

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL CIRCUIT, EAST LONDON**

CASE NO: CC 94/2014

DATE HEARD: 10/2/15

DATE DELIVERED: 11/2/15

NOT REPORTABLE

In the matter between:

THE STATE

and

THANDO NQUMASHE

ACCUSED 1

BONGANI NTSHOZA

ACCUSED 2

JUDGMENT: SENTENCE

PLASKET J

[1] Both accused were charged with two counts of kidnapping and two counts of robbery with aggravating circumstances. In addition, accused 1 was charged with the offence of sexual assault in terms of s 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, as well as rape in terms of s 3 of the same Act.

[2] Both accused pleaded guilty to all of the charges and I duly convicted them on the basis of their pleas, having satisfied myself that they had admitted every element of each charge. I now have the task of sentencing them for their crimes.

[3] In determining a sentence in respect of each offence I am required to have regard to the personal circumstances of the accused, the nature and gravity of the offences they committed and the interests of society.

[4] I do not have a free hand to impose whatever sentences take my fancy. My sentencing discretion must be properly and judicially exercised. I am also bound by the provisions of the Criminal Law Amendment Act 105 of 1997 which provide that, in respect of the robbery convictions, I must impose a sentence of 15 years' imprisonment, and in respect of the rape conviction, life imprisonment, unless I find substantial and compelling circumstances to be present that justify less severe sentences.

[5] No minimum sentence is prescribed for the offence of kidnapping. As no sentence (or range of sentences) is prescribed for the offence of sexual assault, I am, in terms of s 56A of the Criminal Law (Sexual Offences and Related Matter) Amendment Act, free to impose a sentence, as provided for in s 276 of the Criminal Procedure Act 51 of 1977 that is within my sentencing jurisdiction and that I consider to be appropriate. The same situation applies to the kidnapping counts.

[6] I turn now to the facts.

[7] On the night of 21 January 2014, the accused were driving a car, used as a taxi, in the centre of East London. They stopped for the complainant in counts 1 and 2 (who I shall refer to as AS) who apparently believed the accused to be operating a taxi. She said she wanted to be taken to Nompumelo Township near Beacon Bay. Instead, the accused took her elsewhere and robbed her of the property in her possession. They did so at knife point. They also took her to an automatic teller machine (an ATM) and attempted to draw money from her account. When this was happening, both accused wielded weapons – a screwdriver in the case of accused 1 and a knife in the case of accused 2.

[8] Even after this, the accused continued to hold AS against her will. According to accused 1, they had decided to hold her until after midnight when, I presume, a new daily limit for withdrawals came into effect, thus enabling them to draw money from her account.

[9] They continued to hold her against her will and drove around East London. They came across the complainant in counts 3, 4, 5 and 6 (who I shall refer to as AG) who also assumed that the accused were operating a taxi. When she entered the vehicle, she was robbed of her possessions at knife point and held against her will. Accused 1 drove the vehicle to Haven Hills where he, according to his statement in terms of s 112(2) of the Criminal Procedure Act, 'caressed and fondled the breast and body' of AG. He then drove to a secluded spot in Wilsonia where he raped AG twice.

[10] It would appear from the statement of substantial facts – this not having been dealt with in the accused's s 112(2) statements – that AG was released soon after being raped but AS continued to be held against her will until the accused were stopped by the police.

[11] I now turn to the three sets of factors that I am required to consider in arriving at appropriate sentences.

[12] I shall commence with the personal circumstances of the accused. Both were mature men when they committed these crimes. Accused 1 is 29 years old and accused 2 is 35 years old. Accused 1 is a first offender. Accused 2's previous convictions are either very old or irrelevant to this matter, so I will treat him as a first offender. Both are fathers of young children. Accused 1 works as a taxi driver. Accused 2 is self-employed, repairing radios and television sets. Both earn modest livings that go, in part, to the maintenance of their children. Both have little formal education. Accused 1 completed standard 5 and accused 2 completed standard 2. Both claim that they were under the influence of liquor when the offences were committed.

[13] I have set out the facts of the case. They speak for themselves as to the seriousness of the offences committed by the accused. They testified that they had planned the offences in advance. Because they were short of money with which to buy liquor, they decided to wait for dark and then, masquerading as taxi drivers, drive around until stopped by a person who wanted to be conveyed by them. They would then rob their passenger.

[14] That is precisely what they did and their victims were two young women. Both were, particularly on account of their gender, vulnerable. Both were robbed at knife point and both were held against their will. AS was held against her will so that she could be robbed later of whatever the accused could draw from her bank account. AG was held against her will, after being robbed, so that accused 1 could rape her.

[15] When accused 1 was cross-examined by Mr Mgenge, who appeared for the State, he was asked why, having robbed AG, he had not released her, he said at first that the thought had not crossed his mind. It was then put to him that he had decided then that he was going to rape her. He agreed with this proposition. Again he agreed with the proposition that when he sexually assaulted her at Haven Hills, he already had decided to rape her. It was then put to him that he had taken AG to Wilsonia with the purpose of raping her. He agreed with this proposition.

[16] Both AS and AG testified in aggravation of sentence. Both impressed me, not only on account of their forthright, measured and impressive testimony of their terrible experiences at the hands of the accused, but also on account of their fortitude in dealing with the consequences and the mature way in which they appear to have coped. That said, however, it is clear from both that they still live with and experience the effects of the trauma inflicted on them by the accused and will continue to do so into the future.

[17] When the accused testified they expressed remorse and apologized for their deeds. They were forthright as to why they did what they did except that

accused 1 was not able to give any explanation why he had fondled and then raped AG.

[18] In the matter of *S v Chapman* 1997 (2) SACR 3 (SCA), a case in which a man had prowled the streets and a shopping mall in search of women who he deceived by giving them lifts before raping them, Mahomed CJ, Van Heerden JA and Olivier JA spoke of the rights of women to go about their business freely, without fear or hindrance and to come and go without fear, apprehension or insecurity. Those rights, and the interest of society to protect them for the benefit of all, come to the fore most strongly in this case.

[19] Both complainants were on their way home. They wished to catch a taxi home but the accused, in the furtherance of their plan, were on the prowl in search of victims to rob. Although accused 2 denied that they were on the prowl for 'soft targets', as it was put by Mr Mgenge, it seems to me that it was not fortuitous that their victims happened to be young women on their own, rather than strapping young men.

[20] Society has an interest in the protection of the vulnerable against all forms of exploitation and particularly against violent and predatory conduct such as that of the accused.

[21] I turn now to the individual offences of which the accused have been convicted.

[22] As I have said, the robberies were planned well in advance. The accused had to wait for darkness before executing their plan but apparently did not reflect on what they were about to do and reconsider. The motive for the robberies was, purely and simply, greed and the violent acts of robbery were accompanied by an element of deceit. While the accused stated that they were under the influence of alcohol, there is no evidence as to the degree of their intoxication and its effect on their judgment. I take it into account for what it is worth.

[23] I also take into account the short and longer term effects that the accuseds' actions had on their victims, as well as the expression of remorse made by the accused and the fact, for what it is worth, that they pleaded guilty to all charges. I have qualified this last factor because Mr Mgenge argued that because of the strength of the State case, the accused had little choice but to plead guilty. What can be said for the accused however, is that, by and large, they tried to make a clean breast of it. I also, of course, take into account the personal circumstances of the accused.

[24] When the gravely aggravating factors relating to the offence of robbery are weighed against those factors that are mitigatory, I am of the view that the former outweigh the latter to such an extent that I cannot conclude that substantial and compelling circumstances are present to justify a departure from the prescribed minimum sentence of 15 years' imprisonment in respect of counts 2 and 4. That finding applies to both accused.

[25] I view the counts of kidnapping as serious, particularly the kidnapping of AS. She was held for a longer period than AG. She was held, after she was robbed initially, with the intention of robbing her again when her money would become available. While it is not clear when precisely accused 1 decided that AG should be deprived of her liberty so that she could be raped, it is reasonable to assume that this happened, at best for accused 1, shortly before he took her to Haven Hills.

[26] In my view, a sentence of five years' imprisonment in respect of each count of kidnapping is appropriate in respect of both of the accused. I do not believe, however, that this sentence, given the aggravation present in count 1 should, in respect of accused 2, run completely concurrently with count 2. (The reason why this does not apply to accused 1 will become apparent shortly.)

[27] The counts of sexual assault and rape relate only to accused 1. The fact that accused 1 had deprived AG of her liberty before sexually assaulting her aggravates this offence: he had complete control over her, control exerted

what is more, by violence and a weapon. In my view, a sentence of six months imprisonment must be imposed in respect of count 5.

[28] From my exposition of the facts and the evidence of accused 1, it is clear that he decided to rape AG at least shortly before he sexually assaulted her at Haven Hills. To that extent the rape was pre-planned. He raped AG in the presence of accused 2 and AS, thus amplifying the humiliation that he inflicted on AG. He raped her twice and did so despite accused 2's pleas that he should not rape her. Despite AG's fortitude and mature insight into what happened to her, it is clear to me that the effects on her of accused 1's actions are severe and will endure for a very long time.

[29] In these circumstances, I am of the view that all of the factors in favour of accused 1 are insufficient to constitute substantial and compelling circumstances in respect of the rape conviction. Life imprisonment is accordingly the prescribed sentence.

[30] For the reasons set out above, I impose the following sentences:

[31] Accused 1:

- (a) Count 1 (kidnapping) – 5 years' imprisonment;
- (b) Count 2 (robbery with aggravating circumstances) – 15 years' imprisonment;
- (c) Count 3 (kidnapping) – 5 years' imprisonment;
- (d) Count 4 (robbery with aggravating circumstances) – 15 years' imprisonment;
- (e) Count 5 (sexual assault) – 6 months imprisonment;
- (f) Count 6 (rape) – life imprisonment.

[32] Accused 2:

- (a) Count 1 (kidnapping) – 5 years' imprisonment;
- (b) Count 2 (robbery with aggravating circumstances) – 15 years' imprisonment;
- (c) Count 3 (kidnapping) – 5 years' imprisonment;

(d) Count 4 (robbery with aggravating circumstances) – 15 years' imprisonment.

(e) Counts 3 and 4 will run concurrently with count 2. Three years of count 1 will run concurrently with count 2. Accused 2's effective sentence is thus 17 years imprisonment.

C. PLASKET

JUDGE OF THE HIGH COURT

APPEARANCES:

For the State: Adv Mgenge, instructed by National Director Public Prosecutions, Grahamstown.

For Accused 1: Adv Mhlaba, instructed by Legal Aid, East London.

For Accused 2: Ms Marenene, instructed by Legal Aid, East London.