



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal No.: A203/2016

In the appeal between:-

P J MANOPOLE

Appellant

and

THE STATE

Respondent

CORAM: MUSI, AJP *et* JORDAAN, ADJP *et* MATHEBULA, J

HEARD ON: 20 FEBRUARY 2017

JUDGMENT BY: MUSI, AJP

DELIVERED ON: 16 MARCH 2017

Sentence: Schedule 2 Part I with regard to rape involving grievous bodily harm and more than one rape discussed. Anomaly in Act 105 /1997 pointed out in

that an accused who rapes more than one complainant not at risk of being sentenced to life imprisonment in regional court but may be so sentenced if he/she rapes the same complainant twice. Trial court may not antedate sentence if original sentence was not set aside on appeal.

Musi, AJP

- [1] This appeal, which is with the leave of the trial court, is against the sentence imposed by a single judge of this division. The appellant was convicted of housebreaking with the intent to rob and robbery with aggravating circumstances (count 1), and 2 counts of rape (counts 2 and 3). He was sentenced to 15 years' imprisonment on each count. The trial court however ordered that the sentences on count one and two must run concurrently. It further ordered that the sentence be antedated to 29 July 2014.
- [2] On 27 April 2014 the complainant on counts 1 and 2 went to bed at approximately 21h00. Before she slept she ensured that the door and windows of her room were locked and closed. At approximately 02h00 she felt somebody pulling her blankets from her. She woke up and saw a man who was wearing a balaclava standing in her room. She screamed, the person hit her with his fist in her face and demanded money. She told him that she does not have money. He then demanded a cellular phone. She gave him the phone, which she put in his pocket. The person then stabbed her with an object on her right shoulder. She could not see the object and did not sustain any injury. She then told the person that he can take everything in the room. He however told her that he wanted to have sexual intercourse with her. He instructed her to get out of bed, which she did. He then forcibly removed her undergarment and had sexual intercourse with her. Whilst having sexual intercourse with her the cell phone fell out of his pocket. After having sexual intercourse with her he instructed her to get back into bed and cover her face with the blankets. She complied. After approximately 30 minutes she realised that the person had left the room. She got out of bed and noticed that the timber door as well as the safety door were open. She went to her neighbour's room where she reported what happened to

her. When she returned to her room she noticed that an amplifier worth R1000 was removed from her room by the intruder. The cell phone was still in the room. Her neighbour also testified and confirmed that the complainant made a report to her about the incident.

- [3] On 7 June 2014 the complainant on count 2 went to Chakala's Tavern where she drank two Hunters Dry ciders with friends. When she left the tavern the appellant followed her. He told her that it is not safe for her to walk alone and he offered to accompany her. Whilst walking with her he threatened to hit her and forcefully took her to his house, where he had sexual intercourse with her without her consent. She testified that he had raped her three times that evening. In the morning the appellant walked her halfway home. She knew of the appellant.

- [4] Both complainants received medical treatment and vaginal swaps were taken for DNA purposes. After the appellant was arrested blood samples were taken from him and it was detected that he deposited DNA material in the vaginas of both complainants.

- [5] The appellant testified that he had sexual intercourse with both complainants with their consent. He further testified that prior to the days that the complainants testified about, he had sexual intercourse with them on several occasions with their consent. He denied raping any of the complainants.

- [6] The trial court rejected the appellant's version and accepted the version of the state. The trial court found him guilty as charged. The relevance of this finding will become apparent later. The trial court found that it was enjoined to impose life sentences for the rapes, ostensibly because they were rapes as contemplated in Part 1 of Schedule 2 of their Criminal Procedure Amendment Act 105 of 1997 (Act). The trial court said the following in this regard:

“The state further reminded the court that the Legislature compels the court to impose life sentences in the case of rape.”

- [7] Ms. Smit, on behalf of the appellant, submitted that the trial court misdirected itself because the rape in count 2 is not one as contemplated in Part 1 of Schedule 2 of the Act. She further submitted that the trial court misdirected itself by finding, in respect of count 1, that there were substantial and compelling circumstances but nonetheless imposed the minimum sentence for robbery with aggravating circumstances which is 15 years' imprisonment. She however submitted that the rape in count 3 is one as contemplated in Part 1 of Schedule 2 of the Act.
- [8] Mr. Simpson, on behalf of the respondent, submitted that the trial court did not misdirect itself. He supported the sentence imposed by the trial court.
- [9] It is trite that sentencing is pre-eminently the task of the trial court. A court of appeal would only interfere with the exercise of the trial court's discretion if it is convinced that the trial court misdirected itself, or if it committed an irregularity or if the sentence is shockingly inappropriate. In short, if it exercised its discretion wrongly.
- [10] The appeal against the holding that the applicable minimum sentence on count 2 is life imprisonment is meritorious. There are no jurisdictional facts that warrant a finding that it is a rape as contemplated in Part 1 of Schedule 2 of the Act. It is indeed a rape as contemplated in Part III of Schedule 2 of the Act. The applicable minimum sentence for a first offender is therefore 10 years' imprisonment. I say this because there is no evidence whatsoever that the complainant sustained an injury let alone a serious injury. It can therefore not be a rape involving the infliction of grievous bodily harm. In order to classify a rape as one involving the infliction of grievous bodily harm the state must prove that the complainant sustained a serious injury. The state did not prove any serious injury in this case. See **S v Rabako** 2010 (1) SACR 310 (O). In fact, the complainant testified that she did not sustain any significant injury.

- [11] Although the complainant on count 3 testified that she was raped thrice by the appellant, her testimony with regard to this issue was vague. She testified as follows:

“So the accused removed the condom, what then happened? --- He kept raping me saying that he wanted to have a child with me. He spoke about many stories. If I remember well, he raped me three times before he fell asleep.

After he finished the first round, what did he do? --- He just lay aside but he did not fall asleep; then he woke up again and got on top of me. When he was done and fell asleep, I heard him snoring (indistinct). I was not sure that he was fast asleep. I was afraid to make any move thinking he was just pretending to be asleep. I just slept there like that but I did not fall asleep. In the morning, I think it was past 7:00, I told him that I wanted to leave. He stood up and said that he was going to escort me. When we were outside, he told me that I should wait for him, there was something he was going to fetch from inside the house. He was going to fetch that condom and then he threw it in a plastic.”

- [12] It is clear from her testimony that she could, at best, recall two rapes only. The prosecutor did not clarify her evidence in order to assist the court to make a finding that she was raped more than once. The trial court also did not analyze her evidence in order to ascertain whether she was raped more than once or whether this was one continuing act. In the **S v Tladi** 2013 (2) SACR 287 (SCA) para [13] it was said that:

“There is no evidence from the complainant as to how the appellant raped her for the second time. The complainant's evidence does not suggest that there was an interruption in the sexual intercourse to constitute two separate acts of sexual intercourse and, therefore, two separate acts of rape. The complainant's evidence suggests that the sexual acts were closely linked and amount to a single continuing course of conduct. There is no suggestion in her evidence that there was any appreciable length of time between the acts of rape to constitute two separate offences. The evidence against the appellant is therefore limited and is insufficient to establish his guilt on two separate counts of rape. The trial court should have analyzed the state's evidence and should have concluded that only one act of rape had been proved beyond a reasonable doubt. Counsel for the state was constrained to concede that no evidence was presented in the trial court to sustain a conviction on the second count. Consequently there was no basis for the conviction on the second count of rape. And it falls to be set aside.”

In **S v Legoa** 2003 (1) SACR 13 (SCA) par [18] the following was said:

“It is correct that, in specifying an enhanced penal jurisdiction for particular forms of an existing offence, the Legislature does not create a new type of offence. Thus, 'robbery with aggravating circumstances' is not a new offence. The offences scheduled in the minimum sentencing legislation are likewise not new offences. They are but specific forms of existing offences, and when their commission is proved in the form specified in the Schedule, the sentencing court acquires an enhanced penalty jurisdiction. It acquires that jurisdiction, however, only if the evidence regarding all the elements of the form of the scheduled offence is led before verdict on guilt or innocence, and the trial court finds that all the elements specified in the Schedule are present.”

[13] The trial court did not make any finding in relation to the number of times that the complainant on count 3 was raped. It found the appellant guilty as charged. There is no factual averment in the indictment to the effect that the complainant was raped more than once by the appellant. The indictment only states that the provisions of section 51 (1) of the Act are applicable. Section 51 (1) read with Part 1 of Schedule 2 contain various manifestations of rape. Section 51 (1), (3) and (6) provide:

“(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.”

“(3) (a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.

(aA) When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

(i) The complainant's previous sexual history;

- (ii) an apparent lack of physical injury to the complainant;
- (iii) an accused person's cultural or religious beliefs about rape; or
- (iv) any relationship between the accused person and the complainant prior to the offence being committed..."

"(6) This section does not apply in respect of an accused person who was under the age of 18 years at the time of the commission of an offence contemplated in subsection (1) or (2)."

Part 1 of Schedule 2 with regard to a rape provides:

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

(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;

(b) where the victim-

- (i) is a person under the age of 16 years;
- (ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or
- (iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or

(c) involving the infliction of grievous bodily harm..."

[14] A finding of guilty as charged is too open-ended to infer that the trial court found that the appellant raped the complainant more than once. In the absence of a pertinent finding that the appellant raped the complainant more than once, we cannot find, for sentencing purposes, that this was a rape as contemplated in Part 1 of Schedule 2. The trial court misdirected itself by not making such finding before conviction.

[15] The only other basis upon which the provisions of Part 1 of Schedule 2 could find application is, as Mr Simpson suggested, in terms of item (iii) thereof. Item (iii) states:

“(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; ”

In **S v Mahomotsa** 2002 (2) SACR 435 (SCA) para [20] it was said:

“...But the Legislature has itself distinguished him from persons who, having been convicted of two or more offences of rape but not yet sentenced, commits yet another rape. If, for example, the accused in the first instance had not raped the first complainant more than once and he then in the second instance raped the second complainant only once while awaiting trial on the first count the prescribed sentence of life imprisonment would not have come into the reckoning.”

The same interpretation was given to item (iii) in **Ngcobo and Others v S** (AR759/14) [2016] ZAKZPHC 26 (3 March 2016) where it was stated:

“Counsel for the State has argued that the rape convictions in this matter fall under the item of Part I of Schedule 2 to the Act which had been relied upon by the magistrate. However, we should first deal with Item (a)(iii) of the provisions dealing with rape in Part I of Schedule 2, under which the high court accepted jurisdiction. Ignoring the paragraph lettering (which can tend to obscure the meaning of the words employed) the item reads as follows:

‘Rape when committed by a person who has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions’.

The language of that item conveys clearly that a rape which falls within it is one committed by a person who has already been convicted of two or more prior offences of rape but has not yet been sentenced in respect of those convictions. The language permits of no other construction. (This is the construction of the item adopted by Mpati JA in the example given by him in paragraph 20 of his judgment in *S v Mahomotsa* 2002 (2) SACR 435 (SCA).)”

[16] I agree. It is only after the trial court has convicted an accused person that it may have regard to that person's previous convictions. It is only then that the State can prove that the accused has already been convicted of two or more rapes but not yet sentenced for such rapes. There must therefore be two or more other convictions at the time of the last conviction or convictions. This gives rise to another glaring anomaly. An adult accused who rapes the same adult complainant two or more times is exposed to the minimum sentence of life imprisonment whilst an adult accused who rapes two or more adult complainants once, and is convicted and sentenced during the same trial for all the rapes, is not exposed to such sentence. When the trial is conducted in the High Court it can utilize its common law sentencing jurisdiction and sentence the accused to life imprisonment. However if such accused is convicted in the regional court it would not have jurisdiction to sentence him to life imprisonment. One can only wonder whether this was what the Legislature intended or whether it was an oversight. In any event it is clear that the appellant in this matter is not a person as described in item (iii).

[17] The trial court made the following finding:

"The court has to take into account all other factors as well as you being a first offender, you will have been in custody for one year and 9 months. The above indeed amounts to substantial and compelling circumstances and the court will not impose life sentence (sic). In so doing, does not mean the court does not unduly accord inappropriate weight on the offences committed – even though you did not show much or any remorse (sic)."

[18] Notwithstanding the finding that there are substantial and compelling circumstances which militate against the imposition of the minimum sentence the trial court, however, proceeded to impose the minimum sentence of 15 years in respect of count 1. The provisions of section 51(3) are clear; if the court finds that there are substantial and compelling circumstances justifying a deviation from the minimum sentence it must impose a lesser sentence. It is conceivable that a court might find that there are substantial and compelling circumstances

with regard to one count but that no such circumstances exist in respect of another count. On the other hand it might be that the substantial and compelling circumstances relate to all the counts. It is therefore of utmost importance in a case where the accused is convicted of multiple counts, which fall under the purview of the Act, to specify whether the substantial and compelling circumstances relate to a particular count only or to all the counts. In this case the trial court did not make any such distinction. The factors mentioned by the trial court, in any event, relate to the personal circumstances of the appellant. Those circumstances would be the same with regard to all 3 counts. The ineluctable inference is that the trial court found that there were substantial and compelling circumstances with regard to all 3 counts.

- [19] Before considering a proper sentence I pause to point out another irregularity. Section 282 of the Criminal Procedure Act 51 of 1977 states:

“Whenever any sentence of imprisonment, imposed on any person on conviction for an offence, is set aside on appeal or review and any sentence of imprisonment or other sentence of imprisonment is thereafter imposed on such person in respect of such offence in place of the sentence of imprisonment imposed on conviction, or any other offence which is substituted for that offence on appeal or review, the sentence which was later imposed may, if the court imposing it is satisfied that the person concerned has served any part of the sentence of imprisonment imposed on conviction, be antedated by the court to a specified date, which shall not be earlier than the date on which the sentence of imprisonment imposed on conviction was imposed, and thereupon the sentence which was later imposed shall be deemed to have been imposed on the date so specified.”

- [20] It is clear that a trial court may not antedate a sentence, unless its original sentence had been set aside on appeal or review and the matter referred back to it to impose an appropriate sentence. See **S v Seekoei** 1997(1) All SA 40 (NC) at 45a to 46b. The trial court could also not antedate the sentence to 29 July 2014 which was the date of arrest. The order of the trial court antedating the sentence to 29 July 2014 is an incompetent order. I now turn to consider an appropriate sentence.

- [21] It is trite that in considering an appropriate sentence a court must consider the personal circumstances of the accused, the interests of society (which includes the interests of the victim), and the nature of the offence. The court must balance these factors to such an extent that it gives expression to the objectives of sentencing, to wit, retribution, rehabilitation, deterrence and prevention of crime. Where the Act is applicable the court must consider all the relevant factors in order to discern whether there are substantial and compelling circumstances present. Where no such circumstances are present the court must impose the minimum sentence. It has been said that a court should not deviate from the minimum sentences for flimsy or unconvincing reasons and substantial and compelling circumstances are not extraordinarily circumstances. See **S v Malgas** 2001 (1) SACR 469 (SCA) at paras 7-9.
- [22] The appellant was born on 8 June 1988 at Brandfort. He was 27 years old on the date of sentencing. He was unmarried and had one child born on [...] 2007. He was unemployed. His last gainful employment was 2006 when he worked for Pick and Pay and earned approximately R750 per month. He stayed with his mother who was a domestic worker. He had two previous convictions. On 27 March 2006 he was convicted of theft and sentenced to 12 months' imprisonment which was wholly suspended for 5 years on certain conditions. On 3 June 2007 he was convicted of unlawfully possessing dagga for which he was sentenced to a fine of R600 or 30 days imprisonment. The previous convictions were committed long before these crimes were committed and they were irrelevant. The trial court correctly regarded him as a first offender.
- [23] The seriousness of rape and robbery with aggravating circumstances has been repeatedly stated and reaffirmed by our courts. In **S v Nkunkuma** (101/13) [2013] ZASCA 122 (23 September 2013) it was said that rape and robbery have become serious social problems. Pillay JA elaborated, at para [17], and stated that:

“Rape must rank as the worst invasive and dehumanizing violation of human rights. It is an intrusion of the most private rights of a human being, in particular a woman, and any such breach is a violation of a person's dignity which is one of the pillars of our Constitution... The same can be said of robbery. No matter how they are viewed, society has called, one more than one occasion, for the courts to deal with offenders of such crimes sternly and decisively.”

- [24] Rape and robbery with aggravating circumstances are despicable crimes which are abhorrent to our democratic society. Those who earn opprobrium for committing such serious offences should experience society's condemnation clearly and decisively. The most appropriate way to do so is by imposing long term imprisonment. This is consonant with the Legislatures injunction that courts must impose harsher sentences for the crimes mentioned in the Schedule to the Act.
- [25] The complainant in count one was raped and robbed in the sanctity of her house. She was robbed at a place where she was supposed to be safe. It is clear that she tried to shield herself from intruders by putting a security gate in front of the timber door. The second complainant was robbed of her right to freedom of movement. She was intimidated and coerced to accompany the appellant to his house. Both complainants begged the appellant not to rape them he however continued with the pitiless, inconsiderate and wicked sexual attacks.
- [26] The trial court found that there are substantial and compelling circumstances. The state did not appeal against the sentence. That finding is therefore unchallenged. The appellant pertinently submitted that the sentence imposed on count 1 is conspicuously improper because of the finding that there were substantial and compelling circumstances. Ms. Smit correctly conceded that imprisonment is the only suitable sentence.
- [27] I take into consideration the period that the appellant spent in custody awaiting finalization of his trial, which was considered as a substantial and compelling circumstance.

[28] To sum up, the applicable minimum sentence in respect of count 1 is 15 years' imprisonment and in respect of count 2 and 3 it is 10 years' imprisonment. As the trial court found that there are substantial and compelling circumstances and that finding has not been challenged or upset lesser sentences, than the prescribed minimum sentences, must be imposed.

[29] I accordingly make the following order:

- (a) The appeal is upheld.
- (b) The sentence imposed and related orders made by the trial court are set aside and replaced with the following:
 - (i) Count one: 10 years' imprisonment.
 - (ii) Count two: 8 years' imprisonment.
 - (iii) Count three: 8 years' imprisonment.

The sentence imposed on count 1 should run concurrently with the sentence on count 2. The sentence is antedated to 8 April 2016. No order is made in terms of section 103 of Act 60 of 2000.

C.J. MUSI, AJP

I agree.

A.F. JORDAAN, ADJP

I agree.

M.A. MATHEBULA, J

On behalf of Appellant:

Mrs. L. Smit
Instructed by
Legal Aid SA
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On behalf of Respondent:

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