IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

Appeal Case No. AR 118/13

In the matter between:

SIBUSISO JOSEPH SITHOLE APPELLANT

and

THE STATE RESPONDENT

JUDGMENT

Delivered on: 20 June 2013

MNGUNI J

[1] The appellant was convicted of three counts of attempted robbery as defined in section 1 of the Criminal Procedure Act 51 of 1977 ('the Act') (counts 1, 5 and 8), two counts of indecent assault (counts 2 and 3), two counts of common law rape (counts 4 and 10), two counts of assault with intent to do grievous bodily harm (counts 9 and 15) and three counts of rape in contravention of section 3 read with sections 1, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('the CLAA') (counts 12, 13 and 14). The indictment on counts 4, 10, 12, 13 and 14 was read with the relevant provisions of the Criminal Law Amendment Act 105 of 1997 ('the Criminal Law Amendment Act').

[2] On counts 1 and 5 he was sentenced to a term of 5 years' imprisonment on each count. On counts 2, 3 and 8 he was sentenced to a

term of 10 years' imprisonment on each count. On count 10 he was sentenced to life imprisonment. Counts 12, 13 and 14 were taken as one for the purposes of sentence and he was sentenced to life imprisonment. On count 15 he was sentenced to a term of 6 months' imprisonment. The court *a quo* directed all the sentences to run concurrently with the sentence imposed on count 10. In addition, the court *a quo* fixed a non-parole period of 25 years in respect of the effective period of imprisonment. With the leave of the court *a quo*, this appeal is directed against the severity of the sentence.

[3] On behalf of the appellant, it was, firstly submitted that there are substantial and compelling circumstances present which justified lesser terms of imprisonment on counts 10, 12, 13 and 14 than those imposed and therefore this Court is at liberty to interfere with the sentence. Secondly, it was submitted that the court *a quo* misdirected itself in imposing a non-parole period of 25 years in terms of section 276(B) (2) of the Act.

[4] In order to have regard to the contentions raised on behalf of the appellant, it is necessary to set out the facts and the circumstances surrounding the commission of the offences in question, as they emerge from the record.

[5] During January 2007, the complainant on counts 1 and 2 resided at Mpolweni Mission, in the district of New Hanover. On 1 January 2007 she was in Durban. She left Durban in the afternoon for the Mpolweni Mission. She had to catch a taxi to Pietermaritzburg in order to connect with the one to

Mpolweni Mission. She arrived in Pietermaritzburg at 18h00 and alighted at East Street. She went to Masukwane Taxi Rank to connect with a taxi to Mpolweni Mission. She did not find taxis to Mpolweni Mission at the taxi rank. She went to look for a public telephone to telephone home and report about her predicament. She met two males at the robot controlled intersection, one of whom was the appellant. They asked her where she was going to. She told them that she was looking for a public telephone. The appellant and his companion grabbed her by her hand and took her to a bushy area near the ML Sultan School. Upon reaching the bushy area, the appellant's companion left him with her. The appellant thereafter aggressively demanded money from her. She gave him her handbag. The appellant searched through the handbag and found a negligible amount of money.

[6] He threw the handbag at her face and searched her body but did not find anything. He slapped her with his hand and asked her to remove her pants. She refused and the appellant removed them. She unsuccessfully tried to push him away but the appellant ordered her to bend forward. He then unzipped his pants, took out his penis, inserted it into her anus and made sexual movements. After a while, he stopped and asked her to lie down and face up. He climbed on top of her and asked her to kiss him and she refused. The appellant kissed her against her will and he thereafter ordered her to dress up.

[7] She felt wetness in her thighs. He took her panty, threw it away telling her that he was doing that to prevent her from laying charges against him. Dr

Sewrain of Northdale Hospital examined her on the same day of the incident. He recorded his findings and conclusion on the form J88 which was received into evidence as exhibit “C”. The vaginal examination confirmed that she was still a virgin but the anal examination showed a bruising of haematoma, redness and a dilated orifice and a whitish discharge. Dr Sewram concluded that anal penetration had occurred.

[8] During February 2007 the complainant on counts 3 to 6 resided at Ntabamhlophe area in the district of Escourt. On 16 February 2007 she travelled in a bakkie from Escourt to Pietermaritzburg. She arrived in Pietermaritzburg between 17h30 and 18h00. The appellant was also a passenger in the same bakkie. When she arrived in Pietermaritzburg, she alighted near a school and walked up the road to catch a taxi to Machibisa, Edendale. The appellant alighted with her and referred to her as his home girl. The appellant volunteered to carry her bag for her and said that they should take a shortcut to fetch his sister first before going to Machibisa. She walked with him along the suggested shortcut until they reached a bushy area near a school. The appellant then turned and slapped her repeatedly with an open hand on the face. He thereafter forced her to walk with him further into the bush where he aggressively demanded money and a cellphone from her. He assaulted her further and forced her to undress. He thereafter ordered her to lie down, which she did. He pulled his pants down, lay on top of her, pulled out his penis, inserted it into her vagina and sexually assaulted her against her will. When he finished, he ordered her to lick his penis. He took her bag, emptied the contents, took out her towel, wiped himself and threw it at her.

[9] He then walked away and left her in the bush. She found her way out of the bush and went to the Shoprite Taxi Rank where she met a certain lady and reported to her what had happened. The said lady took her to the Imbali Clinic and from there she was transported by ambulance to the Edendale Hospital. Dr Khumalo examined her. During examination, the doctor found abrasions to her posterior fourchette which, according to the doctor, were caused by constant friction without lubrication. The doctor found the abrasions to her posterior fourchette to be consistent with non-consensual intercourse. The doctor also found semen on her vagina. The doctor recorded her findings and conclusion on a form J88 which was received into evidence as exhibit “K”.

[10] During February 2007 the complainant on counts 7 to 10 resided at Sweetwaters area in Pietermaritzburg. In the morning of 17 February 2007 she left home for work in Pietermaritzburg. She knocked off from work at about 14h00 and went to town to buy food for her child. Whilst walking along Retief Street proceeding towards Pietermaritz Street, the appellant approached her and offered to give her a lift home. The appellant was not known to her but he seemed to know her very well and he even called her by name. He introduced himself to her as a prison warder who works at the Westville Prison. The appellant told her that he also resided at the Sweetwaters area.

[11] The appellant asked her to board his vehicle and told her that he would fetch his wife first at the Masukwane Taxi Rank before proceeding home. She boarded his vehicle. The appellant drove towards the Masukwane Taxi Rank

with her. When they arrived at the taxi rank, he asked her to alight with her luggage. Although she became suspicious, she alighted. The appellant also alighted. They walked along a footpath until they reached an area near the ML Sultan School where he aggressively turned against her and demanded money and a cellphone. As she was taking the money out from the bag, the appellant grabbed the bag and took out the money. He thereafter demanded her cellphone but she told him that she did not have one.

[12] The appellant then ordered her to undress but she refused. He undressed her by removing her panty and skirt and ordered her to lie on her back. He thereafter lay on top of her, took out his penis, inserted it into her vagina and sexually assaulted her. When he finished, he ordered her to lie on her stomach and wanted to penetrate her from the back but she refused. She picked up a brick and hit him with it. When he realised that she was fighting back the appellant also picked up a brick and hit her on the head. She sustained an open wound on the head and bled. He grabbed her, pressed her down to the ground, bit her on the chest area, turned her around and forced her to lie facing down. He sexually assaulted her again by penetrating her vagina from the back. When he finished, he instructed her to get up and go.

[13] She ran out of the bushy area with her panty on her ankles until she reached the road. She was assisted by a traffic officer who contacted the police for her. She was taken by ambulance to Northdale Hospital where Dr Rajpaul examined her. The examination revealed that she sustained a laceration on the head and a bite mark on the chest. The doctor concluded

that the laceration on the head was consistent with being hit with a brick. The appellant also robbed her of an amount of R 70.00. The white top which she wore was heavily blood-stained. The doctor also found semen on her vagina. He took a vaginal swab and placed it into the sealed box which he received from the police. He recorded his findings and conclusions in the form J88 which was received into evidence as exhibit “N”.

[14] During December 2007 the complainant on counts 11 to 15 resided at Cinderella Park in Pietermaritzburg and was working at the Eastwood Beer Hall. On 28 December 2007 she knocked off from work at 19h00 and went to a taxi rank near the Asmalls Shop to board a taxi home. The appellant was at the taxi rank and he asked here where she was going to. After she told him about her intended destination, the appellant offered her a lift. He told her that his vehicle was parked behind the Masukwane Taxi Rank and asked her to accompany him to the vehicle. She went with him. Upon reaching the Masukwane Taxi Rank, she asked him as to where was the vehicle he was talking about. The appellant told her to feel free. He said to her that he was a prison warder and promised not to harm her.

[15] When they were near the ML Sultan School he turned against her and demanded money and a cellphone. He grabbed her handbag and searched it but did not find any money. She told him that she only had a taxi fare. The appellant ordered her to remove her clothes and to leave them ten paces away from them. The appellant had already drawn a knife and was threatening her with it. He ordered her to suck his penis. She complied. He

thereafter lowered his pants, asked her to turn around and bend over. He inserted his penis into her vagina from behind whilst she was bending over and holding onto a tree stump. When he finished, he asked her to turn around and lie on her back against the tree stump facing up. He again inserted his penis and sexually assaulted her. When he finished, he went to where she left her clothes, picked up a piece of plank and threw it at her, hitting her on the ankle. She left the scene and reported the incident to the police. She was taken to the Northdale Hospital where she was examined by Dr Vanker. The doctor did not make any positive findings regarding the sexual assault. He, however testified that the absence of such a finding did not mean that no sexual assault had taken place.

[16] It is trite that the sentencing court has a wide discretion in imposing what it considers to be an appropriate sentence and that each case depends upon its own peculiar facts. Accordingly, a court sitting on appeal will generally be slow to interfere with the exercise of the trial court's discretion and may do so only in limited circumstances. In *S v Kent* 1981 (3) SA 23 (A) at 28H Holmes AJA stated these considerations as follows:

"[the] court can only interfere if the [court *a quo*] exercised its resultant discretion improperly; that is to say, if its sentence is vitiated by misdirection or irregularity or is disturbingly inappropriate."

[17] In *S v Malgas* 2001 (1) SACR 469 (SCA) para 12 Marais JA restated the approach in considering an appeal against sentence to be the following:

"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial Court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court may yet be justified in the interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'."

[18] The evidence placed before the court *a quo* in mitigation of the sentence was that the appellant was 37 years of age. He was not married and had two minor children aged 10 and 7 years. Both children were staying with their mother who worked as a domestic worker. The appellant possessed a standard 9 level of education. He was unemployed at the time of his arrest, having been last employed as a Rank Manager in 2007 and earned R 250.00 a week.

[19] In aggravation of the sentence, counsel for the State in the court *a quo* emphasised that the appellant was convicted of theft in 2004 and was sentenced to a term of 6 months' imprisonment. In 2005 he was convicted of robbery and sentenced to a term of 3 years' imprisonment. He submitted that those sentences and the time spent by the appellant in prison did no salutary effect on his further commission of offences. Instead the appellant graduated into committing more serious offences.

[20] The record demonstrates that the appellant was engaged in a course of conduct where he would lure unsuspecting impressionable ladies by a chivalrous act of offering to accompany them to a taxi stop or by offering them lifts in his vehicle. He would then take them to a secluded place where he would attack them and sometimes rob them of their possessions and would thereafter sexually assault them. The court *a quo* correctly found that these attacks, robberies and sexual assaults on the complainants were premeditated, systematically planned and executed.

[21] Having carefully considered the matter, I am satisfied that the court *a quo* was correct in concluding as follows:

"I have said time and time again that rape is one of the most serious of violent crimes. The victim's dignity and privacy are violated. Whilst the physical scars may heal in time, the mental anguish and trauma often live on, with devastating consequences to normal living. The victims in this case were severely traumatised and this manifested as they testified in court. Most of them broke down, could not bear to look at the accused and they had to relive the horror of those moments when they testified. Despite being connected by DNA evidence and being positively identified, you denied involvement in the commission of these crimes. You sat impassive throughout the trial, clearly unmoved by the anguish exhibited by the complainants. All the victims were strangers to you. The offences were brazenly committed in a public place where the complainants had a right to feel safe. You also, in one instance, used a knife to threaten your victim. In another you viciously, as I have indicated, assaulted her with a brick. And, on the last victim you threw a piece of wood at her for no apparent reason. All these offences indicated a sadistic streak. You showed absolutely no regard for the complainants. It is a sad reality that crimes of this nature are increasing. This country, as a result thereof, appears to be plunging into a moras of immorality. Actions, such as yours, rip our very frayed moral fabric asunder. The Courts have a constitutional duty to protect our vulnerable persons."

[22] There remains one further matter to be considered. It is this. Counsel for the appellant contended that the court *a quo* misdirected itself in imposing a non-parole period of 25 years in terms of section 276 (B))2) of the Act in this matter. He submitted that the trial court did not consider whether it should exercise its discretion to impose a non-parole period and did not afford counsel during the trial an opportunity to address the court on whether the court should exercise that discretion, and if the trial court was so disposed, what that non-parole period should be. For this submission, he found comfort in the judgment of *Mthimkhulu v The State* (547/12) [2012] ZASCA 53 (4 April 2013). Although there is some merit in this submission, it does not assist the appellant because in terms of section 73 (6) (b) (iv) of the Correctional Services Act No 111 of 1998 he may not be placed on parole until he has served at least 25 years of the sentence. In any event, I am satisfied from the evidence adduced in the court *a quo* that the appellant is a serial rapist with no prospects of rehabilitation.

[23] Having carefully considered the judgment of the court *a quo* on sentence, I am satisfied that it comprehensively considered and weighed all the competing interests on sentence and made findings that were well grounded in the record. I can find no error in its analysis of the evidence on sentence and I am satisfied that it took into account all the factors enumerated by the appellant's counsel in mitigation of sentence.

[24] I am further satisfied that the circumstances of this case do not render the prescribed sentences unjust and disproportionate to the crime, the

criminal and the needs of the society and that no injustice has resulted in imposing of same.

Order

[25] In the result, I make the following order:

The appeal against the sentence is dismissed and the sentences imposed by the court *a quo* are confirmed.

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Mnguni J

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Patel JP:

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Stretch AJ: I agree

Date of Hearing	:	17 May 2013
Date of Judgment	:	18 June 2013
Counsel for the Appellant	:	Adv. J. Butler
Instructed by	:	PMB Justice Centre
Counsel for the Respondent	:	Adv. A.S.H Walters
Instructed by	:	Director of Public Prosecutions, Durban