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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE: 21/03/2017

CASE NO: A800/2015

In the matter between:

THANYANIN PETER MAGABARA

APPELLANT

and

THE STATE

RESPONDENT

J U D G M E N T

MALI J

[1] This is an appeal against sentence of life imprisonment in respect of three counts of rape. The issue for determination is whether the trial court correctly interpreted the provisions of paragraph (a) (iii) of Schedule 2 to Act 105 of 1997 Part 1 of Schedule 2 to Act 105 of 1997 when passing the sentence.

[2] The appellant was charged with five counts of rape and one count of armed robbery with aggravating circumstances in the Regional Court of Pretoria. The appellant was found guilty of count 1 rape, count 3 rape, count 4 armed robbery and count 5 of rape. He was sentenced to life imprisonment in respect of counts 1, 3 and 5. The said three

counts were taken together for the purposes of sentencing. In relation to count 4 (Robbery with aggravating circumstances) he was sentenced to 15 years imprisonment. All the sentences were ordered to run concurrently.

[3] The appellant who was legally represented pleaded not guilty to all counts. The three complainants in the rape charges were called to testify together with other state witnesses. Later the appellant made admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977.

[4] The state did not call two other complainants in the rape counts and subsequently, the appellant was acquitted in those two counts.

BRIEF BACKGROUND

[5] On 16 August 2009, at about 03:am, M. F. S. ("M."), complainant in count 1 went to the outside toilet with one P. at home. The appellant emerged and chased P. away. He then pointed the complainant with a firearm and led her to a nearby river where he raped her. Subsequent to that he ordered the complainant to put on her clothes and continued walking with her. After 40 minutes he ordered the complainant to undress and raped her again. He then ordered her to go away, as she was walking away, the appellant fired several shots with a firearm.

[6] Under cross examination the appellant disputed that he raped M. at all. Later when he made section 220 admission, he admitted raping M. , however did not mention that he raped her twice.

[7] In respect of count 3, the appellant admitted raping E. S. on 4 August 2011. He admitted that he offered Eunice a lift to work and on the way he changed his motor vehicle's direction to the bushes. The appellant then raped her inside his car and also robbed her of

her cellular phone and money in the sum of R250.00

[8] In respect of count 5 he admitted raping L. N. on 1 September 2011 at 05:15 am in Diepsloot. The appellant pointed her with a firearm and forcefully dragged her into his motor vehicle. He drove with her to the bushes where she raped her inside the motor vehicle.

[9] It has been submitted on behalf of the appellant that he did not get a fair trial with regards to sentencing. The complaint is that the trial court's explanation created the expectation, that should the State prove, with the different complainants, that there is only one count per person in which case a different sentencing regime than life imprisonment would be applicable.

LAW

[10] In **S v Dzukuda and Others; S v Tshilo** [1] at paragraph 12 ACKERMANN J stated:

"...an accused's right to a fair trial under section 35(3) of the Constitution is a comprehensive right and "embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force." Elements of this comprehensive right are specified in paragraphs (a) to (o) ..."

[11] Section 35(3) of the Constitution states:

"3 *Every accused person has a right to a fair trial, which includes the right*

a to be informed of the charge with sufficient detail to answer it; . . ."

[12] In **Ramaite v S** [2] Schoeman AJA (Cachalia J concurring) stated at paragraph 10 the following:

"...Furthermore, that '... the accused's rights were explained to him, must appear from the record, in such a manner as, and with sufficient particularity, to enable a judgment to be made as to the adequacy of the explanation' [3] It would not be sufficient to record that the rights have been explained without sufficient particulars to determine whether that was in fact adequate ..."

[13] In terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (*"the Act"*), subject to subsections (3) and (6) , the court shall sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life. Part 1 of Schedule 2 refers to rape as contemplated in section 3 of the Act and reads as follows:

"(a) when committed-

(i) *in circumstances where the victim was raped more than once whether by the accused or by any co- perpetrator or accomplice;*

(ii) *by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;*

(iii) *by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or*

(iv) *by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;"*

[14] It is common cause that when the appellant was sentenced for the third count of rape (that of L. N.) by the trial court he was convicted but not yet sentenced for the first and second counts, *to wit* one count of rape in respect of M. F. S. and the second count of rape in respect of E. S..

[15] The appellant's complaint is that the learned Magistrate's explanation as contained in

record created an impression that he was not facing a sentence of life imprisonment.

[16] The cause of complaint is found at page 2 of the record. From line 8 to 17 the following is stated;

"In the presence of your lawyer I want to inform you sir that the a, of the provisions of the Criminal Law Amendment Act. Firstly, the possibility of life imprisonment where it might be proven that you might have raped someone in more than once.

That is only if the state proven that, in that instance. I noticed that the charges that were put to him, the complainants are different people and in that instance, if it is only proved that there is one count per person, then schedule, part 3 will be applicable in this instance and for a first offender it is 10 years imprisonment, a second offender 15 years' and a third offender 20 years'. That is the minimum sentence.

It is important before the start the trial that you know what the provisions of the sentencing, of the court's sentence jurisdiction, that is why the court is advising you.

Now I gave you the provisions of, I told you the possibility of life imprisonment, I told you the possibility of the minimum sentence, but you must remember if the minimum sentence is 10, then the maximum is 5 years' from there, so it will be 15. So there is 5 years' in every category with regard to minimum and maximum."

[17] As alluded above the appellant was legally represented the understanding of the proceedings could not have been made easier. The learned Magistrate went an extra mile in exercising caution. Towards the stage of sentencing the Magistrate invited the state and the appellant's representative (accused then) to make submissions on their understanding of the relevant provisions relating to sentencing. The Magistrate's ruling in this regard is found at page 174 to 175 of the record. A page 175 from line 25 and at page 176 from

line 1 -23 the following is stated:

"My ruling therefore, is that the accused in this matter where he is being convicted for three counts rape, will be liable to be looking at life imprisonment, which is not a strange fact, because that was also explained to him at the outset of this trial.

COURT The court wanted to actually give the opportunity to build this case in the defence, so that the decision can be made, whether, whether the accused is facing life imprisonment and in this instance, I have made my ruling, I would like to give the defence an opportunity if there is anything that you have not mentioned and that you would like to change or would like to add in your address, I would give you that opportunity to take instructions if you so wish, so that we can continue from here. Would you like a few minutes, ma'am?

MS MASIKE: *Correct, Your Worship.*

COURT: Very well, then we will take a short adjournment for you to do that and then we will come back as soon as you are ready and of course the [indistinct] rule applies, because if Mr Makua, also feels that he now wants to address in something else, he can respond. Thank you.

COURT ADJOURNS [11:57]

COURT ADJOURNS [12:04]

COURT: *Thank you. A resume after the adjournment, Ms Masike, is there anything else that you, I know there is a comprehensive report on record and you have addressed me on points in that report. Is there anything else you want to say?*

MS MASIKE: Your Worship, I do not have anything to add on the submissions that I already made before this court . . ."

[18] The Court is satisfied the appellant was informed with sufficient particularity of the charges and the consequences thereof. The trial court did its best to ensure that the

appellant understood that he was facing a sentence of life imprisonment. The appellant received a fair trial. Therefore there is no need to interfere with the trial's court decision in respect of sentencing.

[19] In the result the appeal is dismissed.

N.P. MALI

JUDGE OF THE HIGH COURT

I agree and it is ordered

N.V. KHUMALO

JUDGE OF THE HIGH COURT

[1] (CCT23/00) [2000] ZACC 16; 2000 (4) SA 1078 ; 2000 (11) BCLR 1252 (CC) (27 September 2000)

[2] (958/2013) [2014] ZASCA 144; 2015 (2) SACR 79 (SCA) (26 September 2014)

[3] S v Daniels & 'n ander 1983(3) 275 (A) at 299G-H.