

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

**CASE NO: A230/22**

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

DATE

SIGNATURE

In the matter between:

**NICHOLAS ANDREW NINOW**

Appellant

and

**THE STATE**

Respondent

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**JUDGMENT**

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**MKHABELA AJ:**

[1] Mr Nicholas Andrew Ninow (hereinafter referred to as the appellant) was arraigned in the trial Court for the following charges:

1.1 Rape in contravention of various<sup>1</sup> sections of the Criminal Law Amendment Act, 105 of 1997;

1.2 One count of possession and use of drugs;

1.3 One count of assault;

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<sup>1</sup> Section 1, 2, 40, 50, 56 to 59 and 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007.

1.4 One count of defeating or obstructing the administration of justice;  
and

1.5 One count of kidnapping.

[2] The State withdrew the charge on kidnapping at the commencement of the trial.

[3] The appellant pleaded guilty on the counts of rape, possession and use of drugs, and defeating the ends of justice and pleaded not guilty to the count of assault. He gave a plea explanation in terms of section 112(2) of the Criminal Procedure Act<sup>2</sup>.

[4] The State did not accept the appellant's plea explanation in respect of the rape charge but accepted his plea in respect of the other charges namely possession of drugs and defeating or obstruction of the administration of justice. The reason for refusing to accept the plea of guilt for the charge of rape was that it did not sketch directly how the incident occurred.

[5] The court a quo recorded the plea in terms of section 113 of the Criminal Procedure Act and proceeded with the trial in respect of the rape and assault charges.

[6] The trial Court acquitted the appellant of the charge of assault and convicted him of all the other charges including that of rape and was sentenced as follows:

6.1 Count 1: Rape - life imprisonment;

6.2 Count 2: Possession of undesirable substance, contravention of drugs and drug trafficking, Act 140 of 1992 - five years imprisonment;

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<sup>2</sup> Act 51 Of 1977.

6.3 Court 5: Defeating or obstructing the administration of justice – five years imprisonment.

[7] The Court ordered that the sentence imposed on the count of drugs (count 2) to run concurrently with the life sentence imposed for the rape charge.

[8] The order of the Court *a quo* is silent in respect of the sentence imposed on count 5 (defeating or obstructing the administration of justice) as to whether it should also run concurrently with the sentence imposed in respect of the rape count. The relevant wording of the order read as follows:

“effective sentence is life imprisonment and five years”.

[9] The appellant sought leave to appeal against the sentence and a limited aspect of the judgment on conviction from the trial Court, which application was refused by the trial court on 10 March 2020. The appellant petitioned the Supreme Court of Appeal for leave to appeal against the sentence of life imprisonment and the finding of premeditation on the rape count.

[10] The Supreme Court of Appeal granted the appellant leave to appeal to the Full Court of this division. At the time of the incident, the appellant was using the drug “CAT” and this informed the drug related charges. Further the appellant had attempted to dispose the complainant’s underwear by flushing it down the toilet which established the charge of defeating the administration of justice.

[11] The court *a quo* had in relation to the rape charge considered and found that the offence was premeditated, and that the appellant attended the establishment to prowl for a child victim.

[12] It is argued on behalf of the appellant that the court’s finding in this regard is not established on the accepted facts and thus does not justify the inference. It was also argued that the court *a quo* misdirected itself in this regard, which could have a substantive impact on the eventual sentence.

[13] It was further contended on behalf of the appellant that the court *a quo* misdirected itself in ruling that no substantial and compelling circumstances

existed to mandate a deviation from the prescribed minimum sentence of life imprisonment.

[14] The trial Court found that the appellant at some stage, after being seated by the waitress, abandoned his initial table, and moved to one that was next to the children's play area.

[15] The trial Court also held that the appellant went into the female's bathroom where he raped his young victim and was subsequently found half naked inside the same toilet cubicle with the complainant. In reaching this finding the trial court accepted the evidence given by the complainant in the absence of any rebuttal evidence given by the appellant since he did not testify in his own defence.

[16] In respect of the issue of whether the rape was premeditated, the Court held as follows:

"There is no specific reason which was given by the accused as to why he chose to sit in the table which was closer to the children's play area as he refused to testify in his defence. There is also again no reasonable explanation why the accused went to the female bathroom, whereas there was a designated bathroom for the males."

[17] The Court's factual findings that the appellant unilaterally moved to a table closer to the children's playing area is derived from the evidence given by Ms Lihle Dlamini ("Dlamini"), the State witness, who was on duty as the waitress on the relevant day when the appellant arrived at the restaurant.

[18] In the circumstances, there are three issues that arise crisply for determination; the first is whether the rape was premeditated, the second is whether the trial Court misdirected itself in its ruling that there were no substantial and compelling circumstances and the third one is whether the sentences imposed in respect of life imprisonment should run concurrently with the sentence of five years imposed in respect of defeating or obstruction of justice.

[19] The appellant submitted that the trial Court's failure to order that the sentence imposed in respect of defeating or obstructing the administration of justice should also run concurrently with the sentence for life imprisonment would present problems in the future. Furthermore, the appellant submitted that the trial court erred in failing to find that there were compelling and substantial

circumstances which warranted the deviation from imposing the prescribed minimum sentence of life imprisonment in respect of the count of rape.

[20] On the other hand, the respondent submitted that the trial Court dealt with all the issues and that there were no substantial and compelling circumstances to warrant a deviation from the prescribed minimum sentence of life imprisonment for the count of rape. Moreover, the respondent submitted that the rape was premeditated since the appellant followed the complainant into the female toilet and committed the rape after changing the table that was allocated to him to scout for his victim.

[21] In respect of the issue of the concurrency of sentences, the respondent submitted that there is no need for the court to mention whether such sentences should run concurrently since any sentence for life imprisonment run concurrently with any other sentence.

#### Premeditation

[22] It is common cause that Ms Dlamini's testimony to the effect that the appellant changed tables and moved to one that was closer to the children's playing area was rightly accepted as uncontested evidence by the trial Court given the trite authorities on the consequences of electing not to testify in the face of weighty evidence before a Court<sup>3</sup>.

[23] In criminal proceedings the State bears the onus to prove the guilt of the accused beyond a reasonable doubt. In this matter, the appellant pleaded guilty to the charge of rape.

[24] In respect of the question of premeditation for purposes of sentence, the trial Court's factual findings to the effect that "the only reasonable inference that the Court can draw on the proven facts is that the accused saw the complainant when she went to the bathroom and then followed her to the bathroom where he undressed her and eventually raped her", can be interfered with by an appellate Court in circumstances where there is either a material misdirection or in circumstances when there is the disparity between the sentence of the trial

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<sup>3</sup> In the case of *S v Boesak* 2001 (1) SACR (CC) the Constitutional Court, at para 24, had the following to say about the consequences of the choice of an accused person electing not to testify in a criminal trial: "The fact that an accused person is under no legal obligation to testify during proceedings does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused".

Court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can be properly be described as “shocking, startling or disturbingly inappropriate<sup>4</sup>. This is not the case in this matter.

[25] Our case law is also unequivocal that a Court exercising appellate<sup>5</sup> jurisdiction cannot, in the absence of material misdirection by the trial Court, approach the question of sentence as if it were the trial Court and then substitute the sentence arrived at by it simply because it prefers it. To do so would usurp the sentencing discretion of the trial Court.

[26] In respect of the question of premeditation pertaining to the rape charge, it is important to note that it is not the appellant’s case that he ended up being in the female bathroom by mistake. To avoid being seen when he entered the female toilet, the appellant must have timed his move to perfection since he was not detected when he entered the female bathroom.

[27] It follows that the trial Court’s finding that the rape was premeditated since the appellant planned the rape cannot be disturbed. It is well established in terms of case law<sup>6</sup> that the definition of “premeditated” refers to something done deliberately after rationally considering the timing or the method of so doing to increase the likelihood of success or to evade detection or apprehension.

[28] Even though there are differences of opinions by our Courts as to what constitute premeditation, it is now settled that whatever the meaning of premeditation is, it involves a deliberate weighing-up of the proposed criminal conduct, as opposed to committing the crime on the spur of the moment<sup>7</sup>.

[29] Mr Albert conceded in oral argument on behalf of the appellant that premeditation is not an element of the offence of rape. He informed the Court that the issue of premeditation is raised in respect of conviction in the hope that if this Court was inclined to accept that it did not exist then it could assist the appellant to prove that there were compelling and substantial circumstances which would justify a deviation from imposing the prescribed minimum sentence of life imprisonment for the rape charge.

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<sup>4</sup> *S v Francis* 1991 (1) 198 at page 198j – 199a read with *S v Malgas* 2001 (1) 469 (SCA) para12.

<sup>5</sup> *S v Malgas* at para 12, *supra*.

<sup>6</sup> *S v PM* 2014 (2) SACR 481 (GP) at para 36.

<sup>7</sup> *Dlomo v S* 2023 (1) SACR 314 KZP at para12.

[30] Save to challenge the finding that the rape was planned or premeditated, Mr Albert conceded that the appellant does not take issue with the conviction.

[31] During the oral submission, it was conceded by both parties that premeditation was not an element of the offence of rape, nor is it a requirement to trigger life sentence in respect of the rape count. The trigger for life sentence in respect of the rape in this case was the age of the complainant and nothing else.

[32] It is therefore unfortunate that the question of premeditation was entertained during the trial. The concept of premeditation is imported from the offence of murder to impose a life sentence once it is found that a murder was premeditated. It plays no role whatsoever in respect of rape, particularly in the context of this case and with respect, the trial Court should not have been called upon to traverse this issue.

#### Substantial and compelling circumstance

[33] The trial Court found that there were no substantial and compelling circumstances which could justify a deviation from the statutory ordained minimum sentence of life imprisonment in respect of the count of rape. It did so after carefully weighing up the personal circumstances in respect of the appellant and referred to his upbringing, his youth and that he was a first offender as well as the evidence given on his behalf for the mitigation of his sentence.

[34] It is trite that there is no definition of what constitute compelling and substantial circumstances and the legislature has left it to the courts to decide what constitutes the existence of compelling and substantial circumstances in a particular case. In this case the trial court evaluated all the circumstances pertaining to the appellant's upbringing, including the admission that the appellant was still using drugs whilst still in prison and ultimately concluded that there were no substantial and compelling circumstances that warranted a deviation from imposing the prescribed life sentence in respect of the rape count.

[35] In the circumstances, the submission made by the appellant that the trial Court misdirected itself in its ruling that there were no substantial and compelling circumstances which would have justified a deviation from the prescribed

minimum sentence of life imprisonment for the count of rape is not sustainable since it is not borne by the evidence.

#### Concurrency of sentence

[36] In respect of the appellant's submission that the sentence imposed in respect of the defeating or obstructing the administration of justice should have been ordered to run concurrently with the sentence for life imprisonment, we are of the view that this submission is sustainable since it has merit.

[37] The respondent's submission that there is no need to mention whether such sentences should run concurrently since any determinate sentence of incarceration run concurrently with a life sentence as provided for in terms of section 39 of the Correctional Service Act<sup>8</sup> cannot be sustained. This is because the trial Court had expressly made a ruling that the sentence imposed in respect of the contravention of drugs and drug trafficking<sup>9</sup> should run concurrently with the sentence of life imprisonment for the count of rape.

[38] It would have been better and acceptable if the trial Court had made no pronouncement about the concurrency of the sentences in respect of both offences for possession and use of drugs as well as defeating or obstructing the administration of justice. Had the trial Court not made any pronouncement in this regard, all sentences imposed would as a matter of law run concurrently with the sentence for life imprisonment.

[39] As we see it, and for the sake of completion and to avoid any confusion, the sentence imposed for defeating or obstructing the administration of justice must also be expressly ordered to run concurrently with the sentence imposed for life imprisonment. In this limited respect, the appeal pertaining to sentence on this narrow aspect should succeed.

#### **ORDER**

[40] In the result, the following order is made:

- 40.1 The conviction in respect of the charge of rape and sentence is confirmed.
- 40.2 The appeal in respect of life imprisonment in respect of the count of rape is dismissed.

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<sup>8</sup> Read with Section 73 of Act 11 of 1998.

<sup>9</sup> Act 140 of 1992.

- 40.3 The appeal in respect of the trial court's failure to order the sentence on obstructing and/or defeating the administration of justice is upheld;
- 40.4 It is ordered that the sentence imposed on the count of obstructing and/or defeating the administration of justice is to run concurrently with the life sentence imposed on the rape charge.

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**R B MKHABELA**  
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION**  
**PRETORIA**

**I agree,**

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**M P KUMALO**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION**  
**PRETORIA**

**I agree and it is so ordered.**

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**D MAKHOB**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION**  
**PRETORIA**

**APPEARANCES**

**FOR THE APPELLANT:**

**H L Alberts**

**INSTRUCTED BY:**

**State Attorney, Pretoria**

COUNSEL FOR RESPONDENT:

SD Ngobeni

INSTRUCTED BY:

Director of Public Prosecution,  
North Gauteng, Pretoria

DATE OF THE HEARING:

4 September 2023

DATE OF JUDGMENT:

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