IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION
PIETERMARITZBURG

Appeal number: **AR 36/18**

In the matter between:

THANDAZO PETERSON NOMBELE Appellant

and

THE STATE Respondent

JUDGEMENT
DELIVERED ON 18 OCTOBER 2019

MOSSOP AJ:

1. The Appellant was charged with a count of rape and a count of robbery with aggravating circumstances. Remarkably, he was only convicted on the count of rape for which he was sentenced to life imprisonment.

2. Both charges had their genesis in events that occurred on the morning of 17 February 2008 at or near the Bluff when Merle Wright (henceforth 'the Complainant') was robbed and raped in a public toilet near Brighton Beach. Two men were involved in the robbery and two men were involved in the rape.

3. In delivering his judgement in the Court a quo, the Learned Regional Magistrate concluded that he was unable to find that the two individuals who robbed the Complainant were the same two individuals who raped her. I consider this to be a very lucky break for the Appellant, as there can be very little doubt in my view that the robbers and the rapists were one and the same people.

4. Before considering the evidence, it is necessary to consider the fact that the record of the first day of hearing, which included the evidence of the Complainant, was lost. It is most unfortunate that this happened. However, the Learned Regional Magistrate, together with the other role players in the trial who were available, reconstructed the first day of evidence in accordance with decided authority.[1] I am satisfied that the reconstructed record is adequate for the purposes of considering the Appellant's appeal.[2]

5. As regards the evidence led at trial, the evidence of the Complainant did not implicate the Appellant. She was called to establish that the act of rape (and robbery) had occurred. She testified that she held her hands over eyes whilst she was being raped and stated that she was unable to identify who the rapists were. That she was raped was confirmed by a doctor who examined her at Addington Hospital later on the day of the rape. The

[1] **S v Leslie 200 (1) SACR 346 (W); S v Zenzile 2009 (2) SACR 407 (WCC); S v Gora and Another 2010 (1) SACR 159 (WCC).**
[2] **State v Zondi 2003 (2) SACR 227 (W).**

doctor noted in the J88 document that he completed that the vestibule to the vagina was swollen and certain tears to vagina existed at the 2 o'clock and the 4 o'clock position. He also indicated that he took swabs from her vagina for the purpose of testing whether there was spermatozoa present.

6. Other than the oral evidence of a member of the South African Police Services that related to a portion of the chain of evidence regarding the specimens taken from the Complainant, no other oral evidence was led at trial.

7. How the Appellant became linked to this particular crime was as a consequence of him being arrested for a similar matter which also occurred at the same public toilet. The investigating officer in the second matter had a sample of blood taken from the Appellant for forensic analysis purposes and requested that the samples taken from the Complainant in this matter be compared with the specimen taken from the Appellant because of the similarity between the two offences. A subsequent DNA comparison test confirmed that the spermatozoa discovered in the Complainant matched the DNA of the Appellant. A series of documents was handed in by consent showing the complete chain of how the samples taken from the Complainant and the Appellant respectively were dealt with as those sample progressed from those individuals to the forensic laboratory.

8. The Appellant chose not to testify in his defence and called no witnesses.

9. In due course, the Leonard Regional Magistrate convicted the Appellant on the charge of rape and acquitted him on the count of robbery. The sentence imposed on the rape charge was, as stated, that of life imprisonment.

10. By virtue of the sentence, the Appellant was entitled to an automatic appeal of both his conviction and sentence.[3] For some reason, this appeal was never advanced and we are now, some 10 years after conviction, dealing with the automatic appeal.

11. The basis of the Appellants appeal may be found in a manuscript Notice of Application for Leave to Appeal that the Appellant either prepared himself or caused to be prepared on his behalf and in the heads of argument delivered on his behalf. I shall deal with the contents of both documents but commence by considering the manuscript Notice of Application for Leave to Appeal first.

12. In that document the Appellant states that he committed the offence whilst he was intoxicated. He also states that there was no evidence that

[3] **Section 10 of the Judicial Matters Amendment Act 42 of 2013, read with section 309 of the Criminal Procedure Act.**

he forced the Complainant to have sexual intercourse with him. He further claims that the sentence imposed upon him was unreasonable because he pleaded guilty to the offence as an indication of his remorse. He also draws attention to the fact that he spent two years in custody pending his trial and he stresses his youthfulness at the time of the commission of the offence.

13. There was no evidence that the Appellant was under the influence of intoxicating liquor at the time of the commission of the offence. It was never mentioned.

14. As regards there being no evidence that the Appellant forced the Complainant to have sexual intercourse with them, such argument is disingenuous. A knife was produced prior to the rape in order to secure the compliance of the Complainant. The Appellant surely cannot contend that the Complainant voluntarily chose to have intercourse with him and his co-perpetrator in a public place when she did not know them at all. Such a contention is simply outrageous and is evidence of the fact that the Appellant has distorted sense of what happened.

15. Contrary to what is stated in the Notice of Application for Leave to Appeal, the Appellant did not plead guilty to the offences with which he was charged: he pleaded not guilty as the J 15 form indicates. The age of the

accused, which appears to have been 28 at the time of this trial, does not establish the Appellant to be unduly youthful. In short, the notice of appeal is without merit.

16. The contention that the period spent awaiting trial is a mitigating fact is an issue common both to the Notice of Application for Leave to Appeal and the Appellant's heads of argument and will be dealt with later in this judgment.

17. As regards the points raised in the Appellant's heads of argument, they are:

17.1 that the Appellant did not receive a fair trial as he did not have legal representation;

17.2 that there was no reason why the Appellant's version which was apparently contradictory to the State version should have been rejected by the Court a quo;

17.3 that the charge sheet did not disclose why the provisions of Part I of Schedule 2 to Act 105 of 1997 was applicable and that the Learned Regional Magistrate erred in concluding that it fell within Part I of Schedule 2;

17.4 that there were strong mitigating circumstances primarily to be found in the Appellants personal circumstances and the time that he spent in custody awaiting trial; and

17.5 that the sentence induced a sense of shock as the rape was not the 'the worst kind of rape'.

Each of these submissions will be considered.

18. Dealing with the first point, prior to the trial commencing, the Appellant had applied for, and had been granted, legal representation by the Legal Aid Board. He was, however, dissatisfied for an undisclosed reason with the attorney who was assigned to his matter and when the trial commenced he stated that he did not wish to be represented by that particular attorney. The attorney accordingly applied to withdraw from the matter. Such application was granted.

19. Prior to the Legal Aid attorney being permitted to withdraw, he indicated to the Learned Regional Magistrate that he had informed the Appellant of the possible application of a minimum sentence in the matter. The possibility of a minimum sentence being applied was also drawn to the Appellant's attention by the Learned Regional Magistrate prior to the Legal Aid attorney being permitted to withdraw. The Appellant said that he

understood this and stated that he did not wish to employ a private attorney but that he would like to have another Legal Aid attorney other than the one assigned to his case by the Legal Aid Board. The Learned Regional Magistrate explained to the Appellant that he would not able to choose the identity of the Legal Aid attorney assigned to represent him but had to be represented by whichever attorney was assigned by the Legal Aid Board.

20. The entitlement of a person charged to be represented, if necessary, by a legal practitioner at public expense is an important safeguard of fairness in the administration of criminal justice. Although the right to choose a specific legal representative is a fundamental one, and one to be zealously protected by the Courts, it is not an absolute right and is subject to reasonable limitations.[4] The Constitutional Court has endorsed this view, stating that the right embodied in section 35(3)(f) of the Constitution does not mean that an accused person is entitled to the legal services of any counsel he or she chooses, regardless of his or her financial situation. Financial constraints necessarily play a role and competing needs and demands have to be balanced, more so where the entity providing the legal services is the Legal Aid Board with its limited budget.[5] The Learned Magistrate was correct in advising the Appellant as he did.

[4] S v Halgryn 2002 (2) SACR 211 (SCA) at paragraph 11.
[5] Fraser v ABSA Bank 2007 (3) SA 484 (CC) at paragraph 68.

21. The Appellant indicated that he understood this and that in those circumstances he would conduct his own defence.

22. Where a person chooses to represent himself, the desirability of legal representation should be explained to him or her.[6] After all, even an intelligent and educated layman has small and sometimes no skill in the science of law.

23. On virtually every occasion when the matter was adjourned and recommenced, the Learned Regional Magistrate enquired from the Appellant whether he had changed his mind concerning legal representation and whether he wished to apply for representation to the Legal Aid Board. The Learned Regional Magistrate was fastidious about this. On each occasion, the Appellant indicated that he understood the position but that he wished to continue representing himself.

24. In my view, the Learned Regional Magistrate did all that was required of him.[7] The Appellant could not be forced to accept legal representation where he did not desire it. With the freedoms provided by the Constitution comes the right to make independent decisions, even foolish decisions.

[6] S v Radebe; S v Mbonani 1988 (1) SA 191 (T) at page 195B.
[7] S v GR 2015 (2) SACR 79 (SCA).

25. The Learned Magistrate was tolerant and patient with the Appellant. He assisted the Appellant with his case throughout the trial and explained matters that may have been difficult for the Appellant to grasp in terms that he understood. Looking at the matter holistically, there was no substantial injustice that occurred, despite the Appellant having no legal representative.[8]

26. As regards the second point, counsel for the Appellant contended in his heads of argument that the Court a quo was faced with two contradictory versions and was not justified in rejecting the Appellant's version because it was improbable or it was not supported. This argument suffers from but a single flaw, but it is a catastrophic flaw: the Appellant advanced no alternative version. The Appellant chose not to testify and chose to call no witnesses. What alternative version was therefore before the court? The Learned Regional Magistrate clearly informed the Appellant that any questions that he put to witnesses did not constitute evidence in his favour. The Appellant stated that he understood this. This submission is accordingly without merit.

27. As regards the third complaint concerning the charge sheet, the charge sheet stated that:

[8] S v Moyce 2013 (1) SACR 131 (WCC) at paragraphs 19 and 20.

'Section 51 and the/or 52 and schedule 2 of the criminal law amendment act 105 of 1997, as amended is applicable in that: victim was raped by accused and an accomplice at knifepoint.'

28. Section 51(1) of the Criminal Law Amendment Act 105 of 1997 provides that notwithstanding any other law, and subject to subsections (3) and (6), a regional court or a High Court shall sentence a person that it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.

29. Part I of Schedule 2 includes rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 when (i) committed in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice and (ii) when the victim was raped by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy.

30. The unchallenged evidence of the Complainant was that she was raped once by each of two rapists. In my view, the provisions referred to above are self-evidently both of application. The Complainant was raped more than once by the Appellant and his associate. In addition, there is evidence that the two rapists acted in the furtherance of common purpose. Evidence of the common purpose is apparent from the Complainant's evidence:

30.1 both the men pushed her into the toilet cubicle;

30.2 one of them told her to keep quiet and the other one put a knife to her throat;

30.3 whilst she was being raped by the one man, the other told him to 'hurry up'. Thereafter that man also raped her.

31. It is clear from this narration that her assailants acted in concert and they both intended to, and in fact did, rape her.

32. Counsel for the Appellant's contention in his heads of argument was that the Complainant was raped by two individuals, each acting on his own accord. As is evident from what is stated above, there is ample evidence that the Complainant's assailants assisted each other and facilitated and encouraged each other and did not act on their own independent, but identical, accord. I accordingly find that the Learned Regional Magistrate was correct in applying the minimum sentence provisions.

33. Dealing with the fourth point, the factors alluded to by the Appellant in his heads of argument concerning his personal circumstances are not factors that justify the imposition of a lesser sentence. In my view, the imposition of a sentence of life imprisonment was fully justified on the facts of this

case.

34. The meaning and effect of a previous conviction as referred to in s 271 were given as follows by Holmes JA in R v Zonele and Others D 1959 (3) SA 319 (A) at 330C – D:

> **'A previous conviction may be described as one which occurred before the offence under trial. Generally speaking, previous convictions aggravate an offence because they tend to show that the accused has not been deterred, by his previous punishments, from committing the crime under consideration in a given case.'**

35. As regards the fifth point, namely that this was not the worst type of rape, it is so that it may be possible to imagine a more serious set of facts or a more depraved form of violation. But a violation remains a violation. The act of rape is a gross invasion of a woman's bodily integrity. It was described in S v Chapman as:

> **'a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim'.**[9]

36. There is a great public clamour at the moment against gender-based

[9] **S v Chapman 1997 (2) SACR 3 (SCA) at page 278.**

violence and such an outcry is justified. The clamant cry is for appropriate sentences in instances of this nature.

37. This particular rape occasioned injury to the Complainant: the vestibule to her vagina was swollen afterwards and her vagina was torn in two places. The Complainant stated that she felt pain whilst being raped. The attack on the Complainant was committed in a base fashion in a public urinal. The Appellant and his co-perpetrator showed no concern for the Complainant's well-being. They took her clothes with them when they left, presumably in an attempt to hamstring her from emerging from the public toilet to raise the alarm, thus causing her further humiliation. That a rape committed by more than one person is particularly traumatic for the victim requires no further elucidation - this is the very reason why the legislature saw fit to impose the maximum sentence for this offence. That the Complainant was traumatised by her experience was evident in her distress while testifying in the Court a quo.

38. As to whether the sentence induces a sense of shock ordinarily, sentencing is within the discretion of the trial court. An appeal court can only interfere with the sentence imposed if the trial court misdirected itself to such an extent that its decision on sentence is vitiated, or the sentence is so is proportionate or shocking that no reasonable court could have imposed

it.[10] There is abundant case law dealing with sentencing in general and the cumulative effect thereof in particular. In S v Rabie,[11] Holmes JA observed that:

> **'1 In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -**
>
> **(a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court";**
>
> **and**
>
> **(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".**
>
> **2 The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.'**

39. In sentencing the Appellant, the trial court took into consideration his personal circumstances and the nature and seriousness of the offence. It found, correctly so in my view, that the personal circumstances of the Appellant do not constitute substantial and compelling circumstances justifying a deviation from the prescribed sentence of life imprisonment.[12] The Appellant's personal circumstances diminish into insignificance when compared with the seriousness of the offence.

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[10] Bogaards v S 2013 (1) SACR 1 (CC) at paragraph 41.
[11] 1975 (4) SA 855 (A)at page 857D to F.
[12] Sipho Ximba v The State (1171/18) [2019] ZASCA 111 (16 September 2019).

40. It was argued that the period that the Appellant spent in custody was a mitigating factor. The Appellant was arrested on 18 August 2008. He was asked to plead on 9 December 2009, was convicted on 4 October 2009 and was sentenced on 10 November 2010. While not a model of swiftness, the time between arrest and convictions is not startlingly long.

41. The test concerning the period of incarceration is not whether on its own that period of detention constituted a '**substantial and compelling circumstance**', but whether the effective sentence proposed was proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, was a just one. The period spent in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified.[13] A pre-conviction period of imprisonment is not, on its own, a substantial and compelling circumstance; it is merely a factor in determining whether the sentence imposed is disproportionate or unjust.[14]

42. As to the alleged youthfulness of the Appellant, there is no evidence by the Appellant that his relative immaturity should count in mitigation of his sentence. There is also no evidence whatsoever that the Appellant has displayed any remorse for his actions.

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[13] **S v Radebe and Another 2013 (2) SACR 165 (SCA) at paragraph 14.**
[14] **Ngcobo v The State 2018 ZASCA 06 (23 February 2018) at paragraph 14**

43. There was some debate in the Court a quo over whether another offence of rape for which the Appellant was already serving a sentence of life imprisonment was, or was not, a previous conviction. The meaning and effect of a previous conviction as referred to in s 271 was explained by Holmes JA in R v Zonele and Others as follows:[15]

> **'A previous conviction may be described as one which occurred before the offence under trial. Generally speaking, previous convictions aggravate an offence because they tend to show that the accused has not been deterred, by his previous punishments, from committing the crime under consideration in a given case.'**

44. It is not the date of the crime but the date of the conviction that is relevant in deciding what is or what is not a previous conviction.[16]

45. There is, accordingly, no basis on which to find that the sentence imposed by the trial court is disproportionate or shocking and that no other Court would have imposed such a sentence. This Court is, therefore, not entitled to interfere with the sentence imposed by the trial court.

46. In my view, the appeal must fail.

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[15] 1959 (3) SA 319 (A) at page 330C to D.
[16] S v Motebele 1983 (2) PH H201 (O).

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MOSSOP AJ

I agree and it is so ordered.

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KRUGER J