IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A108/2014

In the matter between: 11/8/2014

MOSEKI HEZEKIEL SHIKO Appellant

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

and

08/08/14
DATE

SIGNATURE

THE STATE Respondent

JUDGMENT

Tuchten J:

1 The appellant was convicted by a regional magistrate on two counts of rape. The appellant pleaded guilty to both charges. He was sentenced to 10 years imprisonment on the first charge and to life imprisonment on the second. The court below granted the appellant leave to appeal against his sentences. The minimum sentencing regime applied to both counts. On count 1 the court held that there were no substantial and compelling circumstances to justify a departure from the minimum sentence applicable. Count 2 specified

three separate acts of rape. The minimum sentence was thus life imprisonment. On count 2, as well, the court below held that there was no reason to depart from the minimum sentence.

2 The appellant at no stage testified either before his conviction or thereafter in mitigation of sentence. But there was adequate evidentiary material before the court below in the form of social workers' reports. There are three such reports in all, dealing respectively with the circumstances of the two complainants and the appellant.

3 Counsel for the appellant has advanced only one substantial ground in support of the appeal. The submission is that the appellant by pleading guilty and cooperating with the police displayed remorse. There is no substance in counsel's submission. As it was, with respect, so well put in *S v Matyityi* 2011 1 SACR 40 SCA para 11:

> There is ... a chasm between regret and remorse. Many accused persons might well regret their conduct but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one''s error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question. It is to the surrounding actions

> of the accused rather than what he says in court that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions. There is no indication that any of this, all of which was peculiarly within the respondent's knowledge, was explored in this case. [footnotes omitted]

4 The appellant did not take the court below into his confidence. As I shall show, he did not take the social worker appointed to investigate his personal circumstances into his confidence either.

5 On the authority of *Matyityi*, para 18, one should start with *S v Malgas* 2001 1 SACR 469 SCA paras 7 and 8:

> *Malgas*, which has since been followed in a long line of cases, sets out how the minimum sentencing regime should be approached and in particular how the enquiry into substantial and compelling circumstances is to be conducted by a court. To paraphrase from *Malgas*: The fact that Parliament had enacted the minimum sentencing legislation was an indication that it was no longer 'business as usual'. A court no longer had a clean slate to inscribe whatever

> sentence it thought fit for the specified crimes. It had to approach the question of sentencing conscious of the fact that the minimum sentence had been ordained as the sentence which ordinarily should be imposed unless substantial and compelling circumstances were found to be present.

6 Rape is a revolting crime which has dreadful consequences for the victim. It is no longer necessary to cite authority for this proposition. The facts of these offences bear this out. These facts appear from the reports of the social workers. The reports were admitted for all purposes.

7 On 12 March 2011, the complainant on count 1 (19 years old at the time) went to a tavern with her friend. She decided to go to the toilet, which was outside. As she was approaching the toilet, the appellant grabbed her, undressed her, threw her clothes high into a nearby tree and raped her. She complainant was forced to walk naked through a crowd when she sought help. The rape caused the complainant great physical pain and at the time she was interviewed by the social worker (about March 2013) she was still suffering abdominal pains and nightmares. She had a pervasive feeling of insecurity and fear that she would again be raped.

8 The facts in count 2 are horrendous. The 18 year old complainant and a male friend were talking outside her home in the early hours of the morning on 24 April 2011. The appellant arrived on the scene and forcibly dragged her off, saying that the complainant was from that day on to be his wife. The complainant's male friend tried to intervene to save her but the appellant drew a knife and the friend stopped trying to intervene. The appellant dragged the complainant to a nearby farm, removed his own trousers and ordered the complainant to undress. She refused. The appellant tore her leggings, thereby exposing her genitals, ordered her to lie down and, when she did so, raped her. The appellant had his hand over her mouth to prevent her crying for help.

9 At a stage after the first act of rape, the complainant's male friend and younger brother found the appellant and the complainant but the appellant threw stones at them and drove them off. The appellant then dragged the complainant by her hair into a nearby yard. He found a piece of rope, with which he tied the complainant to a tree. Then he told the complainant that he was not yet satisfied, untied her and raped her again. After the second act of rape, the appellant ordered the complainant to walk to a nearby place called Marken. While they were walking, the appellant attempted to rape the complainant for a third time. However, while still on top of the complainant, the appellant fell asleep. It seems that the appellant did not at this stage succeed

in raping the complainant for a third time. He awoke and ordered the complainant to walk to a clump of trees, where the appellant had placed a blanket. The appellant ordered the complainant to lie down and sleep. They heard the noise of a police van approaching. The appellant covered the complainant's head with the blanket to stop her crying out. The police searched but could not find them. The appellant removed the blanket from the complainant's head and warned her that if she made a noise, he would smash her head in with a rock. The appellant then took an unidentified white substance from his pocket and poured it into the complainant's mouth. She began to feel weak and hungry.

10 The appellant then raped the complainant for a third time. After the third act of rape, the appellant picked the complainant up and started carrying her toward Marken. Then he put her down and ordered her to walk. At a stage the appellant began to walk slowly. The appellant threatened to throw her down a hole if she did not walk faster. Still not satisfied with the pace at which the complainant was walking, he battered her feet with a rock. At this stage the complainant was in pain, was bleeding from her genitals and could not urinate. The appellant finally fell asleep and the complainant was able to escape and, ultimately find help.

11 Either at a stage during the progress of the rapes or thereafter, the appellant told the complainant or members of the community (the report is not clear on this point) that if he were arrested, he would kill the complainant when he got out of prison. The complainant was adversely affected by her ordeal. As at the date of the report, 17 March 2013, she suffering from abdominal pains during menstruation and her feet tended to swell up. She was mocked at school, no longer trusted men and felt insecure when she walked in the street.

12 The appellant was born on 18 July 1981 and was thus 30 when he committed the rapes which formed the subject of the present charges. He never married. It is not clear whether he has any children. He has only ever done piece jobs. At the time he committed these rapes, he lived with his parents. He has a previous conviction for rape, committed in 2001 and for assault, committed in 2007. On the previous rape charge he received a fine with the alternative of imprisonment and on the assault charge, he received a wholly suspended sentence. It seems that the appellant is an alcohol abuser and committed most of his crimes when under the influence.

13 During his interview, the appellant lied to the social worker. He said that the complainant on count 1 was his girlfriend. The social worker reported that the appellant lied several times during the interview and

then changed his story, saying that he was now telling the "real truth". He ascribed his deeds to an uncontrollable aggressive sex drive. He said that while he did not plan it "when he sees a lady the naughty sexual feeling just emerges". The social worker concluded that the appellant has limited insight into the consequences of his crimes. The social worker reported:

> The fact that he endangered the victim's lives to him seems as nothing, as he indicated that he will be sentenced and it will pass.

14 These facts need no further comment or elaboration. They demonstrate that the appellant is a menace to the community. It is highly unlikely that the appellant will ever control his sexual urges. It is thus improbable that the appellant will ever be rehabilitated. At least until advanced old age, the appellant will continue to be a grave danger to the community. The court below was entirely correct in imposing the sentences it did. My own view is that quite independently of the minimum sentencing regime, a life sentence is the only appropriate lawful punishment for the acts which formed the second count.

15 I make the following order: The appeal against sentence is dismissed. The convictions and sentences imposed by the court below are confirmed.

NB Tuchten
Judge of the High Court
8 August 2014

MJ Mushasha
Judge of the High Court
8 August 2014

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