**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

**Case number: A515/2015**

**Date: 26/05/2016**

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

..... .....
DATE SIGNATURE

In the matter between:

**JAMES LANGA**

**APPELLANT**

**And**

**THE STATE**

**RESPONDENT**

**JUDGMENT**

*PRETORIUS J,*

(1) This is an appeal against sentence only. On 8 May 2008 Eksteen AJ sentenced the appellant as follows:

Count 1: Robbery with aggravating circumstances – 15 years' imprisonment

Count 2: Kidnapping – 5 years' imprisonment

**Count 4: Rape – Life imprisonment**

**Count 5: Rape – Life imprisonment**

Count 6: Rape – Life imprisonment

Count 7: Indecent assault – 2 years' imprisonment

Count 8: Possession of an unlicensed firearm – 2 years' imprisonment

Count 10: Attempted robbery – 5 years' imprisonment

Count 11: Attempted robbery – 5 years' imprisonment

(2) On 5 November 2013 leave to appeal against the sentence of life imprisonment imposed on counts 4 and 5 (the rapes of B. A. K.) was granted by Ledwaba DJP.

(3) The facts of the matter are that on 31 March 2004 at 4h00 Mr K., accompanied by his wife and his niece, was driving in his bakkie on

the highway near the Grassmere tollgate. He was forced off the road by a red Camry, in which there were several passengers, including the appellant. One of the assailants took over the steering wheel from Mr K. and the bakkie followed the Camry, to where both vehicles stopped. Mr and Mrs K., as well as their young niece, aged 14 years, were forced out of the bakkie and ordered to get into the boot of the Camry. Mr K. could not do so and he was ordered to run, which he did, whilst being shot at. He fell down an embankment and got away. The Camry drove off with Mrs K. and her young niece in the boot of the car. At a later stage the Camry stopped and Mrs K. and her young niece were taken from the Camry's boot.

(4) Mrs K. was undressed by two assailants at the same time. The person raping her kept on hitting her on her head. She was dragged to the front of the car and raped once more. She begged them not to rape her young niece and as a result they slapped her and the appellant raped her niece, whilst instructing her to keep quiet. This in response to her request not to rape her niece.

(5) Afterwards they were told to run away, wearing only T-shirts and were subsequently found by the police and Mr K.. Both victims had to use anti-retroviral drugs for a period of 6 months.

(6) The appellant was convicted of two counts of rape on Mrs K., as being an accomplice, although he had not raped Mrs K., but was watching whilst she was raped and thus associated himself with the rapes.

(7) The court *a quo* dealt with the sentence of the appellant as follows[1]:

> *"…Although you were convicted of accomplicity in respect of Counts 4 and 5, this Court is of the opinion that the legislator has intended to cover even accomplicity. This specific provision was enacted as a result of the number of rape cases where gangs were operating. Where a rape was initiated as a result of a conspiracy or common purpose. Whether the same person raped three times or whether anybody else three times, it is meant to include any form of rape by a co-perpetrator or an accomplice. And the Court is therefore of the opinion that the provisions of the so-called Minimum Sentences Act is applicable…as well as the three rape charges."*

(8) Counsel for the appellant argued that the indictment only referred to the provisions of section 51 of the **Criminal Law Amendment Act**[2] and did not specify whether the State relied on section 51(1), where life imprisonment is the minimum sentence, or section 51(2), where the minimum sentence is 10 years' imprisonment. Section 51(1) of the Act provides:

> *"(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life."*

And Part 1 of Schedule 2 provides:

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[1] Volume 5 page 458 line 19 etc.
[2] Act 105 of 1997

*"Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007-*

*(a) when committed-*

*(i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;*

*(ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;"*

(9) In **S v Cock; S v Manuel**[3] the Full Bench found that the court is bound by the decision by **Mahlase v State**[4] where the Supreme Court of Appeal held:

*"The second misdirection pertained to the sentence imposed for the rape conviction. The court correctly bemoaned the fact that Ms D M was apparently raped more than once and in front of her colleagues. The learned judge however overlooked the fact that because accused 2 and 6, who were implicated by Mr Mahlangu, were not before the trial court and had not yet been convicted of the rape, it cannot be held that the rape fell within the provisions of Part 1 Schedule 2 of the Criminal Law Amendment Act (where the victim is raped more than once) as the high court found that it did. It follows that the minimum sentence for rape was not applicable to the rape conviction and*

[3] 2015(2) SACR 115 (ECG)
[4] [2011] ZASCA 191 at paragraph 9

*the sentence of life imprisonment must be set aside."*

(10) In the present instance the appellant was convicted after Mr Ismael Casimo had already been convicted and sentenced in 2007 in the High Court, which distinguishes this case from the **Mahlase case**[5], as in the **Mahlase case**, according to the Supreme Court of Appeal, the other perpetrators had not yet been convicted of the gang rape.

(11) We must agree with the State, that the appellant had known throughout the trial that the provisions of section 51 of the **Criminal Law Amendment Act**[6] were applicable. The summary of substantial facts, which formed part of the indictment, clearly stated that Mrs K. had been raped twice by two of the gang members and that her niece had been raped by the appellant in close proximity to the car. We find that the appellant suffered no prejudice because specific reference to section 51(1) was not made. The principles and findings in this regard in **S v Kolea**[7] are applicable.

(12) The defence would not have been handled differently had there been specific reference to section 51(1) in the indictment. There was no objection in the court *a quo* against the application of section 51 of **Act 105 of 1997**. We therefore find that the provisions of section 51(1) are applicable.

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[5] *Supra*
[6] *Supra*
[7] 2013(1) SA 409 (SCA)

(13) The court *a quo* was correct in finding that life imprisonment for both counts was the correct sentence, as Mrs K. was raped twice by more than one person with the appellant partaking as a spectator and raping the young girl.

(14) The second leg of the appellant's argument is that, even if section 51(1) applies, the sentence is shockingly harsh and that this court should consider the question of substantial and compelling circumstances. The court is fully aware of the findings in S v Malgas[8] where it was held:

> *"The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances.* ***Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them****."* (Court emphasis)

(15) The only mitigating fact placed before us by counsel for the appellant, is that the appellant did not physically partake in the rape of Mrs K., as

[8] 2001(1) SACR 469 (SCA)

he was raping her young niece at the time she was raped by the two men. The judgment in the **Malgas case**[9] makes it quite clear that the appellant, as a co-offender, should be treated on the same basis as the persons who had raped Mrs K. in these circumstances.

(16) In **S v Swart**[10] Nugent JA found:

> *"What appears from those cases is that in our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstances.* ***Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role****."* (Court emphasis)

(17) We cannot find that this fact alone is mitigating if regard is had to the whole incident. The appellant was at all times a participant in hi-jacking the bakkie, putting the victims in the boot of the Camry, taking them out, watching whilst Mrs K. was raped and raping her young niece. This is one of the most serious rape cases we have dealt with

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[9] *Supra*
[10] 2004(2) SACR 370 (SCA) at paragraph 12

and the dictum in the **Swart case**[11] is apposite in this case.

(18) Mrs K. and her niece suffered severe trauma, where they witnessed how Mr K. was shot at and did not know at the time whether he had been injured or killed. After the gang rape they were left in a desolate area with very little clothes on. They did suffer physical injury and Mrs K. was raped more than once, whilst a gun was used to subdue her. The victim impact report regarding Mrs K. by Dr Lize Wolfaardt, a psychologist, reflects:

> *"She was treated for severe post-traumatic stress and depression. She was totally shocked, stunned and overwhelmed by what had happened. She experienced intense feelings of shame, helplessness and felt totally stripped of all dignity. On a sexual level she felt like "spoilt goods". It is therefore quite accurate to state that Beverly K. suffered from a total identity crises after being hi-jacked and brutally raped…The happenings of 31 March 2004 have changed Beverley K.'s life forever."*

(19) The appellant and his co-perpetrators acted in a brutal and callous manner with no regard at all to human dignity. These crimes were committed in such a heinous manner that the victims will carry the emotional scars for the rest of their lives.

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[11] *Supra*

(20) These rapes are some of the worst this court has dealt with. The court *a quo* held:

> *"It brings the Court further to discuss whether there are any circumstances substantial or compelling to justify the imposition of a lesser sentence than those sentences prescribed in the Act, referred to above. The Court is of the opinion that any circumstance to be identified in this regard, will be artificial, and it will pay only lip service to the so-called circumstances."*

We have to agree with this opinion of the court *a quo* and cannot find that the court *a quo* had erred in imposing life sentences on both counts.

(21) In the circumstances and after careful consideration of all the facts, we cannot find substantial and compelling circumstances or any reason to interfere with the court *a quo's* sentence.

(22) Therefore, the following order is made:

The appeal, against sentence on both counts 4 and 5 is dismissed.

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Judge C Pretorius

I agree.

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Judge R G Tolmay

I agree.

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Acting Judge Petersen

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| Case number | : A515/2015 |
| Matter heard on | : 13 May 2016 |
| For the Appellant | : Adv L Augustyn |
| Instructed by | : Legal Aid |
| For the Respondent | : Adv E Leonard |
| Instructed by | : Director of Public Prosecutions |
| Date of Judgment | : |