also implicated the accused in that his DNA was found in the swab taken from the complainant. The

accused's DNA was also found in the complainant's tights which I understand to be an item of clothing that is an undergarment.

Mitigating factors.

[12] The accused testified in mitigation of sentence. His evidence was that he is now 27 years old and was 26 years old at the time of the incident. He is not married. He has a one year old son who lives with his mother. Before his arrest he stayed at no.3[...] P[...] C[...] Street in A[...] with his father and his mother. He dropped out of school at grade 11 due to financial difficulties. He was forced by circumstances to drop out of school to go and look for employment. At the time he committed these offences he worked at S[...] P[...] on a casual basis where he earned R1900.00 per month. He used this income to contribute in the upbringing of his son and also contributed at his home with the household expenses. He testified that he admitted that he committed these offences and was sorry about what happened. What happened was a mistake on his part. He was hoping that in sentencing him, the court would be merciful to him. He testified that he knows that what he did was wrong and it will never happen again in future.

[13] Under cross-examination, he testified that at the time of the offences he had a relationship with the mother of his child. He knew the complainant even though he did not visit her house regularly. He went there on that day with S[...]. He confirmed that S[...] caught him raping the complainant. S[...] found him raping his mother at his home. He said that he raped her in a moment of weakness. He knew that she is blind. He would like the court to accept that he is sorry about what he did which he said was why he pleaded guilty. He testified that he was remorseful about what he did to the complainant. He pleaded guilty out of remorse for his actions.

[14] It was put to him that on 22 November 2021 the State withdrew the charges against him. After the charges were withdrawn he instructed his attorney to institute civil proceedings suing the State for R1 000 000.00 for unlawful arrest, detention and malicious prosecution. He confirmed giving such instructions to his attorney to sue the State but he later changed to say that it was his attorney that took the decision to sue the State. He however, maintained that he is sorry for what he did to the complainant. He confirmed under re-examination that he knows the complainant and the complainant knows him. For that reason it was not easy for him to plead guilty because he and the complainant know each other and they stayed in the same street. In answering some questions from the court, Mr Wynkwardt testified that he went to the complainant's homestead accompanying S[...] because he was young and it was at night. The time was around 21:00 at night.

Aggravating factors.

[15] In aggravation of sentence, the State called the complainant to testify. Her evidence was that she was born in 1961. She resides at no.2[...] P[...] C[...] Street in A[...] with her husband, her three children and four grandchildren. S[...] is the last born of those three children. He is now 13 years old and will turn 14 years old in December 2023. She testified that she is blind. However, she was not born blind. Her left eye was somehow inflicted by some disease. That disease affected the right eye with the result that she is now blind on both eyes. She estimated that she started being blind in about 2000 or thereabout. She is assisted at home by her husband and her three children with her basic needs. She testified that she regarded the accused as her own baby as he would visit her home. He grew up in front of her and she trusted him a lot as he regarded him as her own child. She felt abused by the accused when he raped her. She became sick with shock and even

now she is still not well. She testified that the accused assaulted her on her face as a result of which she bled and her face was swollen.

Defence's submissions in mitigation of sentence.

[16] It was submitted on behalf of the accused in mitigation of sentence that he pleaded guilty and therefore did not waste the court's time. The accused could not apologise at the first opportunity he had because it was not easy for him to do so due to the fact that the accused and the victim know each other. The accused lived in the same street as the complainant and he grew up in front of her. However, today in court he apologised to the complainant and to the court thus accepting that what he did was wrong. He is a first offender and is therefore a good candidate for rehabilitation. He must therefore be given another chance as he had testified that he will never do what he did again. He pleaded guilty out of genuine remorse. The offences were not pre-planned but were committed in a spare of the moment. He had been in custody for three weeks since his arrest. He was 26 years old when he committed the offences and therefore was relatively young. It was submitted that all these factors viewed cumulatively, amount to substantial and compelling circumstances to justify a departure by the court from the imposition of the prescribed minimum sentences in respect of counts 1 and 3.

The State's submissions in aggravation of sentence.

[17] On the other hand the State submitted that these offences are all very serious crimes. The complainant was 59 years old at the time of the offences. She is blind and was raped by the accused who knew that she is blind. She went through the ordeal of being raped by someone who was well known to her whom she regarded as one of her own children. She trusted the accused only to be raped by him on two

separate occasions that night. She was raped at her own home in her own sanctuary, a place in which she thought she was safe. The rape included the complainant being assaulted and at some point the accused put his knee on her stomach to force her to stop making noise and continued raping her. Even after he had been told that the complainant's husband and her daughter might be on their way home, the accused went back to the victim's home and raped her again.

[18] Counsel for the State further submitted that the accused was not genuinely remorseful. After his arrest in 2020 he did not plead guilty when he had an opportunity to do so. In November 2021 the charges against the accused were withdrawn for some reason. Since 2020, he did not apologise throughout until he apologised today in court. Instead, consequent upon the withdrawal of the charges, the accused instituted civil proceedings against the State claiming a substantial amount of money from the State for unlawful arrest and detention as well as malicious prosecution. The State submitted that all these factors showed the accused as someone who is opportunistic and will take advantage of any situation for his own benefit. He is therefore not genuinely remorseful. He only pleaded guilty after being aware that there was DNA analysis evidence which implicated him. His personal circumstances are far outweighed by the seriousness of these offences.

[19] Counsel for the State further submitted that the crimes for which the accused has been convicted detrimentally affected not only the complainant but also Siyabulela as well who witnessed his mother being raped by the accused. Reference was made to reports by Ms Karen Andrews, the clinical psychologist who assessed the complainant and Siyabulela which had been submitted to court as part of the exhibits. In her report she makes the following telling observations about S[...]:

“S[...] was negatively affected by witnessing his mother being raped. He becomes stressed very easily, he suffers from nightmares, he gets into fights with other children and he has lost weight. The worst observation is that he has been found smoking the drug called “choef”. He was not doing this before the events of this case.”

The society.

[20] The State emphasized that the society needs protection from the accused. The reality is that our courts are confronted daily with cases of violent abuse and sexual abuse of women, the elderly, the disabled, children and even babies. Clearly the society is abhorred with all these crimes. The society looks up to the courts to pass fitting sentences to such criminals. Those who are convicted of such crimes must be imprisoned for a lengthy period of time. This will give the society some feeling of protection from such people as the accused who commit such offences. That protection would be by this Court imposing the prescribed minimum sentences as the accused being a first offender in this case and his plea of guilty do not, on their own justify a deviation from the prescribed minimum sentences without more. The State submitted that there were no substantial and compelling circumstances as would justify a departure from the prescribed minimum sentences in this case.

Analysis.

[21] Something more needs to be said about the accused's expression of remorse at the very onset. Firstly, it is difficult to understand from his evidence what has changed from the time these offences were committed to the date on which he testified in mitigation of sentence. When he testified he made no attempt to open up about the events of that day by taking the court into his confidence and testify about how he got to be in the complainant's home that night and how he ended up raping an elderly and blind woman. Only he could have enlightened the court about the

circumstances in which the crimes were committed. Even after he chose to testify in mitigation of sentence the court is still none the wiser about what led to him committing the offences for which he has been convicted. There clearly has to be a point from which one moves from being this brutal, merciless and shameless rapist who attacked and raped an elderly and blind woman he knew very well to a supposedly genuinely remorseful person. The court heard none of that from the accused precisely because he said very little more than that he is sorry for what he did and that the court should be merciful to him.

[22] The proposition that his plea of guilty was moved by his remorse is patently without any demonstrable basis. In fact it clearly is an attempt on the part of the accused at bargaining with the court for lighter sentences. His remorse appears to be feigned remorse that is craftily designed to serve his selfish ends which is to get lighter sentences. My impression of his expression of remorse is that of someone who, on the assessment of the evidence the State would have led against him, realised that he had nowhere to run and chose for himself the only option that could possibly result in lighter sentences. That option was to plead guilty. The facts are that there was an eye witness, S[...] who, although he is a child, could testify and give an eye witness account of what he saw the accused doing to his mother that night. The report of Ms Karen Andrews makes it clear that with appropriate measures in place, Siyabulela “has the mental capacity to give evidence in Court”. There is also the DNA evidence that implicated him in these offences. Thirdly, the victim herself knows who raped her and would have testified if the accused had not pleaded guilty. I simply do not think that his plea of guilty had anything to do with true penitence. If he was genuinely remorseful, it is difficult to appreciate why he

waited for more than two years since the date of the incident only to express his remorse during the trial.

[23] On the accused's expression of remorse, counsel for the State referred the court to the case of *Matyityi*⁴ in which the Supreme Court of Appeal stated the approach on the assessment of remorse as follows:

"... It had been held, quite correctly, that a plea of guilty in the face of an open and shut case against an accused person is a neutral factor. The evidence linking the respondent to the crimes was overwhelming. In addition to the stolen items found at the home of his girlfriend, there was DNA evidence linking him to the crime scene, pointings-out made by him and his positive identification at an identification parade. There is, moreover, chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart, and whether he or she does indeed have a true appreciation of the consequences of those actions."

[24] I am therefore not persuaded that the remorse expressed by the accused is a genuine remorse at all. He appears as somebody who is carefully looking out for himself and regretting the fact that he has been caught and would probably be sentenced to a lengthy term of imprisonment. It can therefore be taken out of the equation in the process of determining an appropriate sentence in the circumstances

⁴ S v Matyityi 2011 (1) SACR 40 (SCA) at 46 h to 47 a-d.

of this case. This also applies to his plea of guilty in which it is very clear to me that the accused had a lot of evidence that he would have to refute if he pleaded not guilty and the State witnesses testified. On a careful assessment of the facts of this case it does not appear that the State would have had any difficulties in proving its case beyond reasonable doubt if he had pleaded not guilty. It seems to me that in pleading guilty, he did the State no favour for which he needs to be credited. He would have faced a mammoth task of dealing with what would have been an avalanche of evidence against him from State witnesses. As the court said in *Matyityi*, his plea of guilty must consequently be a neutral factor.

[25] As for the accused's other personal circumstances, I find nothing substantial or compelling about them. They are, restated briefly that he is first offender. He has a child who does not live with him. He is therefore not even a caregiver to that child. It is evidently the mother of the child who looks after that child. In any event the gravity of the offences he committed militates against any consideration of the personal circumstances that the accused mentioned in his testimony as a basis for the departure from the prescribed sentences. They must indeed recede into the background in light of the seriousness of these offences. Besides, the interests of the society are equally an important consideration. The rampant violent crimes including rape in this country require that in deserving cases, such crimes should receive the minimum sentences prescribed by the Legislature. Our society is abhorred at the rape of women and children in this country. This is especially because these types of victims are attacked and abused for no reason other than their vulnerability. The society needs protection from such criminal deviance. The complainant in this case was raped on two separate occasions in the same night after the accused realised that she was a soft target as her husband and her older

children V[...] and N[...] were not at home. The presence of the 12 year old S[...] did not deter the determined accused from continuing with his dastardly acts of victimising an elderly, blind and helpless woman.

[26] In *Vilakazi*⁵ Nugent JA said:

“The personal circumstances of the appellant so far as they are disclosed in the evidence, have been set out earlier. 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 question whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be and those seem to me to be the kind of ‘flimsy’ grounds that *Malgas* said should be avoided.”

[27] The conduct of the accused after the charges against him were withdrawn is a relevant aggravating consideration in my view. This is so because it points to the mindset of the accused about the crimes he committed. He testified under cross-examination that he did instruct his attorneys to institute civil proceedings against the State for unlawful arrest and other heads of damages. How he could possibly think that, in the circumstances of this case and knowing what he knew, his arrest was unlawful and he deserved to be compensated by the State for the fact that police arrested him is mind boggling. Essentially, he sought to get compensation as a direct result of his criminal misdemeanour. He wanted the State to be ordered to pay him for arresting him after he had committed these grievously violent crimes. Looking at all the circumstances of this case especially the behaviour of the accused in general after he committed these offences, I am not convinced that he is a good candidate for rehabilitation even though it is always difficult to say that with any degree of certainty.

⁵ S v Vilakazi 2009 (1) SACR 552 at 574 c-d.

[28] Before I conclude, I do need to point out that a physically disabled person such as the complainant in this case is specifically catered for in Part 1 of Schedule 2. Part 1 of Schedule 2 provides in part as follows:

“Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007-

...

(b) where the victim-

...

(ii) is a physically disabled person who, due to his or her physical disability is rendered particularly vulnerable.”

The complainant is blind which is a physical disability as contemplated in Part 1 of Schedule 2.

[29] Secondly, there can be no debate about whether or not the accused raped the complainant more than once. After the first rape incident the accused left the complainant's home. He returned later although there is no specificity about the time that elapsed after he left and before he returned and raped the complainant for the second time.

[30] This issue was, in any event, put to bed in this Court in the case of *Ncombo*⁶. In that case Bloem J with whom I am in respectful agreement, put the legal position as follows:

“However, the evidence does support a finding that the appellant raped the complainant twice. The first rape was completed after the appellant ejaculated and ‘he climbed off from me or get out from me’. The appellant then had a discussion with the complainant about her reporting him to her mother and her mother calling the police. It was only after that discussion that the appellant penetrated her again.

⁶ S v Ncombo 2017 (1) SACR 683 (ECG) at 688 d-f.

Although there is no evidence as to the time lapse between the withdrawal of his penis at the conclusion of the first rape and the subsequent insertion of his penis, the discussion that he had with the complainant caused a sufficient interruption in the appellant's conduct for those incidents to constitute two separate acts of rape. When the appellant climbed onto the complainant again and penetrated her 'he ... formed the intent to rape again, even if the second rape [may have taken] place soon after the first and at the same place'."

[31] In the absence of substantial and compelling circumstances and they are non-existent in this case, a departure from prescribed minimum sentences is not justified.

[32] In the result the accused is sentenced as follows:

1. In respect of count 2, housebreaking with intent to commit rape, you are sentenced to 5 years imprisonment.
2. In respect of count 1, rape, you are sentenced to life imprisonment.
3. In respect of count 3, rape, you are sentenced to life imprisonment.
4. It is directed that the sentences imposed in respect of counts 2 and 3 shall run concurrently with the sentence imposed in respect of count 1.
5. In terms of section 103 (1) of the Firearms Control Act 60 of 2000, Mr Wynkwardt is unfit to possess a firearm.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances:

Counsel for State: M.M. VAN ROOYEN

Instructed by: Director of Public Prosecutions

MAKHANDA

Counsel for the Accused: H. CHARLES

Instructed by: Legal Aid South Africa

MAKHANDA

Date heard: 07 March 2023

Delivered: 10 March 2023