IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A191/08

In the matter between:

MLUNGISA NDZUBE **Appellant**

And

THE STATE **Respondent**

JUDGMENT: 8 AUGUST 2008

MEER, J

[1] The Appellant was convicted in the Wynberg Regional Court on a count of rape and a count of robbery. Although it was alleged that the girl he had raped (in Oct 1999) was 14 years old, the State

did not prove her age. The Court accordingly considered the rape to be one under Schedule 3 of Act 105 of 1997, attracting a minimum sentence of 10 years.

[2] The Magistrate stated that he considered both charges as one for the purpose of sentencing and sentenced Appellant to 12 years imprisonment.

[3] Appellant appeals against his sentence only. In so doing he contends in essence that the Magistrate erred in failing to inform Appellant, who conducted his own defence, of his right to address the Court on sentence, in failing to consider the question of substantial and compelling circumstances, and in classifying Appellant as an adult male. The sentence, contends Appellant induces a sense of shock and stands to be altered. Alternatively, Appellant's circumstances, viewed cumulatively constitute substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence.

[4] It is simply not so that there is no indication that the accused was not informed about addressing the court before sentencing. The record clearly indicates he was given the opportunity himself

or call witnesses to testify in mitigation of sentence. It is however so that there was a paucity of information about Appellant's personal circumstances before the Court, the information being limited to his having a child and a girlfriend. Not even the SAP 69 was at hand. Given the Appellant's youth, a probation officer's report ought to have been requested enabling the court to obtain a profile of the young offender it was sentencing.

[6] The question which is posed on appeal is whether the sentence of 12 years imprisonment imposed on a first offender is in all the circumstances shocking. The circumstances in which the offences occurred were accompanied by violence – both complainants were young girls. Appellant ripped the chain off the one complainant whom he robbed – then proceeded to drag the 2nd complainant into a bush held a knife to her throat, kicked her, gave her a blue eye and raped her. There is no indication of remorse on his part as he continued to profess his innocence.

[7] I am unable to find that the imposition of the minimum sentence of 10 years on the rape charge was shocking, nor from the record am I able to ascertain substantial and compelling circumstances which militate against the imprisonment of the

minimum sentence. I note moreover the fact that the Magistrate did not pertinently mention substantial and compelling circumstances, does not necessarily means this aspect was not considered.

[8] However I am of the view that the court *a quo* erred in not sentencing Appellant separately on each count with which he was charged. Given the circumstances in which the 2 offences occurred, and moreover the fact that Appellant was a first offender, the court *a quo* ought in my view to have allowed for the concurrent operation of the sentences. On appeal I would accordingly substitute the following sentences:

On Count 1: Rape

The Accused is sentences to 10 years imprisonment.

On Count 2: Robbery

The Accused is sentences to 2 years imprisonment.

The sentence in respect of counts 1 & 2 shall run concurrently.

The Accused is accordingly sentenced to an effective period of 10 years imprisonment.

MEER, J

I agree

S OLIVIER, AJ