IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A385/2010

DATE: 2011-09-02

In the matter between:

ANELE MENYO & 1 OTHER Appellants

and

THE STATE Respondent

J U D G M E N T

BAWA, AJ:

The appellants were charged on two counts in the Wynberg Regional Magistrate's Court. The first count being housebreaking with intent to rob and robbery with aggravated circumstances, and the second count of rape. The crimes were committed at Rondebosch on 27 February 2007.

Both appellants pleaded not guilty on both counts, and no plea explanations were given. Both appellants were legally represented at plea and trial stage.

On 27 January 2010, both appellants were found guilty on the charge of housebreaking with intent to rob, and robbery with aggravated circumstances.

The first appellant was also found guilty of the charge of rape. The first appellant was sentenced to 12 years direct imprisonment in respect of Count 1, and sentenced to 10 years direct imprisonment in respect of Count 2. It was ordered, in respect of the first appellant, that two years in respect of Count 1 run concurrently with that of Count 2. As such, the first appellant will serve an effective sentence of 20 years direct imprisonment.

The second appellant was sentenced to 12 years direct imprisonment in respect of Count 1, and acquitted in respect of Count 2.

On 11 February 2010 the appellants applied for leave to appeal against both conviction and sentence. The Regional Court refused leave against conviction, and granted leave in respect of sentence. The appellants petitioned the refusal of leave to appeal against conviction to the High Court in terms of section 309C(7) of the Criminal Procedure Act, 51 of 1977, which petition was refused on 8 March 2011 by this Court. The

appellants accordingly now appeal against their respective sentences.

Whilst conceding that the Court below took into account all the necessary factors when imposing sentence, the complaint is limited to one that the Court below failed to attach sufficient weight to these factors.

I consider this complaint, in relation to both appellants separately with regard to the respective counts.

SENTENCE: COUNT 1 and COUNT 2 IN RELATION TO THE FIRST APPELLANT

In terms of section 5(2)(a)(i) read with Schedule 2, Part II of the Criminal Law Amendment Act No. 105 of 1997 the prescribed minimum sentence in relation to count 1 that could have been imposed is 15 years.

In terms of section 5(2)(a)(ii) read with Schedule 2, Part III of the same Act the prescribe minimum sentence in relation to Count 2 that could have been imposed is 10 years.

In relation to the first appellant the Court below also ordered that two years of the respective sentences run concurrently

with the effect that in respect of crimes in relation to which the first appellant could potentially have served under the prescribed minimum sentences a period of 25 years, such sentence had been reduced to 20 years.

This is a clear indication that the Court below had regard to, and attached sufficient weight to the age of the first appellant and the fact that he was a first offender. It was precisely for these reasons that the Court below found that there were substantial and compelling reasons to justify the imposition of a lesser sentence than the minimum prescribed sentence.

The Court below's decision in this regard cannot be regarded as arbitrary, and is distinguishable from this Court's decision in S v Meiring 2004(2) SACR 201(C) which dealt with the matter where the magistrate in the Court below failed to find any substantial and compelling grounds to deviate from the prescribed minimum sentence. It is also in material respects different from **S v Nkomo** 2007 (2) SACR 198 (SCA) where the court below did not consider the mitigating factors adduced by the appellant to constitute substantial and compelling circumstances. It is further distinguishable from that matter in that a life sentence had been imposed which the SCA overturned on appeal taking into account mitigation factors that the Court below failed to consider at all. This matter on

the facts is not comparable to the matter currently before this Court.

In relation to the sentence imposed on the first appellant, it must particularly be noted that:

(a) The evidence shows that the rape was perpetrated by the first appellant, despite the second appellant having urged him to leave the scene of the crime after committing the robbery, but the first appellant ignored this request.

(b) The rape occurred in the privacy of the victim's home, where she has every entitlement to feel safe and secure.

(c) The victim, in addition to the rape, also sustained injuries to her wrists where her arms and hands were tied. The evidence before the Court below was that the victim had pleaded with the first appellant to leave her alone.

(d) The rape was committed with a knife being held to the victim's throat whilst she remained tied up.

(e) Whilst there was no evidence of the psychological

consequences of the rape, there can be no doubt that the victim would have been traumatised by the rape.

(f) The first appellant showed no remorse in relation hereto, and there was no evidence before the Court below to indicate that the first appellant had any chance of rehabilitation.

(g) By adopting the approach in **S v Malgas** 2001 (1) SACR 469 (SCA) at para [9] of balancing societal and personal interests, courts should remain mindful of their obligation to send out a clear message to potential rapists and to the community that they are determined to protect the equality, dignity and freedom of all women. As stated by the Constitutional Court in **Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another, amici curiae)** 2007 (5) SA 30 (CC) rape is the most reprehensible form of sexual assault constituting as it does a humiliating, degrading and brutal invasion of the dignity and the person of the survivor (per Nkabinde J at para 36).

In light hereof I see no reason to interfere with the exercise of the Court below's discretion in relation to the sentence it imposed on the first appellant.

SENTENCE: COUNT 1 IN RELATION TO THE SECOND APPELLANT

With regards to the second appellant, it is evident that the Court below had regard to the personal circumstances of the second appellant, i.e. that he was 43 years old at the time of the commission of the offence and that he was also a first offender. However, the trite test is not which sentence the Appeal Court would have imposed, but rather whether the sentence is shockingly inappropriate, or whether an irregularity or misdirection occurred. See S v Shaik 2008(2) SA 208 (CC) at para [72] (and the cases listed in footnote 76 thereof).

There are some matters that the Court below underemphasised, or that the Regional Magistrate failed to properly consider. The Regional Magistrate did not give enough weight to the fact that the second appellant had been in custody since his arrest, and the fact that he was HIV positive and had not received treatment at Pollsmoor Prison whilst incarcerated. His family and personal circumstances, including his HIV status, do not appear to have been given any

due consideration. It was only mentioned in passing that he was the father of an 11-year-old daughter. These constitute further factors in mitigation, which, in my view, should have reduced the sentence of 12 years which had been imposed. Moreover, the first appellant, who committed the more egregious offence, because of the cumulative effect of his sentence, will only be punished with a sentence of 10 years in relation to the same crime being committed by the second appellant.

In view of the above, and with reference to reported decisions, the sentence imposed by the Court below was shockingly inappropriate and disproportionate to the circumstances. This Court is, accordingly, empowered to replace the sentence imposed by the Court below on the second appellant.

I would, accordingly, alter the sentence to one of 10 years imprisonment. In terms of the provisions of section 282 of the Criminal Procedure Act, 51 of 1977, the sentence imposed upon the second appellant is antedated to the date upon which he was originally sentenced on 27 January 2010.

In the result the following orders are made:

(1) The appeal of the first appellant is dismissed.

(2) The appeal of the second appellant succeeds to the extent that his SENTENCE IS REDUCED TO ONE OF TEN (10) YEARS IMPRISONMENT, antedated to the date upon which he was originally sentenced on 27 January 2010.

BAWA, AJ

STEYN, J: It is so ordered:

STEYN, J