

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO.: AR 250/12

In the matter between:

MLUNGISI PATRICK MABASO

and

THE STATE

J U D G M E N T

KOEN J:

Introduction:

[1] I have had the benefit of reading the judgment of D Pillay J. I agree with her that the sentences imposed by the sentencing court should be set aside and with her reasons for doing so. However, in my view, in addition to her reasons, the sentences also fall to be set aside because of a misdirection, which will be amplified later in this judgment. Further, I disagree regarding the length of the sentences to be substituted for those set aside. It is necessary for me in this judgment to repeat some of the factual background, insofar as relevant to my conclusions. I shall however endeavour to restrict myself as much as possible in that respect. I also do not repeat

the grounds advanced by D Pillay J on which she found that the sentences imposed by the sentencing court fall to be set aside. I associate myself with her reasoning in that regard.

[2] The appellant was convicted in the Regional Court¹ of two counts of rape and one count of robbery with aggravating circumstances. Following the conviction, the prosecutor remarked that:

‘as the circumstances of this case prove that the complainant was raped more than once by the accused the matter falls in the ambit of Part 1 of Schedule 2 to the minimum Sentence Act (*sic*)’.

The learned magistrate thereupon concluded:

‘Yes, the two counts of rape are offenses as described in Part 1 of Schedule 2’.

The proceedings were for that reason stopped in terms of section 52 of the Criminal Law Amendment 105 of 1997 (‘the Act’) as that section then provided, and the matter was transferred to the High Court² for sentencing. The High Court took counts 1 (rape) and 3 (rape) together for the purpose of sentence and sentenced the appellant to life imprisonment. In respect of count 2 (robbery with aggravating circumstances) the appellant was sentenced to 15 years imprisonment, which would run concurrently with the sentence on count 1. Leave to appeal against conviction having been refused, the appellant appeals with the leave of the court *a quo* against sentence only.

¹Hereinafter also referred to as ‘the trial court’.

²Hereinafter referred to as ‘the sentencing court’.

The Charge-sheet:

[3] The particulars regarding the rapes in counts 1 and 3 are alleged in identical terms in the annexures to the charge sheet, to be:

'In that upon or about 18-04-2004 and at or near Pieters Area in the Regional Division of KwaZulu-Natal the accused unlawfully and intentionally assaulted MinahPhilileHlatshwayo an adult female and had sex or intercourse with her without her consent'.

Count 1 was stated to be read 'with section 105 of 1997' (*sic*). Count 3 referred more correctly to the second count of rape having to be read 'with the provisions of Act 105 of 1997'. In respect of count 2, the record contains no reference that it had to be read with the provisions of the Act.

The proceedings in the Regional Court:

[4] The appellant was legally represented throughout. When the first count was read out in court by the prosecutor, the record reflects that 'the first count is read with Section ... (indistinct) Act 105 of 1997'. When the third count was read out the record reflects that it was to be 'read with the provision of Act 105 of 1997'. The transcript of the proceedings does not refer to the provisions of the Act relating to prescribed minimum sentences applying to count 2, or why and how it would operate in respect of counts 1 and 3. The record also contains no indication that whatever the effect of the charges being read with the provisions of the Act would be, were explained to the

appellant. Nor was it confirmed with the appellant's legal representative that he had explained the provisions of the Act or its consequences to the appellant. Specifically, the record does not disclose any explanation, prior to the statements quoted in paragraph 2 above following only after conviction, why the provisions of the Act might find application in respect of counts 1 and 3 and what the effect thereof might be.

The findings of the sentencing court:

[5] The learned Judge concluded that:

'The fact that the accused raped the complainant twice almost on the same occasion triggers the minimum sentence provision ...'

The minimum sentence to which reference is made in that context, is one of life imprisonment. The minimum sentence prescribed by the Act in respect of the robbery with aggravating circumstances is 15 years. She further concluded that there was 'nothing before this court to suggest circumstances substantial enough to compel the court to deviate from that sentence'.

The relevant factual circumstances:

[6] The facts found proven at the trial established that on the 18 April 2004 the complainant, a 28 year old lady was walking along Helpmekaar Road and Pieters

Road, KwaZulu-Natal when she was approached by the appellant who purported to propose love to her. She rejected his advances. He grabbed her arm, took out an Okapi knife, pointed it at her and steered her in the direction of a forest nearby. He removed her wallet containing R15 in coins from a bag she was carrying. He thereafter instructed her to undress and to lie down on the ground. Some of the thorns on the ground pierced her shoulders. She complained and he then put her jacket underneath her. He then proceeded to have sexual intercourse with her against her will, but he did not climax. After he had finished he instructed her to get dressed which she did. He removed her Nokia cell phone from her jacket and kept it. After she had dressed they got up and proceeded walking into the forest. Whilst still in the forest he told her to undress so that he could do it again. She took off her skirt and panties and he had sexual intercourse with her again. On this occasion she felt wetness in her vagina after he had finished. He again told her to dress which she did. She asked for directions which he provided and they parted. The first encounter was at approximately half past to quarter to six in the evening and they spent, on her estimation, an hour and a half together before they parted. She experienced severe pain in the bladder on both occasions after the intercourse but not whilst intercourse was happening. This evidence is consistent also with the findings of the doctor who examined her the next day and recorded 'no physical injury'.

The appellant's contentions:

[7] Mr Butler who appeared for the appellant maintained that no misdirection occurred in sentencing the appellant. The only ground on which he challenged the sentence imposed by the court *a quo* was that it placed insufficient weight on mitigating factors in favour of the appellant. He relied on the personal circumstances of the appellant as constituting substantial and compelling circumstances. These included that the appellant was 33 years of age, was in a stable relationship akin to marriage, was self-employed as the owner of a tuck shop, supported his wife and two minor children aged 12 and 3 years and that he did not harm the complainant physically, even though he brandished a knife. Regarding the offence, while recognising the serious nature of all three counts, he submitted that the complainant was a mature woman and that it was not the worst form of rape.

The requirement of a constitutionally fair trial:

[8] In *S v Ndlovu*³ the Supreme Court of Appeal held that where the State intends to rely upon the sentencing provisions contained in the Act, a constitutionally fair trial⁴ generally will demand that such intention be brought pertinently to the attention of the accused at the outset of the trial. If this is not done in the charge sheet, then it must be done in some other form, so that the accused is placed in a position to

³2003 (1) SACR 331 (SCA)

⁴Contemplated in s35(3) of the Constitution.

appreciate properly, and in good time, the charge he faces as well as the possible consequences. What is required is that the accused at least be given sufficient notice of the state's intention to enable the accused to conduct his or her defence properly and in accordance with such intention.⁵

[9] It has also been cautioned, correctly in my view, that it should not be simply assumed because an accused was represented, that the provisions of the Act would pertinently have been brought to his attention.⁶

[10] Formalism must obviously not be placed above substance. Ultimately, the question is whether the accused had a constitutionally fair trial, which will include the sentencing stage. Whether this right has been infringed will require 'a vigilant examination of the relevant circumstances.'⁷ If an accused is not advised adequately in the charge-sheet of the intention to apply the Act, then the enquiry becomes one as to whether he was advised otherwise, either by such notification being given by the State when he is required to plead, or possibly the application of the Act being raised *meromotu* by the presiding magistrate or judge, or knowledge of the application of the Act on the part of an accused being evident from his plea explanation, or some other source. But proper and adequate notification should not be assumed lightly. The Constitutional imperative of a fair trial must be shown to exist, not assumed.

⁵S v Peu 2012 (2) SACR 625 (GNP) at paragraphs 5 and 6

⁶S v Mseleku 2006 (2) SACR 574 D at 581a-e; S v Peu (supra) at para [6].

⁷S v Ndlovu 2003 (1) SACR 331 (SCA) and S v Legoa 2003 (1) SACR 13 (SCA) at para [21].

[11] What seems clear is that a minimum prescribed sentence cannot be imposed where the charge sheet makes no reference to the Act, and neither the accused nor the legal representatives had any advance warning that such minimum legislation would be sought to be made applicable.⁸

[12] Where notification of whatever form is given, the further enquiry is whether such notification is adequate to establish that an accused had a fair trial. The jurisprudence on this aspect appears to be more controversial. What the notification as a general rule must cover is at least some notice that it will be contended that the provisions of the Act are applicable, and the consequences of its application. Hence 'an accused faced with life imprisonment – the most serious sentence that can be imposed – must from the outset know what the implications and consequences of the charge are.'⁹ I am of the view that this requirement necessarily also entails that an accused must be apprised of the particular provisions upon which reliance shall be placed, that is the particulars of the offence as it appears in the relevant Part of Schedule II to the Act, as well as the sentence that will follow in the event of a conviction. It will be of very little assistance to an accused facing a rape charge to know that he might face a life sentence, but not to know that this is because it is contended that he had raped the same complainant twice, or because the complainant was under the age of 16 years, or whichever other provision might find application. A lack of such detail will not 'enable him to conduct his defence properly'.

⁸*S v Tshabalala* 2008 (1) SACR 486 T.

⁹*S v Makatu* 2006 (2) SACR 582 (SCA) at para [7].

[13] It has been held that an accused should not only be informed clearly that a certain minimum sentence may be imposed, and will be sought, but also that it may be a life sentence that he might face.¹⁰ I agree with that view. It has however also been stated that this rule should not 'be expanded to require the prosecution to list all grounds it intends to rely on to invoke the relevant minimum-sentence provisions'.¹¹ I respectfully disagree with that view as a general unqualified statement. Absent adequate disclosure of the grounds upon which it might be contended at the end of the trial that a prescribed minimum sentence may apply, an accused cannot properly prepare his defence.

Count 2 – Robbery with Aggravating Circumstances:

[14] There was no indication in the charge-sheet or at the commencement of the proceedings¹² that the state might seek to invoke the provisions of the Act in respect of count 2. The Court *a quo* accordingly erred in proceeding on the premise that the prescribed minimum sentence in terms of the Act should follow in respect of count 2. This constituted a misdirection.

¹⁰S v Peu 2012 (2) SACR 625 (GNP) at para [5].

¹¹S v Peu (supra) at para [7].

¹² Indeed during the whole of the proceedings before the Regional court until after conviction when the transfer of the matter to the High Court was sought.

[15] The sentence imposed on this count accordingly falls to be set aside and an appropriate sentence determined afresh.

Counts 1 and 3 – Rape:

[16] In regard to the two counts of rape, the appellant was not advised that he would face a possible life sentence, nor was he properly notified of the provisions of the Act which would be sought to be relied upon by the State in the event of his conviction.

[17] A fair trial demands that he should be advised of the possibility of a life sentence and, in my view also the specific provisions on which reliance might be placed for such sentence to follow. He could be advised of these in the charge sheet, or at the commencement of the trial by either the prosecutor of his own volition, or in response to questions from the presiding officer enquiring on what provisions of the Act reliance would be placed. *In casu*, there were simply the terse, general, vague and in respect of count 1 incomplete and nonsensical references in the charge sheet¹³. A reading of the charge sheet did not indicate that a life sentence could follow. Nor was it indicated which of various possible provisions of the Act and more specifically Parts to schedule 2 to the Act, varying from rape as contemplated in Part III, to rape as contemplated in Part I, and in the latter category, which of the various

¹³I shall for present purposes proceed on the basis that the reference to 'section 105 of 1997' in count one would have been understood by the appellant as a reference to 'Act 105 of 1997'.

possibilities ranging from 'rape ... when committed ... in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice', to the other categories including rape when 'involving the infliction of grievous bodily harm', might apply.

[18] The appellant was simply never advised prior to conviction on what basis it would be contended that the provisions of the Act would apply and that he could face life imprisonment. The failure to advise him of the possibility of a life sentence is on its own decisive. In the light thereof the conclusion of the sentencing court that there were no substantial and compelling circumstances and that a sentence of life imprisonment therefore followed, constituted a misdirection in respect of the sentence on the two rape counts.

[19] It might be argued that an astute legal representative could be assumed pertinently to have brought the possibility of life imprisonment to the notice of the appellant based on the victim having been raped more than once by the appellant, in view of there being the two counts of rape. But that is not necessarily the only conclusion or most reasonable conclusion one can draw. I am not prepared to assume, as also in *S v Mseleku*, that this would necessarily have been brought to the notice of the appellant by his legal representative.¹⁴

¹⁴See also *S v Peu* 2012 (2) SACR 625 (GNP) at para [7] and *Maake v Director of Public Prosecutions* [2011] 1 All SA 760 (SCA) at 766.

[20] The important issue always remaining is whether an accused received a fair trial. This question might entail also whether if he had been properly and timeously advised of the specific part of the schedule on which reliance was ultimately placed for the provisions of the Act to apply, whether his defence might have been conducted differently. The appellant was confronted with two rapes of the same victim on the same day. One might therefore be tempted to perhaps think that even if his attention had specifically been brought to the relevant provision(s), his defence might not have been presented differently. That however remains an assumption, and not one to be made where a constitutional imperative, namely the right to a fair trial, is being considered. It is not for me to speculate on the exact respects in which the defence might have differed or been presented differently. Where a minimum sentence of ten years is prescribed in respect of a single rape but a life sentence for rape in any one of the circumstances listed in part I, the right to a constitutionally fair trial demands that an accused should at the outset be appraised fully and properly of the case he has to meet, also on sentence.

[21] A sentencing court should not simply proceed from the premise that the provisions of the Act found application because of the circumstances.

An appropriate sentence:

[22] In concluding that there were no substantial and compelling circumstances although the appellant had not been properly appraised of the application of the Act,

the respects in which it would be contended to apply and the consequences of it applying, and concluding that the minimum sentences therefore followed in respect of the three counts, the court *a quo* in my respectful view erred. However, irrespective of and in addition to these considerations, the sentencing court in any event erred in concluding that there were no substantial and compelling circumstance. These would include some of those advanced by Mr Butler and also alluded to in the judgment of D Pillay J. The sentences imposed were disproportional¹⁵ to the offences of which the appellant was convicted, thus making sentences for less than the prescribed minima more appropriate. In this regard I am *ad idem* with the conclusion of D Pillay J that lesser sentences than those imposed are appropriate. Where we differ is what lesser period of imprisonment would be appropriate.

[23] There is no doubt that rape and also the robbery of which the appellant has been convicted are very serious offences. The robbery was however not accompanied by any serious physical harm and was of items of relative little value, albeit items often the subject of robberies. The invasive and humiliating nature of rape, the discrimination inherent therein and the unfortunate prevalence thereof in society generally demanding that society be protected against this kind of conduct, all require that a lengthy custodial sentence be imposed. But these considerations, also the discrimination inherent in rape, are not aggravating factors and already recognized in sentences that have been imposed by our courts in the past and which serve as precedents and guidelines to this court.

¹⁵S v Vilakazi 2009 (1) SA 552 (SCA) at 560

[24] I have had regard to various decisions of the Supreme Court of Appeal and other courts including inter alia *S v Matyityi*¹⁶, *Bailey v State*¹⁷, *S v Nkomo*¹⁸, *Ndou v S*¹⁹, *S v Abrahams*²⁰, *S v Mahomotsa*²¹, *S v Vilikazi*²². This list is not exhaustive. The sentences imposed in these cases span a wide spectrum, are divergent, but not surprisingly so as the facts of each matter differ. Ultimately, this court, having regard to the aforesaid judgments must consider a balanced sentence, consistent with the principles established in those cases and being harmonious insofar possible with the sentencing trends that emerge from those decisions.

[25] The two rapes were more in the category of those in *S v Mahomotsa* and *S v Nkomo*, although the circumstances were not as aggravated as in *S v Nkomo*.

[26] Due cognisance must be taken of the fact that the complainant was degraded, was dragged into a bush, suffered the indignity of being stripped of her clothing and that she was abused not once but twice within a relative short space of time, and was deprived of certain possessions. This left her traumatised, irrespective of whether physical external injuries manifested. The anguish she experienced is likely

¹⁶2011 (1) SACR 40 (SCA).

¹⁷[2012] ZASCA 154.

¹⁸2007 (2) SACR 198.

¹⁹ [2012] ZASCA 148

²⁰2002 (1) SACR 116 (SCA)

²¹2002 (2) SACR 435 (SCA)

²²2009 (1) SACR 552 (SCA).

to remain with her for a long time. That is the unfortunate result of all violent crimes. The appellant had not shown any remorse nor is there anything to suggest any reduction in his moral blameworthiness. However, as much as there was no evidence to suggest that he be considered to be material for rehabilitation, there was also nothing to suggest that he would not be suitable for rehabilitation.

The appellant's previous convictions:

[27] Reliance was also placed by the State on the fact that the appellant was not a first offender. The record, as is customary, simply reflects that the appellant admitted his previous convictions and sentences. Although the SAP 69 was *ex facie* the record handed in, it is not contained in any of the records of the members of this court. From what can be gleaned from the record, the only possible relevant previous conviction²³, was one relating to abduction. The wife of the appellant testified in mitigation. During her evidence the following question was posed by the learned Judge:

‘And he did something similar years ago as well, he’s abducted somebody. Now when one talks of adopt – abduction, one usually abducts as opposed to kidnapping when one wants the person for sexual favours. That was in 1997, I think. --- The sentence was '97 and he did it in '96, May.

Mmm. So ... (incomplete) --- At that time I was not staying with the accused, we were – the preparations for me to go and stay at his house were being made at that time.

[28] During the course of handing down sentence the learned Judge commented:

²³The others were of possession of an unlicensed fire arm,

‘Now as far as the accused is concerned, he is no stranger to these courts. The fact that he was convicted of abduction suggests that he has some kind of propensity for committing sexual offences’.

[29] On the record, there are no details as to what the previous conviction of ‘abduction’ entailed. Abduction is a crime against parental authority and consists in unlawfully taking a minor out of the control of his or her custodian with the intention of enabling somebody to marry **or** have sexual intercourse with that minor²⁴. Which alternative it was in relation to this previous conviction of the appellant, is not clear. Furthermore this previous conviction dated back some 7 to 8 years at the time that sentence was imposed on 10 May 2005. The particular circumstances and seriousness of the abduction are simply unknown. The record also does not disclose what sentence had been imposed from which any conclusion could possibly be drawn. Although still relevant as a previous conviction, the conclusion that the appellant ‘had some kind of propensity for committing sexual offences’ is, in the circumstances, with respect, harsh and not justified.

Concurrence of sentences:

[30] The sentences imposed in respect of the two rapes and the robbery should run at least partly concurrently to ameliorate the cumulative effect of the sentences on the three counts, and also because they arose from essentially the same event.

²⁴See Milton *South African Criminal Law and Procedure* Volume II (3rd edition) page 533.

Order:

[31] I accordingly propose that the following order be granted:

1. The appeal against sentence succeeds.
2. The sentences imposed by the court *a quo* are set aside and replaced with the following:
 - (a) On count 1, rape, the accused is sentenced to fifteen (15) years imprisonment;
 - (b) On count 2, robbery with aggravating circumstances the accused is sentenced to eight (8) years imprisonment;
 - (c) On count 3, rape, the accused is sentenced to fifteen (15) years imprisonment;
 - (d) The sentences are all antedated to 10 May 2005.
 - (e) It is directed that the sentence on count 2 will run concurrently with that on count 1;
 - (f) It is directed that ten (10) years of the sentence on count 3 will run concurrently with that on count 1;
 - (g) The effective term of imprisonment is therefore twenty (20) years.

KOEN J

I AGREE

PLOOS VAN AMSTEL J

DATE OF HEARING: 6 FEBRUARY 2013.

DATE OF DELIVERY: MAY 2013.

FOR APPELLANT: J BUTLER

PMB JUSTICE CENTRE: 033 394-2190

FOR RESPONDENT:

THE DIRECTOR OF PUBLIC PROSECUTIONS 033 394-6891