IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NO: A50/05

In the matter between:

MAKWAKWA, PETRA First Appellant

LEKALAKALA, JERRY Second Appellant

And

THE STATE Respondent

JUDGMENT

NICHOLLS AJ

1. The appellants were convicted by the Regional Magistrate, Roodepoort of robbery with aggravating circumstance (Count 1), rape (Count 2), unlawful possession of a firearm (Count 3) and unlawful possession of ammunition (Count 4).

2. In terms of section 52 of the Criminal Law Amendment Act 105 of 1997 ("the Act") the appellants were referred to the High Court

for confirmation of the conviction and sentencing. The appellants appeal with the leave of the court against their sentences only.

3. The first appellant was sentenced to 15 years imprisonment on count 1; life imprisonment on count 2; 5 years imprisonment on count 3 and 1 years imprisonment on count 4. It was ordered that all the sentences run concurrently with the sentence of life imprisonment on count 2, an effective life sentence.

4. The second appellant was sentenced to 10 years imprisonment on count 1; 15 years imprisonment on count 2; 2 years imprisonment on count 3 and 6 months imprisonment on count 4. It was ordered that all of the sentences run concurrently with the sentence imposed on count 2, an effective 15 years imprisonment.

5. The appellants were convicted of raping a 22 year old woman on the evening of the 20 April 2003. At approximately 22H00 she was waiting on the street to be picked up in a car by her male companion. The appellants who were armed with a nine millimetre pistol approached the woman. One grabbed her around the neck and hit her on her forehead with the firearm whilst the other removed her cell phone and her rings. When she screamed they threatened to kill her if she did not keep quiet.

6. The appellants then took the young woman into a dark street where they ordered her to undress. She was raped first by the

first appellant while the second appellant stood guard holding a firearm. She was then raped by the second appellant while the first appellant stood guard with the firearm in his hand. Afterwards she was ordered to follow the appellants. [1]

7. As the appellants and the complainant were walking, a police motor vehicle approached from behind. She stopped the vehicle and told the police that she had been raped.[2] The first appellant was apprehended on the scene with the firearm in his trouser pocket. The second appellant was arrested at the taxi rank with the complainant's property in his possession.

8. The complainant suffered bruises on her neck where she had been "choked" and her right forehead was swollen where she had been hit with a firearm. The district surgeon found fresh vaginal tears and bruising.[3]

9. In accordance with the minimum sentencing provisions contained in section 51 of the Act, when a rape is perpetrated by more than one person in execution of a common purpose, the prescribed sentence is life imprisonment unless substantial and compelling circumstances are found to exist. The guidelines for what constitutes substantial and compelling has been set out by the Supreme Court of Appeal in *S v Malgas* 2001 (1) SACR 469 (SCA).

[1] Judgment P91
[2] Judgment P92
[3] Judgment P92

10. In *Mahomotsa v S 2002(2) SACR 435 (SCA)* Mpati JA dealt with the approach to be adopted when sentencing in rape cases. At paragraphs 17, 18 and 19 on page 443 to 444 the test is set out;

"[17] The rapes that we are concerned with here, though very serious, cannot be classified as falling within the worst category of rape. Although what appeared to be a firearm was used to threaten the complainant in the first count and a knife in the second, no serious violence was perpetrated against them. Except for a bruise to the second complainant's genitalia, no subsequently visible injuries were inflicted on them. According to the probation officer - she interviewed both complainants - they do not suffer from any after-effects following their ordeals. I am sceptical of that but the fact remains that there is no positive evidence to the contrary. These factors need to be taken into account in the process of considering whether substantial and compelling circumstances are present justifying a departure from the prescribed sentence.

[18] It perhaps requires to be stressed that what emerges clearly from the decisions in Malgas and Dodo is that it does not follow that simply because the circumstances attending a particular instance of rape result in it falling within one or other of the categories of rape delineated in the Act, a uniform sentence of either life imprisonment or indeed any other uniform sentence must or should be imposed. If substantial and compelling circumstances are found to exist, life imprisonment is not mandatory nor is any other mandatory sentence applicable. What sentence should be imposed in such circumstances is within the sentencing discretion of the trial Court, subject of course to the obligation cast upon it by the Act to take due cognisance of the Legislature's desire for firmer punishment than that A which may have been thought to be appropriate in the past. Even in cases falling within the categories delineated in the Act there are bound to be differences in the degree of their seriousness. There should be no misunderstanding about this: they will all be serious but some will be more serious than others and, subject to the caveat that follows, it is only right that the differences in seriousness should receive recognition when it comes to the meting out of punishment. As this Court observed in S v Abrahams 2002 (1) SACR 116 (SCA) , 'some rapes are worse than others and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial

factors compelling the conclusion that such a sentence is inappropriate and unjust' (para [29]).

[19] Of course, one must guard against the notion that because still more serious cases than the one under consideration are imaginable, it must follow inexorably that something should be kept in reserve for such cases and therefore that the sentence imposed in the case at hand should be correspondingly lighter than the severer sentences that such hypothetical cases would merit. There is always an upper limit in all sentencing jurisdictions, be it death, life or some lengthy term of imprisonment, and there will always be cases which, although differing in their respective degrees of seriousness, nonetheless all call for the maximum penalty imposable. The fact that the crimes under consideration are not all equally horrendous may not matter if the least horrendous of them is horrendous enough to justify the imposition of the maximum penalty".

11. Nugent AJ in *Vilakazi v The State* (2008) ZASCA 87 interprets the "determinative test" set out in the Malgas case and endorsed in *S v Dodo* 2001(3) SA 382 CC, as justifying the view that any sentence considered to be disproportionate to the offence committed would be justification for the imposition of a lesser sentence. This is irrespective whether exceptional circumstances exist or not.

12. Life imprisonment is the ultimate sentence that a court may impose. It is reserved for the most heinous of crimes. This case cannot be classified as "the worst kind of rape". While not minimizing the horror of being raped by two men at gunpoint, this falls far short of senseless brutality and violence that often accompanies rape. The physical injuries were relatively minor. Regard being had to how the Supreme Court of Appeal has seen fit, when sentencing in rape matters, to classify rape according to

the violence accompanying the actual rape, this case falls far short of those instances where the maximum penalty is called for.

13. The first appellant was 32 years old at the time of the commission of the crime. In sentencing him, the court a quo took into consideration his two previous convictions for housebreaking. The learned judge said of the first appellant that he had *"The jail sentence that you have served did not have any impact on you. You proceeded to acquire possession of an unlicensed firearm. This only goes to show that you were now regarding yourself as having graduated from a housebreaker and now you are on the point of becoming a killer. I have no doubt in my mind that you being a housebreaker, you would not hesitate to kill in furtherance of the commission of any crime."*[1] There is no evidence before the court to justify such a finding. The first conviction for housebreaking occurred when the applicant was a teenager, and he second occurred in 1997.[2] In my view the learned judge misdirected himself in coming to this conclusion.

14. The second appellant was a few months short of 18 years when he committed the crime. In these circumstances, Section 51 of Act 105 of 1977 is not applicable.[3] For offenders between the ages of 16 and 18 years the sentencing court is free to impose such sentence as it would ordinarily impose subject to the weighting

[1] Sentence P127
[2] Record P168 - 170
[3] S v B 2006(1) SACR 311 (SCA)

effect of the statutorily prescribed sentence. The court a quo did not appear to be aware of the fact that the mandatory sentence was not applicable. However, the learned judge correctly found that the second appellant's youth and as well as the fact that he was a first offender to be mitigating circumstances.

15. Both the appellants were incarcerated for a period of approximately 2 years as awaiting trial prisoners. This should have been taken into consideration when imposing sentence.[1] The learned judge erred in failing to attach any weight to this period of imprisonment.

In the circumstances, I make the following order:

1. The appeal on sentence is upheld.

2. The sentence imposed by the court a quo is set aside and substituted with the following:

Accused number one is sentenced as follows:

On count 1 : 15 years imprisonment;

On count 2 : 20 years imprisonment;

On count 3 : 5 years imprisonment;

On count 4 : 1 year imprisonment.

The sentences imposed on count 1,3, and 4 are to run concurrently with the sentence imposed on count 2, an effective 20 years imprisonment.

[1] S v Brophy & Another 2007(2) SACR 56 (W)

Accused number two is sentenced as follows:

On count 1 : 10 years imprisonment;

On count 2 : 12 years imprisonment;

On count 3 : 2 years imprisonment;

On count 4 : 6 months imprisonment.

The sentences imposed on count 1, 3 and 4 are to run concurrently with the sentence imposed on count 2, an effective 12 years imprisonment.

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C. NICHOLLS

ACTING JUDGE OF THE HIGH COURT

I concur: _____

L. I. GOLDBLATT

JUDGE OF THE HIGH COURT

I concur:

_____

H. SALDULKER

JUDGE OF THE HIGH COURT

APPEARANCES:

COUNSEL FOR APPELLANT: JESSE PENTON

INSTRUCTED BY: JOHANNESBURG JUSTICE CENTRE

COUNSEL FOR RESPONDENT:

INSTRUCTED BY:

DATE OF HEARING:

DATE OF JUDGMENT: