THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 612/2012
Reportable

In the matter between

HUMBULANI MAKATU **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Makatu v The State* (612/12) [2013] ZASCA 149 (25 October 2013)

Coram: Navsa ADP; Maya, Bosielo and Pillay JJA and Meyer AJA

Heard: **03 September 2013**

Delivered: **25 October 2013**

Summary: **Appeal against both convictions and sentences – 3 counts – murder – rape (read with section 51(1) of the Criminal Law Amendment Act 105 of 1997) – robbery – pleas of guilty – whether the written statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1997 set out all the essential elements which constituted the offences in respect of which the appellant pleaded guilty – whether the evidence on the murder charge was sufficient to support the inference of intent to kill – the proper approach to sentencing – whether the sentences imposed are appropriate.**

ORDER

On appeal from: Limpopo High Court, Thohoyandou (Makgoba J, sitting as a court of first instance):

[1] The appeal against the convictions on all three counts is dismissed.

[2] The appeal against the sentences imposed in respect of counts 1 and 2 is upheld. The sentences imposed by the trial judge are set aside and replaced with the following:

'(i) Ad Count 1: Murder

The accused is sentenced to 15 years' imprisonment.

(ii) Ad Count 2: Rape

The accused is sentenced to 10 years' imprisonment; of which 5 years is ordered to run concurrently with the sentence of 15 years imposed in count 1;

(iii) Ad Count 3: Theft

The accused is sentenced to 6 months' imprisonment, which is ordered to run concurrently with the sentence of 15 years imposed in respect of Count 1.

[3] The effective sentence is imprisonment for 20 years.

JUDGMENT

BOSIELO JA (MAYA JA concurring):

[1] The appellant was arraigned before the Limpopo High Court (Makgoba J) and charged with three counts, namely murder, rape (read with the provisions of s 51(1)(*a*) of the Criminal Law Amendment Act 105 of 1997) and robbery. He pleaded not guilty to the charge of murder but guilty to rape, as set out in the indictment, and to theft in respect of the charge of robbery. His

legal representative submitted a written plea explanation in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 (CPA). The appellant confirmed the contents thereof.

[2] Regarding the charge of murder, the appellant's counsel made certain admissions which were recorded in terms of s 220 of the CPA, after the appellant had confirmed them. These admissions are merely formal and relate to the identity of the deceased; that she died on 19 January 2004 as a result of injuries she sustained on that day; that until the autopsy was conducted on 21 January 2004, the deceased received no further injuries; that Dr Matodzi conducted the post-mortem examination on the deceased; that the report on form SAP 378 contained Dr Matodzi's findings and that they are correct; and further that the photographs which were handed in by the State depicted the crime scene.

[3] At the end of the trial, the appellant was sentenced on 9 June 2004 as follows: murder, imprisonment for life; rape, imprisonment for 20 years; and theft, imprisonment for 6 months. The sentences in respect of the counts of rape and theft were ordered to run concurrently with the life imprisonment imposed in respect of the count of murder. He started serving those sentences on that day.

[4] He was granted leave to appeal by the court below against both his convictions and sentences on 12 June 2012. This was after a delay of some 8 years. The appeal in this court was heard on 3 September 2013.

[5] As the appellant pleaded guilty to two of the counts, the facts relevant to the commission of these offences are paltry. The only evidential material which was put before the trial court consists of the section 220 admissions

made by the appellant and the evidence adduced by Dr Matodzi, who conducted the post-mortem examination on the deceased's body.

[6] Crucially, in his s 220 admissions, the appellant gave an account of the events of the day which culminated in the deceased's death as follows: that he and the deceased were on their way home from a drinking spree and were both drunk; he wanted to have sexual intercourse with the deceased; she resisted his advances; a struggle ensued during which the deceased fell to the ground; he got on top of her; the deceased tried to get up, apparently trying to prevent the appellant from having sexual intercourse with her; in the process, whilst trying to subdue her, he grabbed her by her neck and pressed her down; he only discovered after he had had sexual intercourse with her that the deceased was motionless. He stated that it was neither his intention to kill the deceased nor did he foresee that she would die from their struggle.

[7] In the main the appellant launched a two-pronged attack against his convictions. Essentially, he relied on what he described as deficiencies in the state's case.

[8] As the main thrust of the appeal is that the s 112(2) statement in respect of counts 2 and 3 did not contain the requisite details, I deem it necessary to quote it in full. It reads:

'I, the undersigned, Humbulani Makatu, do hereby state as follows: I am the accused in this matter. I have read and understood the charges laid against me by the state. I plead not guilty to count 1 of murder, I plead guilty to count 2 of rape. I also plead guilty to theft, which is the competent verdict of count 3 of robbery. I admit that on 19 January 2004 and Gaba Location in the district of Thohoyandou I unlawfully and intentionally had sexual intercourse with Balanganani Tshavumbe Mukada, a female person, without her consent. I knew that it was wrong to have sexual intercourse with the complainant without her consent. I also admit that on the same date mentioned in the indictment, I also stole A35 Siemens cellular phone belonging to Balanganani Tshavumbe Mukada. I also knew that it was wrong to steal somebody's

property. I am making this statement freely and voluntary without having been unduly influenced and the consequences of this statement has been explained to me.'

[9] Concerning the count of murder, the main attack which was foreshadowed in his heads of argument, is that the trial court erred in convicting him as the state did not lead evidence to prove intent. I understood the submission to be that the combined effect of the appellant's s 220 admissions and the medical evidence by Dr Matodzi is not sufficient to justify an inference of the intention to kill the deceased as the only reasonable inference to be drawn from these facts.

[10] Dr Matodzi's evidence is crucial. She testified that the cause of death is *anoxic anoxia* which she explained as a lack of oxygen supply to the body tissue, the brain or the body generally. She explained further that this could have been caused by strangulation. Based on the ligature marks which she found around the deceased's neck, which are clearly visible on some of the photographs admitted as exhibits, she concluded that these were probably caused by a rope. She refuted any suggestion that these marks could have been caused by bare hands. Significantly the doctor also ruled out any possibility that the deceased could have hung herself. Her uncontroverted evidence is fatal to the appellant's case.

[11] However, this is not the end of the matter. In convicting the appellant of murder, the trial judge inadvertently omitted to indicate whether it was with direct intent or *dolus eventualis*. However, what is clear from the appellant's s 220 admissions is that he and the deceased came from a shebeen where they had been drinking. They then left together in order to go home. Along the way, the appellant wanted to have sexual intercourse with her. When she resisted his advances, he used physical power to subdue her and he strangled her in the process. There is no evidence that this was pre-planned. As a result, I am unable to conclude that it was proved beyond reasonable doubt that the appellant had planned to kill the deceased. However, the conclusion that he

foresaw that she might die from strangulation and that he recklessly persisted with his conduct is inescapable and reasonable. It follows that the appellant is guilty of murder on the basis of *dolus eventualis.*

[12] The main attack against the conviction of rape is that the section 112(2) statement was a mere regurgitation of the indictment and that it did not provide the necessary details to constitute the offence. Although Mr Madima for the appellant was not forthcoming on this aspect, it appears that the complaint is that the indictment used the expression 'sexual intercourse' without stating in clear terms that there was penetration of the deceased's vagina by the appellant's penis. Relying on a recent and unreported judgment of this court in *Nemavhola v State* (45/13) [2013] ZASCA 81, the appellant's counsel submitted that absent these details, the appellant may not have known what sexual intercourse meant.

[13] It suffices to state that the facts in *Nemavhola* are distinguishable. In *Nemavhola* the complainant was a minor girl who was 13 years old. Understandably, given her young age, immaturity, lack of education and adult life experience, the court held that she could, in all likelihood, not have known what sexual intercourse is. To obviate this uncertainty, the court held that she should have been asked relevant questions to clarify what she meant by sexual intercourse. This concern is not applicable to the present case. The appellant is 23 years old.[1] In his plea explanation that was prepared by his legal representative and which he confirmed as correct, he freely and voluntarily used the phrase sexual intercourse. Furthermore, he admitted that the sexual intercourse was without her consent and, importantly, that he knew that it was wrong. To argue that he did not understand what sexual intercourse means, thus implying that he pleaded guilty under a misapprehension of the proper charge is disingenuous to say the least. There is no substance to this submission.

[1] Although the indictment states he is 23 years, his counsel disclosed to the court during his address on sentence that he was born 28 December 1983. This makes him 21 years old during the commission of these offences. However for the purposes of this matter, this difference in insignificant.

[14] The appellant pleaded guilty to theft instead of robbery which plea the state accepted. In his s 112(2) statement he said the following:

'…I also admit that on the same date mentioned in the indictment, I also stole A35 Siemens cellular phone belonging to Balangenani Tshavumbe Mukada. I also knew that it was wrong to steal somebody's property. I am making this statement freely and voluntarily without having been unduly influenced and the consequences of this statement has (sic) been explained to me.'

[15] The contention here, as foreshadowed in the appellant's heads of argument, is that the s 112(2) statement was deficient and ought not to have satisfied the trial court that the appellant was indeed guilty of theft. It was contended that the statement omitted the essentialia of theft, being unlawfulness, intention and appropriation. On being probed on what the appellant intended to convey in his statement, in particular by the choice of the word 'steal' coupled with his explanation that 'I also knew that it was wrong to steal', Mr Maduma conceded that his submissions were without merit. Importantly, he added that this must be so, particularly because the appellant enjoyed legal representation throughout the trial.

[16] The word 'steal' is not a technical word. It is a word that is ordinarily used by lay persons in their daily encounters. It is easy to understand. Even the dictionary meaning of the word is clear, that 'I take (something) without permission or legal right and without intending to return it dishonestly pass off (another person's ideas) as one's own to give or take surreptitiously or without permission.[2]

[17] Consequently the appeal against the convictions on all the three counts must fail.

[2] Concise Oxford English Dictionary 12 ed (2011) .

[18] I now deal with the sentences imposed on the appellant. Both counsel addressed the trial court from the bar regarding sentence. No witnesses were called to testify.

[19] The following facts were put on record in favour of the appellant: that he was a first offender; he was remorseful; he was not attending school; he was not employed and that he was under the influence of liquor, even though he was able to distinguish between right and wrong; and finally, that he had been in custody pending his trial.

[20] Regarding the nature and seriousness of the offences, the appellant's counsel conceded that all these offences are serious, more so, that ultimately the deceased lost her life. Given the facts of this case, the concession was properly made.

[21] Counsel for the state submitted to the trial court that what made this case even more serious is that the deceased was related to the appellant. She was his mother's elder sister. By raping and then murdering her, the appellant abused the trust relationship between them. Based on this, he argued for the imposition of the minimum sentence as prescribed by the Criminal Law Amendment Act 105 of 1997, more so, he contended, because the appellant had proffered no facts which qualified as substantial and compelling circumstances to justify a sentence lesser than the minimum one prescribed by the Act.

[22] Almost 15 years ago, this Court enunciated the correct judicial approach to sentencing in *S v Siebert*[3] as follows:

'Sentencing is a judicial function *sui generis*. It should not be governed by considerations based on notions akin to onus of proof. In this field of law, public interest requires the court to play a

[3] *S v Siebert* 1998 (1) SACR 554 (SCA) at 558J

more active inquisitorial role. The accused should not be sentenced unless and until the facts and circumstances necessary for the responsible exercise of such discretion have been placed before the court… If there is insufficient evidence before the court to enable it to exercise proper judicial sentencing discretion, it is the duty of that court to call for such evidence. Especially as regards correctional supervision this duty can be discharged easily and without any costs to the accused, by calling for the probation officers' report required by s 276(A)(1) of the Act.'

[23] The trial judge was guilty of a number of misdirections which to my mind are so gross that they vitiate the sentences imposed. First, in sentencing the appellant to imprisonment for life for murder, he states that the murder was committed under circumstances where the offence justified the sentence prescribed under Schedule 2 of Part 1 of the Criminal Law Amendment. A major problem here is that the indictment never made mention of this section or the Act. It does not even give any details to indicate if there are any aggravating features which would bring it within the ambit of the minimum sentencing regime

[24] Secondly, no evidence was led to bring this murder within the purview of the section. Throughout the trial no mention was made of the section except in a cursory manner during the sentencing stage. Suffice to state that this is in conflict with the long line of cases from this court starting with *S v Seleke en andere* 1976 (1) 675 (T); followed by *S v Legoa* 2003 (1) SACR 13 (SCA); *S v Ndhlovu* 2003 (1) SACR 331 (SCA); *S v Makatu* 2006 (2) SACR 582 (SCA); *and S v Kolea* 2013 (1) SACR 409 (SCA). Based on the above, it follows ineluctably that the sentence of life imprisonment was wrongly imposed.

[25] I am also perturbed by a sentence of 20 years' imprisonment imposed on the rape count. This rape is described in the indictment as falling under s 51(1)(*a*) of the Criminal Law Amendment Act. This cannot be correct as there is no such section. Section 51(1) does not have a subsection. The only part of

the Act that might be relevant is s 51(2)(*b*) which refers to Part III of the Schedule. This section prescribes a sentence of not less than 10 years for a first offender unless there are substantial and compelling circumstances to justify a lesser sentence as contemplated in s 51 (3) of the Act.

[26] Undoubtedly, the disparity between 10 and 20 years is stark. Even more disturbing is the fact that the record is silent regarding any facts or circumstances which justified such a drastic departure from the threshold being a minimum of 10 years to 20 years. There is no justification for such a huge disparity. This is yet another misdirection by the trial court. This sentence must be set aside.

[27] Both counts 1 and 2 were not accurately crafted. Evidently, count 1 falls under Part 1 of Schedule 2 read with s 51(1)(*b*) or (*c*) of the Criminal Law Amendment Act which, absent, substantial and compelling circumstances, calls for life imprisonment. Count 2 is rape committed in circumstances where the victim was killed in the process. It falls under Part 1 of Schedule 2 read with s 51(1)(*c*)(*i*) and also qualifies for life imprisonment unless substantial and compelling circumstances have been found to exist.

[28] This lapse can only be attributed to lack of diligence and conscientiousness on the part of the prosecution. Regrettably, there are many cases which have come to this Court from the Limpopo High Court with similar problems. Unfortunately, this has resulted in accused persons not being appropriately punished for the crimes which they in fact committed but which were never properly put to them. Without doubt, this is a disturbing trend which this Court can no longer ignore as it has the potential of throwing the administration of justice into disrepute.

[29] Although the appellant was originally charged with robbery under count 3, he was convicted of theft following his plea of guilty to the crime of theft. He

was sentenced to imprisonment for a period of 6 months. No legitimate attack was launched against this sentence. In any event, I do not think that there is any good reason, given the facts of this case, to interfere with this sentence.

[30] For some time now this country has witnessed an ever-increasing wave in crimes of violence, notably murder and sexual offences. Undoubtedly, these crimes seriously threaten the very social and moral fabric of our society. As a result our society is seriously fractured. The majority of our people, particularly the vulnerable and the defenceless which include women, children, the elderly and infirm live under constant fear. It is no exaggeration to say that every living woman or girl in this country is a potential victim of either murder or rape. This is sad because these heinous crimes happen against the backdrop of our new and fledgling constitutional democracy, which promises a better life for all. These crimes have spread across the length and the breadth of our beautiful country like a malignant cancer. They are a serious threat to our nascent democracy. They have to be exterminated with their roots.

[31] There is a huge and countrywide outcry by citizens, civic organisations, NGO's, politicians, religious leaders and people across the racial, class and cultural divide about these crimes which have become a scourge. There is hardly a day that passes without a report of any of these crimes in the media, it be print or electronic. The Legislature responded to the public outcry with, amongst others the Criminal Law Amendment Act 105 of 1997, which singled out these crimes that are a threat to our wellbeing and welfare, for very severe sentences, the main objective being to punish offenders effectively and in appropriate cases, to remove those who are a danger to society from our midst, circumstances permitting either for life or long term imprisonment. In addition the national Government declared the period from 15 November to 10 December, popularly known as 16 days of activism to be a nationwide campaign to promote a culture and ethos of no violence against women and children. I regret to state that everyday media reports and statistics from the South African Police Services (SAPS) and the National Prosecuting Authority

(NPA) seem to suggest that, despite all these gallant efforts by Government, we are not winning the battle against these crimes.

[32] Faced with this scourge, what role can our courts play to ensure that the rights of all citizens are protected? Our courts which are an important partner in the fight against crime cannot be seen to be supine and unmoved by such crimes. Our courts must accept their enormous responsibility of protecting society by imposing appropriate sentences for such crimes. It is through imposing appropriate sentences that the courts can, without pandering to the whims of the public send a clear and unequivocal message that there is no room for criminals in our society. This in turn will have the salutary effect of engendering and enhancing the confidence of the public in the judicial system. Inevitably, this will serve to bolster respect for the rule of law in the country. See *R v Karg* 1961 (1) SA 231 (AD) at 236A-C; *S v Mafu* 1992 (2) SACR 494 (A) at p496G-J and *S v Mhlakaza and another* 1997 (1) SACR 515 (SCA).

[33] Having found that the trial court misdirected itself in material respects this court is at large to interfere with the sentences imposed.

[34] What then is the appropriate sentence for the appellant? I am of the view that a sentence of 20 years' imprisonment on the count of murder will serve the purposes of punishment, in particular, deterrence and retribution in that, while sentencing the appellant appropriately for the offences which he committed, it will at the same time articulate society's moral outrage and revulsion at the appellant's conduct without destroying him unnecessarily.

[35] Regarding the count of rape, I have already indicated above that the appellant should have been convicted of rape read with the provisions of s 51(2) of Part III of the Schedule which prescribes a minimum sentence of

imprisonment for 10 years for a first offender unless the court finds substantial and compelling circumstances to justify a lesser sentence. The appellant was a first offender. There is no justification on the record for a radical departure from imprisonment for 10 years to 20 years. This is a clear misdirection. In my view, the sentence of imprisonment for 10 years would be appropriate.

[36] In respect of the count of theft, as I stated in para 29 above, no attack was directed against the sentence of imprisonment for 6 months imposed on the appellant. Evidently, the sentence does not warrant any interference.

[37] I interpose to deal with one aspect of this case that has caused me considerable disquiet which is the long delay in having this appeal brought before this court. The appellant was convicted and sentenced on 9 June 2004. He was granted leave to appeal on 12 June 2012. This is after a delay of some 8 years. The appeal was heard by the court on 3 September 2013. All in all it took 9 years for this appeal to be heard. All this happened, notwithstanding the fact that the appellant had according to papers filed in this court in support of a seemingly aborted application for leave to appeal during February 2006 indicated that while acting in person had sought leave to appeal against the sentence, presumably from the high court, but had received no response thereto.

[38] What exacerbates my disquiet is that it has come to my attention that this case is not the only one from the Thohoyandou High Court which has been delayed unreasonably. The reasons for such delays are different. Sometimes it is the ineptitude on the part of the Registrar whilst at other times, the fault lies with the legal representatives. There are also times when the court itself is at fault. However, this is not the time to apportion blame as the sad reality is that it is the appellants who suffers the consequences. Needless to state that this is a serious violation of s 35(3)(*d*) of the Constitution which guarantees every accused the right to have their trial to begin and be

concluded without any unreasonable delay. After all justice delayed is justice denied.

[39] Understandably, this sorry state of affairs caused us considerable unease. In an attempt to get an understanding of this problem we subjected Mr Poodhun, counsel for the respondent, to some lengthy questioning about the inordinate delays, improperly crafted indictments and other irregularities which have become a common feature of that court. The need to investigate this problem became manifest, hence the brief, albeit not exhaustive survey of some of the cases we heard in this court coming from that court as discussed below.

[40] Although this list is not exhaustive, the following cases serve to illustrate the plight of some of the appellants whose matters came before this court in the last 5 years from the Limpopo High Court (Thohoyandou):

(a) *S v Fhetani* [2007] (2) SACR 590 (SCA). The appellant was charged with rape alternatively unlawful sexual intercourse with a girl below the age of 16 years. He pleaded guilty and was convicted on the alternative count. Surprisingly, the court sentenced him to 15 years' imprisonment for rape. Hence this appeal. Regrettably the delays herein were caused by the legal representatives appointed for the appellant by the Legal Aid Board as he was indigent. Leave herein was granted on 5 December 2002. Advocate Sikhwari was briefed to prepare the notice of appeal. In May 2004 the advocate returned the brief due to a dispute about fees. The record was only received on 24 July 2003. There is no explanation for this delay. The record is only 47 pages. One Advocate Snyman was briefed to draw heads of argument. It took him a full year to produce the heads. Still there is no explanation for this long delay. The appeal was heard by this Court on 11 September 2007. By that time the appellant had been in custody for 5 years.

(b) *S v MM* [2012] (2) SACR 18 (SCA). The appellant was sentenced on 12 October 2004, to life imprisonment for rape of a 7 year old girl. Leave to appeal was only granted on 11 May 2009, 5 years after the application was heard. The appeal was heard by this Court on 8 March 2012, a delay of another 3 years.

(c) *Mapule v S* (817/11) [2012] ZASCA 80. The appellant was convicted of rape on 26 October 2001. Leave to appeal was granted 7 years later. The appeal was heard in this court on 18 May 2012. By that time the appellant had already served 11 years.

(d) *Chauke and another v S* (70/12) [2012] ZASCA 143. Leave to appeal was granted after 5½ years. Because of this delay, the appellant had to request the Inspecting Judge of Prisons and the Minister to intervene. The Minister referred the case to the Registrar, who also delayed. As a result, the matter came to this court on appeal 11 years after the appellant had been sentenced.

(e) *S v Tshimbudzi* [2013] (1) SACR 528 (SCA). The appeal came before this court 12 years after the appellant had been sentenced to life imprisonment. The appellant had been in custody throughout. The appeal against both conviction and sentence were set aside on 30 November 2012.

(f) *S v Ramulifho* 2013 (1) SACR 388 (SCA). The appellant was sentenced on 18 July 2002. He spent 12 years in custody, of which 2 years awaiting trial. It took 10 years for his application for leave to appeal to be heard. The appeal was only heard on 9 November 2012 ie after 10 years.

(g) *Nedzamba v S* (911/12) [2013] ZASCA 69. In this case the court remarked that: ‘in this case there were numerous mishaps, encompassing investigations, the prosecution, the trial and even the present appeal.’ As a result, this court concluded that all these irregularities resulted in an injustice to both the complainant and the appellant.

[41] An analysis of all these cases indicates a disturbing practice that has taken roots in that division. It appears that generally there is some serious apathy and ineptitude on the part of the various players involved in the administration of justice *viz*. the courts, registrar, prosecution and the lawyers themselves. All this redound to the grave injustice on either the appellants or the victims. However, the biggest victim is the administration of justice which suffers incalculable damage to its integrity and standing in the eyes of the public. Regrettably, this is likely to lead to loss of confidence in the justice system by the people. The result will be resort to self-help concomitant with lawlessness and anarchy. This conduct calls for a serious and urgent investigation in the interests of justice. I intend to make an appropriate order.

[42] Having given proper and anxious consideration to the appellant and his personal circumstances as a person, the nature, seriousness and impact of the three offences on society and the legitimate interests of society, and, with proper appreciation of what was stated many years ago in *S v Zinn*[4] and recently in *S v Malgas*,[5] I am of the view that the following sentences are appropriate.

[43] In the result the following order is made:

[1] The appeal against the convictions on all three counts is dismissed.

[2] The appeal against the sentences imposed in respect of counts 1 and 2 is upheld. The sentences imposed by the trial judge are set aside and replaced with the following:

'(i) <u>Ad Count 1: Murder</u>

The accused is sentenced to 15 years' imprisonment;

(ii) <u>Ad Count 2: Rape</u>

The accused is sentenced to 10 years' imprisonment; of which 5 years is ordered to run concurrently with the sentence of 15 years imposed in respect of count 1.

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[4] *S v Zinn* 1969 (2) SA 537 (A).
[5] *S v Malgas* 2001 (1) SACR 469 (SCA).

(iii) Ad Count 3: Theft

The appellant is sentenced to 6 months' imprisonment, which is ordered to run concurrently with the sentence of 15 years of imprisonment imposed in respect of count 1.

[3] The effective sentence is imprisonment for 20 years.

[4] The Registrar of this Court is hereby directed to send a copy of this judgment to the Minister of Justice and Constitutional Development, the Commissioner of Police, the Minister of Safety and Security, the Law Society of the Northern Provinces and the General Council of the Bar for further investigations regarding the delays in the prosecution of criminal appeals from the Limpopo High Court (Thohoyandou).

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L O BOSIELO
JUDGE OF APPEAL

NAVSA ADP (PILLAY JA and MEYER AJA concurring):

[44] I have read the judgment of my colleague, Bosielo JA. I agree with his conclusion in relation to the setting aside of the sentence imposed by the High Court and in the main with his reasoning in relation thereto. Regrettably, I have difficulty with his statements concerning delay in the present case and with what is set out in paragraphs 35-41 of his judgment. First, it must be pointed out at the outset that in the present case systemic delay was not at any stage raised or complained of by the appellant himself- not in counsel's heads of argument or in the oral submissions made to us. Second, it is important and necessary to have regard to the facts provided by the appellant in respect of the time lapse. They appear hereafter.

[45] In his application for condonation for the late filing of the appeal record in this court the appellant pointed out that he enjoyed legal representation throughout his trial, which ended on 9 June 2004. The following parts of his affidavit are material and therefore quoted in full:

'6.

6.1. After I was sentenced and detained at Kutama Maximum Prison in Limpopo, I personally drafted [an] application for leave to appeal. My papers were not attended to. As a result of that, I approached the Thohoyandou Justice Centre for assistance with drafting of [my] application for leave to appeal.

6.2. My case was handled by Mr. Madima Maanda, hereinafter referred to as my Attorney, from the above Justice Centre.

6.3. Both applications for condonation and leave to appeal were granted by [the] Honourable Mr. Justice MAKHAFOLA on 12th Day of June 2012.

6.4. I was granted leave to appeal on both convictions and sentences.

7.

7.1. On 28th Day of June 2012, my Attorney typed a letter requesting [the] transcribed record from the Registrar of High Court, Thohoyandou.

7.2. My Attorney filed [the] above letter with [the] Registrar of the High Court, Thohoyandou on the 29th Day of June 2012.

8.

8. My Attorney informed me that he received [the] transcribed record on 23rd Day of July 2012.

9.

9. The delay in prosecuting the Appeal was not occasioned by me but by the delay in my legal representative with the transcribed record.'

[46] The appellant's attorney, Mr Maanda, in a supporting affidavit in the application for condonation, stated that the applicant had personally drafted an application for leave to appeal in 2006, which was two years after he had started serving his sentence. He does not say what steps, if any, were taken by the appellant to pursue that application - whether it was processed in any manner, shape or form - but merely that the appellant approached the Justice Centre for assistance when he realised that 'his papers were not being

considered'. Mr Maanda does not say when that approach was made. Significantly, there is no specific complaint of bureaucratic obstructionism or delay. Mr Maanda went on to state that he prepared the applications for condonation and leave to appeal in the court below which, as stated by the appellant, were granted on12 June 2012. On 28 June 2012, Mr Maanda wrote a letter to the Registrar of the court below requesting a transcript of the record which was provided less than a month later. The final paragraph of Mr Maanda's affidavit is cryptic and not consonant with his conclusion when weighed against the time lapse of several years. He concludes by stating:
'The delay in prosecuting the appeal was not occasioned by the applicant but by the delay in providing me or our Justice Centre with the transcribed records.'

[47] There is no evidentiary support for the assumption made at the end of paragraph 37. A lack of response on the part of the High Court is not complained of by the appellant and his attorney's statement about his realisation that his papers were not being considered is vague in the extreme and it appears designedly so.

[48] What appears from the above is that when the Registrar was approached and the court below was presented with an application for leave to appeal it was dealt with promptly. The record also appears to have been transcribed in less than a month. There is a general and rather vague and unsubstantiated statement by the appellant attributing the delay in obtaining the transcript of the record to fault on the part of his attorney. The attorney, in turn, makes a general an even more vague statement about the delay and he attributes the delay in prosecuting the appeal to a delay in being provided with the transcript of the record, which is not borne out by the facts he himself provided. There is no criticism voiced against any or specific actors involved in the administration of justice in that division of the High Court.

[49] Thus, in the absence of anything concrete, there can be no cause for ‘considerable’ disquiet about systemic delay in the present case. In numerous applications for leave to appeal in criminal cases considered by this court, coming as they do from various divisions of the High Court, there have been delays of many years, attributable mainly to convicted persons increasingly only becoming aware of their right to apply for leave to appeal and of their right to state-funded legal assistance several years after the conclusion of their criminal trials. That appears to be equally so in the present case. It follows from what is set out above that this case does not present itself as part of a trend that reflects systemic delay.

[50] In paragraph 40 of his judgment my learned colleague refers to cases from the Limpopo High Court which he concludes in a later paragraph show a disturbing trend on the part of various actors involved in the administration of justice. This is said in the context of state institutions contributing to unreasonable delay.

[51] It is necessary to consider those cases and their present relevance. In *S v Tshimbudzi* 2013 (1) SACR 528 (SCA), Bosielo JA stated the following:
‘[3] This appeal came before us 12 years after the appellant was sentenced to imprisonment for life. However, this delay is substantially due to the appellant’s own inaction . . .’
As can be seen this court did not in that case attribute fault to systemic delay but to the appellant.

[52] In *Mapule v S* (817/11) [2012] ZASCA 80 (30 May 2012), the appellant had been convicted by a regional court on a count of rape and was sentenced by the high court to life imprisonment. An application by the appellant for leave to appeal was brought in the High Court which granted leave to appeal against conviction only. An enquiry by this court led to an application for leave to appeal being granted in respect of sentence as well. In that case the

appellant brought an application for leave to appeal seven years after he had been convicted and sentenced. Nowhere in the judgment of this court does Snyders JA attribute any blame to systemic delay. The fault of the trial court and High Court in that case was that they had wrongly dealt with the matter on the basis of the applicability of the minimum sentencing regime. In that case, as in the present appeal, given the lapse of time no practical purpose would have been served by remitting the matter and the sentence was accordingly altered on appeal. Delay per se was not an issue.

[53] In *S v Ramulifho* 2013 (1) SACR 388 (SCA), Southwood AJA dealt with an inordinate delay in prosecuting the appeal. In that case the appellant's counsel had not informed the appellant of his right to apply for leave to appeal. He discovered this from fellow prisoners and eventually contacted the Legal Aid Board. It took them seven years to finally enroll the application and then there was a further delay in obtaining the record for the purposes of the appeal. This court voiced its displeasure about the inordinate delay and ordered that the papers in the matter be served on the President of the relevant Law Society and the Chairperson of the Legal Aid Board for investigation and for steps to be taken against those responsible for the delay.

[54] In *S v Fhetani* 2007 (2) SACR 590 (SCA), which was decided more than six years ago, Jafta JA dealt with delays caused by attorneys and counsel appointed by the Legal Aid Board. The matter involved at some stage a dispute about fees not being paid by the Board and to counsel appointed by the attorneys returning the brief, and another excusing his lack of attention to the case because of other commitments. In that case this court expressed its displeasure at the Board not ensuring that the appellant's rights were appreciated and promptly pursued by those it appears to have appointed under the judicare system.

[55] In *Chauke & another v S* (70/12) [2012] ZASCA 143 (28 September 2012), Petse JA considered a long delay in the prosecution of an appeal. In that case the appellant struggled for years to obtain a date for the hearing of his application for leave to appeal. Letters were written to the Registrar without any response. The Inspecting Judge of Prisons was approached as were successive Ministers of Justice. The appellant also delayed in filing the record of appeal. This court considered that the appellant should have been assisted in that endeavour by the State. Petse JA was critical of a number of institutions of state, including the National Prosecuting Authority. The judge who ultimately heard the application for leave to appeal no longer serves in that division of the High Court and is not the judge involved in the present matter.

[56] In *S v MM* 2012 (2) SACR 18 (SCA), Wallis JA was considering a delay of approximately 7 and a half years before the appeal was heard. In that case the appellant had struggled for four and a half years to obtain a date for a hearing of his application for leave to appeal and it took a further three years before his appeal was eventually heard. The appellant had repeatedly engaged the Minister's office and had even approached the Public Protector to obtain assistance. Wallis JA was rightly critical of the Registrar of that division of the High Court and of persons employed by the Justice Centre. He directed that the judgment be served on the Director General of the Department of Justice for appropriate action to be taken against the Registrar of the High Court, Thohoyandou, and on the Head of the Justice Centre there for consideration of the conduct of the officials employed there.

[57] In *Nedzamba v S* (911/2012) [2013] ZASCA 69 (27 May 2013), I dealt with the numerous mishaps which resulted in the convictions being quashed. They involved, inter alia, a trial judge, who no longer serves in that division, not taking care that the complainant, who was a minor, was questioned to ensure that she understood the difference between truth and lies and furthermore by failing to take any steps to protect her as a witness. In addition,

there was an improper intrusion into the arena by the judge and he prevented crucial cross-examination, which all meant that the appellant had not had a fair trial. At the core of that judgment was the lack of proper judicial supervision of a trial. I was also critical of the police investigation and the failure to provide rape testing kits. The prosecution was also criticised for too readily making an unwarranted concession on a point of law. Delay was not dealt with as an issue nor was anyone criticised in that regard.

[58] To sum up: In the three cases referred to in paragraphs 51, 52 and 57 supra delay was not in issue. In the case referred to in paragraph 53 the delay was attributable to counsel who had represented the appellant at his trial and subsequently attributable to the Legal Aid Board in consequence of which this court referred the matter to the relevant authorities for investigation and action to be taken. So too with the case referred to in paragraph 56. In the case referred to in paragraph 54 blame appears to have been attributable to attorneys and counsel appointed by the Legal Aid Board on a judicare basis. That case was decided six years before Southwood AJA's decision, in terms of which the Chairperson of the Board was called upon to act in respect of the delay caused by personnel employed at the Justice Centre. In the case referred to in paragraph 55 the trial judge involved no longer serves in that division. There the delay related principally to not being able to obtain a date for a hearing of the application for leave to appeal. In that case a range of state institutions came in for criticism. The cases differ and were dealt with on the basis of their own facts and when it considered it appropriate this court acted and called for action to be taken. Significantly there is no discernible material connection between the cases referred to and the facts of the present appeal.

[59] This court and all its judges should be concerned about the proper administration of justice in any of the divisions of the high court. It should take care that when it articulates concerns they are borne out by the facts and the issues raised in any specific case. As stated above, systemic delay and its

impact on the merits of the appeal or in relation to procedural aspects in the present case was never an issue between the parties nor indeed explored by any member of this court during the hearing of the appeal.

[60] Essentially, what was debated with counsel for the State in the present appeal was the question of historically improperly crafted indictments that had featured in other cases in this court. I raised that question at the outset of the hearing of the appeal. For that we know the NPA's office to be responsible. In cases in which this Court had been critical of the NPA in respect of poorly crafted indictments and of judges whose judicial supervision of trials was found lacking we identified the problem and its causes. In the present case neither counsel pointed to the indictment being responsible for the delay in the prosecution of the appeal nor indeed, as demonstrated above, could they do so. Counsel for the State was questioned by members of the bench in general terms about other appeals emanating from the division in which he served. The delay in the present case was not attributed to his office or to any specific actor in that division involved in the administration of justice nor explored beyond the affidavits referred to above. It should be borne in mind that it was delay as a specific issue that caused my colleague considerable disquiet and it was to that end that the seven cases were referred to in his judgment, as indicative, together with the facts of the present case, of a trend of systemic delay. Indeed it was the touchstone for paragraph 4 of his proposed order. Other issues such as judicial misconduct or ineptitude were not the object of the envisaged investigation.

[61] In paragraph 41 of his judgment Bosielo JA calls for an urgent investigation into the disturbing trend referred to by him, and paragraph 4 of the order proposed by him requires a host of authorities involved in the administration of justice to conduct an investigation into the delay he complains of. I have concerns about the breadth of the order proposed by him and of its relevance to the present case and to the cases cited by him. First, my colleague does not identify the 'delay' problem in the present case. In

three of the seven cases referred to by him delay was not in issue. In two others this court had decisively identified the causes of the delay and issued a directive for the perpetrators to be investigated. In one other the complaint against the Legal Board had been dealt with six years before the decision by Southwood AJA calling upon the Chairperson of the Board to investigate the Justice Centre in that division. That leaves the one judgment by Petse JA where this court did not call for a specific investigation but identified the institutions of state responsible for the delay. One might ask rhetorically: Who or precisely what is to be investigated?

[62] In paragraph 4 of the order proposed by my learned colleague it is envisaged that the Commissioner of Police be involved. The role of the police in the present case was not debated at all nor is there any other basis for involving the Commissioner's Office. Furthermore, the involvement of the Law Society and the Bar Council and the Minister is envisaged. My colleague states that the cases he referred to are not exhaustive. I have dealt with the cases and their relevance. I must not be understood to be unconcerned about threats to the administration of justice but I am concerned that if we are to ask for an investigation on the scale suggested by my colleague that we should make the effort of being exhaustive and not brief, and we should identify the causes of specified complaints and the particular perpetrators to be investigated. We must take care to formulate the complaints with precision and be clear about the solutions we suggest and the steps to be taken to avoid a recurrence.

[63] If specific patterns and conduct call for investigation and it is shown that there are persons who might be languishing in jail due to the lack of application by specific trial judges in any division potentially resulting in unfair trials or because of any other factor, this court will not hesitate to act. That however is not the investigation called for by my colleague. If there is a dossier to be prepared on issues to be taken up through the office of the Chief Justice the complaints have to be specific and the relevant actors identified.

For all these reasons I would agree with the order proposed by Bosielo JA, save that I would not include paragraph 4.

M S NAVSA
ACTING DEPUTY PRESIDENT

Appearances:

For Appellant:	M Madima Instructed by: Justice Centre, Thohoyandou Justice Centre, Bloemfontein
For Respondent:	AIS Poodhun Instructed by: Director Public Prosecutions, Thohoyandou Director Public Prosecutions, Bloemfontein