IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: A441/2016

DELETE WHICHEVER IS NOT APPLICABLE

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

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

(3) REVISED. ✓

14-12-2016 _____

DATE SIGNATURE

14/12/2016

In the matter between:

MZWAKHE DAVID NXIBA **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

Fabricius J,

1.

The Appellant herein was charged in the Regional Court of Brakpan with three counts of rape committed during October 2000. He was convicted of all three charges. He had a number of previous convictions including assault with intention to do grievous bodily harm, theft, malicious damage to property and during 1990, rape and robbery. He was released on parole in May 1995. After conviction and the admission of previous convictions, the accused was referred to the High Court for purposes of sentence in terms of the then existing provisions of ***Section 52 (1) (b) of the Criminal Procedure Act 105 of 1977***. At that time the Regional Court did not have the power to impose a sentence of life imprisonment.

2.

The charge sheet did not make mention of the fact that the State would rely upon ***Section 51*** read with ***Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1979***, which deals with prescribed minimum sentences. That issue only arose

at the time that the sentence was imposed. On 21 April 2004, the Appellant appeared before Kruger AJ who confirmed the conviction as being proper and in accordance with justice, and taking into account the previous convictions "as part of a conglomerate of evidence" and the fact that three distinct incidents of rape had occurred in the case, found that there were no substantial or compelling circumstances present, and that he was accordingly obliged to impose the minimum sentence of life imprisonment.

3.

On 4 December 2014, the Appellant was granted such leave to appeal against the sentence of life imprisonment by this Court. In granting leave against the sentence only, the learned Judge in those proceedings said the following: "Considering guidance from the decided cases the fact that there is no clear evidence as to how the complainant was traumatised and the fact that the Applicant did not inflict serious injuries I am of the view that there is a reasonable prospect that another Court may impose a lesser sentence".

4.

In ***S v Ndlovu 2003 (1) SACR 331 (SCA) at p. 337 a to c***, the following was said:

"... where the State intends to rely upon the sentencing regime created by the Act a fair trial will generally demand that its intention be pertinently brought to the attention of the accused at the outset of the trial, if not in the charge-sheet then in some other form, so that the accused is placed in the position to properly appreciate in good time the charge that she or he faces as well as its possible consequences. What will at least be required is that the accused be given sufficient notice of the State's intention to enable the accused to properly conduct her or his defence".

In ***S v Mthimkulu 2011 JDR 1254 (SCA)***, Shongwe JA held that the failure to warn an accused timeously of the State's particular intention to rely on the provisions of the minimum sentence legislation constituted a material irregularity.

5.

In ***S v Ndlovu 2003 (1) SACR 331 at 337***, Mpati P held that the failure to make reference to prescribed minimum sentences could constitute a substantial and

compelling reason why the prescribed sentence ought not to have been imposed, inasmuch as the absence of such warning would usually render that part of the trial substantially unfair.

6.

It is not in issue that the record before us is silent as to the topic at hand. That being so, the omission to mention the applicability of the minimum sentence was irregular and constituted a misdirection which entitles us to interfere with the sentence imposed, and to consider the proper sentence afresh, depending however on the facts of a case. Not every irregularity or misdirection vitiates the proceedings.

7.

It was submitted on behalf of the Appellant that the sentence of life imprisonment was disproportionate to the circumstances of the offences, and ought therefore to be replaced with a "suitable" sentence. In the recent decision of ***S v Motloung 2016 (2)***

SACR 243 (SCA) at 247 c to j, the Supreme Court of Appeal reiterated the established principle that a Court of Appeal may not interfere with a sentence unless the imposed sentence is disproportionate to the crime, startlingly inappropriate or where a material misdirection by the trial Court warrants such interference. In this case we are entitled to consider the sentence afresh, but one of the major considerations would in any event be that we are required to impose a sentence that is proportionate to the crime.

7.1 In this case the rapes occurred over a period of time;

7.2 The Appellant pleaded not guilty and displayed no remorse;

7.3 At the time of the offences he was 40 years old and it is clear from his previous convictions that he had been involved in crimes consistently throughout his life. Some of them were super-annuated after a period of 10 years in terms of ***Section 271 A of the Criminal Procedure Act of 1977,*** and the trial Judge held that he would not regard them as aggravating circumstances;

7.4 He committed the present offences some five years after being released from

prison on parole having served a sentence on charges of rape and robbery imposed during October 1990.

8.

In ***S v Chapman 1997 (3) SA 341 (SCA) at p. 344***, the following was said: "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". It was further said that the Courts are under a duty to send a clear message to potential rapists and the community that they are determined to protect the equality, dignity and freedom of all women, and shall have no mercy to those who seek to invade those rights.

9.

Taking into account the above considerations, it was submitted on behalf of the State that there was no basis for interference with the imposed sentence, but even if

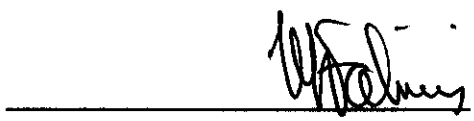
the sentence were to be set aside and a sentence be imposed *de novo*, a sentence of life imprisonment would be the only appropriate sentence. In the present case there is no indication that the Appellant had been prejudiced by the failure to warn him of the possibility of the imposition of a life sentence, having regard to the legislation pertaining to minimum sentences. The mentioned irregularity does in my view not result in a failure of justice or an unfair trial. There is no doubt that the failure to warn an accused as required may give rise to an unfair trial depending on the particular facts. In this instance there is no such evidence. The proceedings relating to conviction were confirmed by this Court and all relevant considerations pertaining to sentence were considered.

10.

Having considered all relevant circumstances pertaining to the conviction, the life of crime led by the Appellant and the public interest, I am satisfied that the sentence of life imprisonment imposed on 21 April 2004 is the suitable sentence.

11.

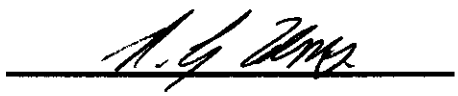
Accordingly, the appeal against sentence is dismissed.



JUDGE H.J FABRICIUS

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA

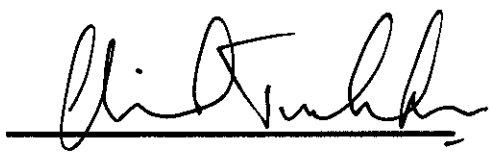
I Agree



JUDGE R. G TOLMAY

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA

I Agree



JUDGE N. B. TUCHTEN

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA

DECEMBER 2016