IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case No: A224/2013

Date: 25 February 2014

In the matter between:

MPUMELELO THAMI MAZIBUKO Appellant

and

THE STATE Respondent

JUDGEMENT

MAKHUBELE AJ

INTRODUCTION

[1] This is an appeal against the sentence imposed by the Regional Court Magistrate, Benoni on appellant on 23 July 2012. Appellant was about 35 years old when he was sentenced after having been charged with and found guilty on one count of rape and one of attempted murder. Both offences were committed on the same day, 24 October 2010.

[2] In count 1, appellant was charged with the crime of RAPE in contravention of "*the provisions of Section 3 read with Sections 1, 56(1), 57, 58, 59, , 60 and 61 of the Sexual Offences and Related Matters Act 32 of 2007 RAPE (read with the provisions of Sections 51 and or 52 and Schedule 2 of the Criminal Law Amendment Act 105 of 1977\ as Amended) in that on or about the 23/10/2010 and at or near DAVEYTON in the Regional Division of Gauteng the said accused did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit, N[...] M[...] by INSERTING HIS PENIS IN HER VAGINA without the consent of the said complainant* "

2.1 In count 2, apppellant was charged with the crime of ATTEMPTED MURDER *in that upon or about the 24th OCTOBER 2010 and at or near [...] M[...] STR D[...], in the Regional Division of GAUTENG the accused did unlawfully and intentionally attempt to kill N[...] M[...], a female person, by INFECTING HER WITH HIV DURING THE COMMISSION OF COUNT 1 (RAPE).*[1]

[3] Appellant admitted that he knew that he was HIV positive at the relevant time. He also stated that he was on antiretroviral treatment. He also admitted that he had sexual intercourse with the complainant on the day in question. His defence was that the intercourse was consensual and that it took place after he and the complainant had agreed that he would pay her an amount of R100.00. His version is that they fought after he realised and confronted the complainant about his money that she stole when he stepped out of the room after they had their first sexual encounter. Appellant's version was rejected by the Presiding Magistrate and he was accordingly convicted on both counts.

[4] Appellant was duly sentenced to life imprisonment with regard to count one and six (6) years for count 2. The sentences were ordered to run concurrently.

[5] He applied for leave to appeal against both conviction and sentence. He however pursued the appeal on sentence in count 1 only.

[6] It appears from the transcript of the record of proceedings that the appellant was legally represented throughout the trial. It is also evident that he had a fair trial in that he was advised of the prescribed minimum sentencing regime at the time when the charges were put to him.

[7] It is trite that the appeal court can only interfere with the discretion of the lower courts to impose sentences only if :

> [7.1] There was an irregularity during the trial or sentencing of an accused person.
>
> [7.2] The lower court misdirected itself in respect of the imposition of the sentence.
>
> [7.3] The sentence imposed court could be described as disturbingly or shockingly inappropriate.[1]

[8] The question is not whether the sentence is right or wrong, but rather whether the lower court exercised its discretion properly and judicially[2].

SENTENCE IMPOSED

[9] The court below found that there were no substantial and compelling circumstances to enable it to deviate

from the prescribed minimum sentencing regime. A term of life imprisonment was imposed in count 1 (rape). The appellant was sentenced to six (6) years imprisonment in count 2 (attempted murder).

[10] It is evident from the record of proceedings that the presiding magistrate only considered whether being HIV positive constitute substantial and compelling circumstances . He failed to take into account or even consider the circumstances under which the offence was committed.

In my view this constitutes a misdirection by the presiding magistrate and this entitles this court to interfere with the sentence imposed.

[12] Count 2 is in reality contained in count 1 in that appellant knew at the time that he has the human immunodeficiency virus. Therefore, for the sake of sentencing, the two counts should have been taken together. It would have been double jeorpardy for the appellant if the sentences were not ordered to run concurrently. However, this a moot question.

[13] In the matter of **Mudau v State**[3] **, MAJIEDT JA**[4] undertook an analysis of recent court decisions to illustrate the approach adopted by our courts on the issue of substantial and compelling circumstances in view of the prescribed minimum sentences regime. There appears to be consensus that each case should be judged on its own merits and that the correct question to ask is whether life imprisonment is the appropriate sentence under the circumstances of each case.

[14] Considering or taking into account factors such as the circumstances preceding the rape, severity of the rape, its effect on the victim, nature of injuries , etc does not in my view minimize the fact that rape is a serious offence. It is a reality that need to be considered by a trial courtto reach a correct conclusion with regard to the question whether there should be a deviation from the prescribed minimum sentencing regime. It is not to say that the compalainant deserved or invited the rape.

The cases referred to in the judgment of Madjiet JA in the paragraphs quoted below are illustrative of this fact.

> *[17] It is necessary to reiterate a few self-evident realities. First, rape is undeniably a degrading, humiliating and brutal mvasion of a person's most intimate, private space.*[10]*The very act itself even absent any accompanying violent assault inflicted by the perpetrator; is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way.*[11] *In S v Vilakcuzi,*[12] *Nugent JA referred to the study done by Rachel Jewkes and* Naeema *Abrahams on the epidemiology of rape*[13] *which concluded on the available eindence that 'women's right to give or withhold consent to sexual intercourse is one of*

the most commonly violated of all, human rights in South Africa."

[18] The second self-evident truth (albeit somewhat contentious) is that there are categories of severity of rape. This observation does not in any way whatsoever detract from the important remarks in the preceding paragraph. This court held in S v Abrahams that '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'.[14] *The advent of minimum sentence legislation has not changed the centrality of proportionality in sentencing. In Vilakazi Nugent JA cautioned against the danger of heaping 'excessive punishment on the relatively few who are convicted in retribution for the crimes of those who escape or in the despairing hope of that it will arrest the scourge'.*[15] *He also pointed to the vast disparity between the ordinary minimum sentence for rape (10 years imprisonment) and the one statutorily prescribed for rape of a girl under the age of 16 years (life imprisonment) and the startling incongruities which may result.*[16] *The judgment also sets out the dramatic effect that the minimum sentencing legislation has had in sentencing, most importantly that statistics show that inmates serving sentences of life imprisonment has increased more than ninefold from 1998 to 2008.*[17] *And he reiterated that even in the context of minimum sentencing legislation the importance of assessing each case on its oivn peculiar facts and circumstances and the need for proportionality must never be overlooked. Nugent JA expressed it as follows:*

> '*It is clear from the terms in which the (determinative) test was framed in Malgas and endorsed in Dodo that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence'*[18].

[19] Life imprisonment is the most severe sentence which a court can impose. It endures for the length of the natural life of the offender,[19] *although release is nonetheless provided for in the* ***Correctional Services Act 111 of 1998****. Whether it is an appropriate sentence, particularly in respect of its proportionality to the particular circumstances of a case, requires careful consideration. A minimum sentence prescribed by law which, in the circumstances of a particular case, would be unjustly disproportionate to the offence, the offender and the interests of society, would justify the imposition of a lesser sentence than the one prescribed by law.*[20] *As 1 will presently shoiu, the instant case falls into this category. This is evident from the approach adopted by this court to sentencing in cases of this kind.*

[20] In S v Abrahams[21] *a sentence of 7 years • imprisonment imposed on a father for raping his 14 year old daughter was increased on appeal to a sentence of 12 years. Cameron JA, writing for a* unanimous *court, emphasized the reprehensibility of rape committed within a family context.* As *stated above, the learned Judge also pointed out, that ‡ome rapes are worse than others • (see para 17 above) and, with reference to the dictum of Ackerman J in S v Dodo, supra at para 38, emphasized the need for proportionality.*

[21] In Bailey v S,[22] *an appeal against a sentence of life imprisonment imposed on a father for the rape of his 12 year old daughter was dismissed. In distinguishing that case from others such as, inter alia Abrahams and Nkomo, referred to above, Bosielo JA (Brand, Heher, Malan and Pillay JJA concurring) laid heavy emphasis on the drastic effect which the rape has had on the victim, as evidenced by the victim impact report, which had been handed in by consent. That report enumerated the following severe sequelae of the rape on the complainant: (a) anxiety, fear and sleeping disorder; (b) misplaced feelings of guilt and shame; (c) mood swings; (d) a loss of trust in mankind and a great sense of anger and hostility towards her father. She also had to leave school prematurely when she discovered that she was pregnant and suffered two miscarriages. Bosielo JA emphasized the need to decide on the imposition of an appropriate sentence based on the particular facts of each case. The primary difficulty in the case before us is that no victim impact report ivas placed before the trial court, an aspect to which I shall revert shortly*

[22] Ndou v S23 concerned the rape of a 16 year old girl by her stepfather. The sentence of life imprisonment was set aside by this court, which substituted in its stead a sentence of 15 years' imprisonment. In its judgment this court (per Shongwe JA) referred to a misdirection on the part of the trial court which. . .'[created the impressionj that the minimum sentence of life imprisonment had to be imposed regardless of the circumstances'.[24] *The learned Judge also made mention of the fact that no evidence was led on the effect the rape had on the victim, but accepted that it must have been very traumatic.*[23] *The court found that a sentence of life imprisonment would be disproportionate and imposed 15 years' imprisonment.*

[23] Lastly there is the judgment of Kwanape v S.26 i must immediately point out that the rape in that matter had not been perpetrated in a family setting. This court (per Petse JA, Nugent JA and Erasmus AJA) dismissed an appeal against a sentence of life imprisonment imposed on a 24 year old first offender who had raped a 12 year old girl. One of the numerous aggravating factors in that case was the fact that the appellant had abducted the complainant while she was in the company of her friends and effectively held her hostage for an entire night. In this matter too, a victim impact report was

handed in by consent, from which it appears that the rape has had a devastating impact on the complainant. She was forced to leave school, compelling her mother to give up her employment in order to render emotional support to the complainant. The latter had become a recluse so as to avoid being ridiculed by her peers.

CIRCUMSTANCES UNDER WHICH THE OFFENCE WAS COMMITTED AND MITIGATING FACTORS.

[15] The following are common cause facts:

[15.1] Alcohol played a role. The complainant and her cousin, M[...] M[...] started drinking at about 19:00 on the day in question. They moved from one place to another in what one may refer to as a dinking night out.

[15.2] The complainant had left her baby at her mother's house. She did not bid anyone goodbye. She simply left because her mother would not have allowed her to leave her baby.

[15.3] The cousin-pair met the appellant at STI's tavern at about 21:00 and were in each other's company enjoying the drinks.

[15.4] They agreed to move to another tavern because complainant wanted to avoid her boyfriend who wanted to take her home to sleep.

[15.5] The three of them walked together to appellant's house at about 01:00 or 02:00 in the morning. The court accepted the complainant's version that appellant wanted to fetch his jersey.

[15.6] According to the doctor's report, "clinical evidence not conclusive of forceful penetration". Thre was clinical evidence for assault though.

[15.7] The complainant was not infected with the HIV. She tested twice for the virus, the first time about two days after the incident and the second time after what she referred to as *"after the window period"*.

[15.8] The complainant initially lied to her sibling about how she sustained her injuries and the whereabouts of the latter's shoes (sandals). She said she was attacked by thugs and that is how she lost the shoes. She consulted a doctor Omar from Africa to give her some medication to cleanse her blood because she was breastfeeding. The doctor advised her to quit drinking. She only went to report the matter to the police after her grandmother threatened to do so herself. This was after the nurses who tested her for HIV insisted that she should report the matter.

[15.8.1] This illustrates the fact that the rape had no impact on the complainant.

[16] The trial court, as indicated above only concentrated on the HIV status of the appellant when considering the question as to whether there are compelling and substantoial circumstances entitling the trial court to deviate from imposing the prescibed sentence of life imprisonment. This was a wrong approach. The question should have been whether, in the light of all mitigating factors (circumstances under which the offence was committed, the nature and effect on the complainant) life imprisonment was an appropriate sentence.

[17] Under the circumstances, in my view, life imprisonment was not an appropriate sentence for the crime.

[18] Appellant intended to infect the complainant with HIV. This is an aggravating factor. This should be balanced with the mitigating factors indicated above, in particular the fact that there is conclusive proof that he did not succeed.

APPROPRIATE SENTENCE AND ORDER

[19] Having found that the trial court misdirected itself with regard to the correct approach to determine whether to deviate from the prescribed minimum sentences regime, I am of the view that this court is etitled to evaluate the mitigatory circumstances of the offence and weigh them against the aggravating factors. The conclusion that I reach is that the sentence of life imprisonment is not proportionate to the crime. Accordingly, a sentence of twelf (12) years is in my view an appropriate sentence in count 1. The appeal is only with regard to sentence in count 1.

[20] The appellant was sentenced on 23 July 2012. He had been in custody since his arrest on 28 October 2010.

[21] In the matter of **S V Vilakazi**[5],**NUGENT JA**[7] stated the following at paragraph 60:

> " *[60] There is one further consideration that must be brought to account. The appellant was arrested on the day the offence was committed and has been incarcerated ever since. At the time he was sentenced he had accordingly been imprisoned for just over two years.*[56] *While good reason might exist for denying bail to a person who is charged with a serious crime it seems to me that if he or she is not promptly brought to trial it would be most unjust if the period of imprisonment while awaiting trial is not then brought to account in any custodial sentence that is imposed. In the circumstances I intend ordering that the sentence - which for purposes of considering parole is a sentence of fifteen years} imprisonment commencing on the date that the appellant was sentenced - is to expire two years earlier than would ordinarily have been the case.*

[61] The appeal against sentence is upheld. The sentence imposed upon the appellant is set aside and the following sentence is substituted:

The *accused is sentenced to fifteen years' imprisonment from which two years are to be deducted when calculating the date upon which the sentence is to expire. '*

[22] Under the circumstances, it is my view that the period that appellant spent in custody awaiting trial should be deducted when his parole is due for consideration.

[23] I propose the following order:

[23.1] The appeal on sentence in count 1 is upheld.

[23.2] The order of the trial court with regard to sentence on count 1 is substitued with the following:

[23.2.1] The accused is sentenced to twelve (12) years' imprisonment from which 21 months are to be deducted when calculating the date upon which the sentence is to expire"

MAKHUBELE AJ

Acting Judge

I agree and it is so ordered

BAM J

APPERANCES: APPELLANT: ADVOCATE P.D MOTSWENI

Instructed by: Pretoria Justice Centre

THE STATE: ADVOCATE M.T MOETAESI

Matter heard on: 27 January 2014.

Judgment delivered *on:* 25 February 2014.

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1 Charge sheet

2 S v Pillav **1977 (4) SA 531** (A) at p 535 E-G

3 2013(2) SACR 292 (SCA)

4 **MTHIYANE DP, CACHALIA JA, ERASMUS and SALDULKER AJJA concurring.**

5 2009 (1) SACK 552 (SCA); 2012 (6) SA 353 (SCA)

7 STRETCHER, MLAMBO, MAYA JJA and HURT AJ A concurring