REPUBLIC OF SOUTH AFRICA

IN THE GAUTENG HIGH COURT
LOCAL DIVISION, JOHANNESBURG

CASE NO: A07/2014

1. REPORTABLE: YES
2. OF INTEREST TO OTHER JUDGES: YES
3. REVISED

9 JUNE 2014 **FHD VAN OOSTEN**

In the matter between

DECEMBER OSCAR MOKHARI **APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

VAN OOSTEN J:

[1] The appellant was convicted in the Regional Court, Johannesburg, of rape and robbery with aggravating circumstances and sentenced to life imprisonment and 17 years' imprisonment respectively. He was furthermore, in terms of s 103 of Act 60 of 2000, declared unfit to possess a firearm. The appeal is directed against sentence and is with leave of the court a quo.

[2] The facts of the matter are these: the complainant, who was [….] years old at the time, at approximately 05h00 on the day of the incident, was alone on a small elevation in a park and while praying on her knees, the appellant arrived, touched her on the neck and demanded the handing over of her cell phone. The appellant was armed with a screwdriver in the one hand and a knife in the other. The complainant handed over her cell phone. She then opened her Bible and the appellant demanded money. She told him she had none. She took her jacket off, gave it to the appellant for him to search for money. He did so but found nothing. He tossed the jacket back to her. While the appellant was standing and looking at her the complainant told him that she did not like what he was doing but there is a God who could help him. The appellant walked away for a short distance and the complainant continued praying. She felt the contact of a knife on her neck. It was the appellant who told her to accompany him to where he was praying. She refused and he grabbed her and dragged her off to an open veldt. There appellant pushed her and she fell to the ground. He partially undressed her and proceeded to rape her twice. The complainant got up, put on her underwear and went back home. Although her mother and a friend were standing outside their house on her arrival, she, without speaking to them, went into the bedroom and locked herself in. The door of the bedroom was later forced open and she was taken to hospital. On medical examination at 11h45 fresh gynaecological injuries consisting of abrasions and tears with resultant bleeding were observed which the doctor testified, were consistent with forceful vaginal penetration. The appellant was arrested 11 days later when the complainant incidentally saw him and alerted the police.

[3] The regional magistrate having found that no substantial and compelling circumstances were present and that he was obliged, in terms of the provisions of the Criminal Law Amendment Act 105 of 1997 (s 51 read with schedule 2 Part I thereof), to impose the prescribed minimum sentence of life imprisonment in respect of the rape based on the evidence of the complainant that she had been raped twice. The finding was attacked on behalf of the appellant on the basis that the charge sheet did not contain any reference to the complainant having been raped twice. The question accordingly arises whether the appellant was sufficiently apprised of the circumstances that would bring the rape within the purview of the section I have referred to.

[4] In the charge sheet, as for count 1 (rape), the allegations concerning the rape are set out, to which is added: ‘read with the provisions of Section 51 and/or 52 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended’. In a postscript below the charge the following appears:

‘Section 51 and/or 52 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended is applicable in that: the accused used a screw driver and a knife’.

The absence of a reference to or reliance on the complainant having been raped twice is apparent. Moreover, the use of a screw driver and knife by the offender, or any other weapons for that matter, is not referred to at all in schedule 2. The only circumstances referred to in schedule 2, of relevance in this matter, are firstly, ‘where the victim was raped more than once whether by the accused or by any co-perpetrator of accomplice’, and, secondly, a rape ‘involving the infliction of grievous bodily harm’. The oft repeated warning that care must be exercised in the drafting and preparing of charge sheets and indictments to ensure that they correctly and adequately reflect all the necessary averments again needs to emphasised (*Mashinini v The State* (502/11) [2012] ZASCA 1 (21 February 2012) para 28).

[5] There is generally no duty on the State to recite in the charge sheet the facts the State intends to prove to establish the circumstances referred to in schedule 2, as was held in *S v Legoa* 2003 (1) SACR 13 (SCA), where Cameron JA stated:

'Under the common law it was therefore "desirable" that the charge-sheet should set out the facts the State intended to prove in order to bring the accused within an enhanced sentencing jurisdiction. It was not, however, essential. The Constitutional Court has emphasised that under the new constitutional dispensation, the criterion for a just criminal trial is "a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution of the Republic of South Africa Act 108 of 1996 came into force". The Bill of Rights specifies that every accused has a right to a fair trial. This right, the Constitutional Court has said, is broader than the specific rights set out in the sub-sections of the Bill of Rights' criminal trial provision. One of those specific rights is "to be informed of the charge with sufficient detail to answer it". What the ability to "answer" a charge encompasses this case does not require us to determine. But under the constitutional dispensation it can certainly be no less desirable than under the common law

that the facts the State intends to prove to increase sentencing jurisdiction under the 1997 statute should be clearly set out in the charge-sheet.
The matter is, however, one of substance and nor form, and I would be reluctant to lay down a general rule that the charge must in every case recite either the specific form of the scheduled offence with which the accused is charged, or the facts the State intends to prove to establish it.'

The enquiry therefore is whether the appellant's constitutional right to a fair trial in terms of s 35 of the Constitution was infringed, which requires 'a vigilant examination of the relevant circumstances' (see *S v Ndlovu* 2003 (1) SACR 331 (SCA) para12; *Legoa* para 21), to which I now turn.

[6] In argument on sentence the regional magistrate raised with the attorney appearing for the appellant whether it was her understanding that the minimum sentence of life imprisonment was applicable. The attorney confirmed as much and commenced by informing the court that she had given consideration to obtaining a probation officer's report. The regional magistrate interrupted her with the remark that that was not what he was suggesting to which he added 'I just do not want you to misunderstand the possible implications of the sentence'. The attorney then proceeded to supplement her address in advancing one single contention which was that the rape was not the worst kind of rape and that life imprisonment therefore was not appropriate. The regional magistrate promptly proceeded to deliver judgment on sentence and in particular addressed the evidence that the complainant had been raped twice which he found brought the appellant within the minimum sentence jurisdiction.

[7] I am constrained to remark that it is regrettable that the regional magistrate, who was acutely aware of a possible misunderstanding by the appellant's attorney concerning the minimum sentence, did not direct her attention to the facts that the complainant had been raped twice which he by then already must have considered to be relevant to the finding he was about to make. From the supplementary argument presented by the attorney it was quite apparent that she was unaware of or perhaps oblivious to the relevance of those facts. I should add that the prosecutor,

likewise, in his address on sentence, did not refer to those facts and simply expressed the 'opinion' that 'no compelling circumstances' were present.

[8] It has often been stated that a criminal trial is not a game where ambush is permitted (*Mashinini* para 11). The presiding officer has a duty to ensure that justice is done. In *S v Siebert* 1998 (1) SACR 554 (A) Olivier JA (at 558i - 559a) said:

'Sentencing is a judicial function *sui generis*. It should not be governed by considerations based on notions akin to onus of proof. In this field of law, public interest requires the court to play a more active, inquisitorial role. The accused should not be sentenced unless and until all the facts and circumstances necessary for the responsible exercise of such discretion have been placed before the court.'

Although reliance can and often must be placed on the competence of legal representatives appearing for accused, the duty remains on the presiding officer, where circumstances demand so, to intervene, in order to avoid misunderstandings and misconceptions by legal representatives (see *S v Mseleku* 2006 (2) SACR 574 (D&CLD); *S v Maake* 2011 (1) SACR 263 (SCA) para 27*)*. Where, as in the present matter, the evidence of the complainant that she had been raped twice was neither referred to in the charge sheet nor addressed at all by any of the legal representatives in argument, it was the duty of the regional magistrate, who was about to find that life imprisonment – the most severe sentence a court can impose - was mandatory based on that very evidence, to invite argument on this aspect (cf *S v Makatu* 2006 (2) SACR 582 (SCA) para7; *S v Mabaso* 2014 SACR 299 (KZP) para 76). His failure to do so, in my view, resulted in unfairness towards the appellant as far as this aspect of the sentence is concerned. In *Mashinini* (para 11), Mhlantla JA, in the majority judgment, in this regard, stated:

'[11] To my mind, the solution to this legal question lies in s 35(3) of the Constitution. Section 35(3)(*a*) of the Constitution provides that every accused person has a right to a fair trial which, inter alia, includes the right to be informed of the charge with sufficient detail to answer it. This section appears to me to be central to the notion of a fair trial. It requires in clear terms that, before a trial can start, every accused person must be fully and clearly informed of the specific charge(s) which he or she faces. Evidently, this would also include all competent verdicts. The clear objective is to ensure that the charge(s) is sufficiently detailed and clear to an extent where an accused person is able to respond and importantly to defend himself or herself. In my view, this is intended to avoid trials by ambush.'

Applied to the present matter I am satisfied that the State's reliance on part 1 of schedule 2 cannot be sustained and that s 51(2) read with Part III of Schedule 2 of the Act applies, prescribing a period of ten years' imprisonment. As mentioned the regional magistrate found that there were no substantial and compelling circumstances to justify the imposition of a lesser sentence. I am satisfied that the finding, which was not challenged before us, was correct.

[9] In the consideration of the sentence to be imposed due cognizance must be taken of the brutality of the appellant's attack on the complainant taking advantage of her vulnerability, that she was raped more than once, the seriousness of the injuries she sustained and the humiliation and degradation that followed, which all constitute aggravating circumstances (see *N v T* 1994 (1) SA 862 (C) 864G; *S v Ncheche* 2005 (2) SACR 386 (W); *S v Chapman* 1997 (2) SACR 3 (SCA); *S v SMM* 2013 (2) SACR 292 (SCA) para 17). A lengthy prison sentence of 15 years, in my view, is both appropriate and proportionate in the circumstances of this case.

[10] Next, I turn to deal with the sentence on count 2. The regional magistrate duly considered the seriousness of the crime of robbery and the importance of the interests of society. The appellant was 28 years old at the time of sentencing, single with no dependents. He had been awaiting trial in custody for some 16 months. This however was not his first brush with the law. In 2006 he was convicted of robbery and sentenced to 8 years' imprisonment of which 4 years were suspended on certain conditions. The sentence obviously did not have the desired effect as the present offences were committed less than four years later. The regional magistrate 'directed' that the suspended portion of the sentence, should it be put into operation, be served concurrently with the sentences imposed in the present matter. Although I am doubtful whether the regional magistrate was empowered to issue such a direction I need not comment any further as this aspect is not on appeal before us.

[11] While one appreciates the regional magistrate's emphasis on the seriousness of the crime of robbery, its prevalence and society's justified intolerance concerning robberies, he did not take into account that no violence was used, that no injuries were sustained by the complainant in the robbery and that she in the face of a threat, handed the cell phone to the appellant. This in itself is a misdirection. No evidence

concerning the impact of the robbery or for that matter, the rape, on the complainant was adduced. The prosecutor, improperly so, in his address informed the court that the complainant had spoken to him at one of the postponements of the matter, and informed him that 'the circumstances were very traumatic' and that she was finding it difficult to forget what had happened to her. Although this is the unfortunate result of all violent crimes, these factors should have been placed before the court by way of evidence either from the complainant or other competent witness or in a victim impact report. The factors I have mentioned should have been considered and given due weight by the regional magistrate. In my view, and considering the dicta in the judgment in *S v Malgas* 2001 (2) SA 1222 (SCA) 1230E-G and 1231A-D, these factors cumulatively constitute substantial and compelling circumstances, warranting the imposition of a lesser sentence.

[12] A sentence of 17 years' imprisonment, having regard to the facts of this matter, strikes me as unduly harsh. The regional magistrate in his judgment on sentence expressed the intention to 'be as lenient as possible under the circumstances' but nothing thereof is reflected in the sentences that were imposed. The sentence, moreover, in my view, is disproportionate to the crime of which the appellant has been convicted (*S v Vilakazi* 2009 (1) SACR 552 (SCA) para 15).

[13] In the light of what I have stated above this court is entitled to intervene and to substitute the sentence imposed by the regional magistrate with one that is that is appropriate. In my view, having regard to the totality of the circumstances, a proportionate sentence to be imposed is 12 years' imprisonment.

[14] Finally, it is necessary to consider the cumulative effect of the sentences I am about to impose. An effective sentence of 27 years' imprisonment undoubtedly, is excessive (cf *S v Mabunda* 2013 (2) SACR 161 (SCA)). In my view, allowing for the time the appellant had spent in custody as an awaiting-trial prisoner (*S v Radebe and another* 2013 (2) SACR 165 (SCA) para 14), the fact that the charges arose from essentially the same incident and in order to ameliorate the harshness of the cumulative effect of the sentences, I propose to order a certain measure of concurrence resulting in effective sentence of 18 years' imprisonment which in my view is appropriate.

[15] In the result the following order is made:

1. The appeal against sentence is upheld to the extent that the sentences imposed by the court a quo are set aside and substituted with the following:

'The accused is sentenced as follows:

1. On count 1 (Rape): 15 years' imprisonment.

2. On count 2 (Robbery with aggravating circumstances): 12 years' imprisonment.

It is ordered that 9 of the 12 year's imprisonment imposed on count 2 are to run concurrently with the sentence imposed on count 1.

The effective term of imprisonment is therefore 18 years.'

2. The commencement date of the sentences in paragraph 2 above, in terms of s 282 of Act 51 of 1977, is antedated to 9 December 2011, being the date of sentencing.

_____

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

_____

G DAMALIS
ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPELLANT	***ATTORNEY JESSE PENTON***
COUNSEL FOR THE RESPONDENT	***ADV T BYKER***
DATE OF HEARING	***9 JUNE 2014***
DATE OF JUDGMENT	***9 JUNE 2014***