IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: A447/11

DATE: 2 December 2011

In the matter between:

WINERS KOKO MADELA Appellant

and

THE STATE Respondent

JUDGMENT

BINNS-WARD, J

In this matter with the leave of the court *a quo* the appellant appeals against the sentences imposed on him in respect of his conviction on a count of rape concerning an assault by him on the claimant, Fiziwe Qosiwe on 16 December 2006, and the attempted murder of the same complainant on the same date and at the same place.

The sentences imposed by the court *a quo* were the prescribed minimum sentence of ten years in respect of the count of rape and a sentence of 10 years in respect of the count of attempted murder.

It is first necessary to say something about the conviction of attempted murder. As mentioned, the appellant had pleaded guilty. In respect of that count a statement was made by him in terms of Section 112 of the Criminal Procedure Act. After reciting the wording of the charge itself the statement proceeded:

> "Ek erken die volgende; ek erken dat ek aanwesig was op die bogenoemde dag en plek; ek erken dat ek en (then there is an apparent misspelling of the complainant's name) 'n argument gehad het omdat sy 'n verhouding het met 'n ander manspersoon. Ek erken dat ek baie kwaad was, dat ek toe my mes uitgehaal het en dat ek haar toe begin steek het. Ek erken dat ek nie weet hoeveel keer ek haar gesteek het nie. Ek erken dat ek ten alle tye geweet het wat ek doen verkeerd was. Ek erken dat ten alle tye ek geen reg of toestemming gehad het vir bogenoemde optrede nie, beide die verkragting en poging tot moord op Fiziwe Qosiwe. Ek erken dat ek geweet het die agbare hof gaan my straf. Ek betoon berou vir my optrede."
>
> Signed at Wynberg on 12 February 2008.

As counsel for the State correctly conceded before us today the content of that statement does not confirm admission by

the appellant of an essential element of the charge, which goes to the question of intention, direct or indirect. In the circumstances, the magistrate, not having clarified the issue, an essential element of the charge on which he convicted the appellant was not on record before the court *a quo*.

In the exercise of this Court's inherent jurisdiction the conviction on the charge of attempted murder must in the circumstances be set aside. It is however apparent from the facts that were admitted by the appellant in respect of the charge put to him that he was guilty of assault with intent to commit grievous bodily harm, which is a competent verdict on the charge that was put. Accordingly the CONVICTION OF ATTEMPTED MURDER WILL BE SET ASIDE AND REPLACED WITH ONE OF ASSAULT WITH INTENT TO CAUSE GRIEVOUS BODILY HARM.

That obviously has an effect on sentence and I shall turn to that in regard to the appeal presently.

There was another disturbing feature about the trial in the court *a quo* and that was that after conviction the prosecutor put in what purported to be a medical report entitled "Report by authorised medical practitioner on the completion of the medico legal examination". That report was put in without

objection from the appellant's legal representative in the court *a quo* in aggravation of sentence. It was implicit therein that the magistrate was enjoined to have regard to the contents of the report. The contents of the report, which had not been completed by a medical practitioner, but by a person Faziela Bartlett, who described herself as a chief professional nurse, contained a description of the assault on her, given to Ms Bartlett, apparently by the complainant. The description of the assault set out in the medical report gives a materially different version of events to that accepted by the State in terms of its acceptance of the appellant's statement in terms of Section 112 of the Criminal Procedure Act.

It was quite improper, in my view, for the State to have put this material before the court *a quo* in the context of its acceptance of an entirely inconsistent set of facts relating to the commission of the offences in its acceptance of the appellant's guilty plea. The medical report contains graphic indications of multiple injuries to the body of the complainant, it is not however apparent how all of them are meant to relate to the assault on the complainant by the appellant. There is, for example, a reference to a laparotomy wound, there is no indication in the evidence as to the circumstances or the origins of that surgical incision, or of any relationship of it with the assault on the complainant. The medical report also refers

to one wound which is described as an "old scab wound" or "old stab wound". It is not altogether clear from the handwritten annotation as to how that interrelates to the assault on the appellant. All in all this reflects in my view a quite unsatisfactory conduct of proceedings in the court *a quo*, both by the prosecutor, and by the presiding officer who failed to recognise these difficulties and shortcomings with the material placed before her.

Reverting to the issue of sentence. Obviously the ten years imposed in respect of the conviction of attempted murder must, as the State properly conceded before us, be set aside and replaced with an appropriate sentence in respect of a conviction for assault with intent to cause grievous bodily harm. Both the State and Ms Mahlasela who appeared for appellant before us today considered a sentence in the five year range to be appropriate in the circumstances. I am inclined to agree with that submission and would impose such a sentence on the substituted conviction for assault with intent to cause grievous bodily harm.

In regard to the appeal against the sentence of ten years in respect of the conviction of rape that is the prescribed minimum sentence to which the appellant was liable and the court *a quo* was at liberty to depart from that only in the event

of it being able to find the existence of substantial and compelling circumstances. Ms Mahlasela was unable, despite her valiant efforts, to point out any misdirection by the court *a quo* on the evidence before it in respect of its determination that the existence of such circumstances had not been proven.

In that regard I find myself unable to find any misdirection by the Court *a quo* for failing to depart from the prescribed minimum sentence and I would dismiss the appeal against the sentence on the count of rape. It seems to me appropriate that part of the sentence in respect of the conviction for assault with intent to cause grievous bodily harm should run concurrently with that imposed in respect of the rape, as the two offences were committed in close connection with one another, and also having regard to the cumulative effect of the two sentences. It seems to me that it would be appropriate in the circumstances for an effective sentence of 12 (twelve) years imprisonment to be imposed and that will be achieved by making 3 (three) years of the 5 (five) years to be imposed in respect of the conviction for assault with intent to cause grievous bodily harm run concurrently with that imposed in respect of the count of rape.

I would therefore make the following orders:

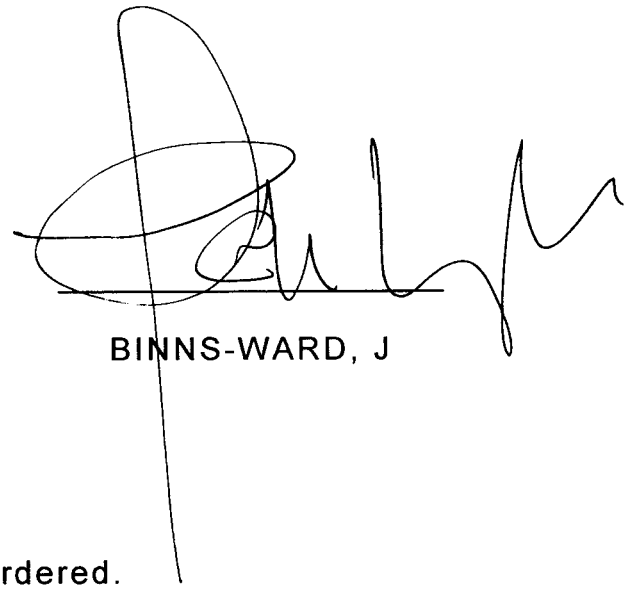
The appellant's APPEAL AGAINST THE SENTENCE OF TEN YEARS IMPRISONMENT IN RESPECT OF HIS CONVICTION ON THE COUNT OF RAPE IS DISMISSED.

The appellant's CONVICTION ON THE COUNT OF ATTEMPTED MURDER IS IN THE EXERCISE OF THIS COURT'S INHERENT REVIEW JURISDICTION SET ASIDE AND REPLACED WITH A CONVICTION FOR ASSAULT WITH INTENT TO CAUSE GRIEVOUS BODILY HARM.

The SENTENCE OF 10 YEARS IMPOSED IN RESPECT OF THE CONVICTION OF ATTEMPTED MURDER IS SET ASIDE and replaced with a SENTENCE OF 5 (FIVE) YEARS IN RESPECT OF THE SUBSTITUTED CONVICTION FOR ASSAULT WITH INTENT TO CAUSE GRIEVOUS BODILY HARM.

The SENTENCE IMPOSED IN RESPECT OF ASSAULT WITH INTENT TO CAUSE GRIEVOUS BODILY HARM IS ANTEDATED IN TERMS OF SECTION 282 OF THE CRIMINAL PROCEDURE ACT TO 12 JANUARY 2008, being the date upon which the sentence of 10 years in respect of attempted murder was imposed. Three years of the sentence imposed in respect of the conviction on assault with intent to cause grievous bodily harm shall run concurrently with the sentence of ten

years imposed in respect of a conviction on the count of rape.



BINNS-WARD, J

I agree, it is so ordered.

McDOUGALL, AJ