IN THE HIGH COURT OF SOUTH AFRICA **REPORTABLE**

KWAZULU NATAL DIVISION, PIETERMARITZBURG

CASE NO. AR505/13

In the matter between:

VUSI MDAKA **APPELLANT**

versus

THE STATE **RESPONDENT**

J U D G M E N T

STEYN J

[1] On 26 May 2010 the appellant was convicted on two counts of rape, three of robbery with aggravating circumstances and one of theft. He was sentenced on the same day to 45 years' imprisonment. Leave to appeal was granted by the Court *a quo* on both conviction and sentence.

[2] In main, the ground of appeal in relation to counts 2, 4 and 5 is that the appellant should have been convicted on counts of robbery *simpliciter.* Accordingly, so it has been argued, this court has to decide whether the object used by the appellant, namely a stone, in the robberies can be classified as a dangerous weapon or whether the appellant possessed it in a manner whereby it constituted a threat to inflict grievous bodily harm to the complainants concerned. Before this Court deals with the evidence adduced by the complainants it is necessary to focus on the offence of robbery with aggravating circumstances as intended in section 1 of the Criminal Procedure Act, 51 of 1977.[1]

[3] Aggravating circumstances are defined in terms of section 1 of the Act as follows:

> "(b) robbery, or attempted robbery, means –
>
> (i) The wielding of a firearm or any other dangerous weapon;
> (ii) the infliction of grievous bodily harm; or
> (iii) a threat to inflict grievous bodily harm, by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence."

[4] Section 1 of the Dangerous Weapons Act, 71 of 1968 defines "dangerous weapon" as "any object, other than a firearm, which is <u>likely to cause serious bodily injury</u> if it were used to commit an assault". (My emphasis) In *casu* the appellant was in possession of a large stone which he used to inflict and induce fear. Undoubtedly the object constitutes a dangerous weapon and it is an object that could cause grievous bodily harm.[2]

[1] Hereinafter referred to as "the Act".
[2] See *S v Molelekeng and Others* 1977 (2) SA 174 (O) wherein LC Steyn J confirmed that a stone qualifies as a dangerous weapon.

[5] In *S v Anthony*[3] the Court held that the question of whether aggravating circumstances are present must be determined objectively. In *S v Mbele*[4] Miller J considered the meaning of aggravating circumstances and held as follows:

> "The wording of the relevant enactment is clear and it says that aggravating circumstances in relation to robbery mean and include a threat to inflict grievous bodily harm. It is, to my mind, a question of fact whether the accused in any given case actually threatened to inflict grievous bodily harm. If he did, then the requirements of the section are complied with. There is no doubt that threats can be made not only by words but also by conduct; a man who points a firearm at another and says – 'Hand over your money' does not need to add – '… if you don't I shall shoot you'. The pointing of the firearm is as eloquent as any words could be. There can clearly be a threat by conduct and by implication for the purposes of the section." (My emphasis.)

Having considered the aforesaid dicta and statutory provisions there can be no doubt that the weapon objectively[5] viewed is a weapon of dangerous proportions and a weapon that could inflict serious bodily harm. In my view the test is only in part objective and that is the part in which the weapon is analysed, thereafter a subjective element is introduced by considering what each and every complainant believed.

[6] It is however necessary to consider the evidence adduced and what each complainant believed the appellant would do with the weapon in his possession. The complainant in count 2 S….. B……'s evidence was that the appellant assaulted her with an instrument which she could not identify but she believed it was a gun, with which he had hit her on the head.[6] After this assault he raped her in the bushes, forcefully took her bank card and went to the bank. He made however sure that she could not escape and tied her up and left her in the bush.

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[3] 2002 (2) SACR 453 (C)
[4] 1963 (1) SA 257 (N) at 260A-C.
[5] *R v Jacobs* 1961 (1) SA 475 (A) at 484-485. CF *Pipers v S* [2010] ZAWCHC 541 at para 23 and *S v Maselani* 2013 (2) SACR 172 (SCA).
[6] See record page 9 lines 15 to 20.

The complainant in count 4, H…… T…….., told the Court *a quo* that the appellant demanded of her and her friend to hand over their cellphones. He made the demand under circumstances wherein she believed he had a weapon. In her evidence in chief she stated:

> "He acted as if he was drawing a firearm."

She explained later in her testimony that they realised after some time that it was a big stone of ± 40 centimetres in his possession.[7]

The third complainant S…… M……. testified that the appellant said to them when he robbed them: "Ja, its finished about you" and he then acted as if he was drawing a firearm from his hip.[8] Like her friend H……. was dispossessed of her belongings, i.e. a wallet containing cash and her Nokia cellphone. She however managed to escape before the appellant could rape her, her friend was less fortunate and was raped by the appellant in the bushes.

[7] Mr Khan, acting on behalf of the appellant, had argued that the Court *a quo* was misdirected to convict the appellant in the light of the evidence of robbery with aggravating circumstances. It is clear on an analysis of the evidence that the appellant's conduct showed that he had used the stone to first assault the complainant in count 2 and later in counts 4 and 5 he used the stone in a manner wherein it was believed that he had a firearm. They believed that it was an object that he could use to harm them if they did not co-operate. Pursuant on his threat, they handed him their belongings. In both counts they discovered only afterwards that in truth and in fact it was not a firearm but a large stone.

[7] See record page 74 lines 12 to 22.
[8] See record page 117 lines 9 to 12.

[8] Given these circumstances I am satisfied that the learned magistrate was neither misdirected on the law nor on the facts when he convicted the appellant on counts 2, 4 and 5 of robbery with aggravating circumstances as intended in section 1 the Act and not on robbery *simpliciter*. There is accordingly no merit in the appeal against the convictions.

Ad sentence

[9] Mr Khan has submitted that counts 1 and 3 (both of the rape counts) could well have attracted a minimum term of life imprisonment, he argued that the appellant was never warned of the said sentences as legally required.[9] I agree with this submission.

It is however necessary to consider whether the Court *a quo* had considered the cumulative effect of each of the sentences imposed, when it sentenced the appellant to 45 years' imprisonment effectively.

[10] The sentencing judgment shows that the learned magistrate failed to consider whether any of the circumstances of the appellant constituted substantial and compelling circumstances. The judgment is silent on any finding of this kind. The learned magistrate was also misdirected in finding that the count of theft (count 6) attracted a minimum sentence. The learned magistrate was misdirected on the law and accordingly this Court is at liberty to consider the sentences afresh.

[11] The following factors were listed in mitigation: the appellant was 27 years old, single and the father of two children, five years and three years old respectively. He not only maintained his two children but also his elderly mother. In addition he had spent two years and 6 months in detention

[9] See *S v Legoa* 2003 (1) SACR 13 (SCA) and *S v Ndlovu* 2003 (1) SACR 331 (SCA).

awaiting his trial. These factors coupled with the fact that he suffers from tuberculosis, in my view, constitute substantial and compelling circumstances. This Court would however fail in its duty if it merely considers the personal circumstances of the appellant without due consideration of the nature of the offences committed. Both rape and robbery with aggravating circumstances are very serious offences. The complainants in counts 1 and 3 were severely traumatised and the learned magistrate was correct in his summation of the facts of these counts, when he said that the appellant acted like a beast. The acts were brutal and the victims were at his mercy, accordingly whatever sentence this Court imposes should serve as deterrent to future offenders and serve as comfort to the complainants concerned.

[12] The appeal against convictions dismissed. The appeal against the sentences is upheld. The sentences imposed on 26 May 2010 are set aside and replaced with the following sentences:

(a) Count 1 – 15 years' imprisonment
Count 2 – 10 years' imprisonment
Count 3 – 15 years' imprisonment
Count 4 – 10 years' imprisonment
Count 5 – 10 years' imprisonment
Count 6 – 3 years' imprisonment.

(b) The sentences in counts 1 and 3 are ordered to run concurrently. It is also ordered that the sentences in counts 2, 4 and 5 shall run concurrently.

(c) The sentences are all antedated to 26 May 2010.

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STEYN J

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HENRIQUES J : I agree

Appeal heard on :	8 May 2014
Counsel for the appellant :	Mr I Khan
Instructed by :	Legal Aid Board
Counsel for the respondent :	Mrs A Watt
Instructed by :	Director of Public Prosecutions
Judgment handed down on :	8 May 2014