REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: JPV 2011/250

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

31 MAY 2013 FHD VAN OOSTEN

In the matter between

THE STATE

and

SIBUSISO BLESSING NYEMBE **ACCUSED**

J U D G M E N T
(SENTENCE)

VAN OOSTEN J

[1] In the consideration of an appropriate sentence to be imposed it is incumbent upon this court "to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence" (*per* Nugent JA in *S v Vilakazi* 2009 (1) SACR 552 (SCA)). Adopting this approach I turn to deal with and consider the accused's personal circumstances, the severity of the offences he has been convicted of against the background of the interests of society. In

this process, the element of mercy, which forms the cornerstone of a civilised society, must never be overlooked.

[2] The personal circumstances of the accused, as put forward by him in evidence, are the following: he is presently 27 years of age and therefore was 21 years old when the crimes were committed. He reached grade 9 at school when the housebreaking incident, referred to later, intervened. He is not married but is the father of a 4 year old girl who is being cared for by his parents. He was unemployed but kept himself busy with computer upgrading and assisting his friends as a disk jockey. The accused indicated that he is desirous of continuing with his school education next year while in prison. He has been in custody since 2008.

[3] This is not the accused's first brush with the law. He has admitted a number of previous convictions. The first was in 2003 when, at the youthful age of 17 years, he was convicted of housebreaking with intent to steal and theft and sentenced to 4 years' imprisonment wholly suspended for 5 years. The sentence did not have the necessary deterrent effect: six years later, in 2009, he was convicted of robbery, rape and kidnapping, in respect of which he was sentenced to 31 years' imprisonment, which he is presently serving. The convictions arose from a single incident, having occurred on 5 January 2008. This incident and the subsequent convictions and sentences must accordingly be considered, not as previous conviction, but as one in the series of four incidents, the other three being dealt with in the present matter. Lastly, the accused maintains his innocence and has not shown any signs of remorse.

[4] It is clear from the conduct of the accused that he shows no respect for women or the law. He targeted, kidnapped, raped, robbed and assaulted defenceless and unsuspecting women. One of the complainants suffered serious physical injuries resulting from being stabbed. They all testified as to the trauma they were subjected to. The psychological consequences they have and still will suffer are immeasurable.

[5] The provisions of s 51(1) of Act 105 of 1997 are applicable. It provides for mandatory life imprisonment where the victim was raped more than once

whether by the accused or any co-perpetrator or accomplice; or by more than one person where such persons acted in the execution or furtherance of a common purpose or conspiracy. The accused has been convicted on 6 counts of rape. In regard to counts 7, 8 and 9 and counts 12 and 13 the complainants were raped more than once. The minimum sentence of life imprisonment also applies to count 2. A minimum sentence is furthermore prescribed in regard to the convictions for robbery with aggravating circumstances (counts 3, 10 and 14). As for statutory mandatory minimum sentences, Ponnan JA, in *S v Matyityi* 2011 (1) SACR 40 (SCA), stated:

'Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from *Malgas,* it still is 'no longer business as usual'. And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons - reasons, as here, that do not survive scrutiny. As *Malgas* makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and like other arms of state owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of state. Here parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as 'relative youthfulness' or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order.'

[6] The offence of rape is considered by our courts as one of the most serious crimes that should attract severe punishment. In *State v Chapman* 1997 (3) SA 341 (SCA) 344 the Court remarked:

'Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization.'

More recently, in *DPP, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) 577*g-i* the Court stated:

'Rape of women and young children has become cancerous in our society. It is a crime which threatens the very foundation of our recent democracy which is founded on protection and promotion of the values of human dignity, equality and the advancement of human rights and freedoms. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right thinking and self-respecting members of society. Our courts have an obligation in imposing sentences for such a crime, particularly where it involves young, innocent, defenceless and vulnerable girls, to impose the kind of sentences which reflect the natural outrage and revulsion felt by the law- abiding members of society. A failure to do so would regrettably have the effect of eroding the public confidence in the criminal justice system.'

It has been held in *S v Vilakazi* 2009 (1) SACR 552 (SCA) and S *v Mahomatsa* 2002 (2) SACR 435 (SCA) that life imprisonment should be reserved for more serious cases of rape: this case in my view, no doubt, falls within that category. In *S v Schwartz* 2004 (2) SACR 370 (SCA) 379b, Nugent JA referred to the interests of society as follows:

'I have pointed out that in the case of serious crimes, societies' sense of outrage and the deterrence of the offender and other potential offenders deserve considerable weight.'

Having considered all relevant circumstances, I have come to the conclusion that there are no substantial and compelling circumstances justifying a lesser sentence that the statutory minimum sentence on the rape charges. I do not think it will serve any purpose in imposing separate sentences and one composite sentence, to run concurrently with the sentences the accused is presently serving, will be appropriate. The accused has become a danger to society and this is the appropriate time by way of the sentence I propose to impose, for his permanent removal from society.

[7] In the result the accused is sentenced as follows:

1. On counts 1 to 14, taken together for the purpose of sentence, the accused is sentenced to life imprisonment.

2. It is ordered that the sentence the accused is presently serving be served concurrently with the sentence of life imprisonment.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR THE STATE	*ADV (MS) DE ZINN*
COUNSEL FOR THE ACCUSED	*ADV MP MILUBI*
DATE OF JUDGMENT	*31 MAY 2013*