IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A55/2018

(1) Reportable No
(2) Of interest to other Judges No
(3) Revised: Yes

Date: 20/May/ 2020

A. Maier-Frawley

In the matter between:

MACANE, ASIMO Appellant

and

THE STATE Respondent

J U D G M E N T

(Handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 20 May 2020.)

MAIER-FRAWLEY J (Adams J concurring):

1. The appeal lies against a sentence of life imprisonment imposed for the crime of rape (count 11) by the learned Regional Magistrate, sitting in the Regional Court, Krugersdorp.

2. The appellant was represented in the appeal proceedings by Attorney Pillay whist the respondent was represented by Adv Mkhari (NPA). The legal representatives of the parties agreed that the appeal could be adjudicated on the papers, including the heads of argument filed on behalf of the parties, as envisaged in section 19(a) of the Superior Courts Act, 10 of 2013.

3. The appellant was arraigned in the Regional Court, Krugersdorp, and charged with the following offences:

Count no 1: Housebreaking with intent to steal and theft,

Count no 2: Housebreaking with intent to steal and theft,

Count no 3: Housebreaking with intent to steal and theft,

Count no 4: Housebreaking with intent to steal and theft,

Count no 5: Robbery with aggravating circumstances,

Count no 6: Housebreaking with intent to rob,

Count no 7: Housebreaking with intent to commit a crime unknown to the State,

Count no 8: Robbery with Aggravating circumstances,

Count no 9: Housebreaking with intent to rob,

Count no 10: Rape: Contravening section 3 (Sexual Offences and Related Matters) Act 32 of 2007,

Count no 11: Rape: Contravening section 3 (Sexual Offences and related Matters) Act 32 of 2007,

Count no 12: Housebreaking with intent to rob,

Count no 13: Assault with intent to do Grievous Bodily harm,

Count no 14: Robbery with Aggravating circumstances,

Count no 15: Rape: Contravening Section 3 (Sexual Offences and Related Matters) Act 32 of 2007,

Count no 16: Housebreaking with intent to rob,

Count no 17: Robbery with aggravating circumstances,

Count no 18: Rape: Contravening Section 3 (Sexual Offences and Related Matters) Act 32 of 2007.

4. On 24 July 2017, the appellant was convicted on counts 1-4, 5, 7-8, 11-12, 14-15 and 17-18.

5. On 13 October 2017, he was sentenced as follows:[1]

Count 1: Three (3) years imprisonment,

Count 2: Three (3) years imprisonment,

Count 3: Three (3) years imprisonment,

Count 4: Three (3) years imprisonment,

Count 5: Fifteen (15) years imprisonment,

Count 7: One (1) year imprisonment,

Count 8: Fifteen (15) years imprisonment,

Count 11: Life imprisonment,

Count 12: Five (5) years imprisonment,

Count 14: Fifteen (15) years imprisonment,

Count 15: Ten (10) years imprisonment,

Count 17: Fifteen (15) years imprisonment,

Count 18: Ten (10) years imprisonment.

6. The appellant was acquitted on counts 6, 9, 10, 13 and 16.

[1] Record: Annexure 'S,' appearing on the unnumbered page following page 276.

7. The sentences imposed on counts 1, 2, 3 ,4, 5, 7, 8, 12, 14, 15, 17 and 18 were ordered to run concurrently with the sentence of life imprisonment imposed on count 11, as contemplated in Section 280(2) of the Criminal Procedure Act, 51 of 1977 ('CPA').

8. In terms of the provisions of section 309(1)(a) of the CPA,[2] the appellant enjoyed an automatic right of appeal to this court. He noted the appeal during July 2019.[3] He simultaneously filed an application for condonation for the late filing of his Notice of Appeal, in which he explained that he was required to attend court in respect of further outstanding cases and wanted to avoid a situation where the appeal court date would clash with dates arranged for his other court appearances. He lodged this appeal upon completion of all the outstanding cases. I consider that it would be in the interests of justice to grant condonation.

9. The grounds of appeal are set out in the Notice of Appeal[4] which I quote verbatim: "*I wish the honourable judge can reconsider this life sentence imposed and come to a lesser conclusion of twenty or twenty-five years imprisonment as I did not waste the court's time. I pleaded guilty to the charges and was promised a twenty year sentence only to be surprised by the verdict of life imprisonment. I am humbly begging for mercy and a lower sentence as I showed remorse for the offence I committed.'*

Submissions of Counsel

10. The heads of argument prepared by Mr Pillay on behalf of the appellant, appear to have proceeded from the mistaken premise that both conviction and sentence were being appealed against. As appears from the Notice of Appeal at pages 279-280 of the record, the appeal was noted only as against the sentence of life

[2] Section 309(1)(a) of the CPA reads as follows: *"… Provided that if that person was sentenced to imprisonment for life by a regional court under Section 51(1) of the Criminal Law Amendment Act no 105 of 1997, he or she may note such an appeal without having to apply for leave in terms of Section 309(B) …"*

[3] The notice of appeal was signed by the appellant on 3 June 2019, by the making of a mark, at the Correctional Centre where he is incarcerated.

[4] The notice of appeal (at pp 279-280 of the record) was completed in manuscript handwriting and signed by way of a mark by the appellant on 3 June 2019, pursuant to his incarceration.

imprisonment (imposed in respect of count 11 [rape]). I will return to the sentence imposed by the learned magistrate later in this judgment.

11. As regards the question of whether or not the appellant was promised a twenty year sentence, Mr Pillay submits that whilst it is unknown 'why the appellant decided to admit his guilt by way of section 220 admissions or who promised the appellant a twenty year sentence', what is known, is that there was 'an inexplicable and extraordinary turnabout after the appellant pleaded not guilty to seventeen of the eighteen charges' and that it 'appears probable that at the time of pleading the appellant was not facing life imprisonment as there were no allegations that the rapes in counts 10 and 11 attracted a sentence of life imprisonment'. In this regard, Mr Pillay submits that the magistrate erred in invoking the provisions of section 51(1), read with Part 1 of Schedule 2 of the Criminal law Amendment Act 105 of 1997 ('CLAA') in circumstances where section 51(1) was 'never alleged in the charge sheet nor was there any application to amend the charge sheet', which negatively impacted upon the Appellant`s rights to a fair trial.

12. Mr Pillay further submits that the magistrate erred in accepting various admissions that were made by the appellant in terms of section 220 of the CPA,[5] which, so the argument developed, were designed to obtain a conviction without a need to call witnesses and subject to a procedure that was prejudicial to the Appellant. The procedure followed was prejudicial to the appellant, so it was contended, because Section 220 of the CPA does not permit of 'questioning of the maker of the section 220 admissions' and does not allow for 'an exposition of the facts which may be able to establish the existence of substantial and compelling circumstances'.

13. As regards sentence, Mr Pillay submits that the sentence of life imprisonment imposed on count 11 [rape] 'is shocking and inappropriate' and that 'this court is at

[5] In terms of s220 of the CPA, *"An accused or his or her legal adviser or the prosecutor may in criminal proceedings admit any fact placed in issue at such proceedings and any such admission shall be sufficient proof of such fact."*

large to interfere' and ought to reduce to sentence to ten or fifteen years imprisonment as is provided for in Section 51(2)(b) of the CLAA.

14. On behalf of the State, Mr Mkhari submits that the magistrate did not misdirect himself in convicting the appellant based on the admissions made by him in terms of s220 of the CPA, and that in so far as the Appellant contends that section 220 does not allow for an exposition of facts which may be able to establish the existence of substantial and compelling circumstances, the totality of the evidence was assessed by the presiding magistrate and no evidence was ignored in arriving at a conclusion that there were no substantial and compelling circumstances permitting of a deviation from the statutorily prescribed minimum sentence of life imprisonment.

15. As regards the issue of the charge sheet containing a reference to the provisions of section 51(2)(b) of the CLAA, Mr Mkhari submits that no prejudice was suffered by the Appellant at the trial, in that the Appellant was warned by the court, and his legal representative made aware, at the material time, that the State would be relying on the provisions of section 51(1) of the CLAA in relation to count 11, which carried a statutorily prescribed minimum sentence of life imprisonment upon conviction - unless substantial and compelling circumstances were found to be present, such as to permit deviation therefrom in the exercise of the court's sentencing discretion.

Evaluation

16. A reading of the transcript of the record reveals the following: The appellant was legally represented throughout the proceedings conducted in the Regional Court. Counts 10 and 11 (rapes) were not individually read to the appellant for purposes of plea, the State Prosecutor having informed the court that such counts should be treated as one count, given that they involved the commission by *inter alia,* the appellant of more than one instance of rape of the same complainant on the same date or occasion. Accordingly, only one count of rape was put to the appellant, who pleaded not guilty to the charge, and was subsequently convicted and sentenced

for the rape under count 11. Save for count 12 (housebreaking with intent to rob), the appellant initially pleaded not guilty to the remaining counts, whilst pleading guilty to count 12.

17. As regards the charges of rape (stipulated in counts 10 and 11), the charge sheet reflected that the State would be relying on the provisions of section 51(2)(b) of the CLAA. At the time of pleading therefore, the accused was notified in the charge sheet that section 51(2) of the CLAA would apply to the rape charge. Before the appellant was asked to plead to the rape count (as contained in counts 10 and 11 but which were accepted as one count) the court warned the appellant of the statutorily imposed minimum sentencing regime, as contained in section 51(2) of the CLAA.[6] The accused then pleaded, and his plea of not guilty was noted on the record. Immediately after the accused had pleaded to the remaining charges, the State Prosecutor informed the court that the State would in fact be relying on the provisions of section 51(1) of the CLAA in respect of the said rape count.[7] At this juncture, the court warned the appellant of the statutorily prescribed minimum sentence (life imprisonment) that could be imposed upon conviction, as envisaged in section 51(1) of the CLAA.[8]

18. As regards the charge of housebreaking with intent to rob (count 12), after the charges in count 12 were read to the accused, he orally pleaded guilty thereto. The record reveals that the appellant's legal representative thereupon informed the court that he had not prepared a statement in terms of section 112 of the Criminal Procedure Act, 51 of 1977 ('CPA') in respect of the appellant's guilty plea, as the appellant's [guilty] plea was not in accordance with the appellant's prior instruction to his legal representative. For this reason, the learned magistrate indicated that he would be impelled to record a plea of not guilty in respect of count 12, as envisaged in section 113 of the CPA. The record reveals that a short discourse followed

[6] Record: p76.

[7] Record: p81.

[8] Record: p81.

between the learned magistrate and the appellant's counsel, with the learned magistrate indicating that although the appellant had sought, in court, to plead guilty to count 12, the court was not in a position to determine whether or not the appellant was factually guilty, as pleaded, in the absence of a statement being made, as envisaged in section 112 of the CPA, or, in the absence of which, on the basis of formal admissions being made in terms of section 220 of the CPA. The matter then stood down until the following day, ostensibly for the appellant to confer with his counsel and provide him with further instructions.

19. The following day, the defence counsel handed in a written statement containing formal admissions made by the appellant in terms of section 220 of the CPA, in respect of all 18 counts.[9] The statement was read into the record and *inter alia,* recorded that the admissions were freely and voluntarily made without any undue influence; that the appellant knew at the time that he committed the offences mentioned therein that his actions were unlawful and therefore punishable by law; and that his attorney had explained the nature of the charges preferred against him and the consequences of the admissions. As regards the rape charges specified in counts 10 and 11, the appellant admitted that his attorney had informed him that the minimum sentence of life imprisonment was applicable, as the complainant had been raped more than once by more than one person (including the appellant) on 31 December 2010. The appellant confirmed that he understood the contents of the said statement, that he had signed same and that he admitted the contents thereof.

[9] The admissions included reference to the date on and place at which the appellant had committed each respective offence, what was done by the appellant or what was taken from the complainants (who were named) in the commission of each offence. The statement containing the admissions also contained an unequivocal acknowledgement that the appellant had been informed by his legal representative of the minimum sentences that could be imposed in respect of each of those offences (including rape as envisaged in section 51(1) of the CLAA) that carried a prescribed minimum sentence in terms of the CLAA.

20. The learned magistrate then asked questions to clarify,[10] *inter alia*, the correctness of certain of the dates appearing in the statement (insofar as they differed to the dates appearing in the charge sheet to which the admissions related) and in clarification of the facts that underpinned the charges in relation to certain counts. For example, in relation to count 7 the appellant admitted the charge of housebreaking with intent to commit a crime unknown to the state, in that on 18 September 2014 at Muldersdrift in the Regional Division of Gauteng, he unlawfully and with intent to commit a crime unknown to the state, broke open the door and burglar [bars] to gain entry into the house and thereupon entered the house of Z V. The court pointed out that the only person who would have known what he wanted to do when breaking into and entering the complainant's house, was the appellant himself, however, the appellant had not specified what he wanted to do or did do after he admittedly unlawfully gained entry to the house.

21. As regards counts 10 & 11 (more than one rape of same complainant on the same day), the appellant admitted in his statement that his attorney had informed him that the minimum sentence of life imprisonment was applicable to the offences described in these counts, given the appellant's admission that the complainant was raped more than once by more than one person; whereas the appellant had not indicated in his statement whether there were other people with him who had also raped the complainant. Further questioning by the court was designed to ascertain what precisely was being admitted by the appellant, given that the appellant did not specify in his statement whether he was admitting that he was an accomplice to rapes committed by other people or whether he was a party in the group who went to the property and raped the complainant more than one time.[11] The appellant's legal representative informed the court from the bar about two accomplices vis-a vis- the rape counts, however, the learned magistrate indicated that such submission would have to be contained in writing given that the

[10] The magistrate questioned the appellant to enable him to understand and thus clarify exactly what the appellant was admitting in his statement submitted in terms of s220 of the CPA. The record reveals that the accused confirmed that he admitted that he committed the offences in each of the counts mentioned in his statement. See: Record: p93.

[11] See Record: p98.

admissions were 'moving towards' (i.e., tantamount to) a plea of guilty.[12] It is clear from the reading of the record that the magistrate was acting out of an abundance of caution. He had commenced his questioning in relation to the statement which contained the appellant's admissions in terms of section 220 of the CPA, by ascertaining from the appellant whether it was correct that his admissions were designed to amount to an admission of guilt in respect of the commission by the appellant of the offences in question. The appellant confirmed that that was indeed correct.[13]

22. The appellant thereafter signed a written addendum in which he admitted factual allegations in support of those counts in which he had admitted the legal requirements (elements) of the offence but which required clarification. The record does not demonstrate that the appellant was induced by the court to do so. The appellant was legally represented and agreed to supplement his formal written admissions to clarify precisely what he did in committing the offences which he admitted he had perpetrated.

23. Mr Pillay submits that '*whilst the legal representative for the Appellant was reading out the Section 220 admissions, that the learned Magistrate who presumably realised that there was insufficient and inconclusive evidence to convict the Appellant on his 220 admissions, called for an addendum to supplement the already formulated document. It is submitted that this is an irregular step, given the intention of Section 220 admissions as set out above*. ' There was, however, nothing contained in the record that reflected that the section 220 admissions (as later amplified) were *not* in accordance with the facts contained in the state docket and/or they were improperly made. Mr Pillay's submission lacks factual foundation and is in any event speculative and hence unsustainable.

[12] Record: p99, Lines 21-23.

[13] Record: p93, Lines 10-15.

24. It is well established principle that an accused is bound by the admissions made on his behalf by a legal representative unless either such legal representative has not been properly instructed or the admission was made as a result of a *bona fide* mistake.[14] The appellant has not asserted that his representative was not properly instructed or that one or other of his admissions were made as a result of a *bona fide* mistake and therefore revocable.[15] Nor did he at any stage of the proceedings seek to revoke the admissions that he had made, even at a time when his legal representative was invited by the trial court to make further submissions, after the state had closed its case, as may have been required by the appellant. As was pointed out in *S v Sesetse en 'n Ander* 1981 (3) SA 353 (A) at 374, a formal admission in terms of s220 of the CPA has the effect of relieving the State of the burden of adducing evidence concerning the facts admitted. If the admission is still standing at the end of the case, it becomes conclusive proof of the facts admitted.

25. Mr Mkhari submits that '*the section 220 admissions tendered by the accused did not render the proceedings unfair, because it is not clear how the Appellant could have conducted his defence differently, as the evidence against him was overwhelming*'. The submission is not without force, given that the appellant was linked *inter alia,* to the rape charge in question by way of undisputed DNA, fingerprint and medical evidence. [16]

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[14] See: *S v Malebo en andere* 1979(2) SA (B) at 644, *Dalmini v Minister of Law and Order & another* 1986 (4) SA 342 (D), *S v Mbelo* 2003 (1) SACR (NC) and *S v Vilakaz*i (unreported SCA case 284/10, 30 September 2010. In *S v Mbelo*, it was however held that an accused could not attack such admissions on the basis of the legal representative`s incompetence or lack of knowledge of the law.

[15] See: *S v Malebo en ande*re 1979(2) SA 636 (B) where Hiemstra CJ stated that the legislature undoubtedly intended the words 'sufficient' or '*voldoende'* in s220 of the CPA to mean '*conclusive' or 'afdoende*', since no further proof was required from the State of these facts, whatever the accused may allege. He added, however, that an admission made under s 220 would not be irrevocable since an accused could always rely on a *bona fide* mistake.

[16] Exhibits 'J' and 'P', read together with exhibit 'O', on record.

26. It is a trite that the imposition of sentence is the prerogative of the trial court.[17] As pointed out in *Hewitt v The State* (637/2015) [2016] ZASCA 100 (9 June 2016),[18] an appeal court '...may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been *an* appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not.[19] Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it.[20] So, interference is justified only where there exists a 'striking' or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised.[21]

27. In terms of Section 51(1) of the Criminal Law Amendment Act 105 of 1997, the minimum prescribed period for sentence in respect of the offences falling under the ambit of Part I of Schedule II, Section 51(1)(a) is that of life imprisonment, in the absence of a finding of substantial and compelling circumstances by the court. In *S v Malgas* 2001 (1) SACR 461 SCA at para 25D, Marais JA cautioned that courts should not deviate from the prescribed sentences lightly or for flimsy reasons. This view was subsequently endorsed in *S v Matyityi* 2011 (1) SACR 40 SCA at para [11].

28. As pointed out earlier in the judgment, the record reflects that the learned magistrate had indeed warned the appellant of the statutorily prescribed minimum

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[17] *S v Pieters* 1987 (3) SA 717 (A) at 727F-H; *S v Sadler* 2000 (1) SACR 331 (SCA) at para 8; *S v Swart* 2000 (2) SACR 566 (SCA) para 21. See also, *S v L* 1998 (1) SACR 463 (SCA) at 468*f* ; *S v Blank* 1995 (1) SACR 62 (A) at 65*h-i*.

[18] At para 8.

[19] *Sadler,* para10.

[20] *S v Pillay* 1977 (4) SA 531 (A) at 535E-F.

[21] *S v Snyders* 1982 (2) SA 694 (A) at 697D; *S v N* 1988 (3) SA 450 (A) at465I-J; *S v Shikunga* 465I-466A; *S v Shikunga & another* 1997 (2) SACR 470 (NmS) at 486*c-f.* See also *S v M* 1976 (3) SA 644 (A) at 649F-650A; *S v Pieters* 1987 (3) SA 717 (A) at 733E-G; *S v Petkar* 1988 (3) SA 571 (A) at 574D; 1997 (2) SACR 470 (NmSC) at 486*d.* See also *S v Abt* 1975 (3) SA 214 (A); *S v Birkenfield* 2000 (1) SACR 325 (SCA) para 8; *S v M* 1976 (3) SA 644 (A) at 649F-650A; *S v Pieters* fn 3 at 733E-G.

sentence of life imprisonment, in terms of section 51(1) of the CLAA. He did so directly after the appellant had pleaded to all eighteen charges and before any evidence was to be led by the State or before any admissions were made by and placed on record on behalf of the appellant.

29. In *MT v S; ASB v S ; September v S* [2018] ZACC 27; 2018 (2) SACR 592 (CC); 2018 (11) BCLR 1397 (CC), para 40, the Constitutional Court held as follows:

> "It is indeed desirable that the charge sheet refers to the relevant penal provisions of the Minimum Sentences Act. This should not, however, be understood as an absolute rule. Each case must be judged on its particular facts. Where there is no mention of the applicability of the Minimum Sentence Act in the charge sheet or in the record of the proceedings, a diligent examination of the circumstances of the case must be undertaken in order to determine whether the omission amounts to unfairness in trial. This is so because even though there may be no mention, examination of the individual circumstances of a matter may very well reveal sufficient indications that the accused`s section 35(3) right to a fair trial was not in fact infringed."

30. In the present matter, mention was indeed made, in the record of the proceedings, of the applicability of the provisions of section 51(1) of the CLAA. An examination of the circumstances that prevailed at the time that the appellant was warned of the statutorily prescribed minimum sentence in terms of section 51(1) of the CLAA, reveals that the appellant could have laboured under no misapprehension of the consequences of his admissions and what sanction could follow upon conviction. Furthermore, in his written statement containing the appellant's formal admissions (as later amplified), he unequivocally acknowledged that he had been informed by his legal representative that a conviction of the crime of rape carried a prescribed minimum sentence of life imprisonment. That would only apply where the offence falls within the ambit of Part I of Schedule II, in the absence of a finding by the court of substantial and compelling circumstances and in the exercise by the court of its sentencing discretion. In the circumstances, I am inclined to agree with the State's submission that no prejudice was or could have been suffered by the appellant by the absence of a reference to section 51(1) of the CLAA in the charge sheet, as it is abundantly clear that the appellant and his legal representative were acutely aware, at all crucial times, that a minimum sentence of life imprisonment

could be imposed upon conviction for an offence falling within the ambit of Part I of Schedule II of the CLAA. There is nothing in the record to indicate how, when or by whom the appellant was promised a sentence of twenty years imprisonment as opposed to prescribed minimum period of life imprisonment.

31. In sentencing the appellant, the trial court accepted that the prescribed minimum sentence was life imprisonment and if there was to be a departure from the sentence ordained by the legislature, substantial and compelling circumstances warranting a lesser sentence would have to be found to be present.

32. It is clear from the record that the learned magistrate ensured that all the relevant facts pertaining to the appellant, including his personal circumstances were placed before the court for purposes of sentence. To this end, he called for a probation officer's report, and heard the oral evidence of Gitumede Sena Ditsela, who had compiled the report. He also considered a victim impact report from the complainant. In *S v EN* 2014(1) SACR 199 (SCA) at paragraph 203C it was held that 'Courts should take care to elicit the necessary information to put them in a position to exercise their sentencing discretion properly.' This was certainly accomplished in the present case. Cross-examination of Ms Ditsela revealed that the appellant had committed a series of crimes (amongst others, no less than 4 rapes, including the rape in question) *not* because he was struggling financially but in circumstances where he had chosen to keep company with the 'wrong' kind of people and was indulging in narcotic drug use.

33. The judgment of the trial court reflects that the learned magistrate thoroughly considered the personal circumstances of the appellant and carefully balanced other relevant factors, such as the seriousness of crime and the interests of society, before imposing the relevant sentence and in finding that there were no substantial and compelling circumstances to deviate from the statutory injunction to impose life imprisonment. As regards the personal circumstances of the appellant, the trial

court took into account that he was a 33 year old first offender who had not enjoyed the benefit of formal schooling. The appellant, who hailed from Mozambique, had moved to South Africa in 2004. He was running a shop at the time of his arrest, earning R6000 per month. Whilst the appellant took responsibility by admitting his unlawful actions, he did so in circumstances where he was faced with overwhelming objective evidence that linked him to the commission of the offence in question. The magistrate also considered the period of the appellant's detention as an awaiting trial detainee (since 20 December 2014) and the fact that that he has been suffering from a chronic illness since 2015.

34. The evidence revealed that the rape perpetrated against the complainant had taken a severe toll on the person and psyche of the complainant, reaping, as it were, emotional havoc and destruction on her life. She remains traumatised by the event. She was raped twice by the appellant on the same day and by other member/s of his party. It is not without reason that the crime of rape is considered, in the pervading climate of gender based violence in our country, as a very serious offence.

35. In the words of Nicholls JA in *Director of Public Prosecutions, Grahamstown v T M* (131/2019) [2020] ZASCA 5 (12 March 2020) at para [15]:

> 'The reality is that South Africa has five times the global average in violence against women. There is mounting evidence that these disproportionally high levels of violence against women and children, has immeasurable and far-reaching effects on the health of our nation, and its economy. … What cannot be denied is that our country is facing a pandemic of sexual violence against women and children. Courts cannot ignore this fact.

To that I may add, that despite the legislature's injunction to impose lengthy terms of imprisonment against perpetrators who commit rape, and despite the efforts of right thinking members of society to dissuade would-be perpetrators from acting on their impulses or compulsions, the war against gender based violence in our society has not been won. The scourge continues, unabated, as several courts have

been astute to point out. Viewing the battle scene up close, it must be said that sexual violence is one of the most horrific weapons of combat, an instrument of terror, which continues to be used by men against women as a show of power, thereby inexcusably infringing upon their constitutionally guaranteed fundamental rights to *inter alia,* dignity,[22] life[23] and the freedom and security of person.[24]

36. The victim in count 11 was raped at gunpoint. As was pointed out by the Constitutional Court in *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 at page 467D:

> "The objective of combating crime was truly laudable and its importance, in the current climate of very high levels of violent crime, could not be overstated. An ugly feature of the current crime wave was the incidence of illegal smuggling, sale and possession of arms. The proliferation of illegal firearms throughout the country contributed in no small measure to the incidence of violent crime. This state of affairs was a matter of serious concern, not for the Courts, but for Legislature, the police and the entire population affected by it. Whatever the causes, crimes of violence, particularly those involving firearms, had reached an intolerably high level and urgent corrective measures were warranted." (own emphasis)

37. In my view, having found, correctly so, in my view, that there were no substantial and compelling reasons to deviate from the prescribed minimum sentence, the trial court was entitled and indeed enjoined to impose the sentence it did in respect of the offence of rape for which the appellant was convicted. In the circumstances of the matter, the only appropriate sentence is the one which has been ordained by statute. The sentence imposed is neither unreasonable nor shockingly inappropriate. I would therefore recommend that the appeal be dismissed.

38. The following order is made:

ORDER:

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[22] Section 10 of the Constitution of the Republic of South Africa.

[23] Section 11 of the Constitution.

[24] Section 12 of the Constitution.

1. The appellant's appeal against his sentence is dismissed.

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Maier Frawley J

I agree

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Adams J

Date of hearing: 7 May 2020
Judgment delivered 20 May 2020

APPEARANCES:

Counsel for Appellants: Attorney. C.J.G Pillay
Instructed by: C J G Pillay Attorneys

Counsel for Respondent : Adv. H.H.P Mkhari
Instructed by: The Director of Public Prosecutions, Johannesburg.